

*The following report is scheduled for discussion by the Board of Governors
at its July 28, 2001 meeting in Los Angeles (1149 S. Hill St).*

THE STATE BAR OF CALIFORNIA

REPORT AND FINDINGS ON MULTIDISCIPLINARY PRACTICE



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**THE STATE BAR OF CALIFORNIA
TASK FORCE
ON MULTIDISCIPLINARY PRACTICE**

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VI. REGULATORY STANDARDS AFFECTED BY PROPOSED MDP CERTIFICATION PROGRAM

Given the above findings, the most directly impacted existing authorities and standards are discussed below.

A. Fee-Splits with Non-lawyers: CRPC 1-320

This rule prohibits a member or law firm from directly or indirectly sharing legal fees with a person who is not a lawyer. Under the Task Force's findings, this rule could be amended to include a new exception allowing fee-sharing among lawyers and non-lawyer professionals who are part of a State Bar certified/registered MDP entity or who are part of an non-integrated Command and Control model entity.

B. Partnerships with Non-lawyers: CRPC 1-310

This rule prohibits a member from forming a partnership with a person who is not a lawyer if any of the activities of the partnership consist of the practice of law. Under the proposed MDP regulatory scheme, this rule could be amended to include a new exception allowing equity relationships between lawyers and non-lawyer professionals who are part of a State Bar certified/registered MDP entity or who are part of an non-integrated Command and Control model entity.

C. Aiding the Unauthorized Practice of Law: CRPC 1-300

This rule prohibits a member from aiding any person or entity in the unauthorized practice of law. Under the proposed MDP regulatory scheme, this rule would not be changed. Rather, clarification likely would be needed to highlight the fact that pursuant to a new rule of court, a duly certified/registered State Bar MDP entity is authorized to practice law in California. As a result, members of the State Bar who practice law on behalf of a MDP entity would not be aiding in any unauthorized practice of law.

One technical issue here is whether a statutory amendment to Business and Professions Code sec. 6125 is necessary. As an entity, a professional law corporation engages in the practice of law in California pursuant to a specific statutory exception (B&P sec. 6127.5).²⁰ In Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal.4th 119, 133-134, the California Supreme Court expressed its view that exceptions to Business and

Professions Code sec. 6125 require legislative action. If it is determined that a statutory amendment is necessary, then a new Business and Professions Code sec. 6127.6 could be proposed exempting the certified MDP from Section 6125.

In turn, the Rules of Court and governing MDP administrative rules and regulations would limit the practice of law activities engaged in by a MDP entity to only those persons who are licensed to practice law in the jurisdiction in which they are practicing.

CRPC 1-300 also prohibits a member from practicing law in a jurisdiction where that member would be violating the regulations of the profession in that jurisdiction. This part of the rule raises multijurisdictional practice issues. Presumably, as in the case of lawyers employed by nationwide or international law firms (and in-house counsel in national/international corporations), lawyers in a MDP entity which conducts business outside of California would be required to comply with this part of CRPC 1-300, at least until the State Bar takes steps to address the multijurisdictional issue.

It is also recommended that serious consideration be given to defining, through a rule of court or rules of professional conduct, what constitutes the practice of law as is currently under consideration in the State of Washington.²¹ Once these fundamentals are addressed, the unauthorized practice of law should be strictly enforced as a consumer fraud issue.

D. Advertising and Solicitation: CRPC 1-400; B&P sec. 6150 et seq

As advertising in the Integrated MDP context will most likely be integrated advertising, the existing authorities governing attorney advertising should continue unchanged and apply to the Integrated MDP, unless the non-lawyer professional's licensing restrictions on advertising are more restrictive in which event the more restrictive provisions should apply.

If advertising is entirely separate for each professional service, however, each profession's advertising standards should apply separately.

Under a general State Bar certification model and as proposed in the Task Force's MDP rule of court and administrative rules and regulations, one requirement of certification would be that the MDP must declare, under penalty of perjury, that its name and all advertising will comply with CRPC 1-400 to the extent that it is applicable.

As to Business & Professions Code sections 6150-6154 (regarding prohibited running and capping) and sections 6157-6159.2 (regarding electronic media advertising), the Task Force recognizes that the definitions used for these statutory schemes are not identical to CRPC 1-400.²² However, the approach set forth above should equally apply to these statutory provisions.

