



Alabama Law Scholarly Commons

Working Papers

Faculty Scholarship

7-29-2019

Black Market Law Firms

Casey E. Faucon

University of Alabama - School of Law, cfaucon@law.ua.edu

Follow this and additional works at: https://scholarship.law.ua.edu/fac_working_papers

Recommended Citation

Casey E. Faucon, *Black Market Law Firms*, (2019).

Available at: https://scholarship.law.ua.edu/fac_working_papers/495

This Working Paper is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Working Papers by an authorized administrator of Alabama Law Scholarly Commons.

Black Market Law Firms

Casey E. Faucon *

ABSTRACT

In business and in competition, value exists in striking first. Accountants, the so-called hawks of the professional world, have made the first move. In September 2017, the global accounting giant PwC opened a law firm in Washington, D.C. called ILC Legal. ILC Legal not only provides legal services on non-domestic matters, but also acts as a multidisciplinary provider (“MDP”) and offers other professional services, such as tax-planning, business consulting, and marketing, throughout its 90-country network. In June 2018, Deloitte quickly followed suit, the second of the Big Four accounting firms to enter the U.S. MDP market, partnering with a U.S. immigration law firm in San Francisco. With accountants now having the “first mover” advantage, the legal profession must respond.

Restricting any competitive response are the legal profession’s current ethical rules. Two weaknesses in the legal profession’s integrity system—the self-regulatory market monopoly over legal services and the ethical treatment of all lawyering acts under a unified profession of law—have restricted collaborative innovations between lawyers and non-lawyers. No more pronounced are larger impacts of these weaknesses to the overall competitiveness of the legal profession than when viewed through the exemplar of Model Rule of Professional Conduct Rule 5.4, which protects the professional independence of a lawyer through prohibiting non-lawyer ownership of law firms. This rule has not stopped accountants, however, from hiring lawyers en masse to deliver legal services to their business and tax clients; nor has the rule stopped enterprising lawyers from collaborating with non-lawyer professionals in an attempt to keep pace and to provide more holistic and comprehensive legal services to clients.

This Article calls for recognition and regulation of MDPs because the legal profession must now overcome the accountants’ first mover advantages. Despite this initial competitive setback, the legal profession is also now in a position to leverage its current self-regulatory monopoly over legal services to market a higher quality, ABA and state ethics board accredited MDP services to clients. This Article then proposes a regulatory framework for recognizing and regulating MDPs based on a classification scheme which categorizes MDPs based on the potential risk that the ownership and control structure could undermine a lawyer’s independent judgment. This novel classification scheme categorizes MDPs as either white, gray, or black market law firms depending on the percentage of non-lawyer majority ownership and control of the MDP. Based on those categories, this Article argues that we should revise Rule 5.4 to allow for unlimited associational forms between lawyers and non-lawyer professionals but prohibit lawyers from providing legal services in black market MDPs, or MDPs which are majority owned and controlled by non-lawyers.

* Casey E. Faucon is an Assistant Professor and Director of the Entrepreneurship & Nonprofit Clinic at the Hugh F. Culverhouse Jr. School of Law at the University of Alabama. The author would like to thank Patience Crowder, Kevin Lynch, Janet Goode, Erik Franklin Amarante, Matthew Rossman, Susan Jones, Courtney Cross, Allyson Gold, Ron Krotoszynski, Nicole Godfrey, Rachel Moran, Timothy Estep, Laura Rovner, Tamara Kuennen, Nantiya Ruan, and Lindsey Webb for providing feedback on previous drafts and presentations.

BLACK MARKET LAW FIRMS (DRAFT)

TABLE OF CONTENTS

INTRODUCTION

- I. THE LEGAL PROFESSION’S “INTEGRITY SYSTEM” FAILURES
 - A. The Legal Market Monopoly
 - 1. Self-Regulation
 - 2. Self-Regulatory Competition + Risk-Based and Outcome-Based Regulation
 - B. Regulatory Conflation
 - 1. Unified Profession of Law
 - 2. Democratic and Economic Functions of Law
 - 3. Impact on Codes of Ethics
 - C. Market Responses and Developments
 - 1. Corporate Models
 - 2. Small Firm Models
 - 3. Continued Need for Empirical Research and Innovation
- II. MULTIDISCIPLINARY PROVIDERS
 - A. MDPs: A Primer
 - 1. Definition and Description
 - 2. Prototypes
 - B. Regulation of MDPs
 - 1. The 1990s-2010s
 - 2. Rule 5.4
 - 3. D.C. Rule 5.4
 - C. Current MDP Debate
 - 1. For Continued Ban
 - 2. For Recognition and Regulation
 - 3. Call to Recognize and Regulate
- III. BLACK MARKET LAW FIRMS—A REGULATORY MODEL
 - A. Regulatory Models
 - 1. Classifications and Regulatory Approaches
 - 2. Analysis of Classifications and Regulatory Approaches
 - B. White, Gray, and Black Market Law Firms
 - 1. Definition
 - 2. Application
 - C. Proposed Regulatory Approach
 - 1. Non-proscriptive Ethical Rule
 - 2. Revisions to Rule 5.4—Regulating for Risks and Outcomes
 - D. Ethical Proscriptions
 - E. Counterarguments

CONCLUSION

BLACK MARKET LAW FIRMS (DRAFT)

INTRODUCTION

Adapt or perish, now or never, is nature's inexorable imperative.—H.G. Wells¹

“How the hell we find ourselves in second place in a two man race?”² On September 21, 2017, *The American Lawyer* first reported that PwC, one of the remaining Big Four accounting firms,³ opened its first U.S. law firm in Washington, D.C.⁴ The law firm, called ILC Legal, operates separately from the accounting firm but assists U.S. clients on international business issues.⁵ *The American Lawyer* first noticed the new law firm after ILC Legal filed numerous trademark registrations, and PwC updated its website to include “ILC Legal.”⁶ Deemed a “wake-up call” to the legal profession, an accounting firm’s push into the international legal market sent shock waves throughout the legal community.⁷ In June 2018, Deloitte UK followed in PwC’s shoes and partnered with a San Francisco-based law firm to give U.S. businesses market access to Deloitte’s global immigration services.⁸ The accountants have struck first. Now the lawyers must respond.

The American Bar Association’s reaction over the past three decades to the growing global movement of accountants providing legal services to their corporate clients has been to formally prohibit such

¹ H.G. WELLS, *THE MIND AT THE END OF ITS TETHER* 19 (1945).

² *Hidden Figures*, 20th Century Fox, at 55:05 (2016) (director of NASA expressing dismay after the Soviets sent a man into orbit around Earth before the U.S.).

³ Chris Johnson, “PwC to Launch US Law Firm as Big Four Expand Legal Offerings,” *THE AMERICAN LAWYER*, Sept. 21, 2017 (<http://www.americanlawyer.com/id=1202798366190/PwC-to-Launch-US-Law-Firm-as-Big-Four-Expand-Legal-Offerings?slreturn=20170915150758>). PwC, formerly known as Pricewaterhouse Coopers, is one of the four remaining “Big Four” accounting firms, which also includes Deloitte, Ernst & Young, and KPMG. Chris Johnson, “Accounting Firms Make New Foray into Legal Services,” *THE AMERICAN LAWYER*, July 30, 2014 (<http://www.americanlawyer.com/id=1202664265927/Accounting-Firms-Make-New-Foray-into-Legal-Services>).

⁴ Johnson, *supra* note .

⁵ *Id.*

⁶ Casey Sullivan, *Five Lawyers to Start PwC Branded Law Firm*, *BLOOMBERG LAW*, Sept. 21, 2017 (<https://biglawbusiness.com/five-lawyers-to-start-pwc-branded-law-firm/>).

⁷ Nicholas Bruch, “PwC’s entry into the US legal market is important—just not for the reasons you think it is,” *LAW.COM*, Oct. 5, 2017 (<http://www.law.com/sites/ali/2017/09/22/pwcs-entry-into-the-us-legal-market-is-important-just-not-for-the-reasons-you-think-it-is/>); Chris Johnson, “PwC makes push into US legal market with launch of Washington DC firm,” *LAW.COM*, Sept. 21, 2017 (<http://www.law.com/sites/legalweek/2017/09/21/pwc-makes-push-into-us-legal-market-with-launch-of-washington-dc-firm/>).

⁸ See Dan Packer, *Deloitte Will Acquire Part of US Law Firm in New Venture*, *THE AMERICAN LAWYER*, June 6, 2018, (<https://www.law.com/americanlawyer/2018/06/06/deloitte-will-acquire-part-of-us-law-firm-in-new-legal-venture/?slreturn=20180719134535>).

BLACK MARKET LAW FIRMS (DRAFT)

activity in the U.S.⁹ These prohibitions have not stopped the accountants, however, from navigating a path through the technical breakwaters and finding a way to offer legal services to corporate clients:¹⁰ PwC already has over 2,500 lawyers in its international networks.¹¹ Nonlawyers clamoring for a share of the over \$430 billion a year legal services market continue to develop creative methods to play outside of the bounds of the restrictive legal services field.¹² Nor have the rules stopped enterprising legal entrepreneurs from trying to keep pace.¹³ Some legal scholars study innovative methods of legal services delivery in the corporate and small firm contexts, detailing changes from the traditional law firm model and showing how such methods address market demands.¹⁴

Grounded in historical conceptions about the unique and elevated role of lawyers,¹⁵ resistance to change and an inability to accept new methods of providing legal services has forced an enterprising generation of lawyers to operate outside of the technical ethical rules in order to stay afloat with market demands and the rising global tide.¹⁶ The ethical rules restrict the development of these legal entrepreneurs in their quest to remain competitive, to determine their own professional identities and steer the legal profession, and to collaborate with other professions to better meet the holistic needs of their clients. This Article first argues that

⁹ ABA MODEL R. PROF. CONDUCT, R. 5.4 (YEAR).

¹⁰ See generally Lawrence J. Fox, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDP*, 84 MINN. L. REV. 1097 (2000) [hereinafter *Hawks*]; Lowell J. Noteboom, *Profession in Convergence: Taking the Next Step*, 84 MINN. L. REV. 1359 (2000); Daniel R. Fischel, *Multidisciplinary Practice*, 55 BUS. LAW. 951, 952 (2000); Elijah D. Farrell, *Accounting Firms and the Unauthorized Practice of Law: Who is the Bar Really Trying to Protect?*, 33 IND. L. REV. 599, _ (2000); Elizabeth MacDonald, *Accounting Firms Hire Lawyers and Other Attorneys Cry Foul*, WALL ST. J., Aug. 22, 1997, at B8.

¹¹ See Bruch, *supra* note _.

¹² “The Size of the US Legal Market: Shrinking Piece of a Bigger Pie—An LEI Graphic,” Legal Executive Institute, THOMPSON REUTERS, Jan. 11, 2016.

¹³ See 2016 ABA REPORT ON THE FUTURE OF LEGAL SERVICES, 18.

¹⁴ See Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217 (2000); John Dzienkowski, *The Future of Big Law: Alternative Legal Service Providers to Corporate Clients*, 82 FORDHAM L. REV. 2995 (2014). See 2016 Report of the ABA Commission on the Future of the Legal Profession, *supra* note _, at 18; Stacy L. Brustin, *Legal Services Provision Through Multidisciplinary Practice—Encouraging Holistic Advocacy While Protecting Ethical Interests*, 73 U. COLO. L. REV. 787, 819-20 (2002).

¹⁵ See Anthony Ogus, *Rethinking Self-Regulation*, 15 OX. J. LEGAL STUD. 97 (1995); Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1696 (2008) [hereinafter *Legal Barriers*]; Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 965 (2000) [hereinafter *Price of Law*].

¹⁶ Since 1998, law office employment shrunk while “all other legal services” grew 8.5% annually and 140% over the whole period. “Issue Paper Concerning Unregulated LSP Entities,” at 3-4, Mar. 31, 2016 (https://www.americanbar.org/content/dam/aba/images/office_president/final_unregulated_lsp_entities_issues_paper.pdf).

BLACK MARKET LAW FIRMS (DRAFT)

we should amend the ethical rules, in particular model Rule 5.4, to recognize and regulate fee-sharing and co-ownership of law firms between lawyers and non-lawyers because of the impact of PwC and Deloitte's competitive advantage in "striking first," as viewed through the lens of "first-to-market" theories.¹⁷ Despite these advantages, the legal profession can leverage its current regulatory monopoly to offer a higher quality, competitive offering to collaborative legal services market. This Article then argues that we should amend our ethical rules to allow lawyers to associate and collaborate with non-lawyer professionals, focusing on restricting law firm structural forms that may improperly subvert the independent judgment of a lawyer and promoting and marketing lawyer majority owned and controlled law firms.

Two underlying weaknesses in our legal profession's "integrity system,"¹⁸ however, currently restrict such a revision—the self-regulated market monopoly that lawyers enjoy over legal services and the regulatory conflation imbedded in our ethical rules that bind all lawyering acts under a "unified profession of law."¹⁹ The broad reach of the monopoly that lawyers enjoy over the practice of law feeds protectionism, however, and creates a highly restrictive environment in which lawyers can deliver legal services to clients in the U.S.²⁰ Gillian Hadfield's article "Legal Barriers to Innovation" sets the framework for the monopoly and regulatory conflation discussion.²¹ The regulatory conflation in the ethical rules result in forcing ill-fitting regulations designed for litigation onto the market-based, transactional work that lawyers do. Scholars document well the chilling impact of these two structural frameworks on innovations in legal services delivery.²²

The window through which to view the impacts of these larger systemic issues is Model Rule of Professional Conduct Rule 5.4, "Professional Independence of a Lawyer."²³ Rule 5.4 currently restricts how a lawyer may provide legal or law related services in four ways.²⁴

¹⁷ See Marvin Lieberman & David Montgomery, *First Mover Advantages*, Strategic Management Journal, Vol. 9 (Summer 1988), 41-58.

¹⁸ ANDREW ALEXANDRA & SEUMAS MILLER, INTEGRITY SYSTEMS FOR OCCUPATIONS (2010).

¹⁹ Hadfield, *Legal Barriers*, *supra* note __, at 1690; Gillian K. Hadfield, *Legal Infrastructure and the New Economy*, 8 ISJLP 1 (2012); Dzienkowski, *supra* note __, at 2996; Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 6 (1981); George Steven Swan, *The Political Economy of Interprofessional Imperialism: The Bar and Multidisciplinary Practice, 1999-2001*, 24 J. LEGAL PROF. 151 (2000).

²⁰ Hadfield, *Legal Barriers*, *supra* note __, at 1694.

²¹ *Id.* at 1696, 1704. The ABA expanded its list of "core values" in 2000 to include "maintain[ing] a single profession of law." ABA CTR. FOR PROF'L RESPONSIBILITY, RESOLUTION OF HOUSE OF DELEGATES ADOPTING REVISED RECOMMENDATION 10F (2002).

²² See 2016 ABA REPORT, *supra* note __, at 39.

²³ ABA MODEL RULE OF PROF. CONDUCT, R. 5.4 (YEAR).

²⁴ *Id.*

BLACK MARKET LAW FIRMS (DRAFT)

First, it prohibits fee sharing between lawyers and nonlawyers, except in certain circumstances.²⁵ Second, it prohibits a lawyer from forming a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.²⁶ Third, it prohibits nonlawyers from directing or regulating the lawyer's professional independent judgment.²⁷ Fourth, it prohibits lawyers from practicing law if any nonlawyer owns or is an officer of the law firm.²⁸ These restrictions essentially require that only lawyers can provide legal services, become a partner in or own firms that provide legal services, direct or control the delivery of legal services, and profit from the delivery of legal services.

The practical impact of Rule 5.4 can harm lawyers and the clients they serve. This hardline stance against potential nonlawyer ownership of law firms trickles down to hindering potential collaborations between lawyers and nonlawyers who respond to client concerns that impact efficient delivery of services to vulnerable and low income populations. In these types of community-focused collaborations, where fears about Enron-type scandals and potential hostile takeovers of law firms by accounting firms are virtually non-existent,²⁹ Rule 5.4's purpose simply does not fit.³⁰

Since the 1980s when MDPs first emerged internationally, strong support for and against MDPs were on both sides of the legal bar.³¹ Those against MDPs, and whose arguments eventually influenced the ABA Model Rule 5.4 that we have today, stand behind the need to protect the "core values" of the profession and conclude that the need to preserve lawyer independence, maintain loyalty, and protect confidentiality take precedent over rules that, while allowing for innovative methods of financing and managing legal services, could implicate these "shibboleths" of the legal profession.³² But these arguments ring hollow with each passing decade, and now the Philistines are at our gates.³³

Legal scholars support the recognition and regulation of MDPs in order to better address client needs and to keep lawyers both satisfied and competitive in a changing market-based economy.³⁴ This Article joins in

²⁵ *Id.* R. 5.4(a); Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 873 (1999).

²⁶ ABA MODEL RULE OF PROF. CONDUCT, R. 5.4(b) (YEAR).

²⁷ *Id.* R. 5.4(c).

²⁸ *Id.* R. 5.4(d).

²⁹ See Yarbrough, *MDPs: Are They Already Among Us?*, 53 ALA. L. REV. 639, 641 (2002) (after the Great Depression, the main individuals charged with unauthorized practice of law were accountants).

³⁰ See Susan Poser, *Main Street Multidisciplinary Practice Firms: Laboratories for the Future*, 37 U. MICH. J. L. REFORM 95, 98 (2003).

³¹ See Terry, *supra* note __, at 875.

³² Hadfield, *Legal Barriers*, *supra* note __, at 1715.

³³ See Lawrence J. Fox, *Rethinking Lawyer Professional Regulation: The Argument Against Change*, EXPERIENCE, Summer 1999, at 8.

³⁴ See, e.g., Daly, *supra* note __; Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 5 AM. B. FOUND. RES.

BLACK MARKET LAW FIRMS (DRAFT)

the debate by supporting the recognition and regulation of MDPs because the legal profession must keep pace with global accounting firms. Also, the Bar's continued outlaw of MDPs has not stopped their development, but only hindered their efficiency and client-centeredness, forcing innovative lawyers to operate within ill-structured and restrictive rules. These lawyers operate for the benefit of their clients and professional well-being at the risk of censure and punishment by state bar associations and ethics boards, labeled as shamefully or bravely engaging in "civil disobedience,"³⁵ depending on the speaker's viewpoint.³⁶ As the ABA's own 2016 Commission on the Future of Legal Services encourages, the legal profession should encourage the continued innovation in legal services delivery, including potentially regulating different types of legal services entities.³⁷

This Article first provides a novel classification scheme that approaches and defines MDPs as either white, gray, or black market legal service providers, classifying the MDPs according to their level of non-lawyer ownership and control over the MDP. Using that novel classification, scheme, this Article ultimately argues that MDP regulation should be broad and non-proscriptive, allowing lawyers to utilize their creativity and innovation to association with nonlawyer professional in any number of potential organization forms, but should restrict MDPs that would fall into the "black market" category.

Part I of this Article discusses the historical and present regulatory rules which govern the delivery of legal services in the United States, detailing how the legal profession's integrity system has created a monopoly over the delivery of legal and law related services. This monopoly, coupled with rhetoric about the legal profession's duty to preserve the "core values" of the profession, impairs the development of innovative methods in the delivery of legal services that stunt and put lawyers at a disadvantage against other professionals. Part I then delineates the impact of our self-regulatory scheme on how we regulated both political/democratic legal acts and economic/market driven legal acts. While considered separate practices in other countries, the U.S.

J. 159, 159-60 (1980); Louise Lark Hill, *The Preclusion of Nonlawyer Ownership of Law Firms: Protecting the Interest of Clients or Protecting the Interest of Lawyers?*, 42 CAP. U.L. REV. 907 (2014); Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 FORDHAM L. REV. 559 (1992); Michael W. Price, *A New Millenniums Resolution: The ABA Continues Its Regrettable Ban on MDP*, 37 HOUS. L. REV. 1495 (2000).

