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Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics

Ted Schneyer†

INTRODUCTION

In its June 1999 Report to the American Bar Association (ABA) House of Delegates, the ABA Commission on Multidisciplinary Practice recommended legal changes that would permit lawyers to practice law in multidisciplinary partnerships (MDPs). MDPs provide legal and other professional services to the public, and are owned by any combination of lawyers and nonlawyers who participate in its operations. The Report pro-

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1. See COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, REPORT (1999), available at <http://www.abanet.org/cpr/mdpreport.html> [hereinafter REPORT]. More precisely, the Commission defines an MDP as a:

   partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, including legal services, and there is a direct or indirect sharing of profits as part of the arrangement.

COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, RECOMMENDATION Recommendation 3 (1999), available at <http://www.abanet.org/cpr/mdprecommendation.html> [hereinafter RECOMMENDATION]. Firms owned in whole or in part by passive investors do not qualify as MDPs, since the Commission supports the traditional ban on passive investment in law firms. See id. Recommendation 13. However, as law firms increasingly find themselves competing with large MDPs, their demand for new sources of capital will create pressure to lift the ban. See Scott Univer, The MDP Commission Report: A Good Beginning, PROF. RESP. NEWS, Summer 1999, at 1, 10. In this Article, the acronym “MDP” refers either to the concept (multidisciplinary practice) or the institution (a multidisciplinary partnership), depending on the context.

1469
poses that the state supreme courts\(^2\) relax the ethics rules that bar lawyers from sharing legal fees with nonlawyers and practicing in firms in which nonlawyers hold an equity interest or managerial control.\(^3\) The courts would no longer regard MDPs as engaged, or MDP lawyers as assisting them to engage, in the unauthorized practice of law (UPL) by selling legal services through a "lay intermediary."\(^4\) MDPs would thus become lawful, but only as long as they behaved themselves. The Commission also proposes a proactive regulatory program to counter the risk that nonlawyer-controlled MDPs will somehow induce their lawyers to place business objectives above the legal profession's core ethical values.\(^5\) In its hypothetical "Model Rule 5.8," the Commission outlines a regulatory program in which each state supreme court would oversee each nonlawyer-controlled MDP in its jurisdiction.\(^6\)

The Commission regards loyalty, competence, confidentiality, and independent professional judgment as the legal profession's "core values." One can hardly disagree. But core val-

\(^2\) More precisely, the Commission refers to the highest court in each jurisdiction with the authority to regulate the practice of law. See RECOMMENDATION, supra note 1, Recommendation 14. In most states, that authority is the supreme court, so I shall refer to the whole class as such.

\(^3\) See RECOMMENDATION, supra note 1, Recommendations 2, 3. Comparable changes have recently been made in the ethics rules governing certified public accountants, who may now practice in firms up to one-third of whose owners are not CPAs. See New York Multidisciplinary Practice Report Says Effective Regulatory Scheme Possible, 15 Laws. Man. on Prof. Conduct (ABA/BNA) 94, 95 (Mar. 17, 1999).

\(^4\) See REPORT, supra note 1 (expressing the Commission's intention to leave UPL rules intact except to the extent that MDPs are permitted to practice law).

\(^5\) See RECOMMENDATION, supra note 1, Recommendation 14. Purely for illustrative purposes, the Commission restates this resolution as an amendment to the Model Rules of Professional Conduct. See COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, REPORT, APPENDIX A (1999), available at <http://www.abanet.org/cpr/mdpappendixa.html> [hereinafter APPENDIX A] (hypothesizing a new Model Rule 5.8, entitled "Responsibilities of a Lawyer in a Multidisciplinary Practice Firm," with comments), The Commission acknowledges, however, that even if the House should accept its Report in toto, the drafting of any implementing amendments to the Model Rules would be left to other ABA entities.

\(^6\) See COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, UPDATED BACKGROUND AND INFORMATIONAL REPORT AND REQUEST FOR COMMENTS (1999), available at <http://www.abanet.org/cpr/febmdp.html> [hereinafter UPDATE] (explaining, however, that the Commission did not want its "conceptual" approach to be detailed, lest it interfere with discussion of general principles; calling for comments on the approach; and recognizing that each jurisdiction would ultimately structure its own regulatory procedures).
ues and useful regulatory concepts are two different things. The bar and the courts have spent decades giving legal meaning and regulatory significance to three of these values but not the fourth. Conflict-of-interest rules and disqualification decisions have defined the lawyer’s duty of loyal and spelled out its implications. Malpractice decisions have fleshed out the duty of competence. Ethics opinions and case law have elaborated on the duty of confidentiality. By contrast, the regulatory history of “independent judgment” is so thin that the value is dismissed in some quarters as a professional “shibboleth.”

The sorts of interference lawyers must resist or be shielded from to play their proper role remain particularly unclear. In academic parlance, “independent judgment” and “interference” are under-theorized legal concepts.

Although the Commission does nothing to operationalize “independent judgment” as a term of art, its Model Rule 5.8(c) is largely designed to protect that value. In each jurisdiction where a nonlawyer-controlled MDP offered legal services, for example, the rule would require the MDP to file with the court a commitment, signed by its CEO and Board (or their equivalents), never to “directly or indirectly interfere with a lawyer’s exercise of independent professional judgment on behalf of a client.”

The MDP would have to “establish, maintain and enforce” procedures that protect lawyers from interference. It would have to review its procedures annually and introduce any changes that are necessary to make them “effective.” And, it would undergo “administrative audits” at its own expense and at any intervals the courts found “appropriate.” If an audit revealed interference or inadequate safeguards, the court could either “decertify” the offending MDP—i.e., bar it


8. See id. (Rule 5.8(c)(1)).

9. See id. (Rule 5.8(c)(2)).

10. See id. (Rule 5.8(c)(6)). The audit concept appears to have been suggested by a member of the Commission, Judge Paul Friedman of the U.S. District Court for the District of Columbia. See ABA Multidisciplinary Panel Hears Final Witnesses on Regulation of MDPs, 15 Laws. Man. on Prof. Conduct (ABA/BNA) 95, 95 (Mar. 17, 1999) (reporting on a hearing before the Commission).

11. See id. (Rule 5.8(c)(8)).
from offering legal services—or order it to take "remedial
measures."3 Any decertified MDP that offered legal services
would be subject to UPL prosecution; and its lawyers, to disci-
pline.

The ABA Model Rules of Professional Conduct already in-
clude provisions designed to preserve independent judgment.
Those rules express what I shall call the Anti-Interference
Principle of legal ethics. They bar all lawyers, regardless of the
setting in which they practice, from permitting third parties to
interfere with,14 "direct," or "regulate" their ability to exercise
independent professional judgment in rendering legal services
to a client.15 The Commission appears to believe, however, that
lawyers practicing in nonlawyer-controlled MDPs16 will be so
vulnerable to interference that the courts must regulate not
only the lawyers, but their firms—as potential "interferers."17

13. Id. (Rule 5.8(d)).

(barring lawyers from accepting compensation from third parties for repre-
senting a client unless there is "no interference with the lawyer's independ-
ence of professional judgment").

15. See id. Rule 5.4(c) (stating that a lawyer "shall not permit a person
who recommends, employs, or pays the lawyer to render legal services for an-
other to direct or regulate the lawyer's professional judgment in rendering
such legal services").

16. MDPs in this category would range from huge entities that originated
as accounting firms to MDPs formed by, say, a lawyer, an accountant, and a
certified financial planner. It is not clear why the Commission regards an
MDP in which lawyers hold a 55% ownership interest as significantly less
worrisome for regulatory purposes from one in which they hold a 45% interest.
Even in the former case, one can imagine nonlawyer principals pressing suc-
cessfully for firm policies that arguably interfere with the exercise of a law-
yer's professional judgment on behalf of a client. If that happens, one might
argue then that the MDP's lawyers have acquiesced in the adoption of the of-
fending policy and the regulators should know about it; how better to learn
than through audits? Moreover, as the Commission acknowledges, it is un-
clear whether to measure "control" by the percentage of an MDP's principals
who are lawyers or by another metric. Cf. UPDATE, supra note 6 (seeking
public comment on the issue). To avoid disputes as to who controls any given
MDP, and to turn the auditing process into a broader educational experience,
Professor Terry would extend any audit requirement to all MDPs. See Laurel
S. Terry, A Primer on MDPs: Should the "No" Rule Become a New Rule?, 72

17. See APPENDIX A, supra note 5 (calling special requirements that Rule
5.8 cmt. 7 imposes on nonlawyer-controlled MDPs "appropriate because of the
serious injury that the MDP's clients may suffer if independence is not exer-
cised"). I see no reason why an MDP's legal client would suffer greater injury
from a lawyer's failure to exercise independence than, say, a client of a legal
services office managed by a lay executive director under the oversight of a
board of directors whose nonlawyer members hold a majority. Perhaps the
Except in New York and New Jersey, where the courts have begun to regulate law firms directly, addressing an enforceable rule of legal ethics to practice entities rather than individual lawyers would be a novelty. Yet Model Rule 5.8 is quite traditional in other respects. Contrary to some commentators, the Commission sees no need for new regulators at the federal level to conduct audits and otherwise enforce the Rule. It contemplates “continued regulation of the delivery of legal services by the highest court of each jurisdiction, regardless of the organizational structure in which a lawyer practices.” MDP oversight would simply be one more task for the familiar institutions of professional “self-regulation”—ethics rules written by the ABA, promulgated (as amended) by the state supreme courts, interpreted in bar association ethics opinions, enforced through the disciplinary process, and reinforced by bans on the unauthorized practice of law.

I am among those who consider MDP legalization as inevitable in the United States as it appears to be elsewhere.
Powerful economic forces are pressing in that direction. So are bar constituencies ranging from "Main Street" lawyers to corporate counsel, whose employers welcome an MDP-enriched legal services market. In this environment, the legal status quo will not hold, even if UPL committees continue to back down from confronting the Big Five accounting firms, which reportedly already offer legal services well beyond tax advice. Those reputation-minded firms do not seem content to operate in legal limbo. Ernst & Young recently crafted a "strategic alliance" with a newly-formed District of Columbia law firm on terms that mock the law firm/MDP distinction and may provoke a legal response.

25. See generally id.
26. See id. at 881-83.
27. See ACCA Board Backs Multidisciplinary Concept Allowing Lawyers to Practice with Nonlawyers, 15 Laws. Man. on Prof. Conduct (ABA/BNA) 73, 73 (Mar. 17, 1999); see also National Conference of Lawyers and CPAs Endorse MDPs, 82 TAX NOTES 1543, 1543 (1999), available in LEXIS, Tax Analysts File. The American Corporate Counsel Association (ACCA) is a specialized bar association for in-house counsel, with most members working for small to mid-size businesses. As for large law firms, those that do not wish to become MDPs or to compete with MDPs may be hostile to legalization, but others have vowed to lobby for it. See Inside: New Pillsbury Madison Chair Aims for MDP, INT'L FIN. L. REV., Feb. 1, 1999, at 4, available at 1999 WL 23416154.
28. See infra note 56 and accompanying text. The Big Five accounting firms have become so diversified that they prefer to be called "professional service firms." I shall refer to them simply as the Big Five.
29. See ABA Commission Examines Controversies over Lawyers' Practice in Accounting Firms, 67 U.S.L.W. 2323, 2323 (1998) (reporting on testimony to the effect that the Big Five accounting firms are attracting lawyers with expertise not only in tax law, but in corporate practice, securities, mergers and acquisitions, employment law, employee benefits, environmental law, intellectual property, health care law, commercial real estate, and regulatory practice); Terry, supra note 16, at 880 (listing "estate planning; litigation support... valuation and business planning advice (including issues of environmental and labor law compliance as well as employee benefits issues); and financial planning").
30. Ernst & Young financed the launching of the law firm, which is headed by highly regarded tax lawyers recruited from Atlanta's King & Spalding. See Tom Herman, Ernst & Young Will Finance Launch of Law Firm in Special Arrangement, WALL ST. J., Nov. 3, 1999, at B10. The new firm will be housed on Ernst & Young property, backed by an Ernst & Young loan whose terms are secret, and known by the trade name of McKee Nelson Ernst & Young. See id. The two firms will work together to provide "one-stop shopping" for legal and other services. Id. According to Ernst & Young, putting the law firm in Washington was attractive because of local bar rules, including a rule permitting the use of a trade name within a law firm's name. See id. This arrangement raises the issue whether major lenders to a law firm pose the same risks to lawyer independence that lay equity holders would pose. For the argument that lenders are indistinguishable from equity investors as
In August 1999, the House of Delegates resolved not to support MDP legalization until evidence "demonstrates" that MDPs will "further the public interest" without "sacrificing or compromising lawyer independence." This profoundly anti-experimental stance may only encourage MDP supporters to leave the fractious ABA on the sidelines while they pursue legalization elsewhere. The ABA Litigation Section's failed campaign in the early 1990s to stop law firms in Washington from establishing ancillary businesses is instructive here. Those potential sources of interference, see Thomas R. Andrews, Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules, 40 HASTINGS L.J. 577, 631-41 (1989). The new law firm is part of an MDP as the Commission defines the term if there is a "direct or indirect sharing of profits as part of the arrangement." To determine whether profits are being shared one would have to know the precise terms of the agreement and whether the firm is paying Ernst & Young rent and interest at fair market rates.

31. UPDATE, supra note 6. The House resolved that the ABA "make no change ... to the Model Rules of Professional Conduct which permits a lawyer to offer legal services through [an MDP] 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. This resolution treats the preservation of independent judgment not only as a core value, but as an absolute; it implies that the House would reject a legalization plan that "compromised lawyer independence" even if the members thought the plan would substantially "further the public interest" in other respects. Id. The resolution was proposed by the Florida State Bar. See id. General purpose state and local bar associations are expected to be MDPs' fiercest opponents, both in the ABA and before the state supreme courts, which often follow their recommendations in matters of professional regulation. See Siobhan Roth, ABA Report's Opponents Strike Quickly, LEGAL TIMES, June 14, 1999, at 1, 12, available in LEXIS, Individual Legal News File; Siobhan Roth, Bar Going Nowhere Fast on MDPs, LEGAL TIMES, Feb. 21, 2000, at 1, 16, available in LEXIS, Individual Legal News File (stating that "[t]he state bars don't like MDPs, and many observers say that's not likely to change"). At the same August 1999 meeting, the House of Delegates adopted a resolution, proposed by the Ohio State Bar Association, urging each jurisdiction to "establish and support a mechanism for reporting ... and for eliminating instances" of UPL and urging the ABA to coordinate the effort by setting up a mechanism to report to local regulators on organizations engaging in UPL at a national or multi-state level. Roth, Bar Going Nowhere Fast on MDPs, supra, at 16.

32. See generally Ted Schneyer, Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study, 35 ARIZ. L. REV. 363 (1993) (examining the ABA's ancillary business debate as a matter of professional politics and policymaking). Ancillaries may be owned and operated jointly by lawyers and other professionals. They have so far been conceived as offering law-related services but not legal services. For example, a lawyer might form an ancillary with nonlawyers to provide "government relations services"—in other words, lobbying. On the Commission's terms, however, if the lawyer's services would be the practice of law had the lawyer provided them back at his law firm, then they are also the practice of law at the
firms retain the right not only to own and operate ancillaries in fields such as government relations, environmental compliance, and international trade but also to confer partnerships on nonlawyers who assist the law firms themselves in providing legal services.\textsuperscript{33}

As an “inevitabilist,” I am less interested in the legalization debate than in the prospects for regulating MDPs once they are lawful. Accordingly, this Article considers the prospects for regulating MDPs as the Commission contemplates to preserve the independent professional judgment of lawyers who practice law in an MDP. My method is to imagine Model Rule 5.8(c) in operation, predict how it would function, assess its “goodness of fit” with the regulatory task at hand, and consider what the exercise suggests about the future. To avoid the problems of defining the practice of law for MDP purposes, I focus on lawyers who specialize in litigation and are unequivocally practicing law.

