REPORT AND RECOMMENDATION OF THE DISTRICT OF COLUMBIA BAR SPECIAL COMMITTEE ON MULTIDISCIPLINARY PRACTICE

(THE VIEWS EXPRESSED ARE THOSE OF THE SPECIAL COMMITTEE AND NOT THOSE OF THE D.C. BAR OR ITS BOARD OF GOVERNORS.)

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REPORT AND RECOMMENDATION OF THE DISTRICT OF COLUMBIA BAR SPECIAL COMMITTEE ON MULTIDISCIPLINARY PRACTICE

The Committee and Its Assignments

The Board of Governors of the D.C. Bar formed this committee in August 1999 to study the recommendation of the American Bar Association Commission on Multidisciplinary Practice that restrictions on multidisciplinary practice be substantially relaxed. We were, first, to consider what position the D.C. Bar should take with respect to the ABA Commission's recommendation. We were also directed to consider whether the rules of this jurisdiction related to multidisciplinary practice should be changed.

In a report dated June 26, 2000, the committee urged that the D.C. Bar support the recommendation of the ABA Commission. Shortly afterward, despite support by the District of Columbia delegation, the ABA House of Delegates rejected the ABA Commission's proposal and disbanded the Commission.

Notwithstanding the action of the ABA House of Delegates, this committee and similar committees in other jurisdictions have continued to study the subject of multidisciplinary practice. After discussion and study of the subject for over a year, and after consultation with the Board of Governors, we issued a preliminary report on February 23, 2001, expressing our initial conclusion that restrictions on multidisciplinary practice should be substantially reduced and soliciting comments from interested sections and committees of the Bar, other bar organizations, and bar members. We then reviewed the comments we received, held further discussion, and now issue this final report and recommendation.

Summary of the Committee's Conclusions

After two years of study, our committee, like the ABA Commission before it, has come to the unanimous conclusion that lawyers and non-lawyers should be permitted to work together and share fees in the delivery of professional services without violating professional conduct rules. We are satisfied that such collaboration can take place within the same organization without sacrificing the core values of the legal profession and that prevention of such collaboration among professions is an unwarranted impediment to delivery of multidisciplinary services to the public.

Many lawyers and other professionals are already engaged in multidisciplinary practice, either on an *ad hoc* basis or, increasingly, in long-term contractual arrangements that enable practitioners of different professions to practice and promote their services in a coordinated manner. Nevertheless, Rule 5.4 of the District of Columbia Rules of Professional Conduct continues to forbid a lawyer to share legal fees with a non-lawyer except in very limited circumstances. By generally forbidding non-lawyers to share in legal fees, D.C. Rule 5.4 presents an obstacle to lawyers and non-lawyers who wish to practice their respective professions together in the same firm. Lawyers and non-lawyers can practice in coordinated and affiliated organizations, but usually not in the same organization.

D.C. Rule 5.4 does permit non-lawyers to be "partners" or "managers" sharing in the fees of a law firm if (1) the firm is devoted "solely" to legal practice, (2) the non-lawyer partners and managers agree to comply with the professional conduct rules of the legal profession, and (3) the lawyers in the firm agree to be responsible for compliance with those rules by their non-lawyer partners. The District of Columbia also permits lawyers to be involved in businesses "ancillary" to their legal practice if specific disclosures are made to potential clients. *See*

Rule 1.7, Comment 25. Although limited in their application, these provisions recognize in principle that shared ownership of a multidisciplinary professional practice is not unethical if lawyer independence is preserved and if clients are adequately informed and protected. It is also permissible for lawyers to work in organizations controlled by non-lawyers, such as business corporations, government agencies, and charitable and public service organizations, so long as no "legal fees" are charged and shared with non-lawyers.

Consistent with these existing rules and practices, this committee does not believe that it is contrary to public policy, nor should it be considered unethical, for lawyers to share legal fees with practitioners of other professions so long as: (1) clients and potential clients are fully informed of the fact of such collaboration and its possible consequences, (2) lawyers retain their independence, (3) lawyers and their legal practice remain subject to legal professional conduct rules, including, particularly, those related to conflicts of interest, protection of client confidences, and the provision of *pro bono* service, and (4) lawyers in multidisciplinary firms can effectively be held responsible for compliance with those rules. For these reasons, this committee unanimously recommends that the Board of Governors propose to the District of Columbia Court of Appeals that, subject to limitations necessary to assure preservation of the foregoing fundamental interests, the Court amend D.C. Rule of Professional Conduct 5.4 to permit lawyers to practice and share fees with non-lawyer professionals engaged with them in multidisciplinary practice.

Background

In August 1999, the ABA Commission issued a report recommending that ABA Model Rule of Professional Conduct 5.4 be revised to permit sharing of legal fees between lawyers and non-lawyers in a newly defined multidisciplinary practice entity called an "MDP."