³⁵ Dzienkowski & Peroni, *supra* note __, at 149; Pennsylvania Bar Association Commission on Multidisciplinary Practice and Related Trends Affecting the Profession, *Preliminary Report to 1999 Mid-Year Meeting of PBA House of Delegates*; Robert K. Christensen, *At the Helm of the Multidisciplinary Practice Issue After the ABA's Recommendation*, 2001 BYU L. REV. 375, 389 (2001) [hereinafter *At the Helm*].

³⁶ See Lawrence J. Fox, *Delegates: Save Us from Ourselves*, NAT'L L.J., July 21, 1999, at A23. *But see* Terry, *supra* note __, at 930; Robert M. Palumbos, *Within Each Lawyer's Conscience a Touchstone: Law, Morality, and Attorney Civil Disobedience*, 153 U. PA. L. REV. 1057, 1065 (2004).

³⁷ 2016 ABA REPORT, *supra* note __, at __.

BLACK MARKET LAW FIRMS (DRAFT)

conflates the two spheres and regulates all lawyering acts under the umbrella of a “unified profession of law.” Part I then provides an overview of new innovations in legal services that respond to both corporate and low-income client needs, concluding with a call for the continued need for empirical research and innovation in both spheres.

Part II introduces the prime example of these systemic failures—multidisciplinary providers or “MDPs”—and explains the different forms of organizations considered MDPs. Part II then explores the global impact of MDPs, the recent history of the current form of ABA Model Rule 5.4, and its impact on the development of MDPs during the early 2000s, discussing state and practitioner responses. Part II then discusses the current status of MDP authorization and the D.C.’s revised Rule 5.4. Part II then summarizes the current arguments for and against MDP recognition. Part II concludes by calling for recognition and regulation of MDPs, as the need to stay globally competitive and embrace innovation becomes renewed. This part argues that PwC’s and Deloitte, as “first movers” have already gained a competitive market advantage that lawyers, later to enter the national MDP market, will need to overcome, but argues that lawyers can leverage their current licensure monopoly to market a higher quality and more ethical MDP product.

Part III discusses the different frameworks and approaches to regulating MDPs and introduces a new classification scheme to both categorize certain types of MDPs as well as create a regulatory scheme focused on those classifications. This Article focuses most attention on fully integrated MDPs and zeros in the real issue at stake—the role or percentage of ownership or management do the non-lawyer professionals. This classification scheme separates MDPs into white, gray, or black market law firms. Part III then uses those distinctions to argue that our regulatory scheme should regulate for the risks inherent in gray and black market law firms. Part III then proposes a general regulatory approach to regulating MDPs that is generally proscriptive, but regulates more specifically for risks inherent in gray and black market MDPs. Finally, Part III concludes with a discussion of some potential counterarguments.

I. THE LEGAL PROFESSION’S INTEGRITY SYSTEM FAILURES

If you destroy a free market, you create a black market.—Winston Churchill³⁸

Lawyers belong to a profession. One distinguishing feature across all professional occupations is the high level of autonomy professionals enjoy in how they deliver their professional services to clients.³⁹ In order to protect client and public interests against the potential for systemic, abusive rent-seeking behavior, a profession’s “integrity system” seeks to

³⁸ Winston Churchill, “Speech in the House of Commons,” Feb. 3, 1949.

³⁹ ALEXANDRA & MILLER, *supra* note __, at 20.

BLACK MARKET LAW FIRMS (DRAFT)

imbue the profession with ethical and business norms meant to protect the interests of clients and the public at large.⁴⁰ The method of establishing such an integrity system can also have the effect of regulating the market economies and limiting the economic potential for the individuals subjected to the system.⁴¹

The legal profession's integrity system is not without its flaws. In an attempt to protect the "core values" of the legal profession, the regulatory framework of the legal profession has two limiting features that have contributed to the current competitive disadvantage lawyers find themselves in today. These two features are weaknesses in the economic structure of legal services and of the approach of the regulatory code of ethics governing the legal profession. Simply put, our regulatory rules have created a market monopoly over the delivery of legal services and our regulatory codes of ethics improperly frame all legal services acts under a unitary vision of the practice of law.⁴²

The failures of the legal profession's integrity system have particular impact on the provision of legal services focusing on contributing to economic and business transactions, namely, lawyers who counsel organizational clients and engage in transactional and counseling work. This section will discuss how these two structural failures have forced such legal entrepreneurs to operate at an innovative disadvantage, as such lawyers must temper their creativity, market-responsiveness, or client-efficiencies or risk operating outside the strict operating and regulatory framework sanctioned by the legal bar.

Despite these restrictions, innovative forms of legal services delivery have emerged over the past few decades. While most of the debate centers around legal service providers who serve organizational and corporate clients,⁴³ small law firms play a vital role in developing innovative and efficient legal services delivery systems in an attempt to better serve their low- and middle-income clients. These small firms present a unique opportunity to balance the normative considerations in developing innovation in the context of responding to client needs.⁴⁴ However, as scholars and regulators alike note, more empirical research is needed to determine the scope and types of innovative legal services models in existence, and more innovation is needed to improve access to and efficiencies in providing professional legal services.

A. The Legal Market Monopoly

The legal profession is one of the few that enjoys self-regulation. The justification for lawyer self-regulation in the U.S. has roots in

⁴⁰ *Id.* at 23-24.

⁴¹ Ogus, *supra* note __, at __.

⁴² Hadfield, *Legal Barriers*, *supra* note __, at 1696, 1706.

⁴³ Poser, *supra* note __, at 96.

⁴⁴ *See* Trubek & Farnham, *supra* note __, at 228-29.

BLACK MARKET LAW FIRMS (DRAFT)

colonial times, when lawyers enjoyed an elevated status of “lawyer-statesman.”⁴⁵ Because of this specialized status, the only persons viewed apt to oversee such a learned and noble profession were those in the profession themselves. This specialized system of lawyer self-regulation continues to affect the front end and back end of attorney regulation today—lawyers proscribe both their own rules of ethical play as well as their own systems of lawyer discipline.⁴⁶ This system, built around the “medieval guild” conception of the legal profession,⁴⁷ has created a highly restrictive monopoly through which a client can receive professional legal assistance.

1. *Self-Regulation*

a. History and Justification. The concept of the legal profession’s self-governance is acceptable on the premise that the law and its protection are so specialized that “relative expertise and hence enhanced capacity to achieve the public interest by those who are themselves members of the profession” is necessary.⁴⁸ In some respects, this justification has merit. Complex legal issues often require the weighing of “not only intellectual subtlety of legal rules[,] but also the mass of factors and contingencies which must or could be considered in determining legal strategies.”⁴⁹ Subject matter complexity alone, however, does not fully justify this regulatory deferment.

Lawyers claim a specialized status in the U.S. In an oft-quoted saying from the second annual ABA meeting held in 1879, the American legal profession, unlike the “titmouse” of England, upholds the institution of democracy itself.⁵⁰ Guided by a duty to protect the ideals of the constitution, which were re-affirmed by the horrors of the Civil War,⁵¹ lawyers in the U.S. were able to not only establish their authority to self-govern and self-regulate, but to also impose proscriptive rules for attorney

⁴⁵ Hadfield, *Legal Barriers*, *supra* note __, at 1696; Anthony Ogus, *Rethinking Self-Regulation*, 15 OXFORD J. LEGAL STUD. 97, 97-108 (1995) (overview of the economic analysis of self-regulation).

⁴⁶ See Benjamin J. Barton, *Do Judges Systemically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 461 (2008) [hereinafter *Judges Systemically Favor*].

⁴⁷ See Dzienkowski, *supra* note __, at 2996. See also AMSTERDAM & BRUNER, *supra* note __, at 3 (“[T]he ways of lawyers . . . suggest the esoteric flimflam of a jealous guild.”); ADAM SMITH, *THE WEALTH OF NATIONS* 165—26 (1902) (1776).

⁴⁸ Hadfield, *Legal Barriers*, *supra* note __, at 1696 (citing Ogus, *supra* note __, at 97-108); Barton, *Judges Systemically Favor*, *supra* note __, at 461-62 (2008); Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AN. L. 7, 14-16; Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 707 (1981).

⁴⁹ Hadfield, *Price of Law*, *supra* note __, at 965.

⁵⁰ Edward J. Phelps, Annual Address, in REPORT OF THE SECOND ANNUAL MEETING OF THE AMERICAN BAR ASS’N (1879) (“Your mere *nisi prius* lawyer knows no more of the principles that control the affairs of state, than a titmouse knows of the gestation of an elephant.”).

⁵¹ *Id.* at 191. See also Robert W. Gordon, *Portrait of a Profession in Paralysis*, 54 STAN. L. REV. 1427, 1440 (2002).

BLACK MARKET LAW FIRMS (DRAFT)

ethical behavior and internal disciplinary procedures for attorney misconduct.

The actual limits of self-governance are somewhat unclear.⁵² For the most part, with the exception of federal regulations enacted in response to the financial crisis of 2008, Congress has remained silent on the issue of lawyer regulation, leaving most rules to the state courts and legislatures.⁵³ The ABA, however, since its inception in 1878, has “woven a powerful, but perhaps untested, claim to a fundamental authority over the regulation of the entire legal system.”⁵⁴ Since its founding, the ABA has sought to regulate not only substantive areas of law and legal practice, but also issues of legal reform, judicial administration, legal education and admission to the bar, and grievances.⁵⁵

The Preamble to the ABA’s Model Rules of Professional Conduct codify the legal profession’s ability to self-regulate.⁵⁶ These paragraphs focus on the unique nature of lawyer self-regulation among other self-regulating professions and the use of courts to enforce that self-regulation,⁵⁷ how self-regulation protects the profession’s independence from “government domination,”⁵⁸ the responsibility of lawyers to abide by the rules,⁵⁹ and the role of lawyers in preserving society.⁶⁰ The Preamble thus enshrines as four of the thirteen motivations for upholding the ethical rules recitals that instruct lawyers to perpetuate their own self-regulation.⁶¹

b. Effects. One effect of self-regulation, which is also not unique to the legal profession’s integrity system among professionals, is the potential for self-regulation to be used as a means of self-preservation, more often implicitly, but sometimes explicitly stated by the profession. For lawyers, the self-regulation results in the potential for and now-realized expansive professional monopoly over the delivery of legal services in the U.S. This monopoly impacts entry into this specialized professional ecosystem and can have the opposite effect of the “core values” intention—namely, creating greater client inefficiencies and reduced holistic professional services.

⁵² See Daly, *supra* note __, at __.

⁵³ See William H. Simon, *Introduction: The Post-Enron Identity Crisis of the Business Lawyer*, 74 FORDHAM L. REV. 947, 950 (2005).

⁵⁴ Hadfield, *Legal Barriers*, *supra* note __, at 1696.

⁵⁵ *Id.* at 1698.

⁵⁶ See ABA MODEL R. PROF. CONDUCT Preamble, paras. 10-13.

⁵⁷ *Id.* para. 10. See generally Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 BUFF. L. REV. 525, 533 (1983); Barton, *Judges Systemically Favor*, *supra* note __, at 462-63. But cf. Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205, 212 (2002).

⁵⁸ ABA MODEL R. PROF. CONDUCT Preamble, para. 11.

⁵⁹ *Id.* para. 12.

⁶⁰ *Id.* para. 13.

⁶¹ See generally Barton, *Judges Systemically Favor*, *supra* note __, at 461.

BLACK MARKET LAW FIRMS (DRAFT)

The purpose of defining the practice of law is to delineate who can engage in it.⁶² The U.S. limits those who can provide legal services through the feature of professional licensure. As explained by Hadfield, “If a product or service provides an input that falls within the ‘practice of law’ then, with few exceptions, only lawyers may be suppliers in that market.”⁶³ In short, only lawyers can practice law. This further means that only those individuals who (for the most part) attend law school at an ABA accredited institution and who pass the bar in a particular state or jurisdiction are authorized to practice law.⁶⁴

The monopoly that lawyers enjoy over the practice of law is both a vertical one and a horizontal one. It is a vertical monopoly in that licensure creates a hierarchy among professionals involved in providing legal services to clients. Only attorneys may provide legal advice or sign pleadings.⁶⁵ The licensure monopoly is also a horizontal one in that it excludes other professionals, such as accountants and business consultants, from practicing law or delivering legal services.⁶⁶ Considering the far reaching nature of the effect of the law on almost every ordinary transaction,⁶⁷ the licensure wall is key to upholding the breadth of the horizontal monopoly that lawyers enjoy over the entirety of the legal services market in the U.S.

2. Self-Regulatory Competition + Risk-Based and Outcomes-Based Regulation

This legal services market monopoly directly impacts the quality of legal services provided to clients. As Anthony Ogus discusses in *Rethinking Self-Regulation*, self-regulation allows those who are impacted by the regulation to potentially benefit from rules designed to reinforce their control and to allow those impacted to engage in rent-seeking behavior at the expense of their consumers.⁶⁸ Empirical evidence demonstrates that with the self-regulatory power to issue licenses to enter a profession, those with that power have used it to limit entry into the field, causing those current professionals operating in the space to earn “supra-competitive profits.”⁶⁹ By monopolizing the provision of legal services, lawyers can and historically have been able to charge a premium for their legal expertise because of the lack of available competitive alternatives.⁷⁰

⁶² Hadfield, *Legal Barriers*, *supra* note __, at 1709.

⁶³ *Id.*

⁶⁴ *Id.* at 1712.

⁶⁵ See generally Allan M. Tow and Susan P. Gaskell, *Observations on Multidisciplinary Practice*, 19 J. PARALEGAL EDUC. & PRAC. 53, 54 (2003).

⁶⁶ Hadfield, *Legal Barriers*, *supra* note __, at 1713.

⁶⁷ *Id.* at 1708.

⁶⁸ Ogus, *supra* note __, at __.

⁶⁹ *Id.*

⁷⁰ *Id.*

BLACK MARKET LAW FIRMS (DRAFT)

In an unrestrained competitive free market, providers compete with one another on quality and price.⁷¹ While providers of goods and services may face quality standards imposed by regulatory agencies, quality determinations are shaped by a number of internal and external forces which impact managerial decision-making as to quality.⁷² Such internal and external forces can include consumer demand, competitive alternatives, and the provider's own imposed standards based on company quality requirements and ethically focused initiatives.⁷³ Directly tied to the level and type of quality offered to consumers is the price point at which a provider can offer a good or service, which is also the result of a balancing of a multitude of factors—one of which is the price point at which a competitor can provide a product of similar quality.⁷⁴ Because of open market competition, Ogus explains, competitive providers can introduce into the market products which match consumers' differing needs across a spectrum of cost-quality combinations.⁷⁵

Competition thus incentivizes providers to innovate in achieving quality standards at price points at which their customers will purchase the good or service. If restraints on the market exist that eliminate competition and favor a single provider, then the provider has less incentive to control quality or costs. This can result in diminished efficiencies, in rent-seeking behavior by the now-only provider, fewer options for consumers, and stagnation in innovation and development.⁷⁶

In the context of providing legal services, however, opening up competition to other professions or to unlicensed legal professionals without regulatory oversight could potentially run afoul of Ogus' two main critiques of open-market competition: when cost and quality competition has adverse impacts on the public at large, and when the nature of the good or service provided is so specialized that it becomes difficult for the consumer to measure or compare the quality of services received.⁷⁷ In the context of providing legal services, lowered quality standards in order to compete for prices could adversely impact the stability of public and private institutions and transactions which rely on the legal profession's providing consistent, high quality legal work. Second, legal services are credence goods, meaning that consumers are not in a position to measure the quality of the service they received.⁷⁸ Further, while many corporate clients will have developed the required sophistication level needed to demand competitive prices from their lawyers due to experiences with legal services over time, the lay person

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ <https://www.investopedia.com/terms/c/credence-good.asp>.

legal consumer, who may only need the services of an attorney once or twice in her life for transactions which she will only encounter once, must rely on mere price, reputation, or other external factors to measure her satisfaction with her attorney.

Anticipating these weaknesses in unrestrained open-market competition, especially as applied to the professions, Ogus theorizes that open-market competition could work with independent agency assisted competition.⁷⁹ Under this model, Ogus discusses the attributes of either using an outside agency to set and maintain minimum standards that competing providers must meet or having all competing providers submit their services for approval or accreditation to the existing self-regulated authority. With the first example, a third party regulator would create a set of standards which would govern all persons providing a particular legal service.⁸⁰ With the second possibility, all legal service providers would seek approval and accreditation from the current regulatory authorities to engage in certain practices on behalf of clients.⁸¹ In this latter instance, Ogus suggests that still some third party agent would need to review the regulatory authority's approval process to ensure fairness and quality control.⁸²

Another possibility would be the creation of not only competition among service providers, but competition for regulatory approval, what Ogus calls "competitive self-regulation."⁸³ He provides an example of how this would operate within a legal system by describing the purpose and effect of the Courts and Legal Services Act of 1990 on the solicitors and barristers in England and Wales. Both principal legal professions enjoy self-regulation under differing regulatory regimes and both had, prior to the Act, monopoly rights over certain legal acts.⁸⁴ The Act authorized "bodies" who represented other professions or practitioners to apply for certain rights previously unavailable to them. A potential consumer would then have the option to choose between a barrister, solicitor, or a different profession entirely altogether for certain legal services, each potential professional regulated by their own self-regulatory system. In this system, approval by competing regulatory systems and professions will signal different standards to consumers.⁸⁵ Competition among regulatory authorities will then incentivize regulators to adapt to market demands and regulate with an eye toward encouraging competition and innovation.

A third party regulatory agency would then need to maintain minimum standards, or the professions would need to agree to certain

⁷⁹ Ogus, *supra* note __, at __.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

BLACK MARKET LAW FIRMS (DRAFT)

minimum standards for certain legal acts. Ogus further discusses how the 1990 Act requires the different self-regulatory agencies to submit their regulatory proposals to independent, public agencies, creating a “second tier of regulation” focused on protecting consumers from malpractice and maintaining minimum practice standards.⁸⁶ With regulation decentralized, additional externalities and internalities will dictate the level of services,⁸⁷ and the regulatory agencies and third party independent reviewer can focus instead on regulating for risks and regulating for client and professional outcomes.⁸⁸

In certain legal contexts, this self-regulatory competition between professions already exists. The federal government specifically allows some professionals, namely accountants, to represent clients in certain tax-related matters. “Circular 230,” published by the Treasury Department, authorizes certain classes of persons to practice before the Internal Revenue Service: attorneys, certified public accountants, enrolled agents, enrolled actuaries, and “others.”⁸⁹ In the *Tax Court Rules of Practice and Procedure*, Rule 200 makes a distinction between attorneys who practice in tax court and “other applicants.”⁹⁰ The Supreme Court clarified that federal authorization for a specific agency does not authorize the general practice of that area of law, “but sanctions only the performance of those services which are reasonably necessary and incident” to the representation before the agency.⁹¹ Thus, potential clients who may need representation before the IRS on certain delineated matters can choose between a lawyer, an accountant, or an “other,” each of which is regulated by its own self-regulatory system but which all submit to the public authority and regulation of Congress and the IRS.

B. Regulatory Conflation

Compounding the restrictiveness of the legal services monopoly, the ethical rules controlling lawyer behavior improperly conflate all of the different legal practice areas available to practicing lawyers, regulating all lawyers under a unified set of rules. The underlying theoretical grounding for this conflation—that there is a single, unified profession of law—is unique to the U.S. and common law countries.⁹² Where civil law counterparts divide the profession into as many as eight different functions, which differ in terms of education, training, and regulations,⁹³ the U.S. continues to adhere to a conception of a singular

⁸⁶ *Id.* at __.

⁸⁷ See Webb, *supra* note __, at __.

⁸⁸ *Id.* at __.

⁸⁹ 31 C.F.R. § 10.32.

⁹⁰ Daly, *supra* note __, at 254; Tax Ct. R. 200(a)(2) (1998) (U.S. Order 98-42).

⁹¹ Sperry v. Florida, 373 U.S. 379, 386 (1963).

⁹² Daly, *supra* note __, at 227.

