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Symposium Articles

Paradigm Regained: How Competition from Accounting Firms May Help Corporate Attorneys to Recapture the Ethical High Ground

Peter C. Kostant*

I. Introduction

Accounting firms have grown enormously in size and in the variety of services that they provide to corporate clients. Now calling themselves Multi-Disciplinary Practices [hereinafter MDPs],¹ accounting firms have recently hired many licensed attorneys. They now provide not just tax assistance, but also most types of legal services, with the exception of actually appearing in court on behalf of clients.²

* Associate Professor, Roger Williams University School of Law. I would like to thank Dean Harvey Rishikof and acting Dean Bruce Kogan for a summer research grant. Professors John Humbach and Jonathan Gutoff, and Edward M. Medici, Esq., were kind enough to make helpful suggestions. Rory Fazendeiro and Dory Ricci provided useful research assistance. Professor Gail Winson and her entire team of extraordinary law librarians also provided valuable help. I would also like to thank my secretaries Theresa Krusczek and Pauline Borges for their patient and cheerful assistance.

1. Competition from MDPs was a driving force in motivating the American Bar Association (hereinafter "ABA") to analyze the general problems of competition for legal services from non-lawyers. The ABA Commission on Multidisciplinary Practice Report to the House of Delegates released its recommendations on June 8, 1999. See *infra* notes 54-61 and accompanying text; see also *The ABA Commission on Multidisciplinary Practice Report to the House of Delegates* (June 8, 1999) <<http://www.abanet.org/cpr/mdpfinalreport.html>>.

2. In fact, they have recently been empowered to appear in tax court, and under some circumstances non-lawyer practitioners can provide a limited version of the attorney-client privilege. Historically, tax related services have actually been performed by American Institute of Certified Public Accountants' members

Not surprisingly, the organized bar has responded to this new competition with gloomy predictions about the end of professional legal ethics as we know them. At the Pace Law Review Symposium, James Moore, quoting the present chairman of the MDP task force for the American Bar Association [hereinafter ABA], called competition from accountants "not the greatest threat to the legal profession in a generation, but in this century."³ Another eloquent spokesperson for the "organized" legal profession, Lawrence Fox, former chair of the American Bar Association Standing Committee on Ethics, has furnished a "parade of horrors," where clients will no longer have the benefits of strict confidentiality, protection from conflicts of interest will attenuate to the point of being meaningless, and the illustrious American bar will lose its cherished independence.⁴ Ironically, all that this means for the large public corporations that are employing MDPs is that their audit committees, comprised of independent directors, will learn all of the material information that their lawyers know.

Whether or not it is a good thing, competition from MDPs is now a reality for American law firms. Currently, the rules that govern MDPs differ from those governing law firms.⁵ Perhaps

and their firms. Except for tax advice by accounting firms and other "paraprofessionals," "the organized bar has successfully policed the market for legal services in the United States." Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1085 (1997). The tax privilege was formally recognized under the IRS Restructuring and Reform Act of 1998, promulgated as section 7525 of the Internal Revenue Code. See I.R.C. § 7525 (West 1999). The change in the law extends the common law privilege of confidentiality between a client or possible future client and her attorney to tax advice "furnished to a client-taxpayer (or potential client-taxpayer) by any individual who is authorized under Federal law to practice before the IRS." S. REP. NO. 105-174, at 70 (1998). This privilege may be claimed in any non-criminal tax proceeding before the IRS or in the federal courts where the IRS is a party to the proceeding. See *id.* The privilege, however, may not be asserted to prevent the disclosure of information to any regulatory body other than the IRS. See *id.*

3. James C. Moore, *Lawyers and Accountants: Is the Delivery of Legal Services Through the Multidisciplinary Practice in the Best Interests of Clients and the Public?*, 20 PACE L. REV. 33, 33 (1999) (quoting remarks made by Sherwin Simmons at the American Bar Association House of Delegates meeting in Los Angeles, California on Feb. 8, 1999).

4. Lawrence J. Fox, *Fighting for Independence*, 61 PHILA. LAW. 28, 28 (1998).

5. The ABA Commission on Multidisciplinary Practice Report to the House of Delegates released its recommendations on June 8, 1999. See *infra* notes 52-59 and accompanying text. See also *The ABA Commission on Multidisciplinary Practice*

the most important difference concerns client confidentiality. Clients of traditional law firms receive an absolute attorney-client evidentiary privilege,⁶ strict confidentiality,⁷ and the protection, where applicable, of the work-product rule.⁸ Clients of MDPs receive much less expansive confidentiality and no evidentiary privilege or work product protection.⁹ Under current law, an MDP that provides auditing services to a client must disclose all material information when certifying financial statements. The duty to disclose presumably includes information that attorneys working for the MDP attorneys have learned.¹⁰ This "watchdog"¹¹ duty for accounting firms became clearer in 1995 when Congress amended the Securities Exchange Act.¹² Audit firms are now required to notify the Secur-

Report to the House of Delegates (June 8, 1999) <<http://www.abanet.org/cpr/mdpfinalreport.html>>.

6. See 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2296, at 566 (McNaughton ed. 1961) (providing the eight elements of the attorney-client privilege). See also *In re Himmel*, 533 N.E.2d 790 (Ill. 1988).

7. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999). The text of the rule states:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

8. See FED. R. CIV. P. 26 (b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947) (giving protection to written materials obtained or produced by counsel in anticipation of litigation).

9. See *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984).

10. See Fox, *supra* note 4, at 28.

11. Quinton F. Seamons, *Audit Standards and Detection of Fraud Under the Private Securities Litigation Reform Act of 1995*, 24 SEC. REG. L.J. 259, 259 n.1 (1996).

12. The Act became law on December 22, 1995. See *id.* at 260 n.2; see also *infra* note 13.

ities and Exchange Commission [hereinafter SEC] of suspected fraud within one day of the client's failure to correct it.¹³

This article will accept the important premise about MDP competition that Fox decries, namely, that MDPs have a duty, when acting as auditors, to disclose materially harmful information that their lawyers may learn.¹⁴ Rather than causing harm, however, this clarified duty will actually benefit all interested parties: transactional corporate clients, third parties and the legal profession. This article attempts to bring a new perspective to the "crisis in professionalism"¹⁵ discourse by arguing that the legal profession should allow MDP competition. If al-

13. In 1995, Congress adopted Section 301 of the Private Securities Litigation Reform Act of 1995, which requires audit procedures "designed to provide reasonable assurance of detecting illegal acts "that would have a direct and material effect on financial statements." Private Securities Litigation Reform Act of 1995 § 301, 109 Stat. 737. Pursuant to Section 10A, the SEC may modify audit procedures and discipline accountants who fail to meet these new standards. *See id.* §10A. In addition to the "substantial change" that makes auditors watchdogs or detectives, it also makes them whistleblowers. If an accountant detects or becomes aware of information indicating that an illegal act has or may have occurred, regardless of materiality, she must determine whether it is likely that an illegal act has occurred, and if it is likely, she shall consider the possible effect of the illegal act on the financial statements. The auditor must, as soon as "practical," inform the appropriate level of management and assure that the audit committee (or board of directors if there is no audit committee) is adequately informed, unless the illegal act is "clearly inconsequential." If the auditor concludes that the illegal act has a material effect on the financial statements, but senior management and the board have not taken timely and appropriate remedial action, and such nonaction is reasonably expected to warrant departure from a standard audit report or warrant resignation by the accountant, the auditor must state this conclusion in a Section 10A Report to the board of directors. *See* Seamons, *supra* note 11, at 263. The board then must notify the SEC of the Report within one business day. If the board does not act within one business day, the accountant must resign, triggering the requirement that the client file a Report Form 8-K, and the accountant must notify the SEC within one business day. Accountants who fail to comply with Section 10A whistleblowing are subject to civil penalties. *See id.* Section 10A(c) provides a safeharbor protecting accountants from civil liability for whistleblowers. *See id.* § 10A(c). For a helpful discussion of this new statute, *see* Seamons, *supra* note 11, at 262-63.

14. *See infra* notes 34-40 and accompanying text.

15. *See generally* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991); Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911 (1996) (discussing the poor image of lawyers and arguing that any improvement must derive from the concerted efforts of law schools and the bar); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 7 (1993) (discussing the American legal profession crisis and reaching the "gloomy conclusion" that the lawyer-statesman ideal is a thing of the past). *Id.*

lowed to take hold, it could lead to a new model for transactional corporate practice where lawyers can better serve clients, and also feel greater professional satisfaction.¹⁶

This article suggests that the duty of strict confidentiality, as currently interpreted by the organized bar, which can be provided only by lawyers in law firms, is either generally unnecessary for large corporate clients, or is actually counterproductive to their welfare. Thus, one of the reasons that large corporations may be eager to hire MDPs to provide legal services is that MDPs employ confidentiality in a more nuanced and valuable manner.

