Agenda

Supreme Court's Advisory Committee on the Rules of Professional Conduct

February 19, 2019
5:00 to 7:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Salt Lake City
Judicial Council Room, Suite N31

Welcome and approval of minutes	Tab 1	Steve Johnson, Chair
Discussion on regulatory reform		Justice Himonas, John Lund
Rule 8.4: Edits from Supreme Court and update on meeting	Tab 2	Steve Johnson, Nancy Sylvester
Update on Rule 1.11 and Intern Policy		Nancy Sylvester
Consistency checklist	Tab 3	Steve Johnson, Nancy Sylvester, Gary Sackett
Comments to RPC Rules affected by Licensed Paralegal Practitioners	Tab 4	Steve Johnson, Nancy Sylvester
Attorney advertising subcommittee rule proposals	Tab 5	Daniel Brough (chair), Billy Walker, Hon. Trent Nelson, Steve Johnson, Joni Jones, Austin Riter
Multidisciplinary Practice Subcommittee update	Tab 6	Tom Brunker (chair), Hon. James Gardner, Cory Talbot, Simon Cantarero, Gary Sackett, Tim Conde
Other business		Steve Johnson

2019 Meeting Schedule:

March 16, 2019 (Saturday regulatory reform meeting)

March 18, 2019 (currently scheduled; will be discussed)

April 13, 2019

May 20, 2019

June 17, 2019

August 19, 2019

September 16, 2019

October 21, 2019

November 18, 2019

Committee Webpage: http://www.utcourts.gov/committees/RulesPC/

Tab 1

MINUTES OF THE SUPREME COURT'S

ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

January 14, 2019

The meeting commenced at 5:10 p.m.

Committee Members Attending:
Steven G. Johnson, Chair
Daniel Brough (by telephone)
Tom Brunker
Simon Cantarero
Tim Conde (by telephone)
Hon. James Gardner
Joni Jones (by telephone)
Hon. Darold McDade (by telephone)
Hon. Trent Nelson (by telephone) (emeritus)
Vanessa Ramos (by telephone)
Cristie Roach (by telephone)
Cory Talbot
Katherine Venti (by telephone)
Billy Walker

Guests:
None

Members Excused:
Phillip Lowry
Amy Oliver
Austin Riter
Gary Sackett (emeritus)
Padme Veeru-Collings

Staff:
Nancy Sylvester

Recording Secretary:
Adam Bondy

I. Welcome and Approval of Minutes

Mr. Johnson determined quorum and welcomed the committee.

Motion:
Mr. Walker moved to approve the minutes from the December 3, 2018 meeting subject to one correction: Hon. Trent Nelson should have been listed as an emeritus member. Mr. Brough seconded the motion. The motion passed unanimously.

II. Update: Supreme Court Comments on Rule 8.4(g)

Mr. Johnson reported on the Supreme Court's concerns regarding proposed Rule 8.4(g) and Mr. Johnson and Mr. Cantarero proposed some changes to the rule. Mr. Cantarero explained the effect of the changes, which was to limit the scope of the rule to the listed laws. The committee discussed several possible new wordings for the rule. The committee proposed the following new wording:

> (g) engage in conduct that is an unlawful, prohibited, or discriminatory employment practice under Title VII of the Civil Rights Act of 1964 or the Utah Antidiscrimination Act, except that for the purposes of this Rule and in applying those statutes, "employer" shall mean any person or entity which employs one or more persons; or

Motion:
Tom Brunker moved to approve the new wording of proposed Rule 8.4(g). Hon. James Gardner seconded the motion. The motion passed unanimously.

III. New Business: Attorney Advertising

The advertising rules need to be reviewed to determine what changes, if any, are needed in light of reports that they are too restrictive.

Action:
New subcommittee formed: Daniel Brough (chair), Billy Walker, Hon. Trent Nelson, Steven Johnson, Joni Jones, Hon. Darold McDade

IV. New Business Multi-Disciplinary Practice (MDP)

Mr. Johnson reported on the ABA changing its course regarding allowing non-attorneys to own law firms, fee-splitting with non-lawyers, and other MDP issues. Accordingly, Utah is reevaluating its rules regarding MDP.

Action:
New subcommittee formed: Tom Brunker (chair), Hon. James Gardner, Cory Talbot, Simon Cantarero, Gary Sackett, Tim Conde

V. New Business: Rule 1.11 and Intern Policy

Ms. Sylvester noted that we have been asked to examine Rule 1.11 to determine its impact on interns working for the court. Specifically, there is concern that supervising attorneys for outside employment may ask the intern to comment on current cases or other court internal processes.

Action:
New subcommittee formed: Cristie Roach (chair), Katherine Venti, Vanessa Ramos, Padme Veeru-Collings, Phillip Lowry

VI. Comments re: Military and Military Spouse Practice Rules

Mr. Johnson summarized the comments received regarding the proposed military and military spouse practice rules. Forty-seven comments in favor of the rule were received. Six comments against the rule were received, including from two members of the admissions committee members. The gist of the negative comments was that the rule risked lowering the standards for attorneys practicing in Utah by lowering the bar score needed to practice.

Mr. Johnson noted that Utah's required bar score is 270, that roughly half the states have passing scores lower than Utah's, and that the lowest passing score is Mississippi at 258—12 points less than Utah's. Mr. Brunker noted that even under the proposed rule, the subject lawyer would have to be supervised by an admitted Utah attorney (with a bar score over 270) and would have to maintain malpractice insurance. Mr. Walker noted that these conditions largely addressed the issues of protecting clients.

Motion:
Tom Brunker moved to recommend that the Court adopt the rule as written. Hon. James Gardner seconded the motion. The motion passed unanimously.

Mr. Johnson noted that the definitions in the proposed rule need to be reordered to make logical sense.

Motion:
Cory Talbot moved to amend the order of the definitions list. Tom Brunker seconded the motion. The motion passed unanimously.

VII. Comments re: RPC Rules Affected by Licensed Paralegal Practitioners

Mr. Johnson reported that the proposed rules were published for comment and would come back to the committee at the next meeting.

VIII. Next Meeting

The next meeting is scheduled for February 25, 2019, at 5:00 p.m.

IX. Adjournment

The meeting adjourned at 6:31 p.m.

Tab 2

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;~~.~~

(g) engage in conduct that is an unlawful, ~~prohibited, or~~ discriminatory, or retaliatory employment practice under Title VII of the Civil Rights Act of 1964 or the Utah Antidiscrimination Act, except that for the purposes of this paragraph and in applying those statutes, “employer” shall mean any person or entity that employs one or more persons; or

(h) egregiously violate, or engage in a pattern of repeated violations, of the Standards of Professionalism and Civility if such violations harm the lawyer’s client or another lawyer’s client or are prejudicial to the administration of justice.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct or knowingly assist or induce another to do so through the acts of another, as when they request or instruct an agent to do so on the lawyer’s behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[1a] An act of professional misconduct under Rule 8.4(b), (c), (d), (e), (f), (g), or (h) cannot be counted as a separate violation of Rule 8.4(a) for the purpose of determining sanctions. Conduct that violates other Rules of Professional Conduct, however, may be a violation of Rule 8.4(a) for the purpose of determining sanctions.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the

administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct bias or prejudice based upon race, color, sex, pregnancy, childbirth, or pregnancy-related conditions, age, religion, national origin, ethnicity, disability, ~~age~~, sexual orientation, gender identity, ~~marital status,~~ or ~~socioeconomic status~~, may violate ~~violates~~ paragraph (d) when such actions are prejudicial to the administration of justice. The protected classes listed in this Comment are consistent with those enumerated in the Utah Antidiscrimination Act of 1965, Utah Code Sec. 34A-5-106(1)(a) (2016), and in federal statutes, and is not meant to be an exhaustive list, as the statutes may be amended from time to time. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of ~~this~~ paragraph (d)~~rule~~.

~~[3a] The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. An egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d).~~

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law guides the application of paragraph (g), except that for purposes of determining a violation of paragraph (g), the size of a law firm or number of employees is not a defense. Paragraph (g) does not limit the ability of a lawyer to accept, decline, or in accordance with Rule 1.16, withdraw from a representation in accordance with Rule 1.16, nor does paragraph (g) preclude legitimate advice or advocacy consistent with these rules. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of paragraph (g). Lawyers may engage in conduct undertaken to discuss diversity and inclusion, including any benefits and challenges, without violating paragraph (g). Implementing initiatives aimed at recruiting, hiring, retaining and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

[4a] Paragraph (g) does not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution.

[5] A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

74 [6][4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that
75 no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity,
76 scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.
77 [7] [5] Lawyers holding public office assume legal responsibilities going beyond those of other
78 citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers.
79 The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian,
80 agent and officer, director or manager of a corporation or other organization.
81 [8] This rule differs from ABA Model Rule 8.4 to the extent that it changes paragraph (g), adds new
82 paragraph (h), changes comments [3] and [4], and contains comments [1a] and [4a].
83

Tab 3

February 13, 2019

Rules of Professional Conduct Consistency and Public Record Checklist

Before a rule amendment is approved by the Advisory Committee on the Rules of Professional Conduct for submission to the Supreme Court, the following steps must be taken to ensure consistency within the rule itself and with the broader Rules of Professional Conduct, and to ensure that a public record is made regarding any comments to rules and committee discussions therefrom:

1. Check for consistency in the rule language and in the title of the rule.
2. Check for impact on other rules, especially the definition sections and comments in other rules.
3. Check to see if the Licensed Paralegal Practitioner rules also need to be changed to correspond with the current rule changes.
4. Check to see if a comment needs to be added for purposes of noting differences between Utah's rules and the ABA Model Rules.
5. Once a rule is back from comment, the Committee shall make a public record regarding its responses to the comments.
6. Carefully proofread for grammar, syntax and consistency of spelling (e.g., judgment v. judgement), symbols (e.g., ( ) v. [ ]), capitalization (e.g., Rule v. rule) and subsection designation (Rule X.Y(b)(3)).
7. Use preferable grammar style (e.g., use of active v. passive voice).
8. Check consistency of Oxford comma (or none).
9. Add [Effective {date}.] once the Supreme Court approves the rule as final.

DRAFT

Tab 4

COMMENTS TO RULES OF PROFESSIONAL CONDUCT AFFECTED BY LICENSED PARALEGAL PRACTITIONERS (1 COMMENT)

Following the recent enactment of rules authorizing licensed paralegal practitioners, the Rules of Professional Conduct have been amended to address interactions between lawyers and licensed legal practitioners. "Legal professional" is now the umbrella term for lawyers and licensed paralegal practitioners.

RPC01.00. Terminology.

RPC01.07. Conflict of Interest: Current Clients.

RPC01.10. Imputation of Conflicts of Interest: General Rule.

