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Getting at the Root of Core Values: A “Radical” Proposal To Extend the Model Rules to Changing Forms of Legal Practice

James W. Jones and Bayless Manning[†]

I. INTRODUCTION

This Article addresses the issue of change in the legal profession. It focuses on the important question of how the profession adapts—or sometimes fails to adapt—to evolutionary changes in the practice of law and to the introduction of new models for the delivery of legal services.

The conclusions and recommendations of this Article are “radical” in the dictionary sense of the word—as something that is “of or from the root . . . ; fundamental; [or] basic.”¹ There have, of course, been many changes and new practice models in the history of the American legal profession, and the challenge presented in each case has been the same: how lawyers should adapt to change while remaining committed to the important core values at the root of the legal profession.

The circumstance that gives rise to the present Article, and indeed to the Symposium of which it is a part, is the current debate within the legal profession (both in the United States and throughout the world) about whether so-called “multidisciplinary practice” (MDP) organizations should be permitted to

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1. WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 1107 (1994).

offer legal services.² And that, in turn, is related to the broader issue of formal affiliations between lawyers and nonlawyers and, more particularly, how such affiliations might impact the professional independence of lawyers or other core values of the legal profession.

Of course, affiliations between lawyers and nonlawyers do not constitute a new phenomenon in the law. Indeed, such relationships have a long history both in the United States and elsewhere.³ In U.S. jurisdictions, however, specific regulations

2. In the United States this debate has focused on the recent recommendations of the American Bar Association's Commission on Multidisciplinary Practice (the Commission) that Rule 5.4 of the Model Rules of Professional Conduct (the Model Rules) be amended to permit lawyers, subject to certain restrictions, to share legal fees with nonlawyers and to offer legal services through organizations in which nonlawyers have an ownership interest or over which they exercise supervision or control. See COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, REPORT (1999), available at <<http://abanet.org/mdpreport.html>> [hereinafter REPORT]. The Commission uses the term multidisciplinary practice to describe such organizations. However, this term is somewhat misleading. In the first place, there are obviously many kinds of multidisciplinary practice models involving nonlawyers outside a law firm—including joint ventures or subcontracting arrangements with nonlawyers—that are (and always have been) perfectly acceptable under the Model Rules. Additionally, there are numerous arrangements in which nonlawyers work in law firms assisting lawyers in what could quite properly be referred to as multidisciplinary practice settings. What the current debate is about is really whether a multidisciplinary organization in which nonlawyers hold an ownership interest or exercise any management supervision or control should be allowed to offer legal services. When this Article refers to MDP arrangements, it is that form that is intended. It should also be noted that this Article treats the current debate generically and does not seek to respond with particularity to the recommendations made by the Commission in its preliminary report for the reason that such recommendations are in fact *preliminary* and may well be changed before the Commission issues its final report to the ABA House of Delegates. See, e.g., COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, DRAFT RECOMMENDATION (Mar. 2000), available at <<http://www.abanet.org/cpr/marchrec.html>>.

3. For many years, it has been quite common for U.S. lawyers to offer numerous services in addition to legal services. Often these services have grown out of or been related to the practice of law—as lawyers serving as agents for title insurance companies or as trustees under various trust arrangements. In many cases lawyers have also served in dual professional capacities as accountants, social workers, financial planners, marriage counselors, or real estate brokers. There have also been numerous examples of law firms operating so-called “ancillary businesses” ranging from registered investment companies to business consulting firms, from lobbying operations to environmental consulting businesses, and from human resource training companies to high tech service firms. See *Ancillary Businesses of the Nation's 250 Largest Law Firms*, NAT'L L.J., Dec. 21, 1992, at 32 [hereinafter *Ancillary Businesses*]; Stephanie B. Goldberg, *More than the Law: Ancillary Business*

have been adopted that seek to define the limits of the relationships that are permitted between lawyers and nonlawyers. Those regulations are reflected in Rule 5.4 of the Model Rules of Professional Conduct (Model Rules) and in various versions of Rule 5.4 and its antecedent rule as adopted in the several states.⁴ Under Rule 5.4, a lawyer is generally prohibited from sharing legal fees with a nonlawyer or from offering legal services through an organization in which a nonlawyer has an ownership interest or over which a nonlawyer exercises any supervision or control.⁵

Growth Continues, A.B.A. J., Mar. 1992, at 54, 54; Phyllis Weiss Haserot, *Multiprofessional Mixes Are Proliferating*, NAT'L L.J., Oct. 19, 1987, at 16; see also Lowell J. Noteboom, *Professions in Convergence: Taking the Next Step*, 84 MINN. L. REV. 1359, 1365-73 (2000) (providing examples of twenty-one prominent law firms' ancillary businesses).

In addition, in many foreign countries, formal affiliations between lawyers and other professionals are expressly permitted. For example, in Germany, lawyers are permitted to partner with patent lawyers, accountants, and auditors. See 1 CCBE, CROSS BORDER PRACTICE COMPENDIUM, Germany-16-18 (D.M. Donald-Little ed. 1991 & Supp. 1998). Likewise, in Italy, lawyers are allowed to partner with "similar professions," including notaries and accountants. See *id.* at Italy-18-20. In the Netherlands "collaborative associations" are permitted between lawyers and certain other professionals, including patent agents, tax advisers, and notaries. See *id.* at The Netherlands-16-18, 19. In the Slovak Republic partnerships are allowed between lawyers and certain other professions, including notaries, patent agents, tax consultants, and auditors. See *id.* at The Slovak Republic-22. In Spain and in certain cantons of Switzerland, there are no prohibitions whatsoever on partnerships between lawyers and other professionals. See *id.* at Spain-16-18; Switzerland-38-39.

4. The Model Rules were adopted by the ABA in 1983 and recommended for adoption in the various states. The Model Rules were an outgrowth of the ABA's Model Code of Professional Responsibility (the Model Code) that was adopted in 1969 (and that was itself an outgrowth of the ABA's Canons of Professional Ethics adopted in 1908). Today, every jurisdiction in the United States except California has adopted some form of the Model Rules or the Model Code to govern the activities of its legal profession. (California adopted its own Rules of Professional Conduct, initially in 1928 and again in 1975. While these rules differ significantly from both the ABA's Model Code and Model Rules, the California rules do take account of and, in many instances, reflect the substance of the ABA's Model Code).

5. See *infra* Part IV.A (discussing the precise language of Rule 5.4). The restrictions contained in Rule 5.4 of the Model Rules are also reflected in the Model Code in Disciplinary Rules 3-102(A), 3-103(A), 5-107(B), and 5-107(C) and Ethical Consideration 5-24. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102(A), DR 3-103(A), DR 5-107(B)-(C), EC-5-24 (1980). In one form or another, these restrictions have been adopted in every U.S. jurisdiction, with the exception of the District of Columbia which permits fee sharing with nonlawyers as well as the participation of nonlawyers in the ownership and management of organizations offering legal services under certain very limited circumstances. See D.C. RULES OF PROFESSIONAL CONDUCT

This Article explores whether Model Rule 5.4 (or its equivalent in various U.S. jurisdictions) serves as an effective means of regulating the conduct of lawyers when they are engaged in activities with nonlawyers. Central to that question is whether the rule in fact operates to preserve the professional independence of lawyers or other core values of the legal profession in circumstances where such independence or core values would otherwise be placed at risk. In considering this question, Part II examines the context in which the current debate must occur—the changing social and economic conditions of the real world in which legal services must be provided. Part III identifies those core values of the legal profession that can and should be preserved even as the profession adapts its methods for delivering legal services to the changing requirements of the world. Part IV assesses the effectiveness of the current provisions of Rule 5.4 in regulating the conduct of lawyers in activities involving nonlawyers and in preserving and enhancing core values, particularly the value of professional independence. Finally, Part V sets out a proposal for two new provisions in the Model Rules that would address the issues of professional independence and affiliations between lawyers and nonlawyers far more effectively and appropriately than the current provisions of Rule 5.4.

Unfortunately, the current professionalism debate tends to be fairly narrowly focused on whether MDP organizations should be permitted to offer legal services. It is important, however, that the present discussion be seen as part of the much larger and more important question of how the legal profession should adapt to change. Indeed, as this Article will show, MDP arrangements are only the latest in a long history of changes in practice models that have evolved in the American legal profession. And they most certainly will not be the last. As American lawyers face the significant challenges of the twenty-first century, it will be increasingly important for lawyers to understand the place of change in the evolution of the legal profession and to respond in ways that are both effective and appropriate.

Rule 5.4 (1991); *see also infra* note 139 and accompanying text (discussing the D.C. Rule in more detail).

II. A CHANGING PROFESSION IN A CHANGING WORLD

Like all other social institutions, the legal profession has throughout its history continuously evolved and adapted to meet the changing conditions, needs, and demands of the society around it. Nowhere has such evolution been more evident than in the history of the legal profession in the United States.

A. A BRIEF OVERVIEW OF THE EVOLUTION OF THE AMERICAN LEGAL PROFESSION

Given the prominence of the American legal profession today, it is hard to imagine the disdain in which lawyers were held during the earliest days of our history. Indeed, in most of the American colonies of the seventeenth century, lawyers were distinctly unwelcome.⁶ The *Body of Liberties* adopted by the Massachusetts Bay Colony in 1641 prohibited pleading for hire.⁷ In 1645, Virginia excluded lawyers from its courts, reflecting a similar ban in Connecticut.⁸ In the Carolinas, the draftsmen of the Fundamental Constitution were equally hostile, declaring it "a base and vile thing to plead for money or reward."⁹ As summarized by one commentator, this animosity toward lawyers arose from various sources:

The Puritan leaders of Massachusetts Bay had an image of the ideal state. Revolutionary or Utopian regimes tend to be hostile to lawyers, at least at first. Lawyers of the old regime have to be controlled or removed; a new, revolutionary commonwealth must start with new law and new habits. Some colonists, oppressed in England, carried with them a strong dislike for all servants of government. Merchants and planters wished to run their affairs, without intermediaries. The theocratic colonies believed in a certain kind of social order, closely directed from the top. The legal profession, with its special privileges and principles, its private, esoteric language, seemed an obstacle to efficient or godly government. The Quakers of the Middle Atlantic were opposed to the adversary system in principle. They wanted harmony and peace. Their ideal was the "Common Peacemaker," and simple, nontechnical justice. They looked on lawyers as sharp, contentious—and unnecessary—people. For all these reasons, the lawyer was unloved in the 17th century.¹⁰

6. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 94 (2d ed. 1985).

7. See *id.*

8. See *id.*

9. *Id.* (quoting *FUNDAMENTAL CONSTITUTIONS OF THE CAROLINAS* (1669)).

10. *Id.* at 95.

This antipathy toward lawyers was not short-lived. Legislation hostile to the practice of law was more or less continuously enacted in virtually all of the American colonies from the middle of the seventeenth to the middle of the eighteenth century.¹¹ Indeed, Virginia's statutory prohibition on the practice of law for a profit was not repealed until 1748.¹² In the end, however, the effort to make do without lawyers proved a failure.¹³

In the early years, lay judges were able to master enough law to run their own courts relying on a few practical books of English law that circulated widely in the colonies.¹⁴ As the colonial societies became more established and settled, however, the legal questions—from commercial disputes to controversies over land grants and sales—became more complex and lawyers were increasingly called upon to bring their skills to bear.¹⁵ Lawyers trained in the English Inns of Court found a ready market for their skills, as did laymen with some legal experience.¹⁶ In fact, “[i]n the late 17th century, justices of the peace, sheriffs, and clerks acted as attorneys in New Jersey.”¹⁷ In any event, despite the continuing and widespread public distrust of lawyers, by 1750 there was an operating professional bar in all major communities in the American colonies.¹⁸

Unfortunately, the years following the American Revolution did little to improve the public standing of the profession. After the Revolution, the new American states sank into a serious and widespread economic depression.¹⁹ Business relationships had been disrupted by the war; ports had been closed and the once profitable West Indian trade had been halted by the

11. See ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 136 (1953).

12. See *id.* at 138.

13. See *id.* at 142-44.

14. The functioning of the courts and the spread of a coherent legal system throughout the American colonies (and later states) was greatly enhanced with the publication of Blackstone's *Commentaries on the Laws of England*, the first volume of which appeared in 1765. See FRIEDMAN, *supra* note 6, at 21, 102. The *Commentaries*, which represented the first comprehensive statement of the English Common Law, was very popular in America. See *id.* Indeed, in many places, it provided the essential backbone for the evolving legal system of the new country.

15. See *id.* at 96-97.

16. See *id.*

17. *Id.* at 97.

18. See *id.*

19. See POUND, *supra* note 11, at 179-80.

British; public debt was enormous, requiring high taxes that most citizens could ill afford; the paper currencies issued by the new governments were virtually worthless; and English creditors, citing the Treaty of Paris, were seeking to recover their property and debts due them.²⁰ The primary business of the law quickly became the collection of debts and the recovery of property held under confiscatory laws, and the role of the lawyer evolved to that of debt collector—not a popular function in an era of economic depression, strict foreclosures, and imprisonment for debt.²¹

During the first half of the nineteenth century, the American legal profession took on the open and egalitarian character that was to mark it for many years to come. In Europe, the profession had evolved on the model of the "learned doctor of laws" who practiced in a tightly controlled and highly hierarchical system. The archetypes were the British barrister, the French *avocat*, and the German *Rechtsanwalt*. The model for lawyering in America never followed this pattern²² for two fundamental reasons.

