I. Introduction

In the increasingly complex and interrelated economy that lawyers face, it has become common for lawyers in private practice to engage in another business in addition to providing legal services in a firm or solo practice.

In this opinion, the Colorado Bar Association Ethics Committee (Committee) considers the ethical responsibilities of a lawyer engaged in private practice and in another business. The Committee specifically evaluates the ethical responsibilities owed by a lawyer who is engaged in a business that provides law-related services. In such a case, the lawyer generally is subject to the Rules of Professional Conduct (Colo. RPC or the Rules) in their entirety unless the lawyer takes reasonable measures to keep the law practice and the law-related business separate. This opinion does not address the ethical obligations of in-house lawyers engaged in another business.

II. Syllabus

The starting point for analyzing the ethical considerations applicable to a lawyer engaged in another business is to determine whether the other business is “law-related,” which is a term of art. If the business is not law-related, such as operating a dry cleaning store or a family restaurant, then a lawyer still has ethical responsibilities, but they are limited to those that apply to all lawyers at all times, including particularly the prohibition against conduct involving dishonesty, fraud, deceit or misrepresentation. Colo. RPC 5.7, cmts. [2], [11]. If, however, the lawyer’s other business provides a law-related service, such as title insurance, accounting or dispute mediation services, then the lawyer may have a number of additional ethical responsibilities. This opinion includes a diagram that demonstrates the analytical path for considering these additional ethical responsibilities.
A lawyer who practices law and is engaged in another business always has ethical responsibilities with respect to the legal services the lawyer provides. For example, the lawyer has a
duty to maintain the confidentiality of client information and segregate that information from the lawyer’s other business (Colo. RPC 1.6), and to avoid conflicts of interest if there is a significant risk that the lawyer’s personal interests in the business will materially limit the lawyer’s ability to represent a client (Colo. RPC 1.7(a)).

Rule 5.7 addresses the ethical responsibilities potentially applicable to a lawyer engaged in a law-related business. Generally stated, the Rules apply in their entirety to the lawyer’s provision of law-related services unless the lawyer takes certain precautions. First, the lawyer must provide the law-related services in a way that readily distinguishes such law-related services from the lawyer’s legal services. Colo. RPC 5.7(a)(1). Second, the lawyer must take “reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.” Colo. RPC 5.7(a)(2). These precautions are required whether the lawyer provides the law-related services directly or through a separate entity that the lawyer controls.

Utilizing the framework of Rule 5.7, this opinion discusses specific issues relating to a lawyer’s provision of law-related services, including what services constitute “law-related services” and what reasonable measures a lawyer should take to avoid confusion about whether a lawyer-client relationship exists when a lawyer is providing law-related services. This opinion also discusses the potential applicability of Rule 5.7 in the context of lawyers who provide mediation, arbitration, or expert witness services.

Finally, this opinion examines the substantial ethical responsibilities applicable to the lawyer when he or she provides law-related services in circumstances that are not distinct from the lawyer’s provision of legal services, or where the lawyer has not taken reasonable measures to assure that the recipient of the law-related business services knows that no client-lawyer relationship exists. Generally, most of the Rules apply to a lawyer in such a circumstance, including those relating to conflicts of interest (Colo. RPC 1.7, 1.8, 1.9, and 1.10); disclosure of confidential information (Colo. RPC 1.6); reasonable fees (Colo. RPC 1.5); sharing legal fees or forming a partnership with nonlawyers (Colo. RPC 5.4(a)—(d)); and lawyer advertising, solicitation, and communication about legal services (Colo. RPC 7.1, 7.2, and 7.3). Although a lawyer’s obligations necessarily will depend on the factual setting—whether the law-related services are being provided in a sufficiently distinct manner and whether the lawyer has taken reasonable measures to avoid confusion about whether a client-lawyer relationship exists—any lawyer engaged in a law-related business should take care to follow the strictures of Colo. RPC 5.7(a)(1)–(2).
III. Analysis

A. Analysis of Colo. RPC 5.7

Rule 5.7 provides:

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term “law-related services” denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Rule 5.7 determines whether the Rules in their entirety will apply to a lawyer when someone receives “law-related services” from the lawyer or from an entity controlled by the lawyer. If the services provided by the lawyer (or an entity controlled by the lawyer) are not “law-related,” and are the only services provided, then the only Rules that govern the lawyer’s conduct are those that apply to lawyers regardless of whether they are providing legal services to a client. These include, for example, Colo. RPC 8.4(c), which prohibits conduct involving fraud, dishonesty, deceit, or misrepresentation. E.g., People v. Rishel, 50 P.3d 938 (Colo. PDJ July 8, 2002) (lawyer’s dishonest handling of pool of funds used for Colorado Rockies season tickets, unrelated to the provision of legal services, violated Rules 8.4(b) (prohibiting “criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects”), 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation), and 1.15(b) (requiring lawyers to deliver and account for funds and property)). A lawyer may be subject to discipline for engaging in conduct prejudicial to the administration of justice in violation of Rule 8.4(d) for purely private conduct. E.g., In re Foster, 253 P.3d 1244 (Colo. 2011) (lawyer’s reassertion of argument that judge was biased against lawyer in lawyer’s sixth appeal in his own divorce case). See Attorney Grievance Comm’n v.
"Link, 844 A.2d 1197, 1211-12 (Md. 2004) (“Only when such purely private conduct is criminal or so egregious as to make the harm, or potential harm, flowing from it patent will that conduct be considered as prejudicing, or being prejudicial to, the administration of justice.”).

If the services provided by the lawyer or an entity he or she controls are “law-related,” the Rules will not apply in their entirety to the lawyer’s provision of the law-related services if the lawyer takes (a) steps to distinguish the law-related services from the lawyer’s legal services, and (b) “reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.” Colo. RPC 5.7(a).1

1 Read literally, Rule 5.7(a)(1) refers to the provision of law-related services by a “lawyer,” while Rule 5.7(a)(2) refers to the provision of law-related services “in other circumstances by an entity controlled by the lawyer individually or with others.” This distinction leads to the inference that subsection (1) is not applicable if the law-related services are provided by an entity controlled by the lawyer, and, conversely, that subsection (2) is applicable only when the law-related services are provided by the lawyer individually or through a law firm. However, Comment [3] to Rule 5.7 indicates that both subsections apply regardless of whether the law-related services are provided by the lawyer or his or her law firm, or by an entity (other than the law firm) that the lawyer controls. The “legislative history” of Model Rule 5.7 supports the interpretation in Comment [3]. Ethics 2000 - February 2002 Report, “Reporter’s Explanation of Changes,” available at http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_57_2002.html. The Committee believes that Comment [3] reflects the intent of the rule and interprets it accordingly, such that, in order to avoid the application of the Rules in their entirety to the provision of the law-related services, a lawyer must satisfy each subsection of Rule 5.7(a), regardless of whether the law-related services are provided by the lawyer or his or her law firm, or by an entity (other than the law firm) that the lawyer controls.
The following diagram is a useful visual guide to the analytical framework of Rule 5.7:

1. Are the business services “law-related”?

Rule 5.7(b) defines “law-related services” as “services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not
prohibited as unauthorized practice of law when provided by a nonlawyer.” Comment [9] to Rule 5.7 gives as examples of law-related services “providing title insurance, financial planning, accounting, trust services, real estate, counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.” See, e.g., In re Rost, 211 P.3d 145, 155 (Kan. 2009) (accounting services and business advice held to be law-related services under same definition). Mediation and arbitration services, discussed separately below, are other examples of law-related services. E.g., N.D. RPC 5.7, cmt. [7] (including “ADR services” among examples of law-related services).

2. **What are “circumstances that are not distinct from the lawyer’s provision of legal services to clients”?**

The Rules will apply in their entirety to the provision of law-related services if the circumstances “are not distinct from the lawyer’s provision of legal services to clients,” as stated in Rule 5.7(a)(1). The comments to Rule 5.7 provide no guidance on when the circumstances surrounding a lawyer’s provision of law-related services are “not distinct from the lawyer’s provision of legal services to clients.”

The Committee concludes that a number of facts tend to show distinctness, including: (1) providing the law-related services from a separate office or facility; (2) using separate advertising, business cards, signage, telephone reception services, internet domain names, websites, and all other forms of communication to and with potential customers, vendors, creditors, service suppliers, and the public at large; (3) the nature of the other services provided, such as mediation; (4) offering the law-related services through a distinct entity with distinct support staff from the entity through which the lawyer practices law; and (5) avoiding the providing of both legal services and law-related services in the same matter. These factors are not exhaustive. A variety of other facts, in appropriate circumstances, may tend to show that a lawyer’s law-related services and legal services are distinct.

Comment [8] to Rule 5.7 states that “[u]nder some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other.” “The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter.” Id. In other words, there will be specific occasions when no amount of disclosure and consultation will avoid the application of the entirety of the Rules to the lawyer’s business services. A lawyer’s services when acting as a guardian ad litem may be an example of such circumstances. Indeed, Chief Justice Directive 04-06 states that a lawyer acting as a guardian ad litem for a child or a child’s representative is bound by the Rules, presumably without regard to steps the lawyer might take to distinguish the law-related services from the lawyer’s provision of legal services.
5. What are “reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist”?