Part I presents a scenario that highlights the regulatory challenge of defining, detecting, and preventing interference in an organizationally complex MDP similar to the Big Five.\textsuperscript{34} Most MDPs will presumably be easier to police. Still, with the specter of the Big Five haunting the legalization debate, any regulatory system must be designed with such entities in mind. My scenario is thus an apt one for testing the fit between the task of preventing interference and the institutions expected to perform it.

ancillary business, which would turn out to have been an unlawful MDP all along. \textit{See infra} notes 65-67 and accompanying text.

33. \textit{See D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4(b) (1991).} This rule is widely understood to be a narrow liberalization. It permits law firms to confer partner status on, say, an accountant or financial advisor, but only if the firm’s “sole purpose” is to provide “legal services to clients.” \textit{Id.} In other words, nonlawyer partners can only work as subordinates to the lawyers, who alone may control legal work. They cannot advise clients of their own, with no lawyer in charge, for then they would either be engaged in the unauthorized practice of law or acting outside the firm’s permissible “purpose.” Yet Comment 4 describes D.C. Rule 5.4(b) as “reject[ing] an absolute prohibition against lawyers and nonlawyers joining together to provide collaborative services, but continu[ing] to impose traditional ethical requirements with respect to the organization \textit{thus created}.” \textit{Id.} at cmt. 4 (emphasis added). If subordinates and collaborators are two different things, then the seeds of MDP legalization are already planted in Comment 4.

34. For simplicity’s sake, I disregard the added challenges of protecting client confidences and privileges and avoiding conflicts of interest between clients in such an entity. For a comprehensive survey of the regulatory issues MDFs will raise, see Terry, \textit{supra} note 16, 869-902.
Part II identifies the interference issues the scenario raises, and predicts that the Commission's regulatory program would play no direct role in resolving them. I argue that the reactive nature of professional self-regulation, coupled with the under-development of "interference" and "independent professional judgment," as regulatory terms of art, militate against the effective implementation of the program. Part III extends that argument by reviewing the regulatory history of other organizational structures where nonlawyer control has been perceived as a threat to independent judgment. None of these workplaces, I hope to show, has attracted the oversight the Commission contemplates for MDPs. Rather, the response to perceived risks of interference has almost invariably been outright prohibition or laissez faire.

My critique of the Commission's regulatory plan may give MDP opponents some ammunition in the legalization debates. After all, the less one can expect from regulation, the more wary of legalization one might become. But arming the opposition is not my aim. Instead, Part IV concludes the Article with some observations about the modest role law can play in protecting the independent judgment of lawyers who practice in MDPs.

I. IMAGINING THE COMMISSION'S REGULATORY PROPOSALS IN ACTION

Imagine a private entity, "BB," that was once a large accounting firm but has become a diversified "professional services" firm. For some years, BB has offered legal services to the public, though it denied this until recently, when MDPs were legalized by the supreme courts in several jurisdictions, by the California legislature, and by Congress. BB now offers legal

35. The Big Five do not hold themselves out as practicing law in the United States. Their lawyers characterize themselves as consultants or tax advisors, and appear to practice or, if you will, consult in areas of federal law such as taxation or employer pension plans in which a practitioner need not be a licensed attorney. By the Commission's light, these lawyers are nonetheless practicing law to the extent that the same activity at a traditional law firm would constitute the practice of law.


37. Congress could become a major player in the fight over MDP legalization, and not only for the District of Columbia. Accountants' political action
services in forty states, mostly to business clients, who not only employ roughly ten percent of the bar "in house," but also consume about two-thirds of the private legal services rendered each year in the United States. BB has well over 1,000 lawyers, some of whom have become equity partners, though in much smaller numbers than the accountants. According to BB's organization chart, every BB lawyer who provides legal services to the public is assigned to BB's Legal Division and reports on client matters solely to lawyer-supervisors. The only exception is Lawyer herself, the tax attorney who is BB's General Counsel and heads the Division. Nonetheless, most BB lawyers work in branch offices that are managed by nonlawyers. Lawyer ultimately sets their salaries, but with substantial input from office managers as well as lawyer-supervisors. All BB partners share in any profits the Law Division generates.

committees (PACs) wield considerable clout in Washington. Congress recently "leveled the playing field" so that accountants can better compete with tax lawyers by creating a federal accountant-client privilege comparable to the attorney-client privilege. See IRS Restructuring and Reform, Tax Legis. (CCH) § 1141 (1998); see also Paul R. Rice, The Wrong Cure for Privilege Envy, LEGAL TIMES, May 4, 1998, at 26, available in LEXIS, Individual Legal News File (criticizing the statute as proposed). Moreover, Congress has refused to leave the regulation of lawyers to the states in other respects. For example, in 1986, Congress abolished the lawyers' exemption from regulation as "bill collectors" under the Fair Debt Collection Act. See 15 U.S.C. § 1692a (1994). The Supreme Court later held that the Act reaches even lawyers who collect debts by litigating in state courts. See Heintz v. Jenkins, 514 U.S. 291, 292 (1995). In 1998, Congress also stepped in to resolve the long dispute between the Conference of Chief Justices and the ABA, on one hand, and the United State Department of Justice, on the other, over their respective roles in regulating federal prosecutors. See Citizens' Protection Act, 28 U.S.C. § 530B (adopted Oct. 21, 1998), reprinted at 28 U.S.C.A. § 530B (West Supp. 1999) (indicating that lawyers for the federal government are subject to the same state regulations as other lawyers practicing in their licensing states).

Several observers sympathetic to MDP legalization consider federal legislation the best route to that end. See Direction of Legal Profession Is Debated at Multidisciplinary Practice Panel Hearings, supra note 23, at 47 (discussing the positions of Samuel Sterrett, former chief judge of the U.S. Tax Court, and Stefan Tucker, Chair of the ABA Section on Taxation); see also Sheryl Stratton, ABA Begins to Look at Multidisciplinary Practice Issues, 81 TAX NOTES 937, 937-38 (1998), available in LEXIS, Tax Analysts File (reporting view of James Holden, a tax partner at Steptoe & Johnson, who believes Congress should create a federal commission to regulate professional service providers, including law firms, that opt into the federal system). For rampant speculation that Congress will create such a commission by 2015, see Ted Schneyer, Professional Discipline in 2050: A Look Back, 60 FORDHAM L. REV. 125, 129 (1991) (foreseeing a National Disciplinary Commission for Lawyers and Allied Professionals, or NDCLAP).
ates, but clients are billed separately for legal services, even for projects on which lawyers team up with other service providers.

Contrary to federal tax work, which the Treasury Department authorizes accountants as well as lawyers to perform, most Division services clearly constitute the practice of law. Accordingly, only lawyers provide those services, though often with the supervised help of BB accountants, economists, human relations experts, or environmental engineers. BB's lawyers and nonlawyers alike claim to have no trouble distinguishing between projects that call for legal services but require the assistance of other professionals, where lawyers must be in charge, and projects that require both legal and nonlegal services, but where lawyers and nonlawyers may control their own work.\textsuperscript{38} Despite the complexity of BB's operations, Lawyer prides herself on running "an independent, multi-branch law firm within an MDP."

Division earnings have been disappointing, however, especially in the Litigation Department. BB's CEO and CFO recently reviewed the problem at headquarters in Chicago. Both are CPAs. The CFO also has a law degree but does not practice law. Among other things, they think Litigation has been too cavalier about advancing funds to cover clients' litigation costs. Whether and to what extent to "front" expenses have so far been left to the discretion of lawyers in the Department. As the CEO knows, Lawyer thinks that this is a sound arrangement. Her reasoning is simple: whether to advance expenses sometimes depends, at least in part, on a judgment about the potential expense and outcome of the client's case, and the litigators are BB's most competent, people to make those assessments. However, an alarming number of clients have proven unable or unwilling to repay advances. Also, twenty percent of BB’s litigation clients retain the firm on a contingent-fee basis.\textsuperscript{39} Un-

\textsuperscript{38} The Commission supports the principle that an MDP lawyer who is delivering legal services to an MDP client and who "works with, or is assisted by, a nonlawyer who is delivering nonlegal services in connection with the delivery of legal services should be required to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer." RECOMMENDATION, supra note 1, Recommendation 10 (emphasis added). When legal and nonlegal services are "connected" seems far from clear, however.

\textsuperscript{39} Interestingly, some of these clients are defendants in commercial litigation. The contingent fee is a percentage of the difference between the defendant's anticipated liability and any lower amount for which the case is resolved. See Michael Orey, Good News/Bad News, AM. LAW, July/Aug. 1991, at 6, available in LEXIS, Individual Legal News File (reporting on a large corpo-
der BB's standard contingent-fee agreement, drafted by senior lawyers in the Department and approved by Lawyer, clients who lose their cases need not repay BB for litigation expenses.  

Taking all this into account, the CEO sends a memo to Lawyer. The memo states that the retainer agreement should be changed to oblige all contingent-fee clients to repay expenses, and that Litigation should in no case advance more than $80,000 for expenses without first getting the CFO's approval.

Lawyer considers how these changes might affect the Department. She wonders whether the CFO's permission to advance expenses beyond $80,000 would have to be solicited before accepting a case or could instead be solicited in the course of an engagement, as the need arose. She also fears that the litigators might conduct too little discovery in some cases for fear of running up against the $80,000 restriction, especially if the CFO turns out to be stingy. Her reaction to the proposed change in the fee agreement is mixed. She worries that the Department could no longer attract clients who insist on contingent-fee arrangements and have strong cases but will not tolerate the risk of losing and paying costs to boot. On the other hand, she has worried for some time that her litigators, knowing that under BB's general cost control policies the costs incurred in a losing cause come out of the Department budget, may be shifting too quickly to a cost-minimizing strategy when contingent-fee cases even begin to look weak, further reducing the odds of prevailing. Requiring clients to pay costs, whatever the outcome, could dampen this perverse incentive.

Lawyer asks whether the CEO's proposals are intended as orders. The CEO prefers to call them requests. Lawyer then orders the new policies to be implemented. Citing ethical concerns, the Litigation Department seeks her permission to inform every prospective client for whom BB would advance expenses about the new $80,000 threshold.  

Lawyer rejects this ration that regularly retains counsel on a "defense contingent fee").

40. Some states still require that clients remain unconditionally liable for expenses. See, e.g., ARIZ. RULES OF PROFESSIONAL CONDUCT Rule 1.8(e)(1) (1956). BB would face the inconvenience of modifying its agreement for those states.

41. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1983) (creating a duty to give clients all the information that is likely to be material to their decisions, but without indicating whether or when the duty runs to prospective clients); see also id. Rule 1.2(c); infra note 202 and accompanying text
request, not wanting to needlessly scare away clients whose cases appear unlikely at intake to generate costs above that threshold.

Ten supreme courts then decide to audit BB's operations in their states. Court-appointed teams of management consultants, legal ethicists, and lawyers with management experience conduct the audits. Team members are experts at MDP assessment, and the audits are well-funded, thanks to the certification fees the courts impose on MDPs that are subject to audit. As a result, the audits are probing indeed. They all reveal that the Litigation Department's policies on advancing expenses were recently changed in response to the CEO's memo to Lawyer. On the basis of its auditors' report, each court's disciplinary agency must now determine whether probable cause exists to believe that (1) BB's process for setting lawyers' salaries; (2) BB's policy of charging Litigation's unrecovered expenses against the Department budget; (3) the CEO's "requests" to Lawyer; (4) the policy requiring the CFO to approve certain advances; and (5) Lawyer's veto of the litigators' full-disclosure proposal violate the Anti-Interference Principle, as embodied in the local version of the Model Rules. A probable cause finding will lead to formal charges and a proceeding in which disciplinary counsel must show by clear and convincing evidence that BB and its agents are interfering with, or inadequately safeguarding, the ability of lawyers in the Litigation Department to exercise independent professional judgment on behalf of clients. If the disciplinary counsel meets this burden, the court will impose an appropriate sanction. Since MDPs are so new, cases and ethics opinions have not yet addressed whether a scenario like this involves interference.

II. WHAT'S WRONG WITH THIS PICTURE?

A. PROCEDURALLY UNREALISTIC

Anyone who knows much about traditional legal ethics enforcement will find the BB story improbable in two respects. First, the story envisions a dramatic shift in enforcement mentality but none at all in enforcement institutions. It portrays state supreme courts proactively enforcing the Anti-Interference Principle by conducting extensive audits with no prior sign of wrongdoing, much as OSHA might enforce safety (discussing Rule 1.2(c)).
regulations through random workplace inspections. Yet the state supreme courts have always been reactive enforcers. Their disciplinary agencies rarely conduct investigations until someone, usually an aggrieved client, files a complaint, though a few conduct random accounting audits to detect and deter mishandling of client funds.

If reactive enforcement simply reflected the meager budgets traditionally provided for ethics enforcement, one could imagine the courts funding proactive MDP regulation by making MDPs pay for it, as the Commission recommends. In fact, however, modest funding is as much an effect as a cause of the reactive tradition. Wary of becoming full-time regulators, state supreme courts rarely favor regulatory initiatives that will take time away from their primary task of adjudication. Lawyers, whose bar dues or registration fees fund the disciplinary process, also see virtues in reactive enforcement. For many, proactive regulation is a euphemism for intrusiveness and bureaucratic waste.

To be sure, MDP lawyers might think differently. Maybe they would welcome auditors as protectors of their professional autonomy. Maybe they would tell the auditors about every MDP policy and procedure that concerned them. Yet, other

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44. As late as 1975, the national rate of disciplinary spending per lawyer in practice was less than $18 a year. See Steele & Nimmer, supra note 42, at 942.

45. One wonders whether state legislatures would permit the courts to impose regulatory taxes on nonlawyer-controlled MDPs, especially if the amounts were based on local revenues from nonlegal as well as legal services. Perhaps the courts would consider themselves entitled to the last word on the subject by virtue of their state constitutional authority to regulate the practice of law and to strike down legislation that is inconsistent with their regulatory objectives. See WOLFRAM, supra note 42, at 22-31 (discussing the use of separation-of-powers doctrine by state supreme courts to maintain control of law practice).