Part II of this article will discuss some recent developments in MDP competition and the response of the organized bar. Part III examines some reasons for the general crisis of legal professionalism, and the increasingly negative public perception of lawyers. Part IV argues that the traditional dichotomy in transactional practice between the role of accountant and lawyer is not a valid basis for separating the professions. Part V suggests that transactional lawyers working for MDP auditors who take on an auditor's duty to disclose harmful material information might well provide a greater value for their clients and behave more like the lawyer-statesmen of the past.¹⁷ Part V also explains how the new MDP paradigm of transactional law might work by taking a look at a traditional area of legal practice, patent law,¹⁸ in which lawyers have always been held to a standard of complete candor. In this practice, full disclo-

16. Some commentators have criticized Anthony Kronman's, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) for centering on lawyers' needs rather than the clients' needs. See, e.g., David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics*, 108 HARV. L. REV. 458, 459, 469-71 (1994). My suggestions are for better serving corporate clients with increased lawyer satisfaction as a beneficial by-product. See also WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYER'S ETHICS* 111-37 (1998) (discussing the alienation problem caused by the absence of meaningful work, as lawyers, under the dominant view, may become participants in causing injustice).

17. See KRONMAN, *supra* note 15, at 11-17, 364-72 (developing the concept of the "lawyer-statesman"); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 54-56 (1988) (stressing traditional need for attorney independence); Daniel R. Coquillette, *Professionalism: The Deep Theory*, 72 N.C. L. REV. 1271, 1271-77 (1994) (observing decline in importance of attorney's duty to third parties and society).

18. See *infra* notes 135-147 and accompanying text.

sure has worked in a regulatory context and clients have not been harmed.

II. The Perceived "Crisis"¹⁹ for the Legal Profession from Accounting Firm Competition

Throughout the world, the Big Five accounting firms²⁰ are aggressively competing with law firms for legal business. The President of the American Bar Association has said that it is "no secret" that the Big Five intend to offer legal consulting services in the United States.²¹ Accounting firms are providing law-related services in the United States that include not only tax, but also advice in business planning, capital markets, mergers and acquisitions, corporate and securities transactions, and employment and employee benefits.²² In addition to these "business law" areas, accounting firms have also provided litigation support, case valuation, investigation, and alternative dis-

19. The Chinese word for "crisis," *wei ji* is comprised of two characters: *wei*, meaning danger; and *ji*, meaning opportunity or chance. This article will examine the opportunities presented by what many legal commentators are calling the crisis of accounting firm competition.

20. Currently the Big Five are Arthur Andersen, Deloitte & Touche, Price-WaterhouseCoopers, Ernst & Young, and KPMG. Rather than calling themselves accounting firms, they now prefer to be known as "professional service firms." Ward Bower, *A Look at the Rise of Multidisciplinary Partnerships*, 61 PHILA. LAW. 28, 32 n.1 (1998).

This global competition began in Germany, which has permissive rules that allow non-lawyers to own firms that practice law. *See id.* at 27. Countries that allow true MDPs include Germany and Australia. *See id.* In countries that do not yet allow for these mergers, accounting firms typically form contractual networks for close cooperation with law firms. *See id.* at 30. For example, in France, KPMG is affiliated with Fidal which employs 1000 lawyers. *See id.* at 27. Accounting firms have these close network relations with law firms in Hong Kong, Singapore, Canada and in much of Africa and Latin America. *See id.*

In 1998, Arthur Andersen was reported to employ 1500 lawyers making it the world's second largest law firm. *See* Howard C. Coker, *Ancillary Businesses - An Economic Opportunity Or an Ethical Dilemma Threatening Our Profession*, Florida Bar Journal (Nov. 1, 1998) <<http://www.flabar.org/newflabar/publicmediainfo/tfbjournal/nov98-pr.html>>.

21. John Gibeaut & James Podgers, *Feeling the Squeeze: Commission Appointed to Assess Threat from Accountants*, A.B.A. J., Oct. 1998, at 88. The ABA Task Force Report on MDP Competition was submitted to the ABA House of Delegates in August, 1999.

22. *See* Bower, *supra* note 20, at 27; Gianluca Morello, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should be Permitted in the United States*, 21 FORDHAM INT'L. L.J. 190 (1997).

pute resolution.²³ These services are generally characterized as “consulting”²⁴ or “advice and consultation . . . [with] legal components”²⁵ because, with the exception of the District of Columbia, no jurisdiction in the United States allows firms owned wholly or in part by non-lawyers to provide legal services.²⁶ Whatever one calls them, these services constitute a “significant threat”²⁷ to law firms. While state ethics rules formally ban pure MDPs in the United States, there is “tacit acceptance”²⁸ of competition for legal services from MDPs. These firms “continue to flourish”²⁹ and “not a single lawyer in an accounting

23. Bower, *supra* note 20, at 27.

24. Statement of Kathryn A. Oberly Before the ABA Commission on Multidisciplinary Practice (Feb. 4, 1999) <<http://www.abanet.org/cpr/oberly1.html>>.

25. *Id.*

26. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1999).

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

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

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

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

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

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

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

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

(2) a nonlawyer is a corporate director or officer thereof; or

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

Only the District of Columbia has amended Rule 5.4 to allow certain lawyer/non-lawyer partnerships. See Morello, *supra* note 22, at 195.

27. See Morello, *supra* note 22, at n.13.

28. See Fox, *supra* note 4, at 29.

29. See Bower, *supra* note 20, at 30.

firm has been disciplined.”³⁰ To date, most accounting firms have been competing with big U.S. law firms for large corporate clients.³¹ MDPs often advise on complex, international transactions for highly sophisticated clients involving an “inextricable mix of finance, accounting, law and other disciplines.”³²

A. *The Response From the Legal Profession*

Much of the response by the organized bar to the new competition has been harsh, indignant, and conclusory.³³ Lawrence Fox argues that attorneys working for accounting firms violate their ethical duties “every day” and “ignore systematically, and with impunity, the major ethical precepts for which we stand.”³⁴ Fox believes that only lawyers in law firms should be permitted to practice law. He contrasts the practices of law firms with those of accounting firms,³⁵ and concludes that accounting firms have lax rules about conflicts of interest, permit misleading advertising, and allow non-competition agreements.³⁶ Fox postulates that lawyers who do not exclusively own their own firms will inevitably lose their professional independence.³⁷ Perhaps, most importantly, Fox concludes that the new compe-

30. See Fox, *supra* note 4, at 29.

31. See Morello, *supra* note 22, at 192-93. One big firm partner concluded: “It sounds like the bean counters are outcompeting and outinnovating us.” *Id.* at 190.

32. Testimony of Stefan F. Tucker Before the Commission on ABA Multidisciplinary Practice (Feb. 4, 1999) <<http://www.abanet.org/cpr/tucker1.html>>.

33. Commentators like David Wilkins have argued that questions about the regulation of lawyers require concrete comparative institutional analysis. See David B. Wilkins, *How Should We Determine Who Should Regulate Lawyers? - Managing Conflict and Context in Professional Regulation*, 65 *FORDHAM L. REV.* 465 (1996). In responding to accounting firm competition, the organized bar has avoided critical examination of its assumptions and has instead relied upon folklore, intuition, and a fervent belief that its self-interest is justified. This is consistent with the general absence of analysis of the dominant model. See SIMON, *supra* note 16, at 7-11.

34. See Fox, *supra* note 4, at 28. Non-competition agreements among lawyers are generally deemed unenforceable as against public policy because they interfere with client authority.

35. See *id.* at 29.

36. See *id.*

37. This is the traditional rationale for the Model Rules of Professional Conduct, Rule 5.4. Leading commentators argue that the decisive rationale for this provision is “economic protectionism.” GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 799 (2d ed. 1990 & Supp. 1996).

tition victimizes clients because they lose the precious protection of attorney confidentiality.³⁸

Fox's dichotomy is clear. Accountants who are auditors must disclose harmful material information, while lawyers must preserve client confidences. Accounting firms that perform audits for clients, for whom they also provide legal services, would be required to disclose all material information that any of their lawyers learn. To be sure, clients have the right to waive confidentiality in advance,³⁹ alleviating this conflict between roles. Fox, however, becomes quite passionate about this suggestion. "As you and I know," he concludes, "confidentiality is a protection we never ask our clients to waive."⁴⁰

B. *The Response of Accounting Firms*

One area of rhetorical agreement in this discourse is that the only important factor in the debate over competition is client welfare. Not surprisingly, each group reaches a different conclusion.⁴¹ The accounting profession denies the existence of the dangers to clients that the organized bar stresses. Their usual argument is that the ABA's Model Rule of Professional

38. See Fox, *supra* note 4, at 29.

39. See HAZARD & HODES, *supra* note 37, 5.4:102, at 798. Rule 1.6 expressly allows clients to consent to any disclosure. "A lawyer shall not reveal information relating to representation of a client *unless the client consents after consultation*, except for disclosures that are impliedly authorized in order to carry out the representation" MODEL RULES OF PROFESSIONAL CONDUCT Model Rule 1.6 (1999) (emphasis added).

