

**A MULTIDISCIPLINARY BAR AND FINANCIAL
PLANNERS: THE RECOMMENDATION OF THE
DISTRICT OF COLUMBIA BAR SPECIAL COMMITTEE ON
MULTIDISCIPLINARY PRACTICE**

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Rita, an investment counselor, decided to go out on her own. She was shrewd and diligent, so business kept coming in. Pretty soon Rita realized that she needed an in-house counsel, and she began to interview new lawyers.

‘As I’m sure you understand,’ she started off with one of the first applicants, ‘in a business like this our personal integrity must be beyond question.’ She leaned forward. ‘Mr. Peterson, are you an honest lawyer?’

‘Honest?’ replied the job prospect. ‘Let me tell you something about honest. Why, I’m so honest that my father lent me \$15,000 for my education and I paid back every penny the minute I tried my very first case.’

‘Impressive. And what sort of case was that?’

The lawyer squirmed in his seat. ‘He sued me for the money.’¹

I. INTRODUCTION

This Article assesses the legal profession and the rise of multidisciplinary practice. Resistance on the part of the organized bar to the sharing of legal fees evinces professional protectionism.² The marketplace for services is far from a free one, not merely for attorneys, but also for investment advisors,³

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¹ THE BEST LAWYER JOKES EVER 29 (Metro Books 2002).

² See, e.g., George Steven Swan, *The Political Economy of Interprofessional Imperialism: The Bar and Multidisciplinary Practice, 1999-2001*, 24 J. LEGAL PROF. 151 (2002).

³ See, e.g., THOMAS P. LEMKE & GERALD T. LINS, REGULATION OF INVESTMENT ADVISORS (2001 ed.). But see JANET BAMFORD ET AL., THE CONSUMER REPORTS MONEY BOOK

(continued)

and money managers,⁴ who are heavily regulated. A free market response to widespread pressures for multidisciplinary practice would expand the opportunities for clients to enjoy the package of professional services they most prefer. Numbered among such clients are both multinational corporations and monied individuals. In a free market, the price mechanism can impel service providers to deliver high quality efforts. Furthermore, a free market environment could enrich the career potential of youthful lawyers. Opening professional doors to, instead of engineering artificial hindrances against, America's young men and women⁵ would improve the chance for their potential recognition and success.⁶

The fledgling financial planning profession meets a mounting demand

114 (rev. ed., 1995).

⁴ See, e.g., TAMAR FRANKEL, *THE REGULATION OF MONEY MANAGERS: MUTUAL FUNDS AND ADVISERS* (2nd ed. 2001).

⁵ GEORGE ELIOT, *MIDDLEMARCH: A STUDY OF PROVINCIAL LIFE* viii (1981).

Here and there a cygnet is reared uneasily among the ducklings in the brown pond, and never finds the living stream in fellowship with its own oary-footed kind. Here and there is born a Saint Theresa, foundress of nothing, whose loving heartbeats and sobs after an unattained goodness tremble off and are dispersed among hindrances instead of centring in some long-recognizable deed.

Id.

⁶ REBECCA WEST, *BLACK LAMB AND GREY FALCON: A JOURNEY THROUGH YUGOSLAVIA* 55 (Viking Press 1958).

As we grow older and see the ends of stories as well as their beginnings, we realize that to the people who take part in them it is almost of greater importance that they should be stories, that they should form a recognizable pattern, than that they should be happy or tragic. The men and women who are withered by their fates, who go down to death reluctantly but without noticeable regrets for life, are not those who have lost their mates prematurely or by perfidy, or who have lost battles or fallen from early promise in circumstances of public shame, but those who have been jilted or were the victims of impotent lovers, who have never been summoned to command or been given any opportunity for success or failure. Art is not a plaything, but a necessity, and its essence, form, is not a decorative adjustment, but a cup into which life can be poured and lifted to the lips and be tasted. If one's own existence has no form, if its events do not come handily to mind and disclose their significance, we feel about ourselves as if we were reading a bad book.

Id.

from a public thirsting for objective financial advice.⁷ Accountants likewise have reacted to this demand.⁸ Yet the Certified Financial Planner (C.F.P.) boasts the credential of choice in the financial planning field. Understandably, C.F.P.s in the marketplace encounter attorneys who themselves engage in the business of financial advising.⁹ Interprofessional cross-training grows timely. A decade ago the Supreme Court already had acknowledged the practice of Silvia Safille Ibanez, a lawyer who simultaneously listed herself as a C.F.P. and a Certified Public Accountant (C.P.A.).¹⁰ And the partnering of various professions in multidisciplinary firms represents an idea whose time has arrived.

It was in this perspective that the District of Columbia Bar Special Committee on Multidisciplinary Practice reported concerning the future of that Bar. Attorneys, as well as professionals such as financial planners and accountants, should be permitted to share legal fees in the District—in practices not necessarily to be controlled by lawyers—to the benefit of clients and firms alike.¹¹

II. THE RISE OF MULTIDISCIPLINARY PRACTICE

A. *The Protectionism Problem*

The 2001 collapse of Enron Corporation was supposed by some to put an

⁷ George Steven Swan, *The Political Economy of Professional Regulation: Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*, 19 J. LEGAL PROF. 121, 130-31 (1994-95).

Forget the smooth patter. Instead, try to figure out whether these advisers really know what they are talking about. Get them to describe their investment philosophy. Find out how long they been in the business and where they got their training. Ask about credentials.

Are they a certified financial planner, a chartered financial consultant or a certified public accountant-personal financial specialist? Do they have a business degree? None of these is a litmus test. But you want some sense you are dealing with a well-informed, thoughtful professional.

Jonathan Clements, *Is He a Fast Talker? Five Ways to Tell If a Financial Adviser is Right for You*, WALL ST. J., Aug. 13, 2003, at D1.

⁸ See Swan, *supra* note 2, at 159-61.

⁹ See Swan, *supra* note 2, at 163-71.

¹⁰ See *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 144 (1994).

¹¹ New York State approaches attorneys' forming practices with, for example, financial planners and accountants, but that jurisdiction retains barriers to sharing legal fees within a single organization.

end to the debate over multidisciplinary practice.¹² But that scandal is unlikely to impede the movement toward multidisciplinary practice significantly.¹³ Notwithstanding protests, the organized bar still tolerates Big Five law practice on a major scale.¹⁴ The market forces evoking multidisciplinary practice endure.¹⁵ Multidisciplinary practice is here to stay.¹⁶ The hunger for multidisciplinary services, demanded by clients, will be appeased. Entrepreneurs within the bar will formulate a method for delivering those services.¹⁷

The multidisciplinary practice debate is, at root, about clients hunting diverse means to achieve their ends.¹⁸ And multidisciplinary practice is about the provision of services (meaning, often, bundled services) for which there is a market.¹⁹ Accountants are still beating attorneys into that market.²⁰ The “Enron debacle” cannot foreclose the competition with lawyers by accountants.²¹ But the issue reaches beyond accountants attempting to do what attorneys do.²² A scenario wherein law firms enter businesses extrinsic to legal practice—including not just financial planning, but real estate brokerage and benefits consulting—can be benign.²³

The multidisciplinary practice signifying the conjunction of lawyers and nonlawyers in partnership in the provision of mixed professional services, and a sharing in any resultant fees, remains generally proscribed (at any rate in the version of total business integration).²⁴ The American Bar Association’s

¹² Steven C. Krane, *Let Lawyers Practice Law*, NAT’L L. J., Jan. 28, 2002, at A16.

¹³ Ward Bower, *MDP Isn’t The Problem*, NAT’L L. J., Mar. 11, 2002, at A21.

¹⁴ *See id.*; *see also*, Adam Miller, *MDP Lines Getting Blurry at Big Five*, FULTON COUNTY DLY. REPORT (ATLANTA), Oct. 29, 2001, at 1.

¹⁵ *A Conversation with D.C. Bar President George Jones*, WASH. LAWYER, July/August 2002, at 36.

¹⁶ Daniel J. Crothers, *Some Thoughts on the Future of the Law . . . or the World According to Garp*, GAVEL, April/May 2002, at 2.

¹⁷ *Conversation*, *supra* note 15, at 36.

¹⁸ Crothers, *supra* note 16, at 2.

¹⁹ Crothers, *supra* note 16, at 2.

²⁰ Crothers, *supra* note 16, at 2.

²¹ Crothers, *supra* note 16, at 2.

²² Crothers, *supra* note 16, at 2.

²³ “A scenario in which law firms get into businesses other than the practice of law—such as serving as real estate brokers, benefits consultants, or financial advisers—is benign, assuming appropriate disclosure and compliance with the applicable ethical rules,” says Cooley Godward partner Glen Kohl.” Brenda Sandburg, *Enron Saga a Loss for MDPs: Multidisciplinary practices not looking so smart in light of Andersen’s dual roles*, LEGAL TIMES, January 28, 2002, at 17.

²⁴ Mortimer M. Caplin, *The Viability of Multidisciplinary Practice*, THE WASH. LAWYER, May 2002, at 36.

Model Rule 5.7 is a template for state ethical rules.²⁵ It bans attorneys from maintaining, with nonlawyers, partnerships including law practice; feesharing with nonattorneys; and attorneys' permitting nonattorneys to supervise lawyers or to control lawyers' professional judgment. Model Rule 5.7 provides:

(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 person;

(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;

²⁵

Id.

(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.²⁶

But critics aggressively decry these prohibitions as plain economic protectionism.²⁷ Attorneys are, first and foremost, turf defenders.²⁸ Indeed, the proscription against sharing legal fees has not foreclosed the emergence of multidisciplinary practice.²⁹ It merely renders multidisciplinary practice more costly and inefficient,³⁰ because law firms create joint marketing and joint practice affiliations with varied providers of professional services encompassing, for example, financial services providers, accounting firms, and consulting firms.³¹ Unquestionably, multidisciplinary practice can be driven underground, but not eliminated.³²

B. *The Free Market Solution*

1. *Opportunities Running to Clients*

In large part, the clients relevant to the multidisciplinary practice debate include some of the most sophisticated multinational corporations of the globe, in the view of David B. Wilkins, Director of Harvard Law School's Program on the Legal Profession.³³ Such clients command massive in-house capabilities.³⁴ It must be odd for the legal profession to strike a paternalistic pose toward such potent clients.³⁵ That paternalism deprives clients of the right to choose between a law firm and a multidisciplinary practice, notwithstanding that most such companies are on record as being in favor of

²⁶ MODEL RULES OF PROF'L CONDUCT R. 5.7 (1983).