An MDP would not have to be controlled by lawyers, but the report recommended that MDPs not controlled by lawyers be required to register with court authorities and to certify in writing that:

> (1) it will not directly or indirectly interfere with a lawyer's exercise of independent professional judgment on behalf of a client;
>
> (2) it will establish, maintain and enforce procedures designed to protect a lawyer's exercise of independent professional judgment on behalf of a client from interference by the MDP, any member of the MDP, or any person or entity associated with the MDP;
>
> (3) it will establish, maintain and enforce procedures to protect a lawyer's professional obligation to segregate client funds;
>
> (4) its members will abide by the rules of professional conduct when they are engaged in the delivery of legal services to a client of the MDP;
>
> (5) it will respect the unique role of the lawyer in society as an officer of the legal system, a representative of clients and a public citizen having special responsibility for the administration of justice. This statement should acknowledge that lawyers in an MDP have the same special obligation to render voluntary *pro bono publico* legal service as lawyers practicing solo or in law firms ….

The ABA Commission also proposed revision of Model Rule 1.10 to provide that a disqualification arising from a conflict "with any client of the MDP, not just a client of a professional services division of the MDP or of any individual lawyer member of the MDP," would be imputed to every lawyer of the MDP. A proposed revision of Rule 1.6 would have required lawyers within an MDP to assure that the MDP undertakes "reasonable efforts to ensure that [each] nonlawyer [participant in the MDP] behaves in a manner that discharges the lawyer's obligation of confidentiality." The ABA Commission also stated in its Report that ownership in the MDP "would be limited to members of the MDP performing professional services. It would

not be permitted for an individual or entity to acquire all or any part of the ownership of an MDP for investment or other purposes."

Shortly after the Commission issued its recommendations, the ABA House of Delegates adopted the following resolution:

> Resolved, that the American Bar Association make no change, addition or amendment to the Model Rules of Professional Conduct which permits a lawyer to offer legal services through a multidisciplinary practice unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients.

The House of Delegates' resolution placed the burden of persuasion on those advocating change to demonstrate that change will be in the "public interest" and will not compromise lawyer independence or loyalty to clients.

Subsequently, the ABA Commission continued to meet and consider the subject. It also solicited input from state and local bars and suggested consideration of possible alternative approaches. Of particular interest to this jurisdiction, in an Updated Background and Information Report and Request for Comments issued in December 1999, the Commission put forward the current District of Columbia Rule of Professional Conduct 5.4 as a model for possible consideration.

D.C. Rule 5.4 differs from ABA Model Rule 5.4 with respect to provision of multidisciplinary services. ABA Model Rule 5.4, as adopted in most states, provides that "(a) [a] lawyer or law firm shall not share legal fees with a non-lawyer …, [and] (b) a lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." The District of Columbia version of Rule 5.4 <u>does</u> permit lawyers and non-lawyers to share legal fees, but only if the following stringent conditions are met:

> (i) … [i]ndividual non-lawyer[s] … perform … professional services which assist the organization in providing legal services to clients,
>
> (ii) the partnership or organization has as its sole purpose providing legal services to clients,
>
> (iii) all persons having … managerial authority or holding a financial interest undertake to abide by the Rules of Professional Conduct,
>
> (iv) the lawyers who have a financial interest or managerial authority in the partnership undertake to be responsible for the non-lawyer participants to the same extent as if the non-lawyer participants were lawyers under Rule 5. 1, and
>
> (v) "the foregoing conditions are set forth in writing."

As the D.C. Bar's Board of Governors explained to the D.C. Court of Appeals: "This Rule rejects an absolute prohibition against lawyers and non-lawyers joining together to provide collaborative services, but continues to impose traditional ethical requirements with respect to the organization thus created." More precisely, the Rule permits sharing of fees with non-lawyers only in an organization engaged "solely" in the practice of law and only if traditional legal ethical requirements are applied to <u>all</u> participants in the enterprise.

The District of Columbia Rules of Professional Conduct also differ from those of most states in specifically recognizing and regulating lawyer participation in non-legal ancillary enterprises. Shortly after adoption of the D.C. Rules, some District of Columbia law firms formed affiliated enterprises providing lobbying, real estate, financial consulting and other services. This development led the Board of Governors to appoint a committee to study, among other things, whether the recently effectuated D.C. Rules of Professional Conduct should be modified to address lawyers' sharing in the fees and management of non-legal enterprises that provide services "ancillary" to legal services. After studying the subject, the committee proposed a new Comment 25 to Rule 1.7, relating to conflicts of interest, and the new Comment was

approved subsequently by the D.C. Court of Appeals. Rather than forbid lawyer participation in fees generated by non-legal work, the Comment requires that clients and potential clients be given sufficient information to decide for themselves how and by whom they wish to be represented as to both legal and ancillary non-legal work.

So far as this committee is aware, the greater permissiveness of the District of Columbia Rules has not resulted in any damage to the public or to the profession. It has also not led to a notable increase in non-lawyer partners of law firms. Failure to make greater use of this opportunity has been attributed both to the severe restrictions embodied in the D.C. rule and to the fact that other jurisdictions in which D.C. law firms might have or wish to locate offices are not comparably permissive.

In its December 1999 Report and in a subsequent February 2000 Postscript, the ABA Commission suggested that other jurisdictions might wish to consider adopting D.C. Rule 5.4 or a variant that would relax the "sole purpose" limitation by permitting non-lawyer partners in firms having the practice of law as "a principal purpose." The ABA Commission also suggested that non-lawyer partners might be limited to "professionals" and that control of the resulting organization might be confined to lawyers. In effect, this variant would permit firms managed by lawyers to offer other professional services but would <u>not</u> allow professional service organizations controlled by members of other professions to practice law. Alternatively, the ABA Commission suggested that organizations controlled by non-lawyers might be permitted to offer legal services, but, if they did, their legal services personnel should be organized into separate units supervised by lawyers.