First, the idea of a learned and elite profession was repugnant to the prevailing political views of Jeffersonian (and later Jacksonian) democracy, which regarded the elevation of one occupation over others as both undemocratic and un-American. Moreover, the creation of an elite group of servants of the law smacked too much of the English system of political privilege for the tastes of most Americans.²³ In addition, the democratic ideals of the new American state were based on the premise that ordinary citizens were fully capable of making, interpreting, and enforcing the laws—a government of experts was unnecessary.²⁴

Second, the geographic distances and conditions of travel in the new country all but dictated decentralized and local con-

20. *See id.*

21. *See id.*

22. It is interesting to note that several American colonies (including Massachusetts, New Jersey, and Virginia) experienced early attempts to set up a graded profession on the English model, i.e., with lawyers being admitted as attorneys, counselors, barristers, and sergeants. *See* FRIEDMAN, *supra* note 6, at 99, 315; POUND, *supra* note 11, at 147-63. These efforts were, however, abandoned after the Revolution. *See* FRIEDMAN, *supra* note 6, at 315; POUND, *supra* note 11, at 147-48.

23. *See* POUND, *supra* note 11, at 182.

24. *See* FRIEDMAN, *supra* note 6, at 304; POUND, *supra* note 11, at 182-83.

trol of virtually everything, including the legal profession.²⁵ The substantial distances and difficulties of communication that prevailed in most of the American states in the years after the Revolution made it necessary to establish courts of general jurisdiction in virtually every local community, and each of those courts had its own unorganized local bar.²⁶ Aspiring lawyers apprenticed themselves in law offices of more experienced practitioners, preparing for what were often perfunctory examinations by the local courts at the time of their admission to the bar.²⁷ Standards for admission to the bar were not uniform and were often lax.²⁸ It is not surprising, therefore, that the law in America became an amorphous profession that provided open access to almost anyone who cared to pursue it. As Professor Lawrence Friedman has described the pre-Civil War bar:

[A] factotum profession, within the grasp of ambitious men of all sorts, was socially useful. The prime economic fact of American life . . . was mass ownership of land and (some bits of) capital. It was a society where many people, not just the noble or the lucky few, needed some rudiments of law, some forms or form-books, some know-how about the mysterious ways of courts or governments. It was a society, in short, that needed a large, amorphous, open-ended profession.

In many ways, then, loose standards were inevitable. Perhaps they even enhanced the vigor of the bar. *Formal* restrictions tended to disappear; but the market for legal services remained, a harsh and sometimes efficient control. It pruned away deadwood; it rewarded the adaptive and the cunning. Jacksonian democracy did not make every man a lawyer. It did encourage a scrambling bar of shrewd entrepreneurs.²⁹

This entrepreneurial aspect of the American legal profession proved a valuable asset during the second half of the nineteenth century.

In the period from 1850 through 1900, the young American Republic underwent revolutionary changes. The most violent, of course, was the Civil War, a conflict that bitterly divided the

25. See POUND, *supra* note 11, at 183.

26. See *id.*

27. A few law schools existed in the country during this period but they had small enrollments and limited course offerings. See RICHARD L. ABEL, *AMERICAN LAWYERS* 40-41 (1989). Harvard Law School, which was founded in 1817, averaged fewer than nine students during its first dozen years and its enrollment did not exceed 100 until 1840. See *id.* By the time of the Civil War, there were 22 law schools in the country but most had no more than a few dozen students. See *id.*

28. See FRIEDMAN, *supra* note 6, at 316-17.

29. *Id.* at 318.

country and fundamentally changed the nature of the federal union. But other changes had profound effects as well. During the period, the American population grew substantially, with major cities experiencing extraordinary growth; the West was settled; the country emerged as a major industrial power; transportation and communication links were extended across the continent; and the U.S. (with the help of a rapidly growing navy and merchant marine) began an expansion of its influence overseas. It was a time of great scientific and technological achievement, with the introduction of many products to make life easier and healthier, even as the stresses in the country's social order became more pronounced.

All of these changes had an impact on the legal profession, some of them in profound ways. And the profession responded with innovations in practice that exhibited both creativity and (to employ one of Professor Friedman's terms) "nimbleness."³⁰ One of the most far-reaching innovations was the evolution of the corporate lawyer, a development that also led by the end of the century to the creation of law firms.

From the founding of the Republic there had been a small but sophisticated bar of commercial lawyers that advised the great mercantile houses on matters of marine insurance and international trade.³¹ These practices were located in major port cities, particularly in New York.³² In the 1820s and 1830s, as infusions of British capital became important to American industry, these commercial lawyers were increasingly called upon to draft the loan documents necessary to finance indus-

30. Professor Friedman has described the legal profession of the 1850-1900 period in the following terms:

The truth was that the profession was exceedingly nimble at finding new kinds of work and new ways to do it. Its nimbleness was no doubt due to the character of the bar: open-ended, unrestricted, uninhibited, attractive to sharp, ambitious men. In so amorphous a profession, lawyers drifted in and out; many went into business or politics because they could not earn a living at their trade. Others reached out for new sorts of practice.

Id. at 634.

31. *See id.* at 310.

32. One prime example was the solo practice of R.M. Blatchford in New York City during the years 1826-32, and his practice in partnership with his brother after 1832—a partnership that ultimately evolved into the Wall Street firm of Cravath, Swaine & Moore. *See* FRIEDMAN, *supra* note 6, at 311. In 1826, Blatchford was made "American financial agent and counsel for the Bank of England" and, in that capacity, received a substantial amount of business on referral from English solicitors. *Id.* He also served as counsel to the Second Bank of the United States. *See id.*

trial expansion.³³ In some cases, the loans needed exceeded the capacity of a single lender, and so the lawyers adapted the trust mechanism that had been devised for use in estate planning for wealthy individuals to the new purpose of financing American business.³⁴ By requiring the pledging or transfer of a borrower's assets to a trustee to be held as security "for the joint benefit of a group of lenders," these lawyers created the forerunners of the modern corporate trust and bond indenture.³⁵ At about the same time, "there also appeared a form of investment security" similar to the "modern investment trust" that was used to attract much needed British capital to new American industries.³⁶ And all of these activities were supported by the rapidly developing concept of the public corporation.³⁷

By 1870, the demands of the country's rapidly expanding business and industrial enterprises placed increased pressure on the small commercial law partnerships in New York and elsewhere to provide more comprehensive services to their corporate clients. As a result, New York partnerships like the Blatchford firm (that became Cravath, Swaine & Moore) and the firm founded by Thomas G. Shearman and John W. Sterling grew and flourished, handling mergers and acquisitions, advising railroads on their legal matters, defending shareholder suits, floating bond issues, and the like.³⁸

Partnerships of more than three lawyers were rare before the Civil War.³⁹ By the end of the nineteenth century, however, "they were much more common on Wall Street and in some of the large cities."⁴⁰ In 1872, there were only three firms in the nation that had as many as five lawyers, and the largest firm

33. *See id.* at 312.

34. *See id.*

35. *Id.*

36. *Id.* at 311-12.

37. Prior to the nineteenth century, a corporation could only be created by an act of the sovereign—in Britain by royal decree and in the United States by the act of a legislature. With the enactment of the first general law for business corporations in New York in 1811, however, this process changed dramatically. *See id.* at 188, 195. Private citizens were able to create new legal entities at will and to use them to facilitate a wide variety of business activities. *See id.* at 195. The importance of this privatization of the incorporation process to the evolution of business law can hardly be overstated.

38. *See id.* at 637.

39. *See id.* at 640.

40. *Id.*

had only six.⁴¹ By 1898, the numbers had changed significantly, with thirty-five firms having five lawyers and another thirty-two firms having more.⁴² And, by 1915, there were 104 firms in the country with five lawyers and an additional 136 firms with more than five.⁴³ This evolution of the law firm—driven principally by the spread of industrialization and demands for capital—was undoubtedly the most significant development in the life of the legal profession in the second half of the nineteenth century and a development that would have profound effects during the next 100 years.

Closely related to the development of the modern law firm was the creation of a new category of lawyer—the associate. By hiring young lawyers who would not be made partners (at least initially), the new commercial law firms introduced the model of the lawyer as an employee—a model that would come to dominate the legal profession by the end of the twentieth century and challenge the validity of the traditional paradigm of the lawyer as an independent practitioner.

A parallel development was the introduction of in-house counsel at major corporations. The use of such in-house counsel "was unheard of in 1800" and "exceedingly rare in 1850."⁴⁴ By 1900, however, it was a well-established form of legal practice as growing companies insisted on hiring lawyers to devote full-time attention to the company's legal affairs.⁴⁵ The Prudential Insurance Company established its in-house counsel in 1885; the Mutual Insurance Company and New York Life each hired its first full-time corporate counsel in 1893; and the Metropolitan Insurance Company established a claim and law division in 1897.⁴⁶ Moreover, these in-house positions attracted lawyers of considerable talent. Justice William Joseph Robertson stepped down from his position on the Virginia Supreme Court to assume the job of general counsel for two railroads;⁴⁷ Judge G.W. McCrary resigned from the federal bench in the 1880s to become general counsel of the Santa Fe Railroad (a position later occupied by Victor Morawetz from the Blatchford firm in New York); and Chief Justice Albert H. Horton of the

41. See ABEL, *supra* note 27, at 182.

42. See *id.*

43. See *id.*

44. FRIEDMAN, *supra* note 6, at 641.

45. See *id.*

46. See *id.*

47. See *id.* at 641.

Kansas Supreme Court resigned in 1895 to become counsel for the Missouri Pacific Railroad.⁴⁸

A similar phenomenon occurred in government agencies. As government grew, so did the number of in-house lawyers required for the functioning of administrative agencies and departments. In 1853, the United States Attorney General functioned with the help of only two clerks and a messenger.⁴⁹ By 1897, the Attorney General's staff had grown to include a "solicitor general, four assistant attorneys general, seven 'assistant attorneys,' and one 'attorney in charge of pardons,'" in addition to "three law clerks, forty-four general clerks, and miscellaneous other employees."⁵⁰ At the same time, the Office of the Solicitor of the Treasury was staffed with sixteen employees.⁵¹ This same kind of growth was mirrored at the state and city level throughout the country.⁵² Indeed, by 1895, the "largest law office in the country" was the Law Department of the City of New York with twenty-eight lawyers and sixty-four clerical assistants.⁵³

As a result of all of these changes, it may be safely said that by 1900 the American legal profession had begun to experience a transformation in the roles that lawyers played and in the structures within which they practiced. Throughout the nineteenth century, the prototypical American lawyer was the independent private practitioner who neither employed lawyers nor was employed by them or by others, and who either worked alone or shared expenses (or less commonly profits) with one or two colleagues.⁵⁴ Although this model of the independent private practitioner has continued to resonate powerfully within the American legal profession—and although most lawyers (at least numerically) continued to practice in such settings until well into the twentieth century⁵⁵—by 1900 it was clear that the independent practitioner would not survive as the dominant model for law practice in the United States. The economic and social forces that gave rise to the development of modern corporate law and the growth of law firms, as well as to the prolifer-

48. *See id.* at 637, 641.

49. *See id.* at 647.

50. *Id.*

51. *See id.* at 647-48.

52. *See id.* at 648.

53. *Id.* at 648.

54. *See ABEL, supra note 27, at 9-10, 179-81*

55. *See id.*

eration of lawyer-employees, whether as associates in law firms or as in-house counsel for corporations or government agencies, were to prove even more powerful as the twentieth century unfolded.

During the nineteenth century, there was no organization able to speak for the American bar as a whole or even for a substantial part of it.⁵⁶ Nor was there any formal organization to govern the conduct of lawyers. Lawyers did form associations but they were predominantly social until the early 1900s.⁵⁷ It was then that many associations began to focus on the problem of defining norms for lawyer conduct.

In 1878, seventy-five representatives from twenty-one jurisdictions gathered in Saratoga, New York to form the American Bar Association.⁵⁸ In 1908, the ABA adopted its Canons of Professional Ethics, an effort to devise a common statement of professional norms (primarily in litigation settings) reflecting the values of most practicing lawyers.⁵⁹ Although the Canons were highly generalized, they were widely adopted.⁶⁰ In some jurisdictions, the Canons were promulgated by state bar associations and enforced by the courts through lawyer disciplinary rules.⁶¹ In other jurisdictions, the Canons were adopted more formally as rules of court or, in a few states, as legislation.⁶² The promulgation of the Canons marked the first serious effort by the organized bar to regulate the professional conduct of lawyers. But the new bar associations soon became active in another equally important activity—defining and seeking to protect the monopoly of the legal profession over the growing range of activities being undertaken by lawyers.

Until 1870, the legal profession was principally concerned about establishing its exclusive right to represent clients in the courts, fighting challenges by both lay representatives and

56. See FRIEDMAN, *supra* note 6, at 648.

57. One of the first of these organizations was the Association of the Bar of the City of New York, formed in February 1870. See *id.* It was followed soon by similar associations throughout the country—the Iowa State Bar Association, organized in 1874, and the Chicago Bar Association, founded in the same year. See *id.* at 648-50. Indeed, "[b]etween 1870 and 1878, eight city and eight state bar associations were founded in twelve different states." *Id.* at 650.

58. See *id.* at 650.

59. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 54-56 (1986).