46. See, e.g., Stefan F. Tucker, Whom Do the Model Rules Protect?, LEGAL TIMES, Mar. 1, 1999, at 25, 26, available in LEXIS, Individual Legal News File (calling for federally mandated deregulation of the bar since today's law firms are adequately regulated by "customer demands and expectations" backed up by damage suits and reputation-impairing publicity).
lawyers who work under lay managers and may therefore be vulnerable to interference—for example, corporate counsel, legal services lawyers, lawyers in group legal services programs, and insurance defense counsel employed by liability insurers—have never clamored for special regulatory protection. On the contrary, they have opposed more proactive measures to protect their independence.\footnote{For example, Rule 5.4 as it appeared in the Kutak Commission’s 1981 public draft of the Model Rules stated: A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization, or government agency, but only if the terms of the relationship provide in writing that (a) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship .... \textit{Commission on Evaluation of Professional Standards, American Bar Ass’n, Model Rules of Professional Conduct Rule 5.4 (Proposed Final Draft 1981), reprinted in C. Barry Schaefer, Proposed Model Rule 5.4: Is It Necessary For Corporate Staff Counsel?, 15 Creighton L. Rev. 639, 641 (1981-1982)} (emphasis added). This appeared to require employers to certify in writing that house counsels’ independence was being preserved, a rare use of legal ethics rules to regulate nonlawyers in their relations with lawyers. Mr. Schaefer, the general counsel for a railroad, opposed the rule, arguing that however useful the provision might be in governing relations between legal services lawyers and their employers, it made no sense for house counsel, whose employers are also their clients. \textit{See id. at} 641-46. He saw no significance in the fact that, although the employer is the client, the directors and officers who oversee the house counsel’s work are not. \textit{See id. at} 643 n.14.} I infer that the reactive tradition will carry over, willy-nilly, to MDP regulation. Audits, if conducted at all, will be infrequent and perfunctory. Interference issues will have to come to the disciplinary agencies through complaints. Yet, complaints will be rare because few clients will know or care enough to complain about third-party “interference,” and even fewer MDP lawyers will file complaints against their own firms.\footnote{In cases where MDP lawyers are fired for refusing to permit “interference,” however, they may sue their former employers for wrongful discharge, as corporate counsel have begun to do. \textit{See infra} note 117 and accompanying text. If the courts honor such claims, they will be protecting lawyer independence through employment law—i.e., through means other than professional self-regulation. Their understanding of what lawyer independence requires may or may not dovetail with the organized bar’s understanding.} This is not to say that the Commission’s program will have no impact. The regulatory backdrop could give MDP lawyers some leverage in negotiating a modus vivendi with their em-
ployers. As MDPs mature, associations such as the ABA and AICPA might jointly identify procedures that work well, and promote them as "best practices" and "safe harbors" for MDPs. Perhaps MDPs will eventually form their own self-regulatory body to suggest procedures, conduct audits, and report to the state supreme courts. But the evolution of safeguards against interference will turn more on these processes than on court-imposed audits, disciplinary cases, or MDP decertification proceedings. This means that whatever safeguards emerge will not be engineered by the bar and the state supreme courts unilaterally.

One also wonders where the regulatory expertise contemplated in the BB scenario would come from. To be sure, malpractice insurers sometimes audit law firms to assess their ex-

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49. Consider an analogy from the legal services field. In 1977, several clients of a legal services program offering health-related legal services to Native Americans had potential claims against one of the program's funding sources. See Ted Finman & Theodore Schneyer, The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct, 29 UCLA L. REV. 67, 91 (1981). The program's governing board, which included nonlawyers, forbade program lawyers to pursue these claims. See id. The lawyers felt that a veto on pursuing the claims would interfere with their professional judgment, which they could not permit under Model Code of Professional Responsibility Canon DR 5-107(B) (1980). See Finman & Schneyer, supra, at 91. They sent the Board a memorandum citing the rule and certain ethics opinions. See id. The Board then "acquiesced and resolved to support a 'policy of non-interference with the professional judgment of... attorneys as required by the Code... especially DR 5-107(B).'” See id. (quoting Letter from Thomas Bush, Health Law Division Attorney, to Ted Finman (Mar. 17, 1977)). Yet, it was far from clear that vetoing the suits before the cases were accepted would implicate the rule. See id. at 90-92.


51. If the state supreme courts were to delegate oversight to a self-regulating organization (SRO) of MDPs but retain the authority to overrule the SROs' determinations, the system would fit the description of "audited self-regulation." That approach has become prominent in the securities industry, where the SEC relies on the expertise of private SROs to monitor broker-dealers, but occasionally reverses the rulemaking and enforcement decisions of the SROs. See Douglas C. Michael, Federal Agency Use of Audited Self-Regulation as a Regulatory Technique, 47 ADMIN. L. REV. 171, 204-06 (1995).

posure to liability and their risk avoidance systems. Disciplinary agencies must also delve into issues of law-office management in responding to complaints about sole practitioners and lawyers in small firms. But these activities will not produce experts on MDP interference, which has no analogue in law firms. Nor are audits the only stage in the system that demands expertise. A court that finds interference, we are told, can either decertify the offending MDP or order "remedial measures." To develop sensible remedial measures, or evaluate the measures an offender proposes to take, the court or its designee would have to understand in detail MDP operations and incentive structures. Few courts will take the time to obtain that understanding.

Yet the simpler disposition—decertification—will usually be too harsh and, when it is imposed, UPL enforcement may not back it up. The Big Five have already demonstrated their power to derail UPL investigations. A firm such as BB, if


54. See, e.g., William J. Wernz, Probation as a Disciplinary Disposition..., BENCH & B. MINN., Apr. 1987, at 9 (discussing disciplinary counsels' growing use of probation with conditions to correct the law office practices of sole practitioners and small-firm lawyers who have neglected files or maintained inadequate records).

55. Recognizing that the state supreme courts are unlikely to become experts on MDP operations, Professor Terry criticizes the Commission for making no specific suggestions about the content of a court audit of an MDP. Terry, supra note 16, at 929. She attributes the Commission's failure to do so to a "desire not to step on state supreme court toes," id., but a better explanation may be the difficulty of deciding how to audit for possible interference with professional judgment when nobody has a firm grasp of what constitutes interference.

56. The best publicized retreat by UPL enforcers occurred in Texas. In August 1997, the state supreme court's UPL committee received a complaint that Arthur Andersen, a Big Five firm, was practicing law by preparing legal documents, forming new companies for clients, and preparing tax opinions on state and federal law. See Sheryl Stratton, The End of the Legal Profession?, TAX NOTES, Feb. 15, 1999, at 948, 950, available in LEXIS, Tax Analysts File (reporting that Arthur Andersen's defense expenditures were "considerable," while the bar had to rely on pro bono legal services from in-state counsel). To much fanfare, the committee mounted an 11-month investigation, only to dismiss the complaint when it became clear that the firm had retained the counsel and experts necessary for an aggressive and comprehensive defense. See id. More recently, the Virginia bar counsel abandoned a UPL investigation
ever decertified, might continue to provide legal services, deny that it was doing so, and defend itself so fiercely that resource-starved prosecutors could rarely make UPL charges stick.

Other historical patterns confirm these enforcement limitations. Professional discipline has never played a significant role in governing lawyers in large law firms,57 though it does help govern relations between sole practitioners and their clients.58 The difficulty of investigating individual wrongdoing within complex firms, the hostility of firms to intrusion, the indifference of business clients and third-party victims to the minimal redress the disciplinary system can provide, and the aggressive defense large firms would mount to protect their reputations all contribute to the pattern. This is not to say that large firms and their lawyers are never held accountable for wrongdoing,59 only that when they are, it is chiefly through civil liability,60 trial court sanctions such as fines or disqualification,61 or enforcement actions by federal agencies.62 A study conducted in the 1980s found that eighty percent of the lawyers disciplined in California, Illinois and the District of Columbia—jurisdictions with many large law firms—were sole practitioners; none came from firms with eight or more lawyers.63 Big


58. See supra note 54.

59. But see Lisa Lerman, Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers, 12 GEO. J. LEGAL ETHICS 205, 232-37, 295 (1999) (discussing recent cases in which large-firm lawyers have been suspended or disbarred for stealing from clients or from their firms).

60. See, e.g., William B. Glaberson et al., A Question of Integrity at Blue-Chip Law Firms: Once Unthinkable, Charges of Foul Play Are Hitting Prestigious Partnerships, BUS. WK., Apr. 7, 1986, at 76 (noting the surprising frequency with which charges of wrongdoing were being leveled at large law firms in nondisciplinary forums).

61. See Wilkins, supra note 57, at 827-38 (discussing direct institutional control of lawyers for large clients by trial courts).


63. See ABEL, supra note 7, at 145.
Five MDPs will be no less formidable targets than large law firms. It is unrealistic to expect active oversight of large MDPs from courts and disciplinary agencies that have never established a regulatory beachhead against large law firms—entities they know much better.64

One final point about the Commission’s regulatory vision. The Commission hopes through MDP regulation to keep as many Big Five lawyers as possible in the legal profession’s regulatory fold. To achieve this, MDP lawyers who presently claim to practice “tax” or to be “consultants” must be viewed as engaging in the practice of law and subject, therefore, to all the rules of legal ethics. Accordingly, the Commission would posit that lawyers are engaged in the practice of law (and cannot make representations to the contrary) whenever their work would constitute the practice of law if provided “by a lawyer in a law firm.”65 By this test, when a lawyer forms a consulting firm with two nonlawyers to provide a “gray area” service such as lobbying,66 the lawyer will presumably be practicing law

64. In light of the “more ethical than thou” attitude that some lawyers take toward the accounting profession, it seems ironic that the AICPA has for several decades maintained a system of regulatory oversight for accounting firms that audit publicly held companies. See Andrew A. Sommer, The Accounting Profession’s Peer Review Program, 20 U. TOL. L. REV. 375, 376 (1989).

65. REPORT, supra note 1.

66. Many services that constitute the practice of law when lawyers provide them in law firms do not constitute law practice for UPL purposes when nonlawyers provide them. Lobbying is just one example. Since lawyers in most states may not form a partnership with nonlawyers if any of its activities constitute the practice of law, see MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(b) (1983), our hypothetical lawyer-lobbyist could be disciplined under current rules for forming the consulting firm if the Commission’s test applied. Yet such firms are precisely what Model Rule 5.7 permits under the “ancillary business” rubric. See id. Rule 5.7 cmt. 8. The Commission’s position is also at odds with the modern view that a lawyer may practice a law-related profession such as lobbying outside of a law office without being subject to all legal ethics rules. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972) (stating that although a lawyer who practices a law-related profession from his law office is subject to all rules of ethics, this is not so when the lawyer practices that profession from a separate office and does not hold himself out as a lawyer).

It is too often forgotten that the definitions of “law practice,” “legal service,” and “legal assistance” vary with the purpose for which the terms are used. For the Commission, a lawyer is presumably practicing law when he helps a law-firm client prepare a simple state income tax return. Yet accountants providing the same service are not practicing law, nor is the service likely to constitute legal assistance for purposes of determining the applicability of the attorney-client privilege to lawyer-taxpayer communications. See
(unless she surrenders her license), and the firm will be subject to full-scale MDP regulation, even though one need not be a lawyer to lobby. This "maximum jurisdiction" policy significantly increases the universe of MDPs the ethics enforcers would be expected to oversee.

B. SUBSTANTIVE INDETERMINACY: IN AN MDP, WHAT CONSTITUTES "INTERFERENCE"?

Putting aside the mismatch between traditional state supreme court regulation of the bar and the requisites for proactive MDP regulation, we come to the second key problem the BB scenario illustrates, namely, the uncharted and highly contestable meaning of Anti-Interference Principle. Regulators cannot detect and sanction interference without knowing it when they see it. Yet the Commission never discusses what should constitute interference in an MDP—testimony perhaps to the intractability of the issue. Instead, the Commission leaves it to state supreme courts, disciplinary agencies, and ethics committees to flesh things out. The scenario illustrates how difficult this would be even under ideal regulatory conditions. In particular, it shows how hard it can be to distinguish decisions that call for a lawyer's judgment qua lawyer from decisions that nonlawyers can properly make even though they may affect lawyer-client relationships.

We can safely assume that BB's CEO would unduly interfere if he ordered a litigator not to take scheduled depositions that the lawyer consider crucial in a current case because the CEO had just learned that the client's financial position was precarious. After all, lawyers themselves cannot ethically curtail service in midstream simply because they lose confidence in a client's ability to pay fees or expenses. If canceling the depositions would breach the litigator's duty of competence, then the CEO's insistence on cancellation would surely interfere with the litigator's exercise of professional judgment. On

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**Restatement (Third) of the Law Governing Lawyers** § 122, illus. 2 (Proposed Final Draft No. 1, 1996) (stating that the trier of fact in such a case may "infer that Client's purpose was not that of obtaining legal assistance," in which case no privilege applies).


68. See, e.g., In re Daggs, 187 N.W.2d 227, 228 (Mich. 1971) (stating that "[t]he failure of a client to pay for [a lawyer's] services does not relieve a lawyer of his ethical duty to perform them completely and on time").
the other hand, whether to close down the Litigation Department when it completes its current engagements would clearly be a business decision, even if it affects consumer access to legal services in the future. These, however, are the easy extremes. A vast range of decisions fall in between.

Consider the CEO's policy changes regarding the advancing of expenses. Both will apply only to future clients, unlike a midstream order to stop taking depositions. Yet the requirement that the CFO approve advances above $80,000 might "interfere" even if the change in the contingent-fee agreement does not, at least if the former will require litigators to defer to the CFO's mid-engagement decisions, which could upset the litigators' pre-trial and trial plans.

If the CFO's midstream intervention would otherwise be improper, would telling all prospective clients about the approval process legitimate it by turning it into a mutually agreed upon limit on the scope of the representation? Is the CFO's intervention acceptable in any event because he is a lawyer, though not one who currently holds himself out as practicing law? Suppose he is licensed to practice in Illinois but not in the auditing states? Would it help to have the CFO's commitment to wear his lawyer's hat whenever he reviews requests for additional advances?

As for the memo to Lawyer, does it matter whether the CEO's statements were requests as opposed to orders? Would such a distinction be administrable? Does it matter whether Lawyer bowed to the "requests" because of the CEO's rank or

69. Compare ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1232 (1972) (finding improper interference where legal services lawyer was required to get approval of lawyer-program director before expanding current client's case into a class action), with ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974) (stating that staff lawyers of legal services office are subject to direction and control of senior lawyers including executive director of office, just as law firm associates are subject to control by senior lawyer; only control by an "external source" such as a lay board is improper). These opinions are further discussed infra notes 179-95 and accompanying text. As proposed in 1981 by the Kutak Commission, but later rejected, Model Rule 5.4(a) treated lawyer-managers in lay organizations, such as public defenders or legal services office directors, as nonlawyers for interference purposes. See supra note 47; cf. Sanchez v. Murphy, 385 F. Supp. 1362, 1365 (D. Nev. 1974) (holding that because an employer has no right to interfere with a lawyer-employee's judgment on behalf of a client, a public defender is not vicariously liable for the malpractice of his salaried deputies); Suzanne E. Mounts, Public Defender Programs, Professional Responsibility, and Competent Representation, 1982 Wis. L. Rev. 473, 516-18 (discussing Sanchez).
instead decided for herself that the changes would not prejudice clients? Is that distinction administrable?

Finally, when Lawyer ordered her litigators not to tell prospective clients about the new policy on advancing expenses unless their cases seemed likely at the outset to be expensive, did she violate the Anti-Interference Principle? Is it relevant that the order governs communications that occur before lawyer-client relationships are formed? Can a lawyer be said to exercise professional judgment on behalf of a client before she has a client?

Lawyer is part of BB's management team but unlike the CFO, she also practices law at the firm. Her order is unquestionably the product of a "lawyer's" judgment. But is the order, ipso facto, the product of professional judgment and, thus, incapable of violating the Anti-Interference Principle? My first instinct is to say, no, on the theory that Lawyer gave the order qua manager. Not only was she motivated by business concerns, but she overruled the litigators' ethics-based judgment that the new policy should be disclosed to every prospective client for whom BB would be prepared to advance expenses. Forcing her subordinates to exalt business goals over ethical concerns seems to be interference par excellence, at least if the resulting nondisclosures would be improper even if they were the product of the subordinates' independent judgment.  