⁹³ See *infra* Part I.B.1.b.

BLACK MARKET LAW FIRMS (DRAFT)

legal profession and regulate different practice areas collectively. The very foundational perspective of our ethical codes create a limited operational playing field that improperly restrict certain legal practice acts.

As Hadfield discusses, at a base level, the profession of law can be divided into two distinct tasks, the democratic/political and economic/market-based.⁹⁴ Within the democratic sphere, lawyers use their positions to secure and defend rights and obligations on behalf of clients in litigation and before administrative agencies. Within the economic sphere, lawyers work with clients to help them achieve market-based outcomes based in entity counseling, transactional lawyering skills, and contract drafting. Even framed by such a crude binary, the different personal and ethical issues at stake in the relationship between the lawyer and her respective clients drastically diverge. While the ABA has made some progress in regulating relationships to organizational and business clients, as opposed to individual clients, scholars point out the continued shortcomings of the ethical rules as applied to the full panoply of services modern lawyers provide to those different types of clients.

1. *Unified Profession of Law*

a. *U.S.* Before the explosion of the corporate form, the demarcation between the promotion of individual rights and the law that controlled market transactions was not as definitive as it is today.⁹⁵ Toward the end of the 1800s, most businesses were personal or family owned, where “owners managed and managers owned.”⁹⁶ It was easy to conceptualize lawyers providing holistic representation to these family-owned businesses as merging the best interests of the business with the individual constituents involved. Because of the close nature between an owner’s interests and a business’s, judges began applying the legal rights traditionally associated with individual rights to corporate interests.⁹⁷ In 1905, the U.S. Supreme court decided *Lochner v. N.Y.*, which judicially expanded the concept of substantive due process and created economic substantive due process.⁹⁸ This laid the basis for the recognition of corporations as “persons” with constitutional and actionable rights.

The role of a lawyer in providing counsel to such a client balanced the lawyer’s obligations to advise the managers in a way that also protected larger constituent and societal impacts. Lawyers acted as a “curb” on the “excesses of capitalism” in addition to providing

⁹⁴ Hadfield, *Legal Barriers*, *supra* note __, at 1701.

⁹⁵ Hadfield, *Legal Barriers*, *supra* note __, at 1702; WILLIAM G. ROY, *SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA* 4 (1997); ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 9 (1977).

⁹⁶ Hadfield, *Legal Barriers*, *supra* note __, at 1702.

⁹⁷ *Id.* at 1703.

⁹⁸ *Lochner v. N.Y.*, 198 U.S. 45 (1905).

BLACK MARKET LAW FIRMS (DRAFT)

operational and economic advice to their clients.⁹⁹ The original 1908 *Canons of Professional Ethics* includes three quotes in its final report, meant to direct the overarching goals and purpose of the Canons. The third quote by Abraham Lincoln echoes this commitment to public welfare in the discharge of a lawyer's duties to clients.¹⁰⁰ Hadfield also recounts the 1902 story of Brandeis counseling the owner of a shoe company to respond to both the owner's profit concerns and the employees' wage concerns.¹⁰¹ This function of the lawyer merged the "corporation lawyer" with the "people's lawyer."¹⁰²

After World War I, however, with the growth of modern, publicly traded corporations in which ownership and management became occupied by distinct groups, the role of an attorney in advising corporations shifted. The imposition of corporate management tiers and the contractual nature of managerial positions splintered the business from its constituents. Courts backed away from *Lochner* and no longer "merge[d] questions of economic policy with questions of constitutional rights."¹⁰³ Despite the constitutional analytical framework shifting away from recognizing corporate constitutional rights and its re-emergence in recent years with decision such as *Hobby Lobby*, which recognized First Amendment genuinely held religious beliefs on behalf of corporations,¹⁰⁴ the Bar still conceptualizes the services that attorneys provide to individuals in litigation as equivalent to those provided to business transactional clients.

b. Civil Law Countries. The breadth of the continued unification of the legal profession becomes even more pronounced when compared to the hierarchical and horizontal landscape of the legal service providers in civil law systems. In France, what the U.S. would consider the practice of law reserved for lawyers, is actually performed by eight different and distinct professions.¹⁰⁵ In most European countries, scholars generally divide the legal services profession into public prosecutor, judge, notary, or lawyer with a right of audience.¹⁰⁶ In France, only a lawyer with a right of audience or a notary needs a specialized license.¹⁰⁷ In Russia, comparatively, only those litigators appearing in criminal cases

⁹⁹ BRANDEIS, *supra* note __, at 323.

¹⁰⁰ See 1908 CODE, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/1908_code.authcheckdam.pdf.

¹⁰¹ See Hadfield, *Legal Barriers*, *supra* note __, at 1703; Luban, *supra* note __, at 722-23.

¹⁰² BRANDEIS, *supra* note __, at 321.

¹⁰³ Hadfield, *Legal Barriers*, *supra* note __, at 1704.

¹⁰⁴ See *Burwell v. Hobby Lobby Stores, Inc.*, 53 U.S. __ (2014).

¹⁰⁵ Olivier d'Ormesson, *French Perspectives on the Duty of Loyalty: Comparisons with the American View*, in RIGHTS, LIABILITY, AND ETHICS IN INTERNATIONAL LEGAL PRACTICES 229 (1995).

¹⁰⁶ Daly, *supra* note __, at 228.

¹⁰⁷ *Id.* at 229.

need a special licensure.¹⁰⁸ For all other duties the U.S. typically associates as lawyer's work, any person can perform on behalf of another.

2. *Democratic and Economic Functions of Law and Quasi-Legal Roles.* At its simplest, scholars divide the work lawyers do into two sectors: the democratic/political sphere and the economic/market-driven sphere.¹⁰⁹ This distinction anchors the democratic sphere to the continuing tradition of the role of lawyers as the defenders of individual rights and of the Constitution. Examples of such services include: "protecting the architecture of democratic institutions, protecting individual rights, implementing the balance of power that promotes the normative goals of self-governance such as human dignity, autonomy, fairness, and well-being."¹¹⁰ The second sphere, economic/market-driven, refers to the role of legal services in providing "efficient market transactions," which include: "establishing real and intellectual property rights, and facilitating contractual and organizational economic relationships in finance, innovation, and trade."¹¹¹ Alternatively, such spheres occupy litigation versus transactional work.

These two spheres differ by the goals of the representation and by the larger implications and stakes involved. The regulation of contracts that will "increase the liquidity of financial markets[] or promote collaborative investment in innovation" differ from those involved in "ensuring that police searches are in compliance with the Fourth Amendment, hiring is accomplished in a nondiscriminatory manner, and products are safely designed and produced."¹¹² In short, democratic lawyering centers around protecting individual rights in the context of disputes or through the vehicle of judicial processes; economic lawyering focuses on facilitating deals and assisting clients to navigate the legal implications of their market transactions.¹¹³

Because of those different goals and orientations, the overall framework and methodology of the work that lawyers do for clients in the democratic sphere also differ from the work that lawyers do for clients in furtherance of market and economic transactions. Lawyers who litigate resolve disputes, while lawyers who engage in transactional work make facilitate deals.¹¹⁴ Litigators engage in remedial lawyering; transactional attorneys engage in preventative lawyering.¹¹⁵ Litigators present disputed

¹⁰⁸ Julie Mamou, *How to Practice in Russia*, Sept. 19, 2014, <http://communities.lawsociety.org.uk/international/regions/cis/russia/how-to-practise-in-russia/5043353.fullarticle>.

¹⁰⁹ Hadfield, *Legal Barriers*, *supra* note __, at 1702.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at __.

¹¹⁴ ALICIA ALVAREZ & PAUL TREMBLAY, INTRODUCTION TO TRANSACTIONAL LAWYERING __ (YEAR).

¹¹⁵ *Id.* at __.

BLACK MARKET LAW FIRMS (DRAFT)

facts in a light most favorable to their client’s legal position; therefore, the perspective of litigation is by necessity backwards looking.¹¹⁶ In contrast, the perspective of dealing-making is forwards looking, where lawyers assist clients to achieve certain transactions by adding value through their familiarity with the legal rules affecting their clients.¹¹⁷

With these differences in the role of a lawyer impacting the orientation and goals of the relationship, different ethical risks also exist in the relationship between lawyers and clients they are representing in the context of litigation versus in the context of deal-making. In the context of litigation, the adversarial positioning requires the utmost observance of and adherence to the lawyer’s ethical obligations to maintain client confidentiality,¹¹⁸ avoid current conflicts of interest and properly address past client conflicts,¹¹⁹ and to zealously and competently advocate on behalf of their clients and deftly navigate the legal processes involved to protect their client’s legal and personal rights.¹²⁰ One risk is that a lawyer could engage in action that would compromise the legal position or privacy interests of their clients, such as disclosing confidential information that makes its way to the public or to opposing counsel. Consider how impactful such a transgression would be when a client’s freedom is involved for lawyers engaged in criminal defense work. If a litigator failed to zealously advocate for a client’s best legal position, this could result in incorrect and unjust results affecting, not only the lawyer’s client, but setting long-term bad precedent and overall loss of integrity in the process of case law development.¹²¹ Indeed, in that sense, litigators do uphold the very “fabric of democracy,” protecting the rights of individuals, and ensuring that the institutions that support our legal rules and social governance systems operate in a just and constitutional manner.¹²² While the breaches of ethical duties in the transactional sphere will often result in similarly negative outcomes for clients in individual context, the larger implications of subpar ethical and zealous compliance within the transactional sphere can negatively impact the vitality and reliability of global and national economies and affect every day transactions that move value from one individual to another.

With the increase in corporate clients’ reliance on lawyers to conduct their operations, lawyers who serve corporate clients have developed into serving “quasi-legal roles,”¹²³ where lawyers not only advise organizational clients and boards of directors on legal matters impacting their companies, but also advising on general business matters and processing efficiencies. With these lawyers switching “in and out of

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Rule 1.6 (YEAR)

¹¹⁹ Rule 1.7 (YEAR).

¹²⁰ Rule __.

¹²¹ Hadfield, *Legal Barriers*, *supra* note __, at __.

¹²² *Id.*

¹²³ Remus, *supra* note __, at __.

practice,” the current sector encompassing strictly legal transactional work is beginning to disintegrate even more.¹²⁴ If more individual, elite lawyers engage in this type of quasi-legal role, then it is likely to follow that legal firms will soon provide corporate clients both legal and non-legal professional consulting on a larger, more organized operational scale. The ethical rules fail to even consider the possibility that a lawyer may use her legal expertise to the advantage of a client that the lawyer is advising outside of the legal context and the potential risks such a role would entail.

Considering the scope of today’s delivery of legal services, regulators could consider a distinction between the functions of law and the further impact such disintegration between legal practice and non-legal professional practice will have.¹²⁵ Because of the different stakes and values involved, the ethical rules should adapt to regulate for risks involved in each context and to legislate and systematize to promote desired outcomes in both litigation and transactional work. While it is more true in recent years with the increase in use of corporate social responsibility initiatives and the growth of social enterprises that lawyers will likely see a return to their role of advising their corporate clients against the “excesses of capital,”¹²⁶ the role of a lawyer in the economic/market sphere should be somehow distinguished from those who provide democratic/political legal services, in practice and regulation and regulated according to risks and desired outcomes.¹²⁷ However, the underlying foundational theory that we practice as a unified profession of law continues to drive the framing and perspective of our ethical rules.

3. *Impact on Codes of Ethics.* The impact of the regulatory conflation of a unified profession of law is evident in the ethical rules. The rules are built upon the underlying foundation of uniformity lawyers, with the rules regulating relationships between lawyers and clients then favoring risks present in performing litigation acts on behalf of individuals.

The original 1908 *Canons of Professional Ethics* say little about representing organizational clients or engaging distinctly in market transactions, except those that control the contractual relationship between the lawyer and client.¹²⁸ The adoption of Model Rule 1.13 in the 1980s was the ABA’s first attempt to regulate delivery of legal services to organizational clients.¹²⁹ Rule 1.13 attempts to regulate a lawyer’s relationship to an organizational client by identifying distinct reporting

¹²⁴ *Id.*

¹²⁵ *See id.* at __.

¹²⁶ BRANDEIS, *supra* note __, at 321.

¹²⁷ Hadfield, *Legal Barriers*, *supra* note __, at 1701.

¹²⁸ *See* Daly, *supra* note __, at __.

¹²⁹ ABA MODEL R. PROF. CONDUCT R. 1.13 (YEAR).

BLACK MARKET LAW FIRMS (DRAFT)

and confidentiality obligations, as they differ from those owed to individual clients. Scholars, however, criticize Rule 1.13 for its sparse commentary and its cursory and crude attempt to mirror reporting and confidentiality obligations and loyalty duties owed to individuals on an organizational level.¹³⁰

While amendments to the ethics codes recognize the different types of clients for whom lawyers will serve,¹³¹ such amendments have less vigilantly adapted to reflect the different types of work lawyers might provide to clients. The written rules contemplate litigation contexts; transactional applications are relegated to the comments.¹³² Because of our ethical grounding in uniformity, we have piecemeal amendments for specific lawyering acts. Our ethics codes thus mirror a tree with a thick trunk (uniformity foundation), a complex web of branches (exceptions and specific instances), with more coloration and leaves on certain branches (commentary on litigation contexts) and with less coloration and fewer leaves on other branches (commentary on transactional contexts). This has prompted scholars to develop specialized rules in the context of organizational clients and business transactions,¹³³ some arguing for a wholesale re-framing of the approach of our ethics rules.¹³⁴

C. Market Responses and Developments

The restrictive nature of the legal profession's market monopoly over the delivery of legal services and the inhibiting nature of the conflated ethical rules have not, however, deterred the development of innovation and market-responsiveness in the delivery of legal services. The enterprising nature, competitive drive, and public service aptitudes of lawyers is too strong, and the desire to stay abreast with larger global professional market trends necessitates that such legal entrepreneurs continue to test the mettle of the restrictive regulatory rules.¹³⁵ While most of the scholarly attention focuses on innovations in law firms serving corporate sector interests,¹³⁶ many of the most impactful changes in legal services delivery models happen in firms serving low income communities pursuing social justice initiatives.¹³⁷ As the ABA's own 2016 Report on the Future of Legal Services provides, the legal profession

¹³⁰ See Daly, *supra* note __, at __.

¹³¹ R. 1.13 (YEAR)

¹³² See, e.g., Rule 4.3.

¹³³ See, e.g., REGAN & BAUMAN, *LEGAL ETHICS AND CORPORATE PRACTICE* (2005); Verita Gulati, *Effects of Legal Ethics in the Business World*, 17 ST. JOHN'S J. LEGAL COMM. 247 (YEAR). Nat'l Internal Reg. of Legal Prof., Article 16, Art. 67; D. Nov. 27, 1991, ss. 111.

¹³⁴ See Dana Remus, *Out of Practice*, DUKE L. J.

¹³⁵ See Paton, *MDP Redux*, *supra* note __, at 2205 (quoting Mary C. Daly, *Monopolist, Aristocrat, or Entrepreneur?: A Consumer Welfare Perspective*, 24 DALHOUSIE L.J. 1 (2001)).

¹³⁶ Poser, *supra* note __, at 96.

¹³⁷ See Trubek & Farnham, *supra* note __, at __; Poser, *supra* note __, at 114.

should encourage this innovation in order to meet the still unmet needs of underrepresented clients.¹³⁸

1. *Corporate Innovations.* Legal scholars have produced a plethora of studies on modern innovations in legal services delivery.¹³⁹ This Article is not intended to cover the breadth of that scholarship, but to discuss relevant examples of legal services innovations to demonstrate larger trends. The majority of recent scholarly work focuses on legal services innovations that serve corporate clients.¹⁴⁰ But small firms often emulate such new practices on a reduced or modified scale.

John Dzienkowski studies six new “big firm” models currently serving the corporate sector and illustrates their efficiencies along five points of inquiry.¹⁴¹ The six firms, Clearspire, VLP Law Group, Axiom Law, VistaLaw, LegalForce, and Paragon, each provide lawyers and legal services to corporate clients.¹⁴² Dzienkowski measures each by studying: “(1) central features in the delivery of legal services to clients, (2) reducing law firm overhead and costs, (3) innovation in billing practices, (4) changes in lawyer compensation and tenure, and (5) the perspectives from lawyers working in alternative firms.”¹⁴³ As his findings show, these new innovations “raise questions” about traditional law firm operations in “(1) the unbundling of the client representation, (2) the training and supervision of lawyers, (3) the training and supervision of nonlawyers, and (4) the maintenance and presentation of documents.”¹⁴⁴ These models also raise issues about these innovations and their impact on a client’s informed consent to potential conflicting ethical duties, protecting client confidences, potential lawyer liability, and unauthorized practice of law.¹⁴⁵

Similarly, a 2015 study identified several new categories of legal services delivery providers: (1) secondment firms, where lawyers work on a temporary or part-time basis in a client organization; (2) companies combining legal advice with general business advice that is typical of management consulting firms; (3) “accordion companies,”¹⁴⁶ providing

¹³⁸ 2016 ABA REPORT, *supra* note __, at 39.

¹³⁹ See, e.g., Dzienkowski, *supra* note __; G. Ellis Duncan, *The Rise of Multidisciplinary Practices in Europe and the Future of the Global Legal Profession Following Arthur Andersen v. Netherlands Bar Ass’n*, 9 TUL. J. INT’L & COMP. L. 537, 541-42 (2001); Lawrence J. Fox, *Old Wine in Old Bottles: Preserving Professional Independence, Ban on MDP Should Remain*, 62 U. PITT. L. REV. 367 (2000); Adam A. Shulenburg, *Would You Like Fries With That? The Future of Multidisciplinary Practice*, 87 IOWA L. REV. 327 (2001); Susan Heyman, *Bringing Down the Bar: Accountants Challenge Meaning of Unauthorized Practice*, 21 CARDOZO L. REV. 1425 (2000).

¹⁴⁰ See *supra* note __.

¹⁴¹ Dzienkowski, *supra* note __, at 3002.

¹⁴² *Id.*

¹⁴³ Daly, *supra* note __ at 3002.

¹⁴⁴ *Id.* at 3024.

¹⁴⁵ Dzienkowski, *supra* note __, at 3023-36.

¹⁴⁶ See also 2016 ABA REPORT, *supra* note __, at 31.

BLACK MARKET LAW FIRMS (DRAFT)

networks of trained, experienced lawyers to fill short-term law firm staffing needs; (4) virtual law practices and companies where attorneys primarily work from home to save on overhead expenses; and (5) law firms and companies offering tailored, specialty services with unique fee arrangements or delivery models.¹⁴⁷

2. *Small Firm Innovations.* With notable exceptions, few scholars have addressed the impact of innovative legal services delivery on low income and underrepresented communities.¹⁴⁸ Because of the continuing need and mandate in the ABA’s Model Rules preamble to increase access to legal services,¹⁴⁹ lawyers and associations dedicated to low income and social justice clients have recently exploded with a barrage of nontraditional legal interventions. Many of the innovations center around the unbundling of legal services,¹⁵⁰ do-it-yourself or online legal services,¹⁵¹ community classes and workshops,¹⁵² advice hotlines,¹⁵³ impact representation,¹⁵⁴ law school clinics,¹⁵⁵ and social justice collaborations or MDPs.¹⁵⁶

Many small (and large) firms have used “unbundling of legal services” to reduce costs to both the client and the lawyer. “Unbundling” is “the practice of breaking the legal representation into separate and distinct tasks,”¹⁵⁷ with “an agreement between the client and the lawyer to limit the scope of services that the lawyer renders.”¹⁵⁸ Lawyers provide almost a checklist of potential services, such as “advice, research, document drafting, negotiation, or court appearances,”¹⁵⁹ from which a client can pick and choose. The clients benefit from unbundling by paying for individual packages of legal services, and lawyers are able to reach a larger customer base by contracting with individuals who can purchase a lawyer’s services on such a limited and unbundled manner.

