

2001

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Recommended Citation

36 Wake Forest L. Rev. 1 (2001)

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VIEWS ON MULTIDISCIPLINARY PRACTICE WITH PARTICULAR REFERENCE TO LAW AND ECONOMICS, NEW YORK, AND NORTH CAROLINA

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This Article—after describing analytical gaps in the work of the ABA Commission on MDP, and after criticizing the analysis of MDP by the law and economics school and the Big Five subset thereof—sets forth, with commentary, proposals relating to MDP developed by the New York State Bar Association and the MDP Task Force of the North Carolina Bar Association. It concludes by comparing these proposals in the context of the law governing lawyers in the United States.

THE ABA'S ANALYTICAL GAP

On July 11, 2000, the American Bar Association ("ABA"), through its governing body, the House of Delegates, took two votes relating to multidisciplinary practice ("MDP"), which effectively repudiated the position recommended by the ABA's Commission on MDP (the "ABA Commission").¹ The first vote rejected a procedural motion supported by the ABA Commission to defer a vote on the merits. The second vote approved a recommendation sponsored by several state bar associations which were substantively opposed to the position of the ABA Commission. The second vote also put an end to the existence of the ABA Commission.²

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1. See ABA Comm'n on Multidisciplinary Practice, House of Delegates Annual Meeting 7/11/00 Transcript, *available at* http://www.abanet.org/cpr/mdp_hod_trans.html [hereinafter Annual Meeting Transcript].

2. See *id.*; ABA Comm'n on Multidisciplinary Practice, MDP Report 10F, *available at* <http://www.abanet.org/cpr/mdp-report10f.html> [hereinafter MDP Report 10F]. The motion to defer was defeated by a vote of 262 against, 152 for. The second vote was on a recommendation (in the form of Report 10F to the House of Delegates) by bar associations of (in alphabetical order) Florida, Illinois, New Jersey, New York, and Ohio. See ABA Comm'n on Multidisciplinary Practice, MDP Recommendation to the House of Delegates (July 2000), *available at* <http://www.abanet.org/cpr/mdprecom10F.html> [hereinafter MDP Rec-

For two years, the ABA Commission had been seeking to persuade the House of Delegates to approve MDP in what might be called its ultimate form—a form whereby nonlegal professionals would be permitted to own or otherwise control legal practices. In 1999, the ABA Commission proposed that such an MDP should be permitted, provided it was required to certify annually to a state court that it had complied with the rules governing the legal profession, and was subject to “administrative audit” by the court.³ In 2000, the ABA Commission, abandoning its 1999 approach, indicated that compliance with those rules by such an MDP “[could] be satisfied in a variety of ways,” and effectively recommended that the several states select from amongst that variety the way or ways that the states deemed best.⁴

Neither the 1999 nor the 2000 proposal of the ABA Commission was voted on as such by the House of Delegates.⁵ Instead, by approving resolutions proposed by state bar groups, the House indicated that the proposals of the ABA Commission were inadequate and thus unacceptable.⁶ In 1999, the House cited a need for additional study of the issues relating to MDP and the legal profession.⁷ In 2000, the House adopted a more detailed resolution clearly disapproving—as incompatible with the “core values of the [American] legal profession”—MDPs in respect of which nonlawyers or nonlegal entities have “any ownership or investment interest in, or managerial or supervisory right, power or position in connection with, the practice of law by any lawyer or law firm.”⁸

ommendation]. It was approved by a vote of 314 in favor, 106 against. John Gibeaut, *It's a Done Deal: House of Delegates Vote Crushes Chances for MDP*, A.B.A. J., Sept. 2000, at 92. The recommendation is summarized in the text two paragraphs below.

3. ABA Comm'n on Multidisciplinary Practice, Report to the House of Delegates, Recommendation (July 8, 1999), available at <http://www.abanet.org/cpr/mdprecommendation.html> (issued in June and dated August 1999) [hereinafter Recommendation]. On August 10, 1999, the House of Delegates declined to adopt the report and, by a vote of 304 to 98, resolved that no change should be made in the Model Rules of Professional Conduct as they relate to MDP. John Gibeaut, *MDP Debate Still Alive: Need for New Rules, Accord by State Bars on Lingering Issues*, A.B.A. J., October 1999, at 84. Such changes were rejected “unless and until additional study demonstrates that such changes will further the public interest.” ABA Comm'n on Multidisciplinary Practice, Report to the House of Delegates (July 2000), available at <http://www.abanet.org/cpr/mdpfinalrep2000.html> [hereinafter Report to the House of Delegates].

4. Report to the House of Delegates, *supra* note 3.

5. See *id.*; Annual Meeting Transcript, *supra* note 1.

6. See *id.*

7. Report to the House of Delegates, *supra* note 3.

8. ABA Comm'n on Multidisciplinary Practice, Report to the House of Delegates, Final Report, available at <http://www.abanet.org/cpr/mdpreport.html> [hereinafter Final Report] (quoting Report of the New York State Bar Ass'n Special Committee on the Law Governing Firm Structure and Operation, Preserving the Core Values of the American Legal Profession: The Place of Multi-

The votes by the House of Delegates, while decisive, may not prove to be definitive. The MDP debate can be expected to continue against the background of the votes by the House indicating that the ABA Commission had failed to come up with acceptable proposals, and removing the ABA Commission from the debate—votes that may encourage lawyers within both the ABA and state bar groups to become more analytical in dealing with MDP.

The MDP debate in the United States has focused in large part on two different types of MDP: One type has its economic center of gravity in a sponsoring nonlegal professional firm, notably one of the firms known as the “Big Five,”⁹ seeking to extend its activities to include the practice of law. The other type comprises a variety of MDPs proposed by legal practitioners seeking to combine the practice of law with other professional activities.¹⁰

Conceptually, these two types of MDP overlap. As a practical matter, however, they are rather different, and it is this difference which the ABA Commission largely failed to analyze and which may inform the future debate. In an MDP whose economic center of gravity lies within a predominantly nonlegal entity, that entity’s dominance alone may dictate that the locus of control of legal practice by the MDP will reside with nonlawyers. In contrast, in MDPs of the second type, legal practitioners may be more likely to control or exercise ultimate influence over the economics of the MDP and thus of its legal practice. The question of economic control of legal practice becomes highly pertinent in the context of the rules governing the legal profession, and the place of that profession in the legal system. Put simply, the question becomes—to what extent is it reasonable to expect MDPs of each type to act in furtherance of those rules and that system?

The ABA Commission did not ignore this question. It simply did not deal with it in a way suggesting that it had received complete and coherent analysis. The approach adopted by the ABA Commission seems to have been to consider submissions made to it by persons appearing before it, but to produce no published synthesis of those submissions, and to refrain from announcing the norms and procedures it used in evaluating the submissions and reaching its conclusions.

The gap in this process was the absence of any published analysis connecting the submissions generated outside the ABA Commission with the conclusions reached within it. Thus, the various ways and contexts in which economic control by nonlawyers might im-

disciplinary Practice in the Law Governing Lawyers, 3, 352-53 (April 2000), available at <http://www.nysba.org/whatsnew/maccrate.pdf>; Annual Meeting Transcript, *supra* note 1.

9. The Big Five are Arthur Andersen, Deloitte Touche Tohmatsu, Ernst & Young, KPMG, and PricewaterhouseCoopers.

10. See John Gibeaut, *Cash Boughs*, A.B.A. J., Feb. 2001, at 50.

pinge on the professional conduct of lawyers and on the legal system itself (although covered in some of the submissions received by the ABA Commission) went essentially unexamined in the Reports and Recommendations produced by the ABA Commission. Most importantly, the ABA Commission made no effort to deal with the difference between the two types of MDP mentioned above, that is, between an MDP sponsored by an economically dominant nonlegal entity, on the one hand, and, on the other, MDPs in which legal professionals would be likely to exercise economic control or ultimate economic influence in managing legal practice by the MDP.

This analytical gap produced discontinuity between the ABA Commission's conclusion and its recommendations. In essence, it concluded that "an MDP that was not controlled by lawyers might, if left to its own devices, be less likely than a law firm to create a firm 'culture' that was supportive of strict observance of the rules of professional conduct."¹¹ Thus stated, the problem was how to assure, in an MDP controlled by nonlawyers, strict observance of the rules of professional conduct applicable to legal practice by the MDP. In 1999 (as mentioned above), the ABA Commission proposed that such an MDP would certify annually to a court that it had complied with those rules, and would be subject to "administrative audit" by the court.¹² This recommendation failed to receive support and was withdrawn by the ABA Commission in 2000.¹³ It then failed to come up with any specific recommendation for solving the problem inherent in its own conclusion.

The problem inherent in the conclusion of the ABA Commission may lie in the duality of its objectives. First, it insisted on authorizing MDP in what might be called its ultimate form (that is, as mentioned above, MDPs in which legal practice is effectively controlled by economically dominant nonlegal entities). Second, it aspired to strict observance of the rules of professional conduct applicable to legal practice. The failure of the ABA Commission to come up with a specific recommendation in 2000 may simply reflect its failure to resolve the contradictory nature of its dual objective. This in turn may have resulted from divided views within the ABA Commission as to policy and strategy. In any event, it has been discharged from the task of filling the analytical gap that it confronted and in significant part created, and the quest for adequate analysis has turned elsewhere.