70. Complications lurk here. Should it be a per se violation of the Anti-Interference Principle for a lay manager to press an MDP lawyer—unduly—to take steps in representing a client which the lawyer considers improper or imprudent, even if the action itself would be entirely proper if only it had sprung from her own "professional judgment?" Does the nature of the pressure matter? Must it actually succeed, as of course it must, to charge the lawyer with permitting a third-party to interfere? If it must succeed, must it also have a demonstrably adverse effect, such as harming the client or inducing behavior that is unethical in other respects? In defining the mischief that the Principle exists to combat, Stephen Gillers lays no stress on the demoralization costs inherent in getting a lawyer to act against her better judgment on a matter she believes is within her professional jurisdiction. See Stephen Gillers, The Anxiety of Influence, 27 FLA. ST. U. L. REV. 123, 126 (1999). Perhaps he fears that, if the Principle is enforced with a view to preventing those effects, lawyers will all too readily entertain the belief, in hopes of expanding their writ beyond its proper bounds. He emphasizes instead the risk that lay pressure will succeed in having a "bad" or "baleful" influence on the lawyer's conduct. Id. As a regulatory matter, I think his instincts are sound. Given the reactive nature of professional self-regulation, the only practical means of enforcing the Principle may be in response to grievances and lawsuits filed by clients and others who think the lawyer's conduct caused them unjustified harm. From the standpoint of fortifying MDP lawyers in their efforts to negotiate favorable arrangements for pressuring their independence, however, a
On the other hand, to say that even lawyer-managers in an MDP can violate the Principle by giving orders based on non-professional considerations has troubling implications. It requires enforcers to assess motives, a difficulty the scenario masks by simply assuming that Lawyer was motivated by business concerns. Moreover, if placing lawyers under the exclusive supervision of other lawyers tends to promote ethical conduct, as most of us lawyers think, then regulators should encourage MDPs to do so. Offering MDPs a safe harbor against interference charges when the supervisors in question are licensed to practice law is one possible inducement. Finally, in governing relations between superior and subordinate lawyers, the Principle is superfluous. If a law firm's managing partner, citing a temporary cash-flow problem, orders his litigation department to curtail discovery in all cases in which the firm is committed to advance expenses, thereby prejudicing clients, he can be held accountable on simpler grounds, such as incompetence or improper supervision. In the BB scenario, Lawyer's order should be treated the same way—as long as she maintains a license to practice law and is therefore subject to disciplinary control.

III. WORKPLACE INTERFERENCE AND ITS REGULATION: A BRIEF HISTORY

Even if the meaning of "interference" in an MDP context remains uncharted, readers may suspect that my litany of un-

broader definition of improper interference may be in order.

71. The Commission has proposed a similar inducement. Rule 5.2 of the Model Rules insulates a subordinate lawyer from discipline if he violates another rule of ethics by acting on the basis of a supervisor's reasonable, though mistaken, resolution of an arguable question of professional conduct. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1983). The Commission would extend this protection to subordinate lawyers working in an MDP, but only when the supervisor is another lawyer. See RECOMMENDATION, supra note 1, Recommendation 6 (stating that a lawyer "acting in accordance with a nonlawyer supervisor's resolution of a question of professional duty should not thereby be excused from failing to observe the rules of professional conduct").


73. See id. Rule 5.1 (defining the lawyer's duty to supervise subordinate lawyers).

74. If Lawyer's order breaches ethical duties but was not dictated by lay management, perhaps BB should not be held responsible for her wrongdoing in an MDP decertification proceeding. After all, BB has no right to interfere with Lawyer's independent professional judgment, even when it is exercised unwisely.
answered questions about BB's operations exaggerates the definitional problems involved. Perceived threats to lawyer autonomy are hardly new. Over time, a number of practice settings have been identified in which interference is a palpable risk. Broadly speaking, the dangers those settings pose are the dangers posed by MDPs. Nevertheless, I shall now argue that the responses of the traditional system of professional self-regulation to interference risks in those settings provide few hints about how to detect, identify, prevent, or rectify interference in MDPs. One reason for this is that we have had little experience at controlling interference risks through regulation, as opposed to trying to avoid them wholesale by outlawing the practice settings in which they arise. Before 1960, the state supreme courts barred lawyers from practicing in a number of presumptively high-risk settings, such as group legal services programs. This eliminated any need for regulatory oversight but it also stunted the growth of any regulatory expertise on interference issues. Later, federal intervention and growing divisions within the organized bar made some bans, including the ban on group legal services programs, unsustainable. Yet no regulation of the sort the Commission now contemplates for MDPs developed when those bans fell—no customized ethics rules like the Commission's proposed Rule 5.8 and no audits or other proactive techniques that could serve as a template for MDP regulation. For better or worse, the limits of state supreme court regulation and the complexities lurking behind the Anti-Interference Principle have mostly left lawyers and their potential "interferers" to hammer out their own accommodations.

A. SOURCES OF INTERFERENCE IN GENERAL

Financial ties, personal allegiances, and obligations to third parties can jeopardize any lawyer's capacity to make disinterested decisions and offer sound professional advice on behalf of clients. If parents retain a close friend to defend their son on criminal charges, for instance, the lawyer may be tempted or pressed to represent the son as the parents wish but the son does not. Legal ethics rules do not bar parents from trying to "interfere," they bar lawyers from permitting third-

75. "By and large," Professor Gillers writes, "we have eschewed finetuning and have preferred broad and absolute prohibitions." Gillers, supra note 70, at 126.

76. See infra notes 168-72 and accompanying text.
party payors to interfere. To anticipate the impact of the Commission's novel program for regulating MDPs as potential interferers, one must focus on the treatment to date of interference risks created (or inadequately avoided) by the organizational structure in which a lawyer works. How, I shall ask, have those risks been addressed and what do the responses suggest about the prospects for preventing interference in MDPs through active state supreme court regulation? The workplaces I shall consider are law firms, corporate law departments, and several forms of "lay intermediaries"—i.e., organizations, other than law firms, that employ lawyers to provide legal services to third parties.

B. INSTITUTIONAL SOURCES OF INTERFERENCE

1. Group law practice: The law firm

On the basis of the Anti-Interference Principle, English barristers and lawyers in some civil law countries have traditionally been forbidden to form law firms, let alone MDPs. If two barrister-partners, or a partner and an associate, should disagree about the proper course to take for a client, the argument runs, one would have to accede to the other's wishes, thereby stifling his own professional judgment. This view has never prevailed in the United States, but is worth noting for

77. See Model Rules of Professional Conduct Rule 5.4(c) (1983) ("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.").


79. See John Henry Merryman, The Civil Law Tradition 113 (1969) (noting that lawyers in some civil law countries are forbidden to form partnerships on the ground that each lawyer must be free to decide how a client's affairs should be handled). For a fascinating account of the gradual reconciliation of (1) the French avocat's traditional duty not to subordinate himself to other avocats with (2) modern economic pressures to form law firms and in-house legal departments, see John Leubsdorf, Man in His Original Dignity: Legal Ethics in France 29-38 (forthcoming 2000).

80. But the concern is not unheard of here. See Barlow F. Christensen, Lawyers for People of Moderate Means 226 (1970) (stating that "there was at one time some fear that large firm law practice endangered the lawyer-client relationship," but "[x]perience has shown this fear to have been unfounded"); cf. Ortiz v. Barrett, 278 S.E.2d 833, 840 (Va. 1981) (finding that co-counsel who ultimately acceded to lead counsel's trial strategy did not thereby violate DR 5-107(B), which required lawyers to exercise independent profes-
its sensitivity to interference even from sources as likely to enhance as to diminish the quality of a lawyer's work. Here the putative interferers are other lawyers exercising their independent judgment! Extended this far, the Anti-Interference Principle becomes detached from its policy rationale, which (I take it) is not to promote lawyer autonomy for its own sake, or for the sake of lawyers' job satisfaction and public image, but for the sake of the client interests and third-party rights lawyers must protect.

2. Corporate Law Departments

Since railroads began to have recurrent and specialized legal needs in the 1880s, many American lawyers have practiced "in-house" as salaried employees of corporate clients. Roughly ten percent of the bar does so today. The arrangement is entirely lawful and receives no special scrutiny from the state supreme courts. Indeed, at least fifteen jurisdictions now permit house counsel who are admitted to practice elsewhere to give a local company legal advice. Nevertheless, two subtly different interference problems can arise in this setting. I shall refer to them as interference with and interference by—in other words, with the lawyer-client relationship or by the client. Only the first involves professional judgment on behalf of clients and receives the Commission's explicit attention. Yet MDP lawyers could encounter both problems, just as corporate counsel do.

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81. Railroads began to form their own law departments in the 1880s as regulatory agencies began to oversee their operations. See Schaefer, supra note 47, at 639, 640 n.3.


84. See REPORT, supra note 1 (proposing to require MDPs to certify that they will not "interfere with a lawyer's exercise of independent professional judgment on behalf of a client" (emphasis added)). The proposal ignores the possibility that lawyers can or should ever exercise professional judgment on behalf of something or someone else. But lawyers can, should, and do. That is the sort of judgment that needs protection from interference by the client.
a. Interference With

A corporate client can only interact with its lawyers through other agents—i.e., management. Those agents are emphatically not the client,⁸ and they can be motivated by personal interests that conflict with corporate interests. Yet they have authority to hire, fire, promote, discipline, and set salaries for the client's in-house lawyers—hence the risk of managerial interference with in-house counsel's exercise of professional judgment on behalf of her client.

Here is an example of interference with: VP, Bigcorp's vice-president for marketing, rejects counsel's advice to drop a proposed pricing scheme that, according to counsel, violates antitrust laws and could lead to substantial liability for the company. VP insists on going ahead with the scheme, convinced that the violation will go undetected, enable the department to reach its annual sales goal, and earn him a big bonus. Sensing the danger to Bigcorp, counsel threatens to go to the CEO unless VP reconsiders.⁸⁶ VP threatens to fire the lawyer, who is assigned to VP's department. The lawyer relents, tells no one, and by his inaction permits the scheme to go into effect. The lawyer has allowed a third-party (VP) to interfere with his exercise of professional judgment on behalf of the client.

Few if any corporate counsel have ever been disciplined for such capitulations,⁸⁷ though the general and long-standing rule against allowing employers to "direct or regulate the lawyer's professional judgment"⁸⁸ on behalf of clients seems to apply. If the rule helps prevent interference, it is only as a source of professional leverage in negotiating a modus vivendi with lay managers, or perhaps as a source of inspiration for lawyers

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⁸. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(a) (1983).
⁹. See id. Rule 1.13(b).
⁸⁶. However, inside as well as outside counsel are sometimes held accountable for such conduct through civil suits. See, e.g., SEC v. National Student Mktg. Corp., 457 F. Supp. 682, 682-712 (D.D.C. 1978) (finding corporate lawyers violated securities law by allowing merger to close, as management wished, after learning that the stockholders had been misinformed about the other party's financial condition). On similar grounds, lawyers have also become targets of administrative enforcement actions by federal agencies. See, e.g., Susan Beck & Michael Orey, They Got What They Deserved, AM. LAW., May 1992, at 68-77 (reporting on Office of Thrift Supervision intra-agency proceeding that recovered $41 million in restitution from Kaye, Scholer and debarred two partners from federal banking practice; the firm allegedly aided Charles Keating in ransacking his thrift and the law firm's client, Lincoln Savings).
⁸⁷. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(c) (1983).
predisposed to stand up to managers like VP. Any law that deters managerial interference more directly is likely to be quite specific, as most rules of legal ethics are not, and to address management—i.e., the potential interferers. Consider two examples.

First, under the Model Business Corporation Act, no board can rely on a legal opinion from house counsel (or even regular outside counsel) to decide if a director is eligible to be indemnified by the company for certain legal expenses. Only lawyers who have no prior relationship with those seeking indemnification will do. Thus, corporate law presumes, as ethics rules do not, that house counsel’s employment status poses an undue risk that those seeking, favoring, or opposing indemnification will interfere with his exercise of judgment on behalf of the company. The second example comes from Yablonski v. United Mine Workers, which involved a suit by union members, analogous to a shareholder derivative action, to enforce the fiduciary duties of management to the union. The allegedly corrupt union kingpin selected the union’s inside counsel to represent the union. No rule of legal ethics expressly barred counsel from taking the case, though the propriety of doing so was dubious given the serious charges and the fact that top union management was allegedly involved in the wrongdoing. Yet, the court disqualified these lawyers on the theory that house counsel could not be as “unquestionably independent” as the situation demands, since their future employment was in management’s hands.

89. See Fred C. Zacharias, Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics, 69 NOTRE DAME L. REV. 223, 224-25 (1993) (noting that legal ethics codes, in part because they must address all manner of lawyers, are weak at specifying rules for specialized fields or practice settings).


92. See id. at 1040.

93. See MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 1.7(b) (1983) (barring representations that “may be materially limited by the lawyer’s responsibilities ... to a third person, or by the lawyer’s own interests, unless ... the lawyer reasonably believes the representation will not be adversely affected” and the client consents after being informed of the risks). Those union leaders whom the suit accused of wrongdoing would presumably be incapable of giving effective consent. See id. Rule 1.13 cmt. 11 (discussing derivative actions).

94. Yablonski, 454 F.2d at 1040-42.
The drafters of the Model Business Act and the *Yablonski* court were interested neither in the organizational structures in which lawyers *should* practice nor in how lawyer-workplaces should be structured. Their aim was to identify the workplaces from which corporations and unions should select lawyers for tasks that pose special interference risks. They were working the "interferer" side of the regulatory street by developing the law of corporate and union governance. The institutions of professional self-regulation were beside the point.

One structural measure that might protect independent professional judgment is to place all of a company's in-house lawyers within a unified legal department rather than assign them to various line departments, such as marketing, where they must report to nonlawyers. Lloyd Cutler stressed the importance of this over twenty years ago. "Unfortunately," he wrote,

> Many corporations are so committed to the line principle of organization that they require lawyers assigned to every operating division . . . to report directly to the Chief Executive of that division . . . with only a "dotted line" connecting them to the general counsel . . . . Lawyers placed in this position can tend to identify themselves too closely with the business objectives of their line superiors . . . . In some recent corporate payment investigations, we have found that lawyers . . . at the division or subsidiary level were so co-opted that they actually participated in the drafting of invoices and agreements that they knew to be false, and never consulted or informed their colleagues at the general counsel level. In our view, corporations could greatly improve their own legal auditing procedures by establishing a single group of lawyers, headed by the Corporate General Counsel, who serve the management of every division . . . in the same way that a law firm serves its various clients . . . .

Many large companies now follow Cutler's advice. But the "internal law firm" has evolved without regulatory pressure. Neither the ABA nor the state supreme courts have even thought to make it an ethical precondition to in-house practice. Nor do ethics rules spell out any procedures that corpo-

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96. See EVE SPANGLER, LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK 74 (1986) (reporting on case studies of five corporate law departments, each of which turned out to be "a fully independent entity headed by a general counsel").