The ABA Commission also recognized in its December 1999 Report and February 2000 Postscript that, in the District of Columbia and elsewhere, it is possible to create

arrangements for multidisciplinary collaboration without revision of current rules. Because the only barrier to the collaborative provision of legal and other professional services is the rule prohibiting non-lawyers' sharing in legal fees, it is possible to create arrangements in which lawyers and non-lawyers share in almost every aspect of their respective practices except in the lawyers' fees. The Commission identified the District of Columbia law firm of McKee Nelson Ernst & Young as sharing part of its name with an accounting firm, although the firm does not provide the accounting firm a share of its legal fees. Another District of Columbia firm, Miller & Chevalier, was identified by the Commission as having entered into a "strategic alliance" with the accounting firm of PricewaterhouseCoopers. The legal trade press has also reported an alliance between the law firm of Morrison & Foerster and KPMG, the merger of the money management practice of Bingham Dana LLP with Legg Mason, an investment firm, and the creation of investment and consulting affiliates by McGuire Woods Consulting and McGuire Woods. Therefore, if, as proponents suggest, there is demand for collaborative provision of legal and non-legal services, means short of single firm collaboration and fee sharing already exist to meet that demand.

It was in this context that in May 2000 the ABA Commission issued a revised Recommendation and Final Report. The ABA Commission's final Recommendation reads as follows:

> RESOLVED, that the American Bar Association amend the Model Rules of Professional Conduct consistent with the following principles:
>
> 1. Lawyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services (Multidisciplinary Practice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services.

> "Nonlawyer professionals" means members of recognized professions or other disciplines that are governed by ethical standards.
>
> 2. This Recommendation must be implemented in a manner that protects the public and preserves the core values of the legal profession, including competence, independence of professional judgment, protection of confidential client information, loyalty to the client through the avoidance of conflicts of interest, and pro bono publico obligations.
>
> 3. Regulatory authorities should enforce existing rules and adopt such additional enforcement procedures as are needed to implement these principles and to protect the public interest.
>
> 4. The prohibition on nonlawyers delivering legal services and the obligations of all lawyers to observe the rules of professional conduct should not be altered.
>
> 5. Passive investment in a Multidisciplinary Practice should not be permitted.

The full text of the Commission's Recommendation, Final Report and extensive appendices is available on the Commission's website at abanet.org/cpr/multicom. In those materials the Commission did not propose a single model by which lawyers should retain "the control and authority necessary to assure lawyer independence in the rendering of legal services." Instead, the Commission concluded that the ABA should not seek to "interfere with the states' ability to identify and enforce the particular structures that they determine are necessary to protect the interests of clients."

Although the ABA Commission concluded that the control and independence requirement "can be satisfied in a variety of ways," the majority of the Commission would not require "that there be [lawyer] majority ownership of an MDP." Instead, the Commission majority concluded that in a large MDP, "such as one including several hundred professionals in different disciplines, formal structures are certain to be needed." In such circumstances, the Commission would require

> (1) structuring the MDP so that the lawyers who are delivering legal services to the MDP's clients are organized and supervised separately from the MDP's other units (*e.g.*, business, technology, or environmental consulting services); and (2) establishing a chain-of-command in which these lawyers report to a lawyer-supervisor whose responsibilities include hiring and firing, fixing the lawyers' compensation and terms of service, making decisions with respect to professional issues such as staffing of legal matters and the allocation of lawyer and paraprofessional resources, and advising on issues of professional responsibility.

A minority of the ABA Commission would have gone further to require that "there be lawyer majority ownership of an MDP (or a supermajority, as any individual state might determine) and that a *primary purpose* of the MDP be the delivery of legal services." These Commission members described themselves as supporting a modified version of the existing District of Columbia Rule 5.4.

On June 26, 2000, shortly after the final ABA Commission Recommendation became available, this committee issued its first report, recommending, in substance, that the D.C. Bar support the Recommendation of the ABA Commission. Despite that recommendation, and support by D.C. Bar delegates, on July 11, 2000, the ABA House of Delegates, by a vote of 314 to 106, rejected the Recommendation of the ABA Commission, resolved to adhere to the current version of ABA Model Rule 5.4, and disbanded the ABA Commission.

Despite the action taken by the ABA House of Delegates, the issues raised by the ABA Commission did not die. State bar committees continued to study multidisciplinary practice and the barriers to it, and bar committees in several states and in several major cities have recommended, with varying limitations and restrictions, that multidisciplinary practice,

including sharing of legal fees, be permitted.[1] Nevertheless, to date, no state of the United States permits pooling the revenues of multidisciplinary practice in a single firm (except to the extent permitted in the District of Columbia), and several state bars have rejected any movement in that direction.[2]

This committee, likewise, continued to consider whether it should make a recommendation to change the existing District of Columbia Rule 5.4 and, if so, what changes it should recommend. Reflecting the results of that study, on February 23, 2001, the committee published a Preliminary Report and Request for Comments that was distributed to the various sections and committees of the D.C. Bar and to other bar organizations in the District of Columbia. The Report was disseminated over the D.C. Bar's website and publicized in the D.C. Bar's magazine distributed to all Bar members.