11. This succinct and instructive statement of the conclusion of the ABA Commission on this key point was published by a member of the ABA Commission, Steven C. Nelson, in *The Report and Recommendation of the ABA Commission on Multidisciplinary Practice*, INT'L L. NEWS, Section of International Law and Practice, ABA, Vol. 28, No. 3, Summer 1999.

12. MDP Recommendation, *supra* note 2.

13. See Annual Meeting Transcript, *supra* note 1.

THE AMERICAN LAW AND ECONOMICS SCHOOL

The analysis of MDP put forward by the American law and economics school, briefly stated, is that the availability of legal services to consumers should be dictated by the marketplace, unrestricted by barriers in the form of rules governing the legal profession. Those rules are viewed as “no different from [those of] any other trade union or interest group pursuing economic protectionism.”¹⁴ Advocates of those rules are said to be “lawyers defending their economic turf.”¹⁵

There is a certain intellectual purity to this school of thought. It holds that the ownership of legal practice should be viewed primarily as a function of economic determinism. Thus, whenever legal practitioners or public authorities adopt regulatory measures relating to the practice of law, they should subordinate those measures to the principle of free movement of capital into the practice of law. Legal practitioners faced with a competitive marketplace “should either adapt or go out of business.”¹⁶

It should be noted that the law and economics school is quite selective in its choice of the economic consideration that is of primary significance in the marketplace for professional legal services. The paramount economic consideration (according to this school) is freedom of ownership and investment, uncomplicated by any consideration of how this freedom may produce different professional-service consequences in different *economic* contexts. In particular, this school is indifferent to potential variation in professional-service consequences flowing from the economics of ownership when legal practices are owned, variously, by (a) lawyers, or (b) conglomerate professional enterprises controlled by nonlawyers, or (c) non-professional investors. As far as the law and economics school is concerned, possible variation in legal product in different economic contexts is of less importance than is ownership of the means of production of that product. This approach is hardly consumer-oriented. The consumer seeks the product, not the adoption of a particular business form by the producer of the product.

This preoccupation with business form may account for, or may result from, the singular meaning given to “multidisciplinary practice” by (among others) the law and economics school. The term has

14. Daniel R. Fischel, *Multidisciplinary Practice*, 55 BUS. LAW. 951, 974 (2000); see also Daniel R. Fischel, Paper for Seminar in Law and Economics, Harvard Law School, March 21, 2000.

15. ABA Comm’n on Multidisciplinary Practice, Written Testimony of James C. Turner, Executive Director of HALT, Inc. (Feb. 5, 1999), available at <http://www.halt.org/FLIP/mdp-ABA.html>; see also Tunku Varadarajan, *Why is the ABA Afraid of a Little Competition for Lawyers?*, WALL ST. J., July 24, 2000, at A27 (discussing the view that protectionism motivates the legal profession in its reaction to MDP).

16. Fischel, *Multidisciplinary Practice*, *supra* note 14, at 972-73.

been transformed into a featureless acronym, "MDP," and the acronym, masterfully marketed, has come to signify a business entity rather than the concept of "multidisciplinary practice" in the sense of professionals harmonizing the practice of their disciplines for the benefit of a common client. Not only marketeers but also legal academicians, sometimes without pausing to acknowledge the transformation, have used "MDP" to mean not the multidisciplinary work-product of professionals who coordinate the provision of services to common clients, but a business entity which, among other pursuits, derives economic rent from the practice of law.¹⁷

To the potential detriment of the consumer of legal and other professional services, "MDP" has thus come to mean not the services but a form of business entity owning or otherwise controlling the means of production for those services. Having deftly used "MDP" to mean a particular form of entity, as to which the consumer should be indifferent, rather than the services in which the consumer has a legitimate interest, the law and economics school has put itself in a position to talk about the entity as though it were talking about the services, and then to focus on assuring that that form of entity has access to the marketplace. Substantially unexamined by the law and economics school is the question of whether the services in which the consumer has a legitimate interest can be made freely and competitively available in the marketplace without imposing a particular form of business entity upon the legal system.¹⁸

Strictly speaking, the law and economics school is not concerned with "multidisciplinary practice" in the sense of the actual availability to consumers of efficiently coordinated and properly rendered professional services. Rather, that school is concerned with the ownership of legal practice in any context, be it unidisciplinary (a conventional stand-alone legal practice), or multidisciplinary (a legal practice integrated with other professional disciplines), or polycommercial (a legal practice integrated with other business pursuits). The premise of freedom of ownership of legal practice in any of these contexts is that the market will determine, efficiently and appropriately, which form of ownership is to be rewarded by consumers purchasing legal services. In order for the market to perform this function, consumers of legal services, it is argued, must be free to acquire them from legal practices owned in those forms that the market elects to reward. The law and economics school does not permit itself to entertain the possibility that there may be a disjunc-

17. For an example of this transformation by legal academicians, see Dzienkowski & Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *FORDHAM L. REV.* 83, 84 n.8 (2000).

18. See Lawrence J. Fox, *Danfiel R. Fischel's World: A Free Enterprise Dream; An Ethics Nightmare*, 55 *BUS. LAW.* 1533 (2000) (although this line of analysis is not found as such in this article, it would seem to underlie it).

tion between providing the consumer with services in the best manner consonant with the public interest, and marketing various forms of ownership of legal practice.

The law and economics school, being essentially unconcerned with "multidisciplinary practice" in the sense of professional practice, would permit nonprofessional investors to become owners of legal practices.¹⁹ Thus, it would carry the concept of integration beyond the type of integrated MDP proposed by the ABA Commission in its 1999 and 2000 reports, and would permit passive portfolio investors, as well as nonprofessional business or commercial enterprises, to own or invest in the practice of law. (The ABA Commission stated that it was opposed to nonprofessional ownership of, or passive investment in, legal practice.²⁰) Were the views of the law and economics school to be adopted, banks, insurance companies, retail enterprises, travel agencies, and business conglomerates, among others, could acquire law firms; and law firms themselves would be free to issue their own equity securities to outside investors through private placements or public offerings.

The potential reach of law and economics thinking is thus quite extensive. To realize its potential, this school of thought would not encumber itself unduly with questions of reconciling nonlawyer control of legal practice with legal rules of professional ethics. It is (as mentioned above) a philosophy of considerable intellectual purity, ordaining that professional rules must simply give way whenever their enforcement would impinge upon the mobility of capital investment in the practice of law. It seems safe to observe that attaining this level of purity in practice—transforming law and economics theory into a matrix of legal practice—would require substantial modification of existing rules governing the practice of law.

THE BIG FIVE AND LAW AND ECONOMICS DOCTRINE

The views of the Big Five on MDP are a subset of law and economics doctrine—a subset tailored, quite understandably, to their

19. A seminal work in this respect is Edward S. Adams & John H. Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CAL. L. REV. 1 (1998). See also Fischel, *Multidisciplinary Practice*, *supra* note 14, at 968 (stating law firms should not be precluded from raising outside equity capital; if "lawyers would be accountable to shareholders whose principal concern is on maximizing return on their investment rather than preserving lawyers' independence . . . so what?").

20. ABA Comm'n on Multidisciplinary Practice, Report to the House of Delegates (Aug. 1999), available at <http://www.abanet.org/cpr/mdprecommendation.html>. For a study of MDP reaching the opposite conclusion and recommending passive investment in law firms in France, see the Rapport Nallet, *Les Réseaux Pluridisciplinaires et les Professions du Droit*, at 118-21 (Paris 1999).

own business objectives.²¹ In light of those objectives, the Big Five do not seem to espouse investment by nonprofessionals in the practice of law. Rather, their approach seems limited to seeking those changes in rules of the legal profession necessary to accommodate the acquisition and control of legal practices by the Big Five themselves, that is, by those professions other than law, notably accounting, in which the Big Five now engage or might engage in the future. On the other hand, it seems clear that the Big Five seek to own and control legal practices within integrated MDPs in which nonlawyers would have, and lawyers would not have, a preponderant economic interest and ultimate decision-making authority. Thus, a major objective of the Big Five is to modify or eliminate, as necessary, professional rules that inhibit or prohibit nonlawyers from owning, investing in, or controlling legal practices—that is, to change those rules in a manner that would permit nonlegal professionals and nonlegal professional entities to own, invest in, and control firms engaged in the practice of law, and to create integrated MDPs subsuming legal practices.²²

Such changes have been resisted by the legal profession including (as discussed above) resistance by the ABA House of Delegates, on the ground that they would threaten the core values of the legal profession.²³ In the Recommendation adopted by the House on July 11, 2000, these values included the duty of the lawyer: (a) to manifest “undivided loyalty to the client”; (b) competently to “exercise independent legal judgment for the benefit of the client”; (c) to “hold client confidences inviolate”; (d) to “avoid conflicts of interest with the client”; and (e) to “help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.”²⁴

The Big Five (apart from occasionally suggesting, along with the

21. Sources used in arriving at the views of the Big Five on MDP include: testimony before the ABA Commission, particularly ABA Comm’n on Multidisciplinary Practice, Oral Remarks of Kathryn A. Oberly Vice Chair and General Counsel, Ernst & Young LLP (Feb. 4, 1999), available at <http://www.abanet.org/cpr/oberly2.html>; the July 1999 statement of the Big Five on the 1999 Report of the ABA Commission (entitled, “By Dramatically Expanding the Definition of the ‘Practice of Law,’ the MDP Commission Transforms Bar Associations into Super-Regulators with Vast Control over Industries and Organizations Never Before Subject to Lawyers’ Rules and Bar Discipline”); and Big Five papers issued outside the United States, particularly *Juri-Avenir, Répondre aux Attentes du Marché: un Plan D’Action Qualité pour L’Audit en Europe* (1996); *Juri-Avenir, L’exercice de la profession d’Avocat en Réseau Pluridisciplinaire* (1998).