E. Protection of Client Confidential Information: B&P sec. 6068(e) and Avoidance of Conflicts of Interest: CRPC 3-300; 3-310; and 3-320

These are both “core values” which must be maintained and protected by the MDP entity. Business and Professions Code sec. 6068(e) requires, *inter alia*, that an attorney maintain inviolate a client’s confidential information. Under the proposed MDP regulatory scheme, this standard would not be changed. It is to be assumed from the outset that each consumer of integrated MDP services is a legal services client entitled to the protections of that status until the client affirmatively “opts out” of legal services. This is to be effectuated through an informed disclosure and consent process at the “intake” stage and thereafter as the consumer’s status changes through the course of the rendered services.

Although a MDP entity would be authorized to practice law in California, this does not necessarily mean that all of the MDP’s activities must be the practice of law. Nor does it mean that all consumers would be “clients” within the meaning of Business and Professions Code sec. 6068(e). Because a MDP entity could offer both legal and non-legal professional services, it becomes critical, from a regulatory standpoint, for the State Bar program to delineate when MDP consumers establish a lawyer-client relationship with the MDP. This is accomplished by the presumption that the consumer of MDP services is a legal services client until the consumer “opts out” of receiving legal services.

The consequence of being a legal services client is that all information (including information gained in consultations with the MDP’s non-lawyer professionals) would be governed by the lawyer’s standards of confidentiality as if the person had sought legal services from a traditional law firm. The consequence of a consumer “opting out” of legal services would be that, as of the point at which the consumer “opts out” of legal services, the lawyer’s confidentiality standards cease to apply.

This approach depends upon an informed disclosure and consent procedure. A primary benefit of disclosure and consent is that it affords consumers the opportunity to weigh relevant benefits and detriments and to make an informed choice as to how services are to

be provided.

Consistent with this approach, California's Rules of Professional Conduct generally favor client-orientated decision making on a variety of "core value" representational issues by utilizing disclosure and consent: conflicts of interest (CRPC 3-310 & 3-320), business transactions with clients and adverse pecuniary interest (CRPC 3-300), referral fees among lawyers (CRPC 2-200), lawyer/advocate testifying as a witness in a client's case (CRPC 5-210), payment of expenses to third parties from funds collected as a result of representation (CRPC 4-210(A)), permissive termination of representation (CRPC 3-700(C)(5)), simultaneous representation of an organization and a constituent of the organization (CRPC 3-600(E)), ongoing sexual relations between attorney and client which predate the initiation of the lawyer-client relationship (CRPC 3-120), sale of a law practice (CRPC 2-300), employment on a client's matter of a disbarred, suspended, resigned, or involuntarily inactive lawyer (CRPC 1-311).

Although the ABA model standards traditionally have differed from California's rules on the matter of disclosure of and consent to conflicts of interest, the latest version of the ABA's Ethics 2000 Commission's proposed amendments to MRPC 1.7 (Conflicts of Interests: General Rule) embrace disclosure and consent.²³

Disciplinary case law and CRPC 3-600(D) presently recognize a duty to inform certain persons that they are not clients. In Butler v. State Bar (1986) 42 Cal.3d 323, 329, an attorney's duty to communicate was found to include the obligation to advise people who may reasonably believe they are clients that they are, in fact, not clients. (See also, In the Matter of Kaplan (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 563.) CRPC 3-600(D) requires an attorney representing an organization to explain to directors, officers, employees, agents and other constituents the identity of the attorney's client (ordinarily the organization, itself, and not any constituent).

In the context of family law practice where certain litigants often choose to proceed in *propria personae*, the legislature and the courts have adopted innovative mechanisms to provide assistance in the form of Family Law Information Centers (Family Code sec. 15000) and Family Law Facilitators (Family Code sec. 10000). In implementing these two new programs, the Judicial Council has issued approved disclosure forms to be used for informing *pro se* litigants that: lawyer-client relationships are not formed; information will not be treated as confidential; and services may be provided to adverse parties in the case.

The Task Force believes that the above observations lend support to the proposition that the “core values” pertaining to confidentiality and conflicts of interest can appropriately be addressed through a mandatory disclosure and consent protocol that requires each customer of a certified MDP entity to affirmatively “opt out” of legal services before losing the protections of those “core values.” The consumer makes the informed choice as to whether the services to be provided are legal services or not.