60. See *id.*

61. See *id.*

62. See *id.*

court clerks. By the latter part of the nineteenth century and the early years of the twentieth, however, the concerns of the bar had broadened "to ward off incursions by title insurance companies, credit and collection agencies, banks and trust companies, accountants, automobile clubs, mortgage and insurance companies, and lay representatives seeking to appear before administrative agencies."⁶³

The bar associations employed a number of methods in seeking to preserve their legal monopolies. In some cases, they sought legislation to define the lawyer's monopoly as broadly as possible.⁶⁴ In other instances, the bar associations negotiated agreements with competing occupations that divided contested markets.⁶⁵ And finally, the bar embarked on an aggressive effort to prosecute lay competitors for the unauthorized practice of law, an effort that became particularly vigorous during the Great Depression when income-producing legal business (like all other kinds of business) became increasingly scarce.⁶⁶

63. ABEL, *supra* note 27, at 112.

64. Such statutes might include within the definition of the practice of law such activities as "giving legal advice, drafting wills, collecting assigned claims, transferring title, drawing up deeds, and appearing before administrative agencies." *Id.* at 113. Between 1870 and 1920, 17 such statutes were enacted around the country, and another 12 were passed between 1920 and 1960. *See id.*

65. The first such agreement was entered with the New Haven Corporate Fiduciaries Association in 1925. *See id.* It was followed by similar agreements in 14 cities and nine states by 1934. *See id.* The first national agreement was concluded between the ABA and the American Bankers' Association in 1933. *See id.* By 1958, there were similar agreements in place with "national organizations of accountants, banks, collection agencies, insurance adjusters, life insurance underwriters, publishers, and realtors." *Id.* Under these agreements, representatives of the bar and the businesses involved met at least annually in so-called "national conference groups" to interpret the various agreements, to amend them as needed, to publicize their contents, and to consider complaints of violations. *See* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 9 (1981).

66. *See* Rhode, *supra* note 65, at 7-8. A comprehensive survey of unauthorized practice cases throughout the country published in 1937 set out 98 pages of pre-1930 decisions and 691 pages of decisions rendered between 1930 and 1937. *See id.* at 8-9. As to the linkage between the vigor of unauthorized practice prosecutions and the increased competitive pressures felt by lawyers during the Depression, Professor Rhode has commented as follows:

Although the organized bar has often suggested that the campaign against lay practitioners "arose as the result of a public demand," the consensus among historians is to the contrary. As J. Willard Hurst concludes, "the coincidence of events ill fitted claims that [unauthorized practice] activity was moved simply by regard for protecting the public against the incompetent or unscrupulous."

The bar associations won some victories in these efforts. But, in the main, the attempts to define and preserve the lawyer's monopoly over the expanding range of activities claimed to be legal practice proved unsuccessful. This was particularly true in the 1960s and 1970s, when the growing consumers movement, the resistance of other professions, and the hostility of the federal government effectively brought an end to most of the organized bar's efforts to expand the legal monopoly beyond traditional litigation activities and to characterize nonlawyers who offered any of the expanded range of services as engaging in the unauthorized practice of law.⁶⁷

One good example of the bar's futile efforts to preserve its monopoly during this period involved group legal services plans. Introduced in the 1930s by merchants and physicians attempting to collect debts and by automobile clubs desiring to insure representation for their members in criminal and personal injury cases,⁶⁸ such plans were designed to provide pre-paid legal services on an "insurance-like" basis. They became very popular with labor unions and with other voluntary associations concerned with providing affordable legal services to low- and moderate-income people and to small businesses who could not otherwise afford lawyers.⁶⁹ Group legal services plans were, however, vigorously attacked by the organized bar as threatening the sanctity of the lawyer-client relationship since, under such a plan, the lawyer's fees are paid not by the client but by the union or association of which the client is a member.⁷⁰ The fight over the issue lasted some thirty years,

Id. at 9 (internal citations omitted).

67. In 1962, realtors in Arizona successfully amended the state constitution (through an initiative process) to overturn a judicial decision limiting their activities. *See ABEL, supra* note 27, at 114. Title insurance companies in Virginia also overrode state bar opposition to maintain the right to conduct title searches. *See id.* In 1977, the ABA ceased publication of the *Unauthorized Practice News*. *See id.* At about the same time, the California State Bar disbanded its committee on unauthorized practice. *See id.* The California Bar also promptly rescinded all 20 of its market division agreements with other occupations in response to an investigation launched by the U.S. Department of Justice. *See id.* In February 1980, the ABA formally rescinded its own agreements with the American Institute of Architects, the American Land Title Association, and the organizations representing professional engineers and publishers. *See id.*

68. *See id.* at 136.

69. *See id.*

70. *See id.*

with the bar's position being ultimately rejected in a series of U.S. Supreme Court decisions in the 1960s and early 1970s.⁷¹

However, by 1970, economic and social forces were at work that would change the American legal profession far more profoundly than the introduction of legal services plans. The extraordinary growth of American business in the decades following World War II, the emergence of the United States as a world power, the increasing globalization of commerce and finance, and astonishing advances in technology all combined to transform the legal profession in fundamental ways during the last third of the twentieth century.

First, during that period, the hegemony of the independent private practitioner was challenged and then displaced.⁷² As increasing numbers of lawyers were hired as in-house counsel to both corporations and government agencies and as law firms grew dramatically in size hiring ever larger numbers of associates, an increasing proportion of lawyers were employees rather than independent practitioners.⁷³ By 1990, this proportion was almost half;⁷⁴ by the end of the century it was almost certainly more than half. This change has important implications for issues of professional independence. As Professor Abel has observed: "Although the 'independence' of lawyers remains an unquestioned shibboleth, it may express nostalgia more than it describes contemporary reality."⁷⁵

Second, by the latter part of the twentieth century, most lawyers were no longer litigators. During the nineteenth century, almost all lawyers "went to court" and, as a consequence, the profession was largely defined by the norms and practices of litigation.⁷⁶ Beginning in the late 1890s, however, the proportion of lawyers engaged in corporate and counseling work began to rise. Spurred by the growing industrialization of the country, as well as by the growth in administrative law and the proliferation of government regulatory agencies at both the

71. See *United Transp. Union v. State Bar*, 401 U.S. 576, 581 (1971); *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1, 8 (1964); *NAACP v. Button*, 371 U.S. 415, 428-29 (1963).

72. See ABEL, *supra* note 27, at 9.

73. See *id.*

74. See *id.*

75. *Id.*

76. As previously noted, the ABA's 1908 Canons of Professional Ethics are framed primarily in terms of the rules of litigation. See *supra* text accompanying notes 58-62. This same tendency is apparent even in the 1969 Model Code and the 1983 Model Rules.

federal and state levels, by the mid-point of the twentieth century, litigation was no longer the dominant form of legal practice in the country. By the end of the century, a much smaller proportion of American lawyers regarded themselves as litigators.⁷⁷

Third, the late twentieth century also saw incredible growth in the size and complexity of organizations for which lawyers worked. The country's large law firms grew even larger at an astonishing rate. Between 1975 and 1987, the number of firms with at least 100 lawyers grew from 47 to 245 (more than a 500 percent increase), and the number of lawyers in those firms soared from 6,558 to 51,851 (an increase of nearly 800 percent).⁷⁸ Today, the sixty largest law firms in the country average 527 lawyers each, and the five largest firms average 1,376 lawyers.⁷⁹ Most firms of any size also now have multiple offices located in other states and frequently in other countries.

The growth in the size of law firms was paralleled in corporate law departments. A 1949 survey of approximately 2,000 American corporations found that about two-thirds employed lawyers in-house.⁸⁰ Of those companies with in-house lawyers, however, over eighty percent had only one or two lawyers on their staffs.⁸¹ A similar survey of the country's 500 largest corporations taken some thirty years later found that virtually all had in-house lawyers, and the numbers of lawyers employed by the companies had increased significantly.⁸² Thus, over half of the companies employed more than six lawyers, while about a quarter of them employed more than fifteen.⁸³ Today, the na-

77. See ABEL, *supra* note 27, at 9.

78. See *id.* at 10.

79. Based on reported statistics for 1999, the five largest firms were Baker & McKenzie (2,434); Skadden, Arps, Slate, Meagher & Flom (1,300); Jones, Day, Reavis & Pogue (1,227); Morgan, Lewis & Bockius (985); and Latham & Watkins (935). See GUIDE TO AMERICA'S TOP 50 LAW FIRMS 14-15 (H.S. Hamadeh et al., eds., 1999). And it must be noted that, as of January 1, 2000, with the consummation of the merger among Rogers & Wells, Clifford Chance, and Pünder, Volhard, Weber & Axster, the resulting firm (with over 3,000 lawyers) became easily the largest firm practicing in the U.S. See *Press Releases, Clifford Chance & Faltz & Kremer Agree To Merge* (release Dec. 14, 1999) <<http://www.cliffordchance.com/uk/news/press-releases/template.asp?file=uk/news/press-releases/articles/1999-12-13-01.html>>.

80. See ABEL, *supra* note 27, at 169.

81. See *id.*

82. See *id.* at 169-70.

83. See *id.*

tion's thirty largest corporate law departments average about 100 lawyers each.

Fourth, the increased complexity of legal practice—particularly corporate practice and the practices spawned by the incredible growth in federal and state regulatory activity since World War II—encouraged widespread specialization among lawyers. This phenomenon was particularly true in the larger commercial law firms located in major cities. As early as the mid-1960s, one study found that seventy percent of the lawyers in New York City devoted at least half their time to a single specialized area of practice, while forty percent devoted three-quarters of their time.⁸⁴ A similar study in the 1970s reported that eighty-seven percent of lawyers in Chicago devoted at least a quarter of their time to a single field.⁸⁵ In more recent years, this trend toward specialization has become even more pronounced. By the end of the twentieth century, the former idealized image of the “general practitioner” no longer reflected the reality of American law practice—particularly in the country's major commercial centers.

Finally, the growth in specialized practice, the increasing complexity of the matters handled by lawyers, and rising client demands for more efficient and cost effective services combined in the early 1970s to encourage lawyers to create new categories of nonlawyer employees to assist in the delivery of legal services.⁸⁶ The first of these was the paralegal, a specialized nonlawyer assistant whose time could be billed directly to clients. By taking over tasks previously performed by secretaries, paralegals transformed overhead into billable time; and, by re-

84. See ABEL, *supra* note 27, at 202.

85. See *id.* A second study at about the same time found that “15.5 percent of Chicago lawyers worked exclusively in one area and another 14.4 percent did significant work in two [fields].” *Id.*

86. Of course, the use of nonlawyers to assist in the delivery of a lawyer's services was not unheard of prior to this time. Indeed, the practice—at least in this country—is almost as old as the legal profession itself. One interesting example cited by Professor Friedman is the following marketing piece circulated in 1892 by the American Collecting Agency, an association of attorneys in Utah:

“A prosperous business year has enabled us to enlarge our offices and put in them an immense fireproof safe to protect our clientage. We have added to our home force, secured detectives in all parts of Utah, and engaged first-class correspondents . . . We make no charge unless we collect. Our charges are reasonable. We remit promptly. We are a godsend to honest creditors—a holy terror to delinquents.”

FRIEDMAN, *supra* note 6, at 644-45 (quoting HUBBELL'S LEGAL DIRECTORY app. 206, 208 (1892)).

placing lawyers for certain tasks, they substantially cut salary costs and improved law firm profitability.

The first paralegals were hired in the early 1970s, but the practice spread quickly throughout the country. By the early 1980s, there were an estimated 30,000 to 45,000 paralegals in the United States.⁸⁷ A 1984 survey found that paralegals were used by sixty-one percent of law firms of all sizes, and a 1987 survey reported that the twenty-five largest law firms in the country collectively employed 2,800 paralegals.⁸⁸ Today, the two largest organizations representing the interests of paralegals—the National Association of Legal Assistants and the National Federation of Paralegal Associations—collectively have over 35,000 members.⁸⁹

In the late 1970s and early 1980s, the systematic use of nonlawyers to supplement the delivery of legal services was expanded as law firms increasingly began to hire varieties of nonlawyer experts to diversify their service offerings and improve their capacities to serve clients. Lobbyists, former government officials, economists, trade specialists, environmental scientists, human resources experts, and others were hired by law firms across the country in increasing numbers.⁹⁰ But nonlawyer professionals soon discovered that being nonlawyer employees in major law firms was not a particularly attractive prospect. Not only were they restricted from having an equity interest in the firms for which they worked, they were often relegated to "second-class citizenship" status in terms of their compensation and standing in the organizations.⁹¹ Accordingly, in the mid-1980s, law firms increasingly began to organize their nonlawyer experts in separate affiliated consulting firms—so-called "ancillary businesses"—that were either wholly or partly owned by the law firms themselves.

These ancillary businesses proliferated rapidly. Indeed, a 1987 survey by the National Association of Law Firm Marketing Administrators found law firms across the country engaged in an astonishing array of activities: investment banking in

87. See ABEL, *supra* note 27, at 197.

88. See *id.* at 197-98.

89. See *The National Association of Legal Assistants* (last modified Mar. 11, 2000) <<http://www.nala.org>>; *National Federation of Paralegal Associations, Inc., Membership Information* (visited Mar. 11, 2000) <<http://www.paralegals.org/membership/home/html>>.