40. See Fox, *supra* note 4, at 28. Fox, an eminent litigator, does not even consider the needs of clients in non-litigation contexts. University of Chicago Law School Dean Daniel Fischel also observed that the legal profession, albeit out of self-interest, has formulated rules that discourage the waiver of confidentiality. See Fischel, *infra* note 64, at 21. One of the most exciting aspects of MDP competition is the potential willingness of clients to waive confidentiality. This directly challenges a bedrock principle of legal ethics, which Stanford Law School Professor William Simon has called the profession's "sacred cow." William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 L. & SOC. INQUIRY 243, 281 (1998) ("confidentiality is a sacred cow in professional discourse"). The Kutak Commission, which drafted the Model Rules, attempted to liberalize an attorney's ethical duties in disclosing confidential information in order to protect third parties. The ABA rejected the liberalizing proposals and adopted Model Rules in 1983 that were more restrictive about disclosure than the prior Model Code of 1969 had been. See also Fischel, *infra* note 64, at 21.

41. See Bower, *supra* note 20, at 30.

Conduct [hereinafter Model Rule] 5.4 is nothing more than transparent economical protectionism for law firms, and provides no meaningful protection for clients.⁴² Yet, knowledgeable clients are flocking to MDPs for the convenience of one-stop shopping. Lawyers working for accounting firms are no less independent than in-house lawyers working in corporations. No one has even suggested that employee lawyers cannot meet their ethical duties. Moreover, in addition to gaining the protection of the model rules, clients of MDPs might further benefit because the American Institute of Certified Public Accountants' [hereinafter AICPA] Code of Professional Conduct Rule 102⁴³ requires independent judgment by lawyers working in accounting firms. Disclosure, Chinese Walls, and informed consent can prevent conflicts of interest among MDP clients.⁴⁴

Some have argued that the purported loss of protection of client confidentiality is really a red herring. One Big Five general counsel testified that there is "little real conflict"⁴⁵ between protecting client confidences and making full disclosure in audits.⁴⁶ While confidentiality flows to clients, counsel should always advise their corporate clients to make full disclosure to their auditors. She explains that companies recognize an independent duty to disclose all material information to their auditors regardless of the attorney-client privilege.⁴⁷ Auditors, who do not receive complete and candid information, must resign or qualify their opinions.⁴⁸

In a similar vein, Stefan Tucker, Chair of the American Bar Association Tax Section, concluded that there is no need to change Model Rule 1.6⁴⁹ since it already allows clients to consent to the disclosure of confidences. According to Tucker, the "concept of privilege is eroding in today's world" and truly informed clients will always consent to full disclosure to their au-

42. See Statement of Kathryn Oberly, *supra* note 24. The Kutak Commission attempted to make Rule 5.4 flexible and meaningful but the ABA completely rejected its draft proposals and instead retained the protectionist policy of the Model Code. See HAZARD & HODES, *supra* note 37, at 5.4:101, 102, at 796-99.

43. See Statement of Kathryn Oberly, *supra* note 24.

44. See *id.*

45. See *id.*

46. See *id.*

47. See *id.*

48. See Statement of Kathryn Oberly, *supra* note 24.

49. See *supra* note 7 (providing the text of Model Rule 1.6).

ditors because it is always in their best interests.⁵⁰ He concludes that when problems arise, they result not from auditors learning of client "confidences," but from lawyers failing to communicate fully and candidly with the client.⁵¹

C. *The Response of the American Bar Association*

On June 8, 1999, the ABA's Commission on Multidisciplinary Practice issued a Report with unanimous recommendations that would allow MDPs to deliver legal services.⁵² The report failed completely to address the key problem of MDPs providing legal services — the necessity of disclosing confidential information to the audit partner who, under certain circumstances, would then have a duty of disclosure. Instead, the Report merely postulates that lawyers in MDPs must provide the same confidentiality to their clients as law firms.⁵³

The commission's recommendations received such severe criticism that they have been tabled, and were not submitted to the ABA House of Delegates in August, 1999 as planned.⁵⁴ One criticism was that lawyers would lose their professional independence if non-lawyers were able to share in profits.⁵⁵ More telling was the refusal of the bar to recognize that a universal

50. Testimony of Stefan F. Tucker, *supra* note 32.

51. *Id.* Tucker believes these failures may result from incompetence, lack of diligence or promptness, arrogance or some combination of these shortcomings.

52. See ABA Commission on Multidisciplinary Practice (Feb. 4, 1999), <<http://www.abanet.org/cpr/mdprecommendation.html>>.

53. Thus, the Commission on Multidisciplinary Practice missed the opportunity to analyze the advantages that contextual rules could provide for the transactional lawyers, including a different standard for confidentiality.

The Report only acknowledges that the Securities and Exchange Commission believes that "auditor independence regulations specifically state that the roles of auditors and attorneys under the federal securities laws are incompatible, and that the SEC has asked the Independence Standards Board for guidance about auditor independence in connection with legal services. In fact, as discussed *infra* at notes 58-59 and accompanying text, the SEC criticism has been more severe.

54. On August 9, 1999, the ABA House of Delegates "overwhelmingly voted to defer approval of multidisciplinary practices . . . until they are proven to be no threat to the lawyers' independence." Darryl Van Duch, *ABA Honchos Differ Over MDP Vote*, 21 NAT. L.J., Aug. 23, 1999, at A6. This means that more hearings on MDPs are necessary and that the ABA could consider additional proposals before any changes are implemented. See *No Multidisciplinary Practice for Now: ABA House of Delegates Refuses to Consider Changes Without More Study*, 85 A.B.A. J. 23 (Sept. 1999).

55. See HAZARD & HODES, *supra* note 37, 5.4:102, at 798.

set of ethical rules is harmful to a profession that provides services in different contexts. Thus, the New York County Lawyers Association adopted a resolution condemning the proposal because it would “‘undermine the advocacy commitment of the legal profession’ and compromise the profession’s duty to the client.”⁵⁶ Similarly, Thomas O. Rice, New York State Bar Association President, condemned the proposal for undermining “zealous and effective legal advocacy.”⁵⁷

The SEC, too, opposed the ABA Commission’s proposal, but on the grounds that it would compromise auditor independence. “The SEC will continue vigorous enforcement of its rules on auditor independence . . . those rules prohibit an auditor from certifying the financial statements of a client with which his firm also has an attorney-client relationship.”⁵⁸ The SEC intends to

56. *Debate on Multidisciplinary Practice Report Continues as Vote by ABA Delegates Nears*, 68 U.S.L.W. 2020 (Jul. 13, 1999).

57. *Id.*

58. Letter from Harvey J. Goldschmid, SEC General Counsel, Lynn E. Turner, SEC Chief Accountant, and Richard H. Walker, SEC Director of Enforcement to Philip S. Anderson, President, American Bar Association (July 12, 1999). The SEC’s auditor independence regulations specifically state that the roles of auditors and attorneys under the federal securities laws are incompatible. Rule 2-01(c) of Regulation S-X, 17 CFR 210.2-01(c) states that in determining whether an accountant is independent of a particular person, the Commission “will give appropriate consideration to all relevant circumstances, including evidence bearing on all relationships between the accountant and that person or any affiliate thereof, and will not confine itself to the relationships existing in connection with the filing of reports with the Commission.” 17 C.F.R. § 210.2-01(c) (1988). The Commission further stated in an interpretive release, which has been incorporated into its Codification of Financial Reporting Policies (“Codification”), that one of the relationships that must be considered in making independence determinations is the relationship created by rendering legal services. The Commission stated,

“Certain concurrent occupations of accountants engaged in the practice of public accounting involve relationships with clients which may jeopardize the accountant’s objectivity, and, therefore, his independence. In general, this situation arises because the relationships and activities customarily associated with this occupation are not compatible with the auditor’s appearance of complete objectivity or because the primary objectives of such occupations are fundamentally different from those of a public accountant”

“A legal counsel enters into a personal relationship with a client and is primarily concerned with the personal rights and interest of such client. An independent accountant is precluded from such a relationship under the Securities Acts because the role is inconsistent with the appearance of independence required of accountants in reporting to public investors.” Codification 602.02.e.i. and e.ii. 7 Fed. Sec. L. Rep. (CCH) ¶ 73,267, 73,268, at 62,903 (Apr. 27, 1988).

bring enforcement proceedings for violations of independence against any firm that provides legal services to audit clients.⁵⁹ Thus, both the organized bar and the SEC have missed an opportunity to allow lawyers to act in a manner that would revitalize a profession much in need of a lift.