97. Referring back the BB scenario, note that if separate departments were an ethical requirement for large MDPs, it is unclear whether BB's "separate" Law Division would qualify since BB's lawyer's are also assigned to regional offices managed by nonlawyers.
rations must use to guard against managerial impairment of
counsel’s ability to exercise independent judgment. Such pa-

ternalism on behalf of corporate clients would be misplaced. It
is also unlikely that the ABA and state supreme courts could
outdo corporate clients at finding cost-justified ways to mini-
mize interference with counsel’s judgment on their behalf.
Moreover, companies have every reason to implement volun-
tarily any worthwhile techniques they discover.

Though not employed by their clients, MDP lawyers face
comparable risks of interference with. One can certainly
imagine a lay manager pressing them to disserve clients in
some way that furthers his own ends or those of the MDP.
Sensitive to the problem, the Commission has sought public
comment on whether “fully integrated MDPs” should be re-
quired to organize their lawyers who provide legal services to
the public as a “separate legal division headed by a lawyer,”
i.e., as a law firm within an MDP. The Commission also wel-
comes comment on whether to mandate any “specific proce-
dures” in order to “safeguard lawyer independence.” In other
words, the Commission will entertain proposals to require
structural protections for MDP lawyers that corporations have
never been required to provide for in-house lawyers.

To evaluate the case for imposing such restrictions on
MDPs, consider the fact that the clients of Big Five-type MDPs
will usually resemble, and often will be, the same businesses
that employ corporate counsel. If companies can be left to their
own devices in guarding against internal interference with
house counsel’s judgment on their behalf, they can be expected
to monitor MDPs to discourage lay interference with the law-
yers working on their matters, just as they use house counsel to
monitor the outside law firms they retain. Mandatory safe-
guards seem no more necessary for MDPs with sophisticated
clients101 than the ABA and state supreme courts have ever

98. Administrative regulations have been proposed, however, to govern
interactions between a public corporation and its federal securities lawyers.
In 1979, the SEC circulated for public comment a rule that would have re-
quired those companies to report to the SEC the circumstances surrounding
any dismissal of its general counsel or other lawyer in connection with SEC
99. UPDATE, supra note 6.
100. Id.
101. Of course, many smaller MDPs will have a different clientele. Con-
ceivably, client sophistication could become a significant variable in MDP
regulation, just as the SEC has made “the sophisticated investor” a term of
considered them to be for companies that employ house counsel.

b. Interference By

This brings us to interference by. Suppose GC, the general counsel, is defending Bigcorp in a civil suit. The CEO orders GC to remove damaging documents from a file before producing the file in response to a discovery order.102 GC recognizes that removing the documents will increase the odds of winning the case, with little downside risk of detection. But he is loathe to follow an order that calls for unlawful conduct and the breach of ethical duties to nonclients.103 When GC demurs, the CEO threatens to fire him. GC relents and removes the documents. GC has allowed the CEO to interfere with his exercise of independent professional judgment.

What was interfered with, however, was not judgment on behalf of the client. The rights GC was at first moved to protect were those of the court° and the opposing party.° It was legitimate, even obligatory, to resist the CEO on behalf of those nonclients, even if, by GC's own lights, resistance would be costly to Bigcorp. It follows that managers can impair the exercise of professional judgment by pressing counsel to compromise duties to the client or duties to nonclients. Because the latter brand of interference occurs in a misguided effort to fur-

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103. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a) (1983) (barring failure to "disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client").

104. See id. Rule 3.3(a)(2) (barring failure to "disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client").

105. See id. Rule 3.4(a) (barring, on grounds of fairness to an opposing party, unlawful obstruction or concealment of documents having potential evidentiary value). Destruction or concealment of the documents would violate discovery law and constitute knowingly assisting the client in defrauding the court and the opposing party in violation of Model Rules of Professional Conduct Rule 1.2(d).
ther client interests, one tends to view an interferer like Big-corp's CEO not as an unfaithful agent of the company, but as its alter ego. This is interference by the client.106

House counsel's interference by problem has an interesting regulatory history. Much of Europe doubts the inside counsel's ability or resolve to respect the nonclient rights or societal interests that lawyers are expected to honor. The view is that no lawyer whose livelihood depends on satisfying a single company can be trusted to exercise independent judgment on behalf of nonclient rights. Accordingly, some European countries "disbar" lawyers while they work in-house.107 (Whether the disbarred may do in-house legal work under another designation, such as "business jurist," is an entirely different question. Often, they may.)108 Other countries withdraw the mantle of the attorney-client privilege from house counsel's communications with management.109

Though once frowned upon by bar leaders as vaguely unprofessional,110 house counsel have always been accepted in the United States—testimony, perhaps, to the power of corporate

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106. To the extent that law treats crimes committed by corporate agents to increase company profits as contrary to the interests of the corporation, the conceptual distinction between interference with and interference by collapses. Yet, the distinction may remain important at the phenomenological level, i.e., in terms of the lawyer's perception of the nature of the problem and the reasons for the interference.


108. See LEUBSDORF, supra note 79, at 26. Notice the analogy between the lawyers who choose to go in-house in Europe and give up the right to designate themselves as lawyers, on the one hand, and the American lawyers who go to work in a Big Five firm in order to do "tax" work or "environmental consulting" and no longer hold themselves out as practicing law. One wonders if lawyer regulation in the United States is drifting toward a designation rather than a licensing system.

109. See Christoforou, supra note 107, at 2.

110. Even today, corporate counsel remain sensitive to policies that suggest mistrust of their ability to conform to professional norms. See, e.g., Larry Lempert, Bar Hammerlock on Inside Counsel Creates a Mess, LEGAL TIMES, Apr. 21, 1986, at 2, available in LEXIS, Individual Legal News File (reporting opposition of American Corporate Counsel Association (ACCA) to a proposal to bar insurance companies from using staff attorneys to represent insureds; ACCA argued that "any ruling which would limit the practice of inside counsel would directly question the professionalism of that segment of the bar" (internal citation omitted)).

111. The attorney-client privilege in the United States protects corporate counsel's communications with the client as well, but the applicability of the privilege is complicated by the fact that many inside lawyers have business as
America to structure its lawyer-client relationships as it sees fit. Although the state supreme courts have never barred house counsel arrangements, Americans have not been oblivious to the risk of interference by powerful corporate clients. Early in the twentieth century, leading Progressives complained that lawyers for the "trusts," many of them inside counsel, were too close to their clients to practice with due regard for the public interest. Later, commentators extolled the large law firm with diverse client portfolio as the antidote to house counsel's dependency.

As in the case of interference with, some specialized law has developed to guard against house counsel's vulnerability to interference by. Again, I offer two examples, neither of which has much to do with professional self-regulation. First, in adjudicating international trade and federal procurement disputes, federal tribunals sometimes permit counsel, in preparing a client's case, to examine a competing company's proprietary data. Though a protective order bars counsel from sharing the data with management, the tribunals have been reluctant to accept in-house lawyers as counsel for these purposes. To do so, according to the Court of International Trade, poses an unacceptable risk of "disclosure within the corporate setting," which would breach counsel's duty to the tribunal. Nothing personal, of course: the court's preference for outside counsel "is not based on any reservation as to the integrity of in-house counsel"; rather, it "is intended to avoid placing them under the unnatural and unremitting strain of having to exercise constant self-censorship in their normal working rela-

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113. See, e.g., ERWIN O. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? 342 (1964) (agreeing with sociologist Talcott Parsons that the size and diversification of large law firms increases their client base and autonomy from their clients, enabling them to act as "a kind of buffer between the illegitimate desires of . . . clients and the social interest").


Second, courts have begun to permit house counsel to sue their employers if they are fired for refusing to engage in unlawful conduct or for insisting on compliance with law.117

Again, these doctrines address corporate employers. By contrast, no state supreme court has considered auditing corporate employers for possible interference, "decertifying" those companies that are found guilty of interference, and barring lawyers from working in-house for decertified companies.

Interference by may not be as controllable through intra-corporate processes as interference with, since the former occurs in pursuing putative client interests at the expense of third-party rights.118 Nevertheless, the case for proactively regulating corporate employers to control this risk would be weak even if the scheme were practical. Though the point seems counter-intuitive, economic theory suggests that in-house lawyers may sometimes possess more leverage than outside counsel over corporate clients.119 At a minimum, they do not appear to face greater risks of interference by than lawyers in "captive" law firms—i.e., "outside" firms whose revenues

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116. Id. at 871 (quoting Atlantic Sugar Ltd. v. United States, 85 Cust. Court. 133, C.R.D. 80-18 (1980)).

117. See, e.g., General Dynamics Corp. v. Superior Court, 876 P.2d 487, 490 (Cal. 1994) (en banc) (permitting in-house counsel to proceed with claims against arms contractor that allegedly fired him for insisting on investigating an internal security breakdown that may have jeopardized national security interests). Professional self-regulation can play a supporting role in such cases because lawyer-plaintiffs can cite rules of legal ethics to justify the "insubordination" that led to their termination as house counsel.

118. One might draw this inference from the fact that the majority of serious civil claims against large law firms, which tend to represent big business, are filed by third-party victims, not by clients. See Robert E. O'Malley, Preventing Legal Malpractice in Large Law Firms, 20 U. Tol. L. Rev. 325, 328 (1989); see also JETHRO K. LIEBERMAN, CRISIS AT THE BAR: LAWYERS’ UNETHICAL ETHICS AND WHAT TO DO ABOUT IT 206-07 (1978) (discussing problems with the disciplinary system).

119. If a lawyer’s expertise becomes highly client-specific, as is often true of in-house counsel, the relationship takes on the features of a bilateral monopoly. See OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 26-29 (1975) (discussing opportunism and how it impacts behavior); Ronald J. Gilson & Robert H. Mnookin, Sharing Among the Human Capitalists: An Economic Inquiry Into the Corporate Law Firm and How Partners Split Profits, 37 STAN. L. REV. 313, 358-60 (1985). On one hand, the lawyer’s job mobility, and thus his leverage over the client, tends to decline because other employers place a relatively low value on his services. On the other, his expertise becomes relatively costly for the current client to replace, thereby increasing his leverage. The net effect on the locus of power in the relationship is unpredictable.
come wholly or largely from one client.\textsuperscript{120} It is not even clear that in-house lawyers are at greater risk of interference by than the many law-firm partners whose firms have a nicely diversified portfolio of clients, but who themselves work largely on one client's account and depend on it to maintain their value to their firms.\textsuperscript{121}

In short, no case can be made for active supreme court oversight of house-counsel settings in order to prevent interference by. Since MDP lawyers have a broader client base than house counsel, it is hard to see why active judicial oversight would be more appropriate for them. Indeed, if house counsel are all too vulnerable to interference by, MDPs may be part of the solution, since many will be retained to do corporate legal work that would otherwise go to house counsel.

3. Lay Intermediaries

Next, consider our regulatory experience with "lay" organizations that employ lawyers to provide legal services to others. These include liability insurers, other "corporate intermediaries," legal services offices, and group legal services plans.

a. Staff Attorney Programs for Defending Insureds

Some liability insurers retain outside lawyers to defend their insureds; others employ staff attorneys. The staff attorney is only marginally different from house counsel since the insurer-employer has its own stake in the defense and may be a co-client with the insured, rather than a mere third-party

\textsuperscript{120} One of the most sustained bouts of unethical lawyering in recent decades involved a New York law firm that remained willfully blind to the massive frauds it helped its flagship client, OPM, commit over several years. OPM accounted for over sixty percent of the law firm's revenues for the period, producing what was "virtually a captured law firm." ROBERT P. GANDOSSY, BAD BUSINESS: THE OPM SCANDAL AND THE SEDUCTION OF THE ESTABLISHMENT 221 (1985); see also In re Keating, Muething & Kiekamp, Exchange Act Release No. 15,982, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,124, at 81,981 (July 2, 1979) (imposing SEC "discipline" on a boutique law firm whose lawyers all did transactional work for the firm's largest client and which helped the client prepare disclosure statements to the SEC which unlawfully omitted material facts about the client's transactions with its self-dealing principals).

\textsuperscript{121} See ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 250 (1988) (finding that large-firm lawyers who do corporate work in Chicago devote over half their time on average to their largest client).
payor. New problems arise in this setting, however, because the company's interests can come into conflict with the insured's. In that event, counsel is understood to owe the insured all the professional duties that run to a client, including duties of competence, loyalty, and confidentiality. Yet the staff attorney's vulnerability to insurer interference with her professional judgment on behalf of the insured is palpable, though perhaps not palpably greater than that of retained counsel who come to depend on an insurer's continuing patronage.

Just what constitutes interference in this context remains surprisingly unclear, even with respect to recurring issues such as:

122. Whether the lawyer should be deemed to have one client or two, and just what rides on the answer, has been much debated. Compare Robert E. O'Malley, Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed, 66 TUL. L. REV. 511, 512 (1991) (favoring only one-client theory on policy grounds), with Charles Silver, Does Insurance Defense Counsel Represent the Company or the Insured?, 72 TEX. L. REV. 1583, 1590-91 (1994) (arguing that if insured and insurer both consent to be represented, then they are both clients as a matter of agency law, and that this is desirable as a matter of public policy). See generally Nancy J. Moore, The Ethical Duties of Insurance Defense Counsel: Are Special Solutions Required?, 4 CONN. INS. L.J. 259 (1997) (concluding that insureds should be informed that their attorney is a salaried employee of the insurance company). One thing is clear: whether defense counsel has one client or two is not determined by the rules of legal ethics. See MODEL RULES OF PROFESSIONAL RESPONSIBILITY Scope ¶ 3 (1983) (stating that "principles of substantive law external to these Rules determine whether a client-lawyer relationship exists"). Compare RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 215 (Proposed Final Draft No. 2, 1998) (treating the issue as a matter of insurance law), with id. § 26 (providing an acontextual rule on the formation of lawyer-client relationships that turns solely on mutual consent or a lawyer's creating in the client's mind a reasonable expectation that the lawyer was representing him).

123. See, e.g., Parsons v. Continental Nat'l Am. Group, 550 P.2d 94, 98 (Ariz. 1976) (en banc) (barring insurer from contesting coverage on basis of information the insured gave to defense counsel, who then breached duty of confidentiality to insured by revealing it to company; whether insurer was a client was irrelevant because duty to insured was superior in any event, and counsel was serving insurer only as liability, not coverage, counsel). The Model Rules recognize that insurance defense work raises difficult issues but do not specify rules for the field. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 10 (referring generally to need to maintain insurance defense counsel's "professional independence").

124. Even the most optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interests of his real client—the one who is paying his fee and from whom he hopes to receive future business—the insurance company.

United States Fidelity & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932, 938 n.5 (8th Cir. 1978).
as whether counsel may accept an insurer's restrictions on expenditures for investigation and discovery, an issue raised as well by the BB scenario in Part I.125 Rules of legal ethics "afford little specific assistance" on such issues.126 Some ethics opinions provide more guidance,127 but they often conflict and are not binding on courts and disciplinary agencies.128 Many of our expectations of insurance defense counsel are derived not from ethics rules, but from insurance law, contract terms, guidelines negotiated by ABA officials and insurance representatives,129 and lawsuits against defense counsel who allegedly succumbed to interference or insurers who allegedly interfered.130 Professional self-regulation—i.e., legal ethics rules as interpreted in advisory ethics opinions—can do no more than vie with other kinds of authority to define the role of the lawyer within the "tripartite relationship."131 The other authorities recognize lawyer independence as a good, but are less likely to treat it as the only relevant good or as an absolute that brooks no compromise. In view of the palpable risk of interference and the inability of the bar and state supreme courts to devise and enforce protocols that can be trusted to prevent it, the question has arisen whether the state supreme courts should bar lawyers from participating in insurers' staff attorney programs on the grounds of undue and uncontrollable interference risk.

