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# Protecting the Profession Through the Pen: A Proposal for Liberalizing ABA Model Rule of Professional Conduct 5.4 to Allow Multidisciplinary Firms

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**PROTECTING THE PROFESSION THROUGH THE PEN: A  
PROPOSAL FOR LIBERALIZING ABA MODEL RULE OF  
PROFESSIONAL CONDUCT 5.4 TO ALLOW  
MULTIDISCIPLINARY FIRMS**

*Candace M. Groth\**

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## I. INTRODUCTION

Lawyers have lost their monopoly, and perhaps even their majority market share, of the provision of legal services. In the past, lawyers performed all legal and law-related services.<sup>1</sup> However, in the modern economy, that role is rapidly disintegrating. Accountants and enrolled agents can now offer federal tax services, including some forms of legal representation, to the general public.<sup>2</sup> Legal service providers, who provide document discovery and low cost bulk legal-related services to companies and law firms, now provide business clients with litigation support, document review, predictive coding, and business consulting at a fraction of the cost of traditional law firms.<sup>3</sup> These legal service providers include Robert Half Legal, Pangea3, and Special Counsel. Some legal service providers, usually called legal process outsourcers, contract with entities outside the United States to outsource legal services.<sup>4</sup> In search of novel, business process management and efficiency-driven services, corporate clients are deserting traditional law firms, or cutting back on “legal services,” in droves.<sup>5</sup>

Commentators argue that American state-based prohibitions on lawyers partnering with nonlawyers are a major factor behind the market

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<sup>1</sup> John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *FORDHAM L. REV.* 83, 110–12 (2000).

<sup>2</sup> *Id.* (discussing the monopoly of lawyers over “legal work and services” in the first half of the twentieth century).

<sup>3</sup> Rachel Zahorsky & William D. Henderson, *Who’s Eating Law Firms’ Lunch*, *ABA J.* (Oct 1, 2013), available at [http://www.abajournal.com/magazine/article/whos\\_eating\\_law\\_firms\\_lunch](http://www.abajournal.com/magazine/article/whos_eating_law_firms_lunch); Dzienkowski & Peroni, *supra* note 1, at 104–05.

<sup>4</sup> Zahorsky & Henderson, *supra* note 3 (describing the outsourcing of legal services to China, India, and other rapidly developing markets).

<sup>5</sup> Zahorsky & Henderson, *supra* note 3; see Dzienkowski & Peroni, *supra* note 1, at 103–07 (noting that “legal services” has an evolving meaning). At heart, legal services means litigation work, transactional work, client representation by licensed lawyers, and all services ancillary or necessary to carry those services out. Ancillary services include document review, tax preparation and management, lobbying, discovery management, and management consulting. Such ancillary services may or may not be done by a lawyer.

changes, particularly increased competition by foreign law firms who can partner with nonlawyers.<sup>6</sup> These concerns and the 2008 recession have encouraged the American Bar Association (ABA) to revisit the issue of multidisciplinary practices and alternative law practice structures (ALPSs). A multidisciplinary practice (MDP) is “[a] fee-sharing association of lawyers and nonlawyers in a firm that delivers both legal and non-legal services.”<sup>7</sup> ALPSs, in contrast, refer to business structures that have both lawyer and nonlawyer partners, but only deliver legal services.<sup>8</sup> A law firm, on the other hand is “a lawyer or lawyers in a law partnership, Professional Corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.”<sup>9</sup> The term “law firm” will only be used throughout this article to refer to an entity completely composed of lawyers engaged in the practice of law. Alternative Business Structures is the term used in the United Kingdom for multidisciplinary practice structures permitted by the Legal Services Act 2007. The Legal Services Act permits business structures that engage in legal and non-legal services with certain restrictions.<sup>10</sup>

This article argues that, contrary to assertions by some legal practitioners, state rules of professional conduct based on ABA Model Rule of Professional Conduct 5.4 (Model Rule 5.4) may be liberalized to allow multidisciplinary practices, without undermining lawyer professionalism, confidentiality, or the professional independence of judgment.<sup>11</sup> Furthermore,

<sup>6</sup> Zahorsky & Henderson, *supra* note 3; Dzienkowski & Peroni, *supra* note 1, at 103–07.

<sup>7</sup> BLACK’S LAW DICTIONARY 1112 (9th ed. 2009) (defining “multidisciplinary practice”).

<sup>8</sup> *For Comment: Discussion Paper on Alternative Law Practice Structures*, ABA COMMISSION ON ETHICS 20/20, (Dec. 2, 2011) [hereinafter ALPS December Letter], available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20111202-ethics-2020-discussion\\_draft-alps.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics-2020-discussion_draft-alps.authcheckdam.pdf) (noting the terminology used in this area is a constant source of confusion among scholars and the ABA Committees themselves). Unfortunately, even the ABA Commission on Ethics 20/20 is often not entirely clear when differentiating one type of entity from another. For example, the ABA Commission on Ethics 20/20 “clarifies” in their report that an ALPS is not a multidisciplinary practice.

<sup>9</sup> MODEL RULES OF PROF’L CONDUCT R. 1.0 (1983) (defining “law firm”).

<sup>10</sup> Legal Services Act, 2007, c. 29, § 72 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2007/29/resource> (defining “alternative business structure”); see *Legal Profession Act 2004* (N.S.W.) s 134 (Austl.), available at [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/lpa2004179/](http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/) (defining “incorporated legal practice”).

<sup>11</sup> MODEL RULES OF PROF’L CONDUCT R. 5.4; ABA, *Variations of the ABA Model Rules of Professional Conduct: Rule 5.4 Professional Independence of a Lawyer* (Feb. 12, 2014) [hereinafter ABA, *Variations*], available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_5\\_4.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_4.authcheckdam.pdf) (detailing implementation of Model Rule 5.4 in the fifty states and District of Columbia). With the exception of the District of Columbia, Model Rule 5.4 has been implemented in almost every state in largely the same form. ABA, *Variations*. Some states have made minor changes to the rule to allow “fee sharing” with the estate of a deceased lawyer within certain parameters. *Id.*

the ABA can adopt the Consumer-Commercial-Contractual Model (CCC Model) as a liberalized, but professionalism-protective version of Model Rule 5.4. The CCC Model incorporates: (a) lawyer/nonlawyer partnership without passive nonlawyer investment, (b) consumer and commercial specific rules, and (c) professionalism protections.

This article presents its argument in three parts. Part II provides a brief history of the prohibition on lawyer/nonlawyer partnership and Model Rule 5.4, including recent efforts to allow some form of multidisciplinary practices. Part III discusses possible models for prohibiting or regulating multidisciplinary practices, including ethical and practical concerns with current Model Rule 5.4. Finally, Part IV argues that the ABA may regulate, rather than prohibit, multidisciplinary practices while still protecting lawyer ethics and professionalism by adopting the CCC Model.

## II. HISTORY

### *A. Pre-1983 Model Rules of Professional Conduct*

The legal profession has traditionally taken a two-pronged approach to nonlawyers and the protection of the practice of law.<sup>12</sup> The first prong encompasses unauthorized practice of law provisions prohibiting nonlawyers from engaging in the practice of law.<sup>13</sup> Such provisions have been common for at least a hundred years in many states.<sup>14</sup> Most state professional rules mimic ABA Model Rule of Professional Conduct 5.5 governing the unauthorized practice of law.<sup>15</sup> However, the “practice of law” is defined differently in each state.<sup>16</sup> Most state statutes prohibit not only individuals from practicing law without a law license, but also corporations and other entity structures, because such structures may contain nonlawyer shareholders, members, etc.<sup>17</sup> Enforcement of unauthorized practice of law statutes has been sporadic, although the ABA did maintain a Standing Committee on the Unauthorized Practice of Law from 1930 until 1984.<sup>18</sup>

The second prong includes rules prohibiting lawyers from partnering with or practicing with nonlawyers. Prohibitions on nonlawyer involvement in the “business of law,” including financial and managerial involvement,

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However, the fee sharing prohibition for nonlawyers and nonlawyer partnerships has remained largely the same from state to state. *Id.* The current ABA Model Rules of Professional Conduct will be referred to as “Model Rule 5.4” and “Model Rule 1.0.”

<sup>12</sup> Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 579–82 (1989).

<sup>13</sup> *Id.* (discussing various state rules prohibiting the unauthorized practice of law).

<sup>14</sup> *Id.* (explaining the longevity of unauthorized practice of law rules).

<sup>15</sup> *Id.* (discussing state adoption of Model Rule 5.5).

<sup>16</sup> *Id.*; MODEL RULES OF PROF'L CONDUCT R. 5.5 (describing the unauthorized practice of law); MINN. R. PROF'L CONDUCT 5.5.

<sup>17</sup> Andrews, *supra* note 12, at 579–82.

<sup>18</sup> *Id.* at 583–84.

appeared in the ABA Canons of Ethics in 1928.<sup>19</sup> Canon 33 prohibited non-licensed individuals from holding themselves out as legal practitioners.<sup>20</sup> Canon 34 prohibited division of fees between lawyers and nonlawyers, and Canon 35 provided that the professional services of a lawyer should not be controlled or exploited by a nonlawyer, non-law entity, or other intermediary.<sup>21</sup> Between 1928 and the adoption of the ABA Model Code of Professional Responsibility in 1969, these canons were consistently construed by the ABA Committee on Professional Ethics and Grievances to prohibit lawyers and nonlawyers from offering legal services in almost all business forms.<sup>22</sup> As non-incorporated forms of businesses exploded in the 1960s and 70s, so too did the extension of lawyer-nonlawyer partnership prohibitions.<sup>23</sup>

The Canons were replaced by the Model Code of Professional Responsibility in 1969, which was quickly adopted in most states.<sup>24</sup> Canons 44, 34, and 33 became Disciplinary Rules (DR) 3-101(A), 3-102(A) and 3-103(A).<sup>25</sup> Additionally, DR 5-107(C) prohibits a professional corporation from directing or controlling the lawyer's professional judgment, and DR 5-107(B) prohibits a third party who pays for or employs a lawyer to render legal services for another from interfering with the lawyer's professional judgment.<sup>26</sup> The ABA Committee on Ethics and Professional Responsibility further expanded on the Disciplinary Rules with Informal Opinion 1241.<sup>27</sup> Informal Opinion 1241, when read in conjunction with Formal Opinion 303 and the ABA Ethics Committee's expansive definition of the practice of law, effectively prohibits a lawyer from operating any "kind of for-profit business organization in which a nonlawyer has a financial or managerial role, if the business of the organization is law or law-related."<sup>28</sup>

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<sup>19</sup> Andrews, *supra* note 12, at 584–87 (discussing the ABA Canon of Ethics and history of lawyer-nonlawyer partnership prohibitions).

<sup>20</sup> *Id.* (describing Canon 33).

<sup>21</sup> *Id.* (discussing Canons 34 and 35).

<sup>22</sup> *Id.* at 586–88 (describing ABA Ethics Committee action on Model Rule 5.4); *see, e.g.*, ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 297 (1961) (stating an accounting firm lawyer may represent the accounting firm, but may not provide legal advice to the firm's clients); ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 201 (1940) (indicating that representing clients in patent applications is the practice of law and that lawyers may not partner with nonlawyers to represent patent clients, even though the patent office permits nonlawyers to represent clients in patent application proceedings).

<sup>23</sup> Andrews, *supra* note 12, at 586–88.

<sup>24</sup> *Id.* at 588–92.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 592–94; ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1241 (1973).

<sup>28</sup> Andrews, *supra* note 12, at 592–94; Informal Op. 1241, *supra* note 27.