III. The General Crisis of the Legal Profession

Few would dispute that the American legal profession is in a state of malaise.⁶⁰ Law firm personnel turnover is enormous; client defections are epidemic; venerable firms are disbanding;⁶¹ and the Mickey Mantle-like attorney that spends her entire career with one firm is becoming a rarity. The bottom line rules.⁶² One especially knowledgeable commentator, the Reporter for the ABA's Model Rules, Professor Geoffrey Hazard, has concluded that the legal profession is in "crisis."⁶³

As attorney job satisfaction reaches its nadir, the public reputation of lawyers has also reached an all-time low. Movie audiences in suburban malls cheer when the *Jurassic Park* Tyrannosaurus eats the lawyer. Lawyer jokes have their own web site (e.g., "How many lawyers does it take to shingle a roof?" "It depends on how thin you slice them."). Most people do not trust

59. See *In re Falk*, CPA, Exchange Act Release No. 34-41424, 69 S.E.C. Docket 1916 (May 19, 1999). In this case, an attorney/CPA provided legal services to a corporation that was an audit client of the firm in which he was a principal. See *id.* While he did not participate as engagement partner or concurring partner on any of the clients audits, he declined to answer questions about the legal representation, relying on attorney client privilege. See *id.* The SEC found that Falk had violated the standards of auditor independence because of the "fundamental conflict between the roles of independent auditor and attorney." *Id.* The SEC, citing *United States v. Arthur Young*, 465 U.S. 805, 817-18 (1994), explained that auditors must be "skeptical," which requires "total independence," while lawyers have "a duty to serve as the client's confidential advisor and loyal advocate." The SEC also pointed to the requirement in Model Rule 1.3 that a lawyer must act "with zeal in advocacy on the clients behalf." See *In re Falk*, CPA, Exchange Act Release No. 34-41424 (May 19, 1999).

60. See, e.g., Bogus, *supra* note 15; KRONMAN, *supra* note 15; Hazard, *supra* note 15.

61. Shea & Gould; Lord, Day & Lord; Mudge Rose Guthrie Alexander & Ferdon; Gaston & Snow; Marshall, Bratter, Greene, Allison & Tucker; and Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey are a few of the famous, large firms to have disbanded recently.

62. See Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 870-72 (1990).

63. Hazard, *supra* note 15, at 1239.

lawyers, and some experts even complain that lawyers are merely parasitic rent seekers who enrich themselves without adding value.⁶⁴ It may be hard to believe, but it was not always this way. Many people delight in the speech, "First we kill all the lawyers," from Shakespeare's "Henry VI," as validation of the low esteem in which lawyers have traditionally been held.⁶⁵

Lawyers once derived dignity from the shared belief that they were learned, independent professionals who were reasonably unpolluted by the marketplace.⁶⁶ Today, few would describe lawyers in this way. Instead, the public generally views even rich and powerful lawyers as servants of big business.⁶⁷ Therefore, lawyers were affected when the reputation of big business, which has been deteriorating since the Great Depression, plummeted during the takeover frenzy of the 1980s.⁶⁸

64. See generally STEPHEN P. MAGEE ET AL., *THE INVISIBLE FOOT AND THE WASTE OF NATIONS: LAWYERS AS NEGATIVE EXTERNALITIES*, in *BLACK HOLE TARIFFS AND ENDOGENOUS POLICY THEORY: POLITICAL ECONOMY IN GENERAL EQUILIBRIUM* (1989); David N. Laband & John P. Sophocleus, *The Social Cost of Rent-Seeking: First Estimates*, 58 PUB. CHOICE 269, 271 (1988). Hazard, *supra* note 15, concludes that the public "seems increasingly convinced that lawyers are simply a plague on society." *Id.* at 1239. Daniel Fischel, Dean of the University of Chicago Law School, has recently suggested that confidentiality and the attorney-client privilege are intended to favor lawyers and not clients, and to give lawyers an unfair competitive advantage. See Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998).

65. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH*, act 4, sc. 2. However, the speech is actually read to mean that the villains want to kill the lawyers to remove the protection of the rule of law so as to institute anarchy. This was the conclusion of Justice John Paul Stevens in *Wallers v. Nat'l. Ass'n. of Radiation Survivors*, 473 U.S. 305, 371 n.24 (1985) (Stevens, J., dissenting); DANIEL J. KORNSTEIN, *KILL ALL THE LAWYERS: SHAKESPEARE'S LEGAL APPEAL* 28-32 (1994).

66. See Russell G. Pearce, *The Professional Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1231-32 (1995).

67. See Hazard, *supra* note 15, at 1245.

68. See *id.* In his subtle and complex analysis of the crisis, Professor Hazard argues that the legal profession no longer knows either its identity or place in the social system. See *id.* at 1239. The "narrative" that the profession once presented was that it defended private parties against a dangerous and "heavy handed" government, thereby defending life, liberty, and property. *Id.* at 1244. The acceptance of this narrative has been undercut by the recognition that lawyers primarily defend business entities and their property rights. See *id.* at 1245. Defending business is no longer seen as heroic or legitimate because the reputation of business had been undercut by the Great Depression and the attacks of democratic politics on capitalism. See *id.* at 1279. Lawyers mostly defend business property (after all it is those with property that have something to defend and can afford to

While some shareholders reaped windfall profits during this period, harsh downsizing, which economists euphemistically call "transition costs," fell on workers, suppliers, lenders (especially owners of "junk" bonds), and local communities.⁶⁹

The savings and loan fiasco, which required a \$500 billion government bailout, also sullied the reputation of the legal profession. The government sued hundreds of law firms and succeeded in securing large settlements from some of the nation's largest and most prestigious firms.⁷⁰ Because of a crucial procedural irony, government agencies, acting as receivers for the failed thrifts, were able to waive the attorney-client privilege, thereby establishing the lawyers' knowing complicity.⁷¹ At a minimum, many lawyers failed to stop massive fraud and some were implicated in the misconduct. The harm to the reputation of lawyers was not lessened by the apologia of the organized bar, which looked like a whitewash to observers.⁷²

There has always been a tension between lawyers' public duties as officers of the court and their duty of loyalty to their clients. Until recently, these conflicting duties were generally perceived to be in some acceptable balance. By the 1990s, the balance had seriously eroded⁷³ in part over confusion as to the duties of a lawyer whose client was engaged in fraud. It also became difficult for a profession that was once relatively small and homogeneous to agree about much of anything after tripling in size in one generation.⁷⁴ Despite scholars' and ju-

pay lawyers to defend it) and courts no longer treat the protection of property as comparable to the protection of life or liberty. *See id.* at 1266.

69. *See generally* Ronn S. Davids, *Constituency Statutes: An Appropriate Vehicle for Addressing Transition Costs?*, 28 COLUM. J.L. & SOC. PROBS. 145 (1995).

70. *See* Peter C. Kostant, *When Zeal Boils Over: Disclosure Obligations and the Duty of Candor of Legal Counsel in Regulatory Proceedings After the Kaye, Scholer Settlement*, 25 ARIZ. ST. L.J. 487 (1993). For example, the law firms Kaye Scholer and Jones Day agreed to settlements with the government for \$41 million and \$51 million respectively.

71. *See id.* at 493.

72. *See, e.g.*, ABA Standing Comm. on Legal Ethics and Professional Responsibility, Formal Op. 375 (1993); ABA Working Group on Lawyers' Representation of Regulated Clients, *Laborers in Different Vineyards? The Banking Regulators and the Legal Profession* 197-212 (1993). For an eloquent description of the failure of the bar adequately to confront or condemn the conduct of Lincoln's lawyers, *see* Simon, *supra* note 40, at 263-67.

73. *See* Pearce, *supra* note 66, at 1250-63.