125. Ethics opinions have reached inconsistent conclusions. Compare ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-403 (1996) (permitting a lawyer to represent an insured under a policy giving the insurer exclusive control of the defense, provided the lawyer explains the limited nature of the representation to the insured), with Alabama State Bar, Formal Op. RO-98-02 (1998), available at <http://www.alabar.org> (holding under similar ethics rules that counsel should remain independent of insurer's direction on such matters, regardless of policy terms).

126. WOLFRAM, supra note 42, at 429.

127. See supra note 125 (citing examples of ethics opinions addressing insurance representation issues).


130. See, e.g., Mitchum v. Hudgens, 533 So. 2d 194, 197-98 (Ala. 1988) (validating an insurance contract giving the insurer the right to settle a malpractice case within policy limits, and concluding that counsel acted properly in settling the case as the insurer instructed, despite insured's objection).

131. Id. at 198 (discussing the nature of the tripartite relationship).
Two courts have found that the staff attorney model, though perhaps useful for controlling costs, unduly jeopardizes counsel's ability to exercise independent judgment on behalf of insureds. The practice of retaining "outside" counsel to handle all of an insurer's cases for a flat fee, which (compared to hourly fees) motivates counsel to invest less time per case, has also come under scrutiny. Following the lead of the state bar association, the Kentucky Supreme Court recently declared both practices so threatening to counsel's independent judgment as to constitute interference per se under prevailing ethics rules; the North Carolina Supreme Court takes the same position as to staff attorneys. Their claim is not that these structures...
invariably lead to interference or cloud counsel’s judgment, merely that banning them to eliminate the risk is desirable.\textsuperscript{134} With no more than anecdotal evidence on hand,\textsuperscript{135} however, these courts were hardly in a position to assess the risk (not to mention any offsetting benefits)\textsuperscript{136} reliably enough to justify such drastic prophylaxis. The courts appear to have decided instead that this practice arrangement is intolerable if it carries any risk, as of course it does.

But, intolerable compared to what? To the outside defense lawyer who spends eighty percent of her time on cases for a single insurer? Fifty percent? The problem is that interference risk in insurance defense work is not a dichotomous variable—staff attorney, yes; outside counsel, no. Nothing is magical about the one-hundred percent line. To draw the line at one hundred percent is to outlaw an organizational structure that the insurance industry, itself highly regulated, finds useful. State supreme courts may claim “exclusive” constitutional authority to regulate law practice, especially where litigation is involved. But it does not follow that they have the political authority or the technical expertise to issue what amounts to structural injunctions against the insurance industry. Cate-

\textsuperscript{134} See American Ins. Ass'n, 917 S.W.2d at 573 (stating that the “mere appearance of impropriety is just as egregious as any actual or real conflict,” and that the ban “acts as a prophylactic device”).

\textsuperscript{135} Here, as with legal aid societies, see infra text accompanying notes 168-70, Americans have had considerable experience with insurers' staff-attorney programs. But there has been little research on the nature and magnitude of interference problems that arise. Perhaps the ABA House of Delegates, which has resolved not to support MDP legalization until further study “demonstrates” that MDP lawyers will be able to exercise independent judgment, would care to fund studies of this sort. Of course, such studies are hard to conduct in the absence of consensus about what actually constitutes interference, either in general or in MDPs specifically.

\textsuperscript{136} Benefits might include cost savings that could be passed on to policyholders in the form of reduced premiums, as well the staff attorney's greater opportunity to gain expertise in the specialty, and gain it faster, than outside counsel with more diversified practices. Because of its duty to oversee the litigation process, a state supreme court is less likely to consider the interests of policyholders here than the defendant-insured’s interest in receiving adequate representation. Yet each post-accident defendant was a pre-accident insured who, given the choice, might well have preferred to pay a lower premium in return for accepting representation from a staff attorney if necessary.
gorically barring lawyers from practice in certain organizational structures means regulating not just lawyers, but lawyers' interactions with other fundamental institutions—the insurance industry here, the accounting profession vis-à-vis MDPs, the federal government vis-à-vis legal services programs.

Fortunately, the weight of authority is to the contrary. Eleven states are unwilling to outlaw the staff attorney model on ethical or UPL grounds. Nor has any state attempted to specify procedures that must be used in order to bring the model into "ethical compliance," or to audit staff attorney programs as a safeguard against interference. Most courts recognize that their competence to second-guess insurer-designed incentive structures for defense counsel is doubtful. They also regard as adequate safeguards against interference an insured's rights upon being victimized to (1) sue counsel for malpractice; (2) sue a negligent staff attorney's employer on a vicarious liability theory; and (3) sue the insurer directly for bad faith when there is demonstrable, case-specific interference. These ex post remedies compensate clients who are victimized by interference and leave it to insurers to decide whether staff attorney programs are justified in light of their liability costs.

Where the staff attorney model is lawful, its use should have no bearing in itself on insurer liability. The link between a lawyer's employee status and any deficiencies in his representation of an insured will normally be too murky to justify insurer liability. Nor will it be necessary to establish such a

137. See Update, supra note 6.

138. See, e.g., In re Allstate Ins. Co., 722 S.W.2d 947, 951, 953 (Mo. 1987) (holding that neither a statute banning the practice of law by corporations nor the conflict-of-interest provisions of the prevailing ethics code militate against an insurer's use of staff attorneys).

139. See id. at 953. Agency law normally treats retained outside lawyers as independent contractors but staff attorneys as servants, whose malpractice is imputable to their employer. Consequently, insurers will have an incentive to abandon the staff attorney model if experience shows that it promotes attorney negligence or breach of fiduciary duties to insureds. At the same time, the staff attorney's ethical duties to the insured afford her some latitude in representing the insured even though her legal status as servant implies that she is under the insurer's control.

140. Theories of corporate or organizational negligence are also unnecessary and unhelpful when law firms are sued for malpractice. Suppose client C relies to his detriment on an unsound legal opinion prepared by L, a junior partner at Firm. If C sues Firm for malpractice, his theory against the firm will almost certainly be vicarious liability for L's breach of the professional standard of care in preparing the opinion. No theory of "corporate" or "struc-
link to recover from the insurer, which will be vicariously liable for a staff attorney's malpractice or breach of fiduciary duty to an insured. On the other hand, interference in a specific case should support insurer liability for bad faith whether the lawyer is a staff attorney or not—\textsuperscript{141}—for example, when a claims administrator induced counsel to defend X's case weakly in order to achieve an outcome that would justify the company in canceling X's policy.

The prevailing willingness to rely primarily on civil liability to control the risks of interference in insurance defense work seems wise. A state supreme court ban on all staff attorney programs (without auditing a single one!) ignores the possibility that most, for their own good, work out adequate anti-interference procedures. Besides, however great their opportunities may be, insurers have no discernible motive to interfere in the mine-run of cases in which claims are within policy limits and raise no coverage issues. With respect to discovery costs, for instance, they will not be penny-wise and pound-foolish with their own money.\textsuperscript{142}

Finally, defendants in professional malpractice cases often complain that defense counsel (employed \textit{or} retained) follow their insurer's instructions to settle (within policy limits), without seeking the insured's consent or giving the insured a chance to convince the company to reconsider. They worry about the effects of settlement on their reputations, which insurers allegedly disregard. But the scenario involves no wrongful interference if, as a matter of \textit{insurance} law, policies that authorize the insurer to make settlement decisions are deemed

\textsuperscript{tural} negligence will be raised. \textit{C} is unlikely to argue, for example, that a reasonable law firm would have had a policy, as Firm did not, requiring legal opinions to be reviewed by an opinion committee before leaving the firm. Even if \textit{C} could show that this policy was customary and cost justified by its value in \textit{reducing} the risk of unsound opinions, \textit{C} might find it hard to show specific causation—i.e., that an opinion committee would have weeded out most unsound opinions and, by inference, this opinion.

\textsuperscript{141} See, e.g., State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625, 629 (Tex. 1998) (stating that, although insurer is not vicariously liable to insured for malpractice by retained defense counsel, who is an independent contractor, insurer could be directly liable on a showing that it "consciously undermined the insured's defense").

\textsuperscript{142} For withering criticism of the Kentucky Supreme Court's economic assumptions in declaring staff attorney and flat fee arrangements unethical, see generally Charles Silver, \textit{Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle over the Law Governing Insurance Defense Lawyers}, 4 CONN. INS. L.J. 205 (1997).
to waive the insured's right to control settlement as two courts have held. Another court insists that policy terms cannot alter the lawyer's ethical duty to elicit the insured client's consent before settling, but there is little need for this protection. The insurance market offers reputation-minded professionals a solution: a more expensive malpractice policy under which the insured retains control over settlement decisions.

b. Corporate or "Lay" Intermediaries

Early in the twentieth century, other businesses and non-profit organizations began to experiment with new ways to provide legal services to their members or to the broader public. Many hired staff attorneys; others forwarded work to lawyers who established no direct, let alone independent, relationships with the parties served. These "corporate intermediaries" included automobile clubs, trust departments in banks, trade associations, and collection agencies.

These experiments largely ceased once the states adopted statutes prohibiting lay organizations (other than legal aid societies) from "practicing law" even if licensed attorneys provided the service. These statutes were sometimes used to enjoin intermediaries from continuing to offer legal services.

143. See Mitchum v. Hudgens, 533 So. 2d 194, 201 (Ala. 1988) (stating that there is no conflict of interest when the insured has contracted away his right to consent to a settlement); Feliberty v. Damon, 527 N.E.2d 261, 262 (N.Y. 1988) (concluding that "the parties' contract unambiguously gave the insurer the unconditioned right to settle any claim").

144. See Rogers v. Robson, Masters, Ryan, Brumund, & Belom, 407 N.E.2d 47, 49 (Ill. 1980) (stating that if the insured's consent is not forthcoming, then the lawyer should withdraw rather than do the insurer's bidding and complete the settlement).

145. See Geoffrey C. Hazard, Jr., et al., The Law and Ethics of Lawyering 639 (3d ed. 1999) (asking why insureds who forgo the option of purchasing a more expensive policy in order to retain control over settlement should be entitled to sue lawyers or insurers who settle their claims within policy limits).

146. Some trade associations employed lawyers not only for their own legal needs, but to serve their members as well.

147. See Christensen, supra note 80, at 230-48 (reviewing intermediary arrangements for legal services).

148. See Wolfram, supra note 42, at 840 (noting that most states have statutes prohibiting the practice of law by corporations).

149. See, e.g., People v. People's Stock Yards State Bank, 176 N.E. 901 (Ill. 1931) (finding bank engaged in unauthorized practice of law); State ex rel. Freebourn v. Merchants' Credit Serv., 66 P.2d 337, 343 (Mont. 1937) (same for
In 1928, the ABA addressed the lawyer's side of the intermediary structure by adding Canon 35 to the Canons of Professional Ethics. Canon 35 barred lawyers from allowing their services to be "controlled or exploited by any lay agency . . . which intervenes between client and lawyer" or entering into any "relations which direct the performance of [their] duties in the interest of such intermediary."\(^\text{150}\) Ethics opinions then construed Canon 35, as well as Canon 47's ban on assisting others to engage in unauthorized practice,\(^\text{151}\) to bar lawyers from practicing in settings such as bank trust departments, where some lawyers drafted wills as a service to bank customers,\(^\text{152}\) and accounting firms, which offered legal advice along with other services for one fee.\(^\text{153}\) Lawyers working with a corporate intermediary were occasionally disciplined for violating these Canons.\(^\text{154}\)

The ABA's job was to make these ethical strictures effective at minimal enforcement cost to the state supreme courts and to the state and local bar associations they deputized to run the poorly funded disciplinary process and investigate UPL complaints. Accordingly, the ABA began in 1937 to negotiate "statements of principles" with associations representing other

\(^{150}\) CANONS OF PROFESSIONAL ETHICS Canon 35 (1929).

\(^{151}\) Id. Canon 47 (forbidding a lawyer to permit his professional services to be "used in aid of, or to make possible the unauthorized practice of law by any lay agency).


\(^{153}\) ABA Comm. on Ethics and Professional Responsibility, Formal Op. 297 (1961) (finding it irrelevant that an accountant with no lawyer's assistance lawfully could provide the same advice as a lawyer).

\(^{154}\) See, e.g., In re Droker, 370 P.2d 242, 248-49 (Wash. 1962) (suspending from practice two lawyers who had provided legal services through an escrow company).
occupations at the national level. These "treaties" were expected to clarify the boundaries between law practice and other services, but were ineffective in that regard. They sometimes played a role in UPL litigation, but mainly served to notify nonlawyers about UPL restrictions and to enlist their trade or professional associations in the cause of UPL prevention, including the prevention of unauthorized practice through intermediaries. The ABA also formed national conferences with treaty partners to interpret treaties, monitor behavior, and study new problems.

These attempts at inter-professional regulation through private ABA negotiations ceased by 1980. Treaties were rescinded and conferences disbanded in response to the growing threat of federal antitrust suits. Without the participation or

155. QUINTIN JOHNSTONE & DAN HOPSON, JR., LAWYERS AND THEIR WORK 184-85 (1976) (listing occupations that made treaties with the ABA).

156. Some treaties, such as the 1937 Statement of Principles with collection agencies focused on the corporate intermediary problem. See id. at 185. For decades, however, the ABA and the collection agencies continued to disagree about which arrangements constituted UPL by lay corporations. See COUNTRYMAN ET AL., supra note 152, at 525-29.

157. If the agreement device is to be a substitute for litigation in the unauthorized practice field, ... there must be many rulings as to what the agreements mean when applied to particular fact situations. ... The experience of the conference groups [as of 1955] gives little indication that this necessary interpretation function can be performed. Few interpretations have been requested ... and there has been difficulty, notably in the lawyer-accountant conference groups, in securing agreement on interpretations.


158. See e.g., State ex rel. Porter v. Alabama Ass'n of Credit Executives, 338 So. 2d 812, 815 (Ala. 1976) (relying on ABA treaty with committee of debt collection agencies).

159. See Johnstone, supra note 157, at 3 (noting these desirable effects from the ABA's standpoint).

160. See JOHNSTONE & HOPSON, supra note 155, at 185 n.71.

161. See WOLFRAM, supra note 42, at 826-27.

162. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 786-92 (1975) (denying state bars' protections under state action exemption of federal antitrust laws and finding no "learned profession" exemption that would protect private bar associations from antitrust liability for issuing anti-competitive fee schedules); Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298, 308-09 (E.D. Va. 1977) (holding that bar association opinions purporting to define areas of unauthorized practice violate antitrust laws); Trustbusters Eye ABA UPL Opinion, 63 A.B.A. J. 1702 (1977) (noting that federal officials were threatening further antitrust suits to counter bars' UPL activities); NAT'L L.J., Mar. 26, 1979, at 29 (announcing a Justice Department suit against a county bar association for conspiring to restrain trade through statement of princi-
approval of the Justice Department or the Federal Trade
Commission, this tradition is unlikely to be revived. For ex-
ample, the ABA and AICPA are unlikely to draw up a "treaty" con-
taining principles to protect lawyer independence in MDPs con-
trolled by accountants. Still, the ABA's campaign to curb
corporate intermediaries through national agreements is worth
keeping in mind when contemplating the prospects for MDP
regulation under the Commission's system. It suggests that
state supreme courts and state bars were too weak to shut
down all intermediaries through state-by-state UPL enforce-
ment. As Professors Quintin Johnstone and Dan Hopson,
Jr., observed in 1955, this weakness reflected not only the lack
of enforcement dollars and personnel, but the fact that the
"major competing groups are respected and established busi-
nesses" and "can be counted on to use their financial and politi-
cal resources to oppose the bar on unauthorized practice when-
ever threatened." Foremost among those competitors were
accounting firms, who even then were helping businesses to
prepare and file incorporation papers, in addition to rendering
tax advice.

