Agenda

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

January 14, 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
Update on meeting with Supreme Court		Steve Johnson, Nancy Sylvester
Rule 8.4 comment 3, and Standard 3	Handout	Simon Cantarero
Attorney advertising and multidisciplinary practice: Assignment of subcommittee	Tab 2	Steve Johnson
Rule 1.11 and Intern Policy: Assignment of Subcommittee	Tab 3	Steve Johnson, Nancy Sylvester
Comments on Military and Military Spouse Practice rules	Tab 4	Steve Johnson, Nancy Sylvester
Comments to RPC Rules affected by Licensed Paralegal Practitioners	Tab 5	Steve Johnson, Nancy Sylvester
Next meeting and monthly schedule options: • 3rd Mondays of the month: January and February holidays will affect this schedule • 1st Mondays of the month: September holiday will affect this schedule		Steve Johnson

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

Tab 1

MINUTES OF THE SUPREME COURT'S

ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

December 3, 2018

The meeting commenced at 5:01 p.m.

Committee Members Attending:
Steven G. Johnson, Chair
Gary Sackett (emeritus)
Tom Brunker
Simon Cantarero
Hon. James Gardner
Joni Jones
Amy Oliver
Austin Riter
Cristie Roach
Melina Shiraldi
Cory Talbot
Katherine Venti
Billy Walker

Daniel Brough (by telephone)
Tim Conde (by telephone)
Hon. Darold McDade (by telephone)
Hon. Trent Nelson (by telephone)
Padme Veeru-Collings (by telephone)

Guests:
None

Members Excused:
Phillip Lowry
Vanessa Ramos

Staff:
Nancy Sylvester

Recording Secretary:
Adam Bondy

I. Welcome and Approval of Minutes

Mr. Johnson welcomed the committee. He then introduced two new members, Cory Talbot and Melina Shiraldi, and asked all members to introduce themselves and their practice areas per rule. Mr. Johnson requested a motion on the prior meeting's minutes.

Motion on the Minutes:
Ms. Roach moved to approve the minutes from the October 22, 2018 meeting. Ms. Jones seconded the motion. The motion passed unanimously.

II. Update: Military Lawyers & Military Spouse Lawyers

Mr. Johnson reported on the progress regarding the rules for out-of-state military lawyers and military spouse lawyers. Those rules are currently out for comment.

III. Update: Supreme Court Standing Order 7/Rules 14-302 and 14-303

Judge Gardner reported for the Standing Order 7 subcommittee. Judge Gardner discussed the rule relating to judicial recusal upon informal referral, and noted that the judicial code already governs judicial recusal. The committee reviewed the current proposed language noting that referral does not form an independent basis for recusal. Ms. Sylvester noted that the proposed language was likely substantive and belonged in the rule itself. The committee made the following amendment to paragraph (a)(5):

> (a)(5) ~~Referrals~~ Submission of a complaint from a judge may be made by telephone. A judge's submission of a complaint does not independently form the basis for disqualification of the judge.

The committee discussed the order of the Board composition rules and the Board function rules.

Motion:
Ms. Jones moved to amend the proposed rule to add the language to paragraph (a)(5) and to place Board composition before the complaint submission process. Ms. Roach seconded the motion. The motion passed unanimously.

IV. *In re Discipline of Steffensen* and Rule 8.4 Comment [1a]

Mr. Johnson summarized the issues surrounding *In re Steffensen*, which addressed a problem with the way Comment [1a] is written regarding sanctions for a violation of Rule 8.4(a). Mr. Walker provided further explanation regarding the historical background of the rule and the problems that have arisen regarding the interplay of Rule 8.4 and Rule 14-604, which addresses appropriate sanctions under each 8.4 paragraph. Mr. Johnson directed the committee's attention to Rule 14-605 and how it connects with Rule 8.4. Judge Gardner and Mr. Cantarero noted that certain conduct such as fraud is not independent grounds for disbarment under the current formulation. Further discussion ensued regarding the effect of *In re Discipline of Steffensen* on Comment [1a].

The committee proposed the following change to Rule 8.4 Comment [1a], which tracks the language of footnote 21 in *Steffensen*, with the addition of new paragraphs (g) and (h):

[1a] ~~A violation of paragraph (a) based solely on the lawyer's violation of another Rule of Professional Conduct shall not be charged as a separate violation. However, this rule defines professional misconduct as a violation of the Rules of Professional Conduct as the term professional misconduct is used in the Supreme Court Rules of Professional Practice, including the Standards for Imposing Lawyer Sanctions. In this respect, if a lawyer violates any of the Rules of Professional Conduct, the appropriate discipline may be imposed pursuant to Rule 14-605.~~ Professional misconduct that falls under Rule 8.4(b), (c), (d), (e), (f), (g), or (h) cannot also fall under Rule 8.4(a) for the purpose of sanctions. Conduct that violates other Rules of Professional Conduct, however, falls under Rule 8.4(a) for the purpose of sanctions.

Motion:
Judge Gardner moved to propose to the Supreme Court an amended comment [1a] to Rule 8.4. Tom Brunker seconded the motion. The motion passed unanimously.

V. Retired Attorneys, Rules 7.1 and 7.5, and Ethics Advisory Opinion 18-01

Mr. Johnson raised the issue of whether attorneys serving in the Utah Legislature or who have retired may still appear on their firm's name. The question extends to all lawyers who are not practicing currently but who are eligible to be practicing. Ms. Shiraldi noted the key issue is whether the firm name becomes misleading. The committee had a long discussion about law firm trade names and the effect of a partner's death, retirement, or leaving a firm to start another and how that relates to whether a firm may retain the name of a former partner.

The committee proposed the following amendments to Rule 7.5 Comment [1]:

[1] A firm may be designated by the names of all or some of its members, by the names of deceased <u>or retired</u> 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 <u>or retired</u> 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 <u>who has</u> not <u>been</u> associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

Motion:
Ms. Venti moved to amend comment [1] to Rule 7.5 to clarify that retired attorneys' names may remain in firm names. Ms. Jones seconded the motion. The motion passed unanimously.