In its Preliminary Report, the Committee stated that it expected to recommend that D.C. Rule 5.4 be amended to permit sharing of legal fees among professionals engaged in

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[1] Bar committees reported on the ABA Commission website as recommending that at least some degree of multidisciplinary practice be permitted include those of the states of Arizona, California, Colorado, Georgia, Maine, Minnesota, North Carolina, Pennsylvania, South Carolina, and Utah, as well as the bars of New York County and San Diego County and the bars of the cities of Boston, Denver, New York, and Philadelphia. In the immediate vicinity, in 1999 the Maryland Multidisciplinary Practice Task Force recommended unanimously that multidisciplinary practice in firms owned and controlled by lawyers be permitted, but that recommendation subsequently was rejected by the Board of Governors of the Maryland State Bar. In Virginia, a committee to study and report on the issue has been formed but has yet to issue a report.

[2] Adopting a recommendation of the New York State Bar, the appellate courts of New York have ruled that, effective November 1, 2000, the state of New York, which led the fight against the Recommendation of the ABA Commission in the ABA House of Delegates, will permit multidisciplinary collaborations between law firms and contractually affiliated entities practicing other disciplines, but existing barriers to sharing of legal fees within a single organization will be maintained. Other state bars reported on the ABA Commission website as having determined to continue to prohibit multidisciplinary fee sharing include those of Arkansas, Florida, Kansas, Maryland, Nebraska, New Jersey, Oregon, Pennsylvania, Rhode Island, Texas, and West Virginia.

multidisciplinary practice, and it gave reasons for the committee's tentative conclusion. To focus comment, two proposed revisions of the existing D.C. Rule 5.4 were appended to the Report. One version permitted multidisciplinary sharing of fees only within an organization controlled by lawyers; the other did not require lawyer control.

Despite the controversy generated by this subject within the ABA House of Delegates, the committee's Preliminary Report and Request for Comments generated surprisingly little response. Two well-publicized public meetings scheduled during the D.C. Bar's annual meeting attracted fewer than ten attendees not members of the committee. The comments received were few in number. They consisted of a series of thoughtful suggestions and questions submitted by the D.C. Bar's Rules of Professional Conduct Review Committee; a request for information, without further comment, from the President of the British Columbia Law Society; a letter from the Chairman of the firm of Miller & Chevalier clarifying the nature of the strategic marketing alliance between that firm and an accounting firm; comments from an Assistant Professor of Law at Catholic University; comments from two individual members of the D.C. Bar supporting the view of the majority of the committee that multidisciplinary practice should be permitted without requiring lawyer control, and a comment from one other D.C. Bar member supporting greater freedom to engage in multidisciplinary practice limited to organizations controlled by lawyers. No comment opposed multidisciplinary practice in concept or supported the existing restrictions on non-lawyer sharing in legal fees.

The Committee's Recommendation

This committee has studied the work and reports of the ABA Commission and House of Delegates, the varying reports and recommendations of numerous other bars and academic and other commentators, and the comments and questions received in response to our

Preliminary Report. We have given particular attention to the suggestions and questions received from our sister body, the D.C. Bar Rules of Professional Conduct Review Committee. We have also consulted representatives of other bar organizations and have met and discussed the issues within our committee at monthly meetings held from September 1999 to the present. Based upon our study and consideration, the committee is unanimous in recommending that Rule 5.4 of the District of Columbia Rules of Professional Conduct be amended to be substantially more permissive of multidisciplinary practice and sharing of legal fees within a single multi-disciplinary practice firm.

We believe that rules can be devised to provide sufficient safeguards to permit multidisciplinary practice without sacrificing any of the core values of the legal profession or any protection of client interests now extant. In our view, users of legal services can be provided the opportunity to obtain professional services in a multidisciplinary setting without sacrificing the protection of the attorney-client privilege, jeopardizing the independence of lawyer professional judgment, or creating irresolvable conflicts of interest. The specific revision of D.C. Bar Rule 5.4 that we recommend be forwarded to the District of Columbia Court of Appeals with the support of the D.C. Bar Board of Governors is appended to this Report. We believe our committee's proposal satisfactorily addresses and in most cases incorporates the suggestions of the D.C. Bar Rules of Professional Conduct Review Committee.

Because so many other reports and articles have been written on multidisciplinary practice, and the ABA Commission's own Report is readily available, we have not attempted to recreate the entire debate on this subject. Those who wish to review that literature will find most of it, pro and con, at the ABA Commission website cited above. Our principal conclusions and the reasoning that has led us to them are as follows:

1. There is no effective existing barrier to the collaborative provision of services by lawyers and other professionals. The only existing prohibition is that barring cross-professional sharing of legal fees. That barrier has not prevented various contractual arrangements, such as those entered into by certain District of Columbia firms, and that model is available to be followed by others if additional demand for such multidisciplinary arrangements exists. It is common for lawyers to work in close collaboration with accountants, economists, environmental engineers, physicians, financial planners, social workers, architects and members of other professions, and that practice will continue whether or not the legal profession changes its rules of professional conduct.