The corresponding consequence is that the duty of confidentiality (including the evidentiary privilege of Evidence Code Section 950 *et seq.*) owed by the lawyer members of the MDP is presumed to be applicable unless and until the consumer affirmatively declares that legal services are no longer being received.

Finally, the full cross-imputation to all participating professionals of conflicts and confidentiality values in full conformity with existing lawyer standards avoids any diminution in the lawyer’s “core value” duties of loyalty and confidentiality.

F. Professional Independent Judgment: CRPC 1-600

This is a “core value” which must be maintained and protected in the MDP environment. Under the CRPCs, only CRPC 1-600 (Legal Service Programs)²⁴ explicitly addresses a member’s “professional independent judgment.” The Task Force believes that existing CRPC 1-600 provides a vehicle for assuring that lawyers’ independent judgement is preserved in the MDP environment. CRPC 1-600 would need to be revised, to some extent, to recognize that lawyers participating in a certified MDP entity do not thereby violate the rule’s prohibition against fee-splits with non-lawyers and against aiding the unauthorized practice of law.

The proposed MDP Certification Demonstration Project anticipates that all lawyers will continue to have individual civil and disciplinary liability for compromising their duty of independent judgment. The MDP entity will be subject to decertification in the event that any “core value” of the legal profession is “wilfully” compromised.

G. Other Issues.

A number of other professional responsibility standards are also potentially affected by the development of an integrated MDP practice form. Among these other standards are the following:

- Geographic scope of rules: CRPC 1-100(D)
- Failing to act competently: CRPC 3-110
- Communication with a represented party: CRPC 2-100
- Discriminatory practices: CRPC 2-400 (uses term “law practice”)
- Limiting liability to client: CRPC 3-400
- Preserving identity of client funds and property: CRPC 4-100
- Unconscionable or illegal fees: CRPC 4-200
- Purchasing property at a foreclosure sale; CRPC 4-300

The above issues have not been exhaustively explored. The Task Force anticipates that the recommended public comment process will seek member and public input on these and other subjects aimed at assuring full accountability for a MDP’s responsibility to assure “core values” are preserved and the public is adequately protected.

VII. CONCLUSION

It is critical in addressing MDP to appreciate that the discussion is just the starting point in the increasingly critical process necessary to evolve, develop and advance the systems by which legal services are delivered to the public with the goal of making legal services and the administration of justice more accessible. MDP alone does not address this issue in any meaningful way. But it is a starting point in reconsidering the systems by which legal services are provided to a public—a public, the majority of which is now unserved or underserved by the legal profession.

Focusing on the narrow issue of MDP, there are existing practice models through which a form of MDP already exists in California and there are potentially viable models for permitting a “pure form” of MDP to exist in California. This is achievable while at the same time assuring that the “core values” of the profession are maintained.

The Task Force also finds that serious consideration should be given to defining, through a Rule of Court or Rule of Professional Conduct, what constitutes the practice of law in a manner that functionally works in a market where the majority of the population cannot currently afford legal services. The State of Washington has boldly sought to address this issue and their model and foresight on this subject warrants consideration.

As these critical delivery system issues are addressed, it is also incumbent upon the legal profession to address the public protection/consumer fraud issues presented by the unauthorized practice of law.

The Task Force recommends that this Report be published for a ninety-day public comment period so all interested parties can be heard regarding this important issue. Upon analysis of the public comment received, and in consultation with the California Supreme Court, the Task Force looks forward to serving the Board of Governors and the California Supreme Court in facilitating the implementation or further study of any of the concepts set forth in this Report.

The Task Force expresses its gratitude and appreciation for the opportunity to have served the State Bar in developing this Report.