90. See *Ancillary Businesses*, *supra* note 3, at 32.

91. See Goldberg, *supra* note 3, at 56.

Atlanta and Memphis; energy and environmental consulting, management services, and employer-benefits consulting in Atlanta; advertising in Arizona; labor-relations consulting in Philadelphia; real estate brokerage in Los Angeles; office support services, seminars, and videos in Pittsburgh; real estate development services nationwide; and business consulting services dealing with international trade in New York.⁹² The survey also found that in Washington, D.C. law firms had spawned a great variety of nonlegal affiliates, ranging in specialization from energy and environmental consulting to health-care consulting and management, and from educational consulting to economic research and legislative and lobbying services.⁹³ This proliferation of ancillary businesses caused a fair amount of controversy within the legal profession, leading ultimately (and by a somewhat tortuous route) to the adoption by the ABA's House of Delegates of the current Rule 5.7 of the Model Rules.⁹⁴

In summary, by the end of the twentieth century, the American legal profession had changed profoundly from the bar of even fifty years before. Most lawyers were employees of law firms, corporations, or government agencies; most lawyers were engaged in transactional, corporate, and counseling activities and not in litigation; most lawyers in the major commercial

92. See Haserot, *supra* note 3, at 16.

93. See *id.*

94. At its Annual Meeting in 1991, the House of Delegates—by a margin of 11 votes—rejected a proposal of the ABA's Standing Committee on Ethics and Professional Responsibility and adopted instead a version of Rule 5.7 proposed by the Section of Litigation that effectively prohibited lawyers from engaging in any "ancillary business activities" outside of their law firms. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 5.7:101, at 826.11-826.14 (1998). That action led to considerable protest by various sections of the ABA and by state and local bars around the country. See James W. Jones, *Lawyer-Nonlawyer Affiliations: Current Practices and Ethical Issues*, in *THE ABA GUIDE TO LEGAL MARKETING* 119, 142-43 (Susan Raridon & Gary A. Monneke eds., 1995). The result was the repeal of the prohibitory version of Rule 5.7 by the House of Delegates at its 1992 Annual Meeting, again by a very narrow margin of only seven votes. See 2 HAZARD & HODES, *supra*, § 5.7:101, at 826.13. Also, "[i]n November 1992, the Chair of the House of Delegates appointed a special committee on Ancillary Business to try and construct an appropriate ABA position on this controversial issue." Jones, *supra*, at 143. The result was the current version of Rule 5.7 adopted in early 1994, a rule that permits lawyers to provide "law-related services" subject to certain disclosure requirements. *Id.* In August 1996, Pennsylvania became the first—and so far the only—state to adopt a version of the current Rule 5.7. See 2 HAZARD & HODES, *supra*, § 5.7:101, at 826.13 n.5.

centers of the country were specialists; and increasing numbers of lawyers worked in close collaboration and even formal relationships with nonlawyer specialists. The prototype of the independent general practitioner/litigator—although continuing to resonate as a kind of mythic paradigm within the legal profession—was, in reality, no longer representative of what most American lawyers actually do.

Given this history and the well understood principles that govern the evolution of all social institutions in response to changing circumstances, it is inevitable that the American legal profession will continue to change as the conditions, needs, and demands of the society around it force new forms of practice and the evolution of new methods for delivering legal services. And, again judging from our history, it is inevitable that there will be voices within the profession decrying the changes and longing for former days when things are remembered as having been simpler and more clearly defined. The question the legal profession must address, however, is *not* whether changes in the legal profession will occur. They will. The issue, rather, is how the profession will respond and adapt to such changes—and, indeed, help shape them—so as to preserve the core values that are essential to the competent, responsible, and effective delivery of legal services to clients.

B. CHALLENGES OF THE FUTURE

The changes and challenges confronting lawyers in the twenty-first century are likely to be equally if not more profound than those of the past. First, there is the continuing globalization of business, finance, and commerce, a trend that will lead inevitably to the evolution of multinational systems and procedures for regulating business activities and behavior. The evidence of this revolutionary change is all around us:

- Capital now moves freely around the globe through continuous electronic trading on the world's stock exchanges and through electronic transfers that individual governments are almost powerless to control.
- Feeding the ever-increasing demands of global trade, the flow of currency through the world's exchange markets is growing at a staggering rate: "Each day, \$600 billion is changed from one type of currency to another. More than a trillion dollars a week flow

through the money-exchange houses in London, New York, and Tokyo."⁹⁵

- As global capital grows, the world's major financial institutions have globalized to keep pace. Today, "each of the top five global banks alone has more assets than the government reserves (including gold) of the United States, Japan, and Germany combined."⁹⁶ The most "globalized" of the big banks—Citicorp—has 2,200 overseas offices in 89 countries, with some 20 million customer accounts.⁹⁷
- World trade has also spawned the growth of global mega-corporations often more economically powerful than the countries in which they operate. Some 37,000 global companies now dominate world trade, accounting for more than 25 percent of total global production.⁹⁸ Indeed, one-third of global trade is now intra-corporate—i.e., conducted between different branches or divisions *within* the same company.⁹⁹
- The new global corporations are huge: "The 1992 revenues of General Motors would make it the largest country in Africa and the second largest in South America," if such revenues were compared to national measures of gross national product (GNP).¹⁰⁰ Saudi Arabia's entire GNP is only slightly larger than the revenues of Exxon.¹⁰¹ IBM produces more revenues than Venezuela generates in GNP, and Toyota more than the Philippines.¹⁰²
- These mega-corporations are genuinely multinational, or perhaps metanational or post-national. Consider, for example, IBM—the quintessential "American" company. Although headquartered in Armonk, New York, IBM has "research facilities in Switzerland and operations in forty-six countries."¹⁰³ It purchases components from Japan, assembles

95. WILLIAM KNOKE, *BOLD NEW WORLD* 77 (1996).

96. *Id.*

97. *See id.* at 79.

98. *See id.* at 139.

99. *See id.*

100. *Id.* at 139-40.

101. *See id.*

102. *See id.*

103. *Id.* at 149.

them in Singapore, and markets and services its products almost everywhere.¹⁰⁴ Two-thirds of IBM's revenues are generated outside the United States, its stock is traded on major exchanges in ten countries, its shareholders are located throughout Europe, Asia, and the Americas "and it pays taxes everywhere."¹⁰⁵ Numerous similar examples could be cited of other companies—both "American" and foreign.

For present purposes, the important point is that lawyers seeking to provide services in such an increasingly globalized market will have to develop skills, attitudes, and institutional structures that extend considerably beyond their own traditional jurisdictional turf. Plainly, lawyers will be needed by rapidly growing and changing global enterprises, but they will have to bring to their task new creativity and flexibility in serving the needs of such clients.

Lawyers in the twenty-first century will also need to come to terms with the continuing revolution in information technology that is rapidly changing the role of the "professional" in our society. That revolution is best epitomized by the growth of the Internet. Started as a project of the U.S. Department of Defense in the late 1960s, the Internet—with its now famous World Wide Web—has become the largest communications network in the world.¹⁰⁶ Today, there are over 65 million users of the Internet on every continent (including Antarctica), and the number is increasing rapidly.¹⁰⁷ As of December 31, 1999, it is estimated that 60 percent of all Americans had access to the Internet.¹⁰⁸

One particularly important result of the spread of the Internet has been a dramatic increase in the quantity of information available to everyone. By giving virtually every user the ability to tap into sources of information previously available to only a few, the Internet has raised a serious challenge to the monopoly on specialized information traditionally held by professionals. One result of this phenomenon has been a growing trend toward a kind of "disintermediation."¹⁰⁹ Con-

104. *See id.*

105. *Id.*

106. *See id.* at 26-27.

107. *See id.*

108. *See id.*

109. "Disintermediation" has been a technical financial term describing a circumstance in which, for example, a bank or savings association, an "inter-

sumers are increasingly able to bypass “professionals” to gather information and to make decisions on their own. There are numerous examples of this trend from real estate brokers and travel agents to stock brokers and physicians. In the case of lawyers, the trend is evident in the proliferation of legal “self help” information increasingly available on the Internet as well as through books sold in almost every bookstore throughout the country.¹¹⁰ With the soaring expansion of the Internet—both in terms of the number of its users and its access to ever more sophisticated databases of information—this trend toward “disintermediation” will accelerate. As it does, it will force lawyers to rethink their roles as monopoly providers of legal services to their clients.

Yet another trend that will affect legal practice in the future is the continuing growth of “consumerism,” as consumers of all types of services, professional and otherwise, increasingly expect and demand access to information and a key role in the decision-making process. A prime example of this phenomenon is the growing expectation and demand of patients to play an active role in medical decisions affecting them. This growth of “consumerism” is tied to increased education and awareness levels among American consumers, as well as to increased access to information through sources like the Internet.¹¹¹

In the world of law firm clients, the growing sense of consumerism is also often enhanced by the presence of professionally trained managers and corporate executives who are accustomed to dealing with legal and regulatory issues that affect

mediate institution,” is unable to loan money profitably because of a mismatch between the interest rates at which the institution is able to borrow money from depositors and the rates it is required by the market to charge for loans. We have adopted the term in the present context to refer to another kind of dysfunctional intermediary—the tendency of the Internet to eliminate the role of the “middleman” in the distribution of information, even highly specialized information to which access was previously controlled or mediated by professionals. Through the Internet, the consumer is increasingly able to buy the item he wants or the service she seeks by going directly to the producer and skipping entirely the function of yesterday’s indispensable auction firm, automobile dealer, travel agent, grocery retailer—or lawyer.

110. Although the organized bar has often complained bitterly about these self-help devices, in some cases the bar itself has encouraged their use. In Florida, for example, the state Supreme Court has published a collection of forms on its own website to assist consumers in handling simple legal matters and in representing themselves pro se in certain kinds of proceedings. See *Florida State Courts, Self-Help Center* (visited Apr. 5, 2000) <<http://www.flcourts.org>>.

111. See *supra* text accompanying notes 106-10.

their businesses. Such clients will be increasingly insistent on the delivery of legal services that are both efficient and cost effective and increasingly intolerant of inefficiencies that result from restrictive rules of the legal profession that appear to the clients to be anachronistic or self-serving.

C. THE CURRENT DEBATE OVER MDP ORGANIZATIONS

The current debate over MDP organizations must be considered in light of both the above-described evolution of the American legal profession and the challenges confronting the profession in the future.¹¹² Proponents of permitting MDP arrangements argue that allowing formal affiliations between lawyers and nonlawyers will enhance the ability of lawyers to serve the needs of many clients who demand efficient and cost effective legal services to address their complex problems throughout the world. They assert that a client should be allowed to choose an MDP organization for certain types of legal services if the client so desires, and that there are no overriding considerations of public interest that should restrict such a choice. They also argue that lifting the current bans of Rule 5.4 would permit American lawyers to be more competitive with other professionals (both nonlawyers as well as foreign lawyers) in the pursuit of client business.¹¹³

Finally, proponents point out that MDP arrangements are facts of life with which the legal profession must come to terms, whether they are formally permitted under the Model Rules or not. As evidence they cite:

- The fact that MDP entities are permitted and currently exist in other parts of the world;¹¹⁴
- The fact that many jurisdictions that have prohibited MDP units in the past either now permit them in

112. The seeds of the present debate were sown when the first associates were employed by law firms, when the first paralegals and other nonlawyer specialists were brought in to assist with the delivery of legal services, and when the first ancillary businesses were established by lawyers. But the issue was pushed to the forefront only as large accounting firms began to make significant inroads in providing services traditionally offered through law firms.

113. *Cf.* Hearings Before the Commission on Multidisciplinary Practice (Feb. 4, 1999) (testimony of Kathryn Oberly, General Counsel and Vice Chair of Ernst & Young LLP), available at <<http://www.abanet.org/cpr/oberly2.html>> [hereinafter Oberly Testimony].

114. See COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, REPORTER'S NOTES (1999) available at <<http://www.abanet.org/cpr/mdpappendixc.html>>.

some form or appear likely to do so in the near future—examples include the United Kingdom, Victoria and New South Wales in Australia, and Quebec in Canada;¹¹⁵

- The fact that, even where formally prohibited, MDP entities often exist de facto through contractual relationships relating to cost and facilities sharing, combining of client lists and contacts, loans for operating capital, and the like. A good example is the arrangements that some of the Big Five accounting and professional services firms currently have with law firms in France and certain other parts of Europe;¹¹⁶ and
- The fact that similar arrangements are beginning to appear in the United States, presumably structured to avoid the current prohibitions of Rule 5.4. Examples include a recently announced alliance between Morrison & Foerster and KPMG;¹¹⁷ a new litigation firm in Washington, D.C. named McKee Nelson Ernst & Young, made up of former partners from King & Spalding, that will share office space and certain other facilities with Ernst & Young;¹¹⁸ and the recent

115. See *id.* Also note that, while Ontario recently modified its rules to permit MDP arrangements, it did so in such a restrictive way as to make the formation of an MDP organization highly undesirable in that province.

116. See Hearings Before the Commission on Multidisciplinary Practice (Nov. 12, 1998) (testimony of J. Rob Collins, Blake, Cassels & Graydon), *available at* <<http://www.abanet.org/cpr/collins1198.html>>; *id.* (testimony of Alison Crawley, Head of Professional Ethics of the Law Society of England and Wales), *available at* <<http://www.abanet.org/cpr/crawley1198.html>>; *id.* (testimony of Gerard Nicolay, Managing Partner of Coopers & Lybrand Juridique et Fiscal and Chief of PricewaterhouseCoopers in Paris), *available at* <<http://www.abanet.org/cpr/nicolay1198.html>>; *id.* (Nov. 13, 1998) (testimony of Andrew Scott, President of the Law Institute of Victoria in Melbourne, Australia), *available at* <<http://www.abanet.org/cpr/scott1198.html>>; *id.* (Feb. 16, 1999) (testimony of Gerard Mazet, President of the International Commission of the French National Bar Council), *available at* <<http://www.abanet.org/cpr/mazet1198.html>>; *id.* (testimony of Thomas O. Verhoeven, Oppenhoff & Rader), *available at* <<http://www.abanet.org/cpr/verhoeven1198.html>>.

117. On August 4, 1999, Morrison & Foerster announced the formation of a "strategic alliance" with KPMG and a law professor at the University of Georgia for the purpose of establishing "a national network of tax and legal professionals ready to help clients meet the challenges of the next millennium." *Morrison & Foerster LLP* (visited Apr. 5, 2000) <<http://209.0.110.65/mofocgi/getpractlong?TAX,0684KPMGSALTNET>> (quoting Thomas H. Steele, partner in charge of the state and local tax group).

118. See Tom Herman, *Ernst & Young Will Finance Launch of Law Firm in*

merger of the New York-based firm of Rogers & Wells with the London-based firm of Clifford Chance in a combination that includes the Pünder firm in Germany that is itself an MDP entity.¹¹⁹

Opponents of permitting MDP organizations assert that the preservation of the current restrictions in Rule 5.4 is essential to preserving the core values of the legal profession.¹²⁰ They argue that lifting the restrictions would significantly weaken the profession and would compromise the interests of clients for whom the protections of the Model Rules were primarily designed.¹²¹

In our view, the key question the current debate raises is whether it is possible for the legal profession to accommodate the changing demands and needs of the society around it by permitting MDP organizations as a new model for the delivery of legal services, without compromising the profession's core values in ways that are detrimental to the interests of clients or the public. The emergence of MDP arrangements is certainly not the first innovation in the practice of law that has involved close collaboration between lawyers and nonlawyers. Nor will it be the last. The issue is not whether it is possible for the legal profession to forbid or halt such innovations, but rather how the profession can perceive them accurately and effectively contain any risks or dangers they may pose.