Consumers also demand improved access to “do-it-yourself” tools.¹⁶⁰ The online “do-it-yourself” industry includes websites such as

¹⁴⁷ *Id.*

¹⁴⁸ *But see* Poser, *supra* note __, at 96; Trubek & Farnham, *supra* note __, at 228.

¹⁴⁹ ABA MODEL R. PROF. CONDUCT, Preamble.

¹⁵⁰ Trubek & Farnham, *supra* note __, at 228. *See also* <http://www.unbundledlaw.org>.

¹⁵¹ *See* Trubek & Farnham, *supra* note __, at 228.

¹⁵² *See* Ingrid V. Eagly, *Community Education: Creating a New Version of Legal Service Practice*, 4 CLIN. L. REV. 433 (1998). Wills workshops, entrepreneurship legal start-up workshops, or online advice for such entrepreneurs are common examples of such innovations. <https://www.law.du.edu/tribal-wills-project>.

¹⁵³ *See* <http://www.equaljustice.org/hotline1/index.html>.

¹⁵⁴ Trubek & Farnham, *supra* note __, at 228 (citing to tobacco and gun impact litigation).

¹⁵⁵ *See* Susan R. Jones, *Current Issues in the Changing Roles and Practices of Community Economic Development Lawyers*, 2002 WIS. L. REV. 437, 452 (2002).

¹⁵⁶ Trubek & Farnham, *supra* note __, at 228.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ 2016 ABA REPORT, *supra* note __, at 30.

¹⁶⁰ Trubek & Farnham, *supra* note __, at 228.

BLACK MARKET LAW FIRMS (DRAFT)

LegalZoom, which offers standardized agreements and forms ranging from organizational documents to wills.¹⁶¹ This growth of self-help tools has expanded in recent years to include mobile applications as well, which assist both lawyers in delivering legal services and clients directly. One app allows users to create, sign, and send legally binding contracts from a smartphone for free.¹⁶² These apps also operate in the democratic sphere, such as providing tools “for immigrants, the indigent, those who face arrest and the lawyers who help them.”¹⁶³ As the ABA’s Report indicates, these apps “not only give everyday people resources to solve their legal problems—they educate people about the law and empower them. In the end, we may end up with a more educated citizenry that can engage meaningfully in the political process.”¹⁶⁴

3. *Continued Need for Innovation and Empirical Research.* While these innovations have increased access to comprehensive and high quality legal services for middle and low income clients, the need for additional innovation and choice within this service sphere persists.¹⁶⁵

The ABA’s own 2016 *Report of the Commission on the Future of Legal Services* demonstrates that much remains in terms of providing innovation and access to justice for low- and moderate-income clients.¹⁶⁶ The Report definitively chooses a side and lists the following relevant findings: (1) “the traditional law practice business model constrains innovations that would provide greater access to, and enhance the delivery of, legal services;” (2) “the legal profession’s resistance to change hinders additional innovations;” and (3) “limited data has impeded efforts to identify and assess the most effective innovations in legal services delivery.”¹⁶⁷ The Report ultimately recommends that “courts should consider regulatory innovations in the area of legal services delivery” and “the ABA should establish a Center for Innovation.”¹⁶⁸ With the Report, the ABA will be pressed to justify its continued restrictions on innovation. The Report also recommended, and other scholars continue to point out the need for, more empirical evidence on the scope and types of non-

¹⁶¹ See 2016 ABA REPORT, *supra* note __, at 30; <http://www.legalzoom.com>. In 1997, the Texas Bar unsuccessfully brought an action against Nolo Press, an online publisher of legal self-help books under its Unauthorized Practice of Law statute. *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768 (Tex. 1999).

¹⁶² See 2016 ABA REPORT, *supra* note __, at 28; *Our Purpose*, Shake, (<https://www.shakelaw.com/about/#purpose>); Sarah Perez, *Fixed, The App That Fixes Your Parking Tickets, Gets Blocked in San Francisco, Oakland, & L.A.*, TECHCRUNCH (Oct. 12, 2015), (<http://techcrunch.com/2015/10/12/fixd-the-app-that-fixes-your-parking-tickets-gets-blcked-in-san-francisco-oakland-l-a/>).

¹⁶³ 2016 ABA REPORT, *supra* note __, at 28.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 39-40.

¹⁶⁶ *Id.* at 37-57.

¹⁶⁷ *Id.* at 18.

¹⁶⁸ *Id.* at 37-57.

BLACK MARKET LAW FIRMS (DRAFT)

traditional and innovative forms of legal services lawyers are currently utilizing today.¹⁶⁹

Until we fix the failures in the legal profession's integrity system, the regulatory restrictions will continue to cause such legal entrepreneurs to operate outside the sanction of the ethical rules in their quest to remain competitive and provide more efficient legal services to clients.

II. MULTIDISCIPLINARY PROVIDERS

*The black market was a way of getting around government controls. It was a way of enabling the free market to work. It was a way of opening up, enabling people.— Milton Friedman*¹⁷⁰

The failures in our legal profession's integrity system are no more pronounced than when viewed through the example of the regulatory treatment and resulting market response of multidisciplinary providers or "MDPs." Such organizations and firms, where lawyers work together with other professionals to provide holistic representation and services to their clients,¹⁷¹ take many forms of associations, ranging from casual referral agreements to fully integrated organizations where lawyers and non-lawyers provide services under one business entity.¹⁷² Traditionally, five different MDP forms have shaped the debates and scholarship discussing MDPs, each arising as a work-around or response to the restrictions against lawyer and non-lawyer collaborations.¹⁷³ Commentators have also developed a number of classification schemes to categorize the different types of MDPs along on some other structural or service sector line.¹⁷⁴

The ethical and regulatory treatment of MDPs represents the intersectional outcomes of legal services monopoly, failures in the ethical codes, restrictions on practice forms, and limitations on innovative collaborations in both democratic and economic areas of practice. For the past 30 years, the ABA has debated the regulation of MDPs and how to address their potential implications on both client outcomes and the core values of the profession.¹⁷⁵ Despite two different pleas throughout the years from two special commissions to recognize and regulate MDPs, the

¹⁶⁹ *Id.* at __.

¹⁷⁰ Interview with Milton Friedman, *Commanding Heights*, PBS.ORG, (https://www-tc.pbs.org/wgbh/commandingheights/press_site/people/pdf/friedman_intv.pdf).

¹⁷¹ Ward Bower, *The Big Five's Case for MDPs*, 1999 A.B.A. SEC. L. PRAC. MGMT. ANN. MEETING 185.

¹⁷² See 2016 ABA REPORT, *supra* note __, at __.

¹⁷³ See *ABA Status of Multidisciplinary Practice Studies by State* [hereinafter *ABA State Status Studies*],

(http://www.americanbar.org/groups/professional_responsibility/commission_multi_disciplinary_practice/mdp_state_action.html#top).

¹⁷⁴ See *infra* Part __.

¹⁷⁵ See *infra* Part __.

BLACK MARKET LAW FIRMS (DRAFT)

ABA has refused to amend the current Model Rules of Professional Conduct to allow lawyers to practice with other, non-lawyer professionals under the same business entity structure.¹⁷⁶

Model Rule 5.4, as currently written, limits the operation of MDPs by preventing partnerships between lawyers and non-lawyers and profit-sharing between lawyers and non-lawyers when any of the activities of the partnership consist of the practice of law.¹⁷⁷ This rule prevents non-lawyer ownership of law firms and restricts how a lawyer can distribute her profits: she is allowed to share fees vertically—with paralegals, legal secretaries, and other administrative officials who work to keep the firm's lights on—but she is not allowed to share fees on a horizontal level, with other professionals, such as accountants, business consultants, engineers, or doctors who may interact with the client on a higher, managerial-type level and provide professional services to the client. While jurisdictions such as Australia, England and Wales, and Germany recognize and regulate MDPs to allow for fee sharing and non-lawyer ownership, D.C. is the only U.S. jurisdiction to amend its rules to allow for a limited MDP form.¹⁷⁸

While the debate about MDPs have swung between protecting the core values of the profession to encouraging innovation and collaboration to stay globally and domestically competitive and improve holistic client outcomes. This Article adds to this debate by introducing a call for recognition and regulation by looking at the impact of PwC and Deloitte's recent additions as a signaling function and by analyzing the risks truly at stake with the proliferation of smaller firm MDPs where a single lawyer and accountant may work together versus the implications of larger market players who may exercise their non-lawyer ownership and control as a part of the firm's voting majority, like the accounting firms, and by arguing that rules can be fashioned which address the risks inherent in MDP structures.

A. MDPs: A Primer

The definition of an MDP has evolved over the years to encompass the different structural forms through which lawyers provide professional services with nonlawyer professionals. Five traditional prototypes exist in the rhetoric and discussions surrounding MDPs since the early 2000s, which framed much of the debates during that time.¹⁷⁹ The prototypes differ in the structural and ownership relationships between the professionals involved, especially with respect to fee-sharing, ownership, and entity affiliation. As the early 2000 state reports demonstrate, lawyers and nonlawyers can theoretically and practically

¹⁷⁶ See 2016 ABA REPORT, *supra* note __, at __.

¹⁷⁷ Rule 5.4 (YEAR).

¹⁷⁸ D.C. Rule 5.4 (YEAR).

¹⁷⁹ See *ABA State Status Studies*, *supra* note __.

BLACK MARKET LAW FIRMS (DRAFT)

operate all five prototype MDP models in a manner that preserves a lawyer's core values of professional independence, loyalty, and confidentiality.

1. *Definition and Description.* Colloquially, the term “multidisciplinary provider” or “MDP” has a range of meanings and is used collectively to refer to an arrangement in which a lawyer works closely or in association with other non-lawyers to provide legal and law-related services. Most of the definitions in the legal scholarship are too limiting,¹⁸⁰ however, and even the ABA's attempt to capture all of the different types and the myriad structural and operational nuances inadvertently limits the profit sharing feature of some MDPs.¹⁸¹

Collaboration types between lawyers and nonlawyers respond to client needs, such as lawyers working with accountants and business consultants to more efficiently serve organizational clients;¹⁸² medical-legal partnerships;¹⁸³ and lawyers, social workers, and financial planners working together to address needs of low-income and at-risk families.¹⁸⁴ Supporters of MDPs think that MDPs can offer clients from all income brackets, ranging from sophisticated entity clients to pro bono clients, lower costs for more comprehensive care due to MDPs' increased economies of scope and scale.¹⁸⁵ MDPs are often referred to as “one-stop shops” for professional services,¹⁸⁶ where multiple professionals work together to fulfill the holistic needs of the client.

Globally and domestically, different industry rules and standards, particularly the Rules of Professional Conduct in any given jurisdiction,

¹⁸⁰ Bower offers one early definition of an MDP: “an organization owned wholly or in part by non-lawyers which provides legal services directly to the public through owner or employee lawyers.” Bower, *supra* note .

¹⁸¹ ABA COMM'N ON MULTIDISCIPLINARY PRAC., *Recommendations, Report, and Reporters' Notes on the ABA Commission on Multidisciplinary Practice*, Appendix A (<http://www.abanet.org/cpr.mdpfinalreport.html>) (“[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 that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, and there is a direct or indirect sharing of profits as part of the arrangement.”)

¹⁸² See Robert J. Reinstein, *Afterword: New Roles, No Rules? An International Perspective*, 72 TEMP. L. REV. 1031, 1032 n.1 (1999) (Big Five accounting firms should be consulting firms because accounting is now a minority of their total worldwide business); Sheryl Stratton, *ABA Rattles Unauthorized Practice of Law Saber While Debating MDPs*, 86 TAX NOTES 1057 (1999).

¹⁸³ See, e.g., Wettach, *supra* note ; The Medical-Legal Partnership for Children, Partnership Sites, (<http://www.mlpforschildren.org/partnershipsites.aspx>).

¹⁸⁴ See, e.g., Poser, *supra* note , at 110.

¹⁸⁵ See Duncan, *supra* note , at 583; Dzienkowski & Peroni, *supra* note , at 120; Michael Trebilcock & Lilla Csorgo, *Multi-Disciplinary Professional Practices: A Consumer Welfare Perspective* (Aug. 4, 1999), at 3.

¹⁸⁶ See Duncan, *supra* note , at 538.

BLACK MARKET LAW FIRMS (DRAFT)

will either allow or limit a MDPs ability to operate as a single entity, in which lawyers and non-lawyers share ownership and any legal fees collected. Notable international jurisdictions that have implemented alternative business structures for law practice, which allow MDPs to varying degrees, are Australia, Canada, England and Wales, France, Germany, the Netherlands, Scotland, Spain, and New Zealand.¹⁸⁷ Australia serves as the global model for MDPs or alternative business structures, as Australia has since 1998 proactively adapted its legal market to incorporate alternative legal practices, allowing MDPs and non-lawyer investment in law firms, including the first initial public offering of shares in a law firm in 2007.¹⁸⁸ This adaptation has created a global market for Australian lawyers and MDPs, particularly in Asian markets in Hong Kong and throughout China.¹⁸⁹

Other countries, recognizing the limited growth potential these restrictions place on legal entrepreneurs seeking to stay competitive in today's market, have removed this structural and financial limitation.¹⁹⁰ In 2007, Slater and Gordon was the first law firm to become publicly traded on the Australian Stock Exchange, with three others following suit shortly thereafter.¹⁹¹ While we are yet to see the impacts of that ten-year-old IPO, the move has already proven a boon for the competitiveness of Australian lawyers. Regulators there are “aggressively investigat[ing] how regulatory frameworks can further be adjusted to ensure that Australian lawyers are poised to compete both from domestic bases and abroad.”¹⁹²

The ABA's position against MDPs and the mixed support from the different state bars do not appear to have deterred the continued development and operation of MDPs, among a variety of different structures and offering a variety of professional services. In the U.S. in particular, lawyers continue to work with non-lawyer professionals in order to respond to global economic demands.¹⁹³ Sophisticated clients

¹⁸⁷ See Hill, *supra* note __, at 925 n. 94; WORKING GRP. ON ALT. BUS. STRUCTURES, ABA COMM'N ON ETHICS 20/20, FOR COMMENT: ISSUES PAPER 8, 15-16 (Apr. 5, 2011) http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper_authcheckdam.pdf [hereinafter ISSUES PAPERS].

¹⁸⁸ See Paton, *MDP Redux*, *supra* note __, at 2196 n. 13; Paton, *Rock and a Hard Place*, *supra* note __, at 104-07.

¹⁸⁹ Paton, *MDP Redux*, *supra* note __, at 2242.

¹⁹⁰ See Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 *FORDHAM L. REV.* 2193, 2196 (2010) [hereinafter *MDP Redux*]; Paul D. Paton, *Between a Rock and Hard Place: The Future of Self-Regulation—Canada Between the United States and the English/Australian Experience*, 2008 *J. PROF. LAW.* 87, 104-07 (YEAR) [hereinafter *Rock and a Hard Place*]; Dzienkowski & Peroni, *supra* note __, at 116.

¹⁹¹ See Andrew Grech & Kirsten Morrison, *Slater & Gordon: The Listing Experience*, 22 *GEO. J. LEGAL ETHICS* 535 (2009).

¹⁹² Paton, *MDP Redux*, *supra* note __, at 2242.

¹⁹³ See Talha A. Zobair, *Point-Counterpoint—Multidisciplinary Practices—Firms of the Future*, 79 *MICH. B.J.* 64 (2000).

BLACK MARKET LAW FIRMS (DRAFT)

increasingly demand more cost efficient delivery of professional and legal services and are willing to look globally for an MDP that makes the most economic sense.¹⁹⁴ To stay competitive with our international counterparts, the bar must embrace innovative methods of collaborative professional and legal services.¹⁹⁵ While it may be too late for the U.S. to get out ahead of the developing global legal market, at best the U.S. can try to keep pace.

The majority of MDPs, however, are smaller organizations, composed of lawyers and nonlawyers who aim to provide a more efficient and comprehensive, and therefore more socially just, experience for their clients.¹⁹⁶ These small firm MDPs developed in response to on-the-ground community needs, often with an aim to fulfill a certain social justice mission.¹⁹⁷ Professionals in these MDPs are able to communicate with one another and ensure quality, coordinated, holistic care, often at one convenient location for their clients.¹⁹⁸ These clients are often in need of legal and emotional assistance as their legal situations are symptomatic of deeper, socio-legal and socio-economic disadvantages.¹⁹⁹ Practitioners who work with society's most vulnerable communities continue to argue that multi-faceted client needs demand an integrated approach to representation.²⁰⁰

2. *Prototypes.* MDPs structure and operate their organizations in a variety of ways. They exist as strictly arms-length partnerships between legal and non-legal entities, to fully integrated models, where the MDP offers all professional services under one entity.²⁰¹ While each MDP functions uniquely, each has a particular method of dealing with issues of confidentiality, conflicts of interest and intake protocols, lawyer independence and non-lawyer ownership, fee sharing, and whether to operate as a non-profit or for-profit MDP.²⁰² MDPs currently operate under a range of five generally accepted prototypes: the Cooperative Model, the Ancillary Business Model, the Contract or Strategic Alliance Model, the Command and Control Model, and the Fully Integrated Model.

a. *The Cooperative Model.* The Cooperative Model occurs when a firm delivers legal services on a "standalone" basis in "cooperation" with other nonlawyer professionals. Fee-splitting and co-principal relationships with nonlawyers are prohibited. Lawyers are free

¹⁹⁴ See Dzienkowski, *Future of Big Law*, *supra* note __, at 2996.

¹⁹⁵ *Id.* at 2995-95.

¹⁹⁶ See Hill, *supra* note __, at 935 (citing GORELICK & TRAYNOR, *supra* note __, at 2).

¹⁹⁷ See Brustin, *supra* note __, at 788; Steven Hobbs, *The Ethics and Professional Norms of Family Business Centers*, STETSON U. ETHICS & PROF. NORMS 9 (2000).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See *infra* Part II.B.

²⁰² *Id.*

BLACK MARKET LAW FIRMS (DRAFT)

to employ nonlawyer professionals under the lawyer's control to assist in providing legal services to clients, and lawyers are also free to work with nonlawyer professionals employed directly by clients. The lawyers' services ultimately "standalone" from all other services.²⁰³

b. The Ancillary Business Model. This model permits a law firm to own and operate an ancillary business entity that provides nonlegal services to clients. The entities, however, operate on a non-integrated basis, and lawyers provide legal services on a "standalone" basis. ABA Model Rule 5.7 on ancillary services, requires that recipients of the ancillary services understand that the ancillary business exists as an entity separate and distinct from the law firm.²⁰⁴

c. The Contract or Strategic Alliance Model. The Contract or Strategic Alliance Model requires an express agreement between a law firm and a professional service firm setting forth various mutually beneficial terms. The agreement might state that: (1) the law firm notes an affiliate on all law firm materials; (2) the law firm and professional firm will engage in nonexclusive referrals; or (3) the law firm purchase goods and services from the professional firm.²⁰⁵ This model does not allow fee-splitting or common ownership interests. The legal services are also "standalone."²⁰⁶

d. The Command and Control Model. This Model reflects the situation that currently exists in Washington, D.C., under its variation of ABA Model Rule 5.4. Lawyers are permitted to share law firm fees and equity interests with nonlawyers subject to specific limitations, including requirements that: "(1) the activities of the firm be limited to the provision of legal services; (2) the involved nonlawyers agree to comply with the lawyers' rules of professional conduct; and (3) the lawyers, who are principals or who have management authority, take responsibility for the acts of the nonlawyers."²⁰⁷ Although fees and equity interests are shared with nonlawyers, all services are controlled by lawyers and relate directly to the rendition of legal services.²⁰⁸

e. The Fully Integrated Model. The Fully Integrated Model is a single, fully integrated professional services firm. The single firm provides legal services, consulting services, accounting services, or other professional services. It is marketed as a "one-stop shop" for clients with legal and other professional needs.²⁰⁹ The professions provide various services to a single client on a single matter or on multiple related (or

²⁰³ The California Board of Governors Task Force in 2001 completed the ABA's study. See *ABA State Status Studies*, *supra* note __.