²⁷ See Caplin, *supra* note 24, at 36.

²⁸ Rosemarie Maldonado, *The Egos of Lawyers and Accountants Will Never Allow Them to be Subordinated to . . . Planners*, INV. NEWS, May 6, 2002, at 22. "I teach ethics and I care deeply about ethics. But I also think it is important to understand that ethics are always used as a foil in turf wars. And the MDP debate is fundamentally about turf." Tim Wells, *A Conversation With David Wilkins*, THE WASH. LAWYER, Dec. 2001, at 20, 31.

²⁹ Charles E. Buffon, *Under One Roof: Multidisciplinary Practices*, THE WASH. LAWYER, Sept. 2002, at 33, 34-35.

³⁰ *Id.* at 35.

³¹ *Id.*

³² ". . . MDPs are popping up all around us, and more and more are coming. Even if we have rules and ethics codes that prohibit multidisciplinary partnerships, those rules will be marginalized and ignored." Wells, *supra* note 28, at 31.

³³ Wells, *supra* note 28, at 31.

³⁴ Wells, *supra* note 28, at 31.

³⁵ Wells, *supra* note 28, at 31.

the multidisciplinary practice option.³⁶

And high-level net-worth individuals desire one-stop shopping for services.³⁷ Persons planning for retirement can save time and money if attorneys and financial planners can provide services through a single organization.³⁸ People undergoing divorce can benefit from legal, financial, and counseling services delivered by a single source.³⁹ The crux of the matter proves to be who decides where a client obtains her multiple professional services: Should it not be the client herself?⁴⁰

The market for the services of self-employed professionals is characterized by a high degree of consumer uncertainty as to the service quality.⁴¹ Hence, government agencies and professional organizations undertake regulatory measures, such as quality standards, barriers to entry, regulation of professional education, and the protection of professional titles.⁴² Many of these moves rigorously check competition.⁴³ Therefore, the query becomes inescapable: Are these regulatory measures efficient?⁴⁴

Services the quality of which can be assessed only post-purchase are frequently denominated “experience goods.”⁴⁵ Specifically, experience goods include the services of self-employed, office-based attorneys and tax accountants.⁴⁶ Interestingly, these goods represent exactly those markets for which quality-enforcement regulation has been enforced by professional associations.⁴⁷ Yet scholarly analysis of the law and economics of legal regulation exposes a point of special interest today, at the birth of multidisciplinary practice. A “dynamic market process”⁴⁸ is one not marked by administered prices for the services of self-employed professionals.⁴⁹ According to J. Matthias Graf von der Schulenburg, the machinery of prices

³⁶ Wells, *supra* note 28, at 31.

³⁷ Maldonado, *supra* note 28, at 22.

³⁸ Buffon, *supra* note 29, at 35.

³⁹ Buffon, *supra* note 29, at 35.

⁴⁰ Buffon, *supra* note 29, at 36.

⁴¹ J.-Matthias Graf von der Schulenburg, *Regulatory Measures to Enforce Quality Production of Self-Employed Professionals—A Theoretical Study of a Dynamic Market Process*, in *LAW AND ECONOMICS AND THE ECONOMIC OF LEGAL REGULATION* 133 (J.-Matthias Graf von der Schulenburg & Göran Skogh eds., 1986).

⁴² *Id.* at 134.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 135, 144.

⁴⁶ *Id.* at 135-36, 144.

⁴⁷ *Id.* at 144.

⁴⁸ *Id.* at 145.

⁴⁹ *Id.* at 134, 142, 144-45.

alone will suffice to motivate new suppliers to produce high quality.⁵⁰ Market-entry barriers both impede, and increase the expense of, a quality-enforcing price policy.⁵¹

2. *Opportunities Running to Practitioners*

Allowing multidisciplinary practice might pay off, likewise, when younger and less-established attorneys discover a wider range of employment settings.⁵² The border dividing legal advice from financial planning was breached long ago.⁵³ It is the independent planners who will most benefit from multidisciplinary practice, because they lack the economies of scale to compete seriously with industries like insurance and banking.⁵⁴ In financial planning, it is economics which impels planners towards multidisciplinary practice.⁵⁵ Financial planners drawn to multidisciplinary practice as a

⁵⁰ *Id.* at 144-45.

⁵¹ *Id.* at 144. "Regular quality control is justified as an additional measure since the economic incentive derived from the repeat purchase mechanism will diminish as the time horizon of the supplier decreases." *Id.* at 145.

⁵² Buffon, *supra* note 29, at 35. "The law firm employment model suits some, but not necessarily all." Buffon, *supra* note 29, at 35.

⁵³ Allen Plummer, *When Tinkers Tailor: As the Legal Profession Decides If It Should Go Into Business with Other Professions, The Future of Multidisciplinary Practice Hangs in the Balance*, BLOOMBERG WEALTH MGR., February 2002, at 66, 69. Witness the Financial Planning Association's Virtual Learning Center session of August 13, 2003, "Forming a Multidisciplinary Practice." Its speakers included Armond A. Dinverno, Esq., C.P.A., C.F.P., and Mark E. Bolasa, C.P.A., C.F.P. See the Financial Planning Association's website, at <http://www.fpanet.org> (last visited Feb. 23, 2004).

⁵⁴ Plummer, *supra* note 53, at 74.

⁵⁵ Jim Grote, *Multidisciplinary Practices: Emerging Slowly . . . Very Slowly*, J. FIN. PLAN., April 2002, at 52, 58.

As the practice of financial planning has matured, planners have come to realize two important business realities: (1) that focusing on the few jobs that make up their expertise, such as client contact or investment selection, while delegating other tasks to other folks, benefits their clients, their finances, and their personal well-being, and (2) that sharing the cost of these 'other folks' greatly increases economic efficiency. Consequently, over the past five years we've seen a gradual transition from a solo practice model to larger ensemble practices that share staffs. We found, for instance, that during 2001 and 2002 (not exactly boom times for financial services) the average planning firm increased its staff by 15%.

business model concede their reaction to client initiative.⁵⁶ Even as financial professionals have lagged, clients have pushed for multidisciplinary practice.⁵⁷

State bars again and again are alerted to the advent of multidisciplinary practice. The State Bar of Georgia received the report of its Multidisciplinary Practice Committee.⁵⁸ That Committee recommended permitting limited forms of multidisciplinary practice to revitalize the profession of law in Georgia.⁵⁹ More specifically relevant to financial planning and multidisciplinary practice, Ohio's Board of Commissioners on Grievance and Discipline formally opined that the Ohio Code of Professional Responsibility does not prohibit any attorney from delivering financial planning through a law firm to business/estate planning clients when such services are delivered in connection with providing legal services.⁶⁰ The Board recommends a fixed fee, flat or hourly, for these financial services.⁶¹ A state by state tabulation of decisions on the issue of allowing practicing attorneys to join multidisciplinary practice was available to financial advisers at the same juncture.⁶²

Indeed, most professional service firms are already multiservice firms—they present a service mix. For example, a typical law firm offers multiple service lines such as antitrust law, family law, real estate law, and personal injury law. Accounting firms, generally, boast a service mix of three fundamental service lines, including auditing, management consulting, and

⁵⁶ Grote, *supra* note 55, at 53.

⁵⁷ Grote, *supra* note 55, at 53. According to Arthur “Art” Grant, the President of Cadaret, Grant & Co. (of Syracuse, New York):

Financial planners are retiring and turning their practices over to sons and daughters. In some cases, they are selling their companies to others in the field. But the most notable transition has been the move toward ensemble practices. They are adding accountants, lawyers, CPAs and insurance agents. These practices are becoming small businesses of their own, providing a lifestyle approach to financial planning and creating a one-stop shop for clients.

Arthur Grant, *Viewpoint: Seeking Better Models One Generation at a Time*, J. FIN. PLAN., Sept. 2003, at 20.

⁵⁸ The entire MDP report can be found on the State Bar of Georgia's website, at <http://www.gabar.org> (last visited Dec.25, 2003).

⁵⁹ *Executive Summary Report: Multidisciplinary Practice Committee of the State Bar of Georgia*, GA. BAR J., Feb. 2002, at 36, 38.

⁶⁰ Eugene P. Whetzel, *Opinion Overview*, OHIO LAWYER, September/October 2002, at 24 (Board Opinion 2000-4).

⁶¹ *Id.*

⁶² *Where State Bars Stand*, BLOOMBERG WEALTH MGR., Feb. 2002, at 74.

tax advising.⁶³

III. THE RISE OF THE FINANCIAL PLANNING PROFESSION

A. *What Is Financial Planning?*

In 2001, the President of the Financial Planning Association announced that, with the help of practitioner focus groups, a white paper discussing the future regulation of the financial planning profession was in its draft stage.⁶⁴ Retained to write the paper was Jonathan R. Macey, the J. DuPratt White Professor of Law at Cornell University.⁶⁵ That 142-page white paper, *Regulation of Financial Planners*,⁶⁶ was released in April 2002.⁶⁷ It revived the long-running debate over regulating the financial planning profession.⁶⁸ Dr. Macey acknowledged that the financial planning profession is frequently compared with the legal profession.⁶⁹ One percent of all C.F.P. certificants practice law today. Three percent of all C.F.P. certificants hold the Juris Doctor degree.⁷⁰ It seems that topflight law students embrace financial planning as a sister profession.⁷¹ Carriage-trade lawyers, investment counselors, and tax-shelter accountants all service a class with well-defined levels of financial resources.⁷²

Of course, the long-term goal has been to establish financial planning as a

⁶³ PHILIP KOTLER & PAUL N. BLOOM, *MARKETING PROFESSIONAL SERVICES* 150-51 (1984).

⁶⁴ *FYI: FPA Developing Regulatory White Paper*, J. FIN. PLAN., Nov. 2001, at 16.

⁶⁵ *See id.* Macey is the author of JONATHAN R. MACEY, *MACEY ON CORPORATION LAWS* (1998), and coauthor of GEOFFREY P. MILLER AND JONATHAN MACEY, *BANKING LAW AND REGULATION* (2nd ed. 1997).

⁶⁶ Jonathan R. Macey, *Regulation of Financial Planners: White Paper Prepared for the Financial Planning Association* (April 2002), available at <http://www.fpanet.org> (last visited Oct.25, 2003).

⁶⁷ *Voice*, J. FIN. PLAN., Oct. 2002, at 16.