***B. The Model Rules of Professional Conduct: Rule 5.4 and the Kutak Commission***

In 1983, the ABA adopted the Model Rules of Professional Conduct (Model Rules).<sup>29</sup> The Model Rules, with various amendments, have been adopted in all fifty states and the Model Rules have been amended fourteen separate times between 1983 and 2002.<sup>30</sup> The ABA Commission on Evaluation of Professional Standards, known as the “Kutak Commission,” spent five years evaluating and revising the Model Rules of Professional Responsibility.<sup>31</sup> The Kutak Commission’s proposal on nonlawyer involvement in the practice of law, enshrined in Rule 5.4, proved to be the most controversial.<sup>32</sup> The Kutak Commission Model Rule would have read as specified in Figure A below.<sup>33</sup>

By its very terms, the rule would have allowed lawyers to partner in organizations in which a nonlawyer holds a management interest or where nonlawyers hold stock or interests of the organization.<sup>34</sup> The Kutak Commission justified Rule 5.4 as a necessary change given the “complex variety of modern legal services” that make it unviable for the bar to define organizational forms that allegedly guarantee compliance with the ABA Rules of Professional Responsibility.<sup>35</sup> Additionally, the Kutak Commission noted that exceptions to the legal service arrangements had “substantially eroded the general rule, leading to inconsistent treatment of various organizations on the basis of form or sponsorship.”<sup>36</sup>

However, the ABA House of Delegates explicitly rejected the proposed Rule 5.4.<sup>37</sup> The House of Delegates members opposed the Rule for several reasons: (1) interference with lawyer professional judgment; (2) the

<sup>29</sup> Andrews, *supra* note 12, at 593.

<sup>30</sup> *Id.*; MODEL RULES OF PROF’L CONDUCT preface, available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble.html); ABA, *States Making Amendments to the Model Rules of Professional Conduct: Dates of Adoption, Chronological Order* (2013), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/chrono\\_list\\_state\\_adopting\\_model\\_rules.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/chrono_list_state_adopting_model_rules.html).

<sup>31</sup> Robert W. Meserve, *Model Rules of Professional Conduct: Commission on Evaluation of Professional Standards, Chair’s Introduction* (Sep. 1983), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble/chair\\_introduction.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble/chair_introduction.html).

<sup>32</sup> Andrews, *supra* note 12, at 593–95.

<sup>33</sup> MODEL RULES OF PROF’L CONDUCT R. 5.4 (Proposed Final Draft 1981) [hereinafter Kutak Commission Final Draft Rule 5.4], available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/kutak\\_5-81\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_5-81_authcheckdam.pdf); see *infra* Figure A.

<sup>34</sup> Kutak Commission Final Draft Rule 5.4 (explaining the contents of the rule).

<sup>35</sup> Kutak Commission Final Draft Rule 5.4 cmt.

<sup>36</sup> Andrews, *supra* note 12, at 594–95.

<sup>37</sup> *Id.* at 595–96. A full transcript of the ABA House of Delegate Sessions 28, 37, and 45–48 in February 1983 has never been released.

possible corporate ownership and operation of law firms, by companies like Sears; (3) destruction of lawyer “professionalism;” and (4) other negative, but unknown effects, on the legal profession.<sup>38</sup> In the Kutak Commission Rule 5.4’s place the House of Delegates adopted a substitute Model Rule based on the prior Model Code provisions.<sup>39</sup>

***C. The ABA Commission on Multidisciplinary Practice and the Commission on Ethics 20/20: Missed Opportunities for Liberalization***

In August 1998, the ABA formed the Commission on Multidisciplinary Practice to further “study and report on the extent to which and the manner in which professional service firms operated by accountants and others who are not lawyers are seeking to provide legal services to the public.”<sup>40</sup> The Commission on Multidisciplinary Practice, after much investigation, recommended to the ABA House of Delegates that the Model Rules be liberalized to allow for lawyers to partner with nonlawyers in business entities.<sup>41</sup> Specifically, the Commission noted that there was already a trend toward legal and business services being offered in multidisciplinary entities and that present rules should not inhibit development of new business structures that provide better legal services and public access to the legal system.<sup>42</sup> Furthermore, the Commission expressly recognized that lawyers already practice in settings with nonlawyers, including government legal departments and union sponsored prepaid legal service programs, and lawyers have maintained their professional independence in such settings.<sup>43</sup>

The Commission’s recommendation was that lawyers be allowed to share fees and practice in concert with nonlawyers, subject to safeguards.<sup>44</sup> These safeguards included reiteration of lawyer independent judgment, clear disclosure to clients of the arrangement, limits of the representation and client protections, multidisciplinary practices being bound by the

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<sup>38</sup> *Id.*; see *infra* Part III (discussing ethical concerns with nonlawyer/lawyer partnerships raised by the 1983 ABA House of Delegates and others).

<sup>39</sup> Andrews, *supra* note 12, at 595–96; see also MODEL RULES OF PROF’L CONDUCT R. 5.4.

<sup>40</sup> ABA, *The Commission on Multidisciplinary Practice: About the Commission*, available at [http://www.americanbar.org/groups/professional\\_responsibility/commission\\_multidisciplinary\\_practice/mdp\\_abt\\_commission.html](http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdp_abt_commission.html) (last visited Nov. 22, 2013).

<sup>41</sup> *Id.*

<sup>42</sup> Robert A. Stein, *Multidisciplinary Practices: Prohibit or Regulate?*, 84 MINN. L. REV. 1529, 1541–43 (2000) (describing in detail the recommendations of the Commission on Multidisciplinary Practice); M. Courtauld McBryde, *The Future of Multidisciplinary Practices in North Carolina: Love ‘Em or Hate ‘Em, North Carolina’s Only Option Is to Regulate Them*, 36 WAKE FOREST L. REV. 193, 202–04 (2001).

<sup>43</sup> Stein, *supra* note 42, at 1541–43; McBryde, *supra* note 42, at 202–04 (discussing government legal departments and other professional settings where lawyers and nonlawyers work side by side).

<sup>44</sup> Stein, *supra* note 42, at 1542–43; McBryde, *supra* note 42, at 202–04.



Professional Rules, and conflict of interest rules to the same extent as traditional law firms.<sup>45</sup>

However, when the Commission's recommendations reached the ABA House of Delegates in July 2002, the House unequivocally rejected the proposals as contrary to preserving the core values of the legal profession.<sup>46</sup> The ABA House of Delegates then passed Resolution 10F, which: (1) listed core values of the legal profession, including undivided loyalty to the client, independent judgment, client confidences, avoiding conflicts of interest, maintaining a single profession of law, and promoting access to justice; (2) encouraged state and local bar associations to vigorously enforce their professional rules, particularly those surrounding the definition of "practice of law;" (3) called upon the ABA Ethics Committee to draft rules regulating strategic and contractual alliances and regulations with nonlawyer service providers and organizations; (4) encouraged states who permit law firms to own nonlawyer businesses to develop rules prohibiting nonlawyers from owning and controlling the practice of law; and (5) discharged the ABA Commission on Multidisciplinary Practice.<sup>47</sup>

The Ethics 2000 Commission, created near the turn of the twenty-first century to recommend broad changes to the ABA Model Rules, proposed very minimal changes to Rule 5.4.<sup>48</sup> Section (a)(4) was added stating that: "a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter."<sup>49</sup> In addition, section (d)(2) was revised to read: "a nonlawyer is a corporate director or officer thereof *or occupies the position of similar responsibility in any form of association other than a corporation.*"<sup>50</sup> Forty-four jurisdictions also created state committees or commissions to study the multidisciplinary practice issue, with mixed recommendations.<sup>51</sup> However, after the ABA Commission on Multidisciplinary Practice was disbanded in 2000, most state-based initiatives were soon shelved or abandoned.<sup>52</sup>

Unlike past committees and commissions on the topic of lawyer/nonlawyer partnerships, the Commission on Ethics 20/20 was the

<sup>45</sup> Stein, *supra* note 42, at 1542–43; McBryde, *supra* note 42, at 202–04.

<sup>46</sup> McBryde, *supra* note 42, at 204.

<sup>47</sup> Louis H. Levinson, *Collaboration Between Lawyers and Others: Coping with the ABA Model Rules After Resolution 10F*, 36 WAKE FOREST L. REV. 133, 142–43 (2001) (discussing Resolution 10F); ABA, *MPD Recommendation—Center for Professional Responsibility* (July 2000), available at [http://www.americanbar.org/groups/professional\\_responsibility/commission\\_multidisciplinary\\_practice/mdprecom10f.html](http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html).

<sup>48</sup> ABA Ethics 2000 Comm'n, *Rule 5.4*, available at [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_rule54.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule54.html) (last visited Aug. 10, 2014).

<sup>49</sup> *Id.* (discussing revisions to Model Rule 5.4 after Resolution 10F).

<sup>50</sup> *Id.*

<sup>51</sup> ALPS December Letter, *supra* note 8, at 7 (describing state action).

<sup>52</sup> *Id.*

first to propose a restrictive, yet liberalized, version of Rule 5.4 for ABA consideration.<sup>53</sup> The work of the Commission on Ethics 20/20 Commission is ongoing, and the ABA House of Delegates has yet to vote on the Commission's proposed rule.<sup>54</sup> Commentators, however, indicate pessimistically that the Commission on Ethics 20/20 and ABA House of Delegates are unlikely to adopt a new Rule 5.4 anytime soon.<sup>55</sup>

#### ***D. Current Model Rule 5.4***

Current Rule 5.4 of the ABA Model Rules of Professional Conduct is substantially similar to the rule adopted by the ABA House of Delegates in 1983, with the changes made by the Ethics 2000 Commission to sections (a)(4) and (d)(2). Model Rule 5.4 has been adopted in some form in all fifty states.<sup>56</sup> Model Rule 5.4 has been interpreted by the ABA Ethics Committee and state courts to prohibit nonlawyers from being partners or holding financial interests in law firms.<sup>57</sup> Also, the rule implicitly prohibits the formation of publically traded law firms, because nonlawyers would be able to hold the traded shares.<sup>58</sup> Nonlawyers may work as independent contractors or employees of a law firm, provided that such agreements comply with all state professional rules, including those governing fee sharing (Rules 5.4 and 2.1) and supervision (Rules 5.1–5.3).<sup>59</sup>

Contemporary federal laws, including the Internal Revenue Code, have limited areas that constitute the “practice of law.” Nonlawyers, including accounting firms may now represent clients before the U.S. Patent and Trademark Office and tax courts provided that they meet the federal

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<sup>53</sup> *Id.*

<sup>54</sup> See ABA, *ABA Commission on Ethics 20/20*, available at [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html) (last visited Aug. 10, 2014) (noting that the ABA Commission on Ethics 20/20 is revising not only Model Rule 5.4, but other Model Rules as well, and has made substantial progress in those areas); James Podgers, *Summer Job: Ethics 20/20 Commission Shelves Nonlawyer Ownership, Focuses on Other Proposals*, ABA J. (June 1, 2012), available at [http://www.abajournal.com/magazine/article/summer\\_job\\_ethics\\_20\\_20\\_commission\\_shelves\\_nonlawyer\\_ownership/](http://www.abajournal.com/magazine/article/summer_job_ethics_20_20_commission_shelves_nonlawyer_ownership/) (showing the Commission on Ethics 20/20 has shelved the nonlawyer ownership issue in favor of working on other proposals, at least for the time being).

<sup>55</sup> Podgers, *supra* note 54 (describing the ABA and Commission on Ethics 20/20 deadlock on ALPSs and multidisciplinary structures).

<sup>56</sup> See *supra* note 30 and accompanying text (providing the number of states that have adopted Model Rule 5.4 in some form).

<sup>57</sup> ABA Standing Comm. on Ethics & Prof'l Responsibility, ABA Formal Op. 01-423 (Forming Partnerships with Foreign Lawyers); ABA Standing Comm. on Ethics & Prof'l Responsibility, ABA Formal Op. 03-430 (Propriety of Insurance Staff Counsel Representing the Insurance Company and its Insured; Permissible Names for an Association of Insurance Staff Counsel); ABA Standing Comm. on Ethics & Prof'l Responsibility, ABA Formal Op. 95-392 (Sharing Legal Fees with a For Profit Corporate Employer).

<sup>58</sup> Dzienkowski & Peroni, *supra* note 1, at 153–59.

