

# ANCILLARY BUSINESS AND THE MDP DEBATE: FINANCIAL PLANNING AS AN EXTENSION OF AN ESTATE PLANNER'S PRACTICE

## Comment

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## I. FINANCIAL PLANNING AS A SOLUTION

A. *Providing Financial Planning as a Service in Addition to Estate Planning*

Estate planners face a dilemma when clients have non-legal professional needs.<sup>1</sup> The estate planner is forced to ask if helping the client in house implicates ethical issues, if it will hurt professional relationships, or if the estate planner is qualified.<sup>2</sup> Whether an attorney could, or should, participate in tax preparation, wealth management, or business consulting in partnership with other professionals was the subject of debate at the turn of the century.<sup>3</sup> That debate continues today, though maybe not with the same heat or passion as in past years.<sup>4</sup>

Suppose you are in a meeting with your client when you discover the client has a need that is not a legal question.<sup>5</sup> What are your options?<sup>6</sup> Today, you have roughly three options: (1) refer the client to a professional in that field, (2) let the client figure it out, or (3) set up a side business, and handle it for the client while billing through the subsidiary or ancillary business.<sup>7</sup> The issue in many of these cases is how the estate planner can offer the service to maximize profit and provide value to the client without opening the firm or the attorney to liability.<sup>8</sup>

Situations in which estate planners can help their clients through non-legal services include: poorly-invested investment portfolios, tax preparation, business management questions, etc.<sup>9</sup> Currently, the American Bar Association's (ABA) moratorium on multidisciplinary practices (MDPs) keeps estate planning firms from partnering with non-legal professional firms in providing these services.<sup>10</sup> Additionally, state bar regulations govern the service if the estate planning firm provides these services in house.<sup>11</sup> How to provide non-legal services becomes a particularly poignant question to estate planners with clients of high net worth or growing wealth.<sup>12</sup> Referring these clients to other professionals forces the attorney to pass up on increased profit

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1. Victoria Kremski, *Multidisciplinary Practices and the Main Street Lawyer*, 79 MICH. B.J. 1196, 1196 (2000).

2. *See id.* at 1197.

3. *See id.* at 1196–97.

4. *See id.* at 1197.

5. Candace M. Groth, *Protecting the Profession Through the Pen: A Proposal for Liberalizing ABA Model Rule of Professional Conduct 5.4 to Allow Multidisciplinary Firms*, 37 HAMLINE L. REV. 565, 579 (2014).

6. *See id.*

7. *See id.*

8. *See id.*

9. *See* Kremski, *supra* note 1.

10. *See id.*

11. *See* Groth, *supra* note 5, at 580.

12. *See* Kremski, *supra* note 1, at 1196.

and a tighter relationship with those clients.<sup>13</sup> An essential part of effective estate planning is knowing what assets the client has, where the assets are located, and how the assets are managed.<sup>14</sup> In many situations, an estate planner's knowledge makes the estate planner a valuable member of the client's professional team.<sup>15</sup> Unfortunately, when an estate planner discovers assets that are not properly managed or invested the estate planner is usually forced to refer the client to another professional, usually a financial planner.<sup>16</sup> There are unique opportunities for estate planners to expand their services to increase their marketability and profitability because of the growth of the financial planning industry and the depth of overlap between estate planning and financial planning.<sup>17</sup>

## II. FINANCIAL PLANNING IS A NATURAL EXTENSION OF ESTATE, TAX, AND BUSINESS LAW

### A. *What Is Financial Planning?*

Today, any number of people will tell you that they are a financial planner.<sup>18</sup> This can range from your neighbor who is an insurance broker, all the way down to the owner of the payday loan store next to your local mall.<sup>19</sup> So what is it exactly that makes a financial planner?<sup>20</sup>

#### 1. *What Do Financial Planners Do?*

In the context of this article, a financial planner is an authority on consumer financial matters including the following: investing, risk management (insurance), retirement, consumer saving and spending, and estate and tax planning.<sup>21</sup> A financial planner in many cases will help clients maintain a chosen lifestyle from the beginning of the client-planner relationship to the end of the client's life through money management and strategic planning.<sup>22</sup> Managing client expectations, creating a financial plan, and helping the client to cultivate good habits are ways a financial planner helps clients achieve their financial goals.<sup>23</sup>

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13. *See id.*

14. GERRY W. BEYER, TEACHING MATERIALS ON ESTATE PLANNING 564 (West, 4th ed. 2013).

15. *See id.* at 570–71.

16. *See id.*

17. *See* Kremski, *supra* note 1.

18. *See id.*

19. *See id.*

20. *See* HAROLD EVENSKY ET AL., THE NEW WEALTH MANAGEMENT: THE FINANCIAL ADVISOR'S GUIDE TO MANAGING AND INVESTING CLIENT ASSETS 1 (John Wiley & Sons, Inc., 1st ed. 2011).

21. *Id.*

22. *See id.* at 33–41.

23. *See id.* at 2.

A financial planner creates, presents, implements, monitors, and reviews a financial plan in a holistic approach to assess the client's financial health and direct the client.<sup>24</sup> A financial planner helps a client form a plan that may include: debt and asset management; planning for higher education; and retirement, business, estate, and tax planning with periodic visits to ensure effective administration of the plan.<sup>25</sup> Other financial professionals may recommend specific investments with little or no thought to the effects that other circumstances may have on the money managed or the more human aspects of finances, such as risk tolerance.<sup>26</sup> In this way, financial planners distinguish themselves from stockbrokers or other professionals that simply sell a product.<sup>27</sup> A financial planner provides an actual service in addition to recommendations on financial products.<sup>28</sup> In many situations the financial planners do not receive any compensation from the companies providing the recommended financial products.<sup>29</sup>

## 2. What Is the Financial Planning Process?

The financial planning process changes with each practice, but generally, it entails the creation of a financial plan.<sup>30</sup> This financial plan is a bundle of recommendations that the planner makes, which can include recommendations on the following: current saving and spending patterns, investment portfolios, estate planning, tax planning, risk management and insurance needs, social security withdrawal strategies, etc.<sup>31</sup> Depending on the client's sophistication, the planning process may be a very small part of the services provided.<sup>32</sup> In some cases, the plan may be as simple as a recommendation that the client contribute a certain amount to retirement savings and investments; or a group of recommended investments, an expected return on those investments, and an expected withdrawal rate during retirement.<sup>33</sup> Once the client agrees to the plan, the planner will invest the money accordingly and either charge the client a percentage of assets under management or receive a commission for the financial products purchased.<sup>34</sup>

Financial planning firms that manage money as a service for their clients are run as Registered Investment Advisors (RIAs), the Securities Exchange

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24. William A. Brackney, *Are You Sure You Want to Be a Financial Planner?*, PROB. & PROP., Dec. 1988, at 51, 52.

25. *Id.* at 53.

26. *See* EVENSKY ET AL., *supra* note 20.

27. *See* FIRST RESEARCH, FINANCIAL PLANNERS & INVESTMENT ADVISERS INDUSTRY PROFILES 2 (2015).

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.*

34. *See id.*

Commission (SEC), and other state regulatory bodies regulate RIAs.<sup>35</sup> To meet high fiduciary standards, the majority of RIAs will bill their clients a percentage of the assets that the wealth manager oversees.<sup>36</sup> This practice is called an Assets Under Management (AUM) model.<sup>37</sup> Usually, the advisor will charge a flat fee ranging from .75%–1.5%, depending on the amount the client leaves in the manager's custody.<sup>38</sup>

Apart from the AUM business model, clients can compensate their financial planners in several other ways.<sup>39</sup> As the industry has matured, commission-based compensation for products sold, or transactional compensation, has decreased but not disappeared.<sup>40</sup> Increasingly, financial planners bill their clients on an hourly rate for services provided.<sup>41</sup> As an alternative, some practices choose to charge clients in some combination of the three to serve a broader client base.<sup>42</sup> Today, planners commonly charge clients with smaller net worth on a commission or hourly basis, and planners charge clients with higher net worth based on an AUM model.<sup>43</sup>

### 3. *How Did the Financial Planning Industry Come About?*

The financial planning industry started in the 1970s, and as of 2013, the industry is a multi-trillion-dollar behemoth.<sup>44</sup> Many of the original practitioners are at, or have passed, the age of retirement.<sup>45</sup> As the industry has grown, an increasing number of imitators and counterfeits have arisen out of adjoining industries—including accounting firms, stockbrokers, and insurance brokers—but these facsimiles are not true financial planners.<sup>46</sup>

During the 1970s, several organizations began to give legitimacy to the financial planning industry.<sup>47</sup> At that point in time, the majority of financial planners sold products to their clients to fill the clients' financial needs.<sup>48</sup> A financial planner would offer a mutual fund for a client needing to save for

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35. *See id.* at 3.