⁶⁸ William Glasgall, *The FPA Stokes the Debate on Regulation*, INV. ADVISOR, June 2002, at 20. *See also* Kathy Chu, *Take a Few Easy Steps to Avoid a Nightmare Financial Planner*, WALL ST. J., Jan. 28, 2004, at D2 (“Anyone can call himself or herself a financial planner. Indeed, planners are often brokers, insurance agents, accountants or even attorneys who have taken on another title. And they may not always have your best interests in mind.”).

⁶⁹ *See Voice*, *supra* note 67, at 16.

⁷⁰ Macey, *supra* note 66, at 58.

⁷¹ *See Voice*, *supra* note 67, at 18. More and more are financial planners called upon to serve as expert witnesses. Donald Jay Korn, *Words from the Wise: In a Bull Market for Lawsuits and Arbitration Hearings, Planners are Called as Experts*, J. FIN. PLAN., June 2003, at 93.

⁷² KOTLER & BLOOM, *supra* note 63, at 97.

profession on a par with attorneys and C.P.A.s.⁷³ But members of the learned professions no longer bask in their lofty esteem of bygone years.⁷⁴ The professions are respectable because their members do not strive for money.⁷⁵ Yet they can continue to be respectable only by succeeding (notwithstanding this pecuniary indifference) in engendering a great deal of money, or a sum adequate to the pursuit of a genteel life.⁷⁶ Funds must flow in as if from an unsolicited recognition of inestimable services.⁷⁷ Fields like law and financial planning contrast with the sciences. The “principal *raison d’être*” of the former is the “external social need” therefor.⁷⁸ It is this which evokes their professionalization.⁷⁹

⁷³ Editorial, *FPA Must Risk Breaking Eggs to Move Industry Forward*, INV. NEWS, Dec. 2, 2002, at 8.

⁷⁴ T.H. MARSHALL, CLASS CITIZENSHIP, AND SOCIAL DEVELOPMENT 159 (1965).

⁷⁵ *Id.*

⁷⁶ *Id.*

Members of the leisure classes have generally lost status when they submitted to pecuniary reinforcement by ‘going into trade.’ Among those reinforced with money, credit usually varies with the conspicuousness of the reinforcement: it is less commendable to work for a weekly wage than a monthly salary, even though the total income is the same. The loss in status may explain why most professions have come only slowly under economic control. For a long time teachers were not paid, presumably because pay would have been beneath their dignity; and lending money at interest was stigmatized for centuries and even punished as usury.

B.F. SKINNER, BEYOND FREEDOM AND DIGNITY 43 (1971).

⁷⁷ MARSHALL, *supra* note 74, at 159. Of course, even were, for example, an investment counselor to elicit primary job satisfaction from her remuneration and not from her calling itself, she would be expected (as a matter of class propriety) to disavow as much. JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY 343 (1958).

⁷⁸ THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 19 (2nd ed. enlarged 1970). And the sole educational institutions concerned with the yield obtainable from knowledge are such professional schools as law, management, engineering, and medical schools: These concentrate their energies upon practice, not theory. PETER F. DRUCKER, POST-CAPITALIST SOCIETY 204 (1994).

⁷⁹ KUHN, *supra* note 78, at 19. From different premises, the late Professor Allan Bloom concluded not dissimilarly:

The moment of the Enlightenment’s success seems also to have been the beginning of its decay. The obscuring of its intention as a result of its democratization is symptomatic of the inner difficulties of its project. That project entailed freedom for the rare theoretical men to engage in rational inquiry in the small number of disciplines that treat the first principles of all things. This requires an atmosphere where the voice of

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During the 1970s, several organizations labored to develop the professional category of financial planner.⁸⁰ Three decades ago the financial planning profession was only beginning.⁸¹ Then, it simply could have represented a superior sales mechanism for the nascent mutual fund industry.⁸² Practitioners did not need to charge a great sum for financial planning insofar as it meant a tool to vend mutual funds and insurance.⁸³ Even nowadays, financial planners are compensated through fees for asset management, for tax return preparation, or for the sale of securities or insurance.⁸⁴ Most financial advisory firms pay a minuscule salary,

reason is not drowned by the loud voices of the various ‘commitments’ prevailing in political life. Knowledge is the goal; competence and reason are required of those who pursue it. The disciplines are philosophy, mathematics, physics, chemistry, biology and the science of man, meaning a political science that discerns the nature of man and the ends of government. This is the academy. Dependent on it are a number of applied sciences—particularly engineering, medicine and law—that are lower in dignity and derivative in knowledge, but produce the fruits of science that benefit the unscientific and make them respectful of science.

ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 261 (1987).

⁸⁰ SYLVIA PORTER, *SYLVIA PORTER’S MONEY BOOK* 845 (1976).

⁸¹ Shelley A. Lee, *What Is Financial Planning, Anyway?*, J. FIN. PLAN., Dec. 2001, at 36, 37.

⁸² *Id.* Comparably, in the life insurance industry during the past, the standard recruiting strategy was to hire as many agents as possible and hope enough would succeed to return a profit. Richard A. Wecker, *Recruit and Retain*, J. FIN. SERV. PROF’L., Nov. 2002, at 59, 61. Even today, “[t]he four-year retention rate of new agents has leveled at 16 percent.” *Id.* at 59.

⁸³ *A Unique Culture*, FPA SUCCESS FORUM 2002, at 11, 14 (remarks of Bob Barry). Bob Barry served as the President of the Financial Planning Association in 2002. *Id.* at 11.

⁸⁴ *Id.* at 14 (remarks of David Yeske). David Yeske served as President of the Financial Planning Association in 2003. *Id.* at 11. In response to an interview question, “What’s your take on the business scandals that we’re seeing today?” David Maister said:

The car wreck that we’re reading about in the newspapers was inevitable. It was going to happen, because professional-services firms don’t practice what they preach. They’re filled with smart people who understand what they should do to win. Those people talk about having a strategy with a longer-term view, but the operational reality is vastly different. They want the money right now. In practice, cash is everything.

That’s how most professional-services firms operate. But are there fabulous accountants, lawyers, consultants, and investment bankers who do it right? Absolutely. What’s missing are whole firms that are built on discipline and strategy. With one or two exceptions, cash is everything for a firm. It’s also important to mention that the current scandals are not that

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supplemented by production, not so much supplemental commissions, as it is earning a proportion of the fees levied against assets under management.⁸⁵ Even for a financial planner who charges clients on a retainer basis, this sum often is a function of her clients' net worth or income.⁸⁶

Should a lawyer or an accountant fail to bill hours, she forfeits her job.⁸⁷ Yet these specialist practitioners are nevertheless deemed professionals.⁸⁸ An increasing number of financial planners now charge for their advice on an hourly basis rather than collect a percentage of assets.⁸⁹ This makes financial planning more accessible to middle-class families.⁹⁰ In all events, financial planning continues foremost as a sales vocation—even if not in a sales sense. This profession is about the art of human influence. Americans, abandoned to their own devices, will forever procrastinate over resolving their financial affairs.⁹¹ Financial planners can be viewed as professionals, at least insofar as

special. They're special in size, but not in nature.

Alan M. Webber, *Are All Consultants Corrupt?*, in BUSINESS ETHICS 15, 15-16 (Patrick E. Murphy ed., 2004). Maister is the author of FIRST AMONG EQUALS (2002); PRACTICE WHAT YOU PREACH: WHAT MANAGERS MUST DO TO CREATE A HIGH-ACHIEVEMENT CULTURE (2001); THE TRUSTED ADVISOR (2000); and MANAGING THE PROFESSIONAL SERVICES FIRM (1993).

⁸⁵ Karen Hansen Weese, *The New Faces of Planning*, INV. ADVISOR, Feb. 2003, at 44, 50.

⁸⁶ Kathy Chu, *Finance Firms Revise Prices, Business Models*, WALL ST. J., Feb. 12, 2003, at B5. "Among advisers who charge fees rather than commissions, the standard rate is 1% of an investor's assets each year." Jonathan Clements, *The Bargain Hunter's Guide to Getting Cheap Professional Investment Advice*, WALL ST. J., Oct. 1, 2003, at D1.

⁸⁷ *More Bridges to Cross: Five Financial Planners Talk About Their Clients, the FPA, the SEC, and Advancing the Profession*, J. FIN. PLAN., July 2003, at 50, 54.

⁸⁸ *Id.*

⁸⁹ Jeff D. Opdyke, *Going Solo: A Tool for People Who Want to Invest Without Hiring Pros*, WALL ST. J., Dec. 31, 2002, at D1. Workers whose product is standardized can be remunerated by unit of output. Yoram Barzel, *Property Rights in the Firm*, in PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 43, 50 (Terry L. Anderson & Fred S. McChesney eds., 2003). (Salespersons can be paid on commission.) But as output becomes less standardized, it grows increasingly challenging to identify a price ensuring that a worker receives her opportunity costs, *id.*, which costs mean that which must be sacrificed to acquire something. GRAHAM BANNOCK ET AL., DICTIONARY OF ECONOMICS 304-05 (1998). (Financial counseling is not readily standardized.) In the latter case, firms are increasingly likely to pay by the hour. Barzel, *supra*, at 50-51.

⁹⁰ Opdyke, *supra* note 89. See, e.g., Cort Smith, *Breaking Free: Casting off the Chains of Commissions Is a Process, Not a One-Time Act. Here's How Some Advisors are Transitioning Successfully, and Others Failing*, INV. ADVISOR, May 2002, at 43. The Garrett Planning Network (of Shawnee, Kansas) has 155 members in 33 states. These financial planners typically charge between \$100 and \$200 per hour. Clements, *supra* note 86.

⁹¹ Cort Smith, *Easing the Transition*, INV. ADVISOR, Nov. 2002, at 95. Convincing
(continued)

planners are remunerated based upon their competence other than upon sales savvy.⁹²

A process, which can be called deinstitutionalization, includes the shift from employees' defined benefit plans to 401(k) plans.⁹³ It also embraces contemporary moves from whole life insurance to variable life insurance, and from profit-sharing plans toward stock options.⁹⁴ The installation of private retirement accounts under the Social Security system would expand this trend.⁹⁵ It is to cope with this vastly enhanced decisional set that clients need objective financial advice.⁹⁶ The profession of financial planning is here to stay, if only because the populace requires it.⁹⁷ The goal remains to win reimbursement for financial planning itself.⁹⁸ Financial planning constitutes a distinct discipline.⁹⁹ It must not be confounded with its implementation subsets, such as, for example, legal advice and tax preparation or asset

many professionals that they ought to become involved actively with selling their own services can be difficult. Of course, many lawyers (or accountants) simply want naught to do with selling, and numerous others lack the requisite personal flair. KOTLER & BLOOM, *supra* note 63, at 12.