RPC01.11. Special Conflicts of Interest for Former and Current Government Employees.

RPC01.12. Former Judge, Arbitrator, Mediator or Other Third-Party Neutral.

RPC01.18. Duties to Prospective Client.

RPC02.04. Lawyer Serving as Third-Party Neutral.

RPC03.03. Candor toward the Tribunal.

RPC03.05. Impartiality and Decorum of the Tribunal.

RPC04.02. Communication with Persons Represented by Counsel.

RPC05.01. Responsibilities of Partners, Managers, and Supervisory Lawyers.

RPC08.03. Reporting Professional Misconduct.

Summary:

There was only one comment, which is below. LPP's have their own Rule 6.5 that tracks the same duties and opportunities as lawyers for pro bono legal services. Mr. Duncan

may not be aware that LPP Rule 6.5 was published for comment last fall and is already in effect.

Dave Duncan

Are the new licensed legal professionals not allowed to participate in pro bono? I was surprised to see that the conflict rules seem to be updated to apply to them as “legal professionals” but that they weren’t added to the conflict exceptions for non-profit and court-annexed programs in RPC6.5. I believe a change proposal to those exceptions has been forwarded to the Advisory Committee from the Bar Commission. Changing the language in that proposal from “lawyer” to “legal professional” would address the issue if it was merely an oversight.

Tab 5

Rule 7.1. Communications Concerning a Lawyer's Services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified or unreasonable expectation about results the lawyer can achieve or has achieved; ~~or~~

(c) contains a testimonial or endorsement that violates any portion of this Rule~~.~~; or

(d) involves coercion, duress or harassment. [Rule 7.3, Option 2]

Comment

[1] This Rule governs all communications about a lawyer's services~~, including advertising permitted by Rule 7.2.~~. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; the use of actors or dramatizations to portray the lawyer, law firm, client, or events; and other information that might invite the attention of those seeking legal assistance.

[4] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[~~4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.~~5] A lawyer may state that he or she is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as the Utah State Bar, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area

greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. In order to ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification. A lawyer can communicate practice areas and can state that he or she "specializes" in a field based on experience, training, and education, subject to the "false or misleading" standard set forth in this Rule. Also, a lawyer can communicate about patent and trademark and admiralty practice.

[6] There is a potential for abuse when a lawyer, seeking pecuniary gain, contacts a person known to be in need of legal services, especially if the contact is in person or otherwise "live." Unrequested contact may subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching. A lawyer should proceed with caution and appropriate boundaries when initiating contact with someone in need of legal services, especially when the contact is "live," whether that be in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection. [Rule 7.3, Option 2]

[7] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased or retired members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[8] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[9] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(d), because to do so would be false and misleading.

[10] It is misleading to use the name of a lawyer holding public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not practicing with the firm. A firm may continue to use in its firm name the name of a lawyer who is serving in Utah's part-time legislature as long as that lawyer is still associated with the firm.

[11] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[4a12] The Utah Rule is different from the ABA Model Rule. Subsections (b), (c), and (cd) are added to the Rule to give further guidance as to which communications are false or misleading. Additional changes have been made to the Comments.

Rule 7.2. ~~Advertising~~Compensation for Referrals or Recommendations.

(a) ~~Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written recorded or electronic communication, including public media~~

~~(b) If the advertisement uses any actors to portray a lawyer, members of the law firm, or clients or utilizes depictions of fictionalized events or scenes, the same must be disclosed.~~

~~(c) All advertisements disseminated pursuant to these Rules shall include the name and office address of at least one lawyer or law firm responsible for their content.~~

~~(d) Every advertisement indicating that the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery shall set forth clearly the client's responsibility for the payment of costs and other expenses.~~

~~(e) A lawyer who advertises a specific fee or range of fees shall include all relevant charges and fees, and the duration such fees are in effect.(f) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a~~A lawyer may give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(b) A lawyer may pay the reasonable cost of advertising permitted by these Rules and may pay the usual charges of a lawyer referral service or other legal service plan.

Comment

[1] ~~To assist the public in learning about and 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, email address, website and telephone number; the kinds of services 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; 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 and other forms of advertising, against advertising going beyond specified facts about a lawyer or against "undignified" advertising. Television, the Internet and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic 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. But see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.

[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.

Paying Others to Recommend a Lawyer[5] Except as permitted by Paragraph (f)this rule, lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work. For guidance, a gift or pattern of gifts with a fair market value of more than $100.00, whether an item, a service, cash, a discount, or otherwise, may be deemed to be greater than nominal.

[2] Nothing in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (f), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements and group advertising. A lawyer may compensate employees, agentsthis Rule is intended to prohibit a lawyer from compensating employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, and any payment to the lead generator is consistent with the lawyer's obligations under these rules. To comply with this Rule 7.1,, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Rule 5.3 (duties of lawyers and law firms with respect to the conduct of non-lawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[63] A lawyer may pay the usual charges of a legal service plan or a lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is an organization that holds itself out to the public to provide referrals to lawyers with appropriate experience in the subject matter of the representation. No fee generating referral may be made to any lawyer or firm that has an ownership interest in, or who operates or is employed by, the lawyer referral service, or who is associated with a firm that has an ownership interest in, or operates or is employed by, the lawyer referral service.

[74] A lawyer who accepts assignments or referral from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer

referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.the Rules.

[85] For the disciplinary authority and choice of law provisions applicable to advertising, see Rule 8.5.

[8a] This Rule differs from the ABA Model Rule in that it defines "advertisement" and places some limitations on advertisements. Utah Rule 7.2(b)(2) also differs from the ABA Model Rule by permitting a lawyer to pay the usual charges of any lawyer referral service. This is not limited to not-for-profit services. Comment [6] to the Utah rule is modified accordingly.

6] This Rule differs from the ABA Model Rule.

Rule 7.3. Solicitation of Clients~~.~~ (Option 1)

(a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not ~~by in-person, live telephone or real-time electronic contact~~ solicit professional employment ~~from a prospective client~~by live person-to-person contact when a significant motive for the lawyer~~'~~'s doing so is the lawyer~~'~~'s or law firm's pecuniary gain, unless the ~~person contacted:~~contact is with a:

~~(a)~~ (1) ~~is a~~ lawyer;

~~(a)~~(2) person who has a family, close personal, or prior business or professional relationship with the lawyer~~,~~ or law firm; or

~~(a)(3) is unable to make personal contact with a lawyer and the lawyer's contact with the prospective client has been initiated by a third party on behalf of the prospective client.~~

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(~~b~~c) A lawyer shall not solicit professional employment ~~by written, recorded or electronic communication or by in-person, live telephone or real-time electronic contact even~~ when not otherwise prohibited by paragraph (a), if:

~~(b)~~(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

~~(b)(2) the solicitation involves coercion, duress or harassment.~~(2) the solicitation involves coercion, duress or harassment.

~~(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2). For the purposes of this subsection, "written communication" does not include advertisement through public media, including but not limited to a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio, television or webpage.~~

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

~~(d~~(e) Notwithstanding the prohibitions in ~~paragraph (a)~~this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses ~~in-person or other real-time communication to solicit memberships or~~live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] ~~A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does~~Paragraph (b) prohibits a lawyer from soliciting

professional employment by live person-to person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not ~~constitute~~ a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to ~~Internet~~electronic searches.

[2] ~~There is a potential for abuse when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.~~"Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection. Such person-to-person, prohibited contact does not include chat rooms, text messages, tweets, Facebook, or other written communications that recipients may easily disregard. The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false, misleading or involve coercion, duress or harassment.

[3] ~~This~~The potential for ~~abuse~~overreaching inherent in ~~direct in-person, live telephone or real-time electronic solicitation~~live person-to-person contact, justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information ~~to those who may be in need of legal services~~. In particular, communications can be mailed or transmitted by email or other electronic means that ~~do not involve real-time contact and~~ do not violate other laws ~~governing solicitations~~. These forms of communications ~~and solicitations~~ make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to ~~direct in-person, live telephone or real-time electronic~~live person-to-person persuasion that may overwhelm a person's judgment.

[4] ~~The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person or other real-time communications, will help to ensure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.~~A solicitation that contains false or misleading information within the meaning of Rule 7.1, that

involves coercion, duress or harassment within the meaning of Rule 7.3(c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited.

~~[5] There is far less likelihood that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has a close personal or family relationship, or where the lawyer has been asked by a third party to contact a prospective client who is unable to contact a lawyer, for example when the prospective client is incarcerated and is unable to place a call, or is mentally incapacitated and unable to appreciate the need for legal counsel. Nor is there a serious potential for abuse in situations where the lawyer is motivated by considerations other than the lawyer's pecuniary gain, or when the person contacted is also a lawyer. This rule is not intended to prohibit a lawyer from applying for employment with an entity, for example, as in-house counsel. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or *bona fide* political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.~~

~~[5a] Utah's Rule 7.3(a) differs from the ABA Model Rule by authorizing in-person or other real-time contact by a lawyer with a prospective client when that prospective client is unable to make personal contact with a lawyer, but a third party initiates contact with a lawyer on behalf of the prospective client and the lawyer then contacts the prospective client.~~

~~[6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information that is false or misleading within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).~~

[~~7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and the details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.~~5] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

~~[8] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or~~

~~sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.~~

~~[8a] Utah Rule 7.3(c) requires the words "Advertising Material" to be marked on the outside of an envelope, if any, and at the beginning of any recorded or electronic communication, but not at the end as the ABA Model Rule requires. Lawyer solicitations in public media that regularly contain advertisements do not need the " Advertising Material" notice because persons who view or hear such media usually recognize the nature of the communications.~~

~~[9] Paragraph (d) of this Rule permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone, live person-to-person contacts or other real-time electronic solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See Rule 8.4(a).~~

Rule 7.4. Communication of Fields of Practice.

~~(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.~~

~~(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.~~

~~(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or substantially similar designation.~~

~~(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:~~

~~(d)(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and~~

~~(d)(2) the name of the certifying organization is clearly identified in the communication.~~

~~Comment~~

~~[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty" or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.~~

~~[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.~~

~~[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.~~ Reserved.

Rule 7.5. Firm Names and Letterheads.

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located. Reserved.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comment

[1] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is not a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased or retired partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer who has not been associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

Effective December 19, 2018

Tab 6

Report on the Multidisciplinary Practice Proposal of the Utah State Bar

Submitted by

The Utah Supreme Court Advisory Committee on the Rules of Professional Conduct

September 27, 2001

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Appendix D, Norman S. Johnson letter to Steven G. Johnson, May 31, 2001.