74. *See* Hazard, *supra* note 15, at 1259.

rists' arguments for legal ethics to reflect the widely varying contexts of contemporary legal practice,⁷⁵ the organized bar continues to cling, Procrustes like, to a universalist model, regardless of the nature of the transaction or the client.⁷⁶

A "cottage industry" has developed around exploring the decline of the legal profession.⁷⁷ Yale Law School Dean, Anthony Kronman, is perhaps the most eloquent academic to contrast current practices with those of a prior era, which if not quite a Golden Age, was at least made of less base metal.⁷⁸ In Kronman's prudentialist view of legal tradition, by employing practical wisdom, lawyers were once able to balance their public responsibilities to the system of justice and society with their loyalty to their clients. The lawyer-statesmen (there were virtually no women) served the public good by remaining independent of the client and exercising judgment that combined

75. See, e.g., David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145, 1152 (1993); Fred C. Zacharias, *Factual Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?*, 6 GEO. J. LEGAL ETHICS 903 (1993); Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149 (1998).

76. The Model Rules of Professional Conduct, adopted in 1983, unlike the prior Model Code, has one section on the role of lawyer for an organizational client (Rule 1.13) and it also addresses the role of lawyer as counselor (Rules 2.1, 2.2 and 2.3). These additions add little to the primary focus on legal practice as adversarial and clients that are individuals. See Simon, *supra* note 16, at 7 (discussing that the dominant view remains adversarial).

77. See Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 TEXAS L. REV. 1139, 1145 (1993) (stating that "lawyers are in decline as a profession . . . taking the public good with them on the way down.").

78. See KRONMAN, *supra* note 15. For others who are nostalgic for a golden age before the decline, see MARY ANN GLENDON, *A NATION UNDER LAWYERS* (1994); SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994); Daniel R. Coquillette, *Professionalism: The Deep Theory*, 72 N.C. L. REV. 1271, 1271-77 (1994). For others critical of this nostalgia, see RICHARD L. ABEL, *LAWYERS: A CRITICAL READER* 131 (1997); Pearce, *supra* note 66; Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549 (1996). For a vivid and humorous example of the power of mythical "golden ages," see SIMONE SIGNORET, *NOSTALGIA ISN'T WHAT IT USED TO BE* (Harper & Row 1978) (1976) (autobiography of the great French actress). According to Ovid, there were no lawyers in the original "Golden Age." "Aurea prima stata est aetas, quae vindice nullo / sine lege, sponte sua fidem rectumque colebat." Translation: "The first age was golden, which without any lawyers, with no law, of its own accord brought forth good faith and upstanding behavior." OVID, *METAMORPHOSIS*, BOOK I. (Prof. Jonathan Gutoff trans., on file with author).

sympathy or a sympathetic identification with the client, with professional detachment. Kronman provides many reasons why lawyers lost the ability to engage in this persuasive dialogue with clients including greed, increasing bureaucracy, and "scientific pretensions" about the nature of law.⁷⁹ Adjusting the duty of confidentiality may help lawyers to regain an independent status. Although confidentiality may be essential in litigation, the duty to disclose material information would provide the transactional lawyers working for MDPs with a self-interested moral compass and leverage against client agents engaged in wrongdoing, enabling them to act more like statesmen.

IV. Similarities Between Accountants and Corporate Lawyers

Conventional wisdom holds that lawyers and accountants serve very different roles for their clients. In *United States v. Arthur Young & Co.*,⁸⁰ the United States Supreme Court explained that the lawyer's duty is to serve as "his client's confidential advisor and advocate" and "to present the client's case in the most favorable possible light."⁸¹ The Supreme Court contrasts this with the independent certified public accountant whose "public responsibility transcends any employment relationship with the client," and who owes "allegiance to the corporations' creditors and stockholders, as well as the investing public."⁸²

While the clear contrast the Supreme Court identifies provides an excellent encapsulation of the universalistic legal ethic adopted by the organized bar,⁸³ the Court is not describing the reality of what many lawyers traditionally do. In practice, cor-

79. KRONMAN, *supra* note 15, at 225-70.

80. 465 U.S. 805 (1984).

81. *Id.* at 817-18.

82. *Id.* (finding no accountant/client evidentiary privilege or work product protection).

83. The Model Rules, which the ABA adopted in 1983, purport to distinguish between the lawyer as advocate, counselor and intermediary. The rules also have one section on representing organizational clients. Nevertheless, commentators have correctly concluded that the Model Rules still treat law as a unitary profession; that despite conceding the existence of different roles, there are no different standards for context; and that the universalist ethic rhetoric makes it more difficult to examine specific representation contexts. See Wilkins, *supra* note 75, at 1152.

porate lawyers perform transactional work, not litigation. The roles of "advisor" and "advocate" that the Court distinguishes from those of accountants need not be automatically bound together as they are in the Court's opinion.⁸⁴ That clients always need confidentiality protection offered by lawyers, but not accountants, is questionable when applied to the large public corporation.⁸⁵ Our legal and economic understanding of large public corporations has expanded, and their governance and norms have changed. The distinction between a lawyer's duties to the corporate "client" on one hand and an accountant's duties to "creditors, shareholders [i.e., corporate constituents] and the investing public" that the Court stresses is in fact much less clear.⁸⁶ The Court's opinion ignores the similar economic function that both transactional lawyers and accountants play as reputational intermediaries for their corporate clients.⁸⁷

The similarity in the roles of accountants and transactional lawyers in federal securities law further illustrate their complementary economic function. Generally, accountants and law-

84. For example, why does strict confidentiality and the existence of a broad corporate attorney-client privilege encourage internal investigations and compliance with the law for corporate clients, see *Upjohn v. United States*, 449 U.S. 383 (1981), but protecting communications with accountants, the essential public watchdog, is unnecessary? Some commentators oppose any attorney-client privilege for corporate clients. See Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157 (1993); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 283-84 (1986). Dean Daniel Fischel has concluded that protecting corporate client confidences either has no effect or actually decreases legal compliance. If a corporation intends to comply, confidentiality is unnecessary; if uncertain about compliance and legal advice is not confidential, the client may decide not to risk engaging in illegal activity, but if advice was confidential it could better weigh the risk and even learn how not to get caught; and finally confidentiality decreases sanctions for past misconduct and increases the ability to cover it up, but it does not increase the incentive to comply with the law. See Fischel, *supra* note 64.

85. See Fischel *supra* note 64, at 25 (the accounting profession, as reputational intermediaries, has survived legal rules that require disclosure of work papers, including notes of client interviews).

86. The clear distinction made in *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984) represents a misunderstanding of the similarities in the function of accountants and transactional lawyers, and that treating all lawyers as "advocates" can be damaging. This is especially true for corporate lawyers who may aggressively "advocate" the position of inside, senior managers against the interests of the entity that is the real client.

87. See *id.* See also Simon, *supra* note 40, at 261. Reputational intermediaries help to overcome information asymmetries by placing their own credibility behind those for whom they act. See Fischel, *supra* note 64, at 20-21.

yers are subject to the same professional standards in practice before the SEC. Pursuant to Rule 102(e)⁸⁸ (this Rule was previously numbered 2(e) and will be referred to as such hereinafter) the SEC may censure or suspend any "professional" from practicing before the Commission. The SEC generally holds attorneys and accountants to the same ethical standards.⁸⁹ Commissioner Randolph, in a recent concurring opinion, reiterated that "neither Rule 2(e), nor the court's recognition of it, have ever drawn a distinction between accountants and attorneys."⁹⁰

88. These proceedings against lawyers or accountants generally arise out of situations where a client's conduct initiated the underlying violation. Joel Seligman has underscored the importance of SEC 2(e) proceedings as regulating fiduciary duties of care and loyalty in corporate governance. He argues that accounting is the language of corporate governance, and the SEC's proceedings against professionals for the misconduct of issuers is the most productive place to look for the reality of the enforcement of director's fiduciary duties to corporations. See Joel Seligman, *Accounting and the New Corporate Law*, 50 WASH. & LEE L. REV. 943, 945 (1993). The SEC stressed that most practice before the Commission is non-adversarial and the Commission must be able to rely on the candor of those that practice before it. The SEC observed that "[v]ery little of a securities lawyer's work is adversary in character. He doesn't work in courtrooms where the pressure of vigilant adversaries and alert judges checks him. He works in his office where he prepares prospectuses, proxy statements, opinions of counsel, and other documents that we, our staff, the financial community, and the investing public must take on faith." *In re Fields*, 45 S.E.C. 262, 266 n.20 (1973). See also Richard W. Painter & Jennifer E. Duggan, *Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation*, 50 SMU L. REV. 225, 227 (1996).