⁹² *More Bridges to Cross*, *supra* note 87, at 54. "Planners who are unconnected with any institution and rely entirely on clients' fees are more likely to be unbiased, but you pay for protection against bias in the form of more expensive hourly charges." BAMFORD, *supra* note 3, at 114.

⁹³ Robert Casey, *For Whom Tolls the Bell? Powerful Trends Spell Trouble for Big Firms But Not For Independent Advisors*, BLOOMBERG WEALTH MANAGER, Sept. 2001, at 17. Ted Benna is often called "The Father of the 401(k)." *Voice: 10 Questions With . . . Ted Benna*, J. FIN. PLAN., Jan. 2003, at 16. According to Benna: "What excited me about the 401(k) was that it would be very beneficial to the average person. It's a great program for those earning between, say, \$20,000 and \$100,000. It's ho-hum for those making big money. But that's not the average person." *Id.*

⁹⁴ Casey, *supra* note 93, at 17.

⁹⁵ Casey, *supra* note 93, at 17.

⁹⁶ Casey, *supra* note 93, at 17.

⁹⁷ NICHOLAS BASTA, TOP PROFESSIONS: THE MOST POPULAR, DYNAMIC, AND PROFITABLE CAREERS IN AMERICA TODAY 13 (1989). "Financial plans have exploded in popularity in recent years as brokers, insurance agents and other financial advisors have touted their benefits." Ruth Simon, *Financial Plans: Selling For In-House Gains*, WALL ST. J., Feb. 9, 2004, at C1.

⁹⁸ BASTA, *supra* note 97, at 13. "During the past several years, the proliferation of investment opportunities—life insurance, annuities, mutual funds, certificates of deposit, and a confusing variety of securities—has led to a parallel growth in the population of professional planners." BAMFORD, *supra* note 3, at 114.

⁹⁹ Nancy Opiela, *David Yeske on the Next Steps in FPA's Emergence*, J. FIN. PLANNING SOURCE BOOK 2003, at 32, 33.

management.¹⁰⁰

Of course, the financial planning profession did not blossom in a vacuum of personal financial services.¹⁰¹ Many accountants who customarily provide tax planning input have delivered financial advice since the 1980s.¹⁰² Indeed, from 1993 to 1999, the number of candidates sitting for the C.P.A. examination declined from 53,700 to 38,500. The proportion of students majoring in accounting shrank from four percent to two percent.¹⁰³ When accountants initially moved into financial services, many actively recommended stocks and bonds (rather than the utilization of a money manger

¹⁰⁰ *Id.*

¹⁰¹ BASTA, *supra* note 97, at 13.

¹⁰² BASTA, *supra* note 97, at 13. The American Institute of Certified Public Accountants created a voluntary membership division, its Advisory Services and Personal Financial Planning Division, during 1968. GRACE W. WEINSTEIN, *THE BOTTOM LINE: INSIDE ACCOUNTING TODAY* 39 (1987).

Personal financial planning, first on the specialization menu on both the state and national level, is clearly of great interest. This isn't particularly surprising, since there's a growing recognition of the need for personal financial planning among Americans of virtually all income levels. CPAs recognize this need and see a market for their services, a market that can expand their client base. CPAs also see that they may be able to offer those clients a unique perspective. 'Non-CPAs who practice financial planning may not be objective or otherwise well qualified,' according to the 1986 proposal for an AICPA membership division for personal financial planning. 'The non-CPAs frequently label their services as PFP while their true objective may be to market a product.' CPAs, by contrast, are recognized and respected for 'their objectivity, their integrity, their independence, their education and proven mastery, through successful completion of the CPA examination, of related analytical skills.'

Id. at 41-42. This continuing development is attested to by the American Institute of Certified Public Accountants:

At a time when the revenues of CPA firms are largely flat, the revenues from their financial planning divisions are up substantially. In fact, in a recent AICPA study of the 100 largest accounting firms, all 100 said their number one growth niche is estate and financial planning.

Bob Clark, *Professional Help: If Accountants Finally Become a Force in Financial Planning, Will They Raise Professional Standards?*, J. FIN. PLAN., Feb. 2004, at 33-34.

¹⁰³ Duane R. Thompson, *The Major Event Affecting Planners? You Choose*, J. FIN. PLAN., Mar. 2003, at 32, 35.

or fund).¹⁰⁴ Combined with a dearth of preparation, and a fragile comprehension of such critical concepts as fee structure, compensation, and the appropriateness of various investments, active investment management generated avoidable mistakes.¹⁰⁵ Added responsibilities pushed some accountants to spread themselves too thinly, triggering damage to reputations and lost clients.¹⁰⁶

B. *Who Is the Certified Financial Planner?*

One finds an alphabet soup of certifications in the financial planning field.¹⁰⁷ Financial advisors can collect titles from among myriad credentials, some of them obscure.¹⁰⁸ The C.P.A. credential certifies public accountants, but the Personal Financial Specialist (P.F.S.) credential (for C.P.A.s alone) attests to a comprehensive grasp of financial planning. The Chartered Financial Analyst (C.F.A.) credential signifies a competence in securities analysis. The Certified Investment Management Consultant (C.I.M.C.) credential confirms training focused on finding good mutual funds and money managers. The Certified Trust and Financial Adviser (C.T.F.A.) credential signifies an estate planning and trust expertise. The Chartered Financial Consultant (Ch.F.C.) credential is a financial planning designation common in the life insurance industry. The Chartered Life Underwriter (C.L.U.) credential is a title awarded to insurance agents.¹⁰⁹

¹⁰⁴ Plummer, *supra* note 53, at 71.

¹⁰⁵ Plummer, *supra* note 53, at 71.

¹⁰⁶ Plummer, *supra* note 53, at 71.

¹⁰⁷ Jana Tuhinkova, *Certification Soup Spells S-U-C-C-E-S-S*, TICKER, May 2002, at 12, 12.

¹⁰⁸ Lewis Braham, *Looking for Some Advice? Almost Anyone Can Hang Out a Shingle. Here's How to Search Out the Right Financial Advisor for You*, USA TODAY, Nov. 15, 2002, at 3B. According to the President of the Investment Management Consultants Association:

For help with tax, financial, and business planning, investors generally consult a CPA. In areas of general financial planning, such as retirement, estate, and insurance planning, many would look for a CFP. For securities analysis, investment managers often hire CFAs.

But when focusing on the strategic management of larger pools of assets—investment strategy development, asset allocation, manager search and due diligence, performance measurement/attribution, and regulatory issues—wealthy investors, endowments, foundations, and pension plans look to the CIMA designation, which is offered by the Investment Management Consultants Association (IMCA).

Richard Joyner, *Letter to the Editor*, INV. ADVISOR, May 2002, at 14, 14.

¹⁰⁹ Amy Borrus, *Check Financial Advisor's Qualifications, Licenses*, USA TODAY, Nov. 15, 2002, at 4B; JORDAN E. GOODMAN & SONNY BLOCH, EVERYONE'S MONEY BOOK 693-94

(continued)

But the C.F.P. title is the designation of choice within the business of financial planning.¹¹⁰ By the early 1980s, there were 3,500 holders of the C.F.P. designation.¹¹¹ That title has commanded a gathering acceptance within the financial planning community in recent years.¹¹² By last year, it was touted as the basic credential of the field:¹¹³ “[W]ith tough requirements to pass the CFP exam and scores of college programs in personal financial counseling, good planners have wide-ranging training.”¹¹⁴ The C.F.P.

(1994); THE WALL STREET JOURNAL LIFETIME GUIDE TO MONEY 49 (C. Frederic Wiegold ed., 1997). The Ch.F.C. and C.L.U. are awarded by The American College (of Bryn Mawr). The American College’s website is found at www.amercoll.edu. The Certified College Planning Specialist (C.C.P.S.) designation is presented by the National Institute of Certified College Planners. A prerequisite to the award of the C.C.P.S. title is a professional certification such as the C.F.P., Ch.F.C., or C.L.U. Cort Smith, *Graduation Day: There’s New Educational Regimen and Designation for Advisors Who Want to Major in College Funding*, INV. ADVISOR, Nov. 2002, at 19. The new Chartered Alternative Investment Analyst (C.A.I.A.) designation is cosponsored by the Alternative Investment Management Association and the Center for International Securities and Derivatives Markets. Jeff Benjamin, *Credential Frenzy Hits Alternatives Industry*, INV. NEWS, Nov. 18, 2002, at 2, 21. And momentum gathers for a Certified Life Planner (C.L.F.) designation. Rick Miller, *Life Planning: ‘Touchy-Feely’ Takes Wing*, INV. NEWS, Nov. 18, 2002, at 1, 19. For that matter, there is found a small group of insurance advisors who for a fee review a client’s insurance coverage and needs. Kaja Whitehouse, *Reviewing Your Insurance Package*, WALL ST. J., July 16, 2003, at D2.

¹¹⁰ Tuhinkova, *supra* note 107, at 12.

¹¹¹ VENITA VANCASPEL, THE POWER OF MONEY DYNAMICS 512 (1983).

¹¹² Jane J. Kim, *New Investing Certification is Offered*, WALL ST. J., Dec. 26, 2002, at A11.

You want to know that your adviser cares enough about managing money to have gone to extra lengths to become a certified financial planner (this is what I am). A certified financial planner has had to pass a series of exams that deal with every aspect of finance, including risk management or insurance, retirement planning, taxes, and estate planning. It usually takes two years to study for and pass these exams, and those who do pass are required to stay up-to-date by taking continuing education courses and to abide by the standards of the International Board of Certified Financial Planners (IBCFP).

SUZE ORMAN, THE 9 STEPS TO FINANCIAL FREEDOM 233 (1997).

¹¹³ “At a minimum, look for a certified financial planner.” *How to Find Guidance You Can Trust*, KIPLINGER’S, April 2003, at 38.