VI. Next Meeting

The next meeting is scheduled for January 14, 2018, at 5:00 p.m.

VII. Adjournment

The meeting adjourned at 6:47 p.m.

Tab 2

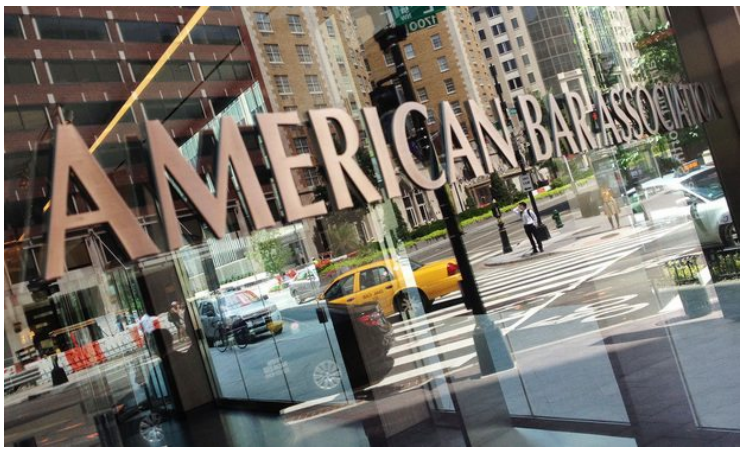
THE AMERICAN LAWYER

ABA Clarifies Rules on Lawyer Advertising (Sort Of)

At the ABA's recent national convention, a board of delegates voted to adopt a set of changes to model rules surrounding attorney advertising, a confusing ethical area for both Big and Small Law.

By Scott Flaherty | August 09, 2018

Changes that the American Bar Association adopted earlier this week to its model rules



(http://www.abajournal.com/news/article/model_rules_on_lawyer_advertising_to_be_mo regarding attorney advertising and business solicitation mark a significant step toward clarifying what has been a confusing area of legal ethics, said several lawyers who focus on professional liability issues.

But the new rules also stop short of addressing murky questions about attorney referrals that have arisen in the age of social media platforms, such as LinkedIn, and lawyer review websites, such as Avvo Inc. (http://www.law.com/legaltechnews/sites/legaltechnews/2018/01/17/avvo-acquisition-poised-to-grow-online-legal-services/), those lawyers added. And the practical impact of the updates will likely depend on whether and how quickly state bar associations follow the ABA's guidance.

The ABA House of Delegates (http://www.americanbar.org/news/abanews/aba-news-archives/2018/07/aba_house_to_conside.html)—a body of 601 members comprised of state, local and other bar associations and legal groups—voted Monday to adopt proposed changes (http://aba.pr-optout.com/Tracking.aspx?Data=HHL%3d8%2f34%3b0-%3eLCE580%3c%2f%3b%26SDG%3c90%3a.&RE=MC&RI=5030940&Preview=False&Distri to its model rules of professional responsibility that supporters believe will streamline a complex set of regulations surrounding lawyer advertisements.

The advertising updates were part of a larger set of proposals (http://www.law.com/americanlawyer/2018/08/06/aba-to-slash-dues-amid-membership-drop/) up for consideration during the tail end of the ABA's recent annual meeting in Chicago (http://www.law.com/americanlawyer/sites/americanlawyer/2018/08/02/avoiding-controversy-rosenstein-defends-rule-of-law-in-aba-speech/). The changes focused on model Rules 7.1 through 7.5 (https://www.americanbar.org/groups/professional_responsibility/publications/model_r parts of which have now been simplified and condensed, the ABA said. Ahead of the delegates' vote on the proposed changes, Lucian Pera, a litigation and dispute resolution partner at Adams & Reese (http://www.law.com/law-firm-profile/?id=1&name=Adams-and-Reese-LLP) in Memphis, who serves as governing council chair of the ABA's professional responsibility section, explained the proposal.

Lucian Pera

"They will focus enforcement on false and misleading ads," said Pera, according to a video of the ABA meeting (http://www.americanbar.org/news/abanews/aba-news-archives/2018/08/annual_meeting_201812.html). "And they will make it easier for lawyers to more effectively communicate to potential users of legal services how lawyers can identify and solve their legal problems—we call that access to justice. And many lawyers—especially younger lawyers—have argued to the committee that many current ad rules also hinder them from being innovative and from making a living."

Specifically, the updates would combine provisions concerning misleading statements into a single section of the model ethics rules and would provide further guidance on what lawyers might be restricted from saying in an advertisement or other communication, according to the ABA. The proposed update would specify, for instance, that communications about a lawyer's fee must also include information about whatever costs a client may have to pay, something that could affect lawyers who plan to offer a partial contingency fee structure that might result in a client paying some court costs.

Separately, the ABA tweaked the model rules related to referral payments, in which someone is paid for recommending a lawyer to a prospective client. Those payments are generally prohibited under the ABA model rules, with some key exceptions. The proposed update wouldn't substantively change the referral rules, but would create a new exception that allows for nominal "thank you" gifts "that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services."

Coming out of the ABA annual meeting, the Association of Professional Responsibility Lawyers (APRL), a Chicago-based group made up of more than 450 lawyers, law professors and judges, hailed the changes to the model rules.

"The first practical issue with the advertising rules is that they're just chaotic. Every state has different regulations, and they change and nobody really knows what they mean," said Holland & Knight (http://www.law.com/law-firm-profile/?id=145&name=Holland-%26-Knight-LLP) partner Allison Martin Rhodes, president of APRL. "Because the legal profession is much more of a national, if not global, enterprise, some simplicity in regulation was necessary."

Allison Martin Rhodes

Martin Rhodes, co-chair of Holland & Knight's legal profession team, explained that the process for updating the ABA's model rules in this area started a few years ago, with APRL playing a large role. The group penned a 2015 report (http://aprl.net/wp-content/uploads/2016/07/APRL_2015_Lawyer-Advertising-Report_06-22-15.pdf) on potential rule revisions, based on survey results and other input from the many state regulators in charge of enforcing legal ethics rules.