The ABA's MDP Commission stated the point precisely and clearly:

Special Arrangement, WALL ST. J., Nov. 3, 1999, at B10.

119. See *Clifford Chance Roger & Wells* (visited Apr. 5, 2000) <<http://www.cliffordchance.com/uk/home/index.shtml>>.

120. For a recounting of the historical evolution of the restrictions contained in the current Rule 5.4 and an interesting argument that such restrictions are wholly unrelated to any core value of the legal profession, see Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1118-33 (2000).

121. See Hearings Before the Commission on Multidisciplinary Practice (Nov. 13, 1998) (testimony of William Elliott, Kane, Russell, Coleman & Logan), available at <<http://www.abanet.org/cpr/elliott1198.html>>; *id.* (Nov. 12, 1998) (testimony of Karen D. Powell, Petrillo & Powell), available at <<http://www.abanet.org/cpr/powell1198.html>>; *id.* (Feb. 4, 1999) (testimony of Lawrence J. Fox, Drinker, Biddle & Reath LLP), available at <<http://www.abanet.org/cpr/fox3.html>>; *id.* (Feb. 6, 1999) (testimony of Jay G. Foonberg, practitioner from Santa Monica), available at <<http://www.abanet.org/cpr/Foonberg.html>>; *id.* (Mar. 12, 1999) (testimony of Sydney M. Cone III, Cleary, Gottlieb, Steen & Hamilton), available at <<http://www.abanet.org/cpr/cone2.html>>.

The legal profession should adopt and maintain rules of professional conduct that protect its core values . . . but should not permit existing rules to unnecessarily inhibit the development of new structures for the more effective delivery of services and better public access to the legal system.¹²²

Therefore, before addressing the merits of the current restrictions of Rule 5.4, it is necessary to reflect on the core values that the rule protects—and that deserve protection.

III. IDENTIFYING PROFESSIONAL CORE VALUES

For purposes of the present analysis, the core values of the legal profession may be considered from two different perspectives—that of the lawyer's client and that of the society as a whole.¹²³ The articulations of the values and of the principles that flow from them vary somewhat depending upon which perspective is adopted, though the two sets of articulations are by no means inconsistent.¹²⁴

From the client perspective, the purposes of the legal profession are to assist clients (i) in structuring their prospective activities to achieve the clients' objectives while conforming to legal requirements, (ii) in accessing the judicial system (or alternative dispute resolution mechanisms) when necessary, and (iii) in resolving disputes through the judicial system (or alter-

122. COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, RECOMMENDATION Recommendation 1 (1999), available at <<http://www.abanet.org/mdprecommentation.html>>.

123. It might reasonably be argued that a third perspective should also be considered—that of the lawyer himself, that specially trained and selected person who is licensed to practice law. Do not his interests and organizational preferences matter? In our view, they do, but not to the extent of allowing some lawyers to impose rules of orthodoxy that mandate certain forms of organization and outlaw others that may be favored by lawyers with different preferences. The history of every culture is studded with examples of efforts to command and fix strict rules—enforced by penalty of fines, prison, death, or damnation—as to who, drawn from what groups, will exclusively be allowed to perform what functions, how, and in what forms of organization. But the lessons of history teach that over time the pressures of competition sand down such distinctions and exclusionary rules. Over time, others than a knight may have a horse, others than sons of kings may head a government, and others than guild members may work to get the job done. So, in our view, the issue at hand is not to be resolved by taking a poll of all people who have passed a bar examination; the core values at stake are grounded in the perspective of the client and the perspective of the society as a whole.

124. It should be noted that this list of core values is *minimal*. While we have attempted to focus on those values that are most commonly identified as being potentially threatened by affiliations between lawyers and nonlawyers, our list is by no means exhaustive.

native dispute resolution mechanisms) when they arise. Successful pursuit of these client interests, in turn, requires that:

- A lawyer be competent, with sufficient relevant knowledge, skill, and experience to represent the client's best interests;¹²⁵
- A lawyer be truthful and deal honestly with the client;¹²⁶
- A lawyer maintain the confidentiality of communications with the client;¹²⁷ and
- A lawyer exercise independent judgment in advising the client, uninfluenced by considerations other than the requirements of the law and the client's best interests. This principle thus requires that, insofar as possible, a lawyer must avoid any conflict of interest when rendering legal advice to a client.¹²⁸ Such conflicts may include either:
 - (1) Direct conflicts, as where a lawyer is concurrently representing another client with an opposing interest or where a lawyer has a financial interest that might be affected by the outcome of the client's matter;¹²⁹ or

125. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983) (requiring "competent representation" of a client and defining "competent representation" as including "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"); *id.* Rule 1.3 (requiring lawyers to act "with reasonable diligence and promptness" in their representation of clients); *id.* Rule 1.4(a) (requiring lawyers to keep their clients "reasonably informed" concerning the status of matters in which the lawyer is representing them).

126. See *id.* Rule 1.5(a) (requiring that lawyers' fees be "reasonable"); *id.* Rule 1.3 (governing potential business relationships between lawyers and their clients); *id.* Rule 1.15 (dealing with the safekeeping of client property entrusted to the lawyer).

127. This duty to maintain the confidentiality of communications is reflected in Rule 1.6(a) of the Model Rules, which prohibits a lawyer from revealing "information relating to [the] representation of a client" without the client's consent. *Id.* Rule 1.6(a).

128. See *id.* Rule 1.7 (dealing with conflicts of interest); *id.* Rule 1.9 (dealing with conflicts of interest with respect to former clients); *id.* Rule 1.10 (addressing imputed disqualifications arising from the representation of other clients); *id.* Rule 1.11 (covering successive government and private employment); *id.* Rule 1.12 (dealing with the lawyer's possible role as a former judge or arbitrator); *id.* Rule 1.13 (regulating representation of organizations as clients); *id.* Rule 2.1 (requiring a lawyer, in representing a client, to "exercise independent professional judgment and render candid advice").

129. Such direct conflicts become particularly troubling where a lawyer holds a separate financial interest that could influence the advice he gives to

- (2) Indirect conflicts, as where a lawyer has a business relationship that could be impacted by the way she deals with the client, where a lawyer has a friend or relative who might be affected by the outcome of the client's matter, or where the lawyer has a particular prejudice or bias that could influence her handling of the client's matter.¹³⁰

From the perspective of the society as a whole, the fundamental purposes of the legal profession are (i) to support the operation of an independent judicial system; (ii) to assist others in pursuing their personal objectives, but only in compliance with the requirements of the law; and (iii) to assist in the peaceful resolution of disputes when they occur.¹³¹ Implementation of the first purpose, supporting the operation of an independent judiciary, requires, in turn, that:

- A lawyer abide by the law and by the rules of procedure established by relevant tribunals;¹³²
- A lawyer be truthful and deal honestly with any tribunal before which she appears;¹³³

the client. It must be noted, however, that current bar rules do not prohibit all such situations. For example, contingent fee arrangements are expressly permitted by the Model Rules (Rule 1.5(c)) and direct investment in client businesses by lawyers is not flatly prohibited. *See id.* Rule 1.5(c).

130. One can cite endless illustrations of such indirect conflicts—as where a lawyer has an informal referral arrangement with an investment banker or other professional that is not disclosed to the client; where a lawyer is under pressure in his own firm to reach the result the client wants; where a particular client, by virtue of the business it provides to a firm, exercises undue influence on a lawyer's professional judgment; or where a lawyer is unduly influenced in the way he relates to a client or approaches a matter because of his own nationality, race, ethnicity, religious preference, social class, etc. The simple fact is that it is impossible for lawyers to avoid all conflicting interests. In the end, the application of the ethical standards on conflicts involves a practical balancing of competing interests, attempting to avoid situations in which a lawyer's professional independence is most likely to be compromised.

131. We recognize that this articulation of the role of lawyers in society derives from the perspective of Anglo-American law. We make no attempt to address the perspectives of other cultures or other legal systems on this question.

132. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1983) (dealing with the unauthorized practice of law); *id.* Rule 8.1 (governing admission to the bar and disciplinary matters); *id.* Rule 8.2 (governing statements regarding judicial and legal officials); *id.* Rule 8.3 (covering the reporting of professional misconduct); *id.* Rule 8.4 (dealing with lawyer misconduct).

133. *See id.* Rule 3.1 (providing that lawyers may advance only those claims and contentions that are meritorious); *id.* Rule 3.2 (obligating lawyers to expedite litigation); *id.* Rule 3.3 (requiring candor toward the tribunal); *id.* Rule 3.5 (dealing with the preservation of the impartiality and decorum of the tribunal); *id.* Rule 3.6 (concerning trial publicity); *id.* Rule 3.7 (dealing with

- A lawyer be truthful and deal honestly with opposing parties and with third parties;¹³⁴
- A lawyer work to provide access to the justice system for all persons;¹³⁵ and
- A lawyer work to improve the system of justice through law reform and other means.¹³⁶

Implementation of the second and third purposes of the legal profession from a societal standpoint (encouraging obedience to the law and promoting the peaceful resolution of disputes) requires, in turn, that:

- A lawyer competently and effectively represent clients (as described above in the discussion of the lawyer's functions from the client perspective); but also
- The legal profession as a whole provide a framework to support and encourage individual lawyers to adhere to all of the norms of conduct described previously in this section.

Although the point has received relatively little attention in commentaries on legal ethics, this latter function of providing a framework to support ethical conduct may, from the societal standpoint, be the most important role of the organized bar. For a profession as dispersed and decentralized as the Ameri-

the lawyer as witness); *id.* Rule 3.9 (treating advocacy in nonadjudicative proceedings).

134. *See id.* Rule 3.4 (dealing with fairness to opposing parties and counsel); *id.* Rule 4.1 (governing transactions with persons other than clients); *id.* Rule 4.2 (concerning communications with persons represented by counsel); *id.* Rule 4.3 (covering dealings with unrepresented persons); *id.* Rule 4.4 (relating to respect for the rights of third persons); *id.* Rule 7.1 (dealing with communications concerning a lawyer's services); *id.* Rule 7.4 (relating to communications of fields of practice and certifications).

135. *See id.* Rule 6.1 (dealing with pro bono services); *id.* Rule 6.2 (concerning a lawyer's acceptance of court appointments to represent clients); *id.* Rule 6.3 (dealing with membership in legal services organizations). Ironically, the core value of public service through pro bono representation is set out in the Model Rules in precatory rather than mandatory terms. *See id.* Rule 6.1. Thus, lawyers are encouraged to render at least 50 hours of pro bono service per year, but compliance is purely voluntary. Indeed, thus far, no American jurisdiction has made pro bono service mandatory, although the Florida Supreme Court recently imposed a requirement that lawyers in that state report the level of their pro bono activities to the court on an annual basis. *See* 2 HAZARD & HODES, *supra* note 94, § 6.1:100 at 830-32.1.

136. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.4 (1983) (permitting a lawyer to participate in law reform activities even if the results of such reform efforts might be construed as detrimental to the interests of the lawyer's clients).

can legal profession, involving as it does practitioners who offer their services in an immense variety of settings—both as private independent practitioners and increasingly as employees of both law firms and other organizations—the organized bar can provide the important educational and “support group” function to give lawyers an understanding of the ethical norms of the profession and to bolster the commitment of individual lawyers to abide by those norms. This function of the organized bar involves formal procedures such as the promulgation of rules of practice and the enforcement of disciplinary mechanisms. However, it also involves informal mechanisms that arise from personal relationships, mentoring situations, and the provision of peer support in difficult circumstances.¹³⁷ This important aspect of “professionalism” must be preserved as the bar explores alternative forms and modes of practice.

IV. THE DEFECTS OF RULE 5.4 FROM A CORE VALUES PERSPECTIVE

An analysis of Rule 5.4 of the Model Rules from the perspective of its effectiveness in preserving and enhancing the core values of the legal profession demonstrates that the current rule comes up short in almost every respect.

A. THE TEXT AND ASSERTED RATIONALE OF RULE 5.4

Rule 5.4, entitled “Professional Independence of a Lawyer,” contains four subsections. The first prohibits lawyers from sharing legal fees with nonlawyers (subject to limited exceptions not relevant for present purposes); the second prohibits lawyers from forming partnerships with nonlawyers for the purpose of practicing law; the third provides that lawyers whose fees are paid by non-client third parties (such as insurance companies for example) must not permit such third parties to influence the independent rendering of legal advice; and the fourth prohibits lawyers from practicing law in any kind of

137. In former times, the mentoring function of senior lawyers was absolutely critical to the training of new practitioners. When lawyering skills were learned primarily through clerkships, contacts with senior lawyers were indispensable, a fact that was reflected even in the traditional dinners held in the English Inns of Court. With the establishment of law schools in the nineteenth century and with the growth of large law firms in the twentieth, the art of mentoring has unfortunately been increasingly de-emphasized in the profession. This development makes the role of the organized bar described here even more important.

organization in which a nonlawyer owns any interest or exercises any form of management control or supervision.¹³⁸

The actual text of Rule 5.4 provides, in relevant part, as follows:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer

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

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

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

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

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

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.¹³⁹

138. Model Rules 5.4(b) and (d) are redundant. Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(b) (1983) (prohibiting lawyers from forming partnerships with nonlawyers for the practice of law) with Rule 5.4(d) (prohibiting lawyers from practicing law in any kind of organization in which a nonlawyer has an ownership interest or exercises any management control or supervision). The explanation for this duplication is probably that the drafters of Rule 5.4—or its antecedents—had an image of the typical law practice as that of the independent practitioner in partnership with one or two other similarly independent lawyers. The concept of a "partnership" was thus an extension of these independent individuals and was not seen as a separate organization. That view is, of course, consistent with the law of partnership under which a "partnership" is not a separate legal entity but rather a collection of its individual members. Thus, the second subsection of the rule was intended to deal with "partnerships" and the fourth subsection with "organizations."