To recognize the existence of multidisciplinary practice and deal with it in a forthright way would, therefore, square with reality. The debate over multidisciplinary practice is really not about whether multidisciplinary practice may exist. It already does. The real debate is about whether and how fees generated by multidisciplinary practice can be shared, what additional rules, if any, are required to assure that provision of legal services in a multidisciplinary context conforms to the core values and standards of the legal profession, and who should be permitted to control organizations that provide legal services to the public.

2. The bar should not create unnecessary incentives for legally trained professionals to avoid participation in the legal profession. Many law school graduates who are partners of or are employed by professional service firms are currently barred from practicing law because non-lawyers share in the fees generated by their services. Indeed, the movement of legally trained personnel into accounting and management consulting firms suggests that many individuals trained as lawyers want to share in the fees of other professions, just as members of other professions want to share in legal fees. Permitting multidisciplinary practice would allow

these law school graduates to practice law and thereby subject themselves to the legal profession's rules of conduct. Refusing to permit non-lawyers to share in fees generated by legal practice creates unfortunate incentives to narrow the definition of legal practice and thereby to deprive the public of the protections provided by legal ethics rules in dealing with many legally trained professionals.

3. Demand for multidisciplinary practice exists. Although we are aware of no quantitative measure of its extent, it is apparent from numerous sources that at least some demand for the provision of multidisciplinary practice exists. The ABA Commission website contains considerable evidence on the subject, and other surveys and reports support the same conclusion.[3]

It is also evident from testimony and statements submitted to the ABA Commission that this demand comes from individuals, small businesses, and the lawyers who serve them, not merely from large corporations. Proposals by accounting and consulting firms to offer multidisciplinary services to large corporations receive much of the publicity, but demand also exists among the practitioners and users of financial planning services, matrimonial and family law services, and in business formation, real estate, health care and other fields of practice having application to individuals and small businesses. There also is apparent demand for multidisciplinary practice with respect to environmental issues, insurance coverage, lobbying,

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[3] On the ABA Commission website, see, for example, the statements of George Abbott, owner of Aras Enterprises and an official of several small and family business associations; Theodore Debro, an official of a Birmingham, Alabama, community action agency; William A. Bolger, Executive Director of the National Resource Center for Consumers of Legal Services; Lora Weber, executive director of a southeastern U.S. coalition of consumer groups and small business owners; Wayne Moore, Director of the Legal Advisory Group of the AARP; Pam H. Schreider, Chair of the ABA Section of Real Property, Probate and Trust Law; Larry Ramirez, Chair of the ABA's General, Solo and Small Firm Section; Steven Bennett, General Counsel of Banc One Corporation, and numerous other written comments submitted to the Commission.

intellectual property, life sciences and biotechnology practice, and in other fields in which many District of Columbia lawyers are involved.

4. The bar should not ask the courts to create or preserve barriers to competition in the provision of professional services unless good reason, in the public interest, exists for doing so. The burden of persuasion should rest with those who would prevent free exercise of professional and consumer choice. We do not know to what extent lawyers will choose to practice in organizations including other professionals or clients will choose to obtain legal services from multidisciplinary entities rather than traditional law firms. Multidisciplinary service organizations may emerge as the wave of the future or simply as one of a number of vehicles for providing professional services, comparable to the provision by law firms of ancillary non-legal services. The relatively small number of cross-professional affiliations created to date, and the failure of those affiliations to sweep the field, suggest that many clients and potential clients regard the availability of "one-stop shopping" as only one of a number of factors to be considered in selecting providers of professional services, and not necessarily the most important one.[4] In any case, in our view individual providers and users of legal services should make the choice.

5. Choices among potential providers of legal services should be well-informed and freely made. To the extent that multidisciplinary practice might in any circumstances jeopardize protection of attorney-client confidentiality or independence of legal judgment, clients ought to know about it. Comment 25 to D.C. Rule 1.7, relating to provision of non-legal services

[4] A recent survey of 200 Illinois business owners and executives jointly performed by the Illinois CPA Society, the Legal Marketing Association, and Martindale-Hubbell suggests that demand for "one-stop shopping" for professional services is far from overwhelming. It is clear that some demand for multidisciplinary practice exists, but many business operators will continue to look for the best specialized services they can find. See icpas.org/icpas/business/MDP.

by separate organizations affiliated with law firms, already provides a model of the type of notice and some of the information that lawyers engaged in multidisciplinary practice in a single firm should provide their prospective clients. We believe that the notice to be provided prospective clients of multidisciplinary practice organizations should be no less informative, and the revised rule we have proposed addresses that issue. In particular, potential clients should be advised of any financial interest the lawyer has in services provided by the enterprise, that some of the enterprise's services are not legal services, that any intra-firm disclosure of client information to personnel not involved in the provision of legal services may create a risk that the attorney-client privilege will be treated as waived, and that alternative sources of legal services are available that do not present this risk. In the case of intra-firm referrals, the client should also be informed of the interests of the enterprise in the services to be provided.