22. Two of the Big Five are in litigation with the Netherlands Bar in Europe over the issue of whether integrated MDPs should be permitted. See Case C-309/99, 1999 O.J. (299) 15-16. The case is now pending before the European Court of Justice. See *id.*

23. See Final Report, *supra* note 8.

24. MDP Recommendation, *supra* note 2.

law and economics school, that the bar's concern for professional core values is window-dressing for professional protectionism)²⁵ have argued that the duties referred to in the preceding paragraph are the duties of *individual* lawyers acting in an *individual* professional capacity, and are not duties binding on a Big Five firm, as such, when it employs lawyers held out to the public as engaging in the practice of law. This position of the Big Five represents a crucial point in the American debate over MDP. Were it to be adopted, a nonlegal entity (such as a Big Five firm) controlling the practice of law would be exonerated from the professional discipline to which individual lawyers are held.²⁶

This argument—that only individual lawyers, but not nonlegal entities controlling legal practices, should be subject to the rules governing the legal profession—has served to focus attention on two features of proposals for MDPs owned or otherwise controlled by nonlawyers. The first is jurisdictional: While legal practitioners are subject to supervision and discipline by the courts, no mechanism exists for giving the courts jurisdiction over nonlawyers controlling legal practices, or even for determining what constitutes such control. The second is substantive: if, in respect of their control of legal practices, nonlegal entities were to be subject to professional rules and discipline, what would be the content of those rules and of measures relating to their enforcement?

The Big Five have not come forward with suggestions that would facilitate resolving these issues, other than to suggest a retrofitting of legal professional rules in a manner that would permit the Big Five to divorce nonlegal control of legal practice from professional responsibility for legal practice. The Big Five are thus themselves seen to be engaged in a form of protectionism. Their argument that only their individual lawyers should be subject to the rules and discipline of the legal profession is an argument for protecting themselves against the rules and discipline of the very profession whose economic benefits they seek. Not the Big Five but individual lawyers would bear the professional risks involved in carrying out the business plans of their employers. This could produce tensions between the nonlawyers with ultimate authority over a Big Five MDP but no accountability under the rules governing the legal profession, and the lawyers in a subordinate position within the MDP responsible for helping to realize those business plans by offering legal services to the public while charged with respecting

25. See *supra* notes 14 and 15.

26. In New York, not only lawyers, but also law firms are expressly subject to professional rules governing the legal profession. See N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-104(a) and 5-105(e). On this and related points, see generally ABA Comm'n on Multidisciplinary Practice, Oral Testimony of Professor Bernard Wolfman, Harvard Law School (Mar. 12, 1999), available at <http://www.abanet.org/cpr/wolfman2.html>.

the rules of their profession applicable to such services.

These potential tensions have been most apparent in the debate over whether legal professional rules on conflicts of interest would apply throughout an integrated Big Five MDP offering legal services to the public. The Big Five argue that they should not be subject to legal conflicts rules, and should be permitted to handle conflicting assignments by using internal devices known as "screens" or "Chinese Walls" that would separate a firm's professionals handling one client's problems from that firm's professionals handling the problems of a client with interests conflicting with those of the first client. This argument has met with considerable skepticism by legal commentators, who can point to contemporaneous court decisions rejecting as ethically inadequate such internal screening by the Big Five.²⁷

One commentator has suggested that the type of legal practice being sought by the Big Five could be accommodated by creating a two-tier legal profession.²⁸ Legal practices fully subject to the rules governing the practice of law would in effect constitute a separate profession, and the only profession entitled to hold itself out as fully protective of the interests of its clients. MDP legal practices that offered a lesser level of client protection would not be entitled to hold themselves out as full-fledged members of the legal profession. This proposal has not found substantial support in the course of the MDP debate, but provides a striking illustration of the issues raised by the debate.

THE OPPOSING COUNTERPART TO THE LAW AND ECONOMICS SCHOOL

Bar associations in several U.S. jurisdictions seem prepared to oppose for the foreseeable future any changes whatsoever in the rules governing the legal profession if the changes would permit MDP. In terms of intellectual purity, this approach is the opposing counterpart to the law and economics school. It sees any involvement of nonlawyers in the practice of law as a threat to the core values of the legal profession (as outlined in Report 10F adopted, as

27. See, e.g., *Prince Jefri Bolkiah v. KPMG*, 2 App. Cas. 222 (1998) (U.K. House of Lords). A more recent case in which Ernst & Young's French law firm found itself on both sides of a case and faced disqualification by a U.S. federal court is discussed in Sheryl Stratton, *Experts from E&Y's French Law Firm Land on Both Sides of IBM Litigation*, 88 TAX NOTES 611-16 (2000). Senior staff members of the U.S. Securities and Exchange Commission ("SEC") have also taken a position inconsistent with Big Five views on conflicts of interest. See ABA Comm'n on Multidisciplinary Practice, Reply of the SEC to the MDP Report (July 1999), available at <http://www.abanet.org/cpr/goldschmid.html> (letter to the President of the ABA from the General Counsel, Chief Accountant, and the Director of Enforcement of the SEC, July 12, 1999); see also *Auditory Discomfort*, ECONOMIST, Jan. 15, 2000, at 78.

28. Statement of L. Harold Levinson to the New York State Bar Association, May 13, 1999.

discussed above, on July 11, 2000 by the ABA House of Delegates), that is, as a threat which, if realized, would bring about a substantial erosion of those values.

Pure negativism is often too simplistic to be maintained in the face of the realities of legal practice. One of these realities is that lawyers, in order to practice law, often need to engage the professional or other services of nonlawyers—services of various types subsumed in the debate over MDP. It is not uncommon for lawyers and law firms to carry out their work with the aid of ancillary arrangements involving such nonlegal services. Many American states countenance these arrangements, and in some cases have adopted legal professional rules that permit them.²⁹

In addition, such ancillary arrangements not only are often necessary for the effective practice of law, but also can shade into difficult conceptual areas not readily dealt with through pure negativism in respect of MDP. An MDP that is effectively the economic preserve of lawyers is, analytically, not readily distinguished from the law firm that uses nonlawyer professionals in carrying out its legal practice. The enforcement of pure negativism, moreover, requires the enforcer to have always at hand a workable and relevant definition of the practice of law; and such a definition has often proved elusive.³⁰

NEW YORK

Beginning in June 1999, the New York State Bar Association (“NYSBA”) had been concerned about perceived analytical deficiencies in the work of the ABA Commission and, in July 1999, the NYSBA created its own Special Committee on the Law Governing Firm Structure and Operation (the “NYSBA Committee”).³¹ In April 2000, the NYSBA Committee issued its Report entitled “Preserving the Core Values of the Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers” (the “NYSBA Report”).³²

29. See, e.g., PA. RULES OF PROF'L CONDUCT Rule 5.7. See also Gibeaut, *supra* note 10.

30. See, e.g., Washington State Bar Ass'n, Comm. to Define the Practice of Law, Final Report, (July 13, 1999), available at <http://www.wsba.org/cdpl/report.html>.

31. Report of the New York State Bar Ass'n Special Comm'n on the Law Governing Firm Structure and Operation, Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers, (Apr. 2000), available at <http://www.nysba.org/whatsnew/maccrate.pdf> [hereinafter NYSBA Report]. The NYSBA Committee has 12 members, plus advisors and liaison officials. See *id.* Robert MacCrate is its Chair; the current President-elect of the NYSBA, Steven C. Krane, and the author are its Vice Chairs; John D. Leubsdorf is its Reporter. See *id.*

32. The NYSBA Report (388 pages plus appendices) is obtainable from the NYSBA, One Elk Street, Albany, N.Y. 12207 ((518) 463-3200; fax (518) 487-

As the title of the NYSBA Report suggests, it approaches MDP from the point of view of the law governing lawyers in the United States—not only statutes and professional rules, but also the considerable body of judge-made law constituting much of the common law of legal practice. Its announced purpose is to present a study of the factual predicates of the MDP debate, and to make specific recommendations as to what should and should not be changed in the law governing lawyers in order, in the public interest, to clarify the place of MDP in that law while, at the same time, preserving the core values of the legal profession.