89. There is some evidence that different standards are sometimes used for lawyers and accountants. The Commission has generally not sought to develop or apply independent standards of conduct for attorneys, and the great majority of 2(e) proceedings against attorneys have involved violations of the federal securities laws. The Commission has used 2(e) proceedings to explain its views about professional standards applicable to accountants. See also *In re Nielson*, Exchange Act Release No. 34-16,479 (Karmel, dissenting) ("Disciplinary action against accountants and attorneys must rest on very different legal analyses and involves very different policy questions."). In *Checkosky v. SEC*, 23 F.3d 452, 456 (D.C. Cir. 1994) before the D.C. Circuit remand, the Commission tried to apply a negligence standard for accountant misconduct, while it had used "wrongful intent" for attorneys in *Carter & Johnson*. In *re Carter & Johnson*, Exchange Act Release No. 34-17,597, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶82,847 at 84,172 (Feb. 28, 1981). See also *In re Danna & Dentinger*, Exchange Act Release No. 34-38,499 SEC Docket 208 (Apr. 11, 1995) (applying a negligence standard to accountants but failing to reason why a scienter standard was required for lawyers in *Checkosky*).

90. *Checkosky v. S.E.C.*, 23 F.3d 452 (D.C. Cir. 1994) (suggesting that the reasoning in the prior *Carter & Johnson* opinion would apply equally to auditors or attorneys; that the text of 2(e) does not distinguish between accountants and law-

Although the crucial ethical concept of "independence" may not have identical meanings for both professions, accountants and lawyers have always stressed their independence and adherence to strict professional standards derived from autonomous self-regulating authorities, the AICPA and the ABA. Additionally, both professions are subject to oversight from governmental regulators and the courts.⁹¹ There is also an important body of case law finding both lawyers and accountants liable for negligently failing to protect corporate clients from the misconduct of client managers. The cases do not treat lawyers and accountants differently.⁹²

yers; and that in 1979 in *In re Keating*, Muething & Klekamp, Exchange Act Release No. 34-15,982, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,124 (July 2, 1979), Chairman Williams' concurring opinion noted that "neither Rule 2(e), nor the courts' recognition of it, has ever drawn a distinction between accountants and attorneys").

91. The accounting profession has not been immune from crisis. Between 1989 and 1994 the Big Six accounting firms paid \$395.82 million to settle class actions; the total paid by all firms was \$482 million. See Painter & Duggan, *supra* note 88, at 236. Judge Sporkin, speaking of accountants as well as lawyers, rhetorically asked, "Where were these professionals?" referring to the misconduct that led to the savings and loan disaster. *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp 901, 920 (D.D.C. 1990).

92. For cases finding either attorneys or accountants liable, see *FDIC v. O'Melveny & Myers*, 969 F.2d 744 (9th Cir. 1992) (finding it irrelevant that wrongdoers who stood to benefit owned nearly all the corporate clients stock); *FDIC v. Clark*, 978 F.2d 1541 (10th Cir. 1992) (determining that the illegal activity was to benefit individuals and not corporate clients); *Schact v. Brown*, 711 F.2d 1343 (7th Cir. 1992) (finding the illegal activity enabled the corporation to exist and continue to operate after it became insolvent, and that its prolonged life did not benefit the corporation); *Resolution Trust Corp. v. KPMG Peat Marwick*, 845 F. Supp. 621 (N.D. Ill. 1994); *Resolution Trust Corp. v. Coopers & Lybrand*, 915 F. Supp. 584 (S.D.N.Y. 1996); *Arthur Andersen LLP v. Superior Court of Los Angeles County*, 67 Cal. App. 4th 1481 (Ct. App. Second Dist. 1998).

For cases where no liability was found, see *FDIC v. Ernst & Young*, 967 F.2d 166 (5th Cir. 1992); *Hanover Corp. v. Beckner*, 211 B. R. 849 (M.D. La. 1997); *FDIC v. Schrader & York*, 991 F.2d 216 (5th Cir. 1993).

Another leading case that did not find liability was *Cenco v. Seidman & Seidman*, 686 F.2d 449 (7th Cir. 1982). Here the accountants were able to impute management misconduct to the corporate client because the illegal conduct was directed primarily against "outsiders" and the corporation's shareholders benefited. The case does acknowledge that loyal but misguided employees may try to benefit both the corporation and themselves and that directors might sometimes be liable for negligently not discovering misconduct. The case concludes that the primary monitor should be the board, and directors can read the case to encourage meaningful reliance on receiving full disclosure from outside professionals.

In a companion essay for The Pace Law Review Symposium, John Humbach, Professor of Law at Pace University School of Law, wrote a telling critique of the legal profession. Professor Humbach describes how traditional norms of practice have a destructive effect on the system of justice lawyers intend to serve.⁹³ Under the traditional model, which other commentators have called the "standard conception"⁹⁴ of lawyering, the lawyer's purported right to finesse the truth has expanded to become a veritable duty to mislead.⁹⁵ One reason for the slippery slope leading to deception, as explained by William Simon, is that the "norms of practice require [the lawyer] to take actions that frustrate the values to which she is supposed to be committed."⁹⁶ Humbach argues persuasively that the kind of trickery lawyers practice does not belong in the adversarial system of litigation before an important tribunal.⁹⁷

Even if justified as the dominant concept of practice for formal litigation,⁹⁸ the organized bar's interpretation of client confidentiality has no place in transactional practice where there is no tribunal to weigh the truth. Nevertheless, ethical rules still encourage it. Thus, Model Rule 4.1(b),⁹⁹ which requires a lawyer to correct material misrepresentations by a client, is rendered meaningless by the duty not to disclose confidential information.¹⁰⁰ For this reason, Model Rule 4.1(b)¹⁰¹ pretends to

93. See John A. Humbach, *The National Association of Honest Lawyers: An Essay on Honesty, "Lawyer Honesty" and the Public Trust in the Legal System*, 20 PACE L. REV. 93 (1999).

94. WILLIAM H. SIMON, *supra* note 16, at 218 n.8.

95. See Humbach, *supra* note 93, at 94-98.

96. Simon, *supra* note 16, at 367 (stressing that client loyalty is not an end in itself; but rather, it is a norm designed to further vindicate legal principles. When the malfunctioning of coordinate institutions indicate that it can no longer serve that purpose, then practices need to be modified).

97. See Humbach, *supra* note 93.

98. See DAVID LUBAN, INTRODUCTION TO THE ETHICS OF LAWYERS at XVII (1994).

99. Model Rule 4.1(b) states in relevant part:

In the course of representing a client a lawyer shall not knowingly: . . . b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1999).

100. See *id.*

101. See *supra* note 99 for the text of Rule 4.1.

favor truthfulness while actually forbidding it.¹⁰² As adopted, the rule underscores that in resolving the tension between a lawyer's duty to her client and to society as an officer of the court, it is society that loses.¹⁰³

Under the ethical rules that preceded the Model Rules, attorneys had a duty to rectify their clients' fraud.¹⁰⁴ However, the ABA completely excused that duty in the 1983 adoption of the Model Rules.¹⁰⁵ Moreover, the broad duty of confidentiality has expanded far beyond the narrow attorney-client privilege.¹⁰⁶ The attorney-client privilege, like all legal privileges, is an exception to the general legal principle of accepting all relevant information in seeking the truth. Accordingly, the attorney-client privilege is narrow in scope. The privilege never covers communications in furtherance of a crime or fraud because such communications are not part of a lawyer's proper function in providing legal assistance.¹⁰⁷ Unfortunately, the narrow attorney-client privilege has been expanded by the bar into the over-broad ethical duty of confidentiality. While the attorney-client privilege previously co-existed uncomfortably with an offsetting duty to rectify client fraud under the Model Code of Professional Responsibility,¹⁰⁸ the duty of confidentiality has metastasized into Rules 1.6,¹⁰⁹ 1.13¹¹⁰ and 4.1(b)¹¹¹ of the Model

102. See HAZARD & HODES, *supra* note 37, 4.1:101, at 711 (arguing that the express language of Rule 4.1(b) must be given a "savings" construction to avoid this unfortunate result).

103. See Robert W. Gordon, *A Collective Failure of Nerve: The Bar's Response to Kaye Scholer*, 23 L. & SOC. INQUIRY 315, 320 (1998).

104. The ABA's Code of Professional Ethics contained a duty to rectify client fraud for which the lawyer's services had been utilized. Because this conflicted with the duty to keep client information privileged, the Model Code was amended in 1972 to subordinate this duty. In 1975, ABA Formal Op. 341, (Sept. 30, 1975), the scope was expanded to include not only privileged information but all client confidences. Most states did not adopt the 1972 amendment. The Model Rules do not contain any duty to rectify client fraud except a rather vague one concerning tribunals (Model Rule 3.3) that is generally irrelevant to corporate practice. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1999).