²⁰⁴ ABA MODEL R. PROF. CONDUCT R. 5.7 (YEAR).

²⁰⁵ See *ABA State Status Studies*, *supra* note __.

²⁰⁶ *Id.*

²⁰⁷ *Id.*; D.C. RULE PROF. CONDUCT, R. 5.4 (YEAR).

²⁰⁸ *Id.*

²⁰⁹ *ABA State Status Studies*, *supra* note __.

BLACK MARKET LAW FIRMS (DRAFT)

unrelated) matters. The lawyers can provide legal services independently from others, and vice versa.²¹⁰

Of the five MDP prototypes, only the Command and Control Model and the Fully Integrated Model allow an attorney to share fees with non-lawyers. The California Board of Governors' Task Force, set with studying MDPs in 2000, ultimately concluded that under all five models, including the Fully Integrated Model, the professionals can operate the MPD in a manner that maintains the "core values" of the legal profession and in fact, reaffirms them "through the principle that all professionals involved may not, by virtue of their integration with other professionals, reduce their responsibilities below those which apply to a non-integrated environment. . . ." ²¹¹

B. Regulation of MDPs

It was not until the adoption of Canons 33 through 35 in the 1920s that the ABA passed rules that began to impact how lawyers can deliver legal services, prohibiting partnerships between lawyers and nonlawyers when any of the partnership's business consists of the practice of law. Canon 34 prohibited fee sharing,²¹² and Canon 35 made an exhortatory plea, reminding lawyers to not be controlled by any intervening person or business between lawyer and client.²¹³ The Code of Professional Responsibility of 1969 incorporated Canons 33 through 35 without much amendment into the version of Rule 5.4 that we have today.

1. The 1990s-2010s. At the end of the 1990s and the years following the turn of the century, global focus convened on MDPs, considered by some as "the most important problem facing the legal profession" at the time.²¹⁴ The catalyst for international regulatory interest in MDPs was the development of the business operations of the Big Five (now Big Four) accounting firms, which led efforts for reform to partner with lawyers in various European countries.²¹⁵ Lawyers and nonlawyers in countries outside of the U.S. began to offer MDP services to clients because regulatory restrictions in those jurisdictions were less stringent. In 1996, the International Bar Association created a standing committee to study MDPs globally.²¹⁶ In September 1998, the committee recommended that

²¹⁰ *Id.*

²¹¹ *Id.* See generally Michael W. Loudenslager, *Cover Me: The Effects of Attorney-Accountant Multidisciplinary Practice on the Protections of the Attorney-Client Privilege*, 53 BAYLOR L. REV. 33, 48 (2001).

²¹² ABA CANONS OF PROF. ETHICS No. 34 (1928).

²¹³ *Id.* No. 35.

²¹⁴ See ABA COMM'N ON MULTIDISCIPLINARY PRAC., *General Information Form*, <http://www.abanet.org/cpr/mdpgeninfor.html>; see also Richard Pena, *Where Do We Go from Here?*, 62 TEX. B.J. 328, 330 (1999).

²¹⁵ Dzienkowski, *supra* note __, at 84; Loudenslager, *supra* note __, at 48.

²¹⁶ Christensen, *At the Helm*, *supra* note __, at 376.

BLACK MARKET LAW FIRMS (DRAFT)

regulators allow MDPs, so long as the client and “public interests are adequately protected.”²¹⁷

The ABA, concerned about the impact that this recommendation would have on international MDPs and the U.S. global legal market share, appointed a special commission called the Commission on Multidisciplinary Practice to investigate and report on MDP practices in the U.S.²¹⁸ A year later, the Commission recommended that “the Model Rules of Professional Conduct be amended, subject to certain restrictions, to permit a lawyer to partner with a nonlawyer even if the activities of the enterprise consisted of the practice of law and to share legal fees with a nonlawyer.”²¹⁹ However, the ABA ignored its Commission’s recommendation,²²⁰ arguing that fee sharing and ownership between lawyers and nonlawyers threaten an attorney’s independent judgment.²²¹

In the years immediately following the ABA’s recommendation, a majority of the state bar associations or their equivalents conducted independent studies of MDPs.²²² The responsive actions from state bar associations ranged from conducting no study at all,²²³ to conducting a formal study without making a recommendation,²²⁴ to making a recommendation to reject MDPs and protect the “core values” of the profession,²²⁵ to making a recommendation to allow and regulate MDPs with different levels of integration among professionals.²²⁶ The District of Columbia is the only jurisdiction in the U.S., however, to have formally approved the operation of MDPs and amended its Rules of Professional Conduct to allow a certain limited form of MDP, namely the Command and Control Model.²²⁷ The ABA recommendation and the mixed reactions from the states did not deter, however, the development of MDPs throughout the U.S. Arizona’s formal study, for example, states that de facto MDPs already exist in the state.²²⁸ Market and client

²¹⁷ *Id.* at 376 (citing Bower, *supra* note __, at 186).

²¹⁸ Dzienkowski, *supra* note __, at __.

²¹⁹ ABA COMM’N ON MULTIDISCIPLINARY PRAC., *Updated Background and Informational Report and Request for Comments*, <http://www.abanet.org/cpr/fedmdp.html>; Christensen, *At the Helm*, *supra* note __, at 376-77.

²²⁰ Christensen, *At the Helm*, *supra* note __, at 377; ABA News Release, *American Bar Association Rejects Sharing of Fees with Nonlawyers and Nonlawyer Ownership or Control of Entities that Practice Law*, (July 11, 2000), <http://www.abanet.org/media/jul00/hodrelease.html>.

²²¹ These “core values” are maintaining independence, protecting privilege, and avoiding conflicts of interest.

²²² See generally *ABA State Status Studies*, *supra* note __.

²²³ See *ABA State Status Studies*, *supra* note __.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See *id.*

²²⁷ For a more in-depth discussion of the DC rule, see *infra* Part __.

²²⁸ See *ABA State Status Studies*, *supra* note __. See also Yarbrough, *supra* note __, at 659.

BLACK MARKET LAW FIRMS (DRAFT)

demands for convenience drove the organic development of the MDP industry.²²⁹

In 2009, the ABA created a special “Commission on Ethics 20/20” in order to address the 21st century social change and the evolution of the legal profession.²³⁰ Acutely aware of the status quo in which “U.S. lawyers and law firms [were] increasingly doing business abroad or affiliating with non-U.S. firms that have different business structures than their own,” the Commission sought to consider how to preserve the core values of the legal profession “while simultaneously permitting U.S. lawyers and law firms to participate on a level playing field in a global legal services marketplace.”²³¹ The Working Group on Alternative Business Structures heard evidence that small firms are interested in having non-lawyer partners.²³² In December 2011, Ethics 20/20 published a draft resolution for comment which would amend Model Rule 5.4 to permit non-lawyers to have minority interests in law firms and permit fee-sharing, if, however, the firm only engages in the practice of law.²³³ Based on the comments, however, Ethics 20/20 determined not to recommend that the ABA amend Rule 5.4, again leaving MDPs as operating outside of the ethical approval of the ABA.²³⁴

2. *Rule 5.4.* ABA Model Rule of Professional Conduct, Rule 5.4 limits the ability of lawyers to provide professional services in a collaborative professional environment through four distinct but overlapping prohibitions.

a. *No Fee-Sharing.* Subpart (a) of Rule 5.4 provides: “A lawyer or law firm shall not share legal fees with a nonlawyer . . .” This subpart flatly prohibits fee sharing with nonlawyers, except in limited circumstances which do not implicate MDPs.²³⁵ Subpart (a) does go on to provide that a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended the lawyer.²³⁶ But this exception only applies in limited situations when a lawyer is awarded attorneys’ fees, which would likely occur in the course

²²⁹ See Daly, *supra* note __, at 274-75.

²³⁰ See Hill, *supra* note __, at 934; ABA COMM’N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 1 (Aug. 2012). (http://www.americanbar.org/conect/dam/aba/administrative/ethics_2020/201205_08_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf).

²³¹ See Hill, *supra* note __, at 934-35.

²³² *Id.* at 935; Jamie S. Gorelick & Michael Traynor, *For Comment: Discussion Paper on Alternative Law Practice Structures 2* (Dec. 2, 2011).

²³³ ABA COMM’N ON ETHICS 20/20, DISCUSSION DRAFT FOR COMMENT: ALTERNATIVE LAW PRACTICE STRUCTURES __ (Dec. 2, 2011).

²³⁴ See Hill, *supra* note __, at 941; Joan C. Rogers, *Ethics 20/20 Ditches Idea of Recommending Option for Nonlawyer Owners in Law Firms*, 28 ABA/BNA LAWYERS’ MANUAL ON PROF’L CONDUCT 250, 251 (2012).

²³⁵ ABA R. PROF. CONDUCT, R. 5.4(a) (YEAR). For the complete text of Model Rule 5.4, see Appendix A.

²³⁶ *Id.* R. 5.4(a)(1-3).

BLACK MARKET LAW FIRMS (DRAFT)

of providing democratic-based services and only in a litigation setting. This exception would thus not implicate fee-sharing with a nonprofit in the course of providing transactional or economic-based services, such as fee-sharing in the course of holding a wills and end of life directive workshop. The prohibition on fee sharing is thus a broad proscription.

b. No Partnerships. Subpart (b) of Rule 5.4 provides: “A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.”²³⁷ While a simple rule, its implications are vast. First, this subpart prohibits partnerships with a nonlawyer in *any* of the activities of the partnership consist of the practice of law, which implicates the generally undefined but far-reaching definition of the “practice of law.” Thus, looking at D.C.’s definition of the practice of law as an example, the “practice of law” includes not only litigation and transactional services, but also counseling on how to manage a client’s legal needs and furnishing the attorneys to provide those services.²³⁸ Both Vista Law and Axiom Law potentially violate this part of the rule if they have nonlawyer partners.²³⁹ Both provide attorneys on short and long term bases to fill unmet organizational in house needs, and Axiom Law also provides legal business consulting services to clients, structuring legal needs for efficiency and cost.²⁴⁰

This subpart has also caused a great deal of consternation among legal practitioners because of its unclear implications on non-profit partnerships or MDPs. The Rules do not further define what it means by a “partnership” at least not in a manner that distinguishes between for profit and non-profit activities. A common law definition of partnership—two or more persons associating to sell a good or service for a profit—suggests that this rule should only apply to for-profit partnerships.²⁴¹ However, some argue that relying on the common law definition of “partnership” in this context is too ambiguous, and that non-profit MDPs need a specific rule.²⁴² In fact, the definitions for purposes of the rules seem to turn on whether the entity provides professional legal services.²⁴³ Further, each state will have a different, nuanced definition of what constitutes a “partnership” for purposes of Rule 5.4, and a survey of state ethic’s opinions on the matter indicate that whether non-profit MDPs are also prohibited under subpart (b) is up to each state’s interpretation.²⁴⁴ Also, subpart (d) of the rule, discussed below, which makes an explicit reference to “for profit” activities, supports the

²³⁷ *Id.* R. 5.4(b).

²³⁸ D.C. R. PRACTICE, R. 49 (YEAR).

²³⁹ *See infra* Part I.C.

²⁴⁰ Dzienkowski, *supra* note __, at 3008.

²⁴¹ BLACK’S LAW DICTIONARY, *partnership* (3d ed. pocket ed.), at 523.

²⁴² *See* Brustin, *supra* note __, at 864-65 (discussing how rules should be clarified to allow non-profit MDPs).

²⁴³ *See* ABA R. PROF. CONDUCT, R. 1.0 (YEAR).

²⁴⁴ *See* Formal Opinion 87, *Collaboration with Non-Lawyers in Preparation and Marketing of Estate Planning Documents*, July 14, 1990, Colorado Ethics Handbook.

BLACK MARKET LAW FIRMS (DRAFT)

argument that non-profits are not meant to be excluded from subpart (b) like they are from subpart (d). Finally, if non-profits are excluded, then what rules regulate them? Are they free to otherwise ignore the remainder of Rule 5.4?

c. Maintain Professional Independence. Subpart (c) provides: “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.”²⁴⁵ This subsection gets at the heart of the matter, and requires that a lawyer not permit any one with monetary or other influence over the lawyer to direct or regulate the professional independence of a lawyer.²⁴⁶ Few scholars have issues with this aspect of the Rule; this author has not found any arguments that favor somehow diminishing the importance of maintaining a lawyer’s professional judgment, nor does this author think this duty should change. This position is not taken merely as a hallmark to the lawyer’s duty to remain steadfast in the face of despotism,²⁴⁷ but also based off of our recent dealings with lawyers involved in the Enron scandal while employed by the now defunct accounting firm Arthur Anderson, who many argue allowed the accounting firm to force the attorneys working at Arthur Anderson to turn a blind eye to the improper “special purpose entities” to hide risks that Enron could not financially bare.²⁴⁸ While the Arthur Anderson example is “tricky” because of the claim that their attorneys were “practicing tax,” they were lawyers working with tax laws, nonetheless, and we have a pretty evident example from past experience how damaging and far reaching the repeated impingement of a lawyer’s professional judgment can be. No one is arguing that we should somehow lessen or remove this “core value” of the legal profession.

d. For Profit Professional Law Practice Restrictions. Subpart (d) provides: “A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if: (1) a nonlawyer owns any interest therein, . . . (2) a nonlawyer is a corporate director or officer therefor or occupies the position of similar responsibility in any form of association other than a corporation; or (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.” The scope of subpart (d) is also broad. It prohibits any type of ownership, either active or passive, by a nonlawyer. That, coupled with subpart (a), nonlawyers are thus not able to be owners or share fees with lawyers. Further, nonlawyers cannot have any board authority or managerial authority in the legal organization. This relegates the nonlawyer to the status of an employee, in the same way that an associate

²⁴⁵ ABA R. PROF. CONDUCT, R. 5.4(c) (YEAR).

²⁴⁶ *Id.*

²⁴⁷ See *infra* Part I.A.1.

²⁴⁸ Steven L. Schwarcz, *Enron and the Use and Abuse of Special Purpose Entities in Corporate Structures*, 70 U. CINN. L. REV. 1309, 1310-11 (2002).

BLACK MARKET LAW FIRMS (DRAFT)

attorney without the opportunity to make partner would be. One of the critiques of Rule 5.4 is that it requires any nonlawyer involved to be an employee and does not provide the professional the opportunity for managerial or ownership if she were providing professional services without the collaboration of the legal services side.²⁴⁹ Finally, nonlawyers cannot direct or control the activities of the lawyer, which is meant to reinforce the lawyer's duty to maintain its professional independence.

Because subpart (d) explicitly applies to law practices for a profit, the rule is still unclear on how it applies, if at all, to non-profit MDPs and legal services organizations. Does this mean, for example, that Rule 5.4(d) does not apply to non-profits? In other words, can a non-profit law firm have a nonlawyer as a director or corporate officer or its equivalent managerial position? Further, a lawyer still cannot share fees with the non-profit professional and partner unless court awarded in a litigation setting. It is unclear from the rules what restrictions apply to non-profit MDPs where all parties involved are not for profit.

3. *D.C. Rule 5.4.* The District of Columbia is the only jurisdiction to take positive steps to amend its Rules of Professional Conduct to allow for Command and Control-type MDPs.²⁵⁰ DC's Rule 5.4 permits fee-sharing and partnerships among professionals in an MDP, but the business must meet certain requirements that limit the nature of services an authorized MDP can offer, requiring that the business' sole purpose must be the provision of legal services,²⁵¹ all owners and managers must abide by the DC Rules of Professional conduct,²⁵² lawyers must have a supervisory capacity over and responsibility for any non-lawyers as if they were lawyers,²⁵³ and the business must put these requirements in writing.²⁵⁴ Thus, while the DC rules seem to explicitly authorize fee-sharing and for profit MDPs, the type of MDPs who could operate legally under these rules still resemble traditional standalone law firms today in which lawyers have managerial authority over all associates and paralegals. What this rule then allows is a law firm's ability to work with accountants or financial planners, for example, who might work in-house at the law firm but are still supervised by the lawyer-managers to assist clients. Subsection (b) specifically limits the participation of non-lawyers to "individuals," excluding other business entities, such as accounting firms from participating in the DC MDP model.²⁵⁵

²⁴⁹ See D.C. RULES OF PROF. CONDUCT, R. 5.4, cmt. [3], [7] (YEAR).

²⁵⁰ *Id.* R. 5.4.

²⁵¹ *Id.* R. 5.4(b).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

C. Current MDP Debate

With the accounting profession's latest introduction of PwC's ILC Legal and Deloitte's legal partnership, the legal profession in the U.S. must again and with renewed vigor address the implications of Rule 5.4 and MDPs. Most of the current debate in favor of continuing to ban MDPs still center around protecting the "core values," but also more explicitly address concerns about maintaining the lawyers' market shares and the potential disintegration and segmentation of the profession, continuing to use "unauthorized practice of law" as a saber to maintain a monopoly over legal services.²⁵⁶ Others accepted this underlying motivation and argued that "core values" was no excuse to ignore market forces and to preclude investigating ways in which the legal profession could adapt in order to protect its sustainability and necessity in the delivery of legal and law related services.²⁵⁷ Most of the arguments supporting recognition and regulation of MDPs focus on maintaining and improving global and national competitiveness, supporting innovations in the legal services market, improving holistic client outcomes, and improving lawyer professional satisfaction with collaborative and non-traditional law firm practice models.

1. *For Continued Ban.* Since the MDP debates first began in the late 1990s, the most prominent and colorful voice against recognizing MDPs has been Lawrence J. Fox, the former vice president of the ABA and a partner at a prominent Philadelphia law firm.²⁵⁸ Fox's main rallying cries center around preserving the professional independence of lawyers, ensuring loyalty, and maintaining confidentiality.²⁵⁹ These are three of the "core values" of the legal profession that do not have a theoretical or doctrinal parallel in the accounting profession.²⁶⁰ Similarly, scholars often raise the directly conflicting duties of confidentiality of lawyers and mandatory reporting requirements of social workers in lawyer-social worker MDPs.²⁶¹ Arguments which relied upon the importance of upholding the "core values" of lawyers carried the day in the late 1990s²⁶²

²⁵⁶ See Paton, *Redux*, *supra* note __, at 2198; Hill, *supra* note __, at 945; Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1137 (2000); Burnele V. Powell, *Flight from the Center, Is It Just or Just About Money?*, 84 MINN. L. REV. 1439, __ (2000).

²⁵⁷ See Dzienkowski & Peroni, *supra* note __, at 90.

²⁵⁸ See Fox, *Hawks*, *supra* note __; Hearings Before the Commission on MDP (written remarks of Lawrence J. Fox) (<http://www.abanet.org/cpr/fox1.html>).

²⁵⁹ See Fox, *Hawks*, *supra* note __, at 1102-04.

²⁶⁰ See Dzienkowski, *supra* note __, at 138. *But see* 26 U.S.C. § 7525 (Supp. IV 1998) (Congress created specialized tax practitioner-client privilege).

²⁶¹ See Jean Koh Peters, *Concrete Strategies for Managing Ethically-Based Conflicts Between Children's Lawyers and Consulting Social Workers Who Serve the Same Client*, KY. CHILDREN'S RTS. J., Mar. 1991, at 15; Wydra, *supra* note __, at 1527-28.

²⁶² Dzienkowski, *supra* note __, at 135-36.