The NYSBA Report considers ownership of legal practice to constitute control of legal practice and recommends that MDP not be permitted in a form in which nonlawyers would have ownership or investment interests.³³ The form of MDP recommended by the NYSBA Report (in addition to lawyer ownership of services ancillary to the practice of law³⁴) is a so-called “side-by-side” affiliation. This (as set out in the NYSBA Report) is an affiliation in which a law firm and a nonlegal professional-service firm enter into and maintain a contractual relationship for the purpose of offering to the public, on a systematic and continuing basis, both legal services performed by the law firm, and other professional services. The NYSBA Report makes it clear, however, that, in such an affiliation between a law firm and a nonlegal professional-service firm, the latter should not be permitted to play a role in deciding whether to provide legal services in a particular matter or to a particular client, or in determining the manner in which lawyers are hired or trained, or relating to *pro bono publico* and other public-interest legal work, or in financial decision-making relating to legal practice, or in determining the compensation or advancement of lawyers.³⁵

The NYSBA Report clearly played a positive role in the deliberations of the ABA House of Delegates leading up to the adoption, on July 11, 2000, of a Recommendation by the House consonant with the NYSBA Report, and the simultaneous termination of the ABA Commission by the House.³⁶ The NYSBA Report filled the analytical vacuum created by the work of the ABA Commission in 1999 and

5699; available at <http://www.nysba.org>).

33. Nonlawyers and nonlegal professional service firms affiliated with lawyers and law firms would not be permitted “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.” The term “ownership or investment interest” is defined to include “any form of debt or equity”. N.Y. RULES OF PROF’L RESPONSIBILITY, Proposed DR 1-107(A)(2), (B)(2), at 352-53.

34. See *id.*, Proposed DR 1-106, at 336-37.

35. See *id.*, at Ch. 12 and appendices for its discussion of its recommendations (with texts).

36. See *supra* note 8.

2000, and in particular was responsive to the call by the ABA House of Delegates, on August 10, 1999, for "additional study" of the issues relating to MDP.³⁷ Moreover, the NYSBA Report, completed in April and distributed in early May 2000, was available to members of the ABA House of Delegates preparing to consider MDP on July 11, 2000 (as discussed above).³⁸ Accordingly, both the content and the timing of the NYSBA Report contributed to the positive role that it played in the mid-2000 U.S. debate on MDP.

One topic covered by the NYSBA Report would seem to merit comment in explaining the role it played in the mid-2000 debate. In contrast to the ABA Commission, the NYSBA Report challenged the nature of MDP being promoted by the Big Five. According to the NYSBA Report, a Big Five MDP resembles not so much professionals from different professions working closely together and guided by enforceable codes of conduct, as it resembles virtually unregulated services offered by giant business conglomerates which, as regards the lawyers in their employ, tend to be indifferent to their actual status in the legal profession.³⁹ A conclusion that can be reached from this analysis is that the Big Five may indeed offer, or seek to offer, the coordinated services of more than one profession, but they are also interested in acquiring ownership and control of the *undisciplined* practice of law for its own sake, and they pursue this interest in a manner that raises serious questions relating to the title topics of the NYSBA Report: the core values of the Ameri-

37. MDP Recommendation, *supra* note 2. Reacting to the 1999 Report of the ABA Commission, the ABA House of Delegates so resolved by a vote of 304 to 98. The additional study supplied by the NYSBA Report consists of six chapters (122 pages) of appraisal of the American legal profession, four chapters (165 pages) on the challenges to maintaining a single public profession of law, including a survey of MDP in 12 countries outside the United States (106 pages), and two chapters (73 pages plus appendices) of analysis of the principal issues together with specific recommendations.

38. The timing was in fact determined by the ABA, which fixed an April 25, 2000 deadline for submissions to be considered by the House of Delegates in July. The NYSBA Committee met this deadline. (The ABA Commission issued its Report and Recommendation on May 12, 2000.) The Executive Committee and the House of Delegates of the NYSBA endorsed the NYSBA Report on, respectively, April 28, 2000 and June 24, 2000.

39. See NYSBA Report, *supra* note 32 at 152-53, 169-76. The report mentions the claim by Ernst & Young that its U.S. affiliated law firm is separate from Ernst & Young itself. *Id.* at 369. In this connection, compare ERNST & YOUNG, 2000 WORLDWIDE CORPORATE TAX GUIDE, Preface and pp. 696-97 (listing the law firm of McKee Nelson, Ernst & Young LLP of Washington, D.C. as a member of Ernst & Young International). It should be noted that an affiliate law firm of the Toronto law firm, Donahue Ernst & Young, has opened an office in New York "to provide foreign legal services in the U.S." The New York affiliate law firm is called Donahue & Partners, is located at the same New York address as Ernst & Young, and distributes materials using the Ernst & Young trade name. A Canadian lawyer with Donahue Ernst & Young, Toronto, was licensed as a legal consultant in New York in January 2000.

can legal profession; and the place of MDP in the law governing lawyers. The NYSBA Report thus provided substantive analysis for those participants in the mid-2000 debate who were inclined neither to accept nor to let pass in silence claims being made in respect of MDP as promoted by the Big Five.

This analysis constitutes an implicit rejection of the tenets of the law and economics school discussed above. It particularly rejects the viewpoint that "MDP" signifies a form of business entity, rather than "multidisciplinary practice" seen as professional services made available to consumers. Focusing on the services, not the business entity, the NYSBA Report concludes with specific recommendations designed to permit law firms and nonlegal professional service firms to form contractual relationships pursuant to which legal and other professional services are offered to the public.⁴⁰ Under these recommendations, the contracting firms are given substantial flexibility and latitude to determine the form, nature and content of their MDP relationship, provided three conditions are met: lawyers must own and control the legal practice; the nonlegal firm must meet recognized professional standards; when relevant, the existence of the relationship must be revealed to clients.⁴¹

The specific recommendations of the NYSBA Report (contained in its appendices) include two proposed new disciplinary rules, one on the conduct of ancillary businesses by lawyers and law firms, the other on "side-by-side" contractual relationships between law firms and nonlegal professional service firms, together with related commentary on these rules, and certain changes to existing rules to conform them with the two proposed new rules. Following publication of the NYSBA Report, the NYSBA Committee received comments some of which were reflected in new texts of the recommendations that were submitted to the NYSBA House of Delegates and approved by it on November 4, 2000. The Appellate Division of the New York Supreme Court has these recommendations under consideration for possible adoption and incorporation into New York's Code of Professional Responsibility. The texts are appended hereto in Code form as Appendix A, and in Model Rule form as Appendix B.

NORTH CAROLINA

The North Carolina Bar Association established a Multidisciplinary Practice Task Force which, on September 13, 2000, submitted a Report (the "NCBA Report") to the Association's Board of Governors for its consideration. The NCBA Report recommends the inclusion of two new rules in the North Carolina Rules of Professional Conduct. One of the proposed new rules, Rule 5.7, is on an-

40. See N.Y. RULES OF PROF'L RESPONSIBILITY, Proposed DR 1-107(A) in App. A; Rule 5.8 in App. B.

41. See *id.*

cillary services; the other, Rule 5.8, is on contractual relationships between lawyers and nonlegal professionals.⁴² The two proposed new rules, as included in the NCBA Report, are closely patterned after the two new disciplinary rules recommended in the April 2000 NYSBA Report, discussed above.⁴³

The NCBA Report also contains a proposal not found in the NYSBA Report. In addition to permitting contractual relationships between lawyers and nonlegal professionals, it would permit what the NCBA Report calls a “modified command and control model” of MDP.⁴⁴ The NCBA Report does not include a proposed new rule to this end, but does contain a draft resolution for consideration by the Association’s Board of Governors which, in significant part, reads as follows:

Lawyers should be permitted to share fees and join with non-lawyer professionals in an entity that delivers both legal and nonlegal professional services provided that the lawyers (who practice law) have the control and authority over the entity necessary to assure lawyer independence in the rendering of legal services, which control must represent at least a 51% controlling interest, in law and in fact, in the entity. “Nonlawyer professionals” means members of recognized professions or other disciplines that are governed by ethical standards. Specifically, lawyers (who practice law) may form a partnership with a nonlawyer and share legal fees subject to certain clearly defined restrictions. The nonlawyer professionals must agree “to abide by the rules of professional conduct” and the lawyers with a financial interest or managerial authority must “undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1.” A significant purpose of the entity must be the provision of legal services.⁴⁵

Although the language just quoted is not cast in terms of presumptions, it seems to raise a rebuttable presumption that, so long as nonlawyers do not own more than 49% of the entity, it should be deemed to be controlled “in law and in fact” by lawyers. If that interpretation is correct, then a party contesting compliance (e.g., a client or disciplinary body) would have the burden of establishing that lawyers did not “in fact” control an entity 51% of which was owned by lawyers and 49% of which was owned by nonlawyers. If

42. North Carolina Bar Ass’n, Report to North Carolina Bar Ass’n Board of Governors by North Carolina Bar Ass’n Multidisciplinary Practice Task Force, (Sept. 13, 2000) [hereinafter NCBA Report].

43. See the text beginning at note 46, *infra*, for issues as to which the NCBA Report differs from New York’s recommendations in respect of proposed Rule 5.8. The New York draft of Rule 5.8 is in Appendix B.