VIII. END NOTES

1. California Rule of Professional Conduct 1-310 provides that, "A member of the State Bar shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law." California Rule of Professional Conduct 1-320(A), in part, provides that, "Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer...."
2. ABA Press Release, Aug. 4, 1998.
3. For a perspective on the international MDP scene see: John S. Dzienkowski & Robert J. Peroni, "Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the 21st Century, 69 Fordham L.Rev. 83; "The Case for MDPs: Should Multidisciplinary Practices be Banned or Embraced?" by Wade Bower, Law Practice Management Magazine, July/Aug. 1999 (<http://www.abanet.org/lpm/magazine/mdp-bowe995.html>); "LawSoc Votes for MDPs after 10-year Wait," by Lucy Hickman, The Lawyer, Oct. 18, 1999, at p. 2.
4. Information on the WTO and GATS positions on access to professional services is found at: http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto06/wto6_38.htm and http://www.wto.org/english/tratop_e/serv_e/20-prof.htm . Accountancy is specifically addressed at: http://www.wto.org/english/news_e/pres98_e/pr118_e.htm; See also, Laurel S. Terry, "A Challenge to the ABA and the U.S. Legal Profession to Monitor the GATS 2000 Negotiations: Why You Should Care," ABA 27th National Conference on Professional Responsibility; Lauren S. Terry, "GATS' Regulation of Transnational Lawyers & Its Potential Impact on U.S. State Regulation of Lawyers," 34 Vanderbilt J. Transnat'l L. ____ (Oct. 2001) (forthcoming).

5. At the time of its publication, the 1999 Report and Recommendation was considered to be “the final report” of the ABA MDP Commission. As it turned out, the ABA House of Delegates voted to postpone action on the MDP issue until further study was accomplished.
6. The State Bar of California submitted a resolution stating, in part, that the ABA proposal addressed “complex and difficult issues with profound implications for the legal profession and the protection of the public interest” and recommended that the ABA defer final action until the ABA MDP Commission presented a more fully developed proposal. The Board of Governor resolution adopted a substantive report of the Standing Committee on Professional Responsibility and Conduct (“COPRAC”) that identified specific unresolved ethical issues in the recommendation and “welcome[d] proposals for new forms of legal practice designed to foster benefits for clients.” (The full text of the Board’s resolution, including COPRAC’s analysis of the 1999 ABA Recommendation, is provided at <http://www.abanet.org/cpr/sbcalif.html>.)
7. For example, see “Round 2 begins for MDPs” by David M.M. Bell, California Bar Journal, Sept. 1999 at p. 8.
8. A viewable video stream recording of the February 2000 ABA Town Hall Meeting is available at: <http://www.abanet.org/mdp> .
9. The full text of the ABA MDP Commission’s March 22, 2000 draft recommendation is found at <http://www.abanet.org/cpr/marchrec.html>.
10. The full text of the ABA MDP Commission’s May 15, 2000 Recommendation and Report is found at <http://www.abanet.org/cpr/mdpfinalrep2000.html>.
11. By resolution adopted by the Board of Governors at its June 10, 2000 meeting the State Bar of California’s delegation to the ABA’s July 2000 Annual Meeting were instructed to work to achieve deferral of any ABA House of Delegates action that would address the merits of the MDP issue.
12. In October 2000, the ABA Standing Committee on Ethics and Professional Responsibility issued a request for comment on proposed amendments to the ABA Model Rules reflecting the ABA Standing Committee’s preliminary conclusion that, “participation in a strategic alliance or other contractual relationship appears to raise few unique challenges to the preservation of the lawyer’s core ethical values....”
13. In California, there are currently studies or other activities involving multijurisdictional practice, court facilitated assistance, discrete task representation, and *propria personae* assistance.
14. See, e.g., “Point Counter Point” views of Demetrios Dimitriou, California Bar Journal, July 1999 (<http://www.calbar.org/2cbj/99jul/pointcp.htm>).

15. Ernst & Young, LLP press release dated November 3, 1999 (posted in the news archives of <http://www.ey.com>).
16. "Dream Team Tax Team," by Arian Campo-Flores, American Law, Sept. 1999 at p. 18. (See also, KPMG Press Release, Aug. 4, 1999 (found at <http://www.us.kpmg.com>).)
17. A summary provided by the ABA on the "Status of Multidisciplinary Practice by State" can be found at www.abanet.org/cpr/mdp_state_summ.html and at www.abanet.org/cpr/mdp-state_action.html and allows direct hypertext access to individual state reports and resolutions that are posted on the internet.
18. California's, Court of Appeal has recognized the need for lawyers to work cooperatively with other service providers. In Ojeda v. Sharp Cabrillo Hospital (1992) 8 Cal.App.4th 1, 4 (reversal of trial court finding that payment of a contingent fee to a nonlawyer consulting firm violated ethical prohibitions against fee-splits with nonlawyers and the unauthorized practice of law), the court observed:

As modern litigation becomes increasingly complex, lawyers are routinely called upon to obtain, understand and utilize specialized expertise in order to effectively evaluate and litigate cases. When lawyers do not possess the expertise themselves, they must seek out others for assistance.
19. In 1983, the then State Bar Board Committee on Admissions and Competence considered the report and recommendation of its Standing Committee on Professional Responsibility and Conduct ("COPRAC") that a form of ABA Model Rule 5.7 not be adopted in California. Subsequently, COPRAC promulgated State Bar Formal Opinion No. 1995-141, finding that business practices ancillary to a law practice are not prohibited if appropriate precautions are taken.
20. In the absence of a specific statutory exception, California authorities interpreting Business and Professions Code sec. 6125 would prohibit a corporation from practicing law. See: People ex rel. Los Angeles Bar Association v. California Protective Corporation (1926) 76 Cal.App. 354; People v. Merchants Protective Corp. (1922) 189 Cal. 531, 538. See also, State Bar Formal Op. No. 1987-91 and L. A. County Bar Assc. Op. No. 444.
21. Washington State's definition of the practice of law is available at www.wsba.org/proposed/.
22. Business and Professions Code sec. 6152(a) uses the phrase, "solicitation or procurement of business for the attorney at law or law firm...." Bus. & Prof. Code sec. 6157(c) uses the phrase, "solicits employment of legal services provided by a member...."

23. The text of proposed amended MRPC 1.7 and an explanatory memo are found in the ABA Ethics 2000 website at: <http://www.abanet.org/cpr/e2k/rule17memo.html> and <http://www.abanet.org/cpr/e2k/rule17draft.html> .

24. CRPC 1-600 provides:

Rule 1-600. Legal Service Programs

(A) A member shall not participate in a non-governmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member's independence of professional judgment, or with the client-lawyer relationship, or allows unlicensed persons to practice law, or allows any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules.

(B) The Board of Governors of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on members.

Appendix A

The Commission recognizes that the House of Delegates will be asked to vote solely on the Recommendations and not on the Report. The Commission asked the Reporter to provide the following illustrations of possible amendments to the Model Rules of Professional Conduct. Approval of the Recommendations will not constitute approval of these Rules and the Rule amendment task will be referred to the appropriate ABA ethics authorities. New material is underlined.

TERMINOLOGY

"Multidisciplinary practice (MDP)" denotes a partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, and there is a direct or indirect sharing of profits as part of the arrangement.

"Legal services" denote those services which, if provided by a lawyer engaged in the practice of law, would be regarded as part of such practice of law for purposes of application of the rules of professional conduct.

"Member" of an MDP denotes any employee, partner, shareholder or the like to the extent permitted of lawyers organized in law firms.

"Practice of Law" means the provision of professional legal advice or services where there is a client relationship of trust or reliance. One is presumed to be practicing law when engaging in any of the following conduct on behalf of another:

(a) Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments or any other instruments intended to affect interests in real or personal property, wills, codicils, instruments intended to affect the disposition of property of decedents' estates, documents relating to business and corporate transactions, other instruments intended to affect or secure legal rights, and contracts except routine agreements incidental to a regular course of business;

(b) Preparing or expressing legal opinions;

(c) Appearing or acting as an attorney in any tribunal;

(d) Preparing any claims, demands or pleadings of any kind, or any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal;

(e) Providing advice or counsel as to how any of the activities described in subparagraph (a) through (d) might be done, or whether they were done, in accordance with applicable law;

(f) Furnishing an attorney or attorneys, or other persons, to render the services described in subparagraphs (a) through (e) above.

* This definition is based in great part on District of Columbia Rule 49, which the Reporter viewed as a useful model.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

Comment

Multidisciplinary Practices

[23] A lawyer in an MDP who provides legal services to the MDP's clients may encounter confidentiality problems that require special attention. The lawyer should scrupulously observe the rules of professional conduct relating to the protection of confidential client information.