36. *See id.* at 2.

37. *See id.*

38. *See id.*

39. George Steven Swan, *A Multidisciplinary Bar and Financial Planners: The Recommendation of the District of Columbia Bar Special Committee on Multidisciplinary Practice*, 32 CAP. U. L. REV. 369, 378–84 (2003) [hereinafter Swan, *A Multidisciplinary Bar*].

40. *Id.* at 380–81.

41. *See id.*

42. *Id.*

43. *Id.*

44. MARK HURLEY ET AL., *BRAVE NEW WORLD OF WEALTH MANAGEMENT: OPPORTUNITIES, MORE COMPETITION, DEMOGRAPHICS AND GROWTH CONUNDRUMS* 15 (2013), [http://www.fiduciarynetwork.com/site/wp-content/uploads/2014/04/FN\\_Paper\\_2013-8LR.pdf](http://www.fiduciarynetwork.com/site/wp-content/uploads/2014/04/FN_Paper_2013-8LR.pdf) [https://perma.cc/2PY5-ZLP3].

45. *Id.* at 1.

46. *Id.* at 15.

47. Swan, *A Multidisciplinary Bar*, *supra* note 39, at 380.

48. *Id.* at 381.

retirement or life insurance products to insure against premature death.<sup>49</sup> Recognizing a need for the world to see them as professionals rather than simple salesmen, the organizations began establishing rigorous standards of education and conduct to create a credible profession.<sup>50</sup>

Today, the Certified Financial Planner (CFP) certification is generally the base certification in the financial planning industry.<sup>51</sup> Like Certified Professional Accountants (CPAs) and attorneys, financial planners can get additional certifications to indicate further specializations.<sup>52</sup>

It is worth noting the similar growth pattern that financial planners share with accountants.<sup>53</sup> At the beginning of the 20th century, problems of accuracy and a lack of professional standards prompted accounting organizations to come together and create what developed into what we know today as the CPA certification.<sup>54</sup> Eventually, the academic community adopted accounting majors, which generated further credibility.<sup>55</sup> Similarly, the organization and creation of certifications have prompted the academic community to create programs and majors designed around the training of financial planners.<sup>56</sup> Today, there are scores of universities with students enrolled in the required CFP coursework in preparation for the certification exam.<sup>57</sup>

There is no question that the financial planning industry has great staying power in today's professional economy.<sup>58</sup> With that in mind, what benefit is there for estate planning attorneys in expanding their service offerings?<sup>59</sup>

### B. Why Should Attorneys Buy In?

Well, that is financial planning, so what?<sup>60</sup> What is it about the financial planning industry that should excite the average main street estate planner?<sup>61</sup> The financial planning industry has several benefits that integrate well with

49. *See id.*

50. *Id.* at 380.

51. George S. Swan, *Legal Education and Financial Planning: Preparation for the Multidisciplinary Practice Future*, 23 CAMPBELL L. REV. 1, 21 (2001) [hereinafter Swan, *Legal Education*].

52. *Id.* at 20.

53. *Id.* at 17.

54. *See id.*

55. *Id.* at 18.

56. *Find an Education Program*, CFP BOARD, <http://cfp.net/become-a-cfp-professional/find-an-education-program> [https://perma.cc/EBG9-JGFZ] (last visited Oct. 21, 2016).

57. *See id.*

58. Swan, *Legal Education*, *supra* note 51, at 24.

59. *Id.* at 25.

60. Alexander E.M. Hess, *10 Fastest-Growing Jobs in the USA*, USA TODAY (Sept. 2, 2013, 6:41 AM), <http://www.usatoday.com/story/money/business/2013/09/02/10-fastest-growing-jobs-in-usa/2750169/> [https://perma.cc/BTT4-4YRK].

61. *See id.*

law firm practice—the industry is also poised for massive growth.<sup>62</sup> Over the next ten years, the financial planning industry anticipates adding 100,000 new jobs to the over 175,000 planners that are currently employed.<sup>63</sup> In addition, many planners are in the twilights of their careers, and the pool of clients is only growing.<sup>64</sup> Aside from the personal benefits to the attorneys, there are many arguments about the benefits to clients in decreased costs and ease of access.<sup>65</sup>

### *1. Why Is Now a Good Time to Enter the Industry?*

There are many reasons that estate planners looking to enter the financial planning industry should be excited.<sup>66</sup> Baby boomers entering retirement will push more assets into the investment pool and create greater profits for financial planning firms.<sup>67</sup> There are nearly 30,000 RIAs, and the SEC regulates 10,500 of those, which means that more than one-third of RIAs have over \$100 million in assets under management.<sup>68</sup> Due to this large growth in the industry, a talent shortage has arisen, which creates problems in succession planning for financial planners.<sup>69</sup> In turn, this creates an opportunity for estate planners to step in and acquire a book of business, potentially at a discount.<sup>70</sup> With each passing year, aging financial planners face succession planning with greater and greater urgency; the need to get a succession plan into place may allow for partnership or even purchase of the firm for a discount.<sup>71</sup> In addition, more than one-half of financial advisors are within fifteen years of retirement, which indicates a large pool of sellers with few buyers on the horizon.<sup>72</sup> Apart from these general incentives, there are specific niches that estate planners can fill.<sup>73</sup> Complicated tax legislation and estate planning strategies have broad implications for investment strategies and can create difficulties for consumers—estate planners can fill that need.<sup>74</sup> The relationship between financial goals and transferring wealth has many forms of application, which could benefit any estate planner's

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62. *See id.*

63. *See id.*

64. *See id.*

65. Henry P. Lee & Edward E. Vettel, *The Lawyer's Role in Financial Planning*, VLR9910 A.L.I.-A.B.A. 1, 3 (2000).

66. *See id.*

67. *See Keynote Presentation at the Tiburon CEO Summit XXIV: The Future of Wealth Management*, TIBURON STRATEGIC ADVISORS 1, 82 (Apr. 9, 2013), [www.tiburonadvisors.com/CEO\\_Summit\\_Binders/Tiburon\\_CEO\\_Summit\\_XXIV\\_Binder.pdf](http://www.tiburonadvisors.com/CEO_Summit_Binders/Tiburon_CEO_Summit_XXIV_Binder.pdf) [https://perma.cc/TBS6-2WE7].

68. *Id.* at 104.

69. *Id.*

70. *Id.* at 110.

71. BOB VERES, *THE FUTURE OF THE FINANCIAL ADVISORY BUSINESS: OPPORTUNITIES CHALLENGES AND TRENDS IN THE SECOND DECADE OF THE 21ST CENTURY INSIDE INFORMATION* (2010).

72. TIBURON STRATEGIC ADVISORS, *supra* note 67, at 121.

73. FIRST RESEARCH, *supra* note 27.

74. *Id.*

effort to branch into the industry.<sup>75</sup> In addition, an attorney specializing in regulatory law or accreditation could easily fill the needs of compliance for a firm.<sup>76</sup> All of the above are reasons that estate planners have an opportunity to leverage themselves into another lucrative industry that is closely tied to their existing firm's service offerings.<sup>77</sup>

There are those in the financial industry that warn of potential drags on industry growth.<sup>78</sup> Many of them cite a dwindling number of millionaire households, with more firms in competition to manage assets; an aging client base, which is consuming more of their assets; a market environment in which lower returns on investment are expected, slowing growth of assets under management; aging firm founders; and increases of operating costs outstripping inflation, including: labor, client acquisition, regulation, and litigation costs.<sup>79</sup>

These problems, however, are not insurmountable.<sup>80</sup> In fact, attorneys who conduct research essential to entering the industry will be performing one of the steps necessary to prepare for these problems.<sup>81</sup> Estate planners entering the financial planning industry will find themselves able to adapt to condition changes more quickly than existing practitioners because they are not anchored to the past practices and methodologies of the industry.<sup>82</sup> Apart from being free from preconceived biases, attorneys entering the industry are tasked to become increasingly efficient; able to shift and reallocate risk appropriately; have a built-in specialty—whether estate, tax, or business planning—keep an eye out to bring on new talent; and adjust the firm's business strategy as circumstances dictate.<sup>83</sup> The ability to pursue these activities is essential for a financial planning firm to thrive.<sup>84</sup>

In addition to addressing the above problems, there are several areas the more successful firms choose to focus on.<sup>85</sup> First, firms should focus on the growth of assets under management.<sup>86</sup> Bringing on new clients is usually the method to spur asset growth, but adding new advisors to the firm who will bring their own book of business can also achieve this goal.<sup>87</sup> Second, firms

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75. *See id.*

76. *See id.*

77. *See id.*

78. HURLEY ET AL., *supra* note 44, at 5.

79. *See id.*

80. *Id.* at 37.