BLACK MARKET LAW FIRMS (DRAFT)

and shrouded the state-by-state studies that each state performed in the early 2000s. For the states rejecting the adoption of MDPs, each directly or implicitly alluded to preserving the core values of professional independence, loyalty, competence, and confidentiality.²⁶³

Considering the potential implications of fee sharing and nonlawyer ownership on these relevant core values, the concerns of those who oppose MDPs are worth consideration. And MDPs do pose risks to a lawyer's professional independence, which requires that we proceed with thoughtful consideration as to how to protect clients while promoting innovation and efficient services.

a. Professional Independence of a Lawyer. The argument for maintaining Rule 5.4 as-is provides that a lawyer employed, paid, or controlled by a nonlawyer supervisor or corporate officer might compromise her independence to bend to the larger desires of the organization at the expense of her professional judgment. While the economic pressure is a valid concern, there are practical ways that lawyers working in MDPs set up processes and procedures where nonlawyers have no control or management over the substance of the legal services provided.

b. Duty of Confidentiality. In the context of MDPs, how to address the lawyer's duty of confidentiality is another valid concern. One can imagine a situation in which a client is speaking with a social worker and a lawyer working together in a non-profit MDP, who thinks that the conversation is confidential and discloses something that may implicate or trigger the social worker's mandatory reporting requirement.²⁶⁴ To address this quite real concern, D.C.'s Rule 5.4 requires flatly that the nonlawyers involved in the MDP are subject to the lawyer's ethical rules.²⁶⁵ But the D.C. rule does not address how an MDP should address confidentiality when the nonlawyer professional might have a reporting requirement.²⁶⁶ MDPs take numerous approaches to dealing with the conflicting reporting and confidentiality duties, but the most common appears to be acquiring informed consent from the client about the nature of the collaborative services, the differing confidentiality and reporting duties, and the consent from the client to receiving legal services in the MDP setting.

c. Duty to Avoid Conflicts of Interest. Less practical information exists on how MDPs address and handle potential conflicts of interest. The issues arise when considering how far the lawyer's duty to avoid conflicts of interest extend to nonlawyers in the MDP. Should the conflicts extend to all professional services, or just legal services? Should the conflicts rules be imputed to nonlawyers in all MDP entity types, or only the fully integrated ones? Should MDPs only be conflicted out of

²⁶³ See *infra* note ____.

²⁶⁴ <https://www.childwelfare.gov/pubPDFs/manda.pdf>.

²⁶⁵ See D.C. RULES OF PROF. CONDUCT, R. 5.4(b) (YEAR).

²⁶⁶ See *id.*

BLACK MARKET LAW FIRMS (DRAFT)

certain litigation based work or transactional work based on content? The potential scope and reach of the lawyer's rules on conflicts of interest in an MDP is a valid concern considering the potential harm to a client, especially in a litigation-based MDP. Even in transactional MDPs, conflicts are key. PwC and ILC Legal, for example, are structured so that the law firm will not provide legal services to PwC's auditing clients.²⁶⁷ This rule based on content of the representation also addresses the confidentiality duties of the lawyers and the public auditing function of the accountants involved.

d. Protection of the Legal Profession. When the ABA Commission recommended that the ABA allow some regulated form of MDPs, at least those who continued to oppose MDPs were more open about their fears of the end of self-regulation, instead of clinging to rhetoric about core values.²⁶⁸ While some commentators during the late 1990s hearings also reported on fears of "blending" the legal profession with others,²⁶⁹ during the 2010s, the competition undercurrent was more explicitly the focus. The debate turned then not on how to preserve the core values, but how to compete with the accounting profession while "avoiding the distasteful notion of picking up a divorce at a Wal-Mart."²⁷⁰ With the 2017 opening of PwC's ILC Legal in D.C., those who oppose MDPs will be hard pressed to deny the benefits to corporate clients and the competitive advantages that MDPs provide. Arguments for a ban would have to center around protecting clients, as there has been little evidence that the caliber of legal services provided through MDPs is less stringent than in a traditional, stand-alone law firm setting.

2. For Recognition and Regulation. The majority of the modern legal scholarship supports some form of recognition and regulation of MDPs. The reasons in support of allowing MDPs range from maintaining an inter-professional competitive advantage, improving client services by providing holistic and one-stop-shopping, and creating more client choice, to improving the professional and personal satisfaction of lawyers as a viable alternative to traditional law firm life.

Other scholars use the MDP example as a case study to make larger critiques of the regulation of the legal profession.²⁷¹ Many scholars

²⁶⁷ See Johnson, *supra* note __.

²⁶⁸ See Hill, *supra* note __, at 942.

²⁶⁹ See Swan, *supra* note __, at 158.

²⁷⁰ Poser, *supra* note __, at 99.

²⁷¹ See Gillian K. Hadfield & Deborah Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. __ (YEAR); Hadfield, *Legal Barriers*, *supra* note __, at 1692; Matheson & Favorite, *Multidisciplinary Practice and the Future of the Legal Profession: Considering a Role for Independent Directors*, 32 LOY. U. CHI. L. J. 577 (YEAR); Paul D. Patton, *Cooperation, Co-Option, or Coercion*, 2010 PROF. LAW 165 (YEAR); Swan, *supra* note __, at 153; Nnona, *Situating Multidisciplinary Practices within Social History: A Systemic Analysis of Inter-Professional Competition*, 80 ST. JOHNS L. REV. 849 (YEAR).

looked to advancements made in Australia, European countries, and Canada for comparison.²⁷² Some scholars used market and regulatory approaches to develop models for MDPs in the U.S.²⁷³ Others, motivated by the need to more efficiently service the needs of both low income and sophisticated clients, provided empirical data on the need to serve such clients.²⁷⁴

In our post-regulatory competition state,²⁷⁵ arguments about market competitiveness may have the most impact today.²⁷⁶ In 2015, the Big Four accounting firms employed 8,500 attorneys worldwide.²⁷⁷ Many lawyers working in accounting firms state that they are not in violation of Rule 5.4 because they are “practicing tax” and not “practicing law.” Our MDP prohibition “compel[s] such expatriates to characterize the services they provide as something other than ‘legal services’ and we exclude such offering from the bar’s ethical and disciplinary system.”²⁷⁸ Because of this fissure, the Big Four accounting firms have brought “the sexy back” into the auditing business by slowly expanding their services into consulting, financial planning, legal management and strategy, and legal services.²⁷⁹ These Big Four firms are also more risk-bearing, due to their size, and have historically taken risks and been able to survive, either through mergers or continued market growth after failed compliance or lost public confidence.²⁸⁰ In order to stay remotely competitive with accounting firms, the legal profession needs to make some moves up top within the regulatory scheme to allow its large firms to diversify as well.

²⁷² See Christensen, *At the Helm*, *supra* note __, at 391-92; Duncan, *The Rise of Multidisciplinary Practices in Europe and the Future of the Global Legal Profession Following Arthur v. Netherlands Bar Assoc.*, 9 TUL. J. INT’L. COMP. L. 537 (YEAR); Katherine Harrison, *Multidisciplinary Practices Changing the Global View of the Legal Profession*, 21 U. PA. J. INT’L. ECON. L. 879 (YEAR); Paton, *MDP Redux*, *supra* note __, at __; Paton, *Rock and a Hard Place*, *supra* note __, at 87.

²⁷³ See Dzienkowski & Peroni, *supra* note __, at 206.

²⁷⁴ See Gillian K. Hadfield, *Higher Demand, Lower Supply, A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L. J. 129 (YEAR); Gillian K. Hadfield, *Legal Infrastructure and the New Economy*, 8 IS:J.L. & POL’Y INFO. AGE 1 (2012).

²⁷⁵ See Julian Webb, *Regulating Lawyers in a Liberalized Legal Services Market: The Role of Education and Training*, 24 STAN. L. & POL’Y REV. 533, 535 (2013).

²⁷⁶ See Johnson, *supra* note __.

²⁷⁷ See Bruch, *supra* note __. Bruch compares the Big Four’s lawyers to large global law firm numbers. If ranked with the law firms, the Big Four would rank 6th (PwC, 2,500 lawyers in 85 countries), 9th (KMG, 2,200 lawyers in 53 countries), 10th (Ernst & Young, 2,000 lawyers in 76 countries), and 11th (Deloitte, 1,800 lawyers in 69 countries) globally for lawyer employment.

²⁷⁸ Harrison, 920-21 (2000).

²⁷⁹ See Fox, *Hawks*, *supra* note __, at 1098 (arguing that the audit business alone promised slow growth and little romance).

²⁸⁰ See Farrell, *Accounting Firms and the Unauthorized Practice of Law: Who Is the Bar Really Trying to Protect?*, 33 IND. L. REV. 599, 599 (2000); Kenneth Li, *Merger of Price Waterhouse, Coopers Firm Creates “Big 5,”* BUFF. NEWS, Sept. 19, 1997, at A12.

BLACK MARKET LAW FIRMS (DRAFT)

Recognizing and regulating MDPs can also benefit low and moderate income clients. Grassroots support for MDPs is overwhelmingly in favor of MDP recognition and regulation as well. Regardless of the increased competitiveness of such a move, MDP proponents have argued for years that MDPs improve client outcomes and access to justice, providing convenient one-stop-shopping, as well as holistic professional services.²⁸¹ Such holistic care provides clients, especially low and moderate income clients, with professional care that they often do not even know they need.²⁸² Consumers appear to receive a more convenient and comprehensive experience.

There are even federal and state programs that fund social justice MDPs because of their improved access to justice,²⁸³ and the ABA's own white paper on "unregulated legal service providers ("LSPs")," included as part of the 2016 *Report of the Future of Legal Services*, recommends some form of recognition, whether performed by lawyers or nonlawyers.²⁸⁴ The practical arguments in favor of MDP recognition can actually work together with explicit fears about professional competition to create an environment where lawyers preserve their core values and cultivate their entrepreneurial spirits.

Attorneys who offer services through MDPs report more professional satisfaction, as an MDP allows them to break away from the traditional law firm 2000 hour/year billing model.²⁸⁵ MDPs also provide for a more collaborative working environment for attorneys, who see firsthand the positive impacts that holistic professional services have on clients.²⁸⁶ MDPs also cultivate lawyers' entrepreneurial spirits, and the new collaborations and improved client efficiencies increase methods to offer new unbundled legal and professional services to new markets.²⁸⁷ To stay competitive and to continue these positive improvements for clients and lawyers, the legal profession must re-assess and re-open its inquiry into recognizing MDPs on a much larger scale and with renewed vigor.

If we do nothing, then we will be casting our legal entrepreneurs into a precarious position where they must risk ethical compliance to pursue innovation service delivery models to respond to market

²⁸¹ See Poser, *supra* note __, at 95.

²⁸² See George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession's Shift to a Corporate Paradigm*, 70 *FORDHAM L. REV.* 775, 802 (2001).

²⁸³ For example, the Abandoned Infants Assistance Program at the federal level and through various sources at the state level provided funding for the MDP operating in New Mexico discussed *supra* note __. Trubek & Farnham, *supra* note __, at 232.

²⁸⁴ 2016 ABA REPORT, *supra* note __, at 66.

²⁸⁵ See Poser, *supra* note __, at 114.

²⁸⁶ See *id.*; Statement of John Dzienkowski to ABA Comm'n on Multidisciplinary Practice (Apr. 8, 1999) ("[A] common partnership fosters a shared culture and produces a consistently high work product with uniform attention to professional standards.").

²⁸⁷ See Phoebe A. Haddon, *The MDP Controversy: What Legal Educators Should Know*, 50 *J. LEGAL EDUC.* 504, 516 (2000).

competition and clients demands for efficiency and choice. Laurel S. Terry, a foremost authority on MDPs in the U.S. and abroad and who testified in support of MDPs during the ABA's hearings, predicted that continuing to ban MDPs would result in "two worlds of lawyers, one regulated and one unregulated."²⁸⁸ She continues, "This parallel world of lawyers—some regulated and some unregulated—will only become larger as MDPs proliferate."²⁸⁹ In that sense, Terry's prediction came true. As there is a growing sector of lawyers who practice in non-legal firms under the guise of providing tax or non-legal work, who claim not to be engaged in the practice of law.²⁹⁰

Whether Terry's assessment of the potential proliferation of MDPs is accurate remains to be seen. Since the state-by-state commissions that studied MDPs in the early 2000s, there is relatively little empirical data about the actual number of MDPs and how they operate, so an actual full snap shot or cross section of the vibrancy and variety of U.S. MDP offerings does not exist.²⁹¹ Until it does, their full extent and reach will remain a mystery because of their continued outlaw and because those involved are not always apt to volunteer such information.

She also warned that she considers the world of unregulated MDPs "dangerous: it will breed disrespect for the law and legal ethics rules, and it may create a race to the bottom. Some lawyers can obtain a competitive advantage by ignoring the legal ethics rules."²⁹² From the MDPs and other alternative legal service providers studied in this Article, lawyers in MDPs do attempt to stay competitive, but do not appear to have ignored their fundamental duties of confidentiality and conflicts of interest, even if they ignore the fee-sharing and nonlawyer ownership limits of Rule 5.4.²⁹³

Lawyers have not simply shed their ethical duties to their clients in their quest to stay competitive. They practice in MDPs despite the potential risks because of their commitment to providing holistic and efficient professional services to clients and to improving the professional satisfaction of lawyers in a changing professional world. Since the MDP debates began, lawyers who opposed their recognition rallied that those lawyers and other professionals who practiced in an MDP engage in civil disobedience every day.²⁹⁴ While these statements were likely made with a critical and shocking affect, this language actually belies these lawyers' larger place in effecting change.

²⁸⁸ Terry, *Primer*, *supra* note __, at 920.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at __.

²⁹¹ *See cf.* Daly, *supra* note __, at 247. This author plans to conduct an empirical study in order to gather more information on the operations of U.S. MDPs.

²⁹² Terry, *Primer*, *supra* note __, at 920.

²⁹³ *See* Poser, *supra* note __, at 122.

²⁹⁴ *See supra* note __.

3. *Call to Recognize and Regulate.* This Article calls for recognition and regulation of all forms of MDPs, with some limits. We should recognize and regulate MDPs because of the impact of PwC and Deloitte in “striking first,” as viewed through the lens of “first-to-market” theories,²⁹⁵ demonstrates how the accountants have already gained a huge competitive advantage in the national market for transactional legal and tax services. Further, the old arguments about needing to prevent the proliferation of MDPs are now stale: MDPs do exist; attempts to ignore them have failed to deter them.²⁹⁶ And now we have global market actors prominently establishing them in the corporate sector. Finally, if we recognize and regulate them, lawyers will still have the opportunity to respond by leveraging the market monopoly that they currently enjoy.

Lawyers in the U.S. should be able to provide legal services under the MDP practice model because the need to stay competitive globally with the Big Four accounting firms is more imperative than ever, as the battle has now come to our shores.²⁹⁷ The impact of PwC and Deloitte in “striking first” is demonstrated through a discussion of first-to-market impact. In Lieberman and Montgomery’s 1988 paper, “First Mover Advantages,” they argue that companies who are “first movers” gain three distinct advantages.²⁹⁸ First, the first mover has the advantage of technological leadership, which means that the first mover can often secure patent rights with valuable economic advantages as well meaning that the first mover will be able to use that advantage to continue to refine its product or offering that is responsive to its market and ensuring continuing customer satisfaction.²⁹⁹ Second, the first mover gains control over resources, including cornering access points to the market or valuable geographic locations that can only support one market actor.³⁰⁰ Finally, the first mover has an advantage because it is simply inefficient and inconvenient for a customer to switch a newer brand.³⁰¹

While Lieberman and Montgomery also provide a thorough analysis of the disadvantages of being the first mover and the advantages of being a later mover,³⁰² the longer the accountants are able to capitalize on these advantages without any real competition from global legal players, the longer they are able to build their market legitimacy and become the dominant player in this type of multidisciplinary service offering. The need to stay competitive and respond to this initial move is more important than ever.

²⁹⁵ Lieberman & Montgomery, *supra* note __, at __.

²⁹⁶ See *supra* Part __.

²⁹⁷ The battle has literally come to our shores—PwC’s ILC is situated in D.C. on the East Coast, and Deloitte’s law firm is situated in San Francisco on the West Coast.

²⁹⁸ Lieberman and Montgomery, *supra* note __, at __.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

BLACK MARKET LAW FIRMS (DRAFT)

One feature of our regulatory framework that we can leverage is our current control over the legal services market monopoly and the attendant approval and accreditation process. As Ogus suggested, one model of a competing market competition would be to have all potential providers of a professional service submit their firms for approval to the current regulator,³⁰³ which would then require some independent third party public agent to neutrally oversee the guidelines.³⁰⁴ In this instance, because accountants do not have the authority to wholesale engage in the practice of law, lawyers could use the legitimizing feature of our current self-regulatory approval process to recognize, regulate, and develop best standards and practices for firms with non-lawyer owners or directors. Because of this approval and accreditation labeling, lawyers would be able to market a higher quality, ABA and state-approved, ethical MDP to potential corporate and small firm clients.

Because of its ability to market a higher quality product, allowing MDPs would at least allow lawyers to shape the market for MDPs at elite levels that would compete with the accountant majority controlled MDPs. Whether we approve of the self-regulatory and market monopoly legal system we current exist within or not, we can at least use our monopoly on approval and accreditation to brand lawyer controlled MDPs with the legitimizing feature of regulatory approval and regulation in order to market a higher quality and less risky product to corporate and small firm clients. The time has come to recognize these developments and those innovative legal entrepreneurs by regulating MDPs or else we will continue to place the legal profession at a competitive disadvantage. However, the longer that lawyers wait to recognize and regulate MDPs, the more time the accountants will have to refine their inter-professional services, collaborations, and client efficiencies, further capturing solidifying its dominance in the global MDP market. The accountants have already turned the tide; the lawyers must be allowed to set sail or remain marooned on the beach indefinitely.

III. BLACK MARKET LAW FIRMS: A REGULATORY MODEL

Heresies are experiments in man's unsatisfied search for truth.—H.G. Wells³⁰⁵

By classifying, we create distinctions. Classifying along lines of distinction allows us to make order out of chaos and select features that we want to highlight.³⁰⁶ In attempts to classify MDPs, scholars and commentators have used numerous definitions and classification systems

³⁰³ Ogus, *supra* note __, at __.

³⁰⁴ *Id.* at __.

³⁰⁵ H.G. WELLS, *ANSATA: AN INDICTMENT OF THE ROMAN CATHOLIC CHURCH* __ (1943).

³⁰⁶ Lois Mai Chan, *Classification, Present and Future*, in *Cataloguing and Classification Quarterly*.

to encompass the multiverse of structural, organizational, and managerial permutations of MDPs. Sometimes these classification methods are pure academic ordering and attempt to clarify the scope and status of MDPs in a descriptive and comparative manner. While each of these classification methods shed clarity on different distinguishing features of MDPs, few actually use the classifications to impact potential proposed legislation.

This Article proposes a new classification scheme for MDPs, which classifies them as either white, gray, or black market MDPs, based on their level of risk of pressure on the lawyers involved to compromise their professional independence. If the line of distinction is one of risk, then black market MDPs are those that pose the most risk, while white market MDPs are those that present little to no risk. Under this novel classification scheme, black market law firms would be MDPs with non-lawyer majority ownership and control, regardless of whether attorneys have the right to direct legal matters. The benefits of this new classification scheme are that in addition to providing a new clarifying perspective, it also provides familiar and incentivizing language that can only benefit lawyers—painting non-lawyer controlled MDPs in the negative framing of a black market service provider.

This new classification scheme also informs the proposed model for recognizing and regulating MDPs, arguing for general non-proscriptive legislation recognizing all forms of MDPs, including fully integrated models. This Part then argues that proscriptive requirements should work within the existing regulatory framework that lawyers currently enjoy to restrict lawyer participation in non-lawyer controlled MDPs. This would allow the legal profession to recognize and offer MDP forms that have lawyer majority ownership and control.

A. Regulatory Models

Scholars and commentators attempt to categorize MDPs using a variety of systems and nomenclature. Most classify or divide MDPs based essentially on their descriptions or types and how they are structured and operate in the real world.³⁰⁷ These definitions distinguish types based on ownership and control,³⁰⁸ on size,³⁰⁹ on integration level between professionals,³¹⁰ and on clientele.³¹¹ Some of these classifications are purely explanatory, while others have larger implications in proposed regulatory approaches. Scholars also propose a wide variety of proposed regulatory solutions to address MDPs, ranging from allowing full fee-

³⁰⁷ See, e.g., *ABA State Status Studies*, *supra* note __.