[24] A lawyer in an MDP who delivers legal services to the MDP's clients and who works with, or is assisted by, a nonlawyer in the MDP who is delivering nonlegal services in connection with the delivery of legal services to a client should make reasonable efforts to ensure that the nonlawyer behaves in a manner that discharges the lawyer's obligation of confidentiality. (See Comment, Rule 5.3)

[25] In the context of an MDP, there is a particular concern about the potential loss of the attorney-client privilege, arising out of the possibility that the MDP's clients might not be properly informed as to the separate functions performed by the MDP and that the members of the MDP would not treat legal matters in a fashion appropriate to the preservation of the privilege. A lawyer in an MDP should take special care to avoid endangering the privilege by either the lawyer's own conduct or that of the MDP itself, or its nonlawyer members, and should take such measures as shall be necessary to prevent disclosure of confidential information to members of the MDP who are not providing services in connection with the delivery of the legal services to the client. (See Comment, Rule 5.1)

RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

Comment

[4] With respect to an MDP, imputed disqualification of a lawyer applies if the conflict in regard to the legal services the lawyer is providing is with any client of the MDP, not just a client of a legal services division of the MDP or of an individual lawyer member of the MDP.

RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

(a) A partner or person in a similar position in a law firm or in an MDP shall make reasonable efforts to ensure that the firm or MDP has in effect measures giving reasonable assurance that all lawyers in the firm or MDP conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved;
or

(2) the lawyer is a partner in the law firm or the MDP in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm , an MDP or legal department of a government agency. This includes members of a partnership and the shareholders in a law firm or MDP organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise , MDP or government agency; and lawyers who have intermediate managerial responsibilities in a firm.

[2] The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

[3] Paragraph (c)(1) expresses a general principle of responsibility for acts of another. See also Rule 8.4(a).

[4] Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory

authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS OR ASSOCIATES

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner or person with a comparable role in a law firm or an MDP shall make reasonable efforts to ensure that the firm or MDP has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm or in the MDP in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

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

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

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

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

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

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

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

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

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

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

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(e) To the extent provided in Rule 5.8, the provisions in subsections (a), (b), or (d) above do not apply to a lawyer in an MDP.

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees The only exceptions to this rule are those contained in Rule 5.8. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

RULE 5.8 RESPONSIBILITIES OF A LAWYER IN A MULTIDISCIPLINARY PRACTICE FIRM

(a) A lawyer shall not share legal fees with a nonlawyer or form a partnership or other entity with a nonlawyer if any of the activities of the partnership or other entity consist of the practice of law except that a lawyer in an MDP controlled by lawyers may do so, subject to the present provisions limiting the holding of equity investments in any entity or organization providing legal services. A lawyer in an MDP not controlled by lawyers may do so, subject to the conditions set forth in paragraphs (c)(1)-(5), and subject to the present provisions limiting the holding of equity investments in any entity or organization providing legal services.

(b) A lawyer in an MDP remains subject to all the Model Rules of Professional Conduct, unless this Rule provides otherwise.

(c) A lawyer may practice in an MDP in which lawyers do not own a controlling interest only if the MDP provides the highest court with the authority to regulate the legal profession in each jurisdiction in which the MDP is engaged in the delivery of legal services written undertakings signed by the chief executive officer (or similar official) and the board of directors (or similar body) that:

(1) it will not directly or indirectly interfere with a lawyer's exercise of independent professional judgment on behalf of a client;

(2) it will establish, maintain and enforce procedures designed to protect a lawyer's exercise of independent professional judgment on behalf of a client from interference by the MDP, any member of the MDP, or any person or entity associated with the MDP;

(3) it will establish, maintain and enforce procedures to protect a lawyer's professional obligation to segregate client funds;

(4) its members will abide by the rules of professional conduct when they are engaged in the delivery of legal services to a client of the MDP;

(5) it will respect the unique role of the lawyer in society as an officer of the legal system, a representative of clients and a public citizen having special responsibility for the administration of justice. This statement should acknowledge that lawyers in an MDP have the same special obligation to render voluntary *pro bono publico* legal service as lawyers practicing solo or in law firms;

(6) it will annually review the procedures established in subsection (2) and amend them as needed to ensure their effectiveness; and annually certify its compliance with subsections (1)-(6) and provide a copy of the certification to each lawyer in the MDP;

(7) it will annually file a signed and verified copy of the certificate described in subsection (6) with the highest court with the authority to regulate the legal profession in each jurisdiction in which the MDP is engaged in the delivery of legal services, along with information identifying each lawyer who has been a member of the MDP during the reporting period, the jurisdiction in which the principal office of each such lawyer is located, and the jurisdiction(s) in which those lawyers are licensed to practice law;

(8) it will permit the highest court with the authority to regulate the professional conduct of lawyers in each jurisdiction in which the MDP is engaged in the delivery of legal services to review and conduct an administrative audit of the MDP, as each such authority deems appropriate, to determine and assure compliance with subsections (1)-(7); and

(9) it will bear the cost of the administrative audit of MDPs described in subparagraph (8) through the payment of a reasonable annual certification fee.