Generally, Martin Rhodes said, APRL learned through the process that the advertising rules weren't being enforced in a standard way across different state bars, if they were being enforced at all. The group also learned that, in a majority of cases, complaints to state bars alleging improper advertising were often coming from lawyers, as opposed to consumers of legal services. That second finding, in particular, was problematic because the advertising and solicitation rules were designed to protect clients from misleading claims by lawyers, not to provide a forum for disputes between lawyers competing against one another for business.

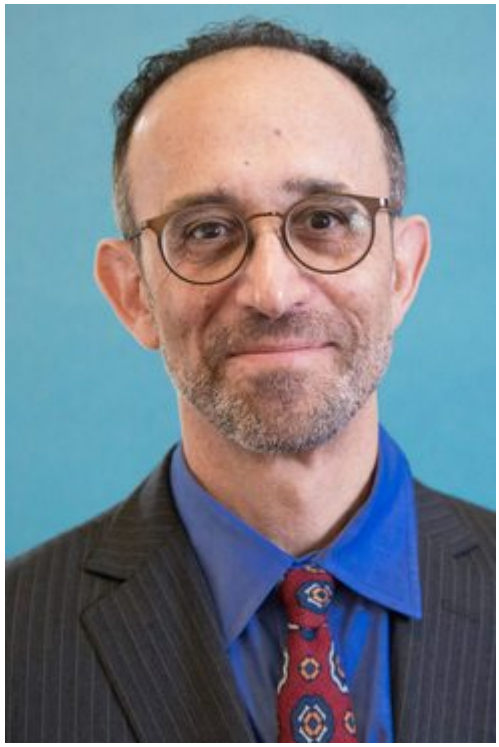
But Martin Rhodes said she believes the recently-approved ABA rule changes will help address the issue and return the focus to clients instead of competing lawyers.

"It will improve the regulator's ability to have a sensible enforcement protocol," said Martin Rhodes, who works out of Los Angeles and Portland, Oregon. "Client protection is our goal."

Martin Rhodes also noted another change in the model rules dealing with the in-person solicitation of clients. The ethics rules in that area have generally sought to tamp down on "ambulance chasing," where a lawyer approaches an unsophisticated consumer who may have just suffered an injury and tries to sign them up as a client.

Under the revised rules, the ABA now makes clear that those prohibitions on in-person solicitation don't apply in the same way to "sophisticated consumers of legal services, such as in-house counsel, risk managers and insurance adjusters," said Barry Temkin, a litigation partner at Mound Cotton Wollan & Greengrass who's also a member and past chairman of the New York County Lawyers Association Committee on Professional Ethics. That shift, Temkin added, aligns with common sense and the modern-day realities of maintaining a legal practice.

"This rule would simply reflect the reality on the ground in most jurisdictions," he said. "After all, the solicitation rules were designed to prevent ambulance chasing of unsophisticated lay persons, and shouldn't be applied to, for example, solicitation of corporate executives on the golf course, who presumably have the business acumen to negotiate with counsel and deflect hard-sell tactics."



Barry Temkin

While Temkin, Martin Rhodes and others said they believe the ABA updates will provide some much needed clarity and simplification of the rules, they both pointed to an emerging area in the legal profession that the ABA's ethics rules don't really address—namely, how the advertising and referral fee rules apply to social media networks or online lawyer review and

referral services like Avvo, which in July said it would discontinue its own legal services offering (http://www.law.com/2018/07/09/avvo-to-discontinue-controversial-legal-services-offering/).

As one example, Temkin said the new ABA rules don't directly answer whether a lawyer who promotes himself or herself on LinkedIn is engaging in attorney advertising that needs to be labeled that way.

"If a LinkedIn contact recommends a lawyer for a skill she manifestly doesn't possess, is that misleading advertising by the recommended lawyer?" said Temkin, giving another specific example of the kinds of questions still left unanswered. "The new ABA rules don't help resolve this issue."

Martin Rhodes said grappling with the kinds of issues that Temkin raised is likely the next frontier for another round of updates to the advertising and solicitation pieces of the ethics rules. In fact, she said, the future of the legal profession is the subject of APRL's next regular meeting, and she expects issues surrounding technology and fees to be at the center of the discussion.

"There are still restraints on what fundamentally is the Avvo model," Martin Rhodes said. "The debate that will continue to rage on will be the extent to which those businesses can receive remuneration … in a way that's tied to whether a lawyer actually receives a referral."

Another open question is how the ABA's model rule changes will trickle down to state bars, which actually enforce ethics rules. The states aren't bound by the ABA's model rules, but often use them as a guide for updating or creating their own state bar attorney licensing and disciplinary regulations.

Martin Rhodes said it's likely the adoption by state bars will take some time, and probably not all states will ultimately enact changes in line with the ABA's guidance. Nonetheless, she noted that Oregon, Washington and Virginia have already adopted

advertising and solicitation rules that do align with the ABA model, and she expects a number of states to follow suit within the next couple of years.

“I think you’re going to find widespread support,” Martin Rhodes said about the ABA model rule changes. Still, she added, “It’ll be a process in each state.”

The Attorney Advertising Rules Are Killing Us

By Megan Zavieh on August 16th, 2018

One of the most frequent excuses we hear for the glacial pace of innovation and problem-solving in the legal profession is that our ethical rules are too confining. Eric Cooperstein and Megan Zavieh propose to remove this last barrier and use this 4-part series to highlight the ethical rules that most desperately need updating. Excuses be damned, these changes would free lawyers to innovate, adapt, and, hopefully, bridge the gaping access-to-justice divide. This series focuses on updating the Rules of Professional Conduct that threaten the very future of law practice.

Introduction

There's plenty of talk about the future of lawyering. Artificial intelligence, machine learning, chatbots, and countless other disruptive technologies promise to change the practice of law as we know it.

But most lawyers head to the office each morning and clock into the same law practice they've always known. Threats presented by the future of lawyering seem remote, at best. Most feel powerless to do anything about these changes anyway, so they keep plugging along.