<sup>59</sup> *Id.*

statutory requirements.<sup>60</sup> Furthermore, lobbying firms, management and consulting firms, and investment banking firms have hired lawyers to provide services to their clients that often bestride the gap between nonlawyer business and investment services and the practice of law.<sup>61</sup> Although the organized bars of many states have attempted to crack down on the “unauthorized practice of law” by nonlawyers such as accounting firms, these efforts have been far outpaced by the growth of legal services providers and others providing law-related or quasi-legal services.<sup>62</sup>

### *E. A Word on the Business-Profession Dichotomy*

Chief among the American and many state legal communities’ concerns regarding lawyer/nonlawyers partnership is the risk that the legal community will be seen as a “business” rather than as a “profession.”<sup>63</sup> These concerns are unfounded for two reasons.

First, business and professional behavior are not fundamentally incompatible.<sup>64</sup> Scholar Cindy Carson recognizes that a business and a profession are entities that seek to promote the greatest societal good, the former by maximizing profit and the latter by maximizing service.<sup>65</sup> Profit maximization in a capitalist economy often takes the form of increasing the

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<sup>60</sup> *Id.* at 105–08; Formal Op. 201, *supra* note 22 (explaining that nonlawyers may appear before the U.S. Patent and Trademark Office, but a lawyer appearing before the same office is presumed to be engaged in the “practice of law”).

<sup>61</sup> Dzienkowski & Peroni, *supra* note 1, at 105–08.

<sup>62</sup> See generally Elijah D. Farrell, *Accounting Firms and the Unauthorized Practice of Law: Who Is the Bar Really Trying to Protect?*, 33 IND. L. REV. 599, 599–629 (2000) (discussing state bar attempts, often futile, to reign in the unauthorized practice of law by accounting firms).

<sup>63</sup> Paul D. Clement, *Comments of Nine General Counsel on the ABA Commission on Ethics 20/20’s Discussion Paper on Alternative Law Practice Structures* (Feb. 29, 2012), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/ethics\\_20\\_20\\_comments/ninegeneralcounselcomments\\_alpschoiceoflawinitialdraftproposal.aucthecheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/ninegeneralcounselcomments_alpschoiceoflawinitialdraftproposal.aucthecheckdam.pdf) (expressing concerns regarding lawyer professionalism in light of any liberalization of Model Rule. 5.4); Dzienkowski & Peroni, *supra* note 1, at 198–200 (noting scholars have criticized various legal professionalism movements throughout the twentieth and early twenty-first century as being smokescreens for “anti-Semitism, nativism, classism, economic protectionism, and general elitism”); see Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 AM. J. LEGAL HIST. 1, 2 (2005), available at <http://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1275&context=scholarlyworks>. It is unclear if modern profession/business concerns stem, at least partially, from the same roots. Andrews, *supra* note 12, at 616–17 (alleging that economic protectionism can be read between the lines of contemporary justifications to prohibit lawyers from practicing with nonlawyers).

<sup>64</sup> Russell G. Pearce et al., *Revitalizing the Lawyer-Poet: What Lawyers Can Learn from Rock and Roll*, 14 WIDENER L.J. 907, 908–15 (2005) (recognizing and discussing the business-profession dichotomy).

<sup>65</sup> Cindy Alberts Carson, *Under New Mismanagement: The Problem of Non-Lawyer Equity Partnership in Law Firms*, 7 GEO. J. LEGAL ETHICS 593, 605–07 (1994).

quality of service provided to customers.<sup>66</sup> Furthermore, a profession is simply defined as, “[a] vocation requiring advanced education and training” or “a type of job that requires special education, training, or skill.”<sup>67</sup> Traditionally, medicine, law, and the ministry were the only true “professions.”<sup>68</sup> However, that list has expanded substantially in the modern era due to the growth in jobs requiring advanced education, such as accounting and engineering.<sup>69</sup> Noticeably absent from the professional definition is whether the enterprise must be for-profit or not-for-profit.<sup>70</sup> In fact, modern law firms made up of “professionals” may be as engaged in the “unethical” business of making money as nonlawyer businesses.<sup>71</sup>

Admittedly, a business is defined as, “[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain.”<sup>72</sup> However, profit motive does not automatically equal propensity toward unethical conduct and deficient legal services.<sup>73</sup> Undeniably, “business” considerations and behaviors, including

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<sup>66</sup> Leonard L. Berry et al., *Improving Service Quality In America: Lessons Learned*, 8 ACAD. MGMT. EXEC. 32 (1994), <http://areas.kenan-flagler.unc.edu/marketing/facultystaff/zeithaml/selected%20publications/improving%20service%20quality%20in%20america-%20lessons%20learned.pdf>.

<sup>67</sup> BLACK’S LAW DICTIONARY 1329 (9th ed. 2009) (defining “profession”); PROFESSION, Merriam-Webster Online (last visited December 2, 2013), <http://www.merriam-webster.com/dictionary/profession?show=0&t=1386007280>.

<sup>68</sup> BLACK’S LAW DICTIONARY 1329 (9th ed. 2009) (defining “profession”) (quoting *Commonwealth v. Brown*, 20 N.E.2d 478, 481 (Mass. 1939) regarding the traditional vocations defined as “professions”).

<sup>69</sup> See, e.g., *Business Professions*, WIS. DEP’T OF SAFETY & PROF’L SERVS., <http://dsps.wi.gov/Licenses-Permits/Credentialing/Business-Professions> (last visited Dec. 2, 2013) (listing the different “business professions” that require a licensure in Wisconsin, including engineering and accounting); *New York State Licensed Professions*, N.Y. ED. DEP’T: OFFICE OF THE PROFESSIONS (Sept. 24, 2013) (listing the fifty professions requiring licensure in New York). It is ironic that Wisconsin juxtaposes business and profession in the same heading, when the business-professional dichotomy is so strong. *Business Professions*. It should be noted, however, that attorneys do not appear on either New York’s or Wisconsin’s list of professions, but rather are regulated by the court system. *Business Professions*; *New York State Licensed Professions*.

<sup>70</sup> BLACK’S LAW DICTIONARY 226, 1329 (9th ed. 2009) (defining “profession” and “business”).

<sup>71</sup> Andrews, *supra* note 12, at 601–03.

<sup>72</sup> BLACK’S LAW DICTIONARY 226 (9th ed. 2009) (defining “business”).

<sup>73</sup> Andrews, *supra* note 12, at 601–03 (stating that: (1) the assumption “profit motive is bound to lead to inadequate or unethical legal services” has no empirical support and contradicts our society’s fundamental scheme of fulfilling consumer demand; (2) the assumption “corporations or laymen engage in the ‘sordid’ business of making money . . . more than . . . traditional law firms” misstates current private law firm practice and misrepresents the abilities of a current private law firms to seek money and current corporations to seek purposes other than money; and (3) the assumption that profit motive is incompatible with law “suffers from an over-simplistic, even arrogant, view of nonlawyers” because the assumption, in turn, assumes that nonlawyers will enter the law business for only one motive—to make money—and this sub-assumption stereotypes and ignores the fact that many lawyers enter the law profession to make money). In particular, the requirement under

economics of scale and efficient integration of services into a single product, can be beneficial to a law firm, as they are with any business.<sup>74</sup> As everyday business activities become more intertwined with legal services, having a law firm that is run with the efficiency, profit-cognizance, and long-term planning of a business is not necessarily a bad thing.<sup>75</sup>

Second, lawyers' assumptions that a lawyer monopoly on the delivery of legal services is the only way to uphold the ethical standards of the profession are presumptuous.<sup>76</sup> Nonlawyers can and do recognize the ethical rules and requirements of the legal profession.<sup>77</sup> Indeed, many nonlawyers are required to follow and uphold state ethical standards and professional codes of conduct for their own business professions.<sup>78</sup> Many nonlawyers such as accountants and engineers have their own professionalism statutes or rules of ethics, additional training requirements, and examination requirements.<sup>79</sup> Thus, suggesting that nonlawyers, simply by virtue of being nonlawyers, cannot separate morality from money is inapposite.<sup>80</sup>

Fears that multidisciplinary practice will herald the end of the legal community as a profession are inconsistent with the realities of what constitutes a "profession" versus a "business" in contemporary times.

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Sarbanes-Oxley that many publically traded businesses create and implement corporate codes of ethics seems to suggest that businesses and their partners, officers, and employees are bound to a certain minimal standard of "business ethics." 17 C.F.R. §§ 228–29, 249 (2003) (Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002).

<sup>74</sup> Mary C. Daly, *Monopolist, Aristocrat, or Entrepreneur?: A Comparative Perspective on the Future of Multidisciplinary Partnerships in the United States, France, Germany, and the United Kingdom After the Disintegration of Andersen Legal*, 80 WASH. U. L.Q. 589, 599 (2002); but see Carson, *supra* note 65, at 602–04 (suggesting that any monetary savings through more efficient management of an entity providing legal services would go to partners and the entity, rather than be passed on to clients and consumers).

<sup>75</sup> Zahorsky & Henderson, *supra* note 3. Indeed, as mentioned *supra*, many business clients are now demanding business like efficiency from their sources of legal services and are turning to legal service providers when traditional law firms do not provide the efficiency they seek. See *supra* notes 2–5 and accompanying text (noting increasing demand for efficient solutions in legal services, not just competency).

<sup>76</sup> Farrell, *supra* note 62, at 626–28.

<sup>77</sup> *Id.* (discussing nonlawyers' adherence and acknowledgement of the legal rules of ethics and professional conduct).

<sup>78</sup> *Id.*

<sup>79</sup> See *AICPA Code of Professional Conduct*, AM. INST. OF CPAs (Oct. 31, 2013), available at <http://www.aicpa.org/research/standards/codeofconduct/pages/default.aspx> (accountant ethics code); *Continuing Education: Professional Engineering and Land Surveying*, N.Y. STATE ED. DEP'T: OFFICE OF THE PROFESSIONS (Nov. 15, 2013), <http://www.op.nysed.gov/prof/pels/peceques.htm> (describing continuing education requirements for professional engineers and land surveyors in New York); *Professional Engineer—Continuing Education*, WIS. DEP'T OF SAFETY AND PROFESSIONAL SERVICES (last visited Dec. 2, 2013), <http://dsps.wi.gov/Licenses-Permits/Engineer/PECE> (discussing continuing education requirements for Wisconsin engineers).

<sup>80</sup> Farrell, *supra* note 62, at 26–28; Andrews, *supra* note 12, at 601–03 (terming the profession-business incompatibility argument to be an "over-simplistic, even arrogant view of nonlawyers").

### III. MULTIDISCIPLINARY PRACTICE AND ALTERNATIVE DISCIPLINARY STRUCTURES

The problem of multidisciplinary practice structures has spawned many different models for regulating and structuring such business entities. The models can be roughly broken up into three categories: (1) models without a formal business structure change; (2) models permitting nonlawyer partnership and passive investment; and (3) models permitting only nonlawyer partnership.<sup>81</sup> Part III discusses the models in detail and briefly indicates why each model is inadequate to address the problem of multidisciplinary practices.

#### *A. Models Without a Formal Business Structure Change*

The category of models without a formal business structure change includes MDP models that do not require lawyers or a law firm to change the business structure (e.g., partnership, limited liability company, etc.) in which they practice.<sup>82</sup> These models include: (1) the cooperation or “status quo” model and (2) the ancillary business services and contract/joint venture models. All of these models work largely within the Model Rules of Professional Conduct in its current form and interpretation by state courts.<sup>83</sup>

#### *1. Cooperation or “Status Quo” Model*

The cooperation or “status quo” model maintains Model Rule 5.4 in its current form.<sup>84</sup> The arrangement, as previously stated, allows law firms to hire nonlawyers as independent contractors or employees.<sup>85</sup> However, nonlawyers cannot hold partnership or similar management interests in a law firm and cannot be passive investors in such an entity.<sup>86</sup> Under this model, the nonlawyers’ services can be bundled with the lawyer’s services under the

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<sup>81</sup> Many of these models are drawn from models created by the ABA Commission on Multidisciplinary Practice in the late 1990s and early 2000s. Model numbers are noted where relevant. See ABA, *Hypotheticals and Models* (March 1999) [hereinafter ABA, *Hypotheticals and Models*], available at [http://www.americanbar.org/groups/professional\\_responsibility/commission\\_multidisciplinary\\_practice/multicomhypos.html](http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/multicomhypos.html); see also Dzienkowski & Peroni, *supra* note 1, at 153–72 (laying out the Commission on Multidisciplinary Practice models in detail and briefly describing pitfalls and challenges with each).