44. See NCBA Report, *supra* note 42, at 2.

45. *Id.* at 2-3.

the 49% owned by nonlawyers were concentrated in the hands of a few individuals associated with and designated by a firm with substantial economic resources, and if the 51% owned by lawyers were held in small lots by individuals with more modest economic resources, would the burden then shift on the issue of control "in fact"? If so, at what point, in terms of measuring the disparity between relative economic resources and relative concentration of ownership, would the burden shift? Suppose the entity was managed by an executive committee on which the lawyers outnumbered the nonlawyers by a majority of one, and suppose the managing partner and head of finance were nonlawyers, how would one go about resolving the issue of control "in fact"?

In a rather basic sense, the burden of proof would always be on the lawyers in the entity, because only they would be subject to the Rules of Professional Conduct (a draft of which does not yet exist) adopted to implement this proposed resolution. Presumably, the burden would be on-going as the entity evolved over the years, and the issue of factual control could in theory be raised from time to time on the basis of current actual circumstances. Were a violation of the control rule to be established, the lawyers might be subject to discipline. It seems unlikely, however, that a case would arise solely over an alleged violation of the requirement of lawyer control, and that, more likely, the control rule would be invoked (if at all) only when a case arose involving some other issue, such as conflict of interest. Then, even if the nonlawyers were relevant to the alleged conflict of interest, only the lawyers would be at risk under the control rule for having failed to maintain control "in fact."

Another factor of potential relevance is the trade name used by the entity. Let us suppose that a law firm, itself named for individual lawyers, used not only the firm name but also the valuable trade name of a nonlegal entity of substantial economic strength whose designees owned 49% of the law firm. Almost certainly the nonlegal entity would insist on entering into a license agreement setting out the terms on which its valuable trade name could be used by the law firm. Should those terms be taken into account in assessing whether the lawyers "in fact" control the law firm? One term of the license would probably give the nonlegal entity the right to cancel the license; and potential influence over the law firm might well flow from this right. Should this right of the licensor (the nonlegal entity) be taken into account in judging whether the licensee (the law firm) is "in fact" controlled by lawyers? If so, how much weight should be given to a revocable trade-name license? Might it, even in an entity majority-owned by lawyers, place the lawyers in a subordinate position not unlike that of a commercial franchisee?

Here, there is a difference in approach between the commentary found in the NCBA Report and the corresponding commentary found in respect of the rules proposed in New York. As regards "in-

terprofessional contractual arrangements”—meaning the “side-by-side” arrangements advocated by both the NCBA Report and the NYSBA Report—the NCBA Report has this to say:

A typical contract [between a law firm and a nonlegal professional services firm] might include terms such as (1) the law firm agreeing to identify its affiliation with the professional services firm on its letterhead and business cards, and in its advertising; (2) the law firm and the professional services firm agreeing to refer clients to each other on a nonexclusive basis; and (3) the law firm agreeing to purchase goods and services from the professional services firm such as staff management, communications technology, and rent for the leasing of office space and equipment.⁴⁶

On the second point (referrals), the New York and North Carolina positions are quite similar, but on the first and third points, their respective approaches are somewhat different. As regards use by the law firm of the trade name of the nonlegal firm, relevant New York commentary reads as follows:

[A] lawyer or law firm may not enter into an agreement or arrangement for the use of a name in respect of which a nonlegal professional or nonlegal professional service firm has or exercises a proprietary interest if, under or pursuant to this agreement or arrangement, that nonlegal professional or firm acts or is entitled to act in a manner inconsistent with DR 1-107(A)(2) [Rule 5.8(a)(2)] or EC 1-13 [related Comment[1]] [the rule and related commentary prohibiting a nonlegal firm from owning or otherwise controlling a law firm].⁴⁷

Thus, New York would take precautions to try to assure that, by virtue of a trade-name license, the law firm was not treated as a franchisee of the nonlegal firm in a manner permitting the latter to exercise “any managerial or supervisory right, power or position in connection with the practice of law by the law firm.”⁴⁸

On the third point in the language from the NCBA Report quoted above (relating to purchases of goods and services by the law firm from the nonlegal firm), New York would permit an allocation of costs and expenses between the two firms “provided the allocation reasonably reflects the costs and expenses incurred or expected to be incurred by each [firm]”; and would permit “the sharing of premises, general overhead, or administrative costs and services on an arm’s

46. *Id.* at 2.

47. Resolution Adopted by New York State Bar Association House of Delegates (Nov. 4, 2000) N.Y. RULES OF PROF'L RESPONSIBILITY EC 1-14 in App. A [hereinafter NYSBA Resolution].

48. The quoted language is in Rule 5.8(a)(2) as proposed by both the NCBA Report, *supra* note 43, and the NYSBA Report, *supra* note 32.

length basis.”⁴⁹ The corresponding provision in the NCBA Report does not contain any language requiring that the allocation be on an arm’s-length basis, or that the allocation otherwise reasonably reflect the respective costs and expenses of the legal and nonlegal firms in question. The third point in the NCBA Report may, therefore, provide further opportunities for the nonlegal firm to treat the law firm as a franchisee, paying the franchisor other than on a cost-reimbursement basis for such items as management assistance, technology, and office space.

CONCLUSION

Both New York (in the NYSBA Report and proposed rules now pending before the New York courts) and North Carolina (in the report now pending before the North Carolina Bar Association) have attempted to fill the analytical gap left by the reports of the ABA Commission. Both the New York and North Carolina reports reject the extreme positions of, on the one hand, the law and economics school espousing MDP in any form, and, on the other hand, those states that oppose MDP in any form. Both of these state reports have concluded that, in the public interest, the core values of the legal profession should be preserved and that this objective can be achieved only if lawyers own and otherwise control the practice of law.

Differences arise, however, in certain areas. Regarding “side-by-side” contractual relationships between law firms and nonlegal firms for the offering of legal and other professional services to the public, the New York report is cautionary in the areas of trade-name agreements and expense-allocation agreements. These are areas in which the New York report is wary of the risk that law firms might become, expressly or subtly, the quasi-franchisees of nonlegal firms pursuant to arrangements granting to the latter a degree of control over the practice of law. In contrast, at the risk of thus conferring on nonlegal firms a degree of control over the practice of law, the North Carolina report almost seems to encourage quasi-franchise arrangements between law firms and nonlegal firms involving trade-names licensed by, and goods and services supplied by, the latter to the former.

A potentially greater difference is that the North Carolina report, while patterned after the New York report regarding both ancillary nonlegal services offered by law firms and “side-by-side” contractual arrangements as mentioned above, would also provide for a “modified command and control model” of multidisciplinary practice. This would be a form of MDP that was majority-owned by lawyers. The North Carolina report discusses and recommends, but does not

49. NYSBA Resolution, *supra* note 47, at DR 1-107(D), EC 1-14 in App. A and related Comment [2] in App. B.

go so far as to formulate a rule that would define and delimit, this form of MDP. Such a rule will not draft itself and, indeed, will bring the people drafting it face to face with issues inherent in but unsolved by the 1999 and 2000 Reports of the ABA Commission. Not inconceivably, the North Carolina report has reached the point beyond which the ABA Commission was unable to proceed, and has thereby brought the MDP debate full circle.

As has been seen in the context of the Big Five, much of the MDP debate revolves around ownership and control of the *unidisciplinary* practice of law—practice, that is, to which nonlegal entities may aspire in part because the practice of law is thought to be profitable. These nonlegal entities may tend to underestimate the problems involved in transforming into profits the complexities and exigencies of legal practice. Be that as it may, the role of nonlegal entities in the practice of law raises questions as to applicable professional rules. Among other common aspects of the New York and North Carolina reports is that they look for answers to those questions in the law governing lawyers in the United States.

APPENDIX A**RESOLUTION ADOPTED BY THE
NEW YORK STATE BAR ASSOCIATION
HOUSE OF DELEGATES****NOVEMBER 4, 2000**

WHEREAS, the New York State Bar Association ("NYSBA") has adopted the Code of Professional Responsibility ("Code"); and

WHEREAS, the Disciplinary Rules of the Code have been expressly incorporated into Rules of Court by the Appellate Division of the Supreme Court ("Appellate Division") in each of the four Judicial Departments in New York State; and

WHEREAS, pursuant to a scheduling resolution adopted on this date, amendments to the Code have been proposed following review by the Special Committee on the Law Governing Firm Structure and Operation, county and local bar associations, interested sections and committees of the NYSBA and other interested organizations; it is

RESOLVED, that the House of Delegates of the NYSBA hereby approves the Code as amended by this House, contingent upon adoption by the Appellate Division of the Disciplinary Rules therein contained; and it is further

RESOLVED, that the Special Committee on the Law Governing Firm Structure and Operation is hereby authorized to make such non-substantive, stylistic changes as might be necessary to ensure uniformity of language and format throughout the Code; and it is further

RESOLVED, that the officers of the Association are hereby empowered and directed to transmit the Code as amended to the Appellate Division and to take such other and further action as may be required or deemed appropriate to achieve the implementation of the recommended Code amendments.