It's not likely these lawyers will power up their desktops one day and discover that their clients have magically disappeared. More likely, lawyers will slowly notice that their client base is shrinking and their revenues are falling. After further inquiry, they may find their prospective clients are being siphoned off by others, probably non-lawyers, and slowly realize they are ill-equipped to deal with the decline in business.

The challenge is to embrace innovation while simultaneously preserving the practice of law as a profession. Along the way, we may also tackle the access-to-justice gap. First, we need to reexamine the structures that stand between lawyers and innovation and talk about updating the Rules of Professional Conduct.

Laggards

A common complaint from lawyers who try to innovate their law practices is that some of our profession's ethics rules create roadblocks and lag the real world. They're right.

For example, other industries experimented with part-time and remote
before those practices infiltrated the law. Even then, when lawyers did

with virtual law offices and remote employees, some ethics regulators went into hyperdrive trying to preserve the old ways. To this day, New York as a "bona fide office" requirement that requires New York-licensed lawyers to maintain a physical office in the state if they want to handle New York legal matters, even if the lawyers are dual-licensed and live in another jurisdiction.

Do We Need to Update the Rules of Professional Conduct?

We, as technology-forward, innovation-friendly ethics lawyers, have a generic sense that the profession is trying to "do" innovation better. For example, lawyers are arguably better today than ever at appropriating technology and culture change from other segments of the economy. But while law firm cultures may be evolving at a speedier clip, innovation is thwarted by some old ethics rules.

Whether this is a good thing or a bad one is subject to some debate. Traditionalists maintain that ethics rules protect the public and mitigate risk through torpor. The futurists counter that protectionism is only a virtue if the thing it shelters from change is worth preserving in the first instance.

There can be no debate, though, that the system traditionalists seek to protect exacerbated, or, more likely, *caused*, the access to justice gap and our plodding advances in the delivery of legal services.

> *Anti-solicitation and advertising regulations are designed to not only protect the public but safeguard the image of lawyers. Nevertheless…access to justice is undermined by the legal profession's maintenances of ethics rules that keep the public uninformed of the importance and availability of legal services.*
>
> *—Milan Markovic in* Juking Access to Justice to Deregulate the Legal Market

It is time we update the Rules of Professional Conduct.

Among rules most ripe for change are those about marketing legal services to the public.

Attorney Advertising Rules Need Updating

There was a time, before 1977, when the rules prohibited lawyers from advertising their services. Legal advertising has come a long way in the last 40 years, but the rules still suffer from decades-long lag. These rules, written from their authors' patriarchal perches, were guided by one (perceived) truth: the general public is woefully unsophisticated and paralyzingly unable to survive exposure to

advertising. There is no evidence, however, that the public is as gullible as the rules and their drafters assume.

The public is not as gullible as the rules and their drafters assume.

ABA Model Rules 7.1 and 7.2 serve as the foundation for most states' advertising rules. And, at that base level, it makes some sense. They say, among other things, that lawyers can't make false or misleading advertisements or pay for recommendations and that every advertisement must include a name and contact details for at least one lawyer or law firm responsible for its content. But many states, viewing advertising as evil, have cobbled on onerous and sometimes bizarre restrictions.

For example, Florida requires lawyers to submit advertisements to the bar for review. You read that correctly: Florida has an office of lawyers devoted to pre-viewing and pre-approving (with a $150 fee per ad!) lawyer advertisements. Direct mail and e-mail, television and radio spots, yellow-pages ads (remember the yellow pages?), and internet advertising are all subject to review. Florida lawyers violate the rule if they have not submitted a proposed ad 20 days in advance. And they can only launch it if the bar approves. The Florida Bar publishes a 35-page book of advertising restrictions and guidelines.

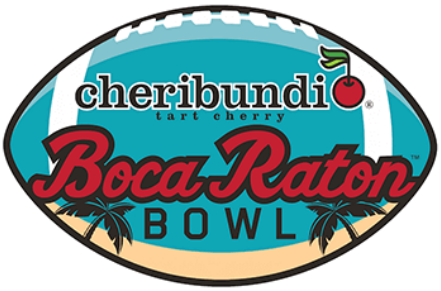
Imagine an attorney becoming aware of a pressing issue for a potential client, like an impending foreclosure or potential fraud. She could not send a letter to the potential client without waiting at least 20 days for the bar to review it.

In New York, lawyers must have detailed descriptions of routine services for which they advertise a flat fee available to the public at the time they publish the fee. New York also has particular requirements for approving and retaining all advertisements and "computer-accessed communications."

Texas, for its part, has severe and burdensome internet advertising rules, too.

Do these restrictions protect the public? It is hard to tell. At a minimum, no available empirical data *supports* these various limits. Worse, they very obviously hinder lawyers' ability and willingness to risk reaching people most in need of their assistance. And its cynicism is apparent: lawyers left unbridled will mislead the public and otherwise violate the rules.

The inherent fallacy is that the public cannot sift through advertisements. And it is nonsense. Turn on any major sporting event and the name of the game and the field on which it is played likely begins with an ad (*see, e.g.*, college football's *Cheribundi Tart Cherry Boca Raton Bowl*). Ride any high rise elevator and ads amuse its captives on high definition screens. Social media ads are ubiquitous. Radio disc jockeys read sound bites in a manner that suggests that they had *used* the advertised services, and public restrooms feature TV screens with a constant deluge of ongoing ads.



Some (most?) states have created rules about advertising. But those states have lagged, often dramatically, in editing and updating them. What rules apply to lawyers making YouTube videos, posting on Twitter and Facebook, and launching podcasts? Few regulators have addressed them, and lawyers are left petrified and paralyzed in the absence of any useful guidance. Those same lawyers are always aware of the regulators' prior peccadilloes, so they are unlikely to innovate for fear of scrutiny.

Some lawyers are creating videos for the public's benefit, and they're trying to navigate rules not designed to address video. Video-savvy lawyers look to ethics opinions about social media (to the extent *those* exist) to chart a course for video. But many are left to guess about how they should advance ethics regulators' patriarchy while also providing marketing materials to their future clients.