<sup>82</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (discussing Models 1–4).

<sup>83</sup> *Id.* (indicating that Models 1–4 work largely within the current professional rules of conduct).

<sup>84</sup> *Id.* (Model 1); Dzienkowski & Peroni, *supra* note 1, at 153–58 (discussing the advantages and pitfalls of Model 1).

<sup>85</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Model 1); Dzienkowski & Peroni, *supra* note 1, at 153–58.

<sup>86</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Model 1).

heading of “legal services.”<sup>87</sup> The nonlawyers’ services must be intimately related to the lawyer’s services, and the client cannot pay solely for the nonlawyers’ services uncoupled from the lawyer’s legal fees.<sup>88</sup>

Additionally, lawyers in the cooperative model are responsible under Model Rule 5.3 to supervise the work of nonlawyers to make sure that the “person’s conduct is compatible with the professional obligations of the lawyer,” including attorney-client privilege and confidentiality.<sup>89</sup> Furthermore, despite the fact that a lawyer may not have an understanding of the nonlawyers’ area of expertise, the lawyer must also supervise the nonlawyer to ensure that the nonlawyer performs his or her duties with a minimum level of competence.<sup>90</sup> Unquestionably, this imposes a high level of liability on the lawyer for any misconduct or lack of knowledge of their “subordinate” but highly skilled nonlawyer employees.<sup>91</sup> Additionally, because nonlawyers cannot be partners in law firms, law firms are less able to attract top talent with lucrative salary packages or raise funds through sales of equity.<sup>92</sup> Finally, as can be seen from the changing market for legal services, the status quo model places law firms at a competitive disadvantage vis-a-vis business service firms that are not bound by the restrictions and Professional Rules of lawyers.<sup>93</sup>

## **2. Ancillary Business Services Model and Contract/Joint Venture Models**

Similarly to the status quo model, the ancillary business services and contract/joint venture models are based on options available under the existing Model Rules.<sup>94</sup> However, unlike the status quo model, these methods of collaboration are far less common because they are on the fringes

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<sup>87</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Model 1); Dzienkowski & Peroni, *supra* note 1, at 153–58.

<sup>88</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Model 1); Dzienkowski & Peroni, *supra* note 1, at 154–56.

<sup>89</sup> MODEL RULES OF PROF’L CONDUCT R. 5.3(b); ABA, *Hypotheticals and Models*, *supra* note 81 (Model 1); Dzienkowski & Peroni, *supra* note 1, at 153–58.

<sup>90</sup> MODEL RULES OF PROF’L CONDUCT R. 5.3(b); Dzienkowski & Peroni, *supra* note 1, at 154–56 (showing that, depending on viewpoint, this duty to supervise for minimal competence may not be much of an extension of state law primary liability for negligent supervision, but it is still a significant burden for the legal professional to bear).

<sup>91</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Model 1); Dzienkowski & Peroni, *supra* note 1, at 153–58.

<sup>92</sup> Dzienkowski & Peroni, *supra* note 1, at 153–58 (discussing nonlawyer compensation in law firms).

<sup>93</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Model 1); Dzienkowski & Peroni, *supra* note 1, at 157–58 (describing the competitive disadvantage of law firms under the status quo model).

<sup>94</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Models 3–4); Dzienkowski & Peroni, *supra* note 1, at 157–60 (discussing the joint venture and ancillary business services models loosely based on Model 3).

of what is permissible under the professional rules of most states.<sup>95</sup> Thus, these methods present risk management and liability concerns for law firms, often with far too little benefit.<sup>96</sup>

The ancillary business service model is based on Model Rule 5.7.<sup>97</sup> Under the model, a law firm may own an interest in a firm that provides non-legal services, such as a real estate broker.<sup>98</sup> The law firm may refer clients to the “ancillary” non-legal firm for various services, and conversely, the ancillary firm will refer clients to the law firm for legal services.<sup>99</sup>

Similarly, the contract and joint venture models involve varying levels of collaboration through contractual relationships between a law firm and another legal or non-legal entity.<sup>100</sup> Frequently, these contractual relationships involve joint advertising.<sup>101</sup> Law firms may also join together in “legal services networks” that agree to refer clients to one another when another firm has better regional or subject matter expertise.<sup>102</sup>

However, a significant disadvantage of both the ancillary and contract/joint venture models are that the law firm may be required to supervise the activities of the ancillary or other firm if the services are “not distinguishable from legal service.”<sup>103</sup> The law firm may also risk liability if fee separation and clear lines of corporate authority are not maintained between the law firm and nonlawyers business involved in the

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<sup>95</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Model 3); Dzienkowski & Peroni, *supra* note 1, at 157–60.

<sup>96</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Model 3); Dzienkowski & Peroni, *supra* note 1, at 157–60 (explaining the significant professional liability risks of adhering to Model 3).

<sup>97</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Model 3); Dzienkowski & Peroni, *supra* note 1, at 157–60.

<sup>98</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Model 3); Dzienkowski & Peroni, *supra* note 1, at 157–60 (describing law firms holding interests in nonlawyer entities and the significant risks involved).

<sup>99</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Model 3); Dzienkowski & Peroni, *supra* note 1, at 157–60.

<sup>100</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Model 4); Dzienkowski & Peroni, *supra* note 1, at 163–70 (stressing the collaborative aspects of these models).

<sup>101</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Model 4); Dzienkowski & Peroni, *supra* note 1, at 163–70.

<sup>102</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Model 4); Dzienkowski & Peroni, *supra* note 1, at 163–70; Two possible examples of this type of arrangement are the Lex Mundi organization and DLA Piper’s “strategic alliance” partnership with the Cohen Group, a business consulting firm. See *About Lex Mundi*, LEX MUNDI, [http://www.lexmundi.com/lexmundi/About\\_Lex\\_Mundi.asp](http://www.lexmundi.com/lexmundi/About_Lex_Mundi.asp) (last visited Aug. 10, 2014); see also *The Cohen Group*, DLA PIPER, <http://www.dlapiper.com/en/us/aboutus/in-the-united-states/the-cohen-group/> (last visited Aug. 10, 2014). DLA Piper Global is itself an example of the contractual and auxiliary models at work, given its numerous “member” or partner entities that are separately organized and regulated throughout the world. Some entities operate under the DLA Piper name, and some do not. See DLA Piper Global, *Legal Notices*, <http://www.dlapiper.com/en/us/footer/legalnoticespage/> (last visited Aug. 10, 2014).

<sup>103</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Models 3–4); Dzienkowski & Peroni, *supra* note 1, at 157–60, 163–70.



arrangement.<sup>104</sup> Indeed, Model Rule 5.3 extends supervisory responsibility to lawyers for all “nonlawyer[s] employed or retained by or associated with a lawyer.”<sup>105</sup> This liability may extend to nonlawyer firm violations of the fee referral, confidentiality, and advertising Professional Rules, among others.<sup>106</sup> Furthermore, many law firms prefer to merge with another law firm to maintain a unified firm culture and cohesive work product, rather than work with multiple firms with uneven policies and work product.<sup>107</sup> And finally, all of these models are problematic in that they assume a one-for-one or equal exchange of referrals between the two firms. In reality, that type of relationship is rare.<sup>108</sup>

### ***B. Models Permitting Nonlawyer Partnership and Passive Investment***

Models permitting both nonlawyer partnership and nonlawyer passive investment (multidisciplinary firms) are the trend in the worldwide legal profession.<sup>109</sup> In the past, the ABA considered and rejected the Kutak Commission Model, which would have liberalized Model Rule 5.4 to allow multidisciplinary practices. Outside of the United States, Britain has adopted significant statutory modifications allowing such business combinations.

#### ***1. The Kutak Commission Model Rule***

As previously mentioned, the Kutak Commission was tasked with a complete revision of the ABA Rules of Professional Conduct.<sup>110</sup> As part of those revisions, the Kutak Commission proposed a new Rule 5.4, which would have allowed lawyers to practice in full multidisciplinary practices.<sup>111</sup>

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<sup>104</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Models 3-4); Dzienkowski & Peroni, *supra* note 1, at 157-60, 163-70 (analyzing fee sharing and liability risks with both models).

<sup>105</sup> MODEL RULES OF PROF'L CONDUCT R. 5.3; ABA, *Hypotheticals and Models*, *supra* note 81 (Models 3-4); Dzienkowski & Peroni, *supra* note 1, at 157-60, 163-70.

<sup>106</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Models 3-4); Dzienkowski & Peroni, *supra* note 1, at 157-60, 163-70.

<sup>107</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Models 3-4); Dzienkowski & Peroni, *supra* note 1, at 157-60, 165-67 (explaining the law firm “culture” concerns not satisfied by auxiliary and contractual arrangements).

<sup>108</sup> ABA, *Hypotheticals and Models*, *supra* note 81 (Models 3-4); Dzienkowski & Peroni, *supra* note 1, at 157-60, 163-70.

<sup>109</sup> See Susan Hackett, *Business as (Un)usual: Re-engineering Legal Professional Training, Development, and Competency to Remain Relevant to Clients*, Hot Topics Seminar, Business Law Inst., Hamline Univ. School of Law (Sept. 27, 2013) (discussing significant changes in the training and structure of the legal profession, including the increased relevancy of multidisciplinary practices and firms that provide more than just legal work).

<sup>110</sup> See *supra* Part II.B (discussing the Kutak Commission).

<sup>111</sup> Kutak Commission Final Draft Rule 5.4, *supra* note 33. The Kutak Commission Model is roughly equivalent to Model 5 in the ABA Commission's Hypotheticals and Models. ABA, *Hypotheticals and Models*, *supra* note 81 (Model 5);

The proposed Kutak Commission Model Rule would have allowed full multidisciplinary practices, including lawyer/nonlawyer partnership in firms, and passive financial investment by nonlawyers in law firms.<sup>112</sup>

However, such a structure raises significant ethical and professional concerns.<sup>113</sup> Firstly, such an arrangement would undermine lawyer independent judgment, a requirement of Rules 1.7 and 1.8(f).<sup>114</sup> Secondly, there is concern regarding the application of lawyer confidentiality (Rule 1.6); disqualification (Rules 1.7–1.8); advertising (Rules 7.1–7.5) and other state professional rules to nonlawyers and within lawyer/nonlawyer partnerships.<sup>115</sup> Lastly, the legal community fears that allowing such arrangements will undermine the legal community as a “profession,” as opposed to a “business,” leading to commercialization and corporatization of the legal profession.<sup>116</sup>

*a. Interference with Independent Professional Judgment*

The most frequent argument made by critics of multidisciplinary practices is that such arrangements will interfere with the lawyer’s independent professional judgment.<sup>117</sup> Primarily, the argument is that a nonlawyer corporation or partner will control litigation or transactional work by a lawyer and how money earned from that representation is distributed.<sup>118</sup> As Thomas Andrews has noted, “[t]he possibility of interference with a lawyer’s independent judgment cannot be denied.”<sup>119</sup> However, as proponents of multidisciplinary practices indicate, this risk may be overstated.<sup>120</sup> Very tellingly, many lawyers already work in structures where their independent professional judgment may be impaired or directed by

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Dzienkowski & Peroni, *supra* note 1, at 171–72 (discussing Model 5, the fully integrated services model).

<sup>112</sup> Kutak Commission Final Draft Rule 5.4, *supra* note 33; ABA, *Hypotheticals and Models*, *supra* note 81 (Model 5); Dzienkowski & Peroni, *supra* note 1, at 171–72.

<sup>113</sup> Andrews, *supra* note 12, at 594–95; ABA, *Hypotheticals and Models*, *supra* note 81 (Model 5); Dzienkowski & Peroni, *supra* note 1, at 171–72 (discussing significant opposition by the ABA House of Delegates to the Kutak Commission Final Draft Rule 5.4).