REPORT ON THE MULTIDISCIPLINARY PRACTICE PROPOSAL OF THE UTAH STATE BAR

SUBMITTED BY
THE UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT
September 27, 2001

I. INTRODUCTION

A. The Bar Petition. On February 14, 2001, the Utah State Bar ("the Bar") filed its "Petition to Authorize Amendments to the Rules of Professional Conduct to Permit Multi-Disciplinary Practice" ("Bar Petition"). Attached to the Petition is the report of a task force appointed by the Board of Bar Commissioners of the Utah State Bar, entitled "Multidisciplinary Practice Task Force Report" and dated November 1, 2000 ("Task Force Report").[1]

At the request of the Utah Supreme Court, the Court's Advisory Committee on Rules of Professional Conduct (the "Committee") has undertaken to study, analyze and make recommendations concerning the Bar Petition. The Petition raises important and difficult contemporary issues, and the Committee is pleased to undertake its role as advisor to the Court on these matters. It has, accordingly, engaged in an extensive consideration, review and analysis of the Bar Petition and its attachments, in which the Bar requests that the Court approve modifications to the Utah Rules of Professional Conduct that would permit multidisciplinary practice ("MDP") by lawyers.

The Petition does not explicitly state the action that it wishes the Court to take. After explaining what is in the Task Force Report, the Petition asks only that the Court "authorize amendments of the [Utah] Rules of Professional Conduct to permit multi-

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[1]The filing that we refer to as the "Bar Petition" was submitted under the signature of David O. Nuffer, as (then) President of the Utah State Bar. As we understand the process that led to this filing, the Board of Bar Commissioners of the Utah State Bar ("the Bar Commission") commissioned the Multidisciplinary Practice Task Force to consider the general MDP issues and to submit a report—the Task Force Report. This report was adopted or approved by the Bar Commission and was attached to the Bar Petition under Mr. Nuffer's signature as President of the Bar. It might be more accurate to characterize the Bar Petition as having been submitted by the Bar Commission in its representative capacity with respect to the 7,000+ lawyers in the Utah State Bar.

disciplinary practice."[2] It does *not*, for example, ask the Court to adopt the specific changes to the Rules of Professional Conduct that are set forth in Attachment A of the Task Force Report. Nevertheless, for purposes of its investigation and analysis, the Committee has treated the suggested changes to the Utah Rules of Professional Conduct included in the Task Force Report as the Bar's "MDP Proposal" (or just "the Proposal").

B. The Scope of the Committee's Investigation. The scope of the Committee's review of MDP was expansive. Spanning more than ten months, it has included presentations by the MDP Task Force, present and past presidents of the Utah State Bar, individual members of the Utah Board of Bar Commissioners, and individual lawyers with a particular interest in the issue. Among the numerous documents reviewed by the Committee were the Utah Task Force Report, the Bar's Petition with its appendices, written comments from more than 50 individuals, reports presented by the American Bar Association, the Commission on Multi-Disciplinary Practice Report to the ABA House of Delegates, law review articles, and reports submitted by proponents and opponents of MDP initiatives from several states. The Committee also solicited the views of interested constituencies, gathered data from other states where various MDP proposals are or have been under review, and engaged in rigorous debate of the issues.

No issue faced by the Committee since the adoption of the Utah Rules of Professional Conduct in 1988 has generated a more searching review than this one. Every Committee member came away from the MDP debate with a deeper understanding and appreciation of the fundamental values that guide the legal profession—the characteristics that form the foundation of the lawyer's claim to be a "professional." The Committee believes that the Rules of Professional Conduct serve to protect and further these values well. Any modifications to the Rules that would materially affect these basic values should not be adopted without a compelling demonstration that there would be real and substantial benefits to the public and that adequate safeguards could be put in place to secure the profession's fundamental values.

The Committee's investigation and analysis has centered around two primary inquiries: (a) What are the core values that are necessary to provide quality legal services with integrity and competence and to fulfill the legal profession's fiduciary responsibilities to the public, and what effect would adoption of the MDP Proposal have on those values? (b) Is there a demonstrable need for the approval of MDPs or, relatedly, is there a demand among users and potential users of legal services that would justify the

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[2] Bar Petition at 6.

adoption of the Proposal?[3]

As a final preliminary matter, we note that the Task Force Report's definition of "multi-disciplinary practice" is somewhat imprecise.[4] Generally, we understand it to mean the practice of law in close conjunction with non-lawyers—usually other professionals such as CPAs and the like—where the non-lawyers are integrally involved in the ownership, the management, common client base and fee- or profit-sharing of the combined practice. In this Report, we use the term only as a short-hand for the business and practice structures that would be permitted to operate under the rule changes set forth in the MDP Proposal.

C. Summary Conclusion. Independence of professional judgment, loyalty to clients, confidentiality of client information and the ancillary attributes of attorney competence and avoidance of conflicts of interest are integral and fundamental to society, are for the protection of clients and the public, and are the foundations upon which our system of jurisprudence and justice has been built for 225 years. Absent a compelling need, MDP should not be adopted if to do so would in any material way jeopardize, impair, or infringe upon core values of the profession. The Committee has concluded that the MDP proposal of the Utah State Bar fails to meet this test.

II. THE SPECIAL RESPONSIBILITIES OF LAWYERS

Underlying many of the Rules of Professional Conduct is the understanding that the practice of law is a profession with special duties and responsibilities to the general public. The framework of all of these rules underscores the higher duty of lawyers to serve as vigorous advocates of clients who wish or need to avail themselves of the American legal system, as the defenders of the Constitution, and as officers of the court, with the accompa-

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[3]We have taken special note of the processes in two states where the MDP issue has been considered in extensive detail—Florida and Arizona. In each state, a comprehensive report has been issued which examines an MDP proposal that is similar to the Utah State Bar's MDP Proposal and concludes that it should be rejected. "Con" Subcommittee of the Florida Bar Special Committee on Multi-Disciplinary Practice, *Facing the Tide of Change* (Dec. 1999), hereinafter the "Florida Report" (attached as Appendix A); *The Report of the State Bar of Arizona Task Force on the Future of the Profession*, (Dec. 13, 2000), hereinafter the "Arizona Report" (attached as Appendix B). We have drawn from these two reports, as they present well-reasoned and comprehensive analyses of the issues that are now before the Court and this Committee in Utah.

[4]Task Force Report 5.

nying responsibility for the quality of justice.[5]

The practice of law is not just a business. As officers of the courts and fiduciaries and confidants to their clients, lawyers share the responsibility for preserving access to justice and a free society. They are required to insure that competent, independent legal advice is rendered and that valid positions are vigorously presented to the tribunals of the country. The Utah Supreme Court recognized the important role that attorneys play in *Ellis v. Gilbert,* when it stated:

> It is indeed true that the lawyer has an obligation to discharge his duties of this character in loyalty and fidelity to the interest of his client. But he also has overarching responsibilities of the same nature to the court as one of its officers, and to the profession itself, in its duty to serve the public according to the ideal which is the purpose of all procedure: to seek the truth and to do justice.[6]

Under the American system of jurisprudence, lawyers are critical fiduciaries who are to be zealous advocates of their clients' interests. In that regard, a client deals with a lawyer as a person whose advice and counsel is trusted at a level far different from that of a person whose professional relationship is based more directly on business.

The Florida Supreme Court has addressed the difference between lawyers and all other business professionals and the corresponding need for independence, stating "[t]he law is not a business,—it is a profession, a noble one, with standards in certain respect different from those applicable to business, which standards it is the duty of the bar to uphold."[7] The Florida court went on to distinguish between the law and other businesses in three ways:

> The lawyer is *an officer and right arm of the court* in the administration of justice, he has the major responsibility for making and administering the law . . . . He is the trustee of his client and is expected to execute that trust in obedience to the Canons of the profession, the constitution of his State and the United States. His relation to his client is *fiduciary* . . . .
>
> There is, in fact, no vocation in life where moral character counts for so

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[5]*See* UTAH RULES OF PROFESSIONAL CONDUCT, Preamble: A Lawyer's Responsibilities.

[6]429 P.2d 39, 41 (1967).

[7]*State ex rel. Florida Bar v. Murrell,* 74 So. 2d 221 (Fla. 1954), *cited in Florida Bar v. Stafford*, 542 So. 2d 1321 (Fla. 1989).

> much or where it is subjected to more crucial tests by *citizen and the public* than is that of members of the bar. His client's life, liberty, property, reputation, the future of his family, in fact all that is closest to him are often in his lawyer's keeping. The fidelity and candor with which he performs his trust, point up reasons that distinguish the legal profession from other business.[8]

There are certain principles unique to the "historical professions" of medicine, the law and the clergy that set them apart from the trades, other professions and other lines of work.[9] Lay persons approach these professions for help in solving complex and highly personal problems—problems that seem to threaten their very lives, physically or spiritually or in some other way that would destroy their liberty or their property. These are the professions that were approached by people to help them make their lives whole again—to help them regain control of their lives.

These complex and personal problems are sufficiently difficult that their solutions require knowledge and skills not normally available to the ordinary person. The problems require a total commitment to the cause, or the person seeking the professional help may not obtain adequate solutions.

The Rules of Professional Conduct are not oriented toward the ability to be successful in business—much less to focus on the ability to compete on an international scale. L. Harold Levinson has stated it well: "The pursuit of wealth is as legitimate an enterprise for lawyers as for anyone else. Lawyers must respond, however, with heightened sensitivity to situations in which the pursuit of wealth—or the pursuit of any other objective—comes into conflict with other duties, especially if these duties are owed to clients or to society in general."[10]

Those who view acquisition of wealth as a primary reason to practice law may have lost sight of these duties. Symptoms of that loss of vision are ubiquitous, as clients are charged for unnecessary and sometimes damaging litigation, spurious claims are made in the courts, and the poor and middle class find themselves unable to obtain the legal assistance they need. Lawyers should not be willing to compromise their responsibil-

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[8]74 So. 2d at 224(emphasis added).

[9]Some references in this portion of the Report to "professions" will be to the three "historical professions"—the law, medicine and the clergy. This short-hand reference is not meant to place these callings "above" other modern-society professionals, such as CPAs, educators, engineers, scientists and many others.

[10]L. Harold Levinson, "*Making Society's Legal System Accessible to Society: The Lawyer's Role and its Implications*," 41 Vand. L. Rev. 789, 799-800 (May 1988).

ities to their clients, the courts and society in exchange for a greater percentage of the market share.

In short, lawyers are officers of the court, one of the three branches of government, responsible for the administration of justice. Their fiduciary obligation to their clients requires that they exercise independent judgment, avoid conflicts of interest, protect their client confidences, act competently and exercise supervision over paralegals, secretaries and other non-lawyers who work with them. The practice of law is not just another business.