In general, we do not believe that lawyers should be made responsible for the actions of non-lawyers in the conduct of professional activities other than law. Nevertheless, in the context of an organization providing multidisciplinary services that include legal services, we believe it prudent and appropriate for lawyer participants in the firm to make reasonable efforts to assure that clients of the organization receiving non-legal services do not mistakenly believe that they or the non-legal services provided to them are subject to the protection of legal conduct rules and legal privileges. For that reason, the proposed rule appended to this report places on lawyer participants the responsibility to take reasonable steps to avoid such misapprehension in organizations that provide non-legal services in addition to legal services. A comment to the proposed rule also provides guidance as to how a multidisciplinary practice firm should distinguish between its legal and non-legal clients.

6. Conflicts rules and other rules of professional conduct should apply to the provision of legal services by law firms and firms providing multidisciplinary services according to the same standards, regardless of the form of organization. All lawyers offering legal services to the public should be subject to the same rules related to conflicts of interest, permissible advertising and solicitation, required client disclosures, and other obligations having possible competitive impact or impact on the public. Traditional law firms should be neither artificially protected from multidisciplinary competition nor disadvantaged in that competition.

With respect to possible conflicts, Comment 25 to D.C. Rule 1.7 provides that when a potential conflict arises between the client of a lawyer and a client of a separate affiliated organization providing non-legal services affiliated with a law firm, the "lawyer should be aware that the relationship of a related enterprise to its own customers may create a significant interest in the lawyer in that relationship." The Comment also states that "[t]he substantiality of such an interest may be enough to require the lawyer to decline a proffered client representation that would conflict with that interest; at least Rule 1.7(b)(4) and (c) may require the prospective client to be informed and to consent before the representation would be undertaken."

In our view, the standard to be applied in a situation in which a legal client is adverse to a non-legal client of the same organization should be no different. If a lawyer shares in income derived from non-legal practice, that lawyer has a personal interest in the revenue generated by that practice, whether undertaken in the same firm or by a separate organization. Such conflicts may be overcome by informed consent, but if the income derived from non-legal practice is more than trivial, the lawyer must disclose the financial interest to a prospective legal services client. The lawyer may not unilaterally determine that the matter can be handled

without divided loyalties or fail to inform the prospective legal client of the financial conflict of interest.

In either situation, informed consent need be obtained only from persons or entities that are existing or prospective clients for legal services. Legal conflicts rules have no application to actual or possible conflicts between or among two or more non-legal clients of the firm. Similarly, when a potential conflict arises between an existing or prospective legal client of the firm and an existing or prospective non-legal client of either the same firm or of an affiliated non-legal business, legal conflicts rules should determine whether it is necessary to obtain the informed consent of the legal client, but those rules would not determine whether non-lawyers are required to obtain the informed consent of a client or customer for whom no legal services are to be performed.

To provide a practical example, if a legal client seeks to retain a multidisciplinary legal and accounting firm to sue a technology consulting client of the firm, the firm should be required to inform the legal client that its intended adversary is a consulting client and to obtain the legal client's consent to the retention with knowledge of the operative facts. Legal conflicts rules should not determine whether the informed consent of the nonlegal consulting client is required before representation of the legal client may be undertaken and suit brought. Conversely, if a legal suit is in progress against a party not a client of the firm, that adversary should not become a client of the firm's non-legal consulting services unless the firm first obtains the informed consent of its litigation adversary, the preexisting firm legal client. The same principles apply no matter whether the conflict arises between legal and non-legal clients of a single firm or between legal clients of a law firm and non-legal clients of a separate organization affiliated with the law firm.

The practical consequence of applying the same conflicts standard to multidisciplinary practice organizations as is now applied to law firms is that the firm providing multidisciplinary professional services must maintain a database of all clients and matters undertaken by the firm. The firm must also perform conflicts checks firm-wide before new matters of any kind are accepted. Just as a new legal matter might conflict with an existing non-legal matter, a new non-legal matter might create a conflict with an existing legal matter.

We recognize that existing conflicts standards and current obligations imposed on law firms, and the burdens created by those obligations, have generated criticism and proposals for providing some form of unilateral solution short of obtaining consent. We consider it beyond the purview of this committee to consider whether, for example, unilateral screening should be recognized as a solution to conflicts between firm clients relating to factually unrelated matters or whether some other limitation or qualification should be placed on the obligation to obtain client consent when actual or potential conflicts are determined to exist. Our sole recommendation is that lawyers in law firms and lawyers in multidisciplinary practice firms be subject to the same standards and that they be required to obtain the informed consent of all affected existing or prospective legal clients when those standards require it. Legal clients should not receive a different level of protection from conflicts depending upon whether they obtain legal services from a traditional law firm or a firm providing multidisciplinary services, and neither type of organization should be permitted to enjoy a competitive advantage over the other in this respect.