¹¹⁴ Jeffrey R. Kosnett, *Advice for Sale*, KIPLINGER’S, April 2003, at 36, 39. “A fairly new development on the CFP education front is the Ph.D. program in financial planning; among the 20 new programs are two Ph.D. programs at Texas Tech.” Karen Hansen Weese and James J. Green, *Higher Education is a Win-Win for Planners, and Clients*, INV. ADVISOR,

(continued)

constitutes the most recognized and prestigious designation in its discipline.¹¹⁵

It is the only financial planning title which requires rigorous schooling and testing.¹¹⁶ That certification process encompasses a two-day, ten-hour examination administered by the Certified Financial Planner Board of Standards¹¹⁷ and annual continuing education requirements.¹¹⁸ Unlike other designations, this title is revocable by an ethical oversight committee, the Certified Financial Planner Board of Standards, Inc., should a C.F.P. breach the code of conduct.¹¹⁹

The *Wall Street Journal* reports of the C.F.P.: “Financial-Planner Certification Gains in Cachet.”¹²⁰ In the twenty-first century, the C.F.P. has attained prominence as consumers increasingly seek them out.¹²¹ Corporate America offers hard cash, travel perks, and educational reimbursement for its financial-adviser employees to win certification.¹²² Merrill Lynch & Co. offers \$100,000 to any financial adviser netting a C.F.P. and likewise meeting some business requirements during a five-year span.¹²³ It is poignant, however, to encounter students in C.F.P. programs, or recent entrants into a financial planning career, in love with assisting people in their financial planning needs. Nearly everyone with whom they confer recruits them for sales work.¹²⁴

More than 2,500 persons registered to take the November 2002, C.F.P. examination. That record figure was driven primarily by the waxing interest

Feb. 2003, at 20.

¹¹⁵ Tuhinkova, *supra* note 107, at 12.

¹¹⁶ Deena Katz, *Here's Some Advice on Selecting a Financial Advisor*, USA TODAY, Nov. 15, 2002, at 3B. “The curricula of CFP Board-Registered Programs must address more than 100 financial planning topics identified in periodic job-task analysis studies. These studies validate the knowledge necessary to provide competent, professional financial planning services.” Certified Financial Planner Board of Standards, Inc., Annual Report 2002, at 3, available at www.CFP.net (last visited February 21, 2004) [hereinafter Annual Report].

¹¹⁷ The C.F.P. Board's website is found at www.CFP-Board.org.

¹¹⁸ Kathy Chu, *Financial-Planner Certification Gains in Cachet*, WALL ST. J., Oct. 30, 2002, at D2.

¹¹⁹ Katz, *supra* note 116.

¹²⁰ Chu, *supra* note 118.

¹²¹ Chu, *supra* note 118.

¹²² Chu, *supra* note 118.

¹²³ See Chu, *supra* note 118; see also *Observer*, J. FIN. PLAN., Feb. 2003, at 25. “MetLife Inc. requires new advisors to either have the CFP certificate or be working at it.” *Id.* “Among new certificants, CFP Board noted an increasing number of individuals who are associated with large financial services companies, which are encouraging, and in some cases requiring, their advisors to earn the CFP certification.” Annual Report, *supra* note 116, at 2.

¹²⁴ Catherine Newton, *The Future of the Profession: Leaders Frame the Issues for FPA*, J. FIN. PLAN., Dec. 2001, at 48, 56 (remarks of Janet G. McCallen).

in the C.F.P. title on the part of financial services firms.¹²⁵ The College for Financial Planning, of Greenwood Village, Colorado, sent a survey to Financial Planning Association members; the survey elicited 247 replies. It disclosed a median after-tax income in 2002 of C.F.P.s totaling \$120,000, up from \$75,000 in 1998.¹²⁶ The median hourly rate amounted to \$150, up from \$100.¹²⁷ As of September 2002, 40,449 persons were authorized to bear the C.F.P. mark in the United States (an all-time peak total).¹²⁸ By the close of November 2002, 40,387 planners were certified by the Certified Financial Planner Board of Standards, a fifty-eight percent leap over the 25,538 such planner-designees in 1992.¹²⁹ Their ranks swell by approximately two thousand annually.¹³⁰ The C.F.P. designation is already borne by more than 62,000 people in fourteen nations.¹³¹ Almost a third of C.F.P.s practice abroad.¹³²

In 2002, the Certified Financial Planner Board of Standards, Inc., was notified that its C.F.P. mark officially had been registered with the U.S. Patent

¹²⁵ Chu, *supra* note 118. "A record number of individuals, 5,935, sat for the exam in 2002, with an overall average pass rate of 54 percent. The average pass rate for first-time testers [sic] was 58 percent." Annual Report, *supra* note 116, at 3.

¹²⁶ Frederick P. Gabriel, Jr., *As CFP Pay and Satisfaction Rise, Others Want In*, INV. NEWS, Oct. 7, 2002, at 11.

¹²⁷ *Id.* The latest FPA Compensation and Staffing Study prepared by the accounting firm of Moss, Adams, LLP (of Seattle, Washington) for the Financial Planning Association discloses that investment advisors boasting the C.F.P. credential outearned their non-C.F.P. peers by 16.5%. William Glasgall, *Realty Check*, INV. ADVISOR, Sept. 2003, at 21-22.

¹²⁸ Letter from Elaine E. Bedel and Louis J. Garday to C.F.P. certificants 1 (Nov. 4, 2002). The number of U.S. C.F.P. certificants officially reached 40,335 at the end of September 2002, according to the Certified Financial Planner Board of Standards, Inc. A Merrill Lynch financial advisor, Teresa Lee, became the 40,000th U.S. C.F.P. certificant. *Observer*, J. FIN. PLAN., Jan. 2003, at 25.

¹²⁹ Doug Nogami, *Letter to the Editor*, INV. NEWS, Jan. 13, 2003, at 11. Doug Nogami serves as the Director of Communications, Certified Financial Planner Board of Standards, Inc.

Data gathered from CP certificants in 2002 reveals that 85 percent describe themselves as financial planning practitioners, 89 percent have either a bachelor's or master's degree, and 68 percent have securities licenses, insurance licenses or both. Seventy-six percent of CFP certificants are male; 24 percent are female.

Annual Report, *supra* note 116, at 2.

¹³⁰ Kosnett, *supra* note 114, at 38.

¹³¹ Bennett Voyles, *Global Expansion*, TICKER, Oct. 2001, at 20.

¹³² *See id.* Financial planners are to learn more of U.S.-Canada-Mexico financial planning challenges. *See, e.g.*, Robert Keats and Raoul Rodriguez-Walters, *North America: The New Financial Planning Frontier*, J. FIN. PLAN., Feb. 2003, at 80.

and Trademark Office as a certification mark.¹³³ The Board has the last word on the use of the C.F.P. name and marks.¹³⁴ A half-dozen countries are poised to join the International C.F.P. Council.¹³⁵ That Council is authorized to act as a standards-setting body.¹³⁶

IV. LAWYERS AND FINANCIAL PLANNING

A. *The Law as a Multifaceted Discipline*

By 2002, the business of purchasing financial advice suddenly came into vogue, as shellshocked investors moved to salvage their portfolios.¹³⁷ Then, some financial planners previously had been attorneys.¹³⁸ Earlier, lawyers had been mailing resumes in search of a path into the financial planning profession.¹³⁹ Were not these lawyers proficient in exploiting trusts and planning estates?¹⁴⁰

¹³³ “CFP” Now Registered as Certification Mark With Patent and Trademark Office Certified Financial Planning Board of Standards, CFP BOARD REPORT, 2nd Quarter 2002, at 1.

¹³⁴ Voyles, *supra* note 131, at 20.

¹³⁵ Voyles, *supra* note 131, at 20.

¹³⁶ Voyles, *supra* note 131, at 20. Thanks to the Financial Planning Association, available today is a cross-border resource library at www.fpaglobal.org. And Peter Lefferts is Chair of the U.S. Technical Advisory Group, which is working with the Investment Organization for Standardization’s Technical Committee 222. That Committee is developing a global standard for the definition, process, practice management, ethics, and professional qualifications of financial planners. *Voice: 10 Questions With . . . Peter Lefferts*, J. FIN. PLAN., July 2003, at 12.

¹³⁷ Jonathan Clements, *If You Think Picking Stocks Is Hard, Just Try Choosing a Financial Adviser*, WALL ST. J., May 22, 2002, at D1.

¹³⁸ *Id.*

¹³⁹ Catherine Newton, *New Kids on the Block: Freshman Planners Share Their Experiences*, J. FIN. PLAN., Sept. 2001, at 90, 92.

Law firms and investment firms are actively pursuing planning engagements. Accountants are getting licensed to sell insurance and investments. Banks are providing investment alternatives beyond CDs. Insurance agencies are providing broader access to financial products and planning. The ‘new face of planning’ is, at long last, the fading of the lines between planning and products, attorney and accountant, bank and investment firm.

Herbert K. Daroff, *Letter to the Editor*, INV. ADVISOR, April 2002, at 14.

¹⁴⁰ Clements, *supra* note 137. This long has been the case: “In 1954, the biggest department in most of the law firms was the tax department—‘You can’t have anything, these days,’ says Colonel Joseph M. Hartfield, senior partner of White & Case, ‘that doesn’t involve taxes.’ The wills and estates department, too, is always busy. MARTIN MAYER, WALL STREET: MEN AND MONEY 236 (1966).

Already, some lawyers (as well as C.P.A.s, stockbrokers, insurance agents, and bankers) vie to profit from investment advising.¹⁴¹ Grouses Stephanie Parlee, C.F.P., the President of Altus Financial Services (of Old Town, Maine), “[y]ou can’t practice law without a license, but for some reason, in our business lawyers can practice.”¹⁴² Since neither the states nor the federal government set minimums for education (or credentials), virtually anyone can hang a shingle and style herself a “professional financial advisor.”¹⁴³

David Wilkins opines:

Part of what makes the contemporary business world so exciting is the opportunity it provides to bring together different kinds of knowledge to solve complex problems

Well, what do professional service firms do? They sell knowledge. If knowledge is increasingly interdisciplinary, then doesn’t it seem that professional service firms need to know how to put knowledge together in effective ways?¹⁴⁴

Contemporary bar magazines offer articles entitled, *An Attorney’s Guide to Financial Advising*.¹⁴⁵ They advertise investment adviser’s manuals.¹⁴⁶ Or as the Dean of Northwestern University School of Law, David E. Van Zandt, posits: “In order to be successful today, you have to be cross-trained.

¹⁴¹ Ron Lieber, *Advice for Sale: How to Pick a Financial Planner*, WALL ST. J., May 13, 2003, at D1.

¹⁴² *More Bridges to Cross*, *supra* note 87, at 54. According to John T. Blankinship, C.F.P., of Blankinship & Foster (of Del Mar, California): “Currently, anybody can print a card and say they’re a financial planner. Rectifying this remains a key issue.” *Practice Profile Snapshot*, SOLUTIONS, September/October 2003, at 5 (Financial Planning Association). This entire interview has been made available at www.fpanet.org/member/practice_center/practice_services/pm/practice_profiles.cfm (last visited Feb. 25, 2004).