The lag between the technology adoption lifecycle and ethics regulators' prescience about lawyers' use of that technology in legal advertising is incapacitating and getting worse. Facebook surpassed 300 million active users in 2009. That is, a cohort of people roughly the population of the entire United States has been using Facebook for nearly a decade. For context, here are some things that didn't exist in 2009:

- iPads
- Google Chrome
- Pinterest
- Google Maps
- The Marvel Cinematic Universe

Amusingly, or *sadly*, depending on one's perspective, California was viewed as a forward-looking state when it issued its Facebook posting ethics opinion *three years later* in 2012. Most states have still not issued specific guidance on how lawyers can use social media ethically.

The problem is obvious: years after Facebook has gone entirely mainstream (and, arguably, begun its inevitable decline into obsolescence), millions of lawyers still have no fundamental guidance about how to identify themselves as being responsible for an ad there or, in the case of Twitter, how to post mandatory disclaimers in 280 characters.

Lawyers likely react to this regulatory framework in one of two ways. Most do nothing at all, leaving the world's most disruptive and powerful marketing channel ever invented to sit idly by as lawyers try to modernize their marketing and advertising and crusade for access-to-justice. The more adventurous ones guess and cross their fingers. To be sure, this is no way to run a self-regulated ethics system.

Recent "Progress"

A revolutionary overhaul of the advertising rules is long overdue. Some may even claim that an overhaul is imminent. After all, the ABA approved a resolution in August 2018 to revise the advertising rules. In our view, the changes do little to advance lawyers' ability to advertise in useful ways.

Rule 7.2 now allows lawyers to use "all media" (a change from "written, recorded or electronic communication, including public media"). In a nod to virtual law practices, lawyers can now designate *other* contact information on an ad instead of an office address. And lawyers can now send gifts of appreciation to referral sources.

Conclusion

To be clear, the ABA's resolution will not result in seismic shifts. Lawyers will still labor under self-imposed restrictions that hinder our reach to potential clients and worry professionals across the land. If anything, the ABA's revisions show how glacial, marginal, and incremental evolution cripples our profession. That is, while media and business change rapidly around us, we nibble around the edges of our old rules. That there was change at all feels like progress, perhaps, but we're only falling further behind.

Regulating lawyer advertising at a microscopic level is unreasonable and ineffective. Regulators should stop trying to control the nitty gritty of attorney advertising. They should take a higher-level approach instead and focus on existing rules that require lawyers to be honest and forthright when communicating with the public. Limiting regulation to an unambiguous, evergreen rule like that would unlock lawyers' creativity and give regulators all the ammunition they need to police our profession from troublesome advertising practices.

Last updated December 20th, 2018.

More Resources

Lawyer Advertising Rules

Page ID: 232581

David Nuffer (2431)
Utah State Bar President
Katherine A. Fox (5278)
General Counsel
Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111
Telephone: (801) 297-7047 – Fax: (801) 531-0660

IN THE SUPREME COURT OF THE STATE OF UTAH

In Re: Utah State Bar Petitioner.	Petition to Authorize Amendment of Rules of Professional Conduct to Permit Multi-Disciplinary Practice

THE UTAH STATE BAR (the "Bar"), by and through its President, David Nuffer, and its General Counsel, Katherine A. Fox, hereby petitions the Court to authorize amendment of the Rules of Professional Conduct to permit multi-disciplinary practice ("MDP"). Carefully tailored amendments would permit lawyers to participate in organizations or associations that provide legal services to others *and* also provide non-legal services that are ancillary to or separate from the legal services offered. This Petition is filed pursuant to unanimous vote of the Board of Bar Commissioners on January 26, 2001.

Regulation of MDP

Until 1928, MDP was permitted in the United States because no rule of attorney conduct prohibited management sharing, partnership or fee sharing between lawyers and other professionals. A model rule of professional conduct was adopted in the late 1920's which

prohibited non-lawyer ownership and management of firms providing legal service. This rule currently exists in Utah in the form of Rule 5.4 of the Utah Rules of Professional Conduct.

The ABA's Kutak Commission, formed in 1977 and reporting in 1981, recommended substantial modification of the rule prohibiting lawyers from alliances with other professionals, but the ABA House of Delegates rejected the proposal. In 1998, the ABA appointed a Special Commission on Multi-Disciplinary Practice which, after substantial study and many hearings, recommended these alliances be permitted. However, in July 2000, the ABA House of Delegates rejected the recommendation and dissolved the Commission. It should be noted that both study efforts, after extensive review, came to the same conclusion -- that it would be beneficial to lawyers and in step with societal changes to relax the regulations prohibiting partnering with non-lawyers.

Utah Study of MDP

In August 1999, the Bar appointed a Task Force to study MDP. The Task Force met with Bar members, presented informational sessions at Bar meetings and CLE seminars, and in November 2000 produced a substantial report which was distributed to every active bar member. The Bar relies heavily on the information, analysis and conclusions in the report which establishes the basis for filing of this Petition. The report analyzes the reasons for and against permitting MDP, summarizes the arguments, concludes that MDP should be permitted, and proposes specific rule changes which would implement the following key concepts:

- Lawyers should be permitted to participate, as other professionals are already permitted to participate, in MDP.
- Lawyers should be permitted to share management, ownership and fees with other professionals.

- Individual lawyers, regardless of the structure of the business in which they practice, are responsible for compliance with the Rules of Professional Conduct governing ethical behavior.
- Rules assuming the position of an individual lawyer in a "law firm" should be revised to reflect that a lawyer might practice in the context of a "firm."
- Advertising restrictions on lawyers which are inconsistent with other professions, should be relaxed.
- No new boards or compliance mechanisms are necessary to implement MDP.