81. *Id.*

82. *Id.*

83. *Id.* at 40.

84. *Id.* at 39.

85. WEALTHMANAGEMENT.COM, 2013 ADVISOR BENCHMARKING RIA TREND REPORT 28 (2013), <http://wealthmanagement.com/research/2013-advisorbenchmarking-ria-trend-report> [https://perma.cc/T3GZ-KM33].

86. *See id.*

87. *See id.*



should focus on increasing profitability.<sup>88</sup> Making office and client communication more efficient tends to increase profitability.<sup>89</sup> Third, expanding the range of services provided increases a firm's staying power.<sup>90</sup> This should be especially exciting for estate planners, as the opportunity to expand their services is built into their existing skill set.<sup>91</sup>

## 2. *What Types of Financial Incentives Are There?*

The financial planning industry has many specific indicators of opportunity.<sup>92</sup> RIAs in 2012 had a median AUM of \$71 million with median net revenues of \$485,000; this indicates that acquiring the capital necessary to purchase a book of business should be relatively easy.<sup>93</sup> Sixty-nine percent of advisors reported annual compensation over \$100,000, with 18% reporting compensation in excess of \$500,000; this represents the gross income of a single financial planner.<sup>94</sup> These numbers are largely due to high margins, reported with a 26% median in 2012.<sup>95</sup> As of 2015, RIAs made up 27% of the financial advising industry with an additional 28% coming from independent financial advisory firms thus, RIAs only make up roughly a quarter of the industry.<sup>96</sup> As a simple illustration, a firm with assets under management of \$100 million will charge a percentage ranging from .75%–1.5% of the client's assets.<sup>97</sup> This percentage point is usually dependent on the amount of assets that the client has under management with the firm.<sup>98</sup> As the amount an individual client has under management rises, the percentage the planner charges decreases.<sup>99</sup> If the firm is charging its clients a per dollar average of 1% then its revenues will be \$1,000,000.<sup>100</sup> It is easy to see why this is a very lucrative opportunity as the median RIA has assets under management exceeding \$71 million.<sup>101</sup> The fact that the AUM model creates residual income is icing on the cake because once a financial planner gains and services a client properly, there is very low propensity for clients to switch planners.<sup>102</sup> Low turnover is a staple in the industry.<sup>103</sup> Clearly,

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88. *See id.*

89. *Id.* at 29.

90. *See id.*

91. *See id.*

92. *Id.* at 6–8.

93. *Id.* at 8.

94. *Id.* at 7.

95. *See id.*

96. ERDOS & MORGAN, FINANCIAL ADVISOR PROFILE 4 (2015).

97. WEALTHMANAGEMENT.COM, *supra* note 85, at 14.

98. *See id.*

99. *See id.*

100. *See id.*

101. *See id.*

102. *Id.* at 28.

103. *See id.* at 14.

there is an opportunity for financial gain in this industry, but how will an expansion of services help your client?<sup>104</sup>

### 3. *How Do My Clients Benefit?*

The financial planning process involves gathering information about not only the client's financial picture but also an understanding of the client's personality and circumstances.<sup>105</sup> Understanding the client at a deeper level allows the financial planner to tailor solutions to the client's needs.<sup>106</sup> Information gathering also allows for attorneys to provide higher quality legal solutions, whether in tax, estate, or business planning.<sup>107</sup> Offering estate and financial planning services allows clients to upload all of their information in one place rather than having to relay the information to two professionals.<sup>108</sup> Due to human nature, clients are likely to create estate and financial plans years apart, which can cause difficulties in implementing either, or both, plans.<sup>109</sup> A one-stop shop provides the client with convenience and continuity between the estate and financial plans.<sup>110</sup>

A large part of any client-attorney relationship involves some form of education, and financial planning is no different.<sup>111</sup> As a financial plan is implemented, the client is informed about the need for the current course of action.<sup>112</sup> Preventing the client from receiving conflicting information becomes infinitely simpler if the client is exposed to fewer professionals.<sup>113</sup> This also requires an attorney versed in several fields, such as the following: the Employee Retirement Income Security Act (ERISA), employment benefits, insurance products, trust funding, etc.<sup>114</sup> As the attorney's expertise expands, the clients benefit from an increasingly informed strategy design.<sup>115</sup> How many times has an attorney drafted a trust, but the trust is underfunded or not funded at all?<sup>116</sup> By including financial planning in the services offered, the estate planner is able to seamlessly implement legal and financial strategies and educate the client.<sup>117</sup> As an added benefit, the need to educate clients results in more contact with the attorney.<sup>118</sup> Instead of just seeing the

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104. Lee & Vettel, *supra* note 65, at 15–16.

105. *Id.* at 18–19.

106. *Id.* at 19.

107. *Id.* at 4.

108. *See id.* at 3.

109. *Id.* at 9–10.

110. *See id.* at 3.

111. *See id.*

112. *See Id.*

113. *Id.* at 15–16.

114. *See id.* at 3.

115. *See id.*

116. *See id.*

117. *Id.*

118. *Id.* at 16.

estate planner every three to five years, the client should see the financial planner every year.<sup>119</sup> Offering financial planning, in addition to estate planning, keeps the estate planner informed of any issues that have arisen in the client's estate plan.<sup>120</sup>

Finally, the cost of obtaining both financial and estate planning services may be significantly defrayed.<sup>121</sup> Rather than paying two professionals at their respective going rates, the client would most likely receive a discount on the services provided due to the reduced cost of the attorney.<sup>122</sup> Several actions could reduce overhead such as: sharing office space, re-working personnel costs, decreasing marketing costs, and sharing other office expenses.<sup>123</sup> This creates a situation in which the financial planner and estate planner can pass savings onto the client.<sup>124</sup>

A large benefit to improved client satisfaction is that clients are willing to refer friends and family to the advisor.<sup>125</sup> If the advisor is able to keep the client happy, business grows.<sup>126</sup> For instance, 80% of RIAs cite client referrals as their chief source of new clients.<sup>127</sup> Other sources for new clients like custodian referrals, marketing, and seminars pale in comparison to client referrals.<sup>128</sup> The sheer magnitude of business garnered through good service is astounding.<sup>129</sup> In addition to the growth by referral, the opportunity to cross-sell services to referred and new clients has the potential to drive profitability to new heights.<sup>130</sup> Given that most main street attorneys receive a large portion of their clients in the same manner, it appears that this would be an ideal marriage.<sup>131</sup> With the benefits to attorneys and clients alike, what needs to happen to expand the services offered?<sup>132</sup>

### C. How Can Estate Planners Buy In?

The opportunity may intrigue an estate planner, but the next question is how?<sup>133</sup> How does an estate planner get into the industry?<sup>134</sup> The answer is,

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119. *See id.* at 3.

120. *See id.*

121. *Id.* at 14.

122. *See id.* at 3.

123. *See id.*

124. *See id.*

125. Prashant Bhatia, *Industry Focus: Registered Investment Advisor Survey*, NORTH AMERICA BROKERS AND ASSET MANAGERS CITI 20 (2008).

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.*

132. Lee & Vettel, *supra* note 65, at 13.

133. *See id.* at 3.