<sup>114</sup> Andrews, *supra* note 12, at 594–95; ABA, *Hypotheticals and Models*, *supra* note 81 (Model 5); Dzienkowski & Peroni, *supra* note 1, at 171–72.

<sup>115</sup> Andrews, *supra* note 12, at 594–95 (explaining the major unknown application of other model rules of professional conduct under a MDP structure).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 605.

<sup>118</sup> *In re* Co-operative Law Co., 92 N.E. 15, 16 (N.Y. 1910) (explaining the concern that nonlawyers may interfere with litigation direction and monetary management).

<sup>119</sup> Andrews, *supra* note 12, at 606–07.

<sup>120</sup> *Id.* (arguing that the risk of interference with the independent judgment of a lawyer may be overstated and oversimplified).

others, such as in-house counsel and non-partner lawyers in law firms.<sup>121</sup> However, ethical lapses by such lawyers have been rare.<sup>122</sup>

Furthermore, law firm capitalization and the issue of passive investment in law firms frequently comes up as an independence of professional judgment concern.<sup>123</sup> The modification of law firm capitalization and financial structures, and the numerous practical, logistical, and ethical issues implicated, are beyond the scope of this paper.<sup>124</sup> As the Kutak Commission itself noted, “[t]o prohibit all intermediary arrangements is to assume that the lawyer’s professional judgment is impeded by the fact of being employed by a lay organization . . . . The assumed equivalence between employment and interference with the lawyer’s professional judgment is at best tenuous.”<sup>125</sup>

*b. Application of the Rules of Professional Conduct Within a Multidisciplinary Practice*

Another crucial concern regarding multidisciplinary practices is how the state professional rules would apply to such entities.<sup>126</sup> Most of the organized bar recognizes and agrees that nonlawyers should be subject to the state professional rules when they provide services in connection with legal services.<sup>127</sup> However, the answer is considerably hazy when the nonlawyers are providing nonlegal services only.<sup>128</sup>

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<sup>121</sup> *Id.* (discussing lawyer-nonlawyer cooperation in corporations and nonpartner lawyers).

<sup>122</sup> *Id.* at 608 (noting an exception, the case of Enron, where in-house counsel may have been complicit in the fraud perpetuated by senior management); Ameet Sachdev, *Enron’s Attorneys Criticized in Report: Evidence Found of Malpractice Examiners Say*, CHICAGO TRIB. (Nov. 28, 2003), [articles.chicagotribune.com/2003-11-28/business/0311280188\\_1\\_neal-batson-enron-law-firms](http://articles.chicagotribune.com/2003-11-28/business/0311280188_1_neal-batson-enron-law-firms) (describing possible Enron attorney malpractice); See NANCY B. RAPOPORT, JEFFREY D. VAN NIEL & BALA G. DHARAN, ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL Reader (2nd Ed.) (chronicling ethical issues inherent in the collapse of Enron from a variety of perspectives).

<sup>123</sup> Andrews, *supra* note 12, at 608.

<sup>124</sup> Indeed, an entire paper could be written just on the issue of passive investment in law firms and law firm long term capitalization and financing. This article will accept the view shared by many in the legal community that passive investment by nonlawyers is unnecessary and could potentially be detrimental to the legal profession. *But cf.* Tyler Cobb, Note, *Have Your Cake and Eat It Too! Appropriately Harnessing the Advantages of Nonlawyer Ownership*, 54 ARIZ. L. REV. 765 (2012) (discussing the benefits of law firm passive investment).

<sup>125</sup> Andrews, *supra* note 12, at 594–95 (quoting the “legal background” section of the Kutak Commission Report). The ABA Kutak Commission Report is no longer available through the ABA website.

<sup>126</sup> Dzienkowski & Peroni, *supra* note 1, at 170–78 (describing concerns and confusion as to how other Model Rules would apply to MDPs).

<sup>127</sup> *Id.* at 174–75 (suggesting that nonlawyers should be subject to the legal rules of professional conduct, at least to the extent that they provide nonlegal services incident to legal services).

<sup>128</sup> *Id.* at 174–78.

Chief among the concerns is how lawyer rules of confidentiality, advertising, and attorney client privilege will apply, if multidisciplinary practices are permitted.<sup>129</sup> The main fear is that confidentiality and attorney-client privilege will be dead letter in an entity where lawyers and nonlawyers freely share information.<sup>130</sup> However, compliance with confidentiality and attorney-client privilege should not be as significant a concern as detractors would have it be. Rather, lawyers have been able to consult with and employ nonlawyers for years in various capacities to assist with presentation of litigation and other legal work.<sup>131</sup> Confidentiality and attorney-client privilege have been maintained, with rare exceptions.<sup>132</sup> Thus, with the appropriate modifications to the professional rules and interpretation by state courts, confidentiality and attorney-client privilege ethical concerns may be addressed and mitigated. Having nonlawyers sign confidentially agreements may also be an option.<sup>133</sup> Similarly, advertising by multidisciplinary firms, like with lawyers, can be regulated by the state bars, mitigating but not eliminating ethical concerns in that area.<sup>134</sup>

*c. The Business-Profession Dichotomy Revisited*

Lastly, practitioners have alleged that allowing lawyers to partner with nonlawyers will diminish the professionalism and professional image of the legal profession.<sup>135</sup> The New York Bar has alleged that “MDPs ‘would place lawyers in the ethically untenable position of allowing services to be offered without client protections. In New York, we won’t allow profit to replace principle as the touchstone of our profession.’”<sup>136</sup> As scholars and practitioners have recognized, nonlawyer “unethicalness” is a legal fiction.<sup>137</sup> Little evidence exists that nonlawyers are driven solely by a desire to make money, as indicated in Part II.E.<sup>138</sup>

Additionally, the legal community, particularly smaller firms and solo practitioners, allege that allowing nonlawyers, including corporations and business entities, to invest in law firms would lead to Sears and other retailers opening law firms in their stores.<sup>139</sup> The smaller practitioners fear that competition from corporate-run firms would drive smaller firms and solo

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Dzienkowski & Peroni, *supra* note 1, at 174–78.

<sup>133</sup> Cobb, *supra* note 124, at 774–76 (suggesting confidentiality agreements as an option to address confidential concerns).

<sup>134</sup> Dzienkowski & Peroni, *supra* note 1, at 174–78.

<sup>135</sup> Andrews, *supra* note 12, at 600–03; Carson, *supra* note 65, at 605–07.

<sup>136</sup> McBryde, *supra* note 42, at 205 (quoting the New York State Bar Association President).

<sup>137</sup> Andrews, *supra* note 12, at 600–03.

<sup>138</sup> *Id.*

<sup>139</sup> Cobb, *supra* note 124, at 770–71.

firms out of business.<sup>140</sup> This corporate-competition fear has become known as the “fear of Sears.”<sup>141</sup> Small legal practitioners argue corporately owned law firms would lead to a diminution in the prestige and image of the profession.<sup>142</sup> This assessment may or may not be accurate. Results have been mixed for corporate-owned professional structures, including optometrists and physicians.<sup>143</sup>

Finally, it should be noted with caution that at least some members of the bar as far back as the Canons for Professional Ethics drafting committee doubted whether multidisciplinary practices and lawyer/nonlawyer partnerships even present threats detrimental to maintaining an ethical profession.<sup>144</sup> However, given the foregoing discussion, this assessment, is probably incorrect.

## 2. *British Statutory Action*

In the past decade, Great Britain and Australia have both adopted rules permitting multidisciplinary practices. Feedback regarding such rules, at least from initial assessments, has been positive.<sup>145</sup> For the sake of simplicity, this paper will only consider the British Model, as the ABA Commission on Ethics 20/20 has recognized it to be the most relevant for creating a comparable ABA model.<sup>146</sup>

The Legal Services Act of 2007 allows lawyers to develop alternative business structures (ABSs) with nonlawyers, and provide legal and nonlegal services within those structures in England.<sup>147</sup> A nonlawyer may work actively for the business as a partner or hold a passive investment interest in the ABS.<sup>148</sup> Significantly, in most cases, an entity that wishes to have nonlawyer and lawyer partners must register and be licensed with the relevant legal regulatory body, and that body must approve nonlawyer

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<sup>140</sup> *Id.*; Interview with Steven G. Brady, CEO, Minnesota Lawyers Mutual, in Minneapolis, Minn. (March 28, 2014) (discussing small firm and solo practitioner concerns regarding corporate ownership of law firms). These concerns include corporate-owned law firms driving down fees for services provided primarily by solo and small firms. Such concerns are similar to those raised by “Mom and Pop” stores against entities such as Wal-Mart.

<sup>141</sup> Cobb, *supra* note 124, at 770–71 (discussing the “Fear of Sears” argument).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 769 (quoting several members of the Canon’s drafting committee who expressed doubts that lawyer/nonlawyer partnerships were inherently unethical).

<sup>145</sup> Matthew W. Bish, Note, *Revising Model Rule 5.4: Adopting A Regulatory Scheme That Permits Nonlawyer Ownership and Management of Law Firms*, 48 WASHBURN L.J. 669 (2009) (discussing the profitability of Australian and British law firms that have moved to a multidisciplinary practice structure).

<sup>146</sup> ALPS December Letter, *supra* note 8 (discussing the British ABS model).

<sup>147</sup> Legal Services Act, 2007, c. 29, § 72 (U.K.), [http://www.opsi.gov.uk/ACTS/acts2007/en/ukpgaen\\_20070029\\_en\\_1](http://www.opsi.gov.uk/ACTS/acts2007/en/ukpgaen_20070029_en_1) (last visited Aug. 10, 2014); Bish, *supra* note 145, at 680–81.

<sup>148</sup> Bish, *supra* note 145, at 680–90 (describing the Legal Services Act of 2007).

partners who hold above a certain percentage interest in the entity.<sup>149</sup> Thus, Britain has effectively brought such nonlawyers, and the British law firm entities themselves, under direct supervision of the state legal regulatory authorities.<sup>150</sup> Additionally, the model also includes a limitation on the percentage interest a nonlawyer may hold.<sup>151</sup> This limitation is based on the strong, but questionable assumption that lawyers must retain majority control of a legal entity in order to ensure the partners in that entity comply with the professional rules.<sup>152</sup> As with all multidisciplinary practice models, the British model does include a qualifier expressly requiring that nonlawyer partners not interfere with a lawyer's ethical duties, including independent professional judgment.<sup>153</sup>

British legislators believe that reducing the restrictions on legal business structures will lead to a more consumer-friendly, flexible environment.<sup>154</sup> The legislature also posits that the structures will lead to more comprehensive services and reduce transaction costs through "one-stop shopping."<sup>155</sup> Furthermore, the availability of nonlawyers holding stock options and other types of nonlawyer capital investment will theoretically allow firms to attract the best talent and conduct better long-term capital structuring of the firm.<sup>156</sup>

The Legal Services Act of 2007 has also spurred renewed litigation in the United States by firms such as Jacoby & Meyers, LLP, who wish to merge with larger U.K. firms to develop global practices.<sup>157</sup> The effect that such litigation will have on the development of Rule 5.4 in jurisdictions such as New York and Connecticut is unknown at this time. Unfortunately, even with the moderate number of entities reincorporating under British ABSs, it is too soon to tell what the ultimate ethical effects of such entities will be on the British legal environment.<sup>158</sup>

### *C. Models Permitting Only Nonlawyer Partnership*

Several models, including the command and control model (D.C. Rule 5.4) and the Commission on Ethics 20/20 model would liberalize

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<sup>149</sup> *Id.*; Legal Services Act (explaining registration and licensing requirements under the Legal Services Act of 2007).

<sup>150</sup> Bish, *supra* note 145, at 680–90; Legal Services Act.

<sup>151</sup> Bish, *supra* note 145, at 680–90; Legal Services Act (explaining the percentile limitation).

<sup>152</sup> ALPS December Letter, *supra* note 8, at 10 (discussing the reasons behind a percentage cap on nonlawyer interests).

<sup>153</sup> Bish, *supra* note 145, at 680–90; Legal Services Act.

<sup>154</sup> Bish, *supra* note 145, at 680–90.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Jacoby & Meyers, LLP v. Presiding Justices of the Appellate Div., 88 Fed App'x 526, 526–27 (2d Cir. 2012).