³⁰⁸ See Burnele V. Powell, *Flight from the Center: Is It Just or Just About Money*, 84 MINN. L. REV. 1439, 1452 (2000) [hereinafter *Flight from the Center*].

³⁰⁹ See Poser, *supra* note __, at 130.

³¹⁰ See Terry, *Primer*, *supra* note __, at 889.

³¹¹ See Poser, *supra* note __, at 130.

sharing and nonlawyer ownership to allowing only “small” MDPs composed of fewer than 30 professionals.³¹²

1. *Classification Schemes and Regulatory Approaches.* The five prototypes previously discussed above distinguish MDPs based on how they are structured and their level of integration.³¹³ Similarly, most scholarly classifications follow this lead, dividing MDPs based on their factual operations, such as based on the percentages of lawyer versus nonlawyer ownership and control, size and clientele of the MDP, and the level of integration of the nonlawyers into the legal entity.

The California Bar’s Task Force on the study of MDPs published its findings and recommendations during the early 2000 wave of MDP study, and the publication repeatedly made a distinction between “pure form” MDPs and those simply regarded as MDPs that are not “pure form.”³¹⁴ A “pure form” MDP, according to the California Bar Task Force, requires a fully integrated structure, where all professional services are housed under the same entity.³¹⁵ This classification scheme, based on pure versus impure MDPs, focuses solely on the level of integration of the nonlawyer professionals. Under this definition, only the Fully Integrated prototype would be considered a “pure form” MDP; all other prototypes and MDPs with differing associational relationships with the nonlawyer professionals are impure MDPs.

Other classifications focus on the level of control that lawyers in the MDP have versus nonlawyer control. According to Powell, there are “regular” MDPs and “irregular” or “non-regular” MDPs.³¹⁶ According to Powell, regular MDPs are those controlled by lawyers and irregular or non-regular MDPs are controlled by non-lawyers.³¹⁷ Powell further explains that MDPs where lawyers are the ultimate decision makers over legal issues facing clients, despite nonlawyers having the “penultimate” authority for the overall MDP, should be considered regular MDPs and regulated accordingly.³¹⁸ Similarly, Terry, writing a comparative piece about German MDP regulations, divides MDPs up into “lawyer dominated” vs. “nonlawyer dominated” MDPs.³¹⁹ The purpose of focusing on control implicates the larger concerns about the effect of nonlawyer MDP control and management on a “subordinate” attorney’s independent and professional judgment.³²⁰

³¹² *Id.*

³¹³ *Id.*

³¹⁴ http://www.calbar.ca.gov/portals/0/documents/reports/2001_MDP-Report.pdf.

³¹⁵ See ABA State Status Studies, *supra* note __.

³¹⁶ See Powell, *Flight from the Center*, *supra* note __, at 1452; Burnele V. Powell, *Looking Ahead to the Alpha Jurisdiction: Some Considerations that the First MDP Jurisdiction Will Want to Think About*, 36 WAKE FOREST L. REV. 101, 107 n. 32 (2001).

³¹⁷ *Id.*

³¹⁸ Powell, *Flight from the Center*, *supra* note __, at __.

³¹⁹ Laurel S. Terry, *German MDPs: Lessons to Learn*, 84 MINN. L. REV. 1547, __ (2002).

³²⁰ *Id.* at __.

BLACK MARKET LAW FIRMS (DRAFT)

One classification scheme has made some substantial permanent ingress into the MDP debate lexicon and distinguishes “Wall Street MDPs” from “Main Street MDPs.”³²¹ Terry is also credited with creating this nomenclature back in 1999.³²² This classification scheme focuses on the clientele, whether they be well funded corporate clients or low and moderate income clients, and separates MDPs into which sector they primarily serve.³²³ Poser takes it a step further and argues that Main Street MDPs should also be limited to 30 non-staff professionals, imposing a size restriction. Poser provides that family law and estate planning are often considered practices that a Main Street MDP could provide more efficiently.³²⁴ The purpose of making this distinction between service sectors was to point out the complete failure of the debates to address the impact of the bans on Main Street MDPs and their clients.

For those scholars that do support the recognition and regulation of MDPs, some use these definitions and classifications as a means to shape their regulatory proposals. As Terry points out, ignoring MDPs and trying to stop MDPs have proved fruitless endeavors; regulation is the only option left.³²⁵ The scholarly regulatory proposals range from broad authorization for MDPs to very limited authorization for Main Street MDPs;³²⁶ others focus on creating specialized procedures for judicial certification and auditing of MDPs;³²⁷ still others suggest creating a separate regulatory scheme for MDPs centered around “entity regulation” and not individual attorney regulation.³²⁸ Some of the MDP definitions and classifications are essential to understanding these proposals, while some have less utility in crafting a workable solution.

The first grouping of regulations ranges from broad authorization for MDP structures to highly limited and regulated MDP structures. Dzienkowski, in his written testimony before the ABA’s MDP Commission, argued that broad authorization for MDPs and broad rules would allow for different types of MDPs to develop.³²⁹ Within that broad authorization, however, others suggest more particularized rules for MDPs in which fee-sharing and ownership are in common with nonlawyer professionals. Terry, after doing an intensive comparison to Germany’s MDP regulations, proposes that all forms of MDPs should be allowed, including Fully Integrated MDPs, with no requirement that there be a lawyer majority owner requirement,³³⁰ and then proposes specific rules for addressing confidentiality and conflicts of interest

³²¹ Poser, *supra* note __, at 123; Terry, *Primer*, *supra* note __, at __.

³²² Terry, *A Primer*, *supra* note __, at 882-83; Poser, *supra* note __, at 97.

³²³ Poser, *supra* note __, at 130.

³²⁴ *Id.* at 97.

³²⁵ Terry, *Primer*, *supra* note __, at 920.

³²⁶ Dzienkowski, *supra* note __, at __.

³²⁷ See Terry, *Primer*, *supra* note __, at 932-34.

³²⁸ See, e.g., Terry, *Primer*, *supra* note __, at 891-92.

³²⁹ See Statement of Professor John Dzienkowski, *supra* note __, at __.

³³⁰ Terry, *German MDPs*, *supra* note __, at 1611.

concerns.³³¹ To address ethics within the MDP, Terry proposes that (1) MDPs should be banned from providing simultaneous legal and audit services to the same clients;³³² (2) Nonlawyers should comply with the lawyers' rules of confidentiality with respect to information they learn in the course of assisting the lawyer with legal issues, but not when the disclosure has no connection to the legal services;³³³ and (3) Conflicts of interest should be imputed firm-wide, unless the firm is not actually fully integrated and the law firm is a separate entity from the accounting or nonlawyer professional services offered.³³⁴ She also proposes, like other scholars, that there should be some sort of certification and audit process for MDPs.³³⁵ She finally proposed that all MDPs, regardless of size, should be subject to the same rules.³³⁶

These broad authorizations for MDPs are in stark contrast to those that suggest that MDPs should be allowed only in certain highly restrictive forms. Poser argues that only Main Street MDPs should be recognized and regulated because the conflicts and independence threats that face Wall Street MDPs are not present in small MDPs.³³⁷ For that reason, "informed consent" from the client about the structure of the MDP and its implications on the lawyers' confidentiality duties should be enough to cover these concerns.³³⁸ She also suggests a ban on MDPs selling goods or products to clients for which any of the professionals in the MDP would receive a commission, like insurance policies or real estate transactions.³³⁹ While she defines Main Street MDPs in terms of the clientele that they serve—low and moderate income clients—she defines and limits the MDP authorization to only those MDPs with 30 or fewer professionals.³⁴⁰ This narrow authorization will allow Main Street MDPs, she argues, to become testing grounds and "laboratories of the future" for innovative legal services delivery.³⁴¹ Like Terry, she also suggests judicial regulation and certification of MDPs.³⁴²

Similar to Poser, Brustin argues that, if anything, the ABA should clarify its Rules to allow "non-profit MDPs."³⁴³ Some of the language in Model Rule 5.4 suggests that it applies to lawyers practicing for a profit, but disagreement exists over whether the partnership prohibition also in

³³¹ *Id.* at 1618-23.

³³² *Id.* at 1616-17. This is the approach that PwC/ILC plans to take with respect to its legal and auditing clients.

³³³ *Id.* at 1618.

³³⁴ *Id.* at 1620-21.

³³⁵ *Id.* at 1619.

³³⁶ *Id.* at 1623.

³³⁷ Poser, *supra* note __, at 102-03.

³³⁸ *Id.* at 130.

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.* at 97.

³⁴² *Id.*

³⁴³ Brustin, *supra* note __, at 4.

Rule 5.4 precludes non-profits from forming MDPs, regardless of their profit generating and potential fee-sharing activities. Brustin argued that non-profit MDPs, often synonymous with Main Street MDPs, “have demonstrated ethical viability and practical benefits.”³⁴⁴

The audit or certification requirement is akin to other suggestions that MDPs appoint special MDP counsel or MDP independent directors. As Terry points out, her research on German MDPs leads her to recommend certification and auditing of MDPs.³⁴⁵ Matheson and Favorite proposed in 2001 that MDPs should employ independent directors because “[i]ndependent directors have proven their value to corporation’s shareholders by serving as watchdogs over their investment.”³⁴⁶ Similarly, independent legal directors of MDPs would ensure the MDP is operating ethically in order to protect clients from any issues of confidentiality, conflicts of interest, and lawyer independence.³⁴⁷

Some scholars also argue that, like in France and Germany, the Rules of Professional Conduct should regulate the MDP entity and not the individual attorneys involved in the MDP.³⁴⁸ This proposal seems controversial, as other scholars, such as Harrison, argue that the “goal should be to assert ethical regulation over all attorneys offering legal services, regardless of the economic or organizational structure of their business.”³⁴⁹ The possibility of entity regulation, instead of individual attorney regulation, is similar to the D.C. requirement now that nonlawyers in the MDP have to abide by the lawyers’ ethical rules, especially with respect to confidentiality and conflicts of interest.³⁵⁰

2. *Analysis of Classification and Regulatory Schemes.* While the classification and regulatory proposals have certainly driven the MDP debate forward, and it is probable that many of the proposals would result in efficient regulation of MDPs in a manner that preserves the lawyer’s duties of independence, confidentiality, and avoiding conflicts of interest, it is too difficult to capture the full panoply of potential methods for organizing and operating an MDP by focusing on classification types based on factual MDP forms. All of the classifications presented further depend on some factual description of the MDP that unifies all other MDPs with that same characteristic, despite other structural or organizational differences that may exist within each defined class.³⁵¹ Some of these classifications also reflect snap shots along the timeline of MDP understanding and growth and make less sense in today’s MDP

³⁴⁴ Poser, *supra* note __, at 116 (citing Brustin, *supra* note __, at 4).

³⁴⁵ Terry, *German MDPs*, *supra* note __, at 1619.

³⁴⁶ Matheson & Favorite, *supra* note __, at 610.

³⁴⁷ *Id.* at 611.

³⁴⁸ See Terry, *German MDPs*, *supra* note __, at 1623.

³⁴⁹ Katherine L. Harrison, *Multidisciplinary Practices: Changing the Global View of the Legal Profession*, 21 U. PA. J. INT’L ECON. L. 879, 920-21 (2000).

³⁵⁰ D.C. R. PROF. CONDUCT R. 5.4 (YEAR).

³⁵¹ See *supra* Part __.

landscape.³⁵² Further, not all of the classifications have much utility outside of providing clarifying explanations, and these classifications do little in terms of setting up a platform for potential regulation.

The “pure” versus “impure” monikers, in which only MDPs that are fully integrated and operate under a single entity are considered “pure,” are helpful in distinguishing the entity or affiliation method of different MDPs.³⁵³ But the “impure” label essentially refers to every other type of MDP that does not operate under a single entity and in that regard is a bit broad. The “regular” versus “irregular” or “non-regular” MDP labels, which refer to MDPs that are controlled by lawyers versus ones that are controlled by nonlawyer professions, respectively,³⁵⁴ is helpful for pointing out potential additional regulatory rules that might apply to nonlawyer controlled MDPs; it is the label itself that is problematic. Irregular MDPs are meant to refer to those not controlled by lawyers, and this author is not convinced that nonlawyer-controlled (i.e., accountant owned) MDPs are the exception, instead of the new norm. Again, without hard empirical data to determine the proliferation of lawyer owned and controlled MDPs versus nonlawyer owned and controlled MDPs,³⁵⁵ it is hard to ignore the impact of the Big Four accounting firms’ utilization of MDPs and to continue to call those industry MDPs “irregular.” Further, in reality, there may not be a meaningful lawyer majority versus nonlawyer majority. Some small firm MDPs may have one attorney working alongside one social worker or one other accountant. If the goals of these MDPs is to respect the contributions and positive impact of collective client representation,³⁵⁶ that forcing MDPs into a situation where they are either lawyer controlled or not is anathema to the underlying practical structure and purposes behind why some of these professionals in MDPs choose to associate.

The most beneficial but also the most theoretically problematic is the “Wall Street” versus “Main Street” MDP classification. The main crux of the Wall Street/Main Street classification is the clientele and the potential size of the MDP. Main Street lawyers are simply described as “lawyers practicing in smaller communities or small firms.”³⁵⁷ Wall Street MDPs are described as “large business organizations such as accounting firms or banks hiring lawyers to give legal advice to their large corporate and business clients.”³⁵⁸ Presumably and implicit in that description is that the client work will lower dollar in value and will include non-profit collaborative MDPs as well. Focusing on the community and the clientele is problematic, however, because there is no theoretical reason

³⁵² See Powell, *Flight from the Center*, *supra* note __, at 1452-53.

³⁵³ See Paton, *Redux*, *supra* note __, at 2226-27.

³⁵⁴ Powell, *Flight from the Center*, *supra* note __, at 1452-53.

³⁵⁵ See Poser, *supra* note __, at 133.

³⁵⁶ *Id.* at 109.

³⁵⁷ Terry, *A Primer*, *supra* note __, at 882.

³⁵⁸ Poser, *supra* note __, at 96.

BLACK MARKET LAW FIRMS (DRAFT)

to treat either type of client differently from the lawyer's perspective and with respect to, again, the three things essentially at stake here, confidentiality, conflicts, and independence.

This classification becomes even more problematic when considering the types of services both Wall Street and Main Street MDPs would provide. As a review of Dzienkowski's Clearspire model shows, for example, a Wall Street MDP like Clearspire provides both litigation and transactional services, in addition to its consulting and technology consulting arm.³⁵⁹ Clearspire's legal services encompass the democratic function of law and the economic function of law. Similarly, many smaller MDPs that serve low income or pro bono clients also operate in both representational spheres. While the market impact of Wall Street and Main Street MDPs will differ and smaller firms might actually present fewer ethical risks to lawyer independence, this author is not convinced, along with Terry, that MDPs should be categorized and distinguished based on size.³⁶⁰ This author also finds no basis for limiting MDP recognition to only small firms with 30 or fewer professionals. That distinction really addresses control, as Wall Street MDPs are known as those Big Four accounting firm-style MDPs in which accountants outnumber and outrank the attorneys.

B. White, Gray, and Black Market Law Firms

While these previous categorizations are insightful and explanatory, this Article argues that we should craft categories or classifications of MDP models along lines of risk, classifying MDPs as either white, gray, or black market law firms based on the percentage of majority and minority control of non-lawyer owners and managers, specifically in the context of fully integrated MDPs. This approach reframes how to classify MDPs because it does not focus on describing the factual realities of the myriad of different MDP forms, but instead focuses on the permissible or impermissible risks of pressure to subvert a lawyer's independent judgment. The rhetorical impact of additionally labeling non-lawyer majority controlled MDPs as "black market" also assists the legal profession's move into the regulated MDP space because it negatively labels the current accountant-controlled MDPs in a negative light.³⁶¹

By focusing on the degree of non-lawyer ownership and control—the real risk at stake in both maintaining the lawyer's legal market and maintaining the lawyer's independence—we can craft a regulatory solution that addresses those risks. The regulation should also be generally proscriptive, promoting innovation and collaboration in legal

³⁵⁹ Dzienkowski, *supra* note __, at 3002-03.

³⁶⁰ Terry, *German MDPs*, *supra* note __, at 1623.

³⁶¹ See *supra* note __.

BLACK MARKET LAW FIRMS (DRAFT)

services firm structures and payment schemes, while providing more explicit limitations on ownership percentages of fully integrated MDPs.

1. *Definition.* *Black's Law Dictionary* defines “black market” as “[a]n illegal market for goods that are controlled or prohibited by the government, such as the underground market for prescription drugs.”³⁶² The definition provided also refers the information seeker to the term “shadow economy,” which *Black's Law* defines as “[c]ollectively, the unregistered economic activities that contribute to a country’s gross national product. A shadow economy may involve the legal and illegal production of goods and services, including gambling, prostitution, and drug-dealing, as well as barter transactions and unreported incomes.— Also termed *black economy*; *black market*; *underground economy*.”³⁶³ In general terms, black market “refers to a market for certain goods or services which are routinely traded in a discreet or underground manner contrary to the laws or regulations of the government in power. Black markets are commonly operated because of the substantial number of buyers who wish to evade restrictive government price controls or inconvenient rationing schemes, to avoid paying heavy taxes on the good or service in question, or simply to be able to obtain forbidden goods or services that the government prohibits consumers from purchasing.”³⁶⁴

Relatedly, the gray market refers to an industry in which the goods or services offered are partly authorized by the regulatory powers, but some aspects of the good or service provided are illegal. *Black's Law Dictionary* defines “gray market” as “[a] market in which the seller uses legal but sometimes unethical methods to avoid a manufacturer’s distribution chain and thereby sell goods (esp. imported goods) at prices lower than those envisioned by the manufacturer.”³⁶⁵ Often used in the context of importing foreign goods, a popular scholarly focus in the 1980s,³⁶⁶ the gray market however also refers more generally to an industry for goods and services in which the good or service is authorized or legal under certain regulatory schemes, but not in the manner or distribution method employed by the good or service provider.³⁶⁷ *Cambridge English Dictionary*, for example, defines “the gray market” as

³⁶² BLACK’S LAW DICTIONARY 988-89 (8th ed., ed. Bryan A. Garner).

³⁶³ *Id.* at 1407.

³⁶⁴ *Black Market Law and Legal Definition*, USLEGAL.COM (<https://definitions.uslegal.com/b/black-market/>).

³⁶⁵ BLACK’S LAW DICTIONARY, *supra* note __, at 989.

³⁶⁶ See, e.g., Nancy K. Dahl, *Grey Market Imports: Stemming the Tide*, 65 OR. L. REV. 123, 123 (1986); Randall J. Towres, *Copiat v. United States, The Grey Market Gets Greyer*, 14 DEL. J. CORP. L. 107, 107 (1989).

³⁶⁷ See Margaret Rouse, *gray market*, WHATIS.COM (<http://whatis.techtarget.com/definition/gray-market>) (“The term *gray market* reflects the somewhat ambiguous middle-ground between the completely legal products sold on the white market and the clearly illegal products sold on the black market.”)

BLACK MARKET LAW FIRMS (DRAFT)

“an unofficial but not completely illegal system in which products are bought and sold[.]”³⁶⁸

2. *Application.* Applying these definitions in the context of structural and operational features of MDPs, this Article introduces a new categorization method that classifies MDPs according to their compliance with current ethical rules and a realistic framework for addressing instance which risk subverting lawyer independence. Despite the current ethical rules banning all partnerships between lawyers and nonlawyers and banning fee sharing between lawyers and nonlawyers, lawyers and non-lawyers frequently engage in collaborations and partnerships across the full spectrum of MDP forms and have managed to develop internal processes to maintain their ethical obligations to clients, delivering holistic professional services where the legal services are managed and controlled by lawyers.

With this framework in mind, this Article posits that MDPs should be categorized as either black, gray, or white market MDPs in accordance with the following contours:

- *Black market.* Non-lawyer equal or majority ownership or management, regardless of whether legal services are managed exclusively by lawyers, under a fully integrated model.
- *Gray market.* Lawyer majority owned and controlled, and legal services are managed exclusively by lawyers, under a fully integrated model.
- *White market.* All other MDP prototypes and non-profit MDPs.