(d) An MDP that fails to comply with its written undertaking shall be subject to withdrawal of its permission to deliver legal services or to other appropriate remedial measures ordered by the court.

Comment:

[1] Independence of professional judgment is a cornerstone of the client-lawyer relationship. It is imperative that the legal profession protect and nurture that independence. The problems faced by clients in modern society are often complex, calling for the coordinated advice of professionals in different disciplines, including the law. To better meet the needs of such clients, lawyers and nonlawyer professionals may join together in MDPs to offer legal as well as other professional services to the MDP's clients. The ethical prohibitions of Model Rule 5.4 against sharing legal fees with a nonlawyer and forming a partnership or other entity with a nonlawyer if any of the activities of the partnership or other entity consist of the practice of law have operated to prevent such affiliations. This rule modifies those prohibitions and permits lawyers and nonlawyers to work together in an MDP that provides legal services to clients. The modification, however, is subject to a number of restrictions that are designed to protect a lawyer's exercise of independent professional judgment on behalf of a client.

[2] "MDP" is defined in the Terminology section. Examples of professions that may appropriately be included in MDPs are accountancy, economic forecasting, financial planning, lobbying, psychological counseling, social work, consulting, architecture and design and tax return preparation. While the provision of legal services is one function of an MDP, it need not be the principal function.

[3] This Rule intends the term "lawyer in an MDP" to mean a person who is licensed to practice law and who holds himself out or is held out as providing legal services to the clients of the MDP. Holding out would include such activities as using the term "Esquire," "attorney-at-law," "counselor at law," "J.D." or the like after the lawyer's name, providing biographical information that indicates that the lawyer is licensed to practice law, or offering the provision of services that would be considered the practice of law, if offered by a lawyer in a law firm. A lawyer in an MDP remains subject to all the rules of professional conduct, unless this rule provides otherwise. For example, the lawyer must maintain confidentiality of information relating to the representation. If a nonlawyer member of the MDP works with a lawyer in providing legal services to the MDP's clients, the lawyer must give reasonable assurances that the member's conduct is compatible with the professional obligations of the lawyer. See Rules 5.1 and 5.3. A lawyer should take special care to insure that the members understand the obligation to maintain confidentiality of information. In addition, it may be necessary for an MDP to implement special procedures to protect confidential information such as building firewalls in the firm's computer information system, restricting access to client files by the use of special

passwords, and physically separating the lawyers and their nonlawyer assistants, paralegals, and secretaries from other service units within the MDP.

[4] A lawyer in an MDP must also take special care to heed the proscriptions of the Rules addressing conflicts of interest (Rules 1.7 through 1.11, especially Rules 1.7(b) and 1.8(a), (b), and (f)). The promotion of the legal services of an MDP must also comply in all respects with Rules 7.1 and 7.3 regarding advertising and contacts with prospective clients. With respect to advertising and solicitation, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law. Finally, lawyers must be especially mindful of the rules governing legal fees and trust accounts. The fact that a lawyer is practicing in an MDP does not excuse compliance with these rules.

[5] There is no ethical bar that prevents a lawyer from being a member of, or practicing, another profession or pursuing another career calling. For example, a lawyer may also be a certified public accountant, a computer programmer, a financial planner, a psychologist, or a social worker. Such a lawyer is often referred to as a "dual professional." When a client is receiving services from a lawyer in an MDP who is a dual professional, it is critical that the client understand in what capacity the lawyer is rendering services. In the absence of a clear understanding, the client may erroneously assume that all the client's communications with the dual-professional lawyer or other nonlawyer member of the MDP are protected by the attorney-client privilege. A lawyer who is a dual professional and who offers nonlegal services to the client of an MDP has an affirmative obligation to insure that the client understand the nonlegal nature of those services.

The lawyer should communicate to the client receiving the nonlegal services, in a manner sufficient to assure that the client understands the significance of the distinction between nonlegal and legal services and that their relationship will not be a client-lawyer relationship. The communication should be made before entering into an agreement for the provision of, or providing, nonlegal services and preferably should be in writing.