<sup>158</sup> Bish, *supra* note 145, at 669–70.

Model Rule 5.4 to allow nonlawyers to “partner” with lawyers in business entities. “Partner” in this context means that the nonlawyer may hold a financial or managerial interest, often a partnership or LLC membership interest, in an organization engaged in the practice of law.<sup>159</sup>

### ***1. The Command and Control Model (D.C. Rule 5.4)***

D.C. Rules of Professional Conduct Rule 5.4 (D.C. Rule 5.4) is unique among state professional rules in that it is the only state rule to allow some form of nonlawyer partnership.<sup>160</sup> D.C. Rule 5.4 requires that nonlawyers be active participants in the firm, prohibiting passive investment.<sup>161</sup> Furthermore, the rule requires that lawyers take full ethical and professional responsibility for the actions of their nonlawyer partners.<sup>162</sup> This responsibility and liability is not a major change from the situation under the status quo model.<sup>163</sup> However, it still does not address the underlying problem that the organized bar is regulating only the lawyers in such a partnership, and only indirectly monitoring the nonlawyers and entity itself.<sup>164</sup> As the ABA Commission on Ethics 20/20 has recognized, a significant problem with the D.C. Rule is the unknown liabilities involved in converting to such a form if a law firm practices in states other than D.C.<sup>165</sup> As such, D.C. Rule 5.4 has not been adopted by many firms and only by smaller firms.<sup>166</sup> Thus, additional ethical concerns are hard to ascertain given the small number of test cases.<sup>167</sup> These problems are not easily solved absent reform by other states.

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<sup>159</sup> See D.C. RULES OF PROF'L CONDUCT R. 5.4; Revised Uniform Limited Liability Company Act § 110, cmt. subsection (d), available at [http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca\\_final\\_06rev.pdf](http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca_final_06rev.pdf) (discussing ultra-contractarianism and RULLCA's rejection of that prospective).

<sup>160</sup> D.C. RULES OF PROF'L CONDUCT R. 5.4; ABA, *Hypotheticals and Models*, *supra* note 81 (Model 2).

<sup>161</sup> Cobb, *supra* note 124, at 783–84 (noting the rule specifically states that, “[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 certain conditions are met).

<sup>162</sup> D.C. RULES OF PROF'L CONDUCT R. 5.4(b)(3).

<sup>163</sup> See *supra* Part III.A.1. (discussing the status quo model).

<sup>164</sup> See D.C. RULES OF PROF'L CONDUCT R. 5.4(b)(2) (stating that “[a]ll persons having such managerial authority or holding a financial interest undertake [must] abide by these Rules of Professional Conduct,” but not subjecting nonlawyers to the jurisdiction of legal disciplinary authorities).

<sup>165</sup> ALPS December Letter, *supra* note 8, at 6–10.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

## 2. *The Commission on Ethics 20/20 Model*

Finally, the Commission on Ethics 20/20 has recently put forth a proposed model for consideration by the ABA House of Delegates and American Bar. The proposed model incorporates many features of D.C. Rule 5.4 and the British ABSs.<sup>168</sup> These features include: (1) a limitation of the services offered by an ALPSs to legal services; (2) a restriction that nonlawyers be active participants in the entity, not passive investors; (3) a percentage cap on nonlawyer interests in the firm; and (4) a “fit to own” requirement for nonlawyers.<sup>169</sup> The active participation element has been otherwise addressed above.<sup>170</sup>

As previously mentioned, the percentage cap on nonlawyer ownership is meant to keep ownership of the law firm in the hands of lawyers, rather than nonlawyers. After numerous discussions, the Commission has proposed a cap of twenty-five percent on nonlawyer interests, via a complicated formula, as sufficient to maintain lawyer control of the entity.<sup>171</sup> The feeling is that keeping lawyers in control of the entity will allow lawyers to maintain the ethical integrity of the lawyers and nonlawyers in the firm.<sup>172</sup> As previously mentioned, whether that reasoning is sound is an unanswered question.<sup>173</sup>

On the other hand, the fit to own requirement is a new feature of ABA proposed models. The fit to own provision requires that lawyers in the firm execute some due diligence to ascertain the ethical character of proposed nonlawyer partners and keep records of such investigation.<sup>174</sup> However, as the Commission’s report recognizes, this requirement may not go far enough because it does not bring nonlawyers under the disciplinary authority of the state bars, and indeed does not even subject them to investigation by the state character and fitness committee.<sup>175</sup> Rather, the proposed rule again places all responsibility on lawyers in the firm, which may or may not be ethically and practically realistic.<sup>176</sup>

As discussed with the British Model and D.C. Rule 5.4 Model, the proposed rule features significant benefits, including requiring that nonlawyers follow the legal professional rules and protecting independent

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<sup>168</sup> See ALPS December Letter, *supra* note 8, at 5–10.

<sup>169</sup> ALPS December Letter, *supra* note 8, Draft Resolution 2.

<sup>170</sup> See *supra* Part III.A–B (discussing the active participation component of some suggested model rules).

<sup>171</sup> ALPS December Letter, *supra* note 8, at 5–10.

<sup>172</sup> *Id.*

<sup>173</sup> See *supra* Part II.E (discussing the business-profession dichotomy); Cobb, *supra* note 124, at 790 (calling the twenty-five percent cap “seemingly arbitrary”).

<sup>174</sup> ALPS December Letter, *supra* note 8, at 5–10; Cobb, *supra* note 124, at 790–92.

<sup>175</sup> ALPS December Letter, *supra* note 8, at 5–10; Cobb, *supra* note 124, at 790–92.

<sup>176</sup> Cobb, *supra* note 124, at 790–92 (discussing division of liability exposure).



professional judgment.<sup>177</sup> However, the modest improvements in the proposal may not justify the mechanical and restrictive rule structure.<sup>178</sup> Indeed, the MDP issue, including the Commission on Ethics 20/20 proposal, has been so contentious that the ABA has failed even to develop policy on the issue.<sup>179</sup> Unfortunately, revisions to Rule 5.4 are stuck on a proverbial merry-go-round between the Ethics Committees and ABA House of Delegates, a journey that likely will not end soon.<sup>180</sup>

**Figure A.**

<b>ABA Model Rule of Professional Conduct 5.4</b>	<b>The Kutak Commission Proposed Rule 5.4</b>
<p>(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:</p> <p>(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;</p> <p>(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;</p> <p>(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and</p> <p>(4) a lawyer may share court-awarded legal fees with a nonprofit</p>	<p>A lawyer may 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, but only if the terms of the relationship provide in writing that:</p> <p>(a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;</p> <p>(b) information relating to representation of a client is protected as required by rule 1.6;</p> <p>(c) the arrangement does not involve advertising or personal contact with prospective clients prohibited by rules 7.2 and 7.3; and</p>

<sup>177</sup> *Id.* at 790-98.

<sup>178</sup> *Id.* (suggesting that further alterations to the Commission rule need to be made).

<sup>179</sup> James Podgers, *ABA Ethics Opinion Sparks Renewed Debate over Nonlawyer Ownership of Law Firms*, ABA J. (Dec. 1, 2013), available at [http://www.abajournal.com/magazine/article/aba\\_ethics\\_opinion\\_sparks\\_renewed\\_debate\\_over\\_nonlawyer\\_ownership\\_of\\_law\\_fi/](http://www.abajournal.com/magazine/article/aba_ethics_opinion_sparks_renewed_debate_over_nonlawyer_ownership_of_law_fi/) (discussing recent ABA action, or rather inaction, on Rule 5.4).

<sup>180</sup> *Id.* (noting more than one commentator laments that action on Rule 5.4 may necessarily come from the states, rather than national-level policy from the ABA).

<p>organization that employed, retained or recommended employment of the lawyer in the matter.</p> <p>(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.</p> <p>(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.</p> <p>(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:</p> <p>(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;</p> <p>(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or</p> <p>(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.</p>	<p>(d) the arrangement does not result in charging a fee that violates rule 1.5.</p>
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<p align="center"><b>The Commission on Ethics 20/20 Rule 5.4</b></p>	<p align="center"><b>D.C. Rule 5.4</b></p>
<p>(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:</p> <p>(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;</p> <p>(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;</p> <p>(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and</p> <p>(4) a lawyer or law firm may do so pursuant to paragraph (b); and</p> <p>(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.</p> <p>(b) A lawyer may practice law in a law firm in which individual nonlawyers in that firm hold a financial interest, but only if:</p> <p>(1) the firm's sole purpose is providing legal services to clients;</p> <p>(2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;</p> <p>(3) the nonlawyers state in writing that they have read and understand the Rules of Professional</p>	<p>(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:</p> <p>(1) An agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;</p> <p>(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services compensation that fairly represents the services rendered by the deceased lawyer. A lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.</p> <p>(3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement;</p> <p>(4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b); and</p> <p>(5) A lawyer may share legal fees, whether awarded by a tribunal or received in settlement of a matter, with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter and that qualifies under Section 501(c)(3) of the Internal</p>

<p>Conduct and agree in writing to undertake to conform their conduct to the Rules;</p> <p>(4) the lawyer partners in the law firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under Rule 5.1;</p> <p>(5) the nonlawyers have no power to direct or control the professional judgment of a lawyer, and the financial and voting interests in the firm of any nonlawyer are less than the financial and voting interest of the individual lawyer or lawyers holding the greatest financial and voting interests in the firm, the aggregate financial and voting interests of the nonlawyers does not exceed [25%] of the firm total, and the aggregate of the financial and voting interests of all lawyers in the firm is equal to or greater than the percentage of voting interests required to take any action or for any approval;</p> <p>(6) the lawyer partners in the firm make reasonable efforts to establish that each nonlawyer with a financial interest in the firm is of good character, supported by evidence of the nonlawyer's integrity and professionalism in the practice of his or her profession, trade or occupation, and maintain records of such inquiry and its results; and</p> <p>(7) compliance with the foregoing conditions is set forth in writing.</p> <p>(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.</p>	<p>Revenue Code.</p> <p>(b) 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, but only if:</p> <p>(1) The partnership or organization has as its sole purpose providing legal services to clients;</p> <p>(2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;</p> <p>(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;</p> <p>(4) The foregoing conditions are set forth in writing.</p> <p>(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.</p>
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(d) A fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer in a firm for a reasonable time during administration.	
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#### IV. THE CONSUMER-COMMERCIAL-CONTRACTUAL MODEL (CCC MODEL)

Each of the models previously proposed has significant flaws, including confidentiality, imputation, and supervision. Unfortunately, the core of the problem is that past models do not easily unite multidisciplinary practice with the unique professional rules and culture of the American legal community. In contrast, this article proposes a model that incorporates both a liberalization of Rule 5.4 and a pragmatic approach to melding the model to address professionalism concerns and the unique contours of the American market and legal community. Part A states the main premises of the CCC Model and the text of the proposed rule itself. Part B discusses the rule and the ethical and practical problems the rule addresses. Part C briefly discusses the challenges and disadvantages of adopting the CCC Model.

##### *A. The CCC Model: Premise and Text*

The model is based on four premises: (a) there are significant concerns with incorporated law firms with non-lawyer shareholders (passive investment); (b) having Wal-Mart or Sears hire lawyers to work in “Wal-Mart law firms” would not comport with the professional rules or lawyer’s image as a “profession”; (c) commercial entities are sophisticated and need access to lawyer/non-lawyer combinations of services while consumers cannot as easily understand such entities; and (d) ultra-contractarianism is a growing trend in business.

The CCC Model for Rule 5.4 would amend sections (a)(4) and (b)–(c) as follows:

- (4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b); and . . . .
- (b) A lawyer may practice law in a partnership or unincorporated business entity in which a financial interest

is held or managerial authority is exercised by an individual nonlawyer, only if:

(1) The partnership or other form of unincorporated business entity is designated a “Multidisciplinary Firm” by the Secretary of State of the partnership or unincorporated business entity’s state of organization.