Throughout the time MDP has been studied nationally and in Utah, substantial publicity has exposed Utah lawyers to the issues. Various articles regarding MDP, the Task Force's study and the issues MDP presents have appeared in the Utah Bar Journal (see Appendix 1) and in Utah's leading daily newspapers (see Appendix 2). Well attended CLE presentations have been made at every Annual and Mid-year Bar meeting since July 1999 (see Appendix 3). Members of the MDP Task Force and others, including former and current Bar Presidents, have spoken at various local bar, section and committee meetings regarding MDP. All these means have served to bring the issue to the forefront with Utah's lawyers and educate them on the issues.

A copy of the MDP Task Force Report (see Appendix 4) and an accompanying letter from David Nuffer, the Bar President, requesting feedback (see Appendix 4) were distributed to every active bar member and the comments the Bar received are included in their entirety in Appendix 5. The clear majority of the responses favor permitting MDP but some observations raise arguments against MDP which are worthy of consideration. The overall balance of the commentary, however, has persuaded the Task Force and the Commission that MDP should be permitted. The Task Force Report contains an analysis of the arguments raised against

permitting MDP and provides explanations why those criticisms do not prevail over the compelling reasons to permit lawyers to partner with other professionals.

The Task Force met after comments had been received from Bar members and others and after review and discussion, concluded that the comments did not alter their position endorsing MDP. A letter from the Chair of the Task Force, Michael D. Blackburn, to the Bar President which reported member comment stated:

> We have reported the comments verbatim in the order received without summarizing or responding to them. We did attempt to label the contents as pro, con, or neutral in order to indicate the general feeling of the Bar. Approximately two-thirds of all comments received were favorable, about 25% were unfavorable, and 8% were neutral.
>
> I have spoken in front of various Bar Association groups on the MDP issue over the course of the last 12 months. I would estimate approximately 15 different occasions speaking to a total of roughly 700 attorneys. Of these 700 attorneys, I would estimate 99% to be either in favor of MDPs or neutral. We received almost no negative comments during our presentations.
>
> The Multidisciplinary Task Force of the Utah State Bar Association recommends the approval of its report by the Bar Commission and submission of a Petition for Adoption to the Utah Supreme Court.

See Appendix 6.

The Bar Commission has studied and discussed MDP in several meetings. The Bar has also devoted substantial effort to the study of issues facing lawyers and legal institutions in the future. Commissioners are well informed of the MDP proposal and the risks and benefits it presents. On January 26, 2001, the Commission, in light of the preceding 19 months of debate and study in Utah as well as by a year of national debate and study, unanimously approved this Petition. The Commission is convinced that permitting MDP is in the best interest of the

profession and the clients it serves and that sufficient safeguards can be enacted to address problems.

The MDP issue does not stand in isolation. It is one of many rapidly evolving issues confronting the profession as changes inevitably occur in society. The response of the Bar, this Court and lawyers to the MDP proposal will presage the ability of the profession and legal system to adapt to change. MDP is a unique concept because it focuses on regulation of lawyer isolation, but this theme of isolation or adaptation will continue to reappear as society redefines itself to meet new challenges. It is important that the decision on MDP signal the direction the Bar should take in the future. MDP is the first of many coming opportunities to do more to serve people in different ways.

Relief Requested

Consistent with the Court's letter dated February 1, 2001, to Robert A. Burton Chair of the Court's Advisory Committee on the Rules of Professional Conduct, the Bar asks that the Advisory Committee's response be submitted by October 1, 2001 as a fundamental conclusion of the Task Force is the demonstrated need for timely action. The Bar also suggests that the Court's Advisory Committee share the experience, materials and input of MDP Task Force members who participated in the drafting of the report and proposed rule amendments and who are in contact with those drafting rules in other states which are proceeding to implement MDP. Specifically, Task Force member George Harris, a University of Utah law professor, has considerable knowledge in this area and Charles R. Brown, immediate past president of the Utah State Bar who appointed the MDP Task Force in 1999, are readily available to consult with the

Advisory Committee. The voluminous materials the Task Force has already assembled should be helpful to the Advisory Committee as it undertakes its consideration.

WHEREFORE, the Utah State Bar respectfully asks that after the Advisory Committee completes its study and recommendations, the Court authorize amendments to the Rules of Professional Conduct to permit multi-disciplinary practice. It is the Bar's belief that MDP, including legal service, will not disappear if we do not responsibly permit lawyers to participate; it will simply expand without lawyer involvement and court-sanctioned regulations.

Dated this 13th day of February, 2001.

David Nuffer
Utah State Bar President

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

Table of Contents

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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

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[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 non-lawyer 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
Steven G. Johnson
Judge Ronald E. Nehring
Kent O. Roche
Gary G. Sackett
Paula K. Smith
Earl Wunderli
Billy L. Walker (ex officio)

Received 4-4-02

IN THE SUPREME COURT OF THE STATE OF UTAH

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Amendment to Rules of Professional Conduct

No. 20010125-SC

ORDER

The court has before it the Utah State Bar's Petition to Authorize Amendment of Rules of Professional Conduct to Permit Multi-Disciplinary Practice.

IT IS HEREBY ORDERED that the petition is denied. However, the court expresses its willingness to reconsider its decision in the future in light of experience that may be gained from other jurisdictions dealing with the multidisciplinary practice issue.

The court expresses its sincere thanks to the members of the Utah State Bar's Multi-Disciplinary Task Force and the Supreme Court's Advisory Committee on the Rules of Professional Conduct for their work in studying and making recommendations on the multidisciplinary practice issue.

FOR THE COURT:

April 2, 2002
Date

Richard C. Howe
Richard C. Howe,
Chief Justice

Tab 3

Rule 1.11. Special Conflicts of Interest for Former and Current Government Employees.

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(a)(1) is subject to Rule 1.9(c); and

(a)(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(b)(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(b)(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which at the time the Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee:

(d)(1) is subject to Rules 1.7 and 1.9; and

(d)(2) shall not:

(d)(2)(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(d)(2)(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(e)(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(e)(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Comment

[1] A lawyer, who has served or is currently serving as a public office or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 In addition, such a lawyer may be subject to statutes and government regulations regarding conflicts of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(f) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(m) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

Effective November 1, 2017

Code of Personal Conduct 500 – Secondary Employment 500.11.2

11.2 Other employment and volunteer activities must not conflict with the interests of the courts ~~the agency or the State of Utah~~ or create the appearance of a conflict of interest.