134. *See id.*

quite simply, there is no answer.<sup>135</sup> Each estate planner may find different levels of involvement beneficial.<sup>136</sup> In addition, the road to that particular level will also change according to circumstance, previous exposure, client base, etc.<sup>137</sup>

Generally speaking, building relationships with financial planners is the best place to start, as there is overlap between law and personal financial planning in estate planning, tax planning, small business planning, and business succession planning.<sup>138</sup> As estate planners build these relationships, they will begin to see where the connections lie between the practice of law and financial planning.<sup>139</sup> Also, it will become clear to the estate planner what type of financial planning practice would integrate well with the existing services the attorney provides.<sup>140</sup> As the estate planner learns the services that a financial planner provides, the natural next step would be to think of ways to incorporate the services and how best to transition between legal and financial planning services.<sup>141</sup> As estate planners take these steps, the transition from referring clients away to referring clients internally becomes clearer and easier to navigate.<sup>142</sup>

Once attorneys determine the type of financial planning practice they desire, the following questions remain: who will provide the service, and who will provide the clients?<sup>143</sup> There are many ways to answer these questions.<sup>144</sup> Buying into a practice, purchasing a book of business, or starting from scratch are all ways to provide clientele.<sup>145</sup> Hiring a younger planner, buying into a partnership, hiring an established planner, or becoming the planner are all ways to provide the service.<sup>146</sup> The answers to the above questions are highly dependent on the attorney, and there is simply not the time to discuss all the factors in this article.<sup>147</sup> Suffice it to say that no matter the path that the individual estate planner or firm takes it will take time and patience to navigate this phase of entry.<sup>148</sup>

There are several things to keep in mind no matter the road that you choose.<sup>149</sup> Before entering the industry, an attorney should answer questions, at least in part, regarding ethical concerns, competing with your referral base,

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135. *See id.*

136. *See id.*

137. *See id.*

138. Brackney, *supra* note 24, at 53.

139. *See id.*

140. *See id.*

141. *See id.*

142. *See id.*

143. Lee & Vettel, *supra* note 65, at 10–11.

144. *Id.*

145. *See id.*

146. *See id.*

147. *See id.*

148. *See id.*

149. Brackney, *supra* note 24, at 53.

market segment, employees providing the service, selling products, licensing, the scope of services, the cost of services, and overhead.<sup>150</sup> For example, choosing to offer commissioned products, fee-based services, or a simple hourly rate will dictate what type of financial plan you can service.<sup>151</sup> Also, the type of services offered will affect the target clientele; if the goal is to bring in investable assets and manage them but the target clientele is between the ages of thirty-five and fifty-five, then it will be difficult to generate assets under management because qualified retirement plans will tie up the majority of that age group's assets.<sup>152</sup> Another common concern is that offering these services will cause professionals who previously passed along referrals to the law office to cease doing so in the face of new competition.<sup>153</sup> This is a completely legitimate fear, but tailoring services to fill the needs that those professionals do not address can manage this concern.<sup>154</sup> By cultivating these relationships, it is completely possible that an opportunity to become involved with one of these firms will arise.<sup>155</sup> The difficulty does not lie in tailoring the services but in assuaging the fears of the professional who feels that the services provided overlap.<sup>156</sup> If some of an estate planner's referrals come from insurance professionals, that estate planner may choose to offer asset management services rather than selling annuities.<sup>157</sup>

If an estate planner is looking to purchase a firm or partnership as a way to buy into the industry, there are some general ideas to understand.<sup>158</sup> Partnership may be more palatable the further from retirement the financial planner is situated.<sup>159</sup> Some planners avoid partnership because of a desire to remain independent—a partnership late in their career may be much more palatable than it was early on.<sup>160</sup> Additionally, a partnership gives the planner more time to create efficiencies in the firm—driving up the final price of the firm at retirement—if you partner now you may pay for it later.<sup>161</sup> The end goal of most planners is to transform their business into something that can survive the founder, which increases the value of the firm significantly.<sup>162</sup> These finished projects may cost a purchaser more but will most likely retain and service clients more efficiently during the transition to new ownership.<sup>163</sup>

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150. Swan, *A Multidisciplinary Bar*, *supra* note 39, at 381.

151. Brackney, *supra* note 24.

152. *See id.*

153. Lee & Vettel, *supra* note 65, at 9.

154. *Id.*

155. Brackney, *supra* note 24, at 53.

156. Lee & Vettel, *supra* note 65, at 9.

157. *See id.*

158. VERES, *supra* note 71, at 21.

159. *See id.*

160. *See id.*

161. *See id.*

162. *Id.*

163. *Id.* at 20.

Those firms that have not finished this transformation usually sell for a simple multiple of one or two times their annual revenues.<sup>164</sup> Firms that have finished this transformation will usually sell for a higher multiple, three to five times their annual revenues.<sup>165</sup> The amount of ownership changing hands is usually what determines partnership purchases.<sup>166</sup>

When looking to acquire a business, there is an additional set of factors to keep in mind.<sup>167</sup> Successful acquirers understand key elements of the acquisition process.<sup>168</sup> Financial planning is dependent on client relationships; the estate planner should find ways to build relationships quickly because continuity of the client experience is crucial.<sup>169</sup> Acquisitions are low probability occurrences so be prepared to look for the right fit, but no business or deal is perfect so do not be too picky.<sup>170</sup> The longer the deal takes, the less likely it is to happen, which indicates that speed is desirable so have the capital in advance because raising capital for such a purchase can be difficult depending on the size of the firm.<sup>171</sup> The purchase price will be considerable because of the residual income aspects of the industry.<sup>172</sup> The end result relies on psychology more than finance; the seller's potential successors can be helpful or harmful to a deal.<sup>173</sup> All of the above are essential factors in a successful purchase of a financial planning practice.<sup>174</sup>

#### *D. How Can the Firm Prepare for the Expanded Service Offering?*

As the firm sets its wheels in motion, it should take steps to prepare for an expansion of services, including the following: building strategic alliances with practitioners in the financial planning field; expanding credentials of a law firm employee, if you plan to use said employee; gathering feedback from your existing clientele as to their willingness to use the new services; and checking with an attorney experienced in malpractice to verify your understanding of the new liabilities that will exist.<sup>175</sup> These new liabilities include those associated with expanded service offered and those concerned the interactions between those providing the specific services.<sup>176</sup> Before charging headlong into the organizational infrastructure of what such a practice would look like, it is beneficial to have an understanding of the

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164. *Id.* at 20–21.

165. *Id.*

166. *See id.*

167. HURLEY ET AL., *supra* note 44, at 12.

168. *Id.*

169. *See id.*

170. *See id.*

171. *See id.*

172. *Id.* at 13.

173. *See id.*

174. *Id.* at 12–13.

175. Kremski, *supra* note 1, at 1197–98.

176. *See id.*

regulating bodies of the financial planning industry and ethical dilemmas that might arise.<sup>177</sup>

### III. THE ETHICS OF THE LEGAL PROFESSION COMPARED TO THE ETHICS OF THE FINANCIAL PLANNING INDUSTRY

#### A. Regulatory Bodies

Apart from the organizations granting certificates briefly described above, the Securities Exchange Commission (SEC), Financial Industry Regularity Authority (FINRA), state agencies, or a combination of the three also regulate financial planners depending on the type and breadth of services provided.<sup>178</sup> For example, “FINRA regulates both the firms and professionals selling securities in the United States and the U.S. securities markets. In this capacity, FINRA writes and enforces its own rules, as well as enforces federal securities rules and laws.”<sup>179</sup> FINRA is recognized as a formidable regulatory body and is known for its focus on consumer protection and industry regulation.<sup>180</sup> Apart from FINRA, the SEC plays a major role in the regulation of the financial planning industry.<sup>181</sup> The SEC’s mission “is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”<sup>182</sup> The SEC also has its own rules and regulations it enforces for the protection of consumers.<sup>183</sup> The SEC is a powerful government agency and has been an effective industry watchdog in protecting the public from unethical practices and individuals.<sup>184</sup> State agencies regulate the sale of insurance products and serve to protect their citizens from predatory sales practices and products.<sup>185</sup>

#### B. The Certified Financial Planner Board

While attorneys have the ABA, financial planners have a plethora of certifications designed around consumer protection and industry integrity.<sup>186</sup> With the passage of time, the financial services industry has evolved.<sup>187</sup> In

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177. *See infra* Part III.

178. TIBURON STRATEGIC ADVISORS, *supra* note 67, at 163.

179. *Oversight*, FINRA, <http://www.finra.org/industry/oversight> [https://perma.cc/XW4B-BWK5] (last visited Oct. 20, 2016).

180. *See id.*

181. TIBURON STRATEGIC ADVISORS, *supra* note 67, at 163.

182. *What We Do*, SEC, <http://www.sec.gov/about/whatwedo.shtml> [https://perma.cc/ZFN8-268A] (last visited Oct. 20, 2016).

183. *See id.*

184. *See id.*

185. *See State Insurance Regulation*, NAT’L ASS’N OF INS. COMM’NS 1, 2 [www.naic.org/documents/consumer\\_state\\_reg\\_brief.pdf](http://www.naic.org/documents/consumer_state_reg_brief.pdf) [https://Y4VY-AGD8] (last visited Oct. 20, 2016).