(2) All nonlawyers are active participants in the Multidisciplinary Firm. Active participant means that the individual nonlawyer actively provides professional, or other services on behalf of the Multidisciplinary Firm or is otherwise engaged in the day to day affairs of the Multidisciplinary Firm. Nonlawyers may not be organizations, entities, or solely investors or passive investors.

(3) All persons, lawyers and nonlawyers, having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct, except as specified in section (7). All rules including confidentiality, conflicts of interest, imputation, and advertising shall apply to nonlawyers and lawyers in a firm, subject to section (7).

(4) Where a nonlawyer is subject to an ethical or professional code of conduct or State or Federal law (collectively “Nonlawyer Ethics Code”) by virtue of his or her profession, licensure, or similar affiliation, the nonlawyer shall be bound by both the Nonlawyers Ethics Code and these Rules of Professional Conduct. If the Nonlawyer Ethics Code and these Rules of Professional Conduct both address an issue, the nonlawyers shall follow the more restrictive rule. If the Nonlawyer Ethics Code and these Rules of Professional Conduct directly conflict, the nonlawyers shall, to the extent possible, seek guidance on a proper course of action from the relevant lawyer and nonlawyers professional ethics authorities. If the direct conflict involves a mandatory disclosure of information or client misconduct a nonlawyer must make under a Nonlawyer Ethics Code, the nonlawyer shall simultaneously make the disclosure and notify the legal disciplinary authority of the jurisdiction where the Multidisciplinary Firm is registered. The Multidisciplinary Firm shall also immediately withdraw from representing and providing services to the client.

(5) All nonlawyers with a managerial or financial interest in the Multidisciplinary Firm agree to be subject

to the jurisdiction of the following state legal disciplinary authorities:

- (A) Disciplinary authority of the state of organization for the Multidisciplinary Firm;
  - (B) For conduct in connection with a matter pending before a tribunal, the disciplinary authority of the tribunal and jurisdiction in which it sits, unless the tribunal's rules provide otherwise.
- (6) The lawyers and nonlawyers who have a financial interest or managerial authority in the Multidisciplinary Firm undertake to be responsible for the lawyer and nonlawyers participants to the same extent as if nonlawyer participants were lawyers under Rules 5.1–5.3.
- (7) The following section applies only to Commercial Clients. A Commercial Client is any individual or entity which does not meet the definition of consumer in § 1-201(11) of the UCC. A Commercial Client and the multidisciplinary entity may agree in a contract for representation or other written agreement, signed by both parties, to vary the application of these Professional Rules of Conduct with regard to nonlawyers in the Multidisciplinary Firm, provided that:
- (A) The work provided by the nonlawyers will not be used exclusively to assist with or in connection with legal services being provided to the Commercial Client;
  - (B) The agreement does not violate any Nonlawyer Ethics Codes or these Rules of Professional Conduct;
  - (C) The Commercial Client is advised in writing to seek independent legal counsel before signing the agreement;
  - (D) The Commercial Client may not waive application of these Rules of Professional Conduct to lawyers involved in the provision of legal or nonlegal services in a Multidisciplinary Firm;
  - (E) The Commercial Client and Multidisciplinary Firm may structure the representation of the client in any manner they see fit provided that the agreement and structure complies with all Nonlawyer

Ethics Codes; these Rules of Profession Conduct, and state and Federal Laws; and

(F) If no agreement under this section has been made, the Multidisciplinary Firm's representation and provision of services to the Commercial Client shall be governed by the provisions of section (8).

(8) The following section applies only to Consumer Clients. A Consumer Client is an individual who meets the definition of consumer in § 1-201(11) of the UCC. The contract for representation between a Consumer Client and the Multidisciplinary Firm shall contain the following information:

(A) A clear statement of the scope of the representation, including specific legal services and nonlegal services that may be provided to the Consumer Client;

(B) A provision stating that the representation is being provided by a Multidisciplinary Firm and a brief description of the nonlegal services provided by nonlawyers in the firm;

(C) A clause in bold, 14 font, stating that the nonlawyers and lawyers in the Multidisciplinary Firm are bound by these Rules of Professional Conduct in their representation or provision of all services, legal or nonlegal, to the Consumer Client; and

(D) All other information required by Rule 1.5 or these Rules of Professional Conduct.

(9) A Certificate of Multidisciplinary Practice shall be filed with the Secretary of State and disciplinary authorities of the Multidisciplinary Firm's state of organization. The Certificate shall contain:

(A) The name of the partnership or organization;

(B) The names of all nonlawyers with managerial or financial interests in the partnership or organization;

(C) An affirmation by the Multidisciplinary firm and all nonlawyers in the firm that they will abide by the conditions set forth in Rule 5.4(b)(1) through (b)(8) and Rule 5.4(c);



(D) An affirmation by all nonlawyers in the Multidisciplinary firm that they will not place limitations on, direct or otherwise interfere with the independent professional judgment of the lawyers in the firm.

(E) A partnership or organization shall file an amendment to the Certificate of Multidisciplinary Practice within thirty (30) days of a nonlawyer with a managerial or financial interest joining or disassociating from the firm.

(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.<sup>181</sup>

***B. The CCC Model Addresses Many Ethical and Practical Problems with Multidisciplinary Practices and Past Proposed Rules 5.4***

The CCC Model addresses many of the ethical and practical issues raised by liberalization of Model Rule 5.4 to allow multidisciplinary partnerships. Firstly, section (b)(2) requires that a nonlawyer who wishes to have a financial or managerial interest in a multidisciplinary firm be an individual and an active participant.<sup>182</sup> The individual limitation reiterates the longstanding rule that lawyers (and now, by extension, nonlawyers), not law firms or other entities, are regulated by the legal professional bars.<sup>183</sup> Furthermore, restricting nonlawyers with managerial or financial interests to individuals also prevents business entities or organizations such as Walmart or Sears from holding interests in or operating multidisciplinary firms.<sup>184</sup>

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<sup>181</sup> Note that proposed sections (a)(4) and (c) are taken almost verbatim from current D.C. Rules of Professional Conduct R. 5.4. See D.C. RULES OF PROFESSIONAL CONDUCT R. 5.4(a)(4), (c). Additionally, all other existing sections of Model Rules of Professional Conduct R. 5.4, except those designated, would remain the same.

<sup>182</sup> CCC Model 5.4(b)(2).

<sup>183</sup> See MODEL RULES OF PROFESSIONAL CONDUCT R. 8.5 (stating that, "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs," but saying nothing about law firms); but see U.S. SENTENCING GUIDELINES MANUAL 489–532 (2013), available at [http://www.uscourts.gov/Guidelines/2013\\_Guidelines/Manual\\_PDF/Chapter\\_8.pdf](http://www.uscourts.gov/Guidelines/2013_Guidelines/Manual_PDF/Chapter_8.pdf) (describing federal sentencing guidelines for "organizations," usually corporations, accused of crimes).

<sup>184</sup> See *supra* notes 139–143 and accompanying text (describing the "Fear of Sears" problem and concerns that multidisciplinary firms operated by large corporations might drive smaller law firms out of business).

Similarly, the active participant limitation restricts nonlawyers in a multidisciplinary firm to active partnership and work for the firm.<sup>185</sup> There is always a risk that non-lawyers will influence the independent professional judgment of lawyers in a multidisciplinary firm; but, the risk of such influence harming the client is lessened when nonlawyer managers or financial interests have an active stake in maintaining that client relationship and may even be providing services to the client, rather than simply holding a passive investment where the only concern is a monetary return.<sup>186</sup> Effectively, the risk of interference with lawyer independent judgment in the proposed multidisciplinary firm is no greater than that in a contemporary law firm or in-house legal department.<sup>187</sup> Section (c) restates and reinforces the prohibition on interference in independent profession judgment by all persons who recommend, pay, or employ a lawyer.<sup>188</sup> Presumably, this section's prohibition would include, as does the current rule, interference by all persons, including other lawyers, nonlawyers, and third parties who pay for a client's legal services.<sup>189</sup>

However, unlike D.C. Rule 5.4 and the Commission on Ethics 20/20 Rule 5.4, the CCC Model does not limit the services provided by a multidisciplinary firm to "legal services" and nonlawyer services assisting the provision of legal services.<sup>190</sup> As a practical matter nonlawyers,

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<sup>185</sup> See *supra* notes 159–167 and accompanying text (discussing D.C. Rule 5.4, which limits nonlawyer partners to active participation and work for the firm, although it does not expressly prohibit passive investment); *supra* Part III.C.2 (describing the Commission on Ethics 20/20's suggested rule, which requires active participation by nonlawyers in the firm and limits services provided by the firm to legal services to further that requirement).

<sup>186</sup> See *supra* notes 123–124 and accompanying text (describing passive investment and lawyer independence of judgment); *supra* notes 64–80 (explaining the business-profession dichotomy and the concern that multidisciplinary practice may make the legal profession focused on profit, rather than provision of better client services).

<sup>187</sup> See *supra* note 121 and accompanying text (stating that law firms, in-house legal departments, and insurance company payment of lawyers on behalf of the insured already raise lawyer independence of judgment concerns, but are still permitted under the professional rules).

<sup>188</sup> See ELIZABETH BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 284–85 (7th ed. 2011) (discussing the prohibition on third party and insurance interference in the independent professional judgment of the lawyer under Rule 2.1); CCC Model 5.4(c).

<sup>189</sup> See *supra* notes 117–125 and accompanying text (discussing lawyer independence of judgment); see also MODEL RULES OF PROF'L CONDUCT R. 5.4 cmt. 2 (explaining that existing Model Rule 5.4(c) reinforces the prohibition on third parties interfering with the lawyer's professional judgment in Model Rule 1.8). Section (c) is an exact copy of current Model Rule 5.4(c) in most states, and thus, at least presumably would be interpreted by state disciplinary authorities and courts the same way as it has been in the past. *Id.*

<sup>190</sup> See *supra* notes 159–167 and accompanying text (discussing the D.C. limitation that permits nonlawyers in a lawyer/nonlawyer entity to provide services ancillary to the provision of legal services, but not to have clients and provide services unattached from the provision of legal services); ALPS December Letter, *supra* note 8, at 10–13 (describing the Commission on Ethics 20/20 limitation on services provided in an ALPS to legal services).

particularly highly skilled professionals, are unlikely to accept working only for clients receiving legal services when they will be compensated highly for their client roster by a nonlawyer business firm.<sup>191</sup> Additionally, the CCC Model contains no percentage limitation on the interests nonlawyers may hold in a multidisciplinary firm.<sup>192</sup> Instead, the CCC Model protects client interests by requiring different initial disclosures by multidisciplinary firms for consumer clients versus commercial clients, as discussed below.<sup>193</sup>

Sections (b)(3) through (b)(6) address whether nonlawyers in a multidisciplinary firm are subject to the Rules of Professional Conduct, a point of frequent concern among practitioners and client protection advocates.<sup>194</sup> The rule lays out the unambiguous rule that nonlawyers are subject to the state professional rules of the jurisdiction in which the multidisciplinary firm is organized, unless waived in specific circumstances by a commercial client.<sup>195</sup> Furthermore, section (b)(4) addresses the circumstances where a nonlawyer ethics code governs the conduct of a nonlawyer in a multidisciplinary firm, a point not addressed by past proposed rules.<sup>196</sup> Section (b)(4) adopts a client and public protectionist approach. It requires nonlawyers to comply with the most restrictive rule and make mandatory disclosures under the Rules of Professional Conduct, a state statute, or other nonlawyer code of ethics even when another ethics code prohibits such disclosures.<sup>197</sup> Thus, nonlawyers cannot hide behind the Professional Rules of Conduct as an excuse not to make disclosures required by Sarbanes-Oxley Act of 2002 or other statutes.<sup>198</sup>

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<sup>191</sup> Interview with Michael Roberts, Business Consultant, Mahto Wacipi Ltd., in Saint Paul, Minn. (Sep. 15, 2013) (discussing his work as a business consultant for a number of corporations and firms, where he is effectively paid to a great extent for his network connections, like many other nonlawyer business professionals and lawyers).