¹⁴³ Alan R. Ziegler, *How to Become a Professional*, LIFE INS. SELLING, Dec. 2002, at 75. “Unlike medicine or law, this profession is almost entirely unregulated, and in many states virtually anyone can adopt the label of financial planner, no matter how flimsy his or her qualifications.” BAMFORD, *supra* note 3, at 114. “Despite the phenomenal growth of financial planning services and the enormous influence that planners can exert over the investment of their clients’ resources, there is virtually no enforced national regulation of the industry or any uniform system of earning credentials.” BAMFORD, *supra* note 3, at 115.

¹⁴⁴ Wells, *supra* note 28, at 30.

¹⁴⁵ Thomas E. Geyer, *An Attorney’s Guide to Financial Advising*, OHIO LAWYER, May/June 2002, at 14.

¹⁴⁶ Advertisement, THOMAS E. GEYER, OHIO INVESTMENT ADVISER MANUAL: A GUIDE TO THE NEW OHIO LAW GOVERNING INVESTMENT ADVISERS AND FINANCIAL PLANNERS (2002), in OHIO LAWYER, May/June 2002, at 15.

Today's work force is team-oriented. A lawyer who doesn't understand the business his client is in, or the businessman who doesn't understand his industry's legal environment, is in a dangerous situation."¹⁴⁷

After all, an online survey conducted by the Florida Bar to demonstrate how clients actually use lawyers elicited more than 800 responses.¹⁴⁸ Of participants, sixteen percent cited real estate transactions as a reason they had used an attorney during the year past.¹⁴⁹ Bankruptcy filings and divorce/separation issues rounded out the top five reasons; each garnered nine percent of responses.¹⁵⁰ Meanwhile, drafting a will was the reason an additional eight percent of participants had retained an attorney.¹⁵¹ Additionally, seven percent needed counsel concerning probate/estate settlement issues.¹⁵² Each of these matters represents a financial planning-related topic.¹⁵³

For numerous lawyers, the most obvious entry into financial planning will be partnering as tax/estate planners with other professionals.¹⁵⁴ The special incentive will prove to be personal wealth planning (i.e., estate planning to ensure asset growth).¹⁵⁵ Potential abounds as well for experts in business succession, and in planned giving.¹⁵⁶ And "the fastest-growing section in the American Bar Association . . . is fiduciary liability: people suing investment advisers and money managers."¹⁵⁷

¹⁴⁷ Katherine S. Mangan, *Professional Schools Seek Degrees of Cooperation: Demand for Cross-Disciplinary Training Leads Law, Medical, and Other Programs to Combine Forces*, CHRONICLE OF HIGHER ED., Sept. 14, 2001, at A14.

¹⁴⁸ *Survey Shows How People Really Use Lawyers*, FLA. BAR NEWS, Oct. 13, 2002, at 1.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 4.

¹⁵² *Id.*

¹⁵³ See, e.g., Alan Feigenbaum, *Estate Planning Emerging From its 'Dark Cave'*, J. FIN. PLAN., June 2002, at 46; see also John J. Scroggin, *Tools of the Trade: The Goal of Estate Planning Is to Preserve and Protect the Family. Here are the Techniques Planners Need to Accomplish That Goal*, INV. ADVISOR, Jan. 2003, at 52.

¹⁵⁴ Plummer, *supra* note 53, at 69.

¹⁵⁵ Plummer, *supra* note 53, at 69.

¹⁵⁶ Plummer, *supra* note 53, at 69. Meanwhile, Merrill Lynch and Co. proposes that the ideal candidate for its global private-client group, already 13,500 financial advisors strong, might be someone with an economics or mathematics foundation: "The group would also consider professionals who are certified public accountants, attorneys or have a sales background." Kemba J. Dunham, *The Jungle: Focus on Recruitment, Pay and Getting Ahead*, WALL ST. J., Jan. 27, 2004, at B8.

¹⁵⁷ Mike Clowes, *How Advisers Can Head Off Litigation*, INV. NEWS, May 27, 2002, at 2. Outlining for the first time essential investment practices which all fiduciaries are to follow is FOUNDATION FOR FIDUCIARY STUDIES, *PRUDENT INVESTMENT PRACTICES: A HANDBOOK FOR*

(continued)

B. *Which Professions Will Marry?*

Some propose that a minimum of three separate professions in-house is required to constitute a multidisciplinary firm.¹⁵⁸ A poll of affluent investors revealed that, of nine possible services provided by financial advisors, only three were solicited by more than 1.5 percent of such investors.¹⁵⁹ Of those polled, 56.7% desired asset allocation, 41.2% desired financial and estate planning, and 23.5% desired tax planning.¹⁶⁰ Observe the correspondence of asset allocation with investment experts; of financial and estate planning with attorneys; and of tax planning with C.P.A.s.

Last year, President Joseph J. Ponzio of Meridian Financial Management (of Elmwood Park, Illinois) envisioned the firm of the future:

Your clients deserve and will demand a team of specialists. They will require an estate planning attorney, a savvy accountant, and a money manager who will invest not only in stocks, bonds, and mutual funds, but also in real estate and closely held businesses. Your clients will want their entire team in-house, and they will expect you, as the planner, to oversee all and to ensure plan conformity.¹⁶¹

Even in 2002, the structure of Tanager Financial Services, Inc.¹⁶² (of Boston) encompassed a Client Services Team boasting these investment advisors: C.F.P.s, J.D.s, and C.P.A.s.¹⁶³ The multidisciplinary shop functions like a diversified portfolio. The mortgage business can flourish (thanks to low interest rates) while the investment business retreats due (ironically) to

INVESTMENT FIDUCIARIES (2003). Lynn O'Shaughnessy, *The White Glove Test*, BLOOMBERG WEALTH MANAGER, Sept. 2003, at 66, 68.

¹⁵⁸ Grote, *supra* note 55, at 53.

¹⁵⁹ John J. Bowen, Jr., *Serving the Affluent Market With an Independent Broker/Dealer Partner*, INDEPENDENT BROKER/DEALER: RESOURCE GUIDE 2003 12, 18 (supplement to FINANCIAL PLANNING).

¹⁶⁰ *Id.*

¹⁶¹ Joseph J. Ponzio, *Under One Roof: The Firm of the Future Will Unite Planner, Asset Manager, Lawyer, and CPA*, J. FIN. PLAN., July 2003, at 112.

Each member of your in-house team would be a specialist. With this team approach, you can focus on creating and maintaining financial plans. Your money manager can focus on investing. Your attorney can focus on estate planning. Your accountant can focus on tax planning. And your clients? They can focus on the things most important to them.

Id.

¹⁶² The Website of Tanager Financial Services, Inc., is available at www.tanagerfinancial.com.

¹⁶³ Grote, *supra* note 55, at 56.

low stock prices.¹⁶⁴ The highly practical, diversified portfolio principle surfaces repeatedly, in varied settings.¹⁶⁵

The heaviest pressure for multidisciplinary practice derives from the nonlegal professions. Those most likely to gain from ready access to a lawyer include financial advisors, who must tackle issues pertaining to exploiting trusts, and to inheritance, and accountants, who confront tax issues relating to trusts.¹⁶⁶ Notwithstanding either the demands of high net-worth clients or the insistence of financial planners and accountants, the legal profession ultimately decides whether multidisciplinary practice comes to fruition.¹⁶⁷

C. *Who Will Captain the Team?*

Dan Moisand, C.F.P., the Chair of the Financial Planning Association Subcommittee on Professional Issues, doubts the capacity of firms to build efficient multidisciplinary practices.¹⁶⁸ Multidisciplinary practice will entail the integration of markedly diverse cultures.¹⁶⁹ These differences between the professions might ignite a power struggle for the command of multidisciplinary practices.¹⁷⁰ Mr. Ponzio fancies planners becoming the “team captain.”¹⁷¹

Jeffrey Barefoot is President of Midwest Continental Co. (of Perrysburg, Ohio). Like Silvia Safille Ibanez, he is an attorney, C.F.P., and C.P.A. He offers: “When lawyers are able to move into the insurance and investment business, it will really define a new era of financial services because everybody will have to compete on the basis of skill and credentials.”¹⁷² Barefoot anticipated neither lawyers nor C.P.A.s entering financial planning

¹⁶⁴ Grote, *supra* note 55, at 60.

¹⁶⁵ See, e.g., George Steven Swan, *The Law and Economics of Company-Owned Life Insurance (COLI): Winn-Dixie Stores, Inc. v. Comm’r*, 27 S. ILL. U. L. J. 357, 374 (2003) (citing ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* 124 n. 3 (1979)) (life insurance company via pooling death risks of policyholders commands a diversified portfolio of life expectancies); George Steven Swan, *Economics and the Litigation Funding Industry: How Much Justice Can You Afford?*, 35 NEW ENG. L. REV. 805, 811, 826-31 (2001) (contingent fee-plaintiff lawyers, litigation funding companies, and prospective purchasers of tort claims all exemplify diversified portfolio-holders).

¹⁶⁶ Plummer, *supra* note 53, at 69.

¹⁶⁷ Plummer, *supra* note 53, at 75.

¹⁶⁸ Dan Moisand, *The Urge to Merge: Insights From a Sole Practitioner’s Search for Partners*, J. FIN. PLAN., Aug. 2002, at 96, 101.

¹⁶⁹ *Id.* “My discussions with CPAs reflect some of this. That is not to say these firms will not be formed successfully. I simply do not see the movement sweeping over the planning business.” *Id.*

¹⁷⁰ Plummer, *supra* note 53, at 75.

¹⁷¹ Ponzio, *supra* note 161, at 112.

¹⁷² Maldonado, *supra* note 28, at 22.

firms:

I don't see CPAs or attorneys coming into financial planner firms. I see them coming to each other, and they will acquire financial planning firms or hire [planners] to come in. The egos of lawyers and accountants will never allow them to be subordinated to the authority of financial planners whom they perceive to be less well educated than themselves.

Whether that is true or not, that is how they see it. It's not to say that isn't going on. I've had CPAs and lawyers work with me. The accountants and lawyers will first affiliate with each other, then have insurance and financial planners join with them.¹⁷³

So much for Ponzio's idea of planners becoming the "team captain."

Meanwhile, almost nobody is inquiring whether compliance with tax laws, securities laws, and the like, will become more likely under multidisciplinary practice.¹⁷⁴ Some states are moving to regulate the financial industries under a single department.¹⁷⁵ This would be appropriate to a multidisciplinary calling like financial planning.¹⁷⁶ And the District of Columbia Special Committee on Multidisciplinary Practice is preparing for the multidisciplinary services future.