Under these classifications, the focus zeros in on the fully integrated practice form and addresses control and management voting majorities that could compromise a lawyer’s duty of professional independence, avoiding conflicts of interest, and maintaining confidentiality. Therefore, any MDPs in which non-lawyers hold a co-equal or majority percentage of the ownership and control of the MDP would be classified as a black market law firm because such an ownership dynamic presents the most risk that a lawyer employed by or a minority interest owner of the MDP would be more susceptible for compromises of integrity. Where there is a risk, there, that a law firm could become

³⁶⁸ “The grey market,” CAMBRIDGE DICTIONARY (YEAR), (<http://dictionary.cambridge.org/us/dictionary/english/grey-market>). The *Macmillan Dictionary* defines “gray market” as “the business of secretly buying and selling goods in a way that is not illegal but that is considered morally wrong.” “Grey Market,” MACMILLAN DICTIONARY (<http://www.macmillandictionary.com/dictionary/british/grey-market>).

“captive” to non-lawyer owners, then such a risk would push that particular MDP into black market territory.

Gray market MDPs, much like their colloquial definitions imply, are MDPs in which lawyers and non-lawyers may partner together, but they do so in a way that does not potentially lead to a strong risk that the lawyers involved in the MDP would compromise their ethical duties. Gray market MDPs could thus be fully integrated MDPs where lawyers and non-lawyers both share control and ownership, but where lawyers retain majority ownership and control and there is no possibility of that percentage dynamic flipping to non-lawyer majority control. Lawyers would, of course, be required to maintain their independence on overseeing legal advice to clients. The Slater & Gordon initial public offering in Australia, for example, resulted in an MDP where the original partner-shareholders owned 77.5 million shares in the firm.³⁶⁹ They sold 17.3 million of those original partner-shares and issued 17.7 million new shares, all of which were acquired by professional and institutional investors.³⁷⁰ At the close of the offering, the original partner-shareholders held 63% of the voting rights, where outside investors held 37%.³⁷¹ In this example, the Slater & Gordon MDP would be a gray market MDP because lawyers still retain and the ownership scheme is designed to maintain lawyer control and voting rights over non-lawyer players.

The D.C. command and control model would also be considered a gray market MDP because lawyers and non-lawyer individuals can partner together to share fees and provide holistic professional services.³⁷² In all gray market MDP models, it is also required that lawyers maintain control and direction over the legal services.

White market MDPs would capture the majority of the collaborative models we see today, including non-fully integrated MDP models, such as the ancillary business model, the strategic alliance model, and the cooperative model. It would also include MDP who are non-profit collaborations, where the financial incentives to compromise professional lawyer integrity are absent.³⁷³ Further, classifying non-profit MDPs as white market MDPs reflects how society and the public seems to regard these types of collaborations, which is with favor and less skepticism for client-centeredness and improved client holistic outcomes. For many scholars writing in the area, non-profit MDPs are a non-issue, and argue that the ethical rules should at least specifically exclude a carve-out for non-profit MDPs or fee-sharing with non-profit organizations.³⁷⁴

³⁶⁹ Milton Regan, Jr., *Lawyers, Symbols, and Money: Outside Investment in Law Firms*, 27 Penn St. Int'l L. Rev. 407 (2008); Justin Petzold, *Firm Offers: Are Publicly Traded Law Firms Abroad Indicative of the Future of the United States Legal Sector?*, 2009 WIS. L. REV. 67 (2009).

³⁷⁰ Petzold, *supra* note __, at __.

³⁷¹ *Id.*

³⁷² See D.C. Rule 5.4 (YEAR).

³⁷³ See Brustin, *supra* note __, at 4.

³⁷⁴ *Id.*

BLACK MARKET LAW FIRMS (DRAFT)

These new classification schemes thus focus on the level of risk that non-lawyer ownership or control could subvert or influence a lawyer's duty to provide independent and professional judgment and other hold lawyers "captive" to the wishes of the non-lawyers. This classification, which makes a distinction along the percentage of ownership in the MDP between lawyer majority controlled and non-lawyer majority controlled MDPs, reflects Germany's current approach to regulated MDP entities, which makes some distinctions along these lines as well.³⁷⁵

C. Proposed Regulatory Approach

1. Non-Proscriptive Ethical Rule. Like other scholarly recommendations, this Article supports, at the very least, that the ABA should amend Rule 5.4 and revise the language that prohibits fee sharing and partnerships between lawyers and nonlawyers.³⁷⁶ This move would incentivize more states to lift their individual bans as well and perhaps cause D.C. to expand upon its limited rule. The regulation authorizing MDPs should also be broad and non-proscriptive, meaning the authorization should not prohibit different types of associational forms, fee-sharing forms, or nonlawyer management or ownership, nor otherwise focus on prohibitions. The attorneys and professionals involved should, following the trend in innovations in legal services delivery, be allowed to structure and associate with one another in any manner they find sufficient, including under a fully integrated model.

The authorization should be broader than D.C.'s rules, which allows for a limited form of MDP, because, as Poser has pointed out, D.C.'s strict authorization has "not lead to an influx" of MDP operations in the area.³⁷⁷ Because those rules are so limiting, those practitioners that are wary of operating outside of the rules of professional conduct opt not to form MDPs at all.³⁷⁸ A general non-proscriptive regulation that allows for the operation of MDPs would thus recognize the positive and beneficial contributions of MDPs for all clientele, thus encouraging the continued development of innovative and collaborative professional services delivery without fear of retribution or sanction by state ethics boards.

Also in contrast to the D.C. rule, the MDP should not need to have, as its "sole purpose" the delivery of legal services.³⁷⁹ Again, the D.C. requirement subordinates the role of the nonlawyer professionals involved and makes the MDP resemble a traditional law firm structure. If the "sole purpose" of the MDP has to be the delivery of legal services,

³⁷⁵ See Terry, *German MDPs*, *supra* note __, at __.

³⁷⁶ See *supra* note __.

³⁷⁷ Poser, *supra* note __, at __.

³⁷⁸ *Id.* at __.

³⁷⁹ D.C. R. PROF. CONDUCT R. 5.4 (YEAR).

then any work the nonlawyer professional does must be in furtherance of completing and addressing the client's legal issues.

Enlarging the purposes allowed for authorized MDPs would also recognize the potential for market growth that adding a nonlegal department can bring to the MDP and the lawyers involved. One of the benefits of an MDP is that it attracts more clients with diverse legal needs because such clients might only seek the assistance of the MDP initially for its financial planning or engineering services and then will understand the full scope of legal services that the client needs as well. What if a client further only wants financial planning or consulting services from the MDP and may have no discreet legal tasks? The purpose of the MDP should be to serve all the professional needs of the client, not just the legal ones.

Additionally, the DC rule specifically limits the participation of non-lawyers to "individuals," excluding other business entities, such as accounting firms, consulting firms, or medical practices, from participating in the DC MDP model.³⁸⁰ This aims at preventing a law firm from creating an MDP with an accounting firm, for example, because of the implicit fears about lawyers becoming "captive" to the accounting firm, as some argue they have become for insurance companies.³⁸¹ General non-proscriptive regulation should allow business entities to provide capital to law firms in exchange for equity, as long as there are other safeguards in place to protect the core values of the profession and lawyer control over the delivery of the legal services. Allowing entity non-lawyer owners would also allow firms more flexibility and creativity in their strategies for raising capital.

The prohibition on partnerships and fee-sharing between lawyers and non-lawyers should thus be removed from the ethical restrictions and replaced with general, non-proscriptive language that allows lawyers to both share fees and share ownership with non-lawyers. This general authorization for MDPs would thus legitimize all grey market MDPs and continue to cast a wary light on all black market, or non-lawyer majority owned and controlled MDPs.

2. *Revisions to Rule 5.4—Regulating for Risks and Outcomes.* In order to address how to regulate for risks, we must address the existing regulatory framework and limitations. While the best approach may be a wholesale revision of the ethical codes in order to distinguish between practice fields and to create practice forms that promote innovation and collaboration, the possibility of re-structuring and re-framing the entirety of the ethics rules is beyond the scope of this Article and, practically, beyond current possibility considering the history and development of the U.S. legal profession and the foundational features of our ethical codes. Therefore, because we are not yet eliminating our self-regulatory

³⁸⁰ *Id.*

³⁸¹ See generally Terry, *Primer*, *supra* note __, at 927-28; Yarbrough, *supra* note __, at 659.

monopoly over the delivery of legal and law related services,³⁸² we cannot yet regulate entities based on the types of services offered or their ownership structures,³⁸³ and we cannot regulate the accountants except as to file unauthorized practice claims against them,³⁸⁴ we must devise regulation that fits within those limitations that regulate risks and promotes collaborative outcomes and allows lawyers to practice in forms that keep them nationally and globally competitive.

Proscriptive limitations in the revised ethical rules would thus prevent lawyers from practicing in black market MDPs and instead authorizing practice forms in which lawyers will maintain the ownership and voting majorities. The limitation on fee-sharing, non-lawyer ownership of firms that provide legal services, and non-lawyer management or control should remain in the statute, but only focus on preserving the “core values” of protecting clients and maintaining lawyer independence.

By only authorizing gray and white market MDPs, the proscriptions would essentially cast black market MDPs as unregulated, offering potential clients of the MDP services model a riskier, potentially lesser quality product, implying by the strength of the “black market” rhetoric that non-lawyer controlled MDPs should be avoided. Further, by legitimizing and regulating gray market MDPs, the legal profession has the opportunity to utilize the branding function of its licensure monopoly to market and provide a higher quality, more ethically sound MDP,³⁸⁵ not subject to risks of economic capture and ruin which besieged Arthur Anderson in the Enron collapse.³⁸⁶ Licensing authorities could even consider expanding its accreditation for MDPs as an entity, which would allow accountant-backed MDPs to apply for licensure, but then only approve such MDPs where lawyers maintain that majority control and ownership. By leveraging its ability to offer a licensed MDP practice form, the legal profession can not only learn from the traditional “mistakes” that often plague “first movers,” but ensure that it remains competitive on a larger scale with encroaching accounting firms and encourages innovation at elite practice levels.

D. Ethical Proscriptions

Where the concept of strict regulation to protect against potential client harms emerges is in the regulations that would remain in Rule 5.4 to require MDPs to set up a transparent procedural process to address the collaborative nature of the MDP, the confidentiality rules, and the conflicts of interest duties of the MDP. This procedural process should

³⁸² See *supra* Part __.

³⁸³ See *supra* Part __.

³⁸⁴ See *supra* Part __.

³⁸⁵ See *supra* Part __.

³⁸⁶ See *supra* Part __.

include, like many scholars have argued before, an informed consent requirement in which clients consent to receiving services from an MDP, to how the collaborative nature affects the duty of confidentiality, and to how the MDP handles potential conflicts of interest.

The more important theoretical and practical question within this space is to determine to what extent the rules for confidentiality and conflicts of interest should apply to the nonlawyers involved in the MDP. Terry provides the most detailed and comprehensive scheme for dealing with these particular issue. His solution is to propose that nonlawyers in the MDP should be subject to the same conflicts of interest rules as the lawyers, so conflicts would be imputed throughout the entire firm. Akin to that, Terry suggests that if the MDP also provides auditing services, that the MDP should not offer auditing and legal services to the same organization. This, of course, is how PwC's ILC Legal is attempting to address the conflicts of interest provision in its black market MDP, but prohibiting ILC Legal to provide legal services to any organization clients that also receive auditing services from PwC.³⁸⁷ The wall between the MDP providing both auditing and legal services to the same organizational client is meant to protect against the accountant's lack of any parallel ethical rule with respect to conflicts.³⁸⁸

On this issue, this author agrees with Terry that conflicts should be imputed to the entire MDP, especially if the MDP is fully integrated under one entity type.³⁸⁹ This author also understands Terry's hesitation to include an imputation rule if the MDP is not fully integrated and operates as two separate entities.³⁹⁰ In that instance, the conflicts of interest rules should not necessarily be imputed to the other professionals involved in an MDP, especially considering the nature of the legal work that the legal arm of the MDP might be providing. For example, if the lawyers in a non-fully integrated MDP provide transactional legal services to an organizational client, such as assisting with forming and entity and drafting organization and operational documents such as bylaws or an operating agreement, the conflicts of interest imputation rules should not prevent the same client from going down the hall or down the street to the financial and consulting arm of the MDP to receive counseling on financial packages or marketing strategies. If the financial and consulting arm is also providing auditing services, then this might be an instance in which imputation might occur, but only for auditing, not for other professional services. Here, this is an instance in which bifurcating the dual functions of law could provide different rules for

³⁸⁷ See Bruch, *supra* note __.

³⁸⁸ See *cf.* Terry, *German MDPs*, *supra* note __, at 1594 (discussing how lawyers, accountants, and tax advisors in Germany are subject to the same obligation of confidentiality and privilege as attorneys).

³⁸⁹ Terry, *German MDPs*, *supra* note __, at 1620-21.

³⁹⁰ *Id.*

conflicts.³⁹¹ This imputation rule should apply, for example, if the legal arm is providing democratic services, such as assisting domestic abuse victims, it might be anathema for the social worker arm to provide counseling, for example, to both the victim and the victim's abuser together. Without that bifurcation, however, the imputation rules should apply only in fully integrated MDPs and only when the nonlawyer arm in a bifurcated MDP entity provides auditing services.

As to the confidentiality rules, Terry argues that nonlawyers should be subject to the lawyer's confidentiality rules only if they are assisting the lawyer in providing legal services.³⁹² Here, this author disagrees with Terry and takes quite the opposite approach. Where Terry thinks a confidentiality duty should not apply unless the nonlawyer is assisting with legal matters,³⁹³ this author argues that the confidentiality duty of lawyers should apply to all professionals involved in the MDP unless those professionals have an alternative, positive reporting duty, such as social workers.³⁹⁴ Accountants providing financial or consulting services in an MDP with lawyers, for example, should be subject to the same confidentiality rules as the lawyers out of protection for the client.

This would have two effects: it would impose a duty of confidentiality on all professionals involved and would extend the confidentiality protection to all professional services received, including legal and nonlegal. From a theoretical standpoint, one could also argue that every decision an individual will make, whether it be personal or in business, is somehow law-related or has legal effects.³⁹⁵ In that regard, lawyers working with nonlawyers in an MDP setting will naturally and by design be assisting with related issues. It makes more sense to treat the entirety of the information disclosed confidential, regardless of how directly it relates to the legal services provided. Further, clients who seek assistance from Main Street MDPs or smaller firm MDPs in which only two or three professionals may be affiliated would likely expect that their disclosures about their personal issues, even if unrelated to the direct legal services delivery, should be kept secret by nature of the close interactions between professionals involved in a Main Street MDP.

Further, extending the confidentiality requirement to all professionals involved in the MDP extends the reach of the potential regulatory agencies to regulate the nonlawyers involved in MDPs if the rules are not amended to provide for MDP entity regulation. It also reflects the reality of how the professionals working together would interact. It would be difficult to ask the attorney not to disclose confidential information to an accountant, for example, in discussing the

³⁹¹ See *supra* Part __.

³⁹² Terry, *German MDPs*, *supra* note __, at 1618-19.

³⁹³ *Id.*

³⁹⁴ See Peters, *supra* note __, at 15.

³⁹⁵ See TRACY A. CINOCCA, CAREERS IN THE LAW: SUCCESS WITHOUT COLLEGE 150 (2001).

client's matter without destroying the confidentiality and attorney-client privilege.³⁹⁶ To prevent the destruction of confidentiality, the nonlawyer professionals should also be covered by those confidentiality rules.

E. Counterarguments

The author does acknowledge that this regulatory approach is not without its potential weaknesses. As acknowledged, this regulatory proposal is still existing within a broken system that is unbalanced and can deter innovation. While a better solution may be a whole sale revision of the ethical rules, which changes the approach and perspective in order to account for certain unifying features of the profession as well as some segmented features and differing lawyering tasks,³⁹⁷ this regulatory proposal at least chips away at some of the monopolistic and conflating aspects of the legal profession's self-regulatory system by introducing almost unrestricted practice forms and collaboration structures between lawyers and nonlawyers.

Another potential shortcoming of this proposal is the required regulatory oversight required to ensure ethical compliance on two levels. First, Ogus argued that in self-regulatory systems where one profession enjoys a monopoly, like the legal profession does, the regulating monopoly should submit its criteria for approval to a third party, public body, like a state Congressional committee.³⁹⁸ Second, with the added reporting and writing requirements to maintain the MDP, this requires additional regulatory oversight from state regulators. While both of these oversight and enforcement features add to administrative costs, state oversight of reporting and writing requirements could be as simple as adding a filing feature to the state's secretary of state website for MDP law firms.

Finally, the model still requires that lawyers maintain majority ownership and control over the MDP form, which could continue to perpetuate the professional inequalities within MDPs. Lawyers often report that the nonlawyer professionals involved in an MDP provide services that are just as, or in some cases can be even more, valuable than the legal services provided. Requiring that nonlawyer professionals in an MDP be subordinate to the lawyers perpetuates the monopoly and elevated status that lawyers in the U.S. have come to enjoy and expect, but that perception is changing, and black market MDPs who provide equality of professions in providing professional services recognize that and are often willing to risk potential sanctions for promoting that equality and market advantage.

CONCLUSION

³⁹⁶ *But cf.* Terry, German MDPs, *supra* note __, at 1621.

³⁹⁷ See Remus, *supra* note __, at __.

³⁹⁸ See Ogus, *supra* note __, at __.

It is not the most intellectual of the species that survives; it is not the strongest that survives; but the species that survives is the one that is able best to adapt and adjust to the changing environment in which it finds itself.—Leon C. Megginson³⁹⁹

Regardless of the criticism this Article levels against previous scholarly classifications and regulatory proposals, the purpose of this Article is to act as a wake-up call for the legal profession and to urge the ABA to amend its Model Rules of Professional Conduct to allow for lawyers to stay professionally competitive and provide clients with collaborative and holistic legal and nonlegal services to better serve their needs. The failure to recognize and regulate MDPs over the past three or so decades has created a class of gray and black market legal service providers who operate just outside of the sanctioned ethical rules.

While this Article does critique the legal profession's method of self-regulation and the need to restructure its ethical rules to bifurcate the types of legal services that lawyers provide to clients, such revisions are unlikely to occur before the ABA needs to address the MDP issue again on a practical matter. This Article does argue that the ABA should at least remove its proscriptive ban on MDPs so that other states may feel more comfortable listening to its lawyer constituency and allowing for MDP operations. A broad, non-proscriptive authorization would also continue to fuel the development of additional innovation in the realm of collaborative and innovative legal services delivery, especially for low and moderate income clients, as the ABA's own Committee on the Future of Legal Services stresses the need to do.⁴⁰⁰

Particular rules can be adopted which address issues of lawyer independence, confidentiality, and conflicts of interest in a way that does not harm clients and does not hinder the collaborative structure or equality among professionals involved in an MDP. Further, clients and lawyers who offer services to clients in an MDP demonstrate the benefits of holistic professional services as well. Surely protecting the legal profession at the expense of client services should be the ABA's focal point.

As other countries and scholars provide classification schemes and numerous potential regulatory methods for MDPs, the ABA and the legal profession are failing to grasp the urgency with which lawyers must face this issue head on. While the MDP bans are predicated on stopping the encroachment from the accounting profession into the legal services market, that ship has sailed—time for the legal profession to enter the race.

³⁹⁹ Leon C. Megginson, *Lessons from Europe for American Business*, 44 *SOUTHWESTERN SOCIAL SCIENCE QUARTERLY* 3 (1963) at 4.

⁴⁰⁰ See 2016 ABA REPORT, *supra* note __, at 37.

APPENDIX A**ABA MODEL R. OF PROF. CONDUCT R. 5.4, Professional Independence of a Lawyer**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.