139. *Id.* Rule 5.4. Versions of Rule 5.4 (or its substantive equivalents under the Model Code) have been adopted in every American jurisdiction. Only the District of Columbia has made a significant modification to the general restrictions set out in the rule. Under Rule 5.4(b) of the District of Columbia Rules of Professional Conduct, "[a] lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients" provided that the following specific conditions are met:

(1) The partnership or organization has as its sole purpose providing legal services to clients;

(2) All persons having such managerial authority or holding a financial interest undertake to abide by . . . [the] rules of professional conduct;

The justification offered for Rule 5.4 is that permitting lawyers to share legal fees with nonlawyers or practice law in organizations in which nonlawyers have any ownership interest or exercise any management control or supervision would run the risk of compromising the lawyer's independence and professional judgment.¹⁴⁰ This argument assumes that if a lawyer answers to a nonlawyer or shares legal fees with a nonlawyer, there is an overwhelming risk that the lawyer's professional judgment could be swayed by his or her own economic interest or by other improper considerations. Consequently, the risk of such improper influence is so great that it justifies a broad prophylactic rule prohibiting categories of relationships between lawyers and nonlawyers. In light of this proffered rationale, the legislative history of Rule 5.4 is particularly relevant.

B. THE LEGISLATIVE HISTORY OF RULE 5.4

The legislative history of Rule 5.4 begins with provisions of the ABA's 1908 Canons of Professional Ethics. A review of the evolution of the rule and its proffered rationale puts the current debate in better context.

As originally set out in the 1908 Canons of Professional Ethics, the provisions prohibiting fee sharing and practicing law in partnership with nonlawyers were justified not on grounds of preserving professional independence but rather as a means of avoiding the unauthorized practice of law.¹⁴¹ The

(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1 [dealing with the responsibilities of partners and supervisory lawyers]; and

(4) The foregoing conditions are set forth in writing.

D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1990).

This rule has been rarely used for two reasons. First, the rule's requirement that the partnership or organization have as its "sole purpose" the providing of legal services to clients substantially reduces the attractiveness of the option. *Id.* Additionally, the ABA's Committee on Ethics and Professional Responsibility concluded that a law firm with offices in more than one jurisdiction could not—consistent with the requirements of other jurisdictions—have a nonlawyer partner in its Washington, D.C. office. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 (1991); Hearings Before the Commission on Multidisciplinary Practice (Nov. 12, 1998) (testimony of Susan Gilbert, Ethics Counsel for the District of Columbia Bar), available at <<http://www.abanet.org/cpr/gilbert1198.html>>.

140. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1983).

141. *See* CANONS OF PROFESSIONAL ETHICS Canons 33, 34 (1908).

ABA's 1969 Model Code of Professional Responsibility maintained the prohibitions on fee sharing and practicing in partnerships with nonlawyers, deeming them necessary to prevent the unauthorized practice of law.¹⁴² However, the Model Code's restrictions on practicing in organizations in which nonlawyers hold an ownership interest or exercise any significant form of management control or supervision was justified on the new grounds of preserving the independence of the lawyer's professional judgment.¹⁴³ The next development came in 1983 with the adoption of the Model Rules. There, all of these restrictions—the prohibitions on fee sharing, practicing in partnership with a nonlawyer, and practicing in organizations in which nonlawyers hold an ownership interest or exercise any significant management control or supervision—were, for the first time, justified as necessary to preserve the independence of the lawyer's professional judgment.

Thus, although the duty of a lawyer to exercise independent professional judgment on behalf of her client has always been clear, it has been less clear what broad organizational prohibitions, if any, should undergird that duty. The ABA extensively debated this issue in the early 1980s when it considered the current Model Rules.

In 1977, in response to widespread criticisms of the 1969 Model Code, the ABA appointed a Special Commission on Evaluation of Professional Standards to consider modification or replacement of the Model Code. The Special Commission—which came to be known as the "Kutak Commission" after its chairman Robert J. Kutak—ultimately recommended a complete revision of the Model Code in a format that eventually led to the Model Rules of Professional Conduct.¹⁴⁴

The Kutak Commission presented a Discussion Draft to the ABA's House of Delegates in January 1980 and a Proposed Final Draft to the House of Delegates in May 1981. Following another round of comments and revisions, a Final Draft was submitted to the House in August 1982, and was debated at

142. The fee-sharing restriction appears as Disciplinary Rule 3-102 of the Model Code. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102 (1980). The prohibition on forming a partnership with a nonlawyer is set out in Disciplinary Rule 3-103. See *id.* DR 3-103. Both rules are included under Canon 3, entitled: "A Lawyer Should Assist in Preventing the Unauthorized Practice of Law." *Id.*

143. See *id.* DR 5-107(C). Canon 5 is entitled: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." *Id.*

144. See 1 HAZARD & HODES, *supra* note 94, at Intro-13.

three successive meetings. In August 1983, the Model Rules were officially adopted by the ABA and promulgated for consideration in the states.¹⁴⁵

In its May 1981 Proposed Final Draft, the Kutak Commission, though acknowledging potential risks associated with nontraditional forms of practice, rejected flat prohibitions on formal affiliations between lawyers and nonlawyers. Instead, the Commission proposed a rule that would have permitted all forms of law practice and all financial arrangements for providing legal services, so long as there were assurances that the participating lawyers would meet their responsibilities under the rules of professional conduct.¹⁴⁶ The Commission identified four legitimate objections to permitting lawyers to practice in formal affiliations with nonlawyers and addressed each one in turn.

First, the Kutak Commission noted the danger that non-lawyer participants in such a scheme might engage in the unauthorized practice of law. The Commission responded to that concern in two ways. It proposed Rule 5.3 (which was adopted and remains a part of the Model Rules) that requires lawyers to supervise the activities of nonlawyer employees and associates to insure that their conduct is "compatible with the professional obligations of the lawyer."¹⁴⁷ Additionally, the Commission proposed a continuation of the traditional prohibition on lawyers assisting in the unauthorized practice of law, a restriction embodied in the current Rule 5.5(b) of the Model Rules.¹⁴⁸

Second, the Kutak Commission acknowledged the risk of nonlawyers jeopardizing the maintenance of client confidential information. It noted, however, that Rule 5.3 (dealing with responsibilities of lawyers in respect of nonlawyer assistants) already governed such situations and argued that the safeguards already in place in traditional law firms to guard against inadvertent breaches of confidences through communications to

145. *See id.* at Intro-13, 16.

146. The Commission's 1981 version of Rule 5.4 would have permitted a lawyer "to be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency," so long as the organization provided written guarantees of compliance with the rules on professional independence, client confidentiality, advertising and solicitation, and fees. WOLFRAM, *supra* note 59, at 879.

147. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3(b) (1983).

148. *See* 2 HAZARD & HODES, *supra* note 94, § 5.4:102 at 797.

nonlawyer assistants could apply to other forms of organizations.¹⁴⁹

Third, the Kutak Commission recognized that affiliations with nonlawyers could impair the lawyer's independent professional judgment. However, the Commission reasoned that other rules already adequately addressed this problem. For example, Rule 1.7 on conflicts of interest requires complete loyalty to the client's interests,¹⁵⁰ Rule 1.8(f) deals with situations in which the lawyer is paid by a third party for his services,¹⁵¹ and Rule 1.2(a) confirms that the client alone has final say as to the objectives of the representation.¹⁵² Nonetheless, the Commission, in its version of Rule 5.4, added an additional step to protect professional independence, a requirement that a lawyer participating in a nonlawyer managed organization must obtain written assurances of the preservation of the lawyer's independent judgment.¹⁵³

Finally, the Kutak Commission noted that its proposal could give rise to concerns about the improper solicitation of clients by a lawyer. In response, however, it pointed to Rule 7.3 that continued the traditional restriction on in-person solicitation and observed that there was no reason to believe that a nonlawyer managed organization would be unable to enforce that rule.¹⁵⁴

Despite this analysis and these arguments, and despite the fact that the Kutak Commission's proposal for a more permissive Rule 5.4 attracted little controversy and little comment from the public or the bar, the House of Delegates adopted an "eleventh hour" amendment in August 1981 rejecting the Kutak Commission's position and restoring the restrictions taken verbatim from various parts of the old 1969 Code of Professional Responsibility.¹⁵⁵ Professor Hazard has described the House's actions as follows:

These multiple protections [established by the Kutak Commission] were all found wanting by the ABA House of Delegates. The Kutak Commission's carefully layered safeguards were disregarded, and in their place was put a flat prohibition on sharing fees or organiza-

149. *See id.* at 797-98.

150. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).

151. *See id.* Rule 1.8(f).

152. *See id.* Rule 1.2(a).

153. *See* 2 HAZARD & HODES, *supra* note 94, § 5.4:102 at 798.

154. *See id.* n.2.

155. *See id.* at 796.

tional authority with nonlawyers regardless whether any of the specified harms occur or are even threatened. This substitution of a broad prophylactic rule where a narrow one would have sufficed suggests that a fifth and illegitimate rationale was actually decisive, namely economic protectionism.¹⁵⁶

Particularly when viewed against this erratic background, the current debate over MDPs requires that we look again at the rationale for Rule 5.4 and analyze anew whether the rule in its current form can be justified as necessary to preserve core values of the legal profession. If not, it is hard to justify how the profession can continue to use the rule to deny clients the choice of an MDP in providing at least certain kinds of legal services.

As previously noted, core values include preserving the independence of professional judgment; assuring competence in the delivery of legal services; maintaining client confidences; maintaining truthfulness and fair dealing in relations with clients, tribunals, and others; abiding by the rules of tribunals; assisting in providing access to justice and improving the justice system; and providing a framework to support the ethical behavior of individual lawyers.¹⁵⁷ The question remains whether the restrictions of the current Rule 5.4 can be justified as necessary to preserve any of these core values. Because it is offered as the primary justification for the rule, an analysis of the issue of preserving the independence of professional judgment provides an appropriate starting point.

C. RULE 5.4'S DEFICIENCIES IN PRESERVING THE INDEPENDENCE OF A LAWYER'S PROFESSIONAL JUDGMENT

As previously noted, the primary rationale offered in the Model Rules for Rule 5.4 is that it is necessary to preserve the independence of a lawyer's professional judgment. In fact, however, even cursory analysis suggests that that rationale is utterly inadequate to justify such a broad proscriptive rule.

First, if the purpose of the rule is to maintain the core value of professional independence by preventing lawyers from offering legal services in any context where the lawyers are supervised by, paid by, or report to nonlawyers, then it must be dismissed as either grossly ineffective or cynically biased. Provisions of Rule 5.4 itself and widespread practices within the profession create so many major exceptions to the rule as to all

156. *Id.* at 799.

157. *See supra* notes 123-37 and accompanying text.

but nullify its validity as protecting a core value of the profession. Examples of such exceptions include lawyers working as in-house counsel in corporate law departments and government agencies, as well as lawyers representing individual clients while employed by nonprofit legal services organizations and prepaid legal insurance plans. All of these exceptions are recognized and accepted in spite of the broad prohibitions set out in Rule 5.4, a most peculiar fact if the risk to professional independence in lawyer-nonlawyer affiliations is so great as to justify the broad general prohibitions included in the rule.

The terms of Rule 5.4 reflect this anomaly. Subsection (d) of the rule provides that "[a] lawyer shall not practice with or in the form of a professional corporation or association *authorized to practice law for a profit*" if a nonlawyer holds any ownership interest or exercises any management control or supervision in the entity.¹⁵⁸ Thus, the provision impliedly permits lawyers to work for government agencies and nonprofit organizations—i.e., entities that work other than "for a profit." It also permits lawyers to work in-house in corporate law departments, since the organizations for which they work are presumably not "authorized to practice law."

Again, these exclusions are quite puzzling. If in fact the independence of a lawyer's professional judgment is so compromised by formal affiliations with nonlawyers that a broad prohibitory general rule is justified, what possible rationale could there be for denying the protections of that rule to the clients of lawyers who work in-house in corporations or in a nonprofit setting? Are such clients not as entitled to the independent professional judgment of their counsel as clients of lawyers practicing in other situations?

Nor can these examples be easily dismissed as not raising the same degree of concern as contexts in which a lawyer offers his services to the general public. Consider, for instance, the case of a military Judge Advocate General (JAG) officer asked to represent a defendant in a court martial proceeding initiated by the JAG officer's commanding officer. It is difficult to imagine a more potentially pressured or coercive hierarchical structure than a military unit. And yet, most lawyers would not challenge the fact that the JAG officer can exercise independent professional judgment on behalf of his client, notwith-

158. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(d) (1983) (emphasis added).

standing the fact that he reports to the very commanding officer who initiated the prosecution.

Second, Rule 5.4 fails to preserve the professional independence of lawyers because its proscriptions only govern interactions between lawyers and nonlawyers. Neither Rule 5.4 nor any other provision of the Model Rules explicitly addresses a situation in which the judgmental independence of a lawyer is threatened or overruled by another lawyer or by the law firm in which the lawyer works.¹⁵⁹ If it is important to protect the independence of a lawyer's professional judgment—and we clearly believe it is—then a rule that purports to do so should be of universal applicability. Indeed, in an era of large and rapidly growing law firms with the attendant economic pressures they create, a focus on threats to a lawyer's independence “from within” would seem equally important to threats “from without.” This is particularly true since, as we have seen, most lawyers in America today are “employees” and not independent practitioners.