V. RULE 5.4 OF THE DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT

The unanimous Report and Recommendation of the District of Columbia Bar Special Committee on Multidisciplinary Practice¹⁷⁷ was dated October 23, 2001.¹⁷⁸ Then, Rule 5.4 of the District of Columbia Rules of Professional Conduct provided:

(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

¹⁷³ Maldonado, *supra* note 28, at 22.

¹⁷⁴ Wells, *supra* note 28, at 31.

¹⁷⁵ Sara Hansard, *FPA Eyes Suits to Police Beat*, INV. NEWS, June 10, 2002, at 1, 20.

¹⁷⁶ *Id.*

¹⁷⁷ *Report and Recommendation of the District of Columbia Special Committee on Multidisciplinary Practice*, WASH. LAW., Jan. 2002, at 30 [hereinafter *Report and Recommendation*]. This Special Committee is not to be confused with its sister body, the District of Columbia Bar Rules of Professional Conduct Review Committee. *Id.* at 33.

¹⁷⁸ *Id.* at 30.

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 undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;

(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) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b).

(b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

(1) The partnership or organization has as its sole purpose providing legal services to clients;

(2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;

(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;

(4) The foregoing conditions are set forth in writing.

(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.¹⁷⁹

Rule 5.4 forbids an attorney from sharing legal fees with any non-attorney, but for very limited circumstances.¹⁸⁰ This rule erects an obstacle to those lawyers and nonlawyers aiming to practice their respective professions together in one firm.¹⁸¹ It allows the sharing of fees only in those organizations engaged solely in legal practice, and only while traditional legal ethical requirements apply to every participant in such an enterprise.¹⁸² Of course, it likewise is permissible for attorneys to serve in such organizations controlled by non-attorneys as business corporations, governmental agencies, and charitable or public service organizations, if no legal fees are collected and shared with non-lawyers.¹⁸³ Rule 5.4 has resulted in neither public injury nor damage to the profession.¹⁸⁴ This presented the context of the 2001 Report and Recommendation.

VI. THE SPECIAL COMMITTEE REPORT

A. *The Real Debate*

1. *The District of Columbia Insight*

The Special Committee submitted that rules can be devised affording safeguards adequate to allow multidisciplinary practice without the sacrifice of any core value of the legal profession, nor the sacrifice of extant protections of client interests.¹⁸⁵ The consumers of legal services can be provided professional services in a multidisciplinary context without risking the attorney-client privilege, jeopardizing independent lawyer professional judgment, or eliciting insoluble conflicts of interest.¹⁸⁶

The Special Committee asserted that there is no contemporary barrier to the collaborative provision of services by lawyers and other professionals.¹⁸⁷ The crux today is the bar against a cross-professional feesharing.¹⁸⁸ It is common for attorneys to collaborate intimately with financial planners and accountants.¹⁸⁹ This will endure whether or not the legal profession reforms

¹⁷⁹ D.C. RULES OF PROF'L CONDUCT R. 5.4.

¹⁸⁰ *Report and Recommendation, supra* note 177, at 30.

¹⁸¹ *Report and Recommendation, supra* note 177, at 30.

¹⁸² *Report and Recommendation, supra* note 177, at 31.

¹⁸³ *Report and Recommendation, supra* note 177, at 30.

¹⁸⁴ *Report and Recommendation, supra* note 177, at 32.

¹⁸⁵ *Report and Recommendation, supra* note 177, at 33.

¹⁸⁶ *Report and Recommendation, supra* note 177, at 33.

¹⁸⁷ *Report and Recommendation, supra* note 177, at 33.

¹⁸⁸ *Report and Recommendation, supra* note 177, at 33.

¹⁸⁹ *Report and Recommendation, supra* note 177, at 33.

its professional conduct rules.¹⁹⁰ The true debate is not about the existence of multidisciplinary practice, but about whether (and how) fees generated therefrom are divisible.¹⁹¹ Witness the record of New York State.

2. *The New York State Example*

The New York Appellate Division wields authority to regulate the legal profession in that state.¹⁹² In 2001, New York became the initial state in the nation to directly govern the multidisciplinary practice of law specifically including attorney participation in multidisciplinary practice groups offering financial planning and accounting services.¹⁹³ Since then, the New York Code of Professional Responsibility has encompassed the following Disciplinary Rules:

DR 1-106 Responsibilities Regarding Non-legal Services

- A. With respect to lawyers or law firms providing non-legal services to clients or other persons:
1. A lawyer or law firm that provides non-legal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Disciplinary Rules with respect to the provision of both legal and non-legal services.
 2. A lawyer or law firm that provides non-legal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Disciplinary Rules with respect to the non-legal services if the person receiving the services could reasonably believe that the non-legal services are the subject of an attorney-client relationship.
 3. A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing non-legal services to

¹⁹⁰ *Report and Recommendation, supra* note 177, at 33.

¹⁹¹ *Report and Recommendation, supra* note 177, at 33.

¹⁹² Sara Hansard, *N.Y. Adopts First Rules for Lawyer Links*, INV. NEWS, Aug. 20, 2001, at 6.

¹⁹³ Mark W. Worthington, *Multidisciplinary Practice Rules Adopted in New York* (Aug. 20, 2001), <http://www.ma-estateplanning.com/article58.html>.

a person is subject to these Disciplinary Rules with respect to the non-legal services if the person receiving the services could reasonably believe that the non-legal services are the subject of an attorney-client relationship.

4. For purposes of DR 1-106(A)(2) and DR 1-106(A)(3), it will be presumed that the person receiving non-legal services believes that the services to be the subject of an attorney-client relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the non-legal services, or if the interest of the lawyer or law firm in entity providing non-legal services is de minimis.
- B. Notwithstanding the provision of DR 1-106(A), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing non-legal services to a person shall not permit any non-lawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under DR 4-101(B) and (D) with respect to the confidences and secrets of a client receiving legal services.
 - C. For purposes of DR 1-106, “non-legal services” shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a non-lawyer.¹⁹⁴

DR 1-107 Contractual Relationship Between Lawyers and Non-legal Professionals

- A. The practice of law has an essential tradition of complete independence and uncompromised loyalty to those it

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N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-106.

serves. Recognizing this tradition, clients of lawyers practicing in New York State are guaranteed “independent professional judgment and undivided loyalty uncompromised by conflicts of interest.” Indeed, these guarantees represent the very foundation of the profession and allow and foster its continued role as a protector of the system of law. Therefore, a lawyer must remain completely responsible for his or her own independent professional judgment, maintain the confidences and secrets of clients, preserve funds of clients and third parties in his or her control, and otherwise comply with the legal and ethical principles governing lawyers in New York State.

Multi-disciplinary practice between lawyer and non-lawyers is incompatible with the core values of the legal profession and therefore, a strict division between services provided by lawyers and those provided by non-lawyers is essential to protect those values. However, a lawyer or law firm may enter into and maintain a contractual relationship with a non-legal professional or non-legal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other non-legal professional services, notwithstanding the provisions of DR 5-101, provided that:

1. The profession of the non-legal professional or non-legal professional service firm is included in a list jointly established and maintained by the Appellate Divisions pursuant to section 1205.3 of the Joint Appellate Division Rules;
2. The lawyer or law firm neither grants to the non-legal professional or non-legal professional service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with the practice of law by the lawyer or law firm, nor, as provided in DR 2-103, shares legal fees with a non-lawyer or receives or gives any monetary or other tangible benefit for giving or receiving a referral; and

3. The fact that the contractual relationship exists is disclosed by the lawyer or law firm to any client of the lawyer or law firm before the client is referred to the non-legal professional service firm, or to any client of the non-legal professional service firm before that client receives legal services from the lawyer or law firm; and the client has given informed written consent and has been provided with a copy of the "Statement of Client's Rights In Cooperative Business Arrangements" pursuant to section 1205.4 of the Joint Appellate Division Rules.

B. For purposes of DR 1-107:

1. Each profession on the list maintained pursuant to a joint rule of the Appellate Divisions shall have been designated sua sponte, or approved by the Appellate Divisions upon application of a member of a non-legal profession or non-legal professional service firm, upon a determination that the profession is composed of individuals who, with respect to their profession:
 - a. have been awarded a Bachelor's Degree or its equivalent from an accredited college or university;
 - b. are licensed to practice the profession by an agency of the State of New York or the United States Government; and
 - c. are required under penalty of suspension or revocation of license to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession.
 2. The term "ownership or investment interest" shall mean any such interest in any form of debt or equity, and shall include any interest commonly considered to be an interest accruing to or enjoyed by an owner or investor.
- C. DR 1-107(A) shall not apply to relationships consisting solely of reciprocal referral agreements or

understandings between a lawyer or law firm and a non-legal professional or non-legal professional service firm.

- D. Notwithstanding DR 3-102(A), a lawyer or law firm may allocate costs and expenses with a non-legal professional or non-legal professional service firm pursuant to a contractual relationship permitted by DR 1-107(A), provided the allocation reasonably reflects only the costs and expenses incurred or expected to be incurred by each.¹⁹⁵

As codified in the Joint Appellate Division Disciplinary Rules, the new regulations were to be effective on November 1, 2001.¹⁹⁶

The regulatory environment of New York now blesses attorneys forming practices with financial planners and accountants.¹⁹⁷ Suzzette B. Rutherford, Esq., is a Certified Financial Planner and the President of Rutherford Asset Planning, Inc., in New York.¹⁹⁸ President Rutherford stated: “[L]awyers have been hesitant to get into relationships like this, mainly because they’re not quite sure how to explain what is covered by the lawyer-client privilege, and what isn’t. This helps clarify expectations.”¹⁹⁹

But the District of Columbia’s Special Committee recounts of the New York precedent that “existing barriers to sharing of legal fees within a single organization will be maintained.”²⁰⁰ Or as stipulated by social critic Jesus of Nazareth: “For where your treasure is, there will your heart be also.”²⁰¹

B. *The Protection of the Public*

¹⁹⁵ N.Y. CODE OF PROF’L RESPONSIBILITY DR 1-107. When DR 1-107(b)(1)(a) alludes to the award of bachelor’s degree, it comports with the Certified Financial Planner Board of Standards’ 2003 work on a model curriculum for personal financial planning as a major. *CFP Board to Develop Model Curriculum*, FIN. ADVISOR, July 2003, at 24. Beginning in 2007, a bachelor’s degree will become a prerequisite to attain the Certified Financial Planner title. Certified Financial Planner Board of Standards, Inc., *Guide to CFP Certification: The Education Requirement*, available at <http://www.cfp.net/become/education.asp> (last visited Feb. 24, 2004). “One of the criteria for professionalization is the number of years of schooling that a group can require before allowing neophytes to enter their ranks.” ARTHUR M. COHEN & FLORENCE B. BRAWER, *THE AMERICAN COMMUNITY COLLEGE* 214 (3rd ed. 1996).