186. Swan, *A Multidisciplinary Bar*, *supra* note 39, at 384.

187. *Id.* at 385.

an effort to distinguish themselves from wealth managers, insurance salesmen, and stockbrokers, financial planners have engaged in an aggressive marketing campaign.<sup>188</sup> This campaign has been relatively successful.<sup>189</sup> There are many voluntary trade organizations and certifications that serve as industry watchdogs and have their own similar codes of conduct, including Chartered Life Underwriters (CLUs), Certified Financial Advisors (CFAs), the Financial Planning Association (FPA), etc.<sup>190</sup>

While the above organizations offer guidance to those in the financial planning industry, the Certified Financial Planner (CFP) certification is recognized as the base certification of the industry.<sup>191</sup> Certified Financial Planners (CFPs) are one of the foremost examples of the financial planning industry's attempts to distinguish themselves from other financial service providers.<sup>192</sup> While CFPs may offer wealth management, insurance, and brokerage services, they are different in several respects.<sup>193</sup> One example is the focus on the client's life goals rather than on net worth as the sole metric.<sup>194</sup> Additionally, the CFP Board holds its certificants to a fiduciary standard comparable to that of the ABA.<sup>195</sup> CFP certificants may have their certificate revoked if the CFP Board finds they violated the code of ethics.<sup>196</sup>

To become a CFP, an applicant must have a bachelor's degree.<sup>197</sup> In addition, a CFP applicant must complete coursework including: general principles of financial planning, insurance planning, investment planning, income tax planning, retirement planning, estate planning, interpersonal communication, professional conduct, and fiduciary responsibility, as well as a financial plan development capstone course.<sup>198</sup> A Juris Doctorate (J.D.)

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188. *Id.* at 380.

189. *Id.* at 385.

190. *Id.* at 384.

191. *Id.* at 385.

192. *See id.*

193. *See* Michael Bradley, *Should you Hire a Financial Planner, Broker, or Wealth Manager?* BUS. INSIDER (Nov. 25, 2012, 2:21 PM), [www.businessinsider.com/financial-planner-broker-or-wealth-manager-2012-11](http://www.businessinsider.com/financial-planner-broker-or-wealth-manager-2012-11) [<https://perma.cc/66TS-CNJ6>].

194. *See* Lee & Vettel, *supra* note 65, at 18.

195. *Compare Code of Ethics & Professional Responsibility*, CFP BOARD, <http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement/standards-of-professional-conduct/code-of-ethics-professional-responsibility> [<https://perma.cc/TX2N-NWJJ>] (listing seven principles to guide financial planners) [hereinafter *Code of Ethics & Professional Responsibility*] (last visited Jan. 16, 2016), with MODEL RULES OF PROF'L CONDUCT Preamble: A Lawyer's Responsibilities (AM. BAR ASS'N 2014) (listing thirteen responsibilities for lawyers).

196. *Professional Standards & Enforcement*, CFP BOARD, <http://www.cfp.net/for-cfp-professionals/professional-standards-enforcement> [<https://perma.cc/YVZY-DAAX>] (last visited Jan. 16, 2016).

197. *Education Requirement*, CFP BOARD, <http://www.cfp.net/become-a-cfp-professional/cfp-certification-requirements/education-requirement> [<https://perma.cc/9JE3-BPT5>] (last visited Jan. 16, 2016).

198. *Id.*



satisfies many of the CFP requirements, and the only remaining requirement is the financial plan development course.<sup>199</sup>

Once the applicant fulfills the education requirement, the applicant must complete the CFP exam.<sup>200</sup> The CFP Certification Examination is made up of 170 multiple-choice questions designed to test the applicant's ability to apply financial planning techniques and knowledge.<sup>201</sup> The test is split into two three-hour sessions.<sup>202</sup> On average, only sixty percent of first-time test takers pass.<sup>203</sup>

Once the applicant passes the exam, the applicant must then fulfill the experience requirement.<sup>204</sup> Individuals can do this in several ways.<sup>205</sup> Applicants may either accrue three years of experience on their own or complete a two-year "apprenticeship."<sup>206</sup> The experiential requirement is broken into two parts.<sup>207</sup> The work experience must entail one or more of the following six personal financial planning processes: establishing and defining the relationship with the client; gathering client data; analyzing and evaluating the client's financial status; developing and presenting the financial planning recommendations; implementing the financial planning recommendations; or monitoring the financial planning recommendations.<sup>208</sup> Applicants must satisfy the second part of the experiential requirement in one of the following five ways: personal delivery to individual client; supervision of personal delivery to individual client; support of personal delivery to individual client (direct, indirect); teaching courses at a CFP board-registered program or finance-related courses at a university; or internships or residency programs.<sup>209</sup>

Finally, the applicant must pass a background check and "agree to adhere to the high standards of ethics and practice outlined in CFP Board's *Standards of Professional Conduct* . . . and to acknowledge CFP

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199. Compare *Education Requirement*, *supra* note 197 (listing the required courses to receive to receive a CFP certification) with *Graduation and Academic Requirements*, TEX. TECH U. SCH. OF L. 1, 2 (Feb. 28, 2015), [www.law.ttu.edu/Policies/pdfs/Academic%20and%20Graduation%20Requirements-policy%20doc.pdf](http://www.law.ttu.edu/Policies/pdfs/Academic%20and%20Graduation%20Requirements-policy%20doc.pdf) [<https://perma.cc/8E9W-ZA67>] (listing the required courses to receive a Juris Doctorate).

200. See *About the CFP Exam*, CFP BOARD, <http://www.cfp.net/become-a-cfp-professional/cfp-certification-requirements/cfp-exam-requirement/about-cfp-exam> [<https://perma.cc/H6VU-XYCQ>] (last visited Jan. 16, 2016).

201. *Id.*

202. *Id.*

203. See *CFP Examination Statistics*, CFP BOARD, [www.cfp.net/news-events/research-facts-figures/cfp-examination-statistics#2](http://www.cfp.net/news-events/research-facts-figures/cfp-examination-statistics#2) [<https://perma.cc/T9MD-KW96>] (last visited Sept. 15, 2016).

204. See *Expanded Definition of Experience Requirement*, CFP BOARD, <http://www.cfp.net/become-a-cfp-professional/cfp-certification-requirements/experience-requirement> [<https://perma.cc/P48J-956V>] (last visited Jan. 16, 2016).

205. See *id.*

206. See *id.*

207. See *id.*

208. See *id.*

209. See *id.*

Board's right to enforce them through its *Disciplinary Rules and Procedures* . . . .<sup>210</sup> This shows the public that the applicant will provide services that are in the client's best interest and that the applicant will adhere to the "highest ethical and professional standards for the practice of financial planning."<sup>211</sup> Once applicants fulfill all of these requirements, they are admitted to use the certification.<sup>212</sup>

Not only do several formidable government agencies regulate the financial planning industry, but also—in an attempt to improve credibility in the profession—there are additional bodies of self-governance that have proved effective in the past.<sup>213</sup> There are some basic similarities between CFP Board's Code of Ethics and Code of Conduct and those of the legal profession.<sup>214</sup> There are, however, some legitimate ethical concerns when it comes to offering services in both legal and non-legal professions.<sup>215</sup> These concerns arise when the firms are closely related, such as ancillary or subsidiary businesses.<sup>216</sup>

### C. CFP v. JD: How Do Their Code of Ethics & Professional Responsibility Differ?

The CFP Code of Ethics is comprised of seven principles: integrity, objectivity, competence, fairness, confidentiality, professionalism, and diligence.<sup>217</sup> The ABA Code of Ethics also has standards of competence, diligence, and confidentiality.<sup>218</sup> The ABA Code of Ethics also contains synonyms or values that correspond with the other four ethics principles of the CFP certification.<sup>219</sup> The main concerns with any overlap in the professions are: the impact on the attorney-client privilege; the potential for conflicts of interest to arise and how to handle them; and the effect on the professional independence of attorneys.<sup>220</sup> For the purposes of this discussion, a later section will address the protection of professional independence.<sup>221</sup>

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210. *Ethics Requirement*, CFP BOARD, <http://www.cfp.net/become-a-cfp-professional/cfp-certification-requirements/ethics-requirement> [https://perma.cc/SQYP-ZR9V] (last visited Jan. 16, 2016).

211. *See id.*

212. *See id.*

213. TIBURON STRATEGIC ADVISORS, *supra* note 67, at 163.

214. *Code of Ethics & Professional Responsibility*, *supra* note 195.

215. Laura Noroski, *New York's Controversial Ethics Code Changes: An Attempt to Fit Multidisciplinary Practice within the Existing Ethical Boundaries*, 76 CAL. L. REV. 483, 508–09 (2003).

216. *See id.*

217. *See Code of Ethics & Professional Responsibility*, *supra* note 195.

218. *See Model Rules of Professional Conduct*, AM. BAR ASS'N (2015), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html) [https://perma.cc/KX3G-QM82].

219. *See id.*

220. Noroski, *supra* note 215, at 506, 509, 513.

221. *See infra* Part IV.