105. See *id.*

106. See *id.*

107. See WOLFRAM, *supra* note 84, at 279-82.

108. See *supra* note 104.

109. See *id.* at Rule 1.6 (1999).

110. See *id.* at Rule 1.13 (1999).

111. See *id.* at Rule 4.1(b) (1999).

Rules, making it unethical for a lawyer to disclose confidences to prevent or rectify client fraud.

Another aspect of what could be called a duty to mislead, is what the former Chief Counsel¹¹² for the Office of Thrift Supervision, a powerful governmental regulator, called the practice of loophole lawyering.¹¹³ Rather than applying the whole law, lawyers act as advocates by using technicalities to enable their clients to engage in unlawful activities, or to delay regulators in stopping client misconduct.¹¹⁴ This is what appears to have been done by many lawyers during the savings and loan debacle.

The bar's official ethical rules have sanctified the duty to mislead. The lawyer as "trickster" is a poor reputational intermediary for her honest client given the "lemons market" problem. Despite the fact that Model Rule 1.7(a) prohibits a lawyer from representing a client if it will be "directly adverse" to another client, and Rule 1.7 prohibits representation that "may be materially limited by . . . responsibilities to another client or to a third person," these problems are currently ignored by the transactional lawyer who withholds material information to protect a devious client. The legal ethic was not always interpreted in this way. Writing in 1836, David Hoffman, one of the best known commentators on legal ethics of the day, recognized his duty to other clients. He explained that he would never press evidence or a principle wholly at variance with sound law, "when if successful it would be a gangrene that might bring death to my cause of the succeeding day."¹¹⁵ This has contributed to the popular conceptions of lawyers as tricksters, playing a game to hide the truth. By following a set of universal rules based upon an adversarial ethical model lawyers can avoid having to make tough ethical judgments about their clients. As a result, lawyers seldom have to decline lucrative fees from ethically dubious clients. At the same time, the universal non-contextual rules make it more difficult for innocent third parties to

112. Harris Weinstein was the Chief Counsel of the Office of Thrift Supervision (OTS).

113. See Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 549 & n.13 (1994).

114. See *id.*

115. SIMON, *supra* note 16, at 63.

avoid injury. At least in the transactional, non-litigation context, the lawyer as trickster game may be beginning to change. Large corporate clients that are repeat players can hire lawyers in non-litigation transactions that work for MDPs and add value as reputational intermediaries.¹¹⁶

Critics of MDP legal practice postulate a loss in zealous representation and advocacy. This criticism rests on the false premise that adversarial advocacy is the sole function of lawyers.¹¹⁷ When clients are using the lawyer's services in ongoing transactions to harm third parties, the duty of loyalty and the preservation of client confidences need closer examination. In such cases, the values that underlie these norms are very different than when lawyers are defending clients charged with past wrongdoing by an all-powerful government.¹¹⁸

The resulting duty of full disclosure of material information could provide real value to clients by making transactional lawyers effective reputational intermediaries. Without this duty, reputable clients suffer from the "lemons market" problem, because third parties cannot distinguish them from others for whom lawyers have a duty to conceal harmful information.¹¹⁹

116. See Richard W. Painter, *Game Theoretic and Contractarian Paradigms in the Uneasy Relationship Between Regulators and Regulatory Lawyers*, 65 *FORDHAM L. REV.* 149, 158-59 (1996) (discussing repeat players, in the context of regulators and regulated firms, as those who deal with each other on multiple occasions); see also DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 6-7 (1994) (discussing strategic behavior and its relation to different paradigms of game theory).

117. See *supra* notes 83-92 and accompanying text.

118. See generally Simon, *supra* note 40, at 277-79.

119. The economist George A. Akerloff described how unequal information can cause the adverse selection problem that results in a "lemons market" for automobiles. Because sellers of lemons know that they are lemons while buyers do not, more lemons are sold because sellers of lemons will be paid somewhat more than the value of a lemon. Buyers eventually realize that they have a greater chance of buying a lemon, and the price of the cars fall. Good car owners become less likely to sell and eventually only lemons are sold. See George A. Akerloff, *The Market for Lemons: Quality, Uncertainty and the Market Mechanism*, 84 *Q.J. ECON.* 488, 500 (1970); THOMAS C. SCHELLING, *MICROMOTIVES AND MACROBEHAVIOR* 99-100 (1978) (utilizing Akerloff's "lemon market" theory as a useful model for analyzing relationships and interdependent behavior and to describe what is known as the critical-mass phenomenon).

V. Paradigm Regained: Corporate Lawyers As Lawyer - Statesmen¹²⁰

As discussed above, the need to satisfy increasingly independent directors and audit committees, as well as competition from MDPs, is changing how corporate lawyers can behave. For corporate lawyers, these developments are accelerating the shift away from the traditional universal ethical paradigm. During most of this century, the traditional professionalism paradigm helped maintain conformity in theory and practice and helped to resolve tensions. Under the traditional professionalism paradigm, lawyers needed to be independent in order to reconcile the needs of their clients with the needs of society and the system of justice. In practice, this meant being independent from government interference and self-regulation.¹²¹ As Fordham Law School Professor Russell Pearce explained,

120. While I argue that recent developments, including powerful competition from accounting firms, may help corporate lawyers to behave in more independent and socially responsible manner, I also recognize that the "paradigm" to be "regained" may never have existed to any significant degree, and to the extent that it did exist, it was plagued with other serious drawbacks, *i.e.*, elitism, racism, and sexism. Nevertheless, in speaking of a "paradigm regained" I am trying to use the kind of "irony" that Peter Margulies characterizes as recognizing the tension between reality and how things should be, not as "facile skepticism" but with a "set of normative commitments that impel one to act even as one acknowledges doubts." Margulies, *supra* note 77, at 1176.

121. Pearce, *supra* note 66, at 1231. Pearce argues that the original "Republican Paradigm" was of a legal profession comprised of individual professionals who were above the self-interest of the marketplace and who served as guardians of the public good. *Id.* at 1241. This paradigm fell victim to the industrial realities of the late 19th Century and was replaced at about the turn of the century with the "Professionalism Paradigm" which gave lawyers the exclusive privilege to provide legal services and be largely autonomous from external regulation. In return, lawyers as professionals, unlike business-people, would altruistically place the good of their clients and society above their own self-interest. *Id.* at 1238. The Professionalism Paradigm contained the Profit Maximizer Taboo (not to treat law as a commodity) and the Business Servant Taboo (not to favor client over social interests). *See id.* at 1242-44. Over the course of the 20th Century because of many factors, including the commercialization of more competitive legal practice, the tremendous growth in the number of lawyers and the decreasing professional mystique, and lawyer advertising, law did indeed become a commodity. The public also ceased to believe that lawyers would exercise independent judgment and did not believe that lawyers would not place client interests over the good of society. *See id.* at 1240. Professor Pearce optimistically believes that a new paradigm, the "Business Paradigm" is being realized, which in what he calls its "middle-range" can combine the advantages of the market system with a communitarian moral vision. *Id.* at 1265-76. I learned a great deal from Pearce's excellent broad analy-

this belief system required that lawyers not be viewed as profit maximizers (in part, because law was not a commodity) or as servants of business.¹²² In time, the paradigm was discredited, as lawyers became functionaries of business.¹²³

During the time period in which the traditional paradigm had vitality, theorists used it to reject inconsistent ideas without having to evaluate their significance. Despite its abuses, and in the absence of any supporting empirical data,¹²⁴ strict confidentiality remained part of the rhetoric of client welfare.¹²⁵ The growth of corporate transactional practice, however, leads to puzzles within the paradigm. These puzzles and changes in the internal governance of the clients, grew to become anomalies, provoking a crisis that the discourse had to try to exclude. In this way, the organized bar continued to insist on a unitary profession with increasingly strict rules of confidentiality, except when a lawyer's personal interest was involved. Moreover, the organized bar afforded excessive deference to corporate managers and as a result the duty to rectify client fraud withered away. Regulators, and occasionally courts, insisted on broader duties, but the bar largely ignored them or treated them with calumny.¹²⁶

The key failure for the traditional professionalism paradigm was that society eventually recognized that it could not trust lawyers to use their independent judgment not to place the interests of their clients, especially large corporations, above those of society. This belief system broke down at least in part because of the conspicuous role of lawyers in the savings

sis, but in this article I am focusing only on corporate lawyers and changes in the context of corporate practice.