Out of these unique obligations of lawyers come the guiding principles that set the practice of law apart from other professions and businesses. These principles are sometimes referred to as the "core values" of the profession. They include the lawyer's duty of undivided loyalty to the client (including the accompanying duty to avoid conflicts of interest), the duty to hold client confidences inviolate, and the duty to render independent opinions and advice. Clients view lawyers as the champions of their rights and liberties. Lawyers must perform their professional services unfettered and unswayed by extraneous personal, social and economic influences.

The Rules of Professional Conduct have been implemented to embody these basic principles to help attorneys resolve ethical issues through the exercise of sensitive professional and moral judgment. Any proposed amendments to the Rules must be analyzed with these basic underlying core values in mind.

III. Core Values

A. Background. Both opponents and proponents of the MDP Proposal agree that certain core values of the legal profession must be protected, but there is not complete agreement on exactly what these core values are.[11] Therefore, before we go further,

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[11]The Task Force Report itself addresses core values differently in three places. The Executive Summary apparently identifies *six* core values under the following headings: confidentiality; conflict of interest; responsibility for your conduct and the conduct of others; independent professional judgment; unauthorized practice; and advertising and solicitation. Notably absent from this list is loyalty to the client, the absolute keystone of the legal profession (although, as we shall see, dealing with conflicts of interest is closely related).

Second, the Task Force Report's background discussion identifies *three* core values: independence of professional judgment; loyalty to clients, including avoidance of conflicts of interest; and protection of clients' confidential information.

Finally, the Report concludes with the explicit identification of *five* core values of the legal profession: the duty to maintain competency; the duty of loyalty to the client;

we first identify those critical characteristics that make the practice of law fundamentally different from other disciplines. Only then can we examine (a) whether the adoption of the Task Force's MDP Proposal will materially affect these characteristics, and (b) if so, whether the "losses" from MDP adoption outweigh the "gains" that may result.

A review of the literature[12] suggests a number of interrelated values that characterize the legal profession. However, there are three values that are common to almost any discussion of this issue:

- Professional independence of the lawyer
- The lawyer's loyalty to clients
- Protection of the client's confidential information

Also often included in broader lists and closely related to these three are:

- Avoidance of conflicts of interest
- Lawyer competence
- Responsibility for the conduct of others

Further, some writers, analysts and committees also mention or include lawyer advertising and solicitation, unauthorized practice of law, and *pro bono publico* responsibilities in their discussions of core values. Although these last three aspects are important adjuncts to the general responsibilities and guidelines for lawyers, we do not see them as true core values in the legal profession and will not analyze them as such.[13]

B. Related "Values." Avoidance of conflicts of interest is a crucial and pervasive responsibility of the lawyer, but is not itself a core value; rather, it is an operational subset of the lawyer's duty of loyalty to clients. Similarly, responsibility for the conduct of others is an implementational aspect of maintaining and carrying out the three basic core values.

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the duty to maintain independence of judgment; the duty to remain free from conflicts of interest; and the duty of client confidentiality.

[12]*E.g.,* Utah Task Force Report; the Florida Report; the Arizona Report; Report to the Assembly of the Illinois State Bar Association (May 17, 2000); Report to the House of Delegates from the American Bar Assoc. Comm'n on Multidisciplinary Practice (Aug. 1, 2000) (attached as Appendix C).

[13]However, we do consider the current advertising and solicitation rules in Section IX in connection with the identification of rules that may warrant modification without significant erosion of core values of the profession.

With respect to lawyer competence, it is quite clearly a critical ingredient in the composition of a lawyer's provision of legal service to clients. But, competence is common to *every* profession—indeed, to any worthy discipline. No one disagrees about this attribute and the need for it, but the lawyer's duty to be and remain competent is not dependent on nor affected by the existence or not of MDPs, and it is not an issue in the current discourse.

Although issues of advertising and solicitation, unauthorized practice of law and *pro bono publico* responsibilities are also important, they do not go to the core values of the legal profession. They are, instead, oriented around the ideas of general protection and service to the public; they are not the part of the *sine qua non* of the legal profession.

What seems clear to us is that, however the core values are defined, they are closely interrelated. Loyalty to the client, for example, implies exercising independent judgment, protecting client confidences, avoiding conflicts of interest, acting competently, and assuming certain responsibilities for the conduct of others.[14] These latter values together are characteristic of the legal profession, but not necessarily of other professions, the trades and other businesses.

The significance of this discussion is to highlight the Task Force Report's incomplete analysis of the effect its MDP Proposal would have on these core values.

C. The Three Primary Core Values. After due consideration, the Committee has concluded that there are three primary core values that set the legal profession apart from other professions and other disciplines and impose special duties and obligations on lawyers that are different from those of other providers of professional services. These are the values against which to measure the possible effects that the Bar's MDP Proposal may induce:

- Loyalty to clients
- Professional independence
- Protection of the client's confidences

First, undivided and uncompromised loyalty to clients is the touchstone of the

[14]That the core values are interrelated is suggested by the Florida Report's recognition that any change to the rule against fee splitting "will have far reaching implications on other core values," and the explicit statement that "the duties of loyalty and independence are inextricably intertwined." Florida Report 21, 28.

lawyer's responsibilities.[15] This dedication to the client's best interests also encompasses other aspects of the lawyer's obligations; in particular, the lawyer's duty to avoid conflicts of interest has its roots in the duty of loyalty. For our purposes here, then, we consider "loyalty to clients" as subsuming the broad and important requirement that the lawyer be always watchful for the conflicts of interest that can arise in an almost uncountable variety of facts and circumstances, and we will analyze them together.

Although closely connected to the duties of loyalty, the fundamental characteristic of "professional independence" is a separate core value that characterizes the attorney-client relationship. The lawyer's rendering of legal advice and counsel cannot be influenced by extraneous considerations that are inconsistent with the client's best interests—whether it is the pressure to heed the entreaties of a third person who is paying the client's bills or the influences of an investor in the fortunes of the lawyer's law firm. The current Comment to Rule 2.1, *Advisor*, lays it out:

> A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.[16]

The protection of client confidences is the other primary characteristic that defines the lawyer's elevated responsibilities. Again, this is closely connected with the other two foundational duties of loyalty and independence, but it brings a separate aspect to the relationship. To be sure, maintaining confidences is related to client loyalty, but there can be undivided loyalty without the constraint of nondisclosure of information. The inability to keep a client's confidences would undermine key elements of a relationship that must encourage the candid exchange of information and ideas between client and lawyer.[17]

These core values of the legal profession that we have identified are not outdated nor in need of change. They form the foundation upon which a strong legal system exists and will endure. To bend or compromise them or to change them solely to achieve

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[15] *See, e.g.,* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121, cmt. b (2000) ("the law seeks to assure clients that their lawyers will represent them with undivided loyalty").

[16] UTAH RULES OF PROFESSIONAL CONDUCT 2.1, cmt. (2001).

[17] *Id.* 1.6, cmt. ¶ 1.

such goals as "one-stop shopping" and other economically driven results is not justified if it will materially compromise clients' expectations of their lawyers or lawyers' commitment to these values and their ability to meet their clients' expectations.

Proceeding under the unanimous agreement of Committee members that these values are the basic underpinnings of the legal profession and must be kept intact, our task has been to investigate the extent to which these core values may be compromised by the adoption of the MDP Proposal.

D. Protection of Core Values. Both proponents and opponents of MDP agree that the core values of the legal profession must be protected. Proponents believe that the core values can be protected in MDPs; opponents believe that MDPs offer too great a risk to these core values to be permitted. The Florida Report quotes John W. Davis, "one of America's greatest advocates before the Supreme Court":

> Every would-be despot has found it necessary to silence the tongues of his country's lawyers. For this, brethren of the Bar, is our supreme function— to be sleepless sentinels on the ramparts of human liberty and there to sound the alarm whenever an enemy appears. What duty could be more transcendent and sublime? What cause more holy?[18]

The Florida Report further notes: "[W]e are facing an issue [MDPs] which may forever transform the practice of law. The legal profession as we know it may never be the same. Our duty as sleepless sentinels cannot drown in the tide of change."[19]

Although the Task Force Report agrees that the core values must be protected, it did not conduct a careful analysis of the fundamental elements. Indeed, the Report hints at the real focus of the Task Force when it indicates that it was created "to look at the market forces and determine how to best preserve the important 'core' values of the legal profession."[20] Without any analysis, it states in conclusory fashion that "the core values of the profession could not be abandoned without abandoning our obligation to the public,"[21] and "MDPs can operate without jeopardizing the core values of the legal profession."[22]

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[18]Florida Report 5.

[19]*Id.*

[20]Task Force Report 19.

[21]*Id.*

[22]*Id.* at 2.

We think that the issue warrants a deeper analysis of the core values and ethical foundations that characterize the legal profession, and we find the Task Force Report to be incomplete in this regard.

Core values must be protected to insure that the public has the highest confidence in lawyers. Clients must be able to trust that lawyers will be their vigorous advocates, exercising independent professional judgment in determining what is best for them and protecting their confidences. Any modification to the Utah Rules of Professional Conduct that would significantly compromise these core values should not be adopted in the absence of a compelling demonstration of substantial benefits to the public and adequate safeguards that prevent serious core value erosion.

IV. Core Values and the Task Force Proposal

A. Loyalty. One thread that runs through the arguments of the MDP proposals, including the one currently before us, is that time has moved forward; the world has changed; and the legal profession must react and adapt to those changes. Surely this is a general truism with which we take no exception. But, it does not follow that *all* aspects of *all* systems must change simply because of the observable changes in some areas of human endeavor. There are—or should be—some immutable concepts and bench marks. Just as healing the sick is the basic underpinning of the medical professions, and Planck's constant *is* constant in particle physics, and parallel lines *never* meet in Euclidian geometry, loyalty is the *enduring keystone* of lawyers' relationships with their clients.

Although we have identified three primary core values, they are all interdependent and connect to client loyalty, which forms the nucleus of the attorney-client relationship and the foundation from which the lawyer's fiduciary duties and obligations emanate.[23] For example, client loyalty is directly related to the obligation to keep the client's confidences. It is also directly related to exercising independent judgment in providing advice, counsel and advocacy that best serves the *client's* best interests—not those of the legal system at large, not society in the main, and not even "truth and justice," but the interests of the *client.*

To be sure, the lawyer is an officer of the court—particularly the litigating lawyer, but this somewhat abstract duty is a general overlay that is only rarely inconsistent with the lawyer's fiduciary duty to the client. It is the complete trust and confidence that a client places in the hands of the lawyer and the assurance that the lawyer's fiduciary responsibilities will not be compromised that sets the responsibility of the lawyer apart from other professions.

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[23] *E.g.,* Restatement (Third) of the Law Governing Lawyers § 121, cmt. b (2000).