### 1. Confidentiality

One of the more important similarities between the practice of law and financial planning is the confidentiality that both attorneys and financial planners must adhere to in regards to their clients.<sup>222</sup> For example: “Confidentiality means ensuring that information is accessible only to those authorized to have access. A relationship of trust and confidence with the client can only be built upon the understanding that the client’s information will remain confidential.”<sup>223</sup> This standard disallows the sharing of client information but does not protect client information from discovery.<sup>224</sup> This difference is obviously an area of concern, but ultimately, disclosure and client education can resolve any problems.<sup>225</sup>

While similarities exist in standards of confidentiality, there is one aspect that requires special attention.<sup>226</sup> Specifically, the effect on the attorney-client privilege when an attorney is offering non-legal services.<sup>227</sup> According to Rule 1.6 of the Professional Rules of Conduct: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation.”<sup>228</sup> While an accountant-client privilege exists in some states, there is no parallel offered to financial planners.<sup>229</sup> Attorneys can have communications and work-product protected from discovery procedures, but no such protection is afforded for the communications or work-product of financial planners.<sup>230</sup> The lawyer and non-lawyer professionals bear the burden to ensure that the client understands that a difference in protections exists.<sup>231</sup> This should be done through both verbal and contractual disclosure.<sup>232</sup>

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222. *Client Lawyer Relationship Rule 1.6 Confidentiality of Information*, AM. BAR ASS’N (2015), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_6\\_confidentiality\\_of\\_information.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html) [https://perma.cc/FB52-6NNW] [hereinafter *Rule 1.6 Confidentiality Information*]; *Code of Ethics & Professional Responsibility*, *supra* note 195.

223. *Code of Ethics & Professional Responsibility*, *supra* note 195.

224. *Id.*

225. *Id.*

226. Noroski, *supra* note 215, at 506.

227. *Id.* at 506–07.

228. *See Rule 1.6 Confidentiality Information*, *supra* note 222.

229. Michael Traynor, *Some Open Questions About Attorney-Client Privilege and Work Product in a Multidisciplinary Practice*, 36 WAKE FOREST L. REV. 43, 44 (2001).

230. *See id.*

231. *Id.* at 45.

232. *Id.* at 46.

## 2. Fiduciary Duty

The fiduciary standard that applies to financial planners is comparable to the ABA's standard of fiduciary duty.<sup>233</sup> In addition to the similar standards, many of the situations requiring such conduct are similar.<sup>234</sup> Currently, "the fiduciary standard of care requires that a financial adviser acts solely in the client's best interest when offering personalized financial advice."<sup>235</sup> The ABA's Rules of Professional Responsibility state: "A lawyer shall not represent a client if the representation involves a concurrent conflict of interest."<sup>236</sup> Like attorneys, financial planners are allowed to disclose the interests that are in conflict and ask the clients to either consent to or deny the conflicts.<sup>237</sup> The legality of the disclosure is highly dependent on the form of disclosure.<sup>238</sup> An effective disclosure must be: in writing, short, and clearly highlight the danger the conflict poses to the client.<sup>239</sup> In addition, the financial planner has the burden of ensuring the client understands the nature and potential effect of the conflict.<sup>240</sup>

When contemplating the fiduciary role of attorneys, the U.S. Supreme Court has said: "There are no transactions which courts . . . will scrutinize with more jealousy than those between attorneys and their clients."<sup>241</sup> Where a conflict of interest exists, the lawyer must be able to demonstrate compliance with Rule 1.7 of the ABA's Rules of Model Conduct.<sup>242</sup> This includes:

[F]ull disclosure of the terms of the transaction and the risks presented by the lawyer's involvement in the transaction; the client being encouraged to seek independent legal counsel regarding the transaction; the client's

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233. *Rule 1.6 Confidentiality Information*, *supra* note 222; *Code of Ethics & Professional Responsibility*, *supra* note 195.

234. *See Rule 1.6 Confidentiality Information*, *supra* note 222; *Code of Ethics & Professional Responsibility*, *supra* note 195.

235. *Fiduciary Standard*, CFP BOARD (2015), <http://www.cfp.net/public-policy/public-policy-issues/fiduciary-standard> [<https://perma.cc/Z5ND-H84E>].

236. *See Client Lawyer Relationship Rule 1.7 Conflict of Interest*, AM. BAR ASS'N (2015), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_7\\_conflict\\_of\\_interest\\_current\\_clients.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients.html) [<https://perma.cc/S2L9-MRHN>] [hereinafter *Rule 1.7 Conflict of Interest*].

237. Tamar Frankel, *The Regulation of Brokers, Dealers, Advisers, and Financial Planners*, in A COLLECTION OF PAPERS WRITTEN TO DISCUSS THE APPLICATION OF THE FIDUCIARY STANDARD OF CONDUCT UPON PROVIDERS OF INVESTMENT ADVICE 80 (2010).

238. *Id.* at 82.

239. *See id.*

240. *See id.*

241. *McPherson v. Cox*, 96 U.S. 404, 408 (1878).

242. Steven G. Blum & Ron A. Rhoades, *The Fiduciary Standard of Conduct: Similarities in Application to Lawyers and to Those Providing Investment Advice*, in A COLLECTION OF PAPERS WRITTEN TO DISCUSS THE APPLICATION OF THE FIDUCIARY STANDARD OF CONDUCT UPON PROVIDERS OF INVESTMENT ADVICE 16 (2010).

consent; and in any event that the terms and circumstances of the transaction remain fair and reasonable to the client.<sup>243</sup>

The fiduciary standard of the attorney is analogous to that applied to the financial planner and is evidenced in the rigidity of the fiduciary standard applied to financial planner activities.<sup>244</sup> The similarity is also noted in court rulings outlining the application of fiduciary duties to the financial industry.<sup>245</sup> The fiduciary duty is retained throughout the relationship between the advisor and the client.<sup>246</sup> The client's interest must be placed above the firm's or advisor's interests.<sup>247</sup> The advisor should not mislead the client through false statements or omissions.<sup>248</sup> The advisor should provide all material facts as part of disclosure prior to any decision regarding a course of action.<sup>249</sup> The advisor should make reasonable efforts to avoid conflicts of interest.<sup>250</sup> These standards established in the courts are strikingly familiar to the fiduciary standard applied to attorneys.<sup>251</sup>

Public policy and consumer protection are the clear reasons for the similar standards of conduct between attorneys and financial advisors.<sup>252</sup> The main difference between the two standards is not content, but the difference in the volume of treatment, whether in the courts or treatises.<sup>253</sup> As time marches on, this disparity in volume will all but disappear as the courts and academics refine and solidify the definition of the fiduciary duty in the financial industry.<sup>254</sup>

Currently, "the fiduciary standard of care requires that a financial adviser acts solely in the client's best interest when offering personalized financial advice."<sup>255</sup> The Department of Labor has strong support from financial advisors for a broadening of the fiduciary standard to include more financial advisors and brokers.<sup>256</sup> While the latter are more reluctant to accept the higher standard, roughly 91% of planners support the increased fiduciary standards.<sup>257</sup> This support may seem surprising considering that many financial advisors affiliated with brokerage or investment firms are compensated through commissions on sales of insurance products or

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243. *Lowe v. SEC*, 472 U.S. 181, 208 (1985).

244. Blum & Rhoades, *supra* note 242, at 19.

245. *See id.*

246. *SEC v. Moran*, 922 F. Supp. 867, 895–96 (S.D.N.Y.1996).

247. *In re Prudential Ins. Co. of Am. Sales Prac.*, 975 F. Supp. 584, 616 (D.N.J. 1996).

248. *SEC v. Wash. Inv. Network*, 475 F. 3d 392 (D.C. Cir. 2007).

249. *Johnson v. John Hancock Funds*, 217 S.W.3d 414, 429 (Tenn. Ct. App. 2006).

250. *SEC v. Capital Gains*, 375 U.S. 180, 191 (1963).

251. Blum & Rhoades, *supra* note 242, at 22.

252. *See id.*

253. *Id.* at 23.

254. *See id.*

255. *See Fiduciary Standard*, *supra* note 235.