Today's MDP-like activities at the Big Five are déjà vu all
over again. It would be vastly more difficult today to wage
state-by-state UPL campaigns against the Big Five for operat-
ing MDPs, which are simply a modern variation on the corpo-
rate intermediary theme. The reason is not just money. State
bars cannot deliver strong UPL enforcement without a consen-
sus on the matter among their own members. If that was
possible in the 1950s, it seems impossible now, with substantial
bar constituencies favoring MDP legalization, including the
lawyers who work for the Big Five.

Providing legal services through corporate intermediaries
remains illegal, and it is still a breach of legal ethics for law-
yers to cooperate in such ventures. But holding the legal line
has come at a price. Ethics enforcers cannot have learned

163. See Roth, Bar Going Nowhere Fast on MDPs, supra note 31, at 20
(quoting executive director of American Antitrust Institute to the effect that,
"[i]f the ABA continues to hold out against the possibility of a more competi-
tive environment, they will be opening up the potential for [antitrust] suits").
164. See JOHNSTONE & HOPSON, supra note 155, at 189-92.
165. Id. at 189, 193.
166. See id. at 193.
167. On the importance of lawyers' support and the problem of gaining it,
see id. at 187-89.
much about the nature and control of interference risks in corporate intermediaries—information that in principle could help them gauge the magnitude and preventability of those risks in MDPs. And, since the ban is only loosely enforced, they have also had to ignore behavior that is much unethical or illegal.

c. Legal Aid Societies and Legal Services Programs

Barlow Christensen wrote in 1970 (surely, without MDPs in mind) that the legal profession had "long recognized that differing circumstances and changing conditions may sometimes call for different forms of organization in law practice." Legal aid societies—charitable organizations providing legal assistance to the poor—have long been an accepted if deviant form. So are the federally-funded legal services programs that many legal aid societies turned into after 1965. Yet most legal aid and legal services programs are structured like corporate intermediaries. They rely on staff attorneys working under boards of directors that include lay members and, in some cases, under lay office directors as well. Although they are nonprofit organizations, their board members' political agenda could easily substitute for the business objectives of lay managers as a motive to interfere. Why, then, have the ABA and state supreme courts tolerated these structures rather than treating them, like other corporate intermediaries, as interference per se?

168. CHRISTENSEN, supra note 80, at 226.
169. See id. "Charitable societies rendering aid to the indigent" were exempt from the strictures of Canon 35, which simply deemed them not to be "intermediaries." Id. at 226 n.4; see also Azzarello v. Legal Aid Society, 185 N.E.2d 566, 569-71 (Ohio 1962) (affirming ruling that legal aid society was not an intermediary engaged in UPL, but a nonprofit corporation that provided lawyers who formed personal lawyer-client relationships with indigents).
170. In a 1978 Supreme Court decision, then-Justice Rehnquist made a similar point about the solicitation of legal clients by nonprofit organizations:
   I cannot share the Court's confidence that the danger ... is minimized simply because a lawyer proceeds from political conviction rather than for pecuniary gain. A State may reasonably fear that a lawyer's desire to resolve "substantial civil liberties questions" may occasionally take precedence over his duty to advance the interests of his client.
   In re Primus, 436 U.S. 412, 445 (1978) (Rehnquist, J., dissenting) (citation omitted) (criticizing decision to protect ACLU lawyer from state supreme court discipline for solicitation based on First Amendment distinction between for-profit solicitation and solicitation to further political aims through litigation). Much the same could be said of the potential motives of legal services board members to "interfere."
Christensen cites two reasons. First, "the social value of an organized and effective method of providing legal services to indigent clients far outweighs any risk of diluting or impairing the lawyer-client relationship." Second, experience has demonstrated that "the lawyer-client relationship can be adequately preserved in legal aid programs." Tolerance, of course, is what permitted that experience in the first place.

The federal government began to fund legal services programs in 1964. Both before and immediately after the National Legal Services Corporation was created in 1975, staff-attorney programs were funded more generously than voucher programs, which permit qualifying clients to choose their own lawyers. Indeed, federal officials openly preferred the staff-attorney structure, though it ostensibly posed greater interference risks. Some bar associations resisted this policy, but

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171. CHRISTENSEN, supra note 80, at 227 (emphasis added). One wonders why the same kind of risk-benefit analysis should not be used to decide whether to legalize MDPs, which many consider an "organized and effective way" to serve non-indigent clients. True, there will be much argument about the nature and extent of both risks and benefits. But why tolerate practice settings that put a lawyer's independent judgment on behalf of clients at risk only when the clients who will suffer if the risk materializes are poor and legally unsophisticated? Is the Anti-Interference Principle only one value to balance against others in judging the acceptability of legal services programs, but an absolute where MDPs are concerned?

Another factor in the bar's tolerance of legal aid societies may have been the perception that they did not compete for clients with private practitioners. Legal aid has generally provided service in civil matters such as landlord-tenant and debtor-creditor disputes. The society in New York City has also provided counsel for indigent criminal defendants, while most communities have separate pubic defender offices or assigned counsel systems for criminal defendants. Early studies of criminal defense programs for indigents showed that the assigned counsel system was more expensive and that staff attorneys in public defenders' offices developed more relevant expertise than assigned counsel. See L. RAY PATTERSON & ELLIOTT E. CHEATHAM, THE PROFESSION OF LAW 336-37 (1971).

172. CHRISTENSEN, supra note 80, at 227.


175. See JOHNSON, supra note 173, at 89-90, 117-21 (1974). There was also early support for lay membership on the boards of directors of legal services programs, but federal officials eventually acceded to organized bar entreaties to require a lawyer-majority on each board. See id. at 121-26.

176. For example, the North Carolina Bar briefly issued rulings suggesting that lawyers employed by a federally-funded legal services office under the existing federal regulations were violating ethics rules and could be disciplined. See id. at 89-90. The Wisconsin State Bar successfully campaigned for funds to administer its Judicare program, a voucher plan. See id. at 117-18.
no state supreme court ever told the federal government that its staff attorney programs amounted to the unlawful practice of law by an intermediary and that staff attorneys were ipso facto in violation of local ethics rules.\textsuperscript{177}

Since legal services programs using staff attorneys were lawful, ABA ethics opinions tried to work out the implications of the Anti-Interference Principle for relations between lawyers and management in those programs. Here, at last, was a chance for the machinery of professional self-regulation to elaborate on the meaning of interference in a workplace where lawyers were lawfully employed by lay intermediaries. The results have not been impressive.

The Legal Services Corporation Act of 1974 restricted the legal services that federally-funded programs could offer: for example, lawyers could only file class actions for clients if doing so was permissible under a policy established by their program's board and the actions were specifically approved by the program director.\textsuperscript{178} A staff attorney who thought a client's case should be turned into a class action could not proceed without the approval of the director, who might or might not be a lawyer. Was this consistent with the Anti-Interference Principle?

An ABA informal opinion had held in 1972 that such a requirement would be impermissible in light of DR 5-107(B) of the Model Code of Professional Responsibility, which required lawyers not to permit a lay employer to "direct or regulate [their] professional judgment."\textsuperscript{179} The implication was that even a lawyer-supervisor is a potential interferer. Just before Congress passed the Act, however, ABA Formal Opinion 334 overruled that holding in favor of the following position:

Staff lawyers of a legal services office are subject to the direction of and control of senior lawyers... or the executive director (if a lawyer),... just as associates of any law firm are subject to the direction and control of their seniors. Such internal communication and control

\textsuperscript{177} Doing so would have implicated serious federalism issues. Moreover, the ABA became a major supporter of the new federal legal services program—staff-attorney model or not—even though many state and local associations were opposed. \textit{See id.} at 49-64.

\textsuperscript{178} \textit{See} Legal Services Corporation Act of 1974, Pub. L. No. 93-355, \S 1006(d)(5).

is not only permissible but salutary. It is only control of the staff lawyer's judgment by an external source that is improper.\footnote{180}

No analysis justified this reversal, which tried to make an ethical virtue of a new federal necessity. Moreover, Opinion 334 failed to clarify several related issues, some of which also appear in my BB scenario. What if the director is a lawyer, but rejects the staff attorney's request purely on the basis of cost? Is that an exercise of professional judgment by definition, because it is a lawyer's judgment? Just what may or must a staff attorney do if a lay director, citing her duties under the Act, refuses to defer to the attorney's judgment regarding the class action? Suppose the board, consisting mostly of lawyers, ratifies the lay director's decision? Would that justify the decision and the staff attorney's acquiescence, or would the board constitute an "external" source of control?

In 1970, ABA Formal Opinion 324 held that under the Model Code a lawyer-board member had an ethical duty to oppose policies that interfere with the independent judgment of staff attorneys in representing their clients.\footnote{181} Yet the Code contained enforceable "Disciplinary Rules" as well as aspirational "Ethical Considerations" and Opinion 324 never declared whether the board member's duty in this instance was enforceable. Four years later, ABA Formal Opinion 334 tried but failed to clarify the matter.\footnote{182} Opinion 334 asserted that earlier committee statements on the duties of lawyer-board members were based "for the most part" on disciplinary rules, but never indicated whether this included the referenced holding in Opinion 324.\footnote{183} Indeed, Opinion 334 added to the confusion by citing only a nonexistent Ethical Consideration to support its position that, although boards could impose subject-matter restrictions on the cases their programs accepted,

priorities must be based on a consideration of the needs of the client community and the resources available . . . . They may not be based on considerations such as the identity of the prospective adverse parties or the nature of the remedy ("class action") sought to be employed.\footnote{184}

The ABA ethics committee cannot have expected these opinions to help enforcers identify and put a stop to any work-

\footnotesize

control policies in legal services offices that violate the Anti-
Interference Principle. Predictably, no state supreme courts
have enforced the Principle through disciplinary proceedings
against lawyer-board members or staff attorneys. Nor has any
court provided for “decertification” proceedings against offend-
ing programs.

Even as sources of guidance for lawyers associated with le-
gal services programs, Opinions 324 and 334 were less than
satisfactory. Both indicate, for example, that a board may con-
trol intake decisions by adopting certain rules limiting the
categories of cases a program will accept and the types of serv-
ice it will provide—for example, no divorce cases—but may not
make intake decisions on a “case-by-case, client-by-client” ba-
sis.\textsuperscript{185} Case-by-case decisions would amount to an employer
“direct[ing] or regulat[ing a staff attorney’s] professional judg-
ment in rendering . . . legal services,” in violation of DR 5-
107(B).\textsuperscript{186} Some may find this distinction attractive as a means
to discourage boards from rejecting politically controversial
cases as they come in.\textsuperscript{187} Others may find it presumptuous for
an ABA committee to tell legal services boards how federal
funds should be allocated through client intake
decisions.\textsuperscript{188} But no one should suppose that the distinction is entailed by
the Anti-Interference Principle as formulated in DR 5-107(B).

On its face, DR 5-107(B) addresses only the staff attorney,
forbidding him to “permit” his employer “to direct or regulate
his professional judgment in rendering . . . legal services.”\textsuperscript{189}
The rule does not address lawyer-board members who partici-
pate in case-specific intake decisions. Moreover, the rule con-
cerns independence of judgment in rendering services to a cli-
ent, not in deciding whether services will be rendered to a
would-be client. Nor do the opinions ever explain just why a
board decision to reject a prospective client who wanted the
program to lobby for a certain bill would “interfere,” while a
categorical ban on lobbying would not.\textsuperscript{190} Does it make sense to

\textsuperscript{185} Id.; see also id. Formal Op. 324 (1970).
\textsuperscript{187} See id. (stating that case-by-case consideration poses “the very real
danger that the more controversial causes—those which often provide oppor-
tunities for law reforms aiding the poor—will be subject to board veto solely
because of a fear of criticism from certain influential segments of the commu-
nity”).
\textsuperscript{188} See Finman & Schneyer, supra note 49, at 135-36 n.262.
\textsuperscript{189} MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B) (1980).
\textsuperscript{190} See generally Finman & Schneyer, supra note 49.
force a nervous board to ban lobbying outright so that it will be able to justify turning away the politically unattractive client who might someday arrive at the office seeking lobbying help?

Finally, Formal Opinion 334 indicates that the Anti-Interference Principle even forbids certain categorical intake rules. For example, a rule forbidding class actions is impermissible;\textsuperscript{191} a rule prohibiting lobbying is permissible;\textsuperscript{192} and a rule prohibiting the giving of advice on legislative reform is impermissible.\textsuperscript{193} These conclusions seem entirely ad hoc. A lobbying ban is permissible, we are told, because a board can limit "the categories of legal services [staff] lawyers may undertake for a client."\textsuperscript{194} But isn't a class action a "category of service?" Likewise, an anti-class action rule is invalid because categorical rules "may not be based on... the nature of the remedy."\textsuperscript{195} But why is a class action a "remedy," while lobbying is not?

Thus, the key early opinions applying the Anti-Interference Principle in a legal services context waffle on whether they are based on enforceable rules, have not stimulated enforcement of the Principle, and offer little concrete guidance that is clearly rooted in ethics rules rather than ad hoc.\textsuperscript{196} There is no reason to think that the meaning and regulatory implications of the Principle will be any clearer in the MDP context.

There is one more chapter in the legal services story. In 1996, Congress put new restrictions on federally-funded legal services programs.\textsuperscript{197} These included bans on class actions, claims that can be expected to generate legal fees, and engage-

\textsuperscript{192} See id.
\textsuperscript{193} See id.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} This does not mean that the opinions contain no good ideas about office policies and procedures or that I could have written better opinions. The Legal Services Corporation itself has found the opinions of some use in resolving issues that arise in local programs. Congress required the Corporation to ensure that legal services were provided to the poor in a manner consistent with the Model Code. See Legal Services Corporation Act of 1974, Pub. L. No. § 1007(a)(10). The Corporation in turn indicated that it would "rel[y] on the ABA's interpretation... thus avoiding inconsistent interpretations by local bar associations." Legal Services Corporation Act & Regulations, Opinions No. 76-12, at 1 (Dec. 27, 1976), cited in Finman & Schneyer, supra note 49, at 83 n.67.
ments for the purpose of influencing the course of welfare reform.\textsuperscript{198} Anticipating these changes, the ABA ethics committee once again addressed the issues confronting legal services lawyers, but in entirely different terms. Formal Opinion 96-399\textsuperscript{199} does not even mention Model Rules 1.8(f)\textsuperscript{200} and 5.4(c),\textsuperscript{201} which are both formulations of the Anti-Interference Principle! Instead, the committee relies heavily on Model Rule 1.2(c), which permits lawyers to restrict the scope of an engagement so long as the client consents and the restrictions are not so limiting as to breach the lawyer's duty of competence.\textsuperscript{202}

As Nancy Moore observes, this is surprising because Rules 1.8(f) and 5.4(c) seem to be directly on point, and Opinions 324 and 334 analyzed the same issues under DR 5-107(B), the predecessor of those rules.\textsuperscript{203} Yet Opinion 96-399 does not appear to be an anomaly; the ABA ethics committee also relied on

\begin{itemize}
  \item \textsuperscript{198} See id. at 620-21.
  \item \textsuperscript{199} ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-399 (1996).
  \item \textsuperscript{200} See supra note 14.
  \item \textsuperscript{201} See supra note 15.
  \item \textsuperscript{202} See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-399 (1996). The committee adds, however, that a legal services lawyer who accepts restricted federal funding should inform all clients of the restrictions and obtain their written consent to abide by them, "even if it does not appear likely that a particular representation will run afoul of those restrictions." Id. (emphasis added). The committee reasons that the consent requirement of Rule 1.2(c) "is not conditioned upon the lawyer's believing that such a limitation will materially or adversely affect the representation; consent is a prerequisite to any limitation upon the scope of the representation." Id. In the BB scenario, if one applies this interpretation to Lawyer's direction of the Litigation Department not to disclose the restriction on advancing expenses over $80,000 to clients whose cases are unlikely to reach that threshold, the direction would violate Model Rule 1.2(c) but would not violate the Anti-Interference Principle.