Much has changed since the days when Justice Cardozo wrote landmark opinions in the 1920s and 1930s, but we believe that his comments on client loyalty are as applicable today as when he wrote them in 1928:

> Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has become the attitude of the courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. . . .[24]

We subscribe to this view of the lawyer's loyalty and believe that the Task Force Report's recommendations would materially erode the bedrock principle of undivided client loyalty by putting into play external interests that are potentially inconsistent with this loyalty.

With that background, we consider the current version of the Rules of Professional Conduct. Although the word "loyalty" does not appear in any of the black-letter rules, it is, nevertheless, the central "driver" of the rules on conflicts of interest, Rules 1.7 through 1.12. The extensive treatment of conflicts in the Rules[25] is the practical manifestation of the importance of fostering and maintaining loyalty to clients and preventing lawyers from wandering away from that commitment. Rules 1.7 through 1.12 and their predecessors in the Code of Professional Responsibility serve to implement the lawyer's fiduciary duties as an advisor and advocate who is loyal to clients. Indeed, the comprehensive group of conflicts rules has the singular purpose to guarantee, as far as possible, that the lawyer's loyalty is not diverted, diminished, inappropriately shared or otherwise compromised.

The Utah Court of Appeals has recently described the effect of a divided loyalty:

> An attorney's failure to provide undivided loyalty to a client does not necessarily mean than an attorney has performed legal services negligently. Instead, an attorney's failure to provide undivided loyalty to a

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[24]*Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, J.) (citing *Wendt v. Fischer*, 243 N.Y. 439, 444 (1926).

[25]As well as the countless number of judicial and bar-association opinions on conflict-of-interest issues.

> client means that an attorney has performed legal services outside the scope of the authority granted by the client . . . . Legal malpractice based on negligence concerns violations of a standard of care; whereas, legal malpractice based on breach of fiduciary duty concerns violations of a standard of conduct.[26]

B. Independence of Judgment. The ability of an attorney to give objective, unbiased legal advice is a critical element of the attorney-client relationship. This does not provide a good fit with a broad approach to MDPs that will involve non-lawyers who have competing financial and professional agendas.

We generally agree with the Arizona Report, which puts particular value on independence of judgment:

> The "core values" are the lawyer's duty of undivided loyalty to clients, the duty to hold client confidences inviolate, the duty to represent clients competently, and the duty to avoid conflicts of interest. While these important values have served the profession well, perhaps the most important characteristic of the legal profession is independence.[27]

The Florida Report also stresses primarily the independence of lawyers, calling "independent professional judgment" the "most essential core value of our profession."[28] The Florida Bar recommended to the ABA that it make no change to the Model Rules of Professional Conduct to permit MDPs without additional studies that demonstrate "that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty."[29]

Both the Arizona and Florida Reports analyzed the importance of protecting the independence of lawyers in the context of MDPs, and both concluded that MDPs would undermine their independence. As the Arizona Report states:

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[26] *Kilpatrick v. Wiley, Rein & Fielding,* 909 P.2d 1283, 1290 (Utah App. 1996).

[27] Arizona Report 1. *See also* L. Harold Levinson, 41 Vand. L. Rev. at 802-03, discussing situations under which the combination of the lawyer's multiple duties and self-interests under the current ethical framework may impair his ability to render objective advice in the best interests of the client entity as a whole. The difficulty multiplies when the lawyer must factor in the interests of the non-lawyer owners who have no allegiance to the ethics of the legal system.

[28] Florida Report 20.

[29] *Id.* at 19.

> At minimum, independence has been of immeasurable value to this country for well over two hundred years. Lawyers have faithfully honored the obligation to exercise their professional judgment in determining what is in the best interest of their clients. Clients view lawyers as champions of their rights, who will perform that function unfettered and unswayed by extraneous personal, social and economic influences. It is that independence that gives clients confidence that lawyers will serve their interests competently and vigorously, and preserve their confidences.[30]

The Florida Supreme Court addressed the issue directly in *The Florida Bar v. James*, where an attorney had affiliated with non-attorneys for the collection of bad debts. The Court stated: "The record in these cases documents the disastrous results that occur when a practicing member of the Bar enters into a profit-making enterprise with a commercial business which subordinates the practice of law to the activities of the commercial business."[31]

In order to insure that competent legal advice is given by qualified persons, an attorney needs to be able to hire, fire, supervise and train the personnel. The Task Force Proposal indicates that it may be necessary for the legal community to allow other professions to have the controlling interest in any such endeavor because of the rules those professions maintain. If the attorney does not have the control, it is likely that the attorney also will not be able to insure that the Rules of Professional Conduct are followed. Proponents argue that the attorneys would still be subject to the Rules, but that argument fails to recognize that other persons in the MDP would not be.

The legal profession is already having a difficult time maintaining credibility with the public. Allowing broad-ranging MDPs would only exacerbate the problems. The lines of responsibility between lawyers and their clients would be blurred, and the ability to protect the public from poor legal representation would be still more difficult.

C. Confidentiality.

1. *The MDP Proposal and Rule 1.6.* As we have noted, the lawyer's near-absolute duty to protect client confidences is essential to the proper fulfilment of the lawyer's fiduciary obligations.[32] Accordingly, any systemic proposal of the type ad-

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[30]Arizona Report 1.

[31] 478 So. 2d 27, 28 (Fla. 1985).

[32]The circumstances under which a lawyer may disclose a confidence are very tightly circumscribed. Rules 1.6(b) and 3.3(b) provide only the narrowest of exceptions for cases where the balance of interests tips in favor of public safety and welfare or the proper administration of justice.

vanced in the Bar Petition must be analyzed with the inquiry: Will this proposal materially diminish a client's expectation of complete confidentiality of the relationship with the lawyer and any associated legal team? The Committee believes that the MDP Proposal's treatment of this critical area demonstrates the major damage to the basic system of American legal representation that would result from adoption of the Proposal. Indeed, the Proposal takes a remarkably nonchalant approach to this key consideration:

> Confidentiality of client communications allows the lawyer to collect the information required to render effective legal service. This rule should remain in place, but the interpretation of its scope should be expanded to include MDPs.[33]

Accordingly, the Task Force suggests no change to Rule 1.6, but recommends that one paragraph in the Rule 1.6 Comment be amended as follows:

> Lawyers in a firm may, in the course of the firm's practice and when appropriate to the proper representation of the client, disclose to[~~each other~~] other members and employees of the firm information relating to a client of the firm, unless the client has instructed that particular information be confined to specified[~~lawyers~~] persons. When the lawyer practices in a firm that offers legal and non-legal services, the lawyer should disclose to the client that information may be disclosed to non-lawyer members of the firm.[34]

Adoption of this innocuous-looking modification would produce a sea change in one of the bedrock tenets of the attorney-client relationship. It would make available to non-lawyers in the MDP firm attorney-client information that would escape the jurisdiction of the comprehensive self-policing procedures that regulate lawyers' ethical behavior.[35]

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[33]Task Force Report 16.

[34]*Id.* at Attachment A, page 2 (deleted material lined out in brackets; added material underlined).

[35]*See* UTAH RULES OF PROFESSIONAL CONDUCT, Preamble:

> The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the processes of government and law. . . . The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the Bar.

And, we might add, ". . . nor the maximization of wealth of law firms and their lawyers."

First, the reference to “firm” in the MDP Proposal is no longer to a “lawyer or lawyers in a private firm,” as it is defined in the Terminology section of the current Rules of Professional Conduct. Rather, the Proposal recommends that “firm” be expanded to include “any partnership, corporation, joint venture, or other business entity that performs legal services for any person other than the firm.”[36] Thus, “firm” would include an MDP consisting of both lawyers and non-lawyers of countless varieties.

Second, the current version of the Comment to Rule 1.6 permits lawyers in a law firm to disclose client confidences to each other. The Task Force Report, however, provides that confidential client information may be disclosed to non-lawyers in the MDP—members and employees alike. This would permit disclosures to persons (a) who are not bound by the Rules of Professional Conduct to protect confidential client information, (b) who are not subject to discipline by the courts, (c) who are not entitled to use the attorney-client privilege to protect this information, and (d) who may jeopardize the confidentiality and, thus, the unique relationship between lawyer and client that encourages clients to seek, and enables lawyers to render, sound, independent, confidential legal advice.[37]

Confidentiality of information is nearly all-encompassing. Even some lawyers have difficulty understanding that Rule 1.6 deals with *all* “information relating to representation of a client,” not just attorney-client communication or attorney work-product that is subject to evidentiary protections. How difficult will it be to extend the client’s entitlement of blanket confidentiality protection to accountants, engineers, real-estate agents, stock brokers and others who are under no legal or disciplinary obligation to observe this fundamental constraint?

In *Trammel v. United States*,[38] the U.S. Supreme Court discussed the importance of the priest-penitent, lawyer-client, and doctor-patient privileges. “The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.” And, further: “These privileges are rooted in the imperative need for confidence

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[36]Task Force Report, Attachment A, page 1.

[37]One Utah lawyer who submitted comments on the Proposal observed: “If I hire an accountant and bring him to a meeting with my client, I know how to keep his presence from constituting a waiver of the privilege. If the accountant is my partner who performs audit services for the client, I’m no longer able to assure the client that the accountant can’t be forced to testify.”

[38]445 U.S. 40 (1980).

and trust."[39]

MDPs would unduly threaten confidentiality. We concur with the Florida Report:

> The MDP model has been built on an underlying assumption that the bundling of services creates efficiency and efficiency creates savings. Part of this efficiency and savings is found in the notion that clients can simply walk down the hall from one professional to the next. The client will have economy through the ability to speak with multiple professionals at once and there will be a reduction in "up to speed time" or knowledge of various aspects of the client's problem. In the context of any other profession, this may be wise, efficient, and even advisable. In the context of the legal profession, it is not possible without substantially threatening the protections afforded by the attorney client privilege and duties of confidentiality.[40]

The Task Force Report attempts to patch up this serious breach in the historical attorney-client relationship by recommending that the lawyer *should* (but not "must") disclose to the client that information may be disclosed to non-lawyer members of the firm.[41] Such a toothless remedy could not conceivably counterbalance the fundamental change that this would bring about.

As the Arizona Report aptly notes, "the duty of confidentiality and the attorney-client privilege function together to encourage the free exchange of information and to promote the administration of justice." If the lawyer simply discloses to the client the "differences in protection that the client's communication may receive," it would be "less likely that clients would confide sensitive information to their lawyers."[42]

It is almost unthinkable that one of the basic underpinnings of the well-developed fabric of American jurisprudence would be swept away in such a cavalier fashion. The Task Force's Proposal would seriously compromise the sanctity of client confidentiality. The relative certainty and predictability of the confidentiality protection is essential to the public's confidence in the legal system. Justice Rehnquist had it exactly right when he wrote in the oft-quoted *Upjohn* case:

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[39]*Id.* at 51.