PROPOSED AMENDMENTS TO THE
CODE OF PROFESSIONAL RESPONSIBILITY

Additions to current Code indicated by underscoring.
Deletions from current Code indicated by <striketrough>.

CANON 1
DISCIPLINARY RULES

* * *

DR 1-106 Responsibilities Regarding Nonlegal Services

A. With respect to lawyers or law firms providing nonlegal services to clients or other persons:

1. A lawyer or law firm that provides nonlegal 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 nonlegal services.

2. A lawyer or law firm that provides nonlegal 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 nonlegal services if the person receiving the services could reasonably believe that the nonlegal 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 nonlegal services to a person is subject to these Disciplinary Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal 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 nonlegal services could not reasonably believe the services to be the subject of an attorney-client relationship if 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 nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is de minimis.

B. Notwithstanding the provisions 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 nonlegal services to a person shall not permit any nonlawyer 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, "nonlegal services" shall mean those services that lawyers may lawfully provide and that are not prohibited as the unauthorized practice of law when provided by a nonlawyer

DR 1-107 Contractual Relationships Between Lawyers and Nonlegal Professionals

A. A lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal 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 professional services, notwithstanding the provisions of DR 5-101(A), provided that:

1. The profession of the nonlegal professional or nonlegal professional service firm is listed by the Office of Court Administration pursuant to DR 1-107(B);

2. The lawyer or law firm neither grants to the nonlegal professional or nonlegal 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; and

3. The fact that the contractual relationship exists is disclosed to any client of the lawyer or law firm to whom nonlegal professional services are provided.

B. For purposes of DR 1-107(A):

1. Each profession on the list maintained by the Office of Court Administration shall have been designated by it sua sponte, or shall have been approved by it upon the application of an individual or firm in this State, 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)(1) shall not apply to relationships consisting solely of reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm.

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

Ethical Considerations

* * *

Provision of Nonlegal Services

EC 1-9 For many years, lawyers have provided nonlegal services to their clients. By participating in the delivery of these services, lawyers can serve a broad range of economic and other interests of clients. Whenever a lawyer directly provides nonlegal services, the lawyer must avoid confusion on the part of the client as to the nature of the lawyer's role, so that the person for whom the nonlegal services are performed understands that the services may not carry with them the legal and ethical protections that ordinarily accompany an attorney-client relationship. The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services, when that may not be the case. The risk of confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter. Under some circumstances, the legal and nonlegal services may be so closely entwined that they cannot be distinguished from each other. In this situation, the recipient is likely to be confused as to whether and when the relationship is protected as a client-lawyer relationship. Therefore, where the legal and nonlegal services are not distinct, DR 1-106(A)(1) requires that the lawyer providing nonlegal services adhere to all of the requirements of the Code of Professional Responsibility with respect to the nonlegal services. DR 1-106(A)(1) applies to the provision of nonlegal services by a lawyer even when the lawyer is not personally providing any legal services to the person for whom the nonlegal services are being performed if the person is also receiving legal services from another lawyer in the firm that are not distinct from the nonlegal

services.

EC 1-10 Even when the lawyer believes that the provision of nonlegal services is distinct from any legal services being provided, there is still a risk that the recipient of the nonlegal services might reasonably believe that the recipient is receiving the protection of an attorney-client relationship. Therefore, DR 1-106(A)(2) requires that the lawyer providing the nonlegal services adhere to the Disciplinary Rules, unless exempted. Nonlegal services also may be provided through an entity with which a lawyer is affiliated, for example, as owner, controlling party or agent. In this situation, there is still a risk that the recipient of the nonlegal services might reasonably believe that the recipient is receiving the protection of an attorney-client relationship. Therefore, DR 1-106(A)(3) requires that the lawyer involved with the entity providing nonlegal services adhere to all the Disciplinary Rules with respect to the nonlegal services, unless exempted.

EC 1-11 The Disciplinary Rules will be presumed not to apply to a lawyer who directly provides or is otherwise involved in the provision of nonlegal services if the lawyer complies with DR 1-106(A)(4) by communicating in writing to the person receiving the nonlegal services that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the nonlegal services. Such a communication should be made before entering into an agreement for the provision of nonlegal services, in a manner sufficient to assure that the person understands the significance of the communication. In certain circumstances, however, additional steps may be required to communicate the desired understanding. For example, while the written disclaimer set forth in DR 1-106(A)(4) will be adequate for a sophisticated user of legal and nonlegal services, a more detailed explanation may be required for someone unaccustomed to making distinctions between legal services and nonlegal services. The lawyer or law firm will not be required to comply with these requirements if its interest in the entity providing the nonlegal services is so small as to be de minimus.

EC 1-12 Although a lawyer may be exempt from the application of Disciplinary Rules with respect to nonlegal services on the face of DR 1-106(A), the scope of the exemption is not absolute. A lawyer who provides or who is involved in the provision of nonlegal services may be excused from compliance with only those Disciplinary Rules that are dependent upon the existence of a representation or attorney-client relationship. Other rules, such as those prohibiting lawyers from engaging in illegal, dishonest, fraudulent or deceptive conduct (DR 1-102), requiring lawyers to report certain attorney misconduct (DR 1-103), and prohibiting lawyers from misusing the confidences or secrets of a former client (DR 4-101(B)), apply to a lawyer irrespective of the existence of a representation, and thus govern a lawyer otherwise exempt under DR 1-106(A). A lawyer or law firm is always subject to these Disciplinary Rules with respect to the rendering of legal services.

Contractual Relationships Between Lawyers and Nonlegal Professionals

EC 1-13 DR 1-107 permits lawyers to enter into interprofessional contractual relationships for the systematic and continuing provision of legal and nonlegal professional services provided the nonlegal professional or nonlegal professional service firm with which the lawyer or law firm is affiliated does not own, control, supervise or manage, directly or indirectly, in whole or in part, the practice of law by the lawyer or law firm. The nonlegal professional or nonlegal professional service firm may not play a role in, for example, the decision whether to accept or terminate an engagement to provide legal services in a particular matter or to a particular client, determining the manner in which lawyers are hired or trained, the assignment of lawyers to handle particular matters or to provide legal services to particular clients, decisions relating to the undertaking of pro bono publico and other public-interest legal work, financial and budgetary decisions relating to the legal practice, and determining the compensation and advancement of lawyers and of persons assisting lawyers on legal matters.

EC 1-14 The contractual relationship permitted by DR 1-107 may provide for the reciprocal referral of clients by and between the lawyer or law firm and the nonlegal professional or nonlegal professional service firm. It may also provide for the sharing of premises, general overhead, or administrative costs and services on an arm's length basis. Such financial arrangements, in the context of an agreement between lawyers and other professionals to provide legal and other professional services on a systematic and continuing basis, are permitted notwithstanding that they involve the exchange of value for client referrals and, technically, a sharing of professional fees, matters that are dealt with specifically in DR 2-103(B)(1) and DR 1-107(D). Similarly, lawyers participating in such arrangements remain subject to general ethical principles in addition to those set forth in DR 1-107 including, at a minimum, DR 2-102(B), DR 5-105(A), DR 5-105(B), DR 5-107(B), DR 5-107(C), and DR 5-108(A). Thus, the lawyer or law firm may not, for example, include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional, or enter into formal partnerships with nonlawyers, or practice in an organization authorized to practice law for a profit in which nonlawyers own any interest. Moreover, a lawyer or law firm may not enter into an agreement or arrangement for the use of a name in respect of which a nonlegal professional or nonlegal professional service firm has or exercises a proprietary interest if, under or pursuant to the agreement or arrangement, that nonlegal professional or firm acts or is entitled to act in a manner inconsistent with DR 1-107(A)(2) or EC 1-13. More generally, although the existence of a contractual relationship permitted by DR 1-107 does not by itself create a conflict of interest violating DR 5-101(A) whenever a law firm represents a client in a matter in which the nonlegal professional firm's client is also involved, the law firm's interest in maintaining an advantageous relationship with the nonlegal professional service

firm might, in certain circumstances, adversely affect the independent professional judgment of the law firm, creating a conflict of interest.

EC 1-15 Each lawyer and law firm having a contractual relationship under DR 1-107 has an ethical duty to observe these Disciplinary Rules with respect to its own conduct in the context of the contractual relationship. For example, the lawyer or law firm cannot permit its obligation to maintain client confidences as required by DR 4-101 to be compromised by the contractual relationship or by its implementation by or on behalf of nonlawyers involved in the relationship. In addition, the prohibition in DR 1-102(A)(2) against a lawyer or law firm circumventing a Disciplinary Rule through actions of another applies generally to the lawyer or law firm in the contractual relationship.

EC 1-16 When in the context of a contractual relationship permitted under DR 1-107 a lawyer or law firm refers a client to the nonlegal professional or nonlegal professional service firm, the lawyer or law firm shall observe the ethical standards of the legal profession in verifying the competence of the nonlegal professional or nonlegal professional services firm to handle the relevant affairs and interests of the client. Referrals should only be made when requested by the client or deemed to be reasonably necessary to serve the client.