Model Rule 1.2(c) permits a lawyer to "limit the objectives of the representation if the client consents after consultation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(c) (1983). Comments add that "[t]he terms upon which representation is undertaken may exclude specific objectives or means," id. Rule 1.2 cmt. para. 4 (emphasis added), but that "the client may not be asked to agree to representation so limited in scope as to violate" the lawyer's ethical duty of competence, id. Rule 1.2 cmt. para. 5. Since lawyers are increasingly being permitted to "unbundle" traditional legal services into component parts and to provide some components but not others in return for a reduced fee, the qualification may not amount to much. See generally David A. Hyman & Charles Silver, \textit{And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Trade-Off}, 11 GEO. J. LEGAL ETHICS 959 (1998).

\item \textsuperscript{203} See Moore, supra note 197, at 621.
\end{itemize}
Rule 1.2(c) and disregarded Rules 1.8(f) and 5.4(c) in its 1996 opinion permitting insurance defense lawyers to accede to insurer control of the defense if the insured’s policy calls for it. Professor Moore thinks these recent opinions may represent a significant trend because Rule 1.2(c) permits scope limitations when the client consents, while Rule 1.8(f) and 5.4(c) do not provide for legitimating third-party “interference” through client consent. With MDP legalization on the horizon, the institutions of professional self-regulation seem to be abandoning rather than refining the Anti-Interference Principle as a regulatory tool, even as they extol independent professional judgment as a core professional value.

d. Group and Prepaid Legal Services Plans

Finally, consider the regulatory history of organizational structures known as group or prepaid legal services plans. These plans are designed to serve clients of “moderate means” who have common legal needs, normally for relatively routine services. In a group plan, a nonprofit entity such as a union or the AARP provides members with free or reduced-fee legal services as a benefit of membership. Services are performed either by staff attorneys or by outside lawyers who agree to participate in return for an annual retainer or for lower fees than they would charge outside the plan. Prepaid legal services plans are owned and operated by insurers or other sponsors. For a monthly charge, they offer subscribers certain covered services at no fee, and others at reduced fees. Again, the par-

204. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-403 (1996); see also supra note 125.

205. See Moore, supra note 197, at 621 n.160, 622. For further evidence of such a trend, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 215 (Proposed Final Draft No. 1, 1996) (permitting lawyers, with client consent, to take directions from third-party payors if those directions are “reasonable in scope or character”).

206. Professor Moore recognizes that insurance policies have for many years provided for the insurer’s right to control the defense, and she finds it acceptable for that control to be legitimated by the consent of the insured. See Moore, supra note 197, at 589-602. She is much less sanguine, however, about permitting client consent to legitimate third-party control in other contexts, such as in legal services programs, where the “consenting” client will often have no alternative, or in cases where a public interest group provides legal services to others but wishes to retain control over the publicity surrounding the cases they finance. See id. at 622-27.

ticipating lawyers are either employed by the plan or contrac-
tually committed to working within its terms.

Another distinction is important here. Closed-panel plans
give members or subscribers a very limited choice of lawyers;
open-panel plans might enroll every interested lawyer in the
service area. One arguable benefit of closed-panel plans is the
enhanced productivity that full-time specialists in the recurring
legal problems of a plan's subscribers might provide. Another
is the comfort that legally unsophisticated subscribers may
take in a plan's certification of certain lawyers as competent
and trustworthy by the very act of selecting them. On the
other hand, the risk of interference may be greater in closed-
panel plans.

Until the 1960s, group and prepaid plans were banned as
lay intermediaries engaged in the unauthorized practice of law.
Lawyer participation was unethical. Then, Supreme Court
decisions struck down state bans on nonprofit plans as incon-
sistent with constitutional guarantees of free speech and asso-
ciation. For some time, the ABA resisted these decisions as
they applied to closed-panel plans. As promulgated in 1970,
the Model Code allowed lawyers to cooperate with nonprofit
closed-panel plans, but only when "controlling constitutional
interpretation ... requires the allowance of such legal service
activities." In 1974, the Model Code was amended to give
broad approval to open-panel plans. But closed-panel plans
remained improper unless they complied with highly restrictive
conditions: users must be free to "opt out" (i.e., go to non-panel
lawyers) and, if they do so, must be reimbursed in a reasonable
amount for their legal fees; plans must be nonprofit and "rea-
sonably related" yet "only incidental" to the primary purposes
of the organization (i.e., no free-standing plans); and each plan

208. See Christensen, supra note 80, at 222-28, 256.
209. See generally United Mine Workers of America v. Illinois State Bar
Ass'n, 389 U.S. 217 (1967) (protecting plan by which union provided services of
a salaried lawyer to assist members on worker's compensation matters);
Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1
(1964) (upholding a union program that advised injured members of need for
legal counsel and referred them to lawyers selected by the union); NAACP v.
Button, 371 U.S. 415 (1963) (protecting a program in which staff attorneys as-
sisted members and others in race discrimination cases).
210. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D)(5)
211. For the text of the ABA's 1974 amendments, see Rowland L. Young,
House of Delegates Acts on Group Legal Services, Shield Legislation, Court Or-
must file its articles of incorporation, bylaws, agreements with counsel, and schedule of benefits and charges with the court having disciplinary jurisdiction. \(^{212}\)

A year later, these rules were again liberalized, in response not only to critical comments from the Antitrust Division of the Justice Department, \(^{213}\) but also to pressure from rank and file members who \textit{wanted} the opportunity to participate in closed-panel plans. \(^{214}\) This marked the first serious breakdown within the ABA over the propriety of practicing law within a non-traditional organizational structure. \(^{215}\) Since then, the trend toward lawyer specialization and workplace diversification has left the ABA powerless to achieve any real consensus on the propriety of new organizational structures, such as ancillary businesses \(^{216}\) and, now, MDPs.

\(^{212}\) Model Code of Professional Responsibility DR 2-103(D)(5) (1974). By establishing a state supreme court registry for group and prepaid legal services plans, this requirement foreshadowed some features of the Commission's proposed regulatory system for nonlawyer-controlled MDPs, but it made no provision for audits or certification. The Model Rules and the ethics rules that prevail in most states today do not require these documents to be filed with state supreme courts. Some state supreme courts, however, have retained filing requirements. \textit{See, e.g.,} FLA. SUP. CT. R., ch. 9 (2000); WIS. SUP. CT. R. Rule 11.06 (1999).


\(^{214}\) \textit{See, e.g.,} Other Views, supra note 213, at 795 (reprinting statement of F. William McCalpin, former chair of ABA Committee on Prepaid Legal Services, to Senate Subcommittee on Representation of Citizen Interests).

\(^{215}\) For a brief debate summing up the positions of closed-panel proponents and opponents within the bar in the mid-1970s, see Alan B. Morrison, \textit{Bar Ethics: Barrier to the Consumer}, TRIAL, Mar.-Apr. 1975, at 14 (decrying ABA ethics rules as roadblocks to the consumer benefits that closed-panel plans will bring, notably cost reduction and "quality control"); Howard C. Sorenson, \textit{Bar Ethics: Guardian of the Profession}, TRIAL, Mar.-Apr. 1975, at 15 (finding the "lay intermediary" problem "at the heart of the hazards associated with group legal services," and a significant threat to "the quality of service and the existence of the vast majority of small firms dependent upon middle income clientele"). In a period of aggressive antitrust enforcement, Mr. Sorenson's expression of concern for the plight of small law firms was not altogether wise.

\(^{216}\) For an account of the ABA's fierce debates in the early 1990s over whether to bless or curse the ancillary business concept, see generally Schneyer, supra note 32.
In 1987, four years after the ABA adopted the Model Rules, the ABA ethics committee issued Formal Opinion 87-355.\textsuperscript{217} That opinion recognized that nothing in the Model Rules categorically bans participation in a closed-panel, for-profit plan relying on staff attorneys. Instead, it purported to set forth “guidelines under the [Model Rules] to . . . identify criteria for prepaid legal services plans in which it is ethically permissible . . . to participate,”\textsuperscript{218} much as Opinions 324 and 334 had attempted to do with respect to legal services programs for the poor. Calling professional independence its “primary” concern, Opinion 87-355 began by restating the Anti-Interference Principle:

\begin{quote}
[N]either the [terms of the] plan nor the participating lawyer [may] permit the sponsoring entity to interfere with the lawyer’s exercise of independent professional judgment on behalf of a client or to direct or regulate the lawyer’s professional conduct. . . . Once the lawyer-client relationship exists between the plan member and the participating lawyer . . . there should be no interference . . . by the plan sponsor.\textsuperscript{219} When it came to “guidelines” for determining what constitutes interference, however, the committee became non-committal. An interference risk was “inherent in these plans,” namely “the potential for economic control of a lawyer who is sufficiently involved in a plan to become financially dependent upon it.”\textsuperscript{220} Moreover, when the participating lawyer or law firm is “exclusively or predominately dependent upon the plan, the issue . . . becomes more serious.”\textsuperscript{221} On the other hand, “[i]t is, of course, a question of fact as to whether the lawyer’s financial dependence upon the plan’s sponsor is so extensive that it affects the lawyer’s judgment.”\textsuperscript{222}
\end{quote}

Far from advancing the enforcement of the Anti-Interference Principle in the context of group or prepaid plans, these statements almost seem calculated to discourage it. The opinion blurs the structural distinction between staff attorneys and outside lawyers by acknowledging that even lawyers who rely “predominately” on a plan are vulnerable to interference. At the same time, it concedes that allowing oneself to become “financially dependent” on a plan does not in itself constitute

\begin{footnotes}
\footnotetext{217}{ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-355 (1987).}
\footnotetext{218}{Id.}
\footnotetext{219}{Id. (citing Model Rule 5.4(a), (b) and (c))}
\footnotetext{220}{Id.}
\footnotetext{221}{Id. (emphasis added).}
\footnotetext{222}{Id. (emphasis added).}
\end{footnotes}
permitting interference; the dependent lawyer's problem is simply "more serious." For regulatory purposes, whether a lawyer has crossed the line and permitted interference is always "a question of fact"—namely, whether her dependency has affected or is affecting her judgment. On this analysis, in order to establish a breach of the duty to maintain independent judgment, disciplinary counsel would have to prove that a lawyer's reliance on a plan's patronage actually induced her to follow a different course than her independent judgment suggested, or would have suggested if only she could have exercised it. Needless to say, one searches in vain for cases in which lawyers have been disciplined for such violations.

Even when it poses a concrete question, Opinion 87-355 shrinks from providing an answer with regulatory bite. "If the plan undertakes to set limits on the amount of time a lawyer may spend with each client's case, or to fix the number of cases which must be handled by a lawyer," the committee writes, "the plan may interfere with the lawyer's independent professional judgment." Then again, it may not. Why, one wonders, was the committee unable to answer such a simple question definitively? Perhaps it wanted to avoid the ad hoc nature of its requirements for preserving independence in legal services offices. Perhaps it recognized that enforcement was beside the point because state ethics enforcers were not prepared to regulate group and prepaid plans proactively, in the manner proposed by the MDP Commission's Model Rule 5.8(c). Or, perhaps it did not want the Justice Department to regard the ABA as erecting unnecessary barriers to the participation of lawyers in innovative programs for delivering legal services.

IV. CONCLUSION: HOW MDP INTERFERENCE RISKS WILL BE GOVERNED

The Commission's proposed system for regulating nonlawyer-controlled MDPs, and particularly for enforcing the Anti-Interference Principle, will not come into being in the foreseeable future. Even if the supreme courts adopt Rule 5.8(c) as part of an MDP legalization package, they will be in no position to administer the rule in the proactive manner the Commission appears to contemplate. The rule may yield routine MDP filings with the courts, but expert audits and mandated safeguards seem well beyond the capacity of professional self-meaningful.

223. Id. (emphasis added).
regulation as we know it. Nothing comparable has developed to manage interference risks in other practice settings where lawyers are accountable to lay superiors.

Quite apart from the limited resources and expertise available to state ethics enforcers, ex ante regulation of practice settings in order to prevent "interference" faces a special difficulty. One can endlessly extol the importance of lawyer independence without getting down to brass tacks about what it needs protection from and, thus, what the Anti-Interference Principle requires when lawyers work under nonlawyers. Professional self-regulation has not gotten down to brass tacks. Had the bar and the state supreme courts tolerated a wider array of workplaces for lawyers over the past century, perhaps we would be farther along the learning curve although that is far from clear in view of the intractable nature of the issues. As things stand, ethics rules, ethics opinions, and disciplinary cases offer little insight.

This means that whatever procedures MDPs develop to safeguard lawyer independence will evolve privately through interactions between MDP lawyers and lay managers; they will not be the unilateral product of the bar and the courts. That has largely been our experience with house counsel, legal services lawyers, and lawyers who participate in group or prepaid plans. If law does influence the procedures MDPs develop, it will do so primarily through ex post liability, not ex ante regulation. When MDP clients or third parties can show they have been harmed as a result of undue interference, they will have claims for malpractice or breach of fiduciary duties against MDP lawyers and their firms. Fear of claims will motivate MDPs to manage interference risks sensibly.

If the bar and the courts insist on a certification system in order to ensure clients that their lawyers are sufficiently independent, they would do well to choose the more modest scheme proposed a decade ago by Professor Harold Levinson, who is both a lawyer and an accountant.224 Professor Levinson is deeply concerned about the preservation of lawyer independence, but unconvinced that every work setting for lawyers must have every attribute of professional independence par excellence—including no lay partners, a diverse client base, non-participation in clients' businesses, non-ownership of ancillary

businesses, etc. Instead, he would have the bar establish and publicize standards of law-firm independence and leave the “informed market” to determine the fate of organizational structures that do and do not meet those standards.\textsuperscript{225}

As MDPs become lawful, the bar’s chief concern should be to observe the new workplaces in order to learn what the Anti-Interference Principle should entail, not to tell MDPs what we lawyers already know it entails. For if the truth be told, we know very little. Like other professionals, lawyers value the ability to exercise professional judgment as a source of job satisfaction, perhaps even social status. But the policy reason for discouraging interference through regulation is not to maximize job satisfaction, social status, or tradition. It is to free lawyers of compromising influences so that they can and will do their best for their clients, consistent with their duties to protect third-party rights. On this rationale, nonlawyer influence should count as interference only when it demonstrably worsens or tends to worsen outcomes from a client’s standpoint or forces lawyers to infringe on third-party rights in carrying out their engagements.

\textsuperscript{225} Id. at 255.