7. It is possible to provide multidisciplinary services in a manner that protects the public and preserves professional independence. The ABA Commission would have required that all lawyers within multidisciplinary practice organizations conform to all existing professional obligations applicable to lawyers, including those relating to preservation of client

confidences and secrets, avoidance of conflicts of interest, and provision of *pro bono* services. We propose no less. Lawyers employed by a multidisciplinary firm should also remain subject to the proposed Rule of Professional Conduct 5.4(a) (moved without substantial change from the present Rule 5.4(c)), which provides: "A lawyer shall not permit a nonlawyer or any person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." All of the standards and safeguards now applicable to lawyers practicing in law firms should apply to lawyers engaged in multidisciplinary practice. This includes all rules related to preservation of client confidences and secrets, avoidance of conflicts of interest, reporting of professional misconduct, and performance of public and *pro bono* service.

8. <u>It is not necessary for lawyers to own or control a multidisciplinary practice in order to preserve lawyers' professional independence and adherence to professional standards and values</u>. Every member of the committee understands and appreciates the importance of achieving compliance with ethical standards and protecting the independent exercise of legal judgment, and we would not place these core values at risk. After thorough study of the subject, we have found no evidence that permitting lawyers to engage in legal practice in conjunction with other professionals practicing their own professions would subvert these important interests, no matter which members of a common organization control its management, and we are not prepared to impugn other professionals based on no more than speculation. In the same respect that accountants, engineers, medical practitioners and other professionals may be expected to continue to conform to the standards of their respective professions in organizations in which majority ownership or effective control resides with lawyers, lawyers will, we believe, continue

to comply with the standards of our profession whether or not majority ownership or control resides in members of another profession.

We recognize that these are serious issues, and none of us belittles the pressures that economic forces place on professionalism. We are particularly concerned that integration of professional practices should not reduce *pro bono* legal work or impede adherence to other professional obligations and aspirations unique to lawyers. For that reason, we have included a separate section in the Comment to our proposed revision of Rule 5.4 emphasizing the aspirational goal that every lawyer, wherever and however employed, should engage in some form of public service. The professional obligations of a lawyer are personal, and adherence should not depend on the nature of the organization in which a lawyer conducts practice.

We are aware of no evidence that business pressures in a multidisciplinary practice differ qualitatively from those in a modern law firm or the law department of a business organization or government agency. In this respect, the performance of lawyers in private and government law departments provides considerable reassurance that lawyers will continue to meet the standards of their profession and seek to achieve its aspirations irrespective of ownership or control of the organizations within which they practice. The performance of law firms that are currently affiliated with other professional organizations supports the same conclusion; there is no evidence that permitting these currently affiliated organizations to share fees and profits has affected the professional or ethical performance of the lawyers involved.

A former member of the committee[5] would require that all organizations that offer legal services to the public and charge legal fees be controlled by lawyers, and our February 23,

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[5] Robert E. O'Malley participated in the committee's June 26, 2000, recommendation favoring adoption of the recommendation of the ABA Commission and in this committee's Preliminary (continued…)

2001, Preliminary Report included a version of a modified Rule 5.4 embodying that requirement. The proposal to require lawyer control did not receive substantial support during the comment period, and the current committee is unanimous in concluding that lawyer control of all organizations providing legal services to the public is neither necessary nor appropriate.

The case for lawyer control is based on a concern that, without such control, the ethical standards of the legal profession will not be adhered to. It is thought desirable that, if multidisciplinary practice in a single organization is to be permitted, there be some additional level of assurance that the standards of the profession will not be sacrificed to economic expediency. Absent lawyer control, there is concern that possible conflicts of interest and other ethical issues unique to the legal profession will be analyzed less thoroughly and addressed less strictly than if a majority of firm managers were personally subject to the rules of the legal profession.

All current members of the committee believe adherence to legal ethical standards can be assured without requiring lawyer control of all organizations that practice law. We discern no sound basis for the economic protectionism implicit in requiring lawyer control. Indeed, the argument for maintaining legal control smacks of professional arrogance, suggesting, as it does, that no one but lawyers can be trusted ethically to control any organization providing professional services that include legal services. The committee is aware of no evidence to support this view and believes that potential concerns can be addressed by less preclusive safeguards.

Report. He resigned from the committee prior to issuance of this final Report and Recommendation.

Following the suggestions made by the D.C. Bar's Rules of Professional Conduct Review Committee, the committee has incorporated specific provisions in the recommended Rule that address the concerns that have been raised. Lawyers practicing in multidisciplinary organizations would be required to make specified disclosures concerning the risks that confidential information may be disclosed, risks arising from intra-firm referrals, and the availability of other sources of legal services that do not present such risks. Additionally, intra-firm conflicts between actual and potential firm legal and non-legal clients would be subject to disclosure, and informed consent would have to be obtained from the existing or prospective legal client. Where a lawyer has a non-trivial financial interest in the multidisciplinary firm's non-legal business, the lawyer would be required to disclose that interest to a prospective legal client. Neither the lawyer nor the management of his or her firm would have discretion to decide unilaterally that no disqualifying conflict exists. In every case, the legal client would have to be informed and would be required to provide consent before the multidisciplinary firm could undertake a matter adverse to that client.