11.2.1 As a limited exception to 11.2, an intern or extern working under the supervision of a justice or a judge may engage in other employment and volunteer activities that could create the appearance of a conflict of interest. This limited exception does not apply to any actual conflict of interest, including but not limited to the following:

11.2.1.1 If an intern or extern has worked or is working on a case or material issue currently before the court in the intern's or extern's other employment or volunteer work, the intern or extern, immediately upon discovering the conflict, shall notify the court and the court shall screen the intern or extern from the case or material issue.

11.2.1.2 If an intern or extern has worked or volunteered for, or is currently working or volunteering for, a law firm or entity that has appeared or is appearing before the court, the intern or extern, immediately upon discovering the conflict, shall notify the court, and the court shall screen the intern or extern from any cases involving that law firm or entity.

Tab 4

USB14-0804. Certification for military legal assistance lawyers. Amend. Updates the standards for military lawyers who are allowed by military and federal law to assist certain persons who can receive military legal assistance.

USB14-0805. Admission for spouse of active military stationed in Utah. New. Allows spouses of servicemen and women who are stationed in Utah to serve as practicing lawyers under certain conditions.

Summary: 52 comments in total; 47 comments support the rules as currently drafted; 5 comments (noted with *****) recommend either that the Bar's version of 14-805 be adopted or that the rule be revised in a way that better protects the public, particularly with respect to minimum competency.

Michael Mayfield

Yes, I support this rule.

Gregory N. Gunn

I also support this rule.

Marie Bradshaw Durrant

I support USB14-0805. Admission for spouse of active military stationed in Utah. This is a great idea and seems to have adequate protections to make sure both the attorney and the Utah public are well served.

Justin Toth

This is a great idea.

Ellen Toscano

I support these rules.

Jascha Clark

I fully support this rule. I think it is a laudable goal to help military families stay together and to minimize the adverse effects of military service on a spouse's legal career. We should join the other thirty-two other states that have adopted similar rules.

Kyle Witherspoon

I support this rule.

Liesel Stevens

I fully support this rule and ask that it be adopted.

Gregg Stephenson

I support these rules.

Bruce Olson

I support this rule and believe that the careful thought and protective features built into it will help maintain the high standards that our Court has established for the practice of law in this State. As one who spent 30 years in the active and reserve military, I am aware of the sacrifices our troops and their families make in our behalf and believe that this new rule is one small but important way we can recognize their contribution.

Jim Bullough

I support this rule.

John Carpenter

The military offers programs to assist military spouses in paying for a law degree. The rules of practice should allow that same military spouse to utilize that degree, with appropriate support, in other locations. A rule like this ensures a military family that is already asked to endure separation during active deployments will not be asked to make further hard decisions here at home for the sake of practice requirements. I support this rule.

AJ Green

I support these rules.

Matt Cannon

I support this rule.

Michael Creer

I think this is an appropriate rule to support our military families

John Hurst

I support this rule. Involuntary moves make it difficult for spouses to maintain good jobs. This will assist lawyer spouses in their moves to Utah.

Mary Westby

I support these rules.

Candice Pitcher

I support this rule.

Clark P. Giles

I support these rules.

Gregory Hoole

I strong support these rule changes.

Shelby Hughes

I support this rule and ask for it to be adopted. This will help military families stay together and to minimize the adverse effects of military service on a spouse's legal career. We should join the other thirty-two other states that have adopted similar rules.

Richard A Yoder, Jr Col USAF Retired

As a retired military member I am sure that there is a small population who would take advantage of this opportunity. Never the less, it is still the right thing to do.

Leland Slaughter

I support this rule. It is a good thing.

Dave Duncan

I support this rule.

Stephen Kilroy

Supporting military families by adopting this rule would be the right thing to do. I encourage the Utah Supreme Court to promulgate this rule.

Adam Richards

I support these rules.

Kristy Larsen

I support these rules.

BRYAN K BASSETT

I support these rules.

Paul N. Taylor

Fully support this rule!

Michael Robert Johnson

As an active attorney with 25 years in private practice I actively support this rule.

James Sorenson

Given the similar laws that other states have passed to help military families, I think Utah should adopt a similar rule and accordingly, I support these rules.

James S. Jardine

In my view, this is an appropriate accommodation for this circumstance, which the public would strongly support.

Aaron Hinton

I support this rule

Douglas M Monson

I also support this new rule, which will help support our veterans and their families.

Charles Livsey

On this Veterans Day I want to show my support for the adoption of this rule.

Elaine Monson

I strongly support adopting these rules.

Tom Hardman

I support this rule.

Justin Kuettel

I support these rules.

Michael Erickson

This is a thoughtful accommodation for military families, and I support its adoption.

***Steven T. Waterman and Daniel A. Jensen, Co-Chairs Utah Bar Admissions Committee**

We fully support the proposed amendments to USB14-0804, which are consistent with the proposal of the Admissions Committee of the Bar.

We fully support military families but believe that the proposed USB14-0805 goes too far and creates a lower standard of competence that is contrary to public protection. Those making comments may not be aware of the proposal made by the Admissions Committee of the Bar which balances benefits for military spouse lawyers with public protection.

The proposal made by the Admissions Committee provides ample concessions that other classes of practitioners do not receive while insuring the same level of competence of bar members. The proposal of the Admissions Committee permits military spouses to be admitted at one-half of the fee and with that amount applied against dues – which means all other applicants and members of the Bar subsidize the admission of military spouses – and is not provided to any other class of practitioners. One-quarter of all Utah admissions are based on motion or a transferred UBE score. The proposal of the Admissions Committee permits military spouses to be admitted by motion, by UBE score, or if admitted in a state without reciprocity or not offering the UBE, then by use of

a MBE score – a benefit not provided to any other class of practitioners. The proposed rule also permits practice under the military spouse rule to apply to full admission to the Bar, a privilege not granted to any other class of practitioners.