In addition to keeping the lawyer’s legal services and law-related businesses distinct from each other, the lawyer must take “reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.” Colo. RPC 5.7(a)(2). The comments to Rule 5.7 offer some guidance in this respect. Comment [6] states that a lawyer “should communicate to the person receiving the law-related services . . . that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.” Comment [7] states that the “burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding,” and that the depth of the explanation will vary depending on the sophistication of the consumer of the law-related services.

A Philadelphia ethics opinion states that to ensure that the recipient of the law-related services “understands that the ancillary business services are distinct from legal services, and therefore not subject to the protections of the rules,” the lawyer “must communicate, preferably in writing, to the person receiving the ancillary business services that the services will not be provided under the protections of the client-lawyer relationship.” Phil. Bar Ass’n Prof. Guidance Comm., Formal Op. 2003-16 (2004).

Oklahoma modified a comment to its identical version of Rule 5.7 to offer guidance about the “reasonable measures” a lawyer might take, depending on the facts and circumstances:

1. Providing written notice of the lawyer's interest in the entity before providing the law-related services, with written acknowledgment of the notice by the person;
2. Keeping the offices of the lawyer and the law-related business physically separate;
3. Providing disclaimers in any marketing or advertising; and
4. Maintaining separate letterhead, or providing clear notices of the relationship between the lawyer and the entity. Okla. RPC 5.7, cmt [6].

By contrast, in a case in which a lawyer opened a “consulting” business after disciplinary problems forced his early retirement, the Kansas Supreme Court observed: “If an attorney continues to perform the same law-related services, for the same clients, from the same location, with the same staff as was done when those services were not distinct from the attorney's provision of legal services, the burden to show the requisite client understanding that the lawyer-client relationship had ceased would appear to be onerous, at best.” In re Rost, 211 P.3d 145, 156 (Kan. 2009).
As the Oklahoma comment to Rule 5.7 notes, what reasonable measures need to be taken to assure client understanding may vary depending on the circumstances. Of course, if the legal services and law-related services are “so closely entwined that they cannot be distinguished from each other,” Colo. RPC 5.7, cmt. [8], there are no measures that a lawyer providing law-related services may take that will relieve the lawyer from being subject to the Rules in their entirety.

6. *When will an entity providing business services be deemed to be “controlled by the lawyer individually or with others”?*

If a lawyer is associated by ownership or otherwise with an entity that provides law-related services that are distinct from the lawyer’s law practice, the lawyer will not be subject to the Rules in their entirety when the entity provides the services unless the entity is “controlled by the lawyer individually or with others.” Colo. RPC 5.7(a)(2). Comment [4] explains that a “lawyer’s control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.” A Pennsylvania ethics opinion concluded that Rule 5.7 would not apply to a lawyer who, together with his law partners, owned 49% of an insurance agency, where their firm’s involvement in the operation of the agency would be “almost nil.” Pa. Bar. Ass’n Comm. Leg. Ethics and Prof. Resp., Formal Op. 2002-07, “Minority Ownership of Insurance Agency by Law Partners” (2002). *Cf. In re Griffith,* 748 P.2d 86, 115 (Ore. 1987) (notwithstanding other extensive misconduct, where company owned by lawyer and three other people entered into series of loans with clients of lawyer’s law firm, lawyer did not violate rule regulating business transactions with clients because he did not personally enter into business relationships with clients).

7. *Application of Rule 5.7 to arbitration, mediation and expert witness services*

Many lawyers in Colorado provide arbitration and mediation services. The Committee believes that a lawyer’s services as a mediator or arbitrator are law-related services within the meaning of Colo. RPC 5.7.

Rule 2.4 addresses lawyers serving as “third-party neutrals,” including as mediators and arbitrators. Similar to Colo. RPC 5.7, Comment [3] to Rule 2.4(b) recognizes that the “potential for confusion is significant when the parties are unrepresented in the process.” Therefore, Colo. RPC 2.4(b) requires a lawyer serving as a third-party neutral to “inform unrepresented parties that the lawyer is not representing them,” and, if the lawyer knows or reasonably should know the party does not understand the lawyer’s role, to “explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.” Where appropriate, the lawyer’s explanation should include the “inapplicability of the attorney-client evidentiary privilege.” Colo. RPC 2.4, cmt [3].
By definition, a lawyer serving as a third-party neutral who provides the information required by Colo. RPC 2.4(b) also will satisfy Colo. RPC 5.7. The required information can be provided in the written contract for mediation or arbitration services. Colo. RPC 2.4(b) expressly does not require lawyer-third-party neutrals to inform represented parties that such lawyer-third-party neutrals are not acting as the represented parties’ lawyer. Likewise, the parties’ legal representation by other lawyers in the proceeding will obviate the arbitrator/mediator lawyer’s need to take further steps to “assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.” Colo. RPC 5.7(a)(2).