Obtaining fully informed consent would, of course, be coupled with potential application of professional disciplinary sanctions to all individual lawyers, no matter in what type of organization they practice. By providing for affirmative disclosure, in addition to application of legal disciplinary rules to all lawyers involved, the committee believes that multi-disciplinary practice within a single firm will prove no more inimical to compliance with legal ethics standards than permitting non-legal services to be performed in separate related organizations has proven to be.[6]

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[6] Although not necessary, in the view of the committee, additional consideration could also be given to making organizations that provide legal services (as differentiated from individual (continued…)

9. Organization of lawyers within a multidisciplinary practice into a separate organizational unit is desirable where feasible. The ABA Commission recommended that if non-lawyers are permitted to control an organization through which legal services are provided to the public, the practicing lawyers within that organization should be organized in a separate working unit directly supervised by lawyers when feasible to do so. The Commission concluded that organization of lawyers into one or more separate working units headed by lawyers would tend both to assure lawyer adherence to the ethical standards of their profession and to facilitate adequate segregation and protection of client confidences and secrets. In our view, this recommendation makes good practical sense, and a comment to the Rule we propose states the same principle. We also believe that organization of lawyers into a separate unit should not be required where, because of the small numbers of lawyers employed or for other reasons, it would be impractical to do so. Although this committee does not believe it necessary that lawyers control the entirety of every organization that provides legal services to the public, we agree with the ABA Commission that, where feasible, younger and less experienced lawyers would benefit from the opportunity to look to more senior lawyers for professional guidance, direct supervision of their work, and reinforcement of ethical standards.

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lawyers) subject to the Rules of Professional Conduct and to sanctions for their violation. We note in this regard that New York has adopted rules, DR 1-104(A) and DR 1-104(C), that make organizations providing legal services responsible for supervising their lawyers and making "reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules." The New Jersey Rules of Disciplinary Jurisdiction also make every "business entity authorized to practice law … subject to the disciplinary jurisdiction of the [state] Supreme Court," and the ABA Standing Committee on Professional Discipline has urged extension to law firms of the supervisory obligations now imposed on law firm partners by Model Rules 5.1(a) and 5.3(a). Consistent with this approach, the Bar of the City of New York, in its July 20, 1999, Statement of Position on Multidisciplinary Practice, concluded that subjecting organizations that provide legal services to the public to legal rules of conduct would be preferable to a requirement that control of all such organizations be confined to lawyers.

10. Permitting non-lawyer sharing of legal fees in the District of Columbia will benefit smaller firms and their individual clients even if larger, multicity firms cannot take advantage of the change. The committee is sensitive to the point that other jurisdictions may be slow to adopt comparable rules. Indeed, some concern has been expressed that, because the District of Columbia is already more permissive of multidisciplinary practice than any other jurisdiction and because, so far, no other jurisdiction has permitted multidisciplinary practice in a single firm,[7] permitting single firm multidisciplinary practice in the District of Columbia might be dismissed as a mere aberration. If no other state were to follow the District of Columbia's lead, it would be difficult for District of Columbia lawyers who are engaged in multistate practice to take advantage of such opportunities for multidisciplinary practice as an amended D.C. rule could potentially provide.

Whatever restrictions inhibit multidisciplinary practice by firms that practice in multiple jurisdictions, no comparable constraint will prevent lawyers admitted to practice only in the District of Columbia from making use of the flexibility provided by an amended standard. A sole or small-firm practitioner engaged in family law, tax preparation and financial planning, environmental work, criminal defense, and other areas of law practice will have the opportunity to enlist physicians, psychologists, accountants, engineers, and other nonlegal professionals as full-fledged partners. Although the Committee cannot foresee how many District of Columbia lawyers will take advantage of such an opportunity, we believe that the potential benefits to both District of Columbia lawyers and members of the public in this community provide adequate reason to adopt the recommended change even if no other jurisdiction were to follow.

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[7] As indicated above, many state bars have affirmatively rejected any sharing of fees among lawyers and other professionals. See note 2.

11. Making it possible for lawyers to share legal fees with members of other professions will contribute to the strength and vitality of the practice of law in this jurisdiction. One of the hallmarks of legal practice within the District of Columbia has been its facility in dealing creatively with the practical problems faced by clients, notwithstanding that non-legal issues might be involved. The need and opportunity for multidisciplinary approaches to public and private issues exist today and are growing. Rather than protecting lawyers or the public, existing barriers that separate law from other disciplines threaten to stifle the ability of lawyers to contribute to the resolution of future business, technological, environmental, political, and societal concerns. Given an opportunity to participate with other professionals on an even footing, District of Columbia lawyers will continue to play a vital role in addressing the many multifaceted issues that confront our society.

CONCLUSION

This committee is unanimous in concluding that the rules of this jurisdiction that bar sharing of legal fees between lawyers and members of other professions should be substantially relaxed. The committee also believes that no basis or need exists to limit multidisciplinary practice to organizations controlled by lawyers. Consistent with its conclusion, the committee has appended a proposed revision of D.C. Rule of Professional Conduct 5.4 and the Comment to the proposed Rule, which we recommend that the Board of Governors submit to the District of Columbia Court of Appeals for its consideration and adoption. We also propose that an additional phrase be added to Rule 1.7(b)(4) to alert lawyers that financial interests that may give rise to a conflict include a lawyer's financial interest in the non-legal practice of either a separate organization affiliated with the lawyer's law firm or the non-legal services provided by a

multidisciplinary practice organization in which the lawyer is a participant. We respectfully submit this Report to the Board of Governors for its consideration.