There are, of course, innumerable examples of such potential pressures “from within:”

- The use of the hourly billing system and the pressures in many law firms, often quite explicit, for lawyers to “keep their billable hours up;”
- The use of contingent fee arrangements that give lawyers an economic stake in the outcome of a client's matter;¹⁶⁰

159. Rule 2.1 of the Model Rules, which deals with the lawyer's role as “advisor” does provide that “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice.” *Id.* Rule 2.1. However, this rule is usually viewed as reflecting the lawyer's obligation to give objective advice to a client, uninfluenced by the lawyer's sense of what the client wants to hear. *See id.* cmt. Since Rule 5.4 is the only rule specifically denominated to deal with the issue of the “professional independence of a lawyer,” it is a fair criticism that it does not treat situations in which a lawyer's independence might be threatened by other lawyers in her own firm—perhaps a more likely occurrence than a threat from a third party. *Id.* Rule 5.4

160. Of course, it should be noted that contingent fee arrangements are explicitly permitted by the Model Rules (except in domestic relations or criminal matters) and arguably serve a useful public purpose by making the judicial system more accessible. *See id.* Rule 1.5(c). It is not the purpose of this Article to debate that point, but merely to note the inherent—indeed, virtually unavoidable—pressures exerted on the independent professional judgment of a lawyer who works under a contingent fee arrangement. To make the point more explicitly, it is difficult to see how a lawyer in a contingent fee arrangement could also comply with the requirement of Rule 1.7(b) of the Model Rules that “[a] lawyer shall not represent a client if the representation of that client

- The widespread practice of lawyers holding an interest in a client's business or serving on the client's board of directors, both practices that can and sometimes do affect the objectivity of a lawyer's professional judgment;
- The familiar scenario of a senior partner subtly (and sometimes not so subtly) encouraging a young associate to arrive at a result in an opinion letter or memorandum of law that is more to the liking of a large client of the law firm; or
- The pressure that a lawyer often feels to refer a client to another lawyer in her own firm, regardless of whether she judges the second lawyer to be the "best" person to handle the client's matter.

Our point, of course, is not to suggest that lawyers or law firms should be held to an impossible standard of complete objectivity or purity on issues of professional independence.¹⁶¹ We wish merely to point out that the threats to the independence of professional judgment from "within" the profession may be just as serious as any from "without." Since Rule 5.4—which purports to treat of the important subject of professional independence—does not cover lawyer-to-lawyer relationships, and since (as shown above) the rule irrationally permits some lawyer-nonlawyer affiliations while condemning others, one must frankly question whether the real motivation for the rule has anything to do with the core value of protecting professional independence.

may be materially limited . . . by the lawyer's own interests . . ." *Id.* Rule 1.7(b).

161. In the context of law firms, there is of course a process of "internal discipline" whereby the work of a lawyer is reviewed by others and the client receives the best advice arising from the collective efforts of the lawyers working on a particular matter. In the course of such work, it is inevitable that lawyers will from time to time disagree as to the advice that should be rendered. For one lawyer in such a setting to accede to the views of her colleagues even though she individually might have come out differently on an issue does not represent a compromise of professional independence of the sort that we are concerned about here. Indeed, it is to be expected that lawyers will often accede to the views of more experienced colleagues or, in close cases, will agree that one particular course of action may be equally preferable to another. Our concern focuses on those circumstances in which a lawyer is asked to compromise her professional judgment for reasons *other than* legitimate and reasonable disagreements over what advice or course of action should be followed.

Professor Robert Gordon of the Yale Law School accurately summarized the problems with the rule in his comments to the MDP Commission:

Any and all forms of professional practice are subject to pressures, constraints and temptations—pressures from hierarchical superiors or peers, payment systems or fee arrangements, incentives to career advancement or financial reward inside firms or in the profession generally—that may to a greater or lesser extent compromise the exercise of a lawyer's independent judgment. Over the course of this century, the legal profession has adopted many arrangements and organizational forms for representing clients and receiving payment for services that pose conflicts between their own interests on the one hand and the interests of clients and the public good on the other. Hourly billing, to take one of many examples, tempts some lawyers to run the meter, churn cases, and pad bills; contingent fees, to take another, tempts others to shirk on effort, and settle early and low. Such conflicts are unavoidable: No set of arrangements has ever been or ever will be devised that will entirely remove such pressures and temptations. The question [the] Commission has to ask is, "Do the proposed arrangements for lawyers to practice with non-lawyers promise to *add* any significant sources of pressure, constraint and temptation to those that already exist?" And even [if] the answer to that question should turn out to be "Yes (or Maybe)," does the likely cost or risk of adding new sources of pressure offset the likely benefits of multidisciplinary practices?¹⁶²

We believe that a case has simply not been made that permitting MDPs would create more conflicts of interest—direct or indirect—and thus more threats to the professional independence of lawyers, than those that currently exist in the everyday practices of lawyers in law firms, corporate law departments, government agencies, and nonprofit organizations.¹⁶³ To be

162. Letter from Robert W. Gordon, Fred A. Johnston Professor of Law at Yale Law School, to the Commission on Multidisciplinary Practice (May 21, 1999), available at <<http://www/abanet.org/cpr/gordon.html>>.

163. A test of this thesis is whether clients have been dissatisfied with the services they have received from the so-called "ancillary businesses" that have been operated by American law firms for many years, particularly since the mid-1980s. See *supra* notes 92-94 and accompanying text. While ancillary businesses are not MDP arrangements, at least as this term is used in this Article, the operation of them by law firms raises precisely the same ethical issues—e.g., preservation of professional independence, avoidance of conflicts of interest, and preservation of client confidences. See Jones, *supra* note 94, at 123-38. It is therefore quite significant that, in testimony before the Commission, representatives of both the malpractice insurance industry and state bar disciplinary committees confirmed that there have been no significant claims or actions against lawyers or law firms in respect of the operation of such ancillary businesses. See Hearings Before the Commission on Multidisciplinary Practice (Nov. 13, 1998) (testimony of William Freivogel, Loss Prevention Counsel for Attorney Liability Assurance Society, Inc.), available at

sure, it is likely that a combination of a large law firm and a large accounting firm would produce more potential conflict situations than either organization would have separately, but that would be more the result of "bigness" than of the multidisciplinary nature of the combined practice. There is just no reason to suppose that such a combination would necessarily generate more conflicts than a merger of two large law firms. And it is arguable that the combination of a small law firm and a small accounting firm might have considerably less conflict situations than currently exist in one of the country's 50 or 100 largest law firms. In short, in our view, the broad proscriptive provisions of Rule 5.4 represent a glorification of form over substance that cannot be justified on the basis of preserving the professional independence of lawyers.¹⁶⁴

D. DEFICIENCY OF RULE 5.4 AS NECESSARY TO PRESERVE OTHER CORE VALUES OF THE PROFESSION

It remains to be inquired whether the current provisions of Rule 5.4 can be justified as contributing to the preservation of any of the other core values of the legal profession that we have identified.¹⁶⁵ We believe they cannot.

1. Assuring Competence

Regarding the core value of assuring competence in the delivery of legal services, there is nothing per se in the formal affiliation of lawyers and nonlawyers that would endanger the

<<http://www.abanet.org/cpr/freivogel1198.html>>; *id.* (Mar. 12, 1999) (testimony of Joseph P. McMonigle, Chair of the ABA Standing Committee for Lawyers Professional Liability), *available at* <<http://www.abanet.org/cpr/mmonigle1.html>>.

164. This same conclusion applies to the current Rule 5.4's prohibition of a lawyer or law firm sharing legal fees with a nonlawyer. There is simply no reason to conclude that for a law firm to accept capital investments from a nonlawyer or to share the fees of an engagement with a nonlawyer professional who assists in a matter would lead to a compromise of the independence of a lawyer's professional judgment. Indeed, the current rule already makes an explicit exception for nonlawyer employees of a law firm who may be compensated "in whole or in part" on a profit-sharing basis. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(a)(3) (1983). There are numerous accounting and billing procedures by which a client could be asked to compensate a lawyer and nonlawyer working jointly without transgressing the literal prohibition on the sharing of "legal fees." *Id.* Rule 5.4(a). In short, the prohibition on fee sharing—like the other restrictions set out in the current Rule 5.4—can simply not be justified on the basis of the preservation of professional independence.

165. *See supra* Part III (discussing the core values of the legal profession).

continuing competence, skills, and experience of the lawyers involved. Indeed, the Model Rules explicitly recognize that a practicing lawyer may engage the services of paralegals, lay researchers, specialists, and other nonlawyer experts and professionals to assist in the delivery of legal services to a client.¹⁶⁶ In fact, permitting lawyers to work in multidisciplinary settings with other professionals could often *enhance* the quality of services delivered to the client by assuring that all legal services are provided by lawyers at the same time that nonlegal services are provided by other competent professionals. The use of MDP arrangements can thus preserve the individual lawyer's ability to develop professionally, while at the same time the client is protected from unqualified decision-making and advice by the lawyer acting outside his own field of expertise.

2. Maintaining Client Confidences

With regards to the core value of maintaining client confidences, again there is no reason to believe that client confidential information is likely to be placed at greater risk by the presence of nonlawyers in an MDP setting. In the first place, lawyers do not have a monopoly on the commitment to safeguard confidential information. Plainly there are many non-lawyer professionals (e.g., doctors, psychologists, social workers, accountants, etc.) for whom the protection of client confidential information is just as sacrosanct as it is for lawyers. And, it may be noted, those professions—as well as many others—manage on a regular basis to provide services successfully to clients that require the transmission of confidential information, even without benefit (in most cases) of the statutory protections afforded to lawyers.

Moreover, it is quite common in the modern practice of law for a lawyer to share client confidential information with third parties, including nonlawyers, when necessary to carry out the

166. Rule 5.3(a) requires a lawyer to supervise the work of such lay assistants and to "make reasonable efforts to ensure" that their conduct is compatible with the rules governing the lawyer's conduct. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3(a) (1983). This rule is an outgrowth of Ethical Consideration 3-6 under the Model Code that recognized that "[a] lawyer often delegates tasks to clerks, secretaries, and other lay persons" and that such delegation "enables a lawyer to render legal service more economically and efficiently." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-6 (1980); see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 316 (1967).

purposes of a representation, and the Model Rules recognize that practice.¹⁶⁷ There is no reason that the same practice—governed by the Model Rules—would not work equally as well in an MDP organization as in a law firm.¹⁶⁸

3. Maintaining Truthfulness, Abiding by Rules of Tribunals, and Providing Access to Justice

As regards the core values of a lawyer (i) maintaining truthfulness and fair dealing in relations with clients, tribunals, and others; (ii) abiding by the rules of tribunals; and (iii) assisting in providing access to justice and improving the justice system, there is no reason to suppose that lawyers working in MDP settings would be less diligent in honoring these obligations than their colleagues working in law firms or other professional settings.¹⁶⁹ Indeed, to suggest that lawyers are more prone to honesty and fair dealing than other professionals or even more interested in the maintenance of an effective justice system than other citizens smacks of professional hubris. In any event, it can hardly be used as a justification for the current restrictions of Rule 5.4.

4. Providing a Support Framework for Ethical Behavior

The current provisions of Rule 5.4 may, in one respect, help to preserve a core value of the profession in a way that unre-

167. Rule 1.6(a) provides, in relevant part, that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983). Under this rule, a lawyer is not required to obtain a client's consent before disclosing information to a third party who is an employee of the lawyer's law firm. *See id.* cmt. Such consent might also be implied where the third party is outside the law firm if the consultation with the third party is necessary to the lawyer's activities on the client's behalf.

168. A similar analysis applies to the evidentiary rule of attorney-client privilege. It is now well established that there is no waiver of the attorney-client privilege when otherwise privileged information is disclosed to a third party appropriately involved in assisting a lawyer in the representation. *See id.* This includes not only other lawyers in a law firm, but also nonlawyer employees of a law firm and other nonlawyers, such as investigators or experts, who are retained to assist the lawyer. *See* 1 HAZARD & HODES, *supra* note 94, § 1.6:103-1 at 144. There is no reason that the evidentiary privilege could not extend to attorney-client communications in an MDP setting just as it does in a law firm setting, although some administrative procedures might need to be put in place to assure that all parties were aware of the presence and the scope of the privileged communication.

169. *See* Oberly Testimony, *supra* note 113.

stricted MDP organizations would not. It relates to the duty of the legal profession to provide a framework to support the actions of individual lawyers in honoring and complying with the ethical requirements of the profession. We do not suggest that lawyers working in an MDP setting would inherently be any less attentive to their ethical duties than lawyers working in law firms. Our point is simply that organizations made up entirely of lawyers would probably be more likely to provide a support system and environment to encourage behavior that meets the ethical norms of the legal profession than would organizations made up of both lawyers and nonlawyers, especially if the lawyers are in a distinct minority. Having said that, the issue could be adequately addressed through administrative procedures in an MDP setting as set out in Part V.

V. A "RADICAL" PROPOSAL TO MODIFY THE MODEL RULES

A. RATIONALE FOR PROPOSAL

The stated goal of the current Rule 5.4 is to preserve the independence of lawyers' professional judgment. It does so by banning some limited subcategories of circumstances in which lawyers engaged in providing legal services (i) share economic interests with nonlawyers or (ii) work under the managerial control or supervision of nonlawyers. Although we believe, for the reasons set out in detail above, that Rule 5.4 in its present form is improperly focused and ineffective, we do not disparage the important issues that it addresses. Encouraging the independence of the lawyer's professional judgment is critically important to the future of the legal profession—particularly given the challenges facing the profession in the future. Likewise, it is very important to address the now common phenomenon of lawyers offering their services in association with nonlawyers. Accordingly, Rule 5.4 should be refocused to deal with the latter issue and a new rule be promulgated to address specifically the challenge of maintaining professional independence in a context in which most lawyers are in fact employees and no longer independent practitioners.