[40]Florida Report 22.

[41]Task Force Report, Attachment A, page 2.

[42]Arizona Report 9.

> But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. *An uncertain privilege*, or one which purports to be certain but results in widely varying applications by the courts, *is little better than no privilege at all*.[43]

To paraphrase this in the current context: "Uncertain confidentiality is little better than no confidentiality at all."

2. *The Role of "Walls."* One of the MDP rejoinders to this argument is, "We can erect computer 'firewalls' and traditional 'Chinese Walls' to solve these problems." But, that reduces their proposal to a near-nullity relative to the current treatment of confidentiality. To protect confidentiality within an MDP by such devices as firewalls within a firm's computer information system, restricting access to client files by the use of special passwords, and physically separating the lawyers from the non-lawyers, assistants, paralegals, and secretaries would negate one of the alleged major justifications for MDPs—the efficiency that leads to savings.[44] Indeed, MDPs could even *increase* the cost of asserting the privilege, because each communication would have to be shown to have been for legal and not business advice.[45]

3. *Role of Accounting Firms.* Because one of the primary moving forces for the adoption of MDPs comes from the major accounting firms, we look specifically at the lawyer's core value of confidentiality relative to the CPAs' professional duties. What we find is a major conflict of principles that could only be resolved by an abdication of confidentiality obligations by the legal profession.

Although CPAs have certain responsibilities to their clients, they have a contemporaneous obligation to individual shareholders and the public at large in connection with their corporate audit function. This pulls them in a fiduciary direction that is not aligned with that of the client's lawyers.

A short, but insightful, article in the *Journal of The American Bar Association* articulates this basic disconnect between the two professions: "[W]hile lawyers are ethically obligated to keep a client's dirty laundry out of sight, the SEC requires accountants

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[43]*Upjohn Co. v. U.S.*, 449 U.S. 383, 393 (1981) (emphasis added) (Rehnquist, J.).

[44]*See, e.g.,* Task Force Report 9-10.

[45]This is not an insignificant consideration. The corporate-counsel setting provides an analog: The in-house lawyer who also has non-legal duties must spend extra effort and resources to make sure that the attorney-client privilege is preserved when wearing a legal hat, *vis-à-vis* a managerial cap.

to hang it on the line for all to see."[46] In simple terms, the lawyer's undivided loyalty to his client and the commitment to confidentiality are fundamentally incompatible with the CPA's obligations to provide information about his clients to the world at large.

Norman S. Johnson, former President of the Utah State Bar and SEC Commissioner, has provided the Committee with additional insight in this regard:

> Auditors of public companies are watchdogs for the public—they owe their preeminent loyalty to the shareholders and to investors generally, not to their audit clients. By contrast, lawyers have quite different duties and obligations. Attorneys owe their primary allegiance to their clients, whose interests they must zealously advocate. You can be sure the SEC will steadfastly oppose any initiative that would permit a single firm to provide auditing and legal services to the same client[47]

In short, confidentiality is a core value of the legal profession. Its protection must be all but certain. Disclosing confidential information to non-lawyers, even with the client's consent, would create uncertainty about the protection of the information and make it more expensive to assert the privilege. The privilege may even be lost in cases where it would not otherwise be at risk. Access to lawyer-client confidences by non-lawyers would undermine this core value and would ill serve the client's best interests, the administration of justice and the interests of society at large.

V. Can Core Values be Protected Under the MDP Proposal?

The Committee has concluded that the short answer to this question is "No." The Task Force Report relies on what appears to be a minor modification of Rule 5.3 to protect the core values in an MDP setting. Under the Proposal, the black-letter statement of Rule 5.3 would not be modified *except* that the reference to a "partner in the law firm" would be changed to "lawyer in the firm," as follows:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
>
> (a) A ~~partner~~ lawyer in a ~~law~~ firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of

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[46] John Gibeaut, *MDP in SEC Crosshairs*, A.B.A.J., April 2000, at 16; *see also* Florida Report 26-27.

[47] Norman S. Johnson letter to Steven G. Johnson, May 31, 2001 (attached as Appendix D).

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 knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is (A) a partner in the ~~law~~ firm in which the person is employed, or has direct supervisory authority over the person, and (B) knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.[48]

But this is a change of major proportions, because "firm" under the Task Force Report would potentially encompass the financial interests of a profusion of non-lawyers over whom the lawyer, the Bar and the Supreme Court have no affirmative authority for enforcement or discipline.

Further, the MDP Proposal would make it explicit in the Comment to Rule 5.3 that "[a]part from this Rule [5.3], Rule 5.1 and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate" in an MDP.[49] This would allow non-lawyer MDP owners or officers to disclose confidential information despite the confidentiality obligations of the lawyers in the MDP.

The MDP Task Force implies that Rule 5.3 imposes precisely the same obligation on an MDP lawyer that he has in a law firm, and that Rule 5.3 should work equally well in an MDP. There are serious concerns that the obligations will *not* work within the framework of the proposed MDP. An MDP will combine professional cultures, unlike the rather narrow context of a law firm in which the Rules of Professional Conduct are the sole controlling authority and where the law firm culture is (or should be) of one mind on matters covered by the Rules. As discussed previously, perhaps the clearest example of a materially different MDP culture is the one that would be brought by CPAs, who are under obligation to discover and make public the financial details of their

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[48]Task Force Report 15, proposing modification to UTAH RULES OF PROFESSIONAL CONDUCT 5.3, *Responsibilities Regarding Nonlawyer Assistant,* as indicated.

[49]*Id.* 15-16. Rule 8.4(a) provides that it is professional misconduct for a lawyer to violate the Rules of Professional Conduct, assist another to do so, or do so through the acts of another. Rule 5.1 is the supervision-of-lawyers counterpart to Rule 5.3 for non-lawyer assistants.

clients, and that of lawyers, who are under obligation to protect information about their clients.

Add to such a combination of professional cultures persons not trained as lawyers who are expected to know when one or another culture applies, and the risks of failing to protect confidential client information increase. According to the Task Force Report, if the lawyer has "made reasonable efforts," but client confidential information is nevertheless disclosed, the lawyer cannot be disciplined nor, of course, can the non-lawyers, who are beyond the reach of the legal-discipline system. Thus, MDPs increase the risk that this core value of the legal profession would not be protected.[50]

VI. No Compelling Need for MDPs Has Been Shown

A. Introduction. The Committee has consistently taken the general view that it will recommend modifications to the Rules of Professional Conduct when there is a demonstrable need or a clear systemic or societal benefit without any material erosion of basic values of the profession. If there is no demonstrated need for, or clear net benefit from, such a change, then we believe that the Rules should not be modified.

The Committee has a history of being sensitive to the legitimate economic interests of Utah lawyers. When it can be shown that the core values of the profession will not be compromised, the Committee has not hesitated to accommodate those interests. For example, the Committee recently recommended liberalizing restraints imposed on the sale of law practices[51] and lifting the prohibition on lawyers' participation in for-profit referral services.[52] In view of its desire to accommodate economic interests, the Committee was particularly attentive, therefore, to claims that Utah lawyers would suffer

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[50]The Florida Report identifies a significant difference in the application of Rule 5.3 to law firms and MDPs. It notes that

> [I]n a law firm setting, each of these elements [of proof in a privilege assertion] is either easy to prove given the minimal number of non-legal professionals exposed to the information or are presumed because of the way a law firm setting is known to exist. When the lawyer is providing legal and non-legal advice or is in a setting where others provide such, the analysis will be more akin to an in-house counsel analysis. Each communication must be shown to have been for legal advice and not business advice."

Florida Report 24.

[51]Utah Rules of Professional Conduct 1.7 and 7.2(c) (2001).

[52]*Id.* 7.2(c).

a competitive disadvantage against MDP firms operating in states that have adopted MDP rules. However, we believe that it is unreasonable to jeopardize the core values of the profession to fend off a speculative, hypothetical competitive threat to the economic well-being of Utah lawyers.

MDP proponents presented the Committee with many creative alliances through which, it was claimed, lawyers could provide bundled services of one kind or another to clients. These ranged from lawyer affiliations with real estate agents, accountants, stockbrokers, and life insurance salesman, to truly novel affiliations of lawyers with health care professionals. All shared the common characteristic of putting at risk core values of the profession. None was accompanied by any demonstrable consumer demand. Time and time again the Committee returned to one question: Where is the demand for multi-disciplinary alliances? None was found.

The proponents of MDP have failed to demonstrate a need for the integrated multidisciplinary services that the Task Force Report's proposed rule revisions would allow. It is not sufficient to declare that permitting lawyers to form partnerships with accountants will provide efficiencies that will permit the client to pay less for better services. It may well be true that a lawyer's advice to a client may conflict with a course of action proposed by an accountant or a member of a calling with whom the lawyer might affiliate under an MDP rule. But, a client who may experience frustration and added cost caused by such a conflict is, more often than not, protected by and the beneficiary of this legal system that is the product of the lawyer's independence.

B. Analysis. In this section, we analyze the Task Force Report's claims and implications that there is a need or public demand (or both) for the reformation of the structure of law firms in Utah. This analysis is independent from the foregoing discussion of the fundamentals of the proposal in Sections IV and V and provides a separate justification for rejecting the Bar's Petition.

In basing its Petition on claims that there is both a need and a demand for a fundamental change in the American legal framework to permit MDPs, the Task Force Report has cited several factors that it claims establish that the Rules of Professional Conduct need to be changed to allow MDPs:

1. Advancements in technology
2. Concentration of financial services
3. Intent of CPA firms to expand into legal services
4. International competition
5. Client needs or demands
6. Major changes in the profession
7. Attorneys having priced themselves out of the middle-class market

In addition to the core-value analysis in the previous sections, we have examined the individual factors the Task Force has identified to justify the Proposal, and we conclude that a current need to change the Rules to allow MDPs does not exist.

1. *Advancements in Technology.* The Task Force points to the fact that many "do it yourself" kits for performing certain types of legal services are now available on the Internet. These kits and other information now readily available to consumers allow them to create divorce documents, bankruptcy documents, real estate closing documents, estate planning documents, and so forth. It is anticipated that the availability of this type of legal information will only increase in the future. In addition, more laws and regulations are now accessible via the Internet. This gives more people the opportunity to participate in legal research without the need for attorneys.

The Task Force fails to show how the fact of increased technology justifies the use of MDPs. With or without MDPs, technology will bring to consumers an ever-increasing amount of information and the ability to use that information to further their interests. MDPs will not change this fact.

Individuals have been allowed to represent themselves historically. Even with MDPs, they will continue to be allowed to perform their own legal services and to represent themselves, even in court, if they feel they have the skills and knowledge to do so, if it is convenient for them, and if they see a cost advantage.