¹⁹⁶ Press Release, *New York State Unified Court System*, July 24, 2001, at http://www.courts.state.ny.us/pr2001_14.html.

¹⁹⁷ Jennifer L. Reichert, *New York Courts OK Multidisciplinary Practices, with Limits*, TRIAL, Oct. 2001, at 78.

¹⁹⁸ Joanne Cleaver, *First Impressions: Legal Ties*, TICKER, Oct. 2001, at 14.

¹⁹⁹ *Id.*

²⁰⁰ *Report and Recommendation*, *supra* note 177, at 40 n.2.

²⁰¹ *Matthew* 6:21; *Luke* 12:34 (King James).

The bar should not needlessly create incentives for legally-trained professionals to shun participation in their own profession.²⁰² Today, numerous law school graduates partnering in (or employed by) professional service firms are precluded from practicing law because non-attorneys share in the fees triggered by their contribution.²⁰³ A plentitude of women and men trained as lawyers desire a share in the fees of other professions, even as members of these professions look to share in legal fees.²⁰⁴ Allowing multidisciplinary practice would permit such law school graduates to practice law, thereby subjecting themselves to the legal profession's rules of conduct.²⁰⁵ To so refuse must create incentives to deprive the public of those protections delivered by legal ethics rules in their dealings with many legally-trained professionals.²⁰⁶ After all, a demand for multidisciplinary practice obtrudes. It arises from not simply major corporations, but from individuals, small businesses, and those attorneys serving them.²⁰⁷ Specifically, a demand exists among both the practitioners and users of financial planning services.²⁰⁸

The bar should not solicit the judiciary either to build or to extend barriers to competition in the delivery of professional services, absent good reason in the public interest.²⁰⁹ The burden of persuasion falls upon those who would frustrate the free exercise of professional, and of consumer, choice.²¹⁰ Meanwhile, choices among potential providers of legal services should be not merely freely rendered, but well-informed.²¹¹

C. *Protectionism Refuted*

Conflicts rules, and other rules of professional conduct, ought to apply to provision of legal services by law firms, and firms providing multidisciplinary services, under an identical standard (notwithstanding the organizational form).²¹² Traditional law firms should be neither artificially insulated from multidisciplinary competition nor handicapped in their competition.²¹³ It is possible to deliver multidisciplinary services in a fashion protecting the public and preserving professional independence.²¹⁴ Every safeguard and standard

²⁰² *Report and Recommendation, supra* note 177, at 33.

²⁰³ *Report and Recommendation, supra* note 177, at 33.

²⁰⁴ *Report and Recommendation, supra* note 177, at 33-36.

²⁰⁵ *Report and Recommendation, supra* note 177, at 36.

²⁰⁶ *Report and Recommendation, supra* note 177, at 36.

²⁰⁷ *Report and Recommendation, supra* note 177, at 36.

²⁰⁸ *Report and Recommendation, supra* note 177, at 36.

²⁰⁹ *Report and Recommendation, supra* note 177, at 36.

²¹⁰ *Report and Recommendation, supra* note 177, at 36.

²¹¹ *Report and Recommendation, supra* note 177, at 36.

²¹² *Report and Recommendation, supra* note 177, at 38.

²¹³ *Report and Recommendation, supra* note 177, at 38.

²¹⁴ *Report and Recommendation, supra* note 177, at 38.

currently applicable to attorneys practicing in law firms should apply to those attorneys committed to multidisciplinary practice.²¹⁵

There is no necessity for attorneys to own or control a multidisciplinary practice to sustain attorneys' professional independence and adherence to professional standards.²¹⁶ There is no evidence that allowing attorneys to engage in a legal practice wedded with additional professionals (practicing their own callings) subverts crucial interests, whatever members of a common organization command it.²¹⁷ Nor is there evidence that in a multidisciplinary practice the business pressures qualitatively diverge from those in a modern law firm (or the legal department of a business organization).²¹⁸ Attorneys will continue to meet the standards of their profession regardless of the ownership of the enterprises wherein they practice.²¹⁹ Having lawyers control everyone providing legal services is neither needed nor even appropriate:²²⁰ "We discern no sound basis for the economic protectionism implicit in requiring lawyer control. Indeed, the argument for maintaining legal control smacks of professional arrogance"²²¹

Nevertheless, an organization of attorneys within a multidisciplinary practice into a distinct organizational unit, whenever feasible, is desirable.²²² Younger (and more inexperienced) attorneys would profit from their chance to look toward senior attorneys for professional guidance, supervision of their work, and the reinforcement of ethical standards.²²³

Permitting non-lawyer sharing of legal fees in the District of Columbia would benefit smaller firms and their individual clients, even if large, multi-city firms cannot benefit from reforms.²²⁴ The solo or small-firm practitioners engaged in such a legal practice as financial planning will enjoy the option of enlisting accountants as full-fledged partners.²²⁵ The prospective benefits flowing to both the District of Columbia's Bar and the general public constitute an adequate rationale to adopt reform, even should no other jurisdiction follow her lead.²²⁶ The cry for, and opportunity for, multidisciplinary approaches to public and private issues are real and are

²¹⁵ *Report and Recommendation, supra* note 177, at 39.

²¹⁶ *Report and Recommendation, supra* note 177, at 39.

²¹⁷ *Report and Recommendation, supra* note 177, at 39.

²¹⁸ *Report and Recommendation, supra* note 177, at 39.

²¹⁹ *Report and Recommendation, supra* note 177, at 39.

²²⁰ *Report and Recommendation, supra* note 177, at 39.

²²¹ *Report and Recommendation, supra* note 177, at 39.

²²² *Report and Recommendation, supra* note 177, at 40.

²²³ *Report and Recommendation, supra* note 177, at 40.

²²⁴ *Report and Recommendation, supra* note 177, at 40.

²²⁵ *Report and Recommendation, supra* note 177, at 40.

²²⁶ *Report and Recommendation, supra* note 177, at 40.

growing.²²⁷ Rendering it possible for attorneys to share legal fees with members of different professions will contribute to the strength and vitality of the practice of law in the District.²²⁸

VII. THE SPECIAL COMMITTEE'S RECOMMENDATION

Hence, the Special Committee's Proposed Rule 5.4, Professional Independence of a Lawyer:

- A. A lawyer shall not permit a nonlawyer or any person who recommends, employs or pays the lawyer to render services for another to direct or regulate the lawyer's professional judgment in rendering such services.
- B. A lawyer or law firm shall not share 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 undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;
 - 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. Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (c).
- C. A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by one or more nonlawyers who perform professional services on behalf of the organization or its clients, but only if:

²²⁷ *Report and Recommendation, supra* note 177, at 40.

²²⁸ *Report and Recommendation, supra* note 177, at 40.

1. Lawyers who perform legal services on behalf of the organization assume responsibility for nonlawyer participants engaged in legal representations as provided under Rule 5.3, and such lawyers make reasonable efforts to ensure that the organization in which they practice do [sic] not intentionally or inadvertently lead their clients or customers receiving nonlegal services to believe that those services are subject to the professional conduct standards and confidentiality protections applicable to legal services.
2. At the outset of a legal representation on behalf of a new client for legal services, a lawyer practicing law in such an organization makes full disclosure to the prospective client of information sufficient to permit the prospective client to make an informed decision whether to retain the lawyer to provide legal services, including (i) the nature of the lawyer's interest in other services provided by the organization; (ii) that some of the services provided by the organization are not legal services and are not governed by the standards and confidentiality protections applicable to legal services; (iii) that nonlawyer participants in the organization may undertake to provide nonlegal services to the client or to adversaries of the client; (iv) that actual or potential conflicts of interest may arise from the lawyer's interest in services provided by nonlawyer participants in the organization; (v) that the form of partnership or organization may create risks with respect to the attorney-client privilege and of precautions necessary or appropriate to protect confidences and secrets of the client; and (vi) that legal services are available from sources that do not present the same risks.
3. In considering the acceptance or retention of a legal representation, the lawyer complies with Rule 1.7 with respect to conflicts of interest and, where required, obtains from legal services clients such informed consent as may be required by Rule 1.7(c) to permit the acceptance or continuation of such a

representation.²²⁹

The Special Committee's Proposed Rule 5.4 embraces attorneys' sharing of fees in a partnership or alternative organization wherein a financial stake is enjoyed or a managerial authority is wielded by one (or more) nonattorneys who perform professional services. The public interest remains defended.

VIII. CONCLUSION

The preceding discussion has appraised the bar and the advent of multidisciplinary practice. The organized bar's opposition to the sharing of legal fees evidences professional protectionism. But increasing pressures on behalf of multidisciplinary practice elicit a more nearly free market reaction. Such a reaction could multiply the prospects for clients to discover enterprises bundling those services they seek. Included among such clients are well-off men and women, and multinational corporations. The price mechanism in a laissez-faire environment can spur service providers to put forth high-level efforts. And such a free-enterprise atmosphere of service offerings could enlarge the financial opportunities for new attorneys.

The recently-coalescing profession of financial planning addresses a growing demand on the part of the general public, which is greedy for objective financial counsel. Response to this demand already has been attempted by accountants. Nonetheless, it is the Certified Financial Planner title which entails a cachet in the realm of financial planning. These Certified Financial Planners share the market not only with accountants, but with lawyers intervening in the financial advisory field. Interprofessional cross-training is relevant and practical. The linkage of several professions in a multidisciplinary firm marks an option whose day has dawned.

In light of these developments, the District of Columbia Bar Special Committee on Multidisciplinary Practice reported on the future of multidisciplinary practice. In the District of Columbia, lawyers and such sister professionals as financial planners and accountants might, in principle, be allowed to share legal fees to the greater good of both clients and firms. These practices, in principle, need not be under attorneys' control. (Already, New York State had embraced the formation of practices by attorneys with financial planners and accountants. Nevertheless, New York protracted its ban against the sharing of legal fees within a single organization.) These recommendations of the Special Committee were worthy steps toward progressive reform. Bars nationwide would do well to heed these advances, which so sagely have been summoned in the District of Columbia.

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Report and Recommendation, supra note 177, at 34.