EC 1-17 To assure that only appropriate professional services are involved, a contractual relationship for the provision of services is permitted under DR 1-107 only if the nonlegal party thereto is a professional or professional service firm meeting appropriate standards as regards ethics, education, training, and licensing. The Office of Court Administration maintains a public list of eligible professions. Individuals and firms in this state may apply for the inclusion of particular professions on the list, or professions may be added to the list by the Office of Court Administration sua sponte. A lawyer or law firm not wishing to affiliate with a nonlawyer on a systematic and continuing basis, but only to engage a nonlawyer on an ad hoc basis to assist in a specific matter, is not governed by DR 1-107 when so dealing with the nonlawyer. Thus, a lawyer advising a client in connection with a discharge of chemical wastes may engage the services of and consult with an environmental engineer on that matter without the need to comply with DR 1-107. Likewise, the requirements of DR 1-107 need not be met when a lawyer retains an expert witness in a particular litigation.

EC 1-18 Depending upon the extent and nature of the relationship between the lawyer or law firm, on the one hand, and the nonlegal professional or nonlegal professional service firm, on the other hand, it may be appropriate to treat the parties to a contractual relationship permitted by DR 1-107 as a single law firm for purposes of these Disciplinary Rules, as would be the case if the nonlegal professional or nonlegal professional service firm were in an "of counsel" relationship with the lawyer or law firm. If the parties to the relationship are treated as a single law firm, the principal effects would be that conflicts of interest are imputed as between them pursuant to DR 5-105(D), and that the

law firm would be required to maintain systems for determining whether such conflicts exist pursuant to DR 5-105(E). To the extent that the rules of ethics of the nonlegal profession conflict with these Disciplinary Rules, the rules of the legal profession will still govern the conduct of the lawyers and the law firm participants in the relationship. A lawyer or law firm may also be subject to legal obligations arising from a relationship with nonlawyer professionals who are themselves subject to regulation.

CANON 2
DISCIPLINARY RULES

DR 2-101 Publicity and Advertising.

A. A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication or communication to a prospective client containing statements or claims that are false, deceptive or misleading.

B. (Repealed)

C. It is proper to include information, provided its dissemination does not violate the provisions of DR 2-101(A), as to:

1. legal and nonlegal education, degrees and other scholastic distinctions; dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by the Code of Professional Responsibility; public offices and teaching positions held; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency;

2. names of clients regularly represented, provided that the client has given prior written consent;

3. bank references; credit arrangements accepted; prepaid or group legal services programs in which the attorney or firm participates; nonlegal services provided by the lawyer or by an entity owned and controlled by the lawyer; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by DR 1-107, and the nature and extent of services available through those contractual relationships; and

4. ~~legal~~ fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing the information required by DR 2-101(L) of this section; range of fees for legal and nonlegal services, provided that there be available to the public free of charge a written statement

clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal and nonlegal services.

D. Advertising and publicity shall be designed to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel. Information other than that specifically authorized in DR 2-101(C) that is consistent with these purposes may be disseminated providing that it does not violate any other provisions of this Rule.

* * *

DR 2-102 Professional Notices, Letterheads, and Signs.

A. A lawyer or law firm may use professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule, and are in accordance with DR 2-101, including the following:

1. A professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under DR 2-101(C), DR 2-101(D) or DR 2-105. A professional card of a law firm may also give the names of members and associates.

2. A professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or of any nonlegal business conducted by the lawyer or law firm pursuant to DR 1-106. It may state biographical data, the names of members of the firm and associates and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the *legal* practice if permitted under DR 2-105.

3. A sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to DR 1-106. The sign may state the nature of the *legal* practice if permitted under DR 2-105.

4. A letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under DR 2-101(C), DR 2-101(D) or DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client.

The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

B. A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation shall contain "P.C." or such symbols permitted by law, the name of a limited liability company or partnership shall contain "L.L.C.," "L.L.P." or such symbols permitted by law, and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like, may be used only by qualified legal assistance organizations, except that the term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein. A lawyer or law firm may not include the name of a non-lawyer in its firm name, nor may a lawyer or law firm that has a contractual relationship with a nonlegal professional or nonlegal professional service firm pursuant to DR 1-107 to provide legal and other professional services on a systematic and continuing basis include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith. A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit his or her name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

DR 2-103 Solicitation and Recommendation of Professional Employment

* * *

B. A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:

1. A lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to an agreement or other contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by DR 1-107; or

2. A <a> lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as

permitted by DR 2-107.

* * *

Ethical Considerations

* * *

EC 2-10 A lawyer should ensure that the information contained in any advertising which the lawyer publishes, broadcasts or causes to be published or broadcast is relevant, is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to select a lawyer. A lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel. Although communications involving puffery and claims that cannot be measured or verified are not specifically referred to in DR 2-101, such communications would be prohibited to the extent that they are false, deceptive or misleading. Special care should be taken to avoid the use of any statement or claim which is false, fraudulent, misleading, deceptive or unfair, or which is violative of any statute or rule of court, in disclosing information, by advertisements or otherwise, relating to a lawyer's legal or nonlegal education, experience or professional qualifications, the nature or extent of any nonlegal services provided by the lawyer or by an entity owned and controlled by the lawyer, or the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by DR 1-107, and the nature and extent of services available through those contractual relationships. A lawyer who advertises in a state other than New York should comply with the advertising rules or regulations applicable to lawyers in that state.

* * *

APPENDIX B

CORRESPONDING CHANGES TO THE
ABA MODEL RULES OF PROFESSIONAL CONDUCT*Rule 5.7 Responsibilities Regarding ~~Law-Related~~ Nonlegal Services*

~~(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:~~

~~(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or~~

~~(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.~~

~~(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.~~

(a) With respect to lawyers or law firms providing nonlegal services to clients or other persons:

(1) A lawyer or law firm that provides nonlegal 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 Rules of Professional Conduct with respect to the provision of both legal and nonlegal services.

(2) A lawyer or law firm that provides nonlegal 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 Rules of Professional Conduct with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal 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 is providing nonlegal services to a person is subject to these Rules of Professional Conduct with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of an attorney-client relationship.

(4) For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services could not reasonably believe that the nonlegal services are the subject of an attorney-client relationship if 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 nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is de minimis.

(b) Notwithstanding the provisions of paragraph (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 nonlegal services to a person shall not permit any nonlawyer 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 duties under Rules 1.6(a) and 1.8(b) with respect to the confidentiality of information relating to the representation of a client receiving legal services.

(c) For purposes of Rule 5.7, "nonlegal services" shall mean those services that lawyers may lawfully provide and that are not prohibited as the unauthorized practice of law when provided by a nonlawyer.

Comment

[1] For many years, lawyers have provided nonlegal services to their clients. By participating in the delivery of these services, lawyers can serve a broad range of economic and other interests of clients. When a lawyer performs law-related nonlegal services or controls an organization that does so, there exists the potential for ethical problems: the lawyer must avoid confusion on the part of the client as to the nature of the lawyer's role, so Principal among these is the possibility that the person for whom the law-related nonlegal services are performed understands fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related nonlegal services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related nonlegal services when that may not be the case.

[2] The risk of confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter. Under some circumstances, the legal and nonlegal services may be so closely entwined that they cannot be distinguished from each other. In this situation, the recipient is likely to be confused as to whether and when the relationship is protected as a client-lawyer relationship. Therefore, where the legal and nonlegal services are not distinct, Rule 5.7(a)(1) requires that the lawyer providing nonlegal services adhere to all of the requirements of the Rules of Professional Conduct with re-

spect to the nonlegal services. Rule 5.7(a)(1) applies to the provision of nonlegal services by a lawyer even when the lawyer is not personally providing any legal services to the person for whom the nonlegal services are being performed if the person is also receiving legal services from another lawyer in the firm that are not distinct from the nonlegal services.

~~{2}~~ [3] Although a lawyer may be exempt from the application of the Rules of Professional Conduct with respect to nonlegal services on the face of Rule 5.7(a), the scope of the exemption is not absolute. A lawyer who provides or who is involved in the provision of nonlegal services may be excused from compliance with only those Rules that are dependent upon the existence of a representation or attorney-client relationship. Other Rules, such as those prohibiting lawyers from engaging in illegal, dishonest, fraudulent or deceptive conduct (Rule 8.4), requiring lawyers to report certain attorney misconduct (Rule 8.3), and prohibiting lawyers from misusing confidential information of a former client (Rules 1.6 and 1.8(b)), apply to a lawyer irrespective of the existence of a representation, and thus govern a lawyer otherwise exempt under Rule 5.7(a). A lawyer or law firm is always subject to the Rules of Professional Conduct with respect to the rendering of legal services. Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related nonlegal services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related nonlegal services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

~~{3}~~ [4] Even when the lawyer believes that the provision of nonlegal services is distinct from any legal services being provided, there is still a risk that the recipient of the nonlegal services might reasonably believe that the recipient is receiving the protection of an attorney-client relationship. Therefore, Rule 5.7(a)(2) requires that the lawyer providing the nonlegal services adhere to the Rules of Professional Conduct, unless exempted. When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in Rule 5.7(a)(1).