Similarly, many lawyers in Colorado provide services as expert witnesses. There are generally two types of lawyer-experts: testifying expert witnesses and nontestifying consulting experts. As noted in American Bar Association (ABA) Formal Opinion 97-407, a testifying expert is obligated to provide independent, objective testimony. Emphasizing that a testifying expert rarely provides services directly to a client, the ABA opinion concludes that the services of a testifying expert are not law-related services under Model Rule 5.7. ABA Comm. on Ethics and Prof. Resp., Formal Op. 97-407, “Lawyer as Expert Witness or Expert Consultant” (1997). In contrast, the ABA opinion concludes that a consulting expert "occupies the role of co-counsel" and, as such, is subject to all of the Model Rules of Professional Conduct. Id.

The Committee believes that whether a lawyer acting as a testifying expert witness or a consulting expert, or both, forms a client-lawyer relationship with either the engaging lawyer or with the client of that lawyer, depends on the facts and circumstances. See generally D. Richmond, “Lawyers as Witnesses,” 36 N.M. L. Rev. 47, 65-72 (Winter 2006). It is also an issue that requires the application of principles of law, not legal ethics, which the Committee does not address and which lawyers must decide for themselves.

If a lawyer who acts as a testifying or consulting expert, or both, concludes that he or she in fact has formed or will form a client-lawyer relationship with either the engaging lawyer or the client of that lawyer, then the Rules in their entirety apply to the expert lawyer, just as they would in any legal representation. In that event, Rule 5.7 is irrelevant.

But, if there is no client-lawyer relationship, then Rule 5.7 is applicable, because the lawyer’s services are “law-related.” The Committee disagrees with ABA Formal Opinion 97-407 that the services of a lawyer acting as a testifying expert witness are inherently not “law-related.” A lawyer-expert may avoid the application of all of the Rules by compliance with Rule 5.7, for example, by clarifying the lawyer’s role in a written engagement agreement signed at least by the engaging lawyer and, preferably, also by the engaging lawyer’s client. In addition, lawyers with litigation experience are likely to understand the distinction between a lawyer-expert’s legal services and his or her expert services, and, at least in the context of a testifying expert, that the protections of the client-lawyer relationship do not exist.
However, communications between lawyers and their consulting experts are generally protected from discovery by rules of civil procedure rather than by the attorney-client privilege. See C.R.C.P. 26(b)(4)(B); F.R.C.P. 26(b)(4)(D). A client may not understand the difference. In contrast, communications between lawyers and their testifying experts are generally subject to discovery under Colorado procedural rules. C.R.C.P. 26(b)(4). But cf. F.R.C.P. 26(b)(3) and (4) (testifying expert witness subject to discovery except for drafts of expert’s report and communications with party’s attorney).

Because consulting experts’ communications are generally protected from discovery like those of a retained advocate lawyer, and the role of a consulting expert is often similar to that of an advocate lawyer, a client may not understand that the consulting expert’s services are not legal services and that the protections of the client-lawyer relationship do not exist. Clients are less likely to fall prey to these misunderstandings in respect to lawyers serving as testifying expert witnesses because their role is so unlike that of the advocate lawyer. These distinctions may blur in the client’s mind when a lawyer serves as both a consulting expert and a testifying expert witness in the same case, either in chronological sequence or contemporaneously. Lawyers, in contrast, are unlikely to be confused by the role of a consulting or testifying expert.

B. Significance of Applicability of the Rules to Law-Related Services

1. General background

As noted in a 1972 ABA formal opinion, the applicability of the Rules to a lawyer’s provision of business services is a substantial obligation. ABA Comm. on Ethics and Prof. Resp., Formal Op. 328 (1972). It means that the lawyer will be required to treat customers of the law-related business as if they were law firm clients. Comment [10] to Rule 5.7 advises the lawyer to pay particular attention to “the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)),” as well as Rule 1.6 regarding confidentiality.

But this is not an exclusive listing. The fees and expenses charged by the lawyer or the lawyer’s entity for the law-related service must be reasonable, as required by Rule 1.5(a); and other subsections of Rule 1.5 are applicable as well. The lawyer also must comply with various provisions of Rule 5.4, and the lawyer’s communications regarding the law-related service, including advertising and solicitation of customers, must comply with Rules 7.1 through 7.3. The application of some of the most significant Rules to the provision of law-related services is discussed below.