The Task Force Report accurately points to the fact that this increased technology has the potential to help attorneys meet the needs of consumers for affordable legal services. But the Report also fails to show how increased technology illustrates any demand or need for MDPs. In fact, access to increased technology by attorneys cuts against the argument for MDPs. Through this increased technology, attorneys can perform legal services quickly and at a lower charge to their clients. They can communicate more easily with other professionals and with accountants, real estate brokers, insurance salespersons, engineers and others to assure that their clients obtain the best possible legal services.

2. *Concentration of Financial Services.* The Task Force claims that the repeal of the Glass-Steagall Act in 1999, which paved the way for mergers of banks and other financial institutions, justifies the existence of MDPs. If such financial institutions desire to offer to their customers a range of legal services, they could be subject to the types of problems that the Rules of Professional Conduct were intended to prevent. These problems include considerations of conflicts of interest, confidentiality, and the independence of the attorneys who represent the clients. This possibility of financial institutions offering a wide range of legal services is speculative, and does not support an argument that the Rules should be changed to allow MDPs. Even if such institutions offer legal services, the lawyers who perform the legal services will be subject to the constraints of the

Rules. The Task Force fails to show how the "phenomenon" of bank mergers compels a Rule change to allow MDPs.

3. *Intent of CPA Firms to Expand into Legal Services.* The Task Force suggests that the need for MDPs is in part driven by the desire of the large accounting firms to compete for their share of the legal marketplace. The Task Force has failed to cite evidence to support the allegations that the "Big 5 [accounting firms] employ large numbers of lawyers who currently practice accounting, but who could also shift to the practice of law when needed."[53]

In addition, the Task Force recognizes that the likelihood of the large accounting firms entering into the legal marketplace is unlikely because of the rules of the Securities and Exchange Commission. These rules prohibit audit accounting firms from having an interest in the public companies which they audit. The SEC's financial reporting policy states:

> A legal counsel enters into a personal relationship with a client and is primarily concerned with the personal rights and interests of such client. An independent accountant is precluded from such a relationship under the securities acts because the role is inconsistent with the appearance of independence required of accountants in reporting to public investors.[54]

Auditors must maintain their independence from their audit clients, both in appearance and fact. The auditor's independence is not an abstract ideal. It is a crucial part of our system of financial reporting. Auditors of public companies are watchdogs for the public. They owe their preeminent loyalty to the shareholders and to investors in general, not to their audit clients. By contrast, attorneys have very different duties and obligations. They owe their primary allegiance to their clients, whose interests they must zealously advocate.[55]

The rules of the SEC recognize this dichotomy. Section 210.2-01(c)(4)(ix)[56] of the Commission's regulations prohibits the provision of any audit services under circumstances in which the person providing the service must be admitted before the courts of a

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[53]Task Force Report 12.

[54]Codification of Financial Reporting Policies, Fed. Sec. L. Rep. (CCH) ¶ 73,268, at 62,903 (1982).

[55]One Utah lawyer submitted a comment that went to the heart of the matter: "If MDP went through, financial service firms would offer estate plans prepared by attorneys expected to market investments. The conflict of interest would be palpable."

[56]17 C.F.R. § 210.2-01(c)(4)(ix) (2001).

United States jurisdiction.

Section 10A of the Securities Exchange Act of 1934 (enacted as part of the Private Securities Litigation Reform Act of 1995) requires an accountant who has detected illegal acts during the course of an audit to take certain steps, including reporting the illegalities to the SEC if the issuer fails to take prompt remedial action.[57] An accountant who willfully violates Section 10A may be subject to civil penalties or even criminal prosecution. These statutes and rules cannot be reconciled with the attorney's duty to protect client confidentiality.

In addition, an accountant's knowledge of client confidences is routinely discoverable in civil litigation. The Task Force Report asserts that firewalls, physical separation and restricted access will suffice to protect a client's confidential information. Civil discovery rules can reach through these walls, bridge artificial physical separation and ignore restricted-access policies to get to the information. It has been said that there is no Chinese wall so high that a grapevine cannot grow over it. This old bromide appears to have modern application to the MDP proposals.

The Task Force is likely correct when it states that the rules and regulations of the SEC "have called into question whether audit firms will be able to expand into related lines of business."[58] Without serious restructuring of the "Big 5" accounting firms, this calls into question (1) whether they will have any interest in joining or forming MDPs, which was one of the original justification for MDPs, and (2) whether these firms can themselves provide legal services and take over the practice of law. In any case, there is no reliable information indicating that the Big 5 will restructure. On the contrary, Task Force representatives indicated to the Committee that the Big 5 firms may not be willing to abide by lawyers' advertising rules.

4. *International Competition.* The Task Force alleges that, because MDPs exist in several countries, Utah lawyers are placed at a competitive disadvantage. This allegation is based on the premise that a foreign MDP can perform certain services for a Utah client while a Utah company cannot. But, a foreign company is not allowed to perform legal services in Utah if that company is not licensed to practice law in Utah or its lawyers are not admitted *pro hac vice*. The Task Force did not submit any evidence that the existence of foreign MDPs has changed the competitive landscape for legal services in Utah. Rules prohibiting the unauthorized practice of law[59] can prevent this type of prob

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[57]15 U.S.C. § 78j-10B-1.

[58]Task Force Report 12.

[59]The Committee notes the uncertain state of the law caused by an inadvertent deletion of former Utah Code Ann. § 78-51-25 without enacting any corresponding

lem without the need to violate any international treaties. No treaty requires Utah to change its unauthorized practice of law rules, nor is there any evidence that Utah lawyers and law firms operate at a disadvantage relative to foreign law firms—either in Utah or elsewhere.

A related basis for the Task Force's MDP recommendation is that the U.S. legal profession must compete in the global legal market and that MDPs are necessary to allow it to do so. Even if global participation and competitiveness were conceded as sufficiently important as to justify a compromise of core values, the Task Force Report in no way established that MDPs are a necessary ingredient.[60] And, even further, where is it written that the legal system that supports the world's leading economic system should bend its long-established, well-developed legal system to compromise protection of clients and the general public in order to accommodate international mega-MDPs?

5. *Client Needs or Demands.* The Task Force claims that clients occasionally need advice from multiple disciplines. Under today's legal framework, without MDPs, attorneys meet with accountants, engineers, doctors, environmental consultants, investment advisors and a host of other experts and advisors on a regular basis in order to provide appropriate and complete advice to their clients. These meetings are as convenient as a telephone call or an e-mail message. This type of activity already occurs without the need to amend the Rules of Professional Conduct, and without the need to authorize MDPs. The Task Force Report contains no evidence that MDPs would significantly enhance the convenience for clients to obtain advice from multiple disciplines—whether coordinated or not, much less that they are necessary.[61]

Closely related to this point is the "one-stop shopping" argument that has been vigorously cited numerous times to the Committee as a justification for approving the

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replacement statute to prohibit the unauthorized practice of law. We assume this problem will ultimately be remedied, as a prohibition of the unauthorized practice of law is designed as a protection to the public at large.

[60]Perhaps practicing in an MDP is a *sufficient condition*, but the question is whether it is necessary. Other than to make categorical statements in this connection, the Report does not establish the necessity. Indeed, a great many U.S.-based law firms are actively engaged in international practice, with apparent success.

[61]The Committee borrows the "public convenience and necessity" standard from the regulatory law of public utilities and other public enterprises. Although it is not, strictly speaking, the legally applicable standard here, it provides a useful analog for comparison. Under such a regime, the Committee finds that the Task Force has not established that the public convenience and necessity warrant the adoption of MDPs in the form proposed.

formation of MDPs. We have probed this point and have concluded that this is, at most, a theoretical advantage. No evidence of consumer demand was provided in the Task Force Report or any comments delivered to the Committee, nor was there any demonstration of consumer clamor for this kind of service. Further, we have not even been convinced that the structures that the MDP proponents contemplate would produce lower-cost or more convenient one-stop shopping for a market basket of professional services.[62]

6. *Major Changes in the Profession.* The Task Force Report states that the ethical rules must change "to ensure that the practice of law doesn't become obsolete."[63] It cites as examples of changes the increased use of alternative dispute resolution procedures and forums, and the use of form documents such as wills, trusts and other business agreements. None of the examples cited by the Task Force are relevant to the analysis of the need for change the Rules of Professional Conduct. The Rules apply to the practice of law whether an attorney is practicing before a federal court, state court or administrative tribunal, or in an alternative dispute resolution forum. They apply whether an attorney is using a form document or creating a document unique to a client.

None of these changes cited by the Task Force will be affected if MDPs are allowed. Clients will continue to use alternative dispute resolution forums when they see it will be to their advantage. They will continue to use do-it-yourself forms, whether for convenience or cost, as long as they see that such forms are advantageous to them. MDPs will not change these situations.

The examples cited by the Task Force do not logically lead to the need for fundamental changes in the Rules of Professional Conduct nor the allowance of MDPs. The current Rules are sufficient to deal with the current changed circumstances.

7. *The Middle-Class Market.* We accept as true for purposes of this discussion that there is a body of citizens of modest economic means who cannot afford first-rate legal support. The Task Force Report cites this conclusion as partial justification for the formation of MDPs. Yet, neither the Report nor any of the oral and written comments

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[62]Equally as speculative, but perhaps equally as likely, is the subject of a comment submitted in response to the Task Force Report: "I also believe it will economically injure small firms and sole practitioners who are unwilling or unable to associate into their practices non-attorneys professionals." If that turns out to be the case, it is not at all clear that this would be in the public interest. Indeed, it seems contrary to the Task Force Report's concerns about providing services to lower- and middle-income users of legal services.

[63]Task Force Report 13.

presented to the Committee contains any evidence that these persons will gain relief from high legal fees or have access to other forms of low-cost legal services if MDPs are allowed in Utah.[64] There is no evidence that MDPs will decrease the costs of legal fees to any segment of the marketplace. The legal services will need to be provided by an attorney, whether that attorney is practicing in a law firm or in an accounting firm, or whether that attorney is practicing in a real estate brokerage. The Task Force Report simply has not established the need for MDPs to address any problem in this area.[65]

In summary, the Task Force Report raises several issues that may warrant attention or action by individual lawyers, by law firms or by society at large, but fails to establish any firm connection between those issues and the role of MDPs in addressing any of these areas. For these reasons alone, the Committee recommends that the Court reject the Bar Commission's request that the Court amend the Rules of Professional Conduct to allow MDPs in Utah.