~~{4}~~ [5] Law-related Nonlegal services also may be provided through an entity that is distinct from that through which the lawyer provides legal services with which a lawyer is affiliated, for example, as owner, controlling party or agent. In this situation, there is still a risk that the recipient of the nonlegal services might reasonably believe that the recipient is receiving the protection of an attorney-client relationship. Therefore, Rule 5.7(a)(3) requires that the lawyer involved with the entity providing nonlegal services adhere to all the Rules of Professional Conduct with respect to the nonlegal services, unless ex-

~~empted. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.~~

~~{5} When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related nonlegal service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a):~~

~~{6} The Rules of Professional Conduct will be presumed not to apply to a lawyer who directly provides or is otherwise involved in the provision of nonlegal services if the lawyer complies with Rule 5.7(a)(4) by communicating in writing to the person receiving the nonlegal services that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the nonlegal services. Such a communication should be made before entering into an agreement for the provision of nonlegal services, in a manner sufficient to assure that the person understands the significance of the communication. In certain circumstances, however, additional steps may be required to communicate the desired understanding. For example, while the written disclaimer set forth in Rule 5.7(a)(4) will be adequate for a sophisticated user of legal and nonlegal services, a more detailed explanation may be required for someone unaccustomed to making distinctions between legal services and nonlegal services. The lawyer or law firm will not be required to comply with these requirements if its interest in the entity providing the nonlegal services is so small as to be de minimis. In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.~~

~~{7} The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.~~

~~{8} Regardless of the sophistication of potential recipients of law-related~~

~~services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity which the lawyer controls complies in all respects with the Rules of Professional Conduct.~~

~~{9} A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.~~

~~{10}~~ [7] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(b) and 1.8(a),(b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related nonlegal services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

~~{11} When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).~~

Rule 5.8 Contractual Relationships Between Lawyers And Nonlegal Professionals

(a) A lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal 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 professional services, notwithstanding the provisions of Rule 1.7(b), provided that:

(1) The profession of the nonlegal professional or nonlegal professional service firm is listed by the [high court of the state] pursuant to Rule 5.8(b); and

(2) The lawyer or law firm neither grants to the nonlegal professional or nonlegal 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; and

(3) The fact that the contractual relationship exists is disclosed to any client of the lawyer or law firm to whom nonlegal professional services are provided.

(b) For purposes of Rule 5.8(a):

(1) Each profession on the list maintained by the [high court of the state] shall have been designated by it sua sponte or shall have been approved by it upon the application of an individual or firm in this State, upon a determination that the profession is composed of individuals who, with respect to their profession:

(i) have been awarded a Bachelor's Degree or its equivalent from an accredited college or university;

(ii) are licensed to practice the profession by an agency of this State or the United States Government; and

(iii) 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) Rule 5.8(a)(1) shall not apply to relationships consisting solely of reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm.

(d) Notwithstanding Rule 5.4(a), a lawyer or law firm may allocate costs and expenses with a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship permitted by Rule 5.8(a), provided the allocation reasonably reflects the costs and expenses incurred or expected to be incurred by each.

Comment

[1] Rule 5.8 permits lawyers to enter into interprofessional contractual

relationships for the systematic and continuing provision of legal and nonlegal professional services provided the nonlegal professional or nonlegal professional service firm with which the lawyer or law firm is affiliated does not own, control, supervise or manage, directly or indirectly, in whole or in part, the practice of law by the lawyer or law firm. The nonlegal professional or nonlegal professional service firm may not play a role in, for example, the decision whether to accept or terminate an engagement to provide legal services in a particular matter or to a particular client, determining the manner in which lawyers are hired or trained, the assignment of lawyers to handle particular matters or to provide legal services to particular clients, decisions relating to the undertaking of pro bono publico and other public-interest legal work, financial and budgetary decisions relating to the legal practice, or determining the compensation and advancement of lawyers and of persons assisting lawyers on legal matters.

[2] The contractual relationship permitted by Rule 5.8 may provide for the reciprocal referral of clients by and between the lawyer or law firm and the nonlegal professional or nonlegal professional service firm. It may also provide for the sharing of premises, general overhead, or administrative costs and services on an arm's length basis. Such financial arrangements, in the context of an agreement between lawyers and other professionals to provide legal and other professional services on a systematic and continuing basis, are permitted notwithstanding that they involve the exchange of value for client referrals and, technically, a sharing of professional fees, matters that are dealt with specifically in Rules 7.2(c) and 5.8(d).

[3] Similarly, lawyers participating in such arrangements remain subject to general ethical principles in addition to those set forth in Rule 5.8 including, at a minimum, Rules 1.7(a), 1.9, 5.4(c), 5.4(d) and 7.5(d). Thus, the lawyer or law firm may not, for example, include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional, or enter into formal partnerships with nonlawyers, or practice in an organization authorized to practice law for a profit in which nonlawyers own any interest. Moreover, a lawyer or law firm may not enter into an agreement or arrangement for the use of a name in respect of which a nonlegal professional or nonlegal professional service firm has or exercises a proprietary interest if, under or pursuant to the agreement or arrangement, that nonlegal professional or firm acts or is entitled to act in a manner inconsistent with Rule 5.8(a)(2). More generally, although the existence of a contractual relationship permitted by Rule 5.8 does not by itself create a conflict of interest violating Rule 1.7(b) whenever a law firm represents a client in a matter in which the nonlegal professional firm's client is also involved, the law firm's interest in maintaining an advantageous relationship with the nonlegal professional service firm might, in certain circumstances, adversely affect the independent professional judgment of the law firm, creating a conflict of interest.

[4] Each lawyer and law firm having a contractual relationship under Rule 5.8 has an ethical duty to observe these Rules of Professional Conduct with

respect to its own conduct in the context of the contractual relationship. For example, the lawyer or law firm cannot permit its obligation to maintain client confidences as required by Rules 1.6 and 1.8(b) to be compromised by the contractual relationship or by its implementation by or on behalf of nonlawyers involved in the relationship. In addition, the prohibition in Rule 8.4(a) against a lawyer or law firm circumventing a Rule of Professional Conduct through actions of another applies generally to the lawyer or law firm in the contractual relationship.

[5] When in the context of a contractual relationship permitted under Rule 5.8 a lawyer or law firm refers a client to the nonlegal professional or nonlegal professional services firm, the lawyer or law firm shall observe the ethical standards of the legal profession in verifying the competence of the nonlegal professional or nonlegal professional service firm to handle the relevant affairs and interests of the client. Referrals should only be made when requested by the client or deemed to be reasonably necessary to serve the client.

[6] To assure that only appropriate professional services are involved, a contractual relationship for the provision of services is permitted under Rule 5.8 only if the nonlegal party thereto is a professional or professional service firm meeting appropriate standards as regards ethics, education, training, and licensing. The [high court of the state] maintains a public list of eligible professions. Individuals and firms in this state may apply for the inclusion of particular professions on the list, or professions may be added to the list by the [high court of the state] sua sponte. A lawyer or law firm not wishing to affiliate with a nonlawyer on a systematic and continuing basis, but only to engage a nonlawyer on an ad hoc basis to assist in a specific matter, is not governed by Rule 5.8 when so dealing with the nonlawyer. Thus, a lawyer advising a client in connection with a discharge of chemical wastes may engage the services of and consult with an environmental engineer on that matter without the need to comply with Rule 5.8. Likewise, the requirements of Rule 5.8 need not be met when a lawyer retains an expert witness in a particular litigation.

[7] Depending upon the extent and nature of the relationship between the lawyer or law firm, on the one hand, and the nonlegal professional or nonlegal professional service firm, on the other hand, it may be appropriate to treat the parties to a contractual relationship permitted by Rule 5.8 as a single law firm for purposes of these Rules of Professional Conduct, as would be the case if the nonlegal professional or nonlegal professional service firm were in an "of counsel" relationship with the lawyer or law firm. If the parties to the relationship are treated as a single law firm, the principal effects relationship would be that conflicts of interest are imputed as between them pursuant to Rule 1.10. To the extent that the rules of ethics of the nonlegal profession conflict with these Rules, the rules of the legal profession will still govern the conduct of the lawyers and the law firm participants in the relationship. A lawyer or law firm may also be subject to legal obligations arising from a relationship with non-lawyer professionals who are themselves subject to regulation.

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication.

(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that

(1) a lawyer may

(i) ~~(1)~~ pay the reasonable costs of advertisements or communications permitted by this Rule;

(ii) ~~(2)~~ pay the usual charges of a not-for-profit lawyer referral service or legal service organization; and

(iii) ~~(3)~~ pay for a law practice in accordance with Rule 1.17.

(2) a lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to an agreement or other contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by Rule 5.8.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

Comment

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of serv-

ices the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; the nature or extent of nonlegal services provided by the lawyer or by an entity owned and controlled by the lawyer; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by Rule 5.8, and the nature and extent of services available through those contractual relationships; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

[5] Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer

[6] A lawyer is allowed to pay for advertising permitted by this Rule and for the purchase of a law practice in accordance with the provisions of Rule 1.17, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

[7] Reciprocal referrals of clients by and between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm pursuant to an interprofessional contractual arrangement permitted by Rule 5.8 are excluded from the scope of Rule 7.2(c).