Permitting a lower level of competence as set forth in USB14-0805 is not justifiable as it does not protect the public. Either there is a standard of competence to practice in Utah or there is not. Other states with military spouse rules have a consistent competence standard. For example, the Connecticut rule states:

"(11) has not failed to achieve the Connecticut scaled score on the Uniform Bar Examination administered within any jurisdiction within the past five years."

Rules of the Superior Court Regulating Admission to the Bar, Section 2-13A (a)(11).

Offering the remedy of mandatory malpractice insurance does not cure incompetence. Nor does the Supreme Court or Bar have a system to monitor the malpractice insurance requirement. Having a dual competence standard as proposed will invite challenges by other worthy special interest groups.

It is possible to provide military spouse lawyers with benefits without sacrificing the competence requirement to protect the public.

Steven T. Waterman

Daniel A. Jensen

Co-Chairs Utah Bar Admissions Committee

Dominica Dela Cruz

I strongly support this rule. I am a military spouse, I was lucky enough to be able to go to school in Utah and take the Utah State Bar. However, not all military spouses are as lucky. This rule will allow military families to stay together and let the attorney spouse be able to practice in their chosen field.

Krystaly Koch

I fully support this rule. The families of our servicemen and women give up so much, including constantly moving from place to place. It is unrealistic to ask these spouses to take the bar in every place they move to. If this is one way we can support our military families, then we definitely should.

Alyssa Wood

I support this rule.

Blake Johnson

I 100% support these rules! This would help our military families so much. I can't think of any reason we shouldn't do this.

***Bryon Benevento**

As a former member of the US Navy, I support efforts to assist active duty military personnel. However, the current version of the rule for military spouses creates a slippery slope. There are a number of professions (such as medical) that serve rural areas of the country, and are required to move frequently. Should we allow their spouses to waive into the Utah Bar? Should we allow military spouses whose exam scores are lower than Utah's requirements to waive into the Utah Bar? Is legal malpractice insurance truly sufficient to address unreported acts of malpractice committed by lawyers who have competency scores below Utah's standards? I think the answer to these questions is No. I do not support this rule as currently drafted.

***D. Oberg**

While the overall concept behind this proposed rule is laudable, it raises client protection and equal treatment concerns in that it allows admission to the Bar for military spouses who have not satisfied minimum competency standards by earning a passing score on the bar examination (by Utah's standards). When considering the welfare of legal clients in Utah, it is difficult to conceive of a reason that military spouses would not have to meet the same competency standards required of every other applicant to the Utah Bar. While the other allowances in this proposed rule are workable, this concession creates concerns about differential treatment and basic client protection. The competency standards were imposed for a reason—and that reason applies equally to all who apply to practice in Utah. Competency should be a requirement, not an option, for all bar members.

Bret Bryce

I support this rule 100%. It only makes sense to join the vast majority of other states in supporting family members of our military.

Leilani Whitmer

I fully support this rule.

***M. Barnhill**

The goal of the proposed rule is commendable. We should support military families that are stationed in Utah, and Utah has already made it easier for lawyers from other jurisdictions to work in Utah. Each of those changes kept Utah's competency standards intact. The proposed rule does not. The proposed rule permits the licensure of individuals who would have lower bar exam scores than the cutoff established by the Supreme Court; therefore, those individuals have not met the minimum competency standard set by the Supreme Court. Thus, the proposed rule would subject the public who, by Utah's standards, are not minimally competent to practice law. The Supreme Court established minimum competency standards to ensure the public is served by counsel competent to serve their needs, and the proposed rule undercuts that

requirement. Additionally, the comment above is correct regarding equal treatment. Utah's competency standards should apply to all–a select few should not be exempt.

The proposed rule that attorneys admitted under this rule carry malpractice insurance is ineffective to protect the public. Not all members of the public will be able to prosecute malpractice claims, and insurance cannot cure all harm–such as ineffective assistance of counsel in a criminal case when an individual is wrongfully convicted because that person's counsel was not competent. The goal of the rule is a good one, and it is one we should work to realize. But we should not do so at the public's expense. The rule can and should be revised to meet the goal of allowing military spouses to practice in Utah while also protecting the public.

Neil Skousen

I support this rule. Our military service members and military spouses sacrifice much. This rule accommodation makes sense as service members are transferred to new assignments.

***S.J. Quinney College of Law**

The University of Utah S.J. Quinney College of Law fully supports the proposed amendments to USB14-0804, which are common sense improvements clarifying the importance of military legal- assistance lawyers. We urge the Utah Supreme Court to adopt this rule.

The College of Law acknowledges the important role of military families and welcomes this opportunity to lighten the administrative and financial burden placed on the attorney-spouses of our military members. However; we agree with the Admissions Committee of the Utah State Bar that the proposed USB14-0805 creates a lower standard of competence that is contrary to the best interests of the public. The Utah State Bar, in its role of protector of the public, has established that a minimally competent attorney should be capable of scoring a 270 on the UBE or the equivalent on the MBE. The vast majority of licensed-attorney military spouses will satisfy this requirement. Permitting a lower level of competence as set forth in USB14-0805 creates a risk to clients as determined by the Utah State Bar in the lengthy discussions culminating in the choice of 270 as the UBE cut-off. The reduced fees and simplified administrative regime described in USB14-805 are examples of the steps our community can, and should, take to welcome those who sacrifice so much in support of their servicemember spouses. However; we urge the Court to seek a version of the rule which reduces the administrative and financial burdens on military spouses while also maintaining basic fairness among all applicants to the bar and not undermining the public's confidence in the competence of the Utah Bar.

Erin Burke

I support these rules.

Tab 5

COMMENTS TO RULES OF PROFESSIONAL CONDUCT
AFFECTED BY LICENSED PARALEGAL PRACTITIONERS (NO COMMENTS)

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 have been no comments made on these rules as of January 10, 2019. Although the comment period lasts through January 27, 2019, we do not expect that they will receive any hereafter. It would be appropriate for the committee to recommend the rules' adoption to the Utah Supreme Court.