<sup>192</sup> ALPS December Letter, *supra* note 8, at 10–13 (proposing a twenty-five percent cap on nonlawyer interests held in an ALPS); *see supra* notes 145–158 and accompanying text (discussing the British ABS and the twenty-five percent nonlawyer limitation).

<sup>193</sup> ALPS December Letter, *supra* note 8, at 10–13 (stating that the limitation on the percentage of a law firm held by nonlawyers is meant to protect clients). The ALPS December Letter provides no support for its assertion that having nonlawyers limited to a certain percentage ownership interest will protect client interests. *Id.*; *See infra* notes 199–201 (laying out the commercial versus consumer client disclosure differences in the CCC Model).

<sup>194</sup> *See supra* notes 127–128 and accompanying text (explaining that most practitioners agree that nonlawyers should be subject to the legal Rules of Professional Conduct when providing services ancillary to legal services, but that practitioners are divided on whether those rules should apply to all services, law-related or nonlegal, that a nonlawyer provides).

<sup>195</sup> CCC Model 5.4(b)(3).

<sup>196</sup> *Supra* Part III (discussing proposed Rule 5.4 models, with no mention of nonlawyer codes of ethics and conflict between legal codes of conduct and nonlawyer ethics codes); CCC Model 5.4(b)(4).

<sup>197</sup> CCC Model 5.4(b)(4).

<sup>198</sup> *See supra* note 73 (discussing the Sarbanes-Oxley Act of 2002).

A unique feature of the proposed CCC Model, though, is the distinction drawn between commercial clients and consumer clients in sections (b)(7) and (b)(8). The separate treatment of the two groups of clients is necessary for two reasons. First, the ABA Model Code of Professional Conduct already treats representation of an entity differently than representation of an individual client.<sup>199</sup> The consumer-commercial client distinction merely expands the ABA Model Code treatment of the lawyer-entity relationship to specify that representation of a sophisticated businessperson in the functions of a business should be treated differently than representation of an individual accused of a crime or obtaining a divorce. Secondly, consumer protection and differentiation between commercial and consumer transactions is a growing trend.<sup>200</sup> For example, many states differentiate between commercial entities and consumers for real estate disclosures, UCC secured transactions, and consumer credit lawsuits.<sup>201</sup>

Furthermore, sections (b)(7) and (b)(8) adopt a mixed ultra-contractarianism approach.<sup>202</sup> Ultra-contractarianism or simply contractarianism refers to the modern trend in unincorporated business statutes that allow incorporators, organizers, partners, etc. . . . to modify by “contract” the default rules to suit the business’s needs.<sup>203</sup> Section (b)(7), applicable only to commercial clients, extends this trend by allowing commercial clients and MPDs to contractually structure their relationship as they see fit.<sup>204</sup> As John S. Dzienkowski and Robert J. Peroni recognized,

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<sup>199</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.13 (governing the representation of entities by lawyers).

<sup>200</sup> MINN. STAT. § 336.9-102(a)(22), (26) (2013) (defining consumer debtor and consumer transactions for purposes of secured transactions); MINN. STAT. § 491A.01 (2013) (stating that the Minnesota Conciliation Court jurisdiction is limited to certain “consumer credit transactions”); MINN. STAT. § 513.52 (2013) (noting residential real estate versus commercial property specialized seller disclosure requirements); see also William D. Warren & Steven D. Walt, SECURED TRANSACTIONS IN PERSONAL PROPERTY 34, 49, 311 (9th ed. 2013) (discussing consumer and nonconsumer debtor and transaction differences in Article 9 treatment including after-acquired property, automatic perfection, and strict foreclosure).

<sup>201</sup> See *supra* note 200.

<sup>202</sup> See CCC Model 5.4(b)(7)–(8).

<sup>203</sup> Daniel S. Kleinberger, Careful What You Wish For—Freedom of Contract and the Necessity of Careful Scrivening, 5 *ESOURCE* 6, 19–23 (Dec. 2006), available at <http://apps.americanbar.org/buslaw/newsletter/0054/materials/pp7.pdf> (discussing Delaware’s contractarianist approach to corporation and unincorporated business entity statutes); see also Del. Code Ann. tit. 6, § 18-1101 (e) (West 2013). Delaware’s LLC and corporation statutes are a prime example of this “ultra-contractarianism” trend. Delaware statutes permit incorporators or organizers to completely eliminate officer, manager, or director duty of loyalty through the articles of incorporation, bylaws, management agreement, or similar contract; REVISED UNIFORM LIMITED LIABILITY COMPANY ACT § 110, cmt. subsection (d), available at [http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca\\_final\\_06rev.pdf](http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca_final_06rev.pdf) (referencing the ultra-contractarianism trend).

<sup>204</sup> CCC Model 5.4(b)(7).

“[t]he premise in allowing a single entity MDP is that professionals should be free to structure the entity in whatever way best serves the clients.”<sup>205</sup> This rationale also extends to flexibility in structuring the multidisciplinary firm’s relationship with its commercial clients to better meet the needs of that client base, while providing meaningful default protections to consumer clients.

Additionally, the rule addresses practical concerns. First, section (b)(1) gives an entity with both lawyers and nonlawyers holding financial or managerial interests a name, the multidisciplinary firm. The multidisciplinary firm designation distinguishes the entity from law firms or ABSs and covers all business entity forms employed by law firms.<sup>206</sup> Second, section (b)(9) requires that a Certificate of Multidisciplinary Practice be filed with the Secretary of State of the multidisciplinary firm’s state of organization. This ensures that a state government has a record of such entities, and the nonlawyers practicing in those entities, for purposes of regulation.<sup>207</sup> It is also possible that this registration could be used to better regulate nonlawyer professionals and ensure that unethical nonlawyers are not permitted to practice in multidisciplinary firms.<sup>208</sup> Lastly, the CCC Model’s choice of law provisions, contained in section (b)(5) also provides nonlawyers clarity regarding where they may be subject to discipline under the Rules of Professional Conduct and, thus, which rules they must follow.<sup>209</sup> Overall, many of the provisions of the CCC Model make multidisciplinary practice more predictable and less risky.<sup>210</sup>

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<sup>205</sup> Dzienkowski & Peroni, *supra* note 1, at 170–72.

<sup>206</sup> See *supra* notes 7–10 and accompanying text (discussing the different terminology used to refer to entities in which lawyers and nonlawyers practice and the resulting confusion).

<sup>207</sup> See *supra* note 147 and accompanying text (explaining the regulation of multidisciplinary entities in the United Kingdom, where multidisciplinary entities are required to register as ABSs).

<sup>208</sup> See *supra* note 69 (discussing licensing of engineers, certified public accountants, and other “business professionals” by many states, including Wisconsin and New York).

<sup>209</sup> See MODEL RULES OF PROF’L CONDUCT ANN. R. 8.2, 8.5 (including comments). The comparable provision for lawyers is contained in Model Rule 8.5, governing choice of law. However, unlike Model Rule 8.2, the choice of law provision governing nonlawyers only subjects them to discipline in two states, the state of organization of the multidisciplinary firm and the rules of any tribunal involved in a case for which a nonlawyer provided services. Since nonlawyers would not otherwise be subject to the jurisdictional powers of a state’s legal disciplinary authority, but for the fact that they provide services in a multidisciplinary firm, this limiting of jurisdictional and disciplinary powers to certain defined and specific locations and rules makes sense. Additionally, the rule provides that nonlawyers waive the right to object to the jurisdiction of the tribunal on personal jurisdiction grounds. This effectively shortens the time needed to regulate and litigate these fee disputes. CCC Model 5.4(b)(5).

<sup>210</sup> See *supra* note 165 and accompanying text (describing the unknown ethical and liability considerations of multidisciplinary practice as a risk management hazard and practical problem inhibiting the growth of multidisciplinary practices in D.C., particularly since nonlawyers may only partner with lawyers in that jurisdiction).

### *C. Challenges with Adopting the CCC Model*

Despite its numerous benefits, there are some challenges to adopting the CCC Model. The rule necessarily contemplates that Rules 1.7 through 1.13 governing conflicts of interest and imputation of conflicts of interest will be amended.<sup>211</sup> Such amendments would be needed to clarify rules applying to conflicts of interest with past clients, including what is meant by “materially adverse.”<sup>212</sup> Amendments may also allow greater use of screening, rather than complete disqualification of the multidisciplinary firm from providing services to a client. Screening is already used, with great success, for government employees.<sup>213</sup>

Another particularly tricky area is when nonlawyers in a multidisciplinary firm are bound by codes of conduct or federal or state laws specific to their profession, licensure, etc.<sup>214</sup> The CCC Model approaches that conflict by adopting a “client protection” mindset and requiring the nonlawyer to follow the most restrictive rule.<sup>215</sup> Additionally, the CCC Model requires that nonlawyers adhere to the mandatory disclosure requirements of their business or profession. Such adherence is again in the best interests of the public and clients. However, depending on the nature of the conflict between the lawyer professional rules and the nonlawyer ethics code, this approach may be overly simple or need modification to comport with the practical realities of practice.

Finally, given that multidisciplinary practice has been rejected several times in the years since the adoption of the ABA Model Rules of Professional Conduct in 1983, it is an open question whether the organized bar will accept such a liberal form of Model Rule 5.4.<sup>216</sup> This is especially true given that the Commission on Ethics 20/20 proposed rule is far more restrictive than the CCC Model.<sup>217</sup> Nevertheless, on the whole, the CCC Model provides a strong alternative to other models proposed in the past

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<sup>211</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7–1.9; Carson, *supra* note 65, at 618–20 (describing the problems of conflicts of interest in the multidisciplinary firm, as a rationale for rejecting the form).

<sup>212</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7–1.9 (conflicts of interest); MODEL RULES OF PROF'L CONDUCT R. 1.10–1.12 (imputing conflicts of interest and screening of government employees).

<sup>213</sup> BENNETT ET AL., *supra* note 188, at 184–85, 194–95. Current Rule 1.10 allows screening in the lateral hire context when the disqualification is based on Rule 1.9(a) or (b). As commentators have recognized, screening is necessary to avoid the harsh consequences of imputed conflicts of interest when a lawyer previously performed government work. *Id.* at 194–95. Those harsh consequences may also provide a rationale for employing screening in the nonlawyer conflicts context as well, particularly where larger firms with multiple offices are involved. *Id.*

<sup>214</sup> See CCC Model § 5.4(b)(5) (describing the state professional rules to which nonlawyers would be subject).

<sup>215</sup> CCC Model § 5.4(b)(5).

<sup>216</sup> See *supra* Part II.

<sup>217</sup> See *supra* Part III.C.2.

thirty years and is a solution that the ABA should seriously consider reviewing.

## V. CONCLUSION

Given the momentum of the rapidly changing legal market and the growth of legal services providers, it is only a matter of time before the ABA is forced to confront the issue of multidisciplinary practices.<sup>218</sup> The tremendous history of failed attempts at reform and recent developments overseas give the ABA multiple models and ethical challenges to consider.<sup>219</sup> The CCC Model provides the best proposal for such reform and addresses significant issues, such as disciplinary authority over nonlawyers, professional rule conflicts of laws, and additional client protections for commercial versus consumer clients.<sup>220</sup> Above all, the CCC Model introduces structured flexibility into American multidisciplinary structures, where other proposed models have been too rigid to be practical.<sup>221</sup>

In the end, as Elijah D. Farrell has recognized, “resolution of the current dissonance may be “driven less by lawyers’ own notions of ethical propriety than by the demands of clients in the modern global marketplace.”<sup>222</sup> Let us hope that reform comes through the contractual pen and consumer-commercial contrast, rather than through inaction or overly restrictive regulation.

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<sup>218</sup> See generally Zahorsky & Henderson, *supra* note 3 (discussing the rapidly changing legal marketplace); Hackett, *supra* note 109 (describing current trends toward legal service providers and the quick shift to more technology-based forms of providing legal services).

<sup>219</sup> See *supra* Parts II–III.

<sup>220</sup> See *supra* Part IV.

<sup>221</sup> See *supra* Part IV; see also *supra* Part III.C.2 (discussing the Commission on Ethics 20/20 Model).

<sup>222</sup> Farrell, *supra* note 62, at 627–28.