VIII. Other Considerations

A. Impairment of the Court's Ability to Regulate and Discipline Lawyers. The Committee is also very concerned about the implications MDP may have for the Supreme Court's authority to regulate and discipline lawyers. Attorney James B. Lee, a former Bar Commissioner and current Chair of the Bar's Ethics and Discipline Committee, recalled that, before the enactment of the current judicial article to the Utah Constitution in 1984, legislation seeking to wrest regulatory authority over lawyers from the Utah State Bar and place it with what was then known as the Department of Business Regulation regularly found its way onto the agenda during the legislative session.[66]

Protests to the contrary notwithstanding, the creation of MDP firms would blur the regulatory boundaries between the legal profession and affiliated occupations. We believe this environment would inevitably invite the Legislature to renew its long-standing interest in exercising executive branch control over lawyers and, accordingly, blur

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[64]Not only were there no citations to formal studies or empirical evidence, we cannot even recall anecdotal evidence being offered to support the proposition.

[65]Neither the Task Force Report nor any spokesman for the MDP proposal submitted any evidence to establish that MDPs operating in other countries have improved or increased the availability of legal services to the lower and middle economic levels.

[66]It is also worth noting that the unauthorized practice of law is a public-protection problem that should be considered. The Bar's MDP Proposal would make a currently uncertain area of Utah law even more unpredictable, because of the difficulty of separating the practice of law engaged in by lawyers from what has previously been the unauthorized practice of law by non-lawyers.

the constitutional separation-of-powers boundaries. This prospect may be reason enough to reject the MDP Proposal.

MDP's composed of lawyers and others such as financial planners, insurance salesmen, real estate agents, stockbrokers and the like would likely serve to reignite or reinforce legislative efforts to remove the control of lawyers from this Court.

B. No Need to Be in the Vanguard. Many states that have looked at MDP proposals have adopted a wait-and-see attitude. Utah should do likewise. The Bar argues the Court needs to act now and approve MDP because, like it or not, MDP is here to stay. The Bar contends that by being in the forefront of the MDP movement, Utah will have an opportunity to shape, mold, and control MDP. Unfortunately, the Bar's MDP model does none of these things.

There is no justification for placing Utah in the front lines of the MDP debate.[67] If, over time, MDP firms prove to be as appealing to clients as their proponents claim, Utah will be in the advantaged position of being able to learn from the experience of states that have adopted MDP and may then fashion rules informed by actual experience rather than entrepreneurial imagination. In that regard, we agree with the observation of a Utah lawyer who submitted extensive comments analyzing the MDP Proposal: "There is no need to rush into a potentially disastrous alteration of the structure of the legal profession so that a relative few lawyers can prosper. There is no need for Utah to hasten to take the lead in what may turn out to be a stampede over a cliff."

We do not rely on our let's-not-be-first suggestion in our ultimate recommendation, but it is worth noting that the unanswered questions about the effects of such a major shift of legal philosophy might better be observed as other states undertake to approve MDPs of various stripes and strains.

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[67]The catastrophic effects of electric-power deregulation in California illustrates the potential peril of being first to act in uncharted territory. At least California regulators perceived that there was a critical need for some action, although they arguably took a wrong turn. Here, there is no such demonstrated critical need.

VIII. "MULTIDISCIPLINARY PRACTICE" IN ANOTHER CONTEXT: AN OBJECT LESSON?

Many argue that there is a "new paradigm"[68] that will govern the way in which legal services are provided, that—for their very survival—the lawyers must band together with other professionals who have fundamentally different allegiances, loyalties and standards to serve the users of legal services. This general argument sounds disturbingly similar to the recent proclamation of a new paradigm by the professionals, pundits, seers and media talking heads in the milieu of investing in computer-technology equity securities—i.e., the dot-com companies that flooded the investment scene for a relatively short time. When investors from the "old school" asked how it could be that all the old fundamental rules about sound investment being grounded in sales, revenues, earnings and cash flow were no longer applicable, the professionals who ostensibly manage clients' money and have their allegiances to their clients were quick to christen the "new paradigm" that did not require these things.

There may be no direct connection between this phenomenon and the Bar's MDP Proposal, but there is an important lesson to be drawn from the dynamics that characterize the recent rise and fall of the dot-com equity securities.[69] Here was an area where two groups of professionals held enormous power and ability to protect the interests of their respective client bases: the investment bankers, whose clients were the companies who desired to raise the maximum amount of capital; and the fund managers and brokerage firms, whose clients sought to maximize their return on the purchase (and sale) of equity securities.

In the mad frenzy of initial public offerings (IPOs), the professionals who had duties and loyalties to their clients put them aside and followed the money trail. Result: Many of those who staked their trust in the professionals lost. A recent article in *Fortune* magazine put it best: "Rather than raising the most money possible for the side they're supposed to be representing (the issuer paying the fat fee), investment firms use the IPO

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[68]Our apologies for the use of this currently fashionable, tiresomely overworked and often misused term, but the message of the MDP proponents appears to be precisely that: We are entering a new era in which the old reference frames of values have become outdated, outmoded and inapplicable to modern relationships—the "new paradigm."

[69]Although not directly connected, it bears observing that lawyers who have recently sold their services to some of the cash-poor dot-com companies in exchange for significant ownership interests through stock or stock options may have created significant conflict-of-interest problems, entirely without the complication of having nonlawyer business partners involved.

game to curry favor with their other major clients, institutional investors."[70] Instead of maximizing IPO capital, investment bankers routinely underpriced IPOs, the result of which was that fund managers, fund investors and secondary-market investors made (or had the opportunity to make) millions—actually, billions—at the expense of the entrepreneurs who relied on their investment bankers to maximize their capital intake.

If this admixture of several disciplines that have incompatible incentives, responsibilities and duties is an exemplar of the "new paradigm," then the lawyers should have no part of it. The proponents of MDPs will respond that "this will never happen to us; we're different; we will protect our clients; we can handle the competing interests." But, that was what the investment bankers, institutional investors and brokerage firms said.

IX. RULES THAT WARRANT FURTHER CONSIDERATION.

Because the Committee believes its task was to evaluate the specific MDP Proposal that was submitted to the Court, we have not engaged in speculation of what lesser or different modifications of the Rules might be warranted to meet contemporary conditions without seriously compromising the core values of the profession.

The Bar's proposal is essentially open-ended, with few restrictions. It does little to mold, form or provide structure and public safeguards in potential MDP's. For example, unlike the approach of some other states, it places no limits on the type of professionals or non-professionals with whom a lawyer may form a partnership. Nor does it prohibit an MDP from offering legal and audit services to the same client, as have some other proposals, even though such an MDP would likely violate SEC regulations and place its lawyers and accountants in untenable positions vis-à-vis one another and their clients.

Additionally, the Task Force Proposal places no limitation on the ownership of MDP's. Some proposals have been premised on the requirement that lawyers must own a majority interest in the MDP.[71] The Bar's proposal specifies no such restrictions. Perhaps these variations merit further study. The Committee's only conclusion here is that the MDP Proposal filed by the Utah State Bar does not pass the test for providing adequate protection of the foundational elements of the legal profession and protection of

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[70] Shawn Tully, *Betrayal on Wall Street*, FORTUNE, May 14, 2001, at 85.

[71] For example, the Missouri Bar concluded: "If MDP's are allowed, they should be controlled by lawyers, meaning that lawyers should constitute at least 51% of the ownership of MDP's. Passive investment in MDP's should not be permitted." Report of the Board of Governors of the Missouri Bar on the Multidisciplinary Practice of Law 11 (June 30, 2000).

the public at large.

Nevertheless, we recognize that some of the existing parts of the Utah Rules of Professional Conduct impose restrictions on lawyers that do not directly address the fundamental commitments of lawyers to be loyal to their clients (and potential clients), to protect their confidences and property, and to provide them with sound, competent and independent judgment and advice. A few rules have been adopted to address these core values only indirectly, and they are legitimate candidates for a second look to decide whether, in their present form, they are currently necessary to serve clients' best interests and the public at large. Induced by the Bar's MDP Proposal, the Committee has initially identified the following portions of the Rules that may merit cautious reassessment.

Rule 5.4, *Fee-splitting restrictions.* The primary focuses of this rule are the prohibition on fee-sharing with non-lawyers [Section 5.4(a)] and the related preclusion of non-lawyer ownership interests in a law firm [Sections 5.4(b) and 5.4(d)]. Parts of Rule 5.4 speak directly to a prohibition on non-lawyers' directing or controlling the legal judgment of the lawyer. It may be possible to preserve these aspects without the full imposition of the prophylactic restrictions concerning non-lawyer participation. That is, the near-absolute preclusion of lawyers' and law firms' involvement with non-lawyers and non-legal business might be loosened while preserving the basic attribute of "independence of a lawyer" to render the best legal advice to the client.

Another way to look at it is that there is nothing inherently anti-client or anti-public-interest in a law firm's association with non-lawyers so long as that association does not compromise the lawyers loyalty to the client and his ability and inclination to render independent judgment on behalf of the client. The current rule may be overbroad in an effort to remove the temptations of outside influences. Perhaps there is another way to protect core values without imposing such blanket prohibitions.

Rule 5.3, "*Responsibilities Regarding Non-lawyer Assistants.*" To the extent that a law firm were to be allowed more flexibility in associating with non-lawyers under a modification of Rule 5.4, this rule might be suitably modified to take that into account.

Rule 5.5, "*Unauthorized Practice of Law.*" A closer look at this rule should be undertaken in any event in connection with the ongoing consideration of multi-jurisdictional practice issues. But, it could also be reconsidered in connection with lawyers' ventures with non-lawyers.

Rules 7.1 through 7.4, "*Information about Legal Services.*" Here is another area that is not an intrinsic part of the core values of lawyering. It is designed to protect clients, prospective clients and the public at large from misleading information and from the undue influences and pressures that might be brought to bear by an overzealous lawyer. These rules offer another area for reconsideration in light of the general permis-

sion of advertising and dissemination of factual information. (For example, the general prohibition in Rule 7.4 on designating one's practice as "specializing in" a particular field seems somewhat artificial and unnecessarily restrictive.)

There may be other areas that deserve a second look, but the foregoing are the most obvious areas for possible "liberalization" to accommodate lawyers and firms who want to widen their practices to include non-lawyers in a limited, controlled fashion that is consistent with what has been denominated as core values of the legal profession.

X. CONCLUSION

For the foregoing reasons, the Supreme Court Advisory Committee on the Rules of Professional Conduct recommends that the Utah Supreme Court deny the Petition to Authorize Amendments to the Rules of Professional Conduct to Permit Multi-Disciplinary Practice, submitted by the Utah State Bar.

This recommendation is respectfully submitted this 27th day of September 2001 by the unanimous agreement of the voting members of the SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT:

Robert A. Burton, Chair
John A. Beckstead
Gary L. Chrystler
Karma K. Dixon
Royal I. Hansen
William R. Hyde
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Judge Ronald E. Nehring
Kent O. Roche
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