Our recommendations arise from the conviction that the current Rule 5.4 has been counterproductive and has disserved both clients and the legal profession through a number of serious though unintended consequences. First, though purporting to address the issue of professional independence, the rule ig-

nore threats to that important value that may be posed by lawyers themselves or by law firms. As a result, the current approach has arguably shielded from close ethical scrutiny a number of practices and activities that can and do impinge on a lawyer's independence.¹⁷⁰ This lapse is especially important in light of the growing size of many law firms and other changes in modes and forms of practice in recent years.

Second, by arbitrarily permitting certain types of affiliations between lawyers and nonlawyers while condemning others, the current Rule 5.4 creates the strong impression that its primary purpose is not the preservation of independent judgment but rather the selfish protection of lawyers' economic interests. Moreover, by simply carving out exceptions for lawyers practicing in corporations, government agencies, and nonprofit organizations, the current approach leaves obscured the guidelines that should apply in those entities to safeguard the independence of the lawyer's professional judgment.

Finally, by requiring that lawyers must practice *only* in traditional law firms (i.e., in firms owned and controlled solely by lawyers)—unless they fall under one of the approved exceptions for in-house counsel, government lawyers, or attorneys for nonprofit organizations—the current rule effectively forces lawyers who want to use their legal skills in other organizational settings to move *out* of the profession. As a consequence, thousands of such lawyers now work in consulting firms, investment banking houses, accounting firms, and elsewhere, applying their skills and offering advice to clients (albeit advice that is technically not couched as "legal advice") completely outside the structure of the legal profession and outside the reach of the rules of practice.¹⁷¹ That result is not good for the

170. See *supra* notes 159-64 and accompanying text.

171. The legal profession has been "hoisted by its own petard" in respect of these "nonlawyer lawyers." By insisting that a lawyer can practice law only in a traditional law firm and defining any other kind of practice as the unauthorized practice of law, the legal profession has forced lawyers working in non-traditional situations to define what they do as something other than the practice of law. So long as those activities are not activities that would constitute the unauthorized practice of law if undertaken by a layman, the profession is essentially estopped from claiming them to be the practice of law if undertaken by someone trained as a lawyer. As a consequence, a lawyer may literally leave her law firm, walk across the street, and join a consulting firm where she continues to perform the same services as previously, but now—because of the definitions imposed by the legal profession—she is no longer deemed to be engaged in the practice of law. We suggest that this is an absurd result.

lawyers involved, not good for the legal profession, and not good for the public. As the inexorable pressures for multidisciplinary practice continue to grow,¹⁷² the legal profession will find both its numbers and its influence greatly reduced unless it is willing to embrace flexible and comprehensive ground rules governing the work of lawyers in diverse organizational structures.

B. TEXT OF PROPOSED RULES

For the reasons detailed above, we offer two proposals to modify the Model Rules—a new Rule 1.18 and a new Rule 5.4. The new Rule 1.18 deals explicitly with the important objective of safeguarding the independence of the lawyer's professional judgment.¹⁷³ That new rule (which we propose be included in that part of the Model Rules dealing with the Client-Lawyer Relationship) provides as follows:

Rule 1.18. Independence of Professional Judgment

A lawyer shall not represent a client if the lawyer—because of personal economic interest, circumstances of employment, relationship with or commitment to another person, or for any other reason—cannot render to the client objective and independent legal advice, unless:

- (1) the lawyer reasonably believes that any such factor will not prevent the lawyer from rendering objective and independent advice; and
- (2) the client consents after consultation.

As for Rule 5.4, we propose that it be revised to focus explicitly on the responsibilities of lawyers when practicing in association with nonlawyers and be broadened to cover *all* types

172. See *supra* notes 114-19 and accompanying text.

173. Of course, several provisions of the Model Rules other than Rule 5.4 already touch on the issue of professional independence. Rule 1.8(f) provides that a lawyer may accept compensation for representing a client from someone other than the client only if such arrangement does not interfere with the lawyer's independence of professional judgment. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (1983). Similarly, Rule 2.1 provides that a lawyer, in counseling a client, "shall exercise independent professional judgment and render candid advice." *Id.* Rule 2.1. In addition, Rule 1.7(b), while not expressly referencing professional independence, specifies that a lawyer should not represent a client if the representation would be "materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests." *Id.* Rule 1.7(b). However, given the substantial changes that have impacted the profession and the new forms of practice that have emerged since the Model Rules were adopted in 1983, a persuasive argument can be made that a new rule explicitly tailored to address the challenges to professional independence faced by today's lawyers is appropriate.

of such association. The new Rule 5.4 (which we would also re-name) provides as follows:

Rule 5.4. Responsibilities Regarding Practice in Association with Nonlawyers

(a) A lawyer who is an active member of the bar and who provides legal services in any partnership, corporation, government agency, or other organization the activities of which are not limited exclusively to the practice of law, shall be subject to the Rules of Professional Conduct in respect of all legal services, as defined in paragraph (b), that the lawyer may provide.

(b) For purposes of this Rule 5.4, "legal services" denotes services that would be regarded as legal services if performed by a lawyer in a law firm or other organization the activities of which are limited exclusively to the practice of law, even if such services are not prohibited as unauthorized practice of law when provided by a nonlawyer.

(c) A lawyer may not practice in any partnership, corporation, government agency, or other organization in which a nonlawyer has an ownership or economic interest or in which the lawyer's employment is subject to the control of a nonlawyer, unless the lawyer reasonably believes that there are adequate policies and procedures in effect in such partnership, corporation, government agency, or other organization to permit the lawyer to comply freely with the requirements of the Rules of Professional Conduct.

C. COMMENTARY ON PROPOSED RULES

The two new rules that we propose address the deficiencies identified in the current Rule 5.4 in several respects.

- The proposed new Rule 1.18 provides a single focal point in the Model Rules for issues of professional independence. It is applicable to *all* lawyers regardless of the organizational settings in which they work—in law firms, corporations, government agencies, non-profit organizations, MDP organizations, or other entities. It requires the lawyer to identify, analyze, and weigh the full range of his own personal interests and relationships that could potentially affect his capacity for professional independence and judgment—interests and relationships that have become increasingly complex as the practice of law has changed in recent years.
- Implicit in the new Rule 1.18 is a recognition that the creation of a totally conflict-free environment in which a lawyer operates with complete objectivity and independence of judgment is an unattainable ideal. The rule, however, obliges lawyers continuously to weigh and, in appropriate cases, to disclose

to their clients the potential impact of any interest, status, or behavior (direct or indirect) that might impinge on their objectivity. In this respect, the new rule is patterned on the current approach to conflicts of interest embodied in Rule 1.7 of the Model Rules.

- The new Rule 5.4, in subsections (a) and (b), provides—for the first time in the Model Rules—that every lawyer who is an active member of the bar is subject to the Rules of Professional Conduct in respect of broadly defined legal services offered through any organization for which the lawyer works. These provisions are intended to close the regulatory gap with regard to lawyers who may currently be “forced out of the profession” because they elect to use their skills in non-traditional organizational settings.¹⁷⁴ The definition of legal services for these purposes is a broad one, essentially embracing the concept that a lawyer who works in an MDP setting should be held to the standards set out in the Model Rules whenever she is engaged in activities that would be considered the practice of law if she were to engage in them in a traditional law firm setting. It should be stressed, however, that our proposed rule does *not* expand the definition of legal practice for purposes of enforcing unauthorized practice of law restrictions against nonlawyers. Indeed, the new rule expressly recognizes that a particular activity might constitute the “practice of law” for purposes of applying the Model Rules to the work of a lawyer *even if* the same activity would not constitute the unauthorized practice of law if engaged in by a nonlawyer.
- The new Rule 5.4’s use of active membership in the bar¹⁷⁵ as the criterion for applicability of the new rule is designed to provide a simple and objective way of determining who is a “lawyer” for purposes of the Model Rules. Obviously, a lawyer could “opt out” by terminating his active bar membership. In that case, however, the lawyer would be prohibited from holding himself out as a lawyer, would be barred from

174. See *supra* notes 72-75, 137 and accompanying text.

175. This refers, of course, to active membership in the bar of the highest court of the lawyer’s state, not necessarily to membership in the state bar association.

appearing in court on behalf of clients, and would no longer be able to offer his clients the protections of the attorney-client privilege. He would, in other words, assume the status of a nonlawyer.

- Subsection (c) of the proposed new Rule 5.4 reverses the prohibitions of the current rule by providing that a lawyer may practice law in any organizational setting—whether or not one in which nonlawyers have economic interests or exercise managerial control or supervision—but *only if* the lawyer reasonably believes that the organization in which she practices has in place adequate policies and procedures to enable the lawyer to comply with the Rules of Professional Conduct. It is, of course, impossible to draft a rule that mandates the specifics of such policies and procedures, given the infinite variety of potential organizational structures. For that reason, the proposed new rule (consistent with the overall philosophy of the Model Rules) places the burden on the individual lawyer to judge whether adequate policies and procedures are in place. Such judgments would, of course, be subject to review by the appropriate disciplinary committees of the bar.¹⁷⁶

Under the proposed new Rule 5.4, a lawyer who works in an MDP setting is thus required, in appropriate circumstances, to make inquiry and seek assurances from his employer that he will be freely able to comply with the Rules of Professional Conduct. Such assurances might include the creation of a separate operating unit for the lawyers in the MDP organization, the establishment of separate reporting lines for lawyers, the implementation of firewalls or other screening procedures to protect the lawyer's client confidences, or a variety of other procedures designed to assure that the lawyer can conform to the

176. It should be stressed that, under the proposed Rule 5.4, the burden placed on individual lawyers is a serious one. Lawyers would be subject to professional discipline if they failed to take reasonable steps to assure that the organizations in which they practiced enabled them to comply with all of the requirements of the Model Rules, including of course the requirement of the new Rule 1.18 regarding professional independence. As provided in various provisions of the Model Rules, lawyers practicing in MDP organizations are also responsible for the conduct of all nonlawyers working with them, at least insofar as such conduct impacts the delivery of legal services.

new rule's requirements. In some circumstances—as when an obligation to disclose information is imposed upon the lawyer that is inconsistent with his duty under the Rules of Professional Conduct—the lawyer might be required to decline or terminate his employment with the organization.

CONCLUSION

Like all social institutions, the legal profession has evolved throughout its history to meet the changing conditions, needs, and demands of the society around it. This has been particularly true in America where the bar—in part because of its early development as an open-ended profession—has proved quite flexible in adapting to client needs through new and creative forms of law practice. Examples of such adaptation include the emergence of the corporate lawyer, the creation of modern law firms, the introduction of associates, the development of in-house corporate law departments, the expansion of key roles for lawyers in government service, the introduction of group legal services plans, the evolution of highly specialized practices, the recent explosive growth of the “mega-firms,” the creation of new categories of employees like paralegals to assist in the delivery of legal services, and the expansion of multidisciplinary approaches to client problems through the widespread use of nonlawyer experts and the establishment of ancillary businesses. Every one of these developments has occurred in direct response to the changing needs of clients in a changing world.

This evolution of the legal profession will continue. Indeed, it is inevitable that the profession will continue to change as the conditions, needs, and demands of society force the creation of new forms of practice and the evolution of new methods for delivering legal services. Given the significant challenges facing American lawyers in the twenty-first century, such as globalization, rapid technological change, universal access to specialized information, and growing consumer demands for efficiency and cost effectiveness, it seems likely that the use of MDP organizations will prove an increasingly effective approach (and perhaps the *only* efficient approach) for the delivery of at least some kinds of legal services.

The key question is how this new form of legal practice can be accommodated in ways that preserve the core values of the legal profession. To the extent that it can without significantly compromising the interests of clients or the public, MDP struc-

tures must be permitted just as many other innovative practices have previously—though sometimes reluctantly—come to be permitted by the profession.

The stated rationale for the current Rule 5.4, that presently prohibits formal MDP organizations, is the preservation of lawyers' professional independence. But the rule simply cannot be rationally defended on that basis. Nor can the current rule be justified by reference to other core values of the legal profession. Accordingly, we believe that the current rule should be repealed.

At the same time, we recognize and are concerned about the need to encourage and protect the independence of a lawyer's professional judgment. That is a problem, however, that is as challenging to lawyers who work in law firms, corporations, and government agencies as it is to lawyers who work in an MDP organization. Accordingly, we propose the adoption of a new rule, which we call "Rule 1.18," on this important topic that would apply to *all* lawyers.

Although our proposals reject the current approach to regulating affiliations between lawyers and nonlawyers set out in Rule 5.4, we recognize the importance of having provisions in the Model Rules to deal with the special responsibilities that lawyers face when they work in settings outside traditional law firms. Again, however, that is an issue that is broader than MDP structures. Accordingly, the proposed new Rule 5.4 addresses *all* circumstances in which lawyers practice in association with nonlawyers. Our proposal reasserts the jurisdiction of the Model Rules over the delivery of legal services by *all* active members of the bar, regardless of the nature of the organizations in which they work. The proposal also imposes special obligations in circumstances where a lawyer practices in an organization in which nonlawyers have ownership or economic interests or in which nonlawyers exercise managerial control or supervision.

The proposals made here are truly "radical" in the traditional meaning of the word. They cut to the "roots" of the key values that are at stake in the delivery of legal services by challenging lawyers to focus on the needs and interests of clients and the public and not on the narrow self-interest of the legal profession. They also call upon the American bar to return to its "roots" as an open-ended and comprehensive profession, one that is prepared to embrace change in new and innovative forms of law practice while maintaining the core values

that protect clients and the public interest. Only such an attitude of openness will keep the American legal profession vibrant and relevant in the twenty-first century.