256. FIRST RESEARCH, *supra* note 27.

257. *Id.*

investment vehicles.<sup>258</sup> It is worth noting that legislators and regulators have been pushing for more separation between advisors and firms that provide such products.<sup>259</sup> Many financial advisors move from commission-based services to fee-based services, such as Asset Under Management models or even hourly billing rates, has aided this separation.<sup>260</sup> An increased focus on consumer protection may result as professionals realize that their ability to function as a business model is reliant on public perception.<sup>261</sup>

#### IV. ORGANIZATION: THE STRUCTURE OF EXISTING AND POTENTIAL PARTNERSHIPS BETWEEN LAW FIRMS AND FINANCIAL PLANNING FIRMS

With an understanding of the ethical dilemmas and the knowledge of the regulating bodies involved, it becomes clear that a big part of any service expansion is organizational structure.<sup>262</sup> There are three ways that a firm could expand its service offering.<sup>263</sup> First, the firm can offer financial planning services “in-house.”<sup>264</sup> Second, the firm can open or purchase a subsidiary business as a separate entity; alternatively, an attorney could open or purchase an ancillary business under this method of expansion.<sup>265</sup> The third, and final, method is a model that is currently only allowed in a few states: a multidisciplinary practice.<sup>266</sup>

Generally, it is not recommended that law firms simply handle the financial planning in-house.<sup>267</sup> Such treatment would subject the employees providing the services to the direct supervision of an attorney, which is not desirable in most cases.<sup>268</sup> Additionally, any services a financial planner in the firm provides are subjected to the professional conduct rules and case law applied to legal services.<sup>269</sup> While the standards of conduct in the financial planning industry are similar to those of the legal profession in many regards, they are better suited to the financial industry and have considerably more certainty of application.<sup>270</sup> Furthermore, if the services are handled in-house,

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258. *See id.*

259. *See id.*

260. *See id.*

261. *See id.*

262. Kathleen Maher, *Building Your Side Business*, ABA J. 40 (Oct. 2003).

263. *See id.*

264. Groth, *supra* note 5, at 580.

265. Maher, *supra* note 262.

266. *See id.*

267. *See id.*

268. Groth, *supra* note 5, at 580.

269. *See id.*

270. *See supra* Part IV.

the breadth of services may be limited or inefficiently administered to meet with ABA standards.<sup>271</sup> There is a better way to organize the business.<sup>272</sup>

### A. Ancillary and Subsidiary Business Models

Fortunately, it is relatively simple to set up an ancillary business that the attorney owns or a subsidiary business the law firm owns.<sup>273</sup> However, it may not be as easy to implement the practices needed to maintain a clear division of the entities.<sup>274</sup> To function as a legitimate ancillary or subsidiary business, a distinction between when and how services are provided must exist.<sup>275</sup> It is possible for an employee to work for both the estate planning firm and financial planning firm.<sup>276</sup> It must be clear at any given time to the client or to the applicable regulatory body for which firm the employee is working.<sup>277</sup> Further, “. . . there is currently no U.S. jurisdiction that bans lawyers from owning or operating such ancillary business enterprises or, if conducted outside the law firm itself, from sharing the ownership of such enterprises with non-lawyers.”<sup>278</sup>

Rule 5.7 of the ABA’s Model Rules of Professional Conduct allows attorneys to participate in other professional services that “might reasonably be performed in conjunction with and in substance are related to the provision of legal services.”<sup>279</sup> The attorney must “take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.”<sup>280</sup> Under this model, each group providing professional services should maintain a distinct business entity, collecting its own fees for the provided services.<sup>281</sup> In this way, it avoids non-compliance with Rule 5.4’s fee-sharing and partnership prohibitions.<sup>282</sup> It also allows the ancillary or

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271. Justin Schiff, *The Changing Nature of the Law Firm: Amending Rule 5.4 to Allow for Alternative Business Structures Resulting in Nonlawyer Ownership of Law Firms*, 42 CAP. U. L. REV. 1009, 1017 (2014).

272. Maher, *supra* note 262.

273. Rees M. Hawkins, *Not “If” but “When” and “How”: A Look at Existing De Facto Multidisciplinary Practices and What They Can Teach Us About the Ongoing Debate*, 83 N.C. L. REV. 481, 483 (2005).

274. Schiff, *supra* note 271.

275. Groth, *supra* note 5, at 579–80.

276. Hawkins, *supra* note 273, at 515.

277. *See id.* at 515.

278. HILDEBRANDT HANDBOOK OF LAW FIRM MANAGEMENT § 10:2.

279. *Law Firms and Associations Rule 5.7 Responsibilities Regarding Law-Related Services*, AM. BAR ASS’N (2015), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_5\\_7\\_responsibilities\\_regarding\\_law\\_related\\_services.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_7_responsibilities_regarding_law_related_services.html) [https://perma.cc/Y7AF-H6UG] [hereinafter *Rule 5.7 Responsibilities*].

280. *See id.*

281. Hawkins, *supra* note 273, at 512.

282. *See id.*

subsidiary business to operate outside of the rules of the legal profession.<sup>283</sup> Subsidiary or ancillary businesses identify themselves as separate entities on their websites and in contracts with clients or employees to distance themselves from the law firm.<sup>284</sup> Professionals should not have any vote or say in the form of practice of any profession in which they are not licensed to practice, which will ensure the preservation of professional independence.<sup>285</sup> This is desirable because a professional that does not understand the standards of conduct of another profession may inadvertently pressure an employee to breach ethical standards.<sup>286</sup> The professionals should obtain waivers of confidentiality from each client at all professional levels if it is determined that professional collaboration is desirable.<sup>287</sup> It is also essential to inform the client at the outset of the relationship, and periodically thereafter, the information and conversations that are confidential and that are not.<sup>288</sup> In most instances, disclosures to clients or signed waivers may address issues like the attorney-client privilege and conflicts of interest.<sup>289</sup> It is also important for the law firm to regularly conduct conflict of interest checks with subsidiary clients in regards to the law firm.<sup>290</sup> This will allow the law firm to flag clients with potential conflicts of interests and thus, screen out potential liability or conflicts of interest.<sup>291</sup>

It is important to note that there is no prohibition on sharing office space to save on costs or generate cross-selling opportunities as long as certain procedures are followed, though the computer systems of each profession must be separate.<sup>292</sup> Advertising may be done jointly as long as the separate entities are clearly identified.<sup>293</sup> Referring clients between professionals is permitted as long as there is no referral fee or intention to have reciprocal referrals.<sup>294</sup> As a final thought, it may set the attorney's mind at rest to know that, according to representatives of the malpractice insurance industry and the disciplinary committees of the various state bar associations, it is rare for attorneys or law firms to face significant claims or actions for their operation of ancillary businesses.<sup>295</sup>

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283. Jay S. Zimmerman & Matthew J. Kelly, *MDPs May Be Dead After Arthur/Andersen, but Subsidiary Businesses Thrive*, 29 L. & SOC. INQUIRY 639, 645 (2004).

284. *See id.*

285. Hawkins, *supra* note 273, at 512.

286. *Id.*

287. *See id.*

288. *See id.*

289. *Id.* at 514.

290. Zimmerman & Kelly, *supra* note 283, at 645–46.

291. *See id.*

292. *See* Hawkins, *supra* note 273, at 515.

293. *See id.*

294. *See id.*

295. Zimmerman & Kelly, *supra* note 283, at 651.



### B. Multidisciplinary Practice Models

It is important to note that expanding one's services beyond legal work is not a simple matter.<sup>296</sup> Currently, there are only a handful of state bar associations that allow for multidisciplinary firms (MDPs).<sup>297</sup> Even the states that allow for MDPs are very specific in what types of MDP practices are allowed.<sup>298</sup> An MDP has been defined as:

[A] partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. . . [I]t also includes an arrangement by which a law firm joins with one or more other professional firms to provide services, including legal services, and there is a direct or indirect sharing of profits as part of the arrangement.<sup>299</sup>

The language in Model Rule 5.4 of the rules of professional conduct of the ABA creates this definition, which states:

[A] lawyer or law firm shall not share legal fees with a non-lawyer. . . [a] lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law. . . [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.<sup>300</sup>

Clearly this prohibits non-legal professionals from participating in any law firms as a partner and prohibits almost any form of profit sharing compensation.<sup>301</sup> The ABA has a well-documented history in determining whether to heed the call for MDPs.<sup>302</sup>

#### 1. The ABA's History with Multidisciplinary Practice

In 1998, the ABA assigned the commission on multidisciplinary practice to "study and report on the extent to which and the manner in which

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296. Louise Lark Hill, *The Preclusion of Nonlawyer Ownership of Law Firms: Protecting the Interest of Clients or Protecting the Interest of Lawyers?*, 42 CAP. U.L. REV. 907, 912 (2014).

297. *See id.*

298. Lee & Vettel, *supra* note 65.

299. Hawkins, *supra* note 273, at 484.

300. *Rule 5.7 Responsibilities*, *supra* note 279.