[6] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding and that the client understands that the MDP is not rendering legal services in this matter. A sophisticated user of the services offered by an MDP, such as a publicly held corporation, may require a lesser explanation than an individual client seeking advice from a lawyer-accountant or lawyer-social worker. The failure to take reasonable measures to insure that the client understands the nonlegal nature of the services constitutes a material misrepresentation of facts in violation of Rule 7.1.

[7] To protect a client's right to the exercise of independent professional judgment by a lawyer and to facilitate conduct by a lawyer that is consistent with the obligations set forth in the Model Rules, this rule places special requirements upon an MDP not controlled by lawyers. These requirements are appropriate because of the serious injury that the MDP's clients may suffer if independence is not exercised or a lawyer fails to observe the lawyer's ethical

responsibilities. Thus, a lawyer may not practice in an MDP unless the MDP undertakes in writing: (1) that it will not directly or indirectly interfere with a lawyer's exercise of independent professional judgment on behalf of a client; (2) that it will establish and enforce procedures designed to protect a lawyer's exercise of independent professional judgment on behalf of a client from interference by the MDP, any constituent of the MDP, or any person or entity associated with the MDP; (3) that members of the MDP will abide by these rules of professional conduct when they assist a lawyer in the MDP in the delivery of legal services to a client of the MDP; (4) that it will respect the special role of the lawyer as a representative of clients, an officer of the legal system and public citizen having special responsibility for the administration of justice; and (5) that it will annually review the procedures established in subsection (c)(2), certify its compliance with subsections (c)(1)-(6), and a copy of the certification provide to each lawyer in the MDP.

[8] A lawyer plays a unique role in society as a representative of clients, an officer of the legal system and public citizen having special responsibility for the administration of justice. The MDP must acknowledge and respect that role. It must be cognizant that in certain circumstances, the representation of a client consistent with the Model Rules of Professional Conduct may require a lawyer to take action that may result in a diminution of the MDP's profits either with respect to a particular matter or in general. The MDP, like all law firms, must respect the fundamental principle that every lawyer, regardless of professional prominence or professional work load, has an obligation to provide legal services to those who are unable to pay.

[9] This Rule requires that the MDP agree in writing that it will annually review the procedures established in subsection (c)(2) and amend them as appropriate, certify its compliance with subsections (c)(1)-(6), and provide a copy of the certification to each lawyer in the MDP. The purpose of this certification is two-fold: first, it serves as an annual reminder to the MDP of the importance of the procedures and encourages any appropriate amendments to them; and second, it reminds a lawyer in an MDP of the lawyer's own obligation to insure that the MDP is in compliance with the Rule. If an MDP is not in compliance, the lawyer should remind the highest authority of the MDP of this fact and urge compliance. If the MDP remains in noncompliance, the lawyer must terminate the lawyer's relationship with the MDP. In addition, the lawyer may have an obligation to inform the appropriate professional authority of the professional misconduct of any other lawyer who continues to offer legal services to clients of the MDP. It would be professional misconduct for a lawyer employed by or affiliated with an MDP to offer legal services to clients of the MDP if that MDP is not in compliance with this Rule.

[10] In addition, this Rule provides for the review and supervision of MDPs not controlled by lawyers by the highest court in a jurisdiction responsible for the professional conduct of lawyers. Since MDPs are new structures for the delivery of legal services and permit previously prohibited fee-sharing and ownership interest with nonlawyers, it is appropriate that those not controlled by lawyers be monitored to assure the preservation of a lawyer's independent professional judgment, the protection of confidential client information, and the avoidance of conflict of interest. The Rule requires that such MDP annually file a signed and verified copy of

the certificate described in subsection (6) with the jurisdiction's highest court and that the copy must be accompanied by information identifying each lawyer employed by the MDP during the reporting period and the jurisdictions in which each lawyer is licensed to practice law. The Rule also permits the jurisdiction's highest court to review the certificates or conduct an investigation or an administrative audit of MDPs, as it deems appropriate, to determine and assure compliance with subsections (1)-(7) and permits the court to take appropriate action if it finds that an MDP has not complied with those subsections. Finally, the Rule provides that the cost of conducting the investigation and administrative audit described in subparagraph (8) is to be borne by the MDPs through the payment of an annual fee.