122. See Pearce, *supra* note 66, at 1242.

123. See generally Simon, *supra* note 40, at 266.

124. See SIMON, *supra* note 16, at 56.

125. Anticipations of later paradigms did exist in the past, and lawyers before the adoption of the Model Rules in 1983 did have a duty to rectify client fraud, but these duties were deleted from the Model Rules because they were purported to conflict with more important values. See discussion *supra* notes 104, 108 and accompanying text.

126. See Susan Koniak, *When Courts Refuse to Frame the Law and Others Frame it at Their Will*, 66 S. CAL. L. REV. 1075 (1993) (discussing the bar's preferred duty of non-disclosure and the failure of courts to articulate clear standards).

and loan debacle,¹²⁷ and the corporate takeover frenzy of the 1980s.¹²⁸ Corporate governance also changed and independent boards began to demand different legal services. Sophisticated corporate clients no longer suffered from the same asymmetries of legal information, and lawyers no longer had special knowledge that their clients lacked.¹²⁹ Eventually, even the United States Supreme Court acknowledged that the business/profession dichotomy was an anachronism.¹³⁰

In the new contextual paradigm that is developing, corporate lawyers, whether they work for MDPs, law firms or in-house, may, in fact, be more independent because they serve an increasingly independent board rather than acting as the servants of powerful inside managers. In helping the independent board to mediate among corporate constituencies, lawyers may be able to engage in a deliberative process that bears some resemblance to Kronman's lawyer-statesman.¹³¹

History provides examples of how lawyers, when confronted with effective competition from non-lawyers, developed high ethical standards. When bar associations and courts have exclusive power to make regulations, there has been relatively little political accountability.¹³² On the other hand, in areas in which both lawyers and non-lawyers are permitted to compete to provide services (*i.e.*, tax, patent, lobbying and bill collecting), courts and bar associations have less authority and standards may be higher.¹³³ As discussed above, in SEC 2(e) proceedings, lawyers and non-lawyer accountants are held to largely the same ethical rules,¹³⁴ and a very high standard applies.

127. See generally Kostant, *supra* note 70, at 11.

128. See Peter C. Kostant, *Exit Voice and Loyalty in the Course of Corporate Governance and Counsel's Changing Role*, 28 *Journal of Socio-Economics* 203, 215 (1999).

129. See Gilson, *supra* note 62, at 900-01.

130. See *Bates v. Arizona*, 433 U.S. 350, 371-72 (1977) ("the belief that lawyers are somehow 'above' trade has become an anachronism").

131. See Kostant, *supra* note 128, at 243-45 (analyzing the proper role for corporate lawyers as honest brokers for directors who can better serve the corporate entity by being fair to all constituencies, and arguing that the existing position of corporate counsel as lawyers for inside management cannot be supported and is destructive of sound corporate governance).

132. See Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 *FORDHAM L. REV.* 33, 40-42 (1986).

133. See *id.*

134. See *supra* notes 80-90 and accompanying text.

Perhaps the clearest example of lawyers being held to consistently high ethical standards of complete candor is the patent bar, which traditionally competed with non-lawyers who were able to act as patent agents. In making a patent application, the client and the attorney each have an independent duty¹³⁵ to report "all facts concerning possible fraud or inequitableness underlying the [patent] application in issue."¹³⁶ Courts have described the relationship between applicant and government examiner in fiduciary duty terms because the relationship is a confidential one and not "at arms length."¹³⁷ The standards of candor for patent lawyers have always been very high. In one important case, the United States Supreme Court affirmed an order disbaring a patent attorney¹³⁸ who had participated in a scheme to deceive the Patent Office.¹³⁹ His client, Hartford-Empire Co., intended to "prepare and publish, over the signature of an apparently disinterested labor leader, an article to be published and then used in support of the company's pending patent application."¹⁴⁰ The article, published in a trade journal, was later presented to the Patent Office as "recognition by a 'reluctant witness' of the success of the device under consideration."¹⁴¹

The defendant attorney, Dorsey, was one of four attorneys accused of deceiving the Patent Office as to the authorship of the article, which influenced the Patent Office's decision in regard to the patent.¹⁴² The three other lawyers involved were also disbarred. In his appeal, Dorsey claimed that he had never made a false statement to the Patent Office. Justice Robert H. Jackson agreed, writing in his dissent that "[t]he worst that can

135. See 37 C.F.R. Sec. 1.56 (1999). The regulation requires a duty to disclose information material to probability. Because patents are of public concern, individuals associated with the filing of patents must deal with utmost good faith and candor. See *id.*

136. *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 818 (1945). Cf. *Crites, Inc. v. Prudential Co.* 322 U.S. 408, 415 (1944).

137. *Id.* See also *True Tempe Corp. v. C.F. & I. Steel Corp.*, 601 F.2d 495, 501 (10th Cir. 1979).

138. See *Kingsland v. Dorsey*, 338 U.S. 318 (1949). This case is discussed in Kostant, *supra* note 70 at 535-36.

139. *Id.*

140. *Id.* at 321. See generally *Hazel-Athens Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944).

141. *Dorsey*, 338 U.S. at 321.

142. See *Hatch v. Ooms*, 69 F. Supp. 788, 790 (D.D.C. 1947).

be said of Dorsey is that he took advantage of this loose practice to use a trade journal article as evidence, without disclosing that it was ghost-written for the ostensible author.”¹⁴³ Justice Jackson noted that Dorsey had practiced law for 59 years “without blemish”¹⁴⁴ to his record, and that “not only is there no claim that the . . . article contained one false statement, but there is no denial that, whoever was the scribe, [the purported author] believed and knowingly adopted as his own every word of it.”¹⁴⁵

The majority of the justices, however, found Dorsey to be in gross violation of congressional policy to protect the public from the “evil consequences that might result if practitioners should betray their high trust.”¹⁴⁶ Citing the Patent Office Committee on Enrollment and Disbarment, the Court in Dorsey stated: “[i]n its relation to applicants, the Office . . . must rely upon their integrity and deal with them in a spirit of trust and confidence.”¹⁴⁷ Candor can build trust and efficient business operations. There is no reason why it need apply only in patent regulation.

In another article, I have explored at length how the mechanics of corporate governance are changing so that shareholders and other corporate constituencies are increasingly employing voice rather than exit as an ameliorative device.¹⁴⁸ In this new governance regime, corporate lawyers are uniquely qualified to act as “gyroscope” and honest broker for independent directors. In playing this role, corporate lawyers can help to protect the entity and all its constituents from the wrong doing of corporate managers. The enhanced duty of candor of MDP transactional lawyers could help to achieve this objective.

VI. Conclusion

Traditional legal ethics attempted to justify many of its tenets with claims that they were in the best interests of clients. Today, large public corporations are extremely sophisticated consumers of legal services who are able to judge their own

143. *Dorsey*, 338 U.S. at 323 (Jackson, J., dissenting).

144. *Id.* at 320.

145. *Id.* at 323.

146. *Id.* at 320.

147. *Id.* at 319.

148. See generally Kostant, *supra* note 128.

needs. By hiring MDP lawyers, such clients are challenging two of the organized bar's most basic assumptions. First, these clients are rejecting the notion that all lawyers must act as though they are involved in adverse practice. To paraphrase Lenin's description of the suffrage of the Russian Army in 1917, these corporations by hiring MDPs are voting with their feet. By choosing MDPs that have a duty to make full disclosure in audits rather than acting as advocates in an adversarial system, they are instead opting for a much more valuable and nuanced kind of loyalty from their lawyers. Second, by rejecting the bar's traditional prohibition against sharing profits with non-lawyers, large corporate clients are preventing the organized bar from continuing to rely upon independence arguments to insulate their conduct from requirements that they provide what their clients really need.¹⁴⁹ If the changing market for legal services is forcing lawyers to serve their clients better,¹⁵⁰ who could plausibly argue that these changes are not beneficial? It is time for the bar to reject the outdated canard that lawyers are necessarily more ethical than business people.¹⁵¹

149. See David B. Wilkins, *Who Should Regulate Lawyers?* 105 HARV. L. REV. 799, 858-63 (1992) (arguing that independence arguments can help insulate lawyers from client pressures).

150. See Gilson, *supra* note 62 (stressing the importance of the demand side of the market by sophisticated clients but reaching a less optimistic conclusion).

151. See, e.g., Pearce, *supra* note 66, at 1266 (pointing to "reinterpretation of business as a worthy endeavor" and the work of commentators like Thomas Shaffer and Mary Ann Glendon rejecting "characterization of business persons as morally inferior to lawyers."); Gilson, *supra* note 62, at 871 ("economists do not view the label 'business' as perjorative. If becoming a business means efficiently rendering an important service in a competitive environment, then of what is there to complain").