301. Hill, *supra* note 296, at 914.

302. *Id.* at 909–14.

professional service firms operated by accountants and others who are not lawyers are seeking to provide legal advice to the public.”<sup>303</sup>

When the commission returned in 2000 to present its findings, it unanimously recommended that the ABA allow MDPs to have the power to influence and regulate MDPs.<sup>304</sup> The commission concluded there was an interest in the opportunity to choose lawyers who delivered services as part of multidisciplinary practices.<sup>305</sup>

As part of the report, the commission made many recommendations, including the holding of all parts of an MDP to the legal code of ethics.<sup>306</sup> This recommendation means that the core values of the legal profession still apply to MDPs that attorneys run.<sup>307</sup> Likewise, if a non-attorney runs an MDP that offers legal services, not only the core values of the legal profession apply but also to additional verification.<sup>308</sup> This was recommended to preserve the quality of service and the independence of the attorneys providing that service.<sup>309</sup>

The commission also noted that all of the principles governing attorney conduct, save those outlined in Rule 5.4, apply in MDP formats.<sup>310</sup> Simply put, the recommendation’s only difference would be to allow the sharing of fees between legal and non-legal professionals; all other principles would remain intact.<sup>311</sup> Instead, the ABA chose to keep attorneys from participating in MDPs.<sup>312</sup> As justification, the ABA cited fears of failure to provide protection for confidential client information and an inability to guarantee loyalty to the client in conflicts of interest.<sup>313</sup>

Many arguments arose in opposition of MDPs during the protracted debate leading up to the ABA’s decision to continue the prohibition of MDPs.<sup>314</sup> These arguments consist of three basic principles.<sup>315</sup> First, protecting the reputation of the legal profession from the unscrupulous practices of other professions.<sup>316</sup> Second, attorneys are too polite or refined to compete well in an environment of expanded business services.<sup>317</sup> Third,

303. Anthony J. Luppino, *Multidisciplinary Business Planning Firms: Expanding the Regulatory Tent Without Creating a Circus*, 35 SETON HALL L. REV. 109, 158 (2004).

304. *Id.* at 159.

305. Burnele Powell, *Flight from the Center: Is It Just or Just About Money?*, 84 MINN. L. REV. 1439, 1449 (2000).

306. *Id.* at 1452–53.

307. *Id.*

308. *Id.* at 1453.

309. *See id.*

310. *Id.* at 1451–52 (stating that Rule 5.4 prohibits lawyers from sharing legal fees with non-lawyers).

311. *See id.*

312. Luppino, *supra* note 303, at 120.

313. Anne Schroeder, *Collaborating with Nonlawyer Professionals: Regulation or Relevance?*, 15 T.M. COOLEY J. PRAC. & CLINICAL L. 29, 41 (2013).

314. *See id.* at 32.

315. Powell, *supra* note 305, at 1455.

316. *See id.* at 1455–59.

317. *See id.* at 1459–62.

the legal regulatory system lacks the will or capacity to control these practices.<sup>318</sup> All three of these arguments are based on assumptions that may not have been understood or substantiated at the time.<sup>319</sup> The first argument depends on the assumption that the legal profession is incapable of protecting its own reputation from the practices of other professions.<sup>320</sup> One could argue after the scandals of WorldCom and Enron that the legal profession could benefit from closer relationships with other professions, such as accountants.<sup>321</sup> The second argument assumes that attorneys are somehow less capable than other professions to compete in a marketplace without some form of protection.<sup>322</sup> That doesn't seem to be in line with the sentiment that permeates law schools and law firms.<sup>323</sup> The third, and final, argument relies on the alleged lack of ability or desire to regulate the practice of law in such an environment.<sup>324</sup> While it is true that there are instances of non-legal firms practicing law, which goes fairly unregulated, that does not show that expanding the MDP restrictions would aim new regulatory efforts at de facto and new MDPs.<sup>325</sup> The commission's confidence in allowing MDPs in its recommendation to the ABA addresses and undermines all three of these arguments.<sup>326</sup> It may be time for the MDP debate to return, and it may be that Financial Planning and Legal services offer an opportunity for an expansion of the MDP doctrine.<sup>327</sup>

## 2. *The Financial Planning Industry Is an Ideal Testing Ground for Modern MDPs*

Financial planning and estate planning firms may warrant an MDP exception.<sup>328</sup> State bar associations would have a strong ally in the regulation of such firms as the regulatory offices of the SEC and FINRA become better equipped to regulate financial planning firms as they conduct more frequent audits with more intense scrutiny than ever before; the state bar associations would have a strong ally in the regulation of such firms.<sup>329</sup> The newly proposed fiduciary standard for the financial industry shows an increasing similarity between the two professions in their abilities to manage conflicts

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318. *See id.* at 1462–64.

319. *See id.* at 1458, 1461, 1463.

320. *Id.* at 1459.

321. *See id.*

322. *Id.* at 1461.

323. *See id.*

324. *Id.* at 1463.

325. *See* Robert A. Stein, *Multidisciplinary Practices: Prohibit or Regulate?*, 84 MINN. L. REV. 1529, 1536 (2000).

326. *See* Powell, *supra* note 305, at 1464.

327. *See* Susan Poser, *Main Street Multidisciplinary Practice Firms: Laboratories for the Future*, 37 U. MICH. J. L. REF. 95, 115 (2003).

328. *See id.*

329. TIBURON STRATEGIC ADVISORS, *supra* note 67, at 163.

of interest.<sup>330</sup> Compliance and administrative functions in the financial planning industry are already major components of most financial planning firms due to the laws put in place to prevent the abuse of the fiduciary position of financial planners.<sup>331</sup> The ethics are very similar, if not identical, in some cases.<sup>332</sup> All of these factors point to an improved chance of success in marrying the two professions in a way that protects legal ethics while strengthening the economic position of the legal profession.<sup>333</sup>

Such an experiment would need to do at least six things, which are: apply the legal profession's code of ethics to the potential MDPs; regulate MDPs at the state level; bind attorneys in the MDP to the Rules of Professional Conduct; require registration of MDPs with the state bar association; maintain that non-lawyers cannot practice law; and treat clients of the MDP the same as clients of an attorney in conflict of interest circumstances.<sup>334</sup> These restrictions would go a very long way in ensuring the core values that the ABA set forth in preparing for the MDP debate.<sup>335</sup> To address the concerns about professional independence of attorneys, one potential additional restriction is to disallow non-lawyer ownership of an MDP.<sup>336</sup> MDPs could use additional disclosure and waiver agreements to ensure the clients of such entities understand the client's position and rights.<sup>337</sup>

## V. CONCLUSION

The ABA should loosen the MDP policy to facilitate growth in the legal profession and to allow for law firms to include financial planning services.<sup>338</sup> Estate planning attorneys wishing to expand their services may choose to make their state bar representatives aware of the arguments for such a policy.<sup>339</sup> The financial planning industry already has many correlations with estate planning, resulting in a greater understanding and association of ethics and practices.<sup>340</sup> The growth of the legal profession and the health of its reputation rely on expansion, not isolation.<sup>341</sup>

If the ABA does not loosen MDP restrictions, small firm attorneys can still use an ancillary business to supplement their income through ownership

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330. Blum & Rhoades, *supra* note 242, at 19.

331. HURLEY ET AL., *supra* note 44, at 28.

332. *See supra* Part II.

333. Poser, *supra* note 327, at 115.

334. Michael Kelly, *Ethical Issues Associated with Multidisciplinary Practices in Texas*, 41 ST. MARY'S L.J. 733, 743 (2010).

335. *See id.*

336. *See Hill, supra* note 296, at 931.

337. *See Lee & Vettel, supra* note 65, at 15–16.

338. *See Schiff, supra* note 271, at 1010.

339. *See Hawkins, supra* note 273, at 515.

340. *See Kremski, supra* note 1.

341. *See Schiff, supra* note 271, at 1011.

in a financial planning firm.<sup>342</sup> Estate planners that choose to expand into the financial planning industry will likely find themselves benefiting from a growth industry with significant benefits such as steady residual income.<sup>343</sup> These estate planners are uniquely positioned to enter this industry due to their existing skill set, clientele, and professional relationships.<sup>344</sup> While entry into an alternate industry is not without peril, there are ways to mitigate and even eliminate liability.<sup>345</sup> Delineating the firms, establishing practices of disclosure, and requiring waiver agreements from clients are all ways an estate planning attorney can minimize potential liability.<sup>346</sup> If financial planning sounds appealing, then there is a way for estate planners to keep those clients they do not wish to send away.<sup>347</sup>

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342. See Groth, *supra* note 5, at 579.

343. See WEALTHMANAGEMENT.COM, *supra* note 85, at 14.

344. See *id.* at 29.

345. See HURLEY ET AL., *supra* note 44, at 12.

346. See Hawkins, *supra* note 273, at 514.

347. See *id.* at 513–14.