2. Colo. RPC 1.5: Fees

When the Colo. RPC are applicable to the services provided by a lawyer’s law-related business, Rule 1.5(a) requires the fees of the law-related business to be reasonable. Also, Rule 1.5(b) requires the lawyer to confirm the basis or rate of the fee in writing for all clients whom the lawyer has not “regularly represented.” If the fee is contingent on the outcome of the law-related service,
Rule 1.5(c) requires the lawyer to comply with the Rules Governing Contingent Fees, C.R.C.P. Chap. 23.3.

The fees charged for some law-related services—for example, percentage-based commissions—may seem exorbitant when measured by one of the traditional methods of charging legal services, such as hourly or fixed fees. A California ethics opinion addressed an inquiry from a lawyer/real estate broker who proposed to charge his client a brokerage commission if the transaction closed and his normal hourly rate as a lawyer if it did not. The opinion concluded:

[The] fee payable in the circumstance that the transaction is successfully consummated is likely to appear shockingly large when compared to the attorney's normal hourly rate charges. On the other hand, the overall fee arrangement is quite advantageous to the client since the client obtains the services of both an attorney and a broker at no additional cost (indeed, at no cost in most cases where the buyer's and seller's broker split fees payable by the seller).

Accordingly, the fee arrangement proposed should not be viewed as objectionable under [the California equivalent of Rule 1.5(a)].


In addition, Rule 1.5(e) prohibits referral fees. It proscribes a lawyer from paying and receiving referral fees. CBA Formal Ethics Op. 106, “Referral Fees and Networking Organizations” (1999). When the Rules apply to a lawyer providing business services, the lawyer or the entity he or she controls may not pay or receive referral fees in connection with that business operation. For example, in an informal opinion, the Committee concluded that Colo. RPC 1.5(e) prohibited a lawyer from receiving a fee from a broker-dealer/registered investment advisor for referring clients to it for a “fee-based asset management program.” CBA Ethics Comm. Response to Letter Inquiry, Abstract 96/97-13, available at http://www.cobar.org/index.cfm/ID/20280/subID/2101/CETH/96/97-13/.

Colo. RPC 1.5(f) requires a lawyer to deposit any advance payment of fees in the lawyer’s trust account until earned. A Tennessee ethics opinion concluded that trust account requirements apply to law-related businesses operated by lawyers, including mediation and arbitration services. Tenn. Sup. Ct. Bd. of Prof. Resp., Formal Op. 94-F-135 (1994). Colo. RPC 1.5(g) prohibits nonrefundable fees or retainers and any agreement that “unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees.” Colo. RPC 1.5(g).

3. Colo. RPC 1.6: Confidentiality of information

Colo. RPC 1.6(a) requires a lawyer to maintain the confidentiality of “information relating to the representation.” When the Rules apply to the provision of law-related services, the lawyer will be required to protect information relating to the services provided by the law-related business to the
same extent as the lawyer must protect information relating to the representation of clients. This obligation would extend to (a) segregating information related to law-related services from information related to legal work for the lawyer’s clients, (b) preventing access to information related to law-related services by individuals who do not work for the law-related business, and (c) preventing access to information related to the lawyer’s legal work for clients by individuals who do not work for the lawyer in the provision of legal services.

With limited exceptions, Rule 1.8(b) prohibits a lawyer from using information protected under Rule 1.6(a) to the disadvantage of a client. Comment [10] to Rule 5.7 specifically mentions Rule 1.8(b) as a rule to heed when the Rules apply to the provision of law-related services.

4. Colo. RPC 1.7(a)(2): Conflict of interest: current clients

In relevant part, Rule 1.7(a)(2) states that a lawyer shall not represent a client if there is a “significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer.” When the Rules apply to the provision of law-related services, a lawyer providing such services will be deemed to “represent” the person receiving those services. Thus, among other considerations, the lawyer must ensure that his or her provision of law-related services is not limited by the lawyer’s personal, including pecuniary, interests in providing those services, or by the lawyer’s obligations to other clients or other customers of the law-related business.

When the Rules apply to the provision of law-related services, the law firm and the business will be treated as a single law firm for purposes of conflicts of interest. The conflicts of each lawyer will be imputed to all lawyers in the joint enterprise. Cf. ABA Comm. on Ethics and Prof. Resp., Formal Op. 90-357, “Use of Designation ‘Of Counsel’” (1990) (“The effect of two or more firms sharing an of counsel lawyer is to make them all effectively a single firm, for purposes of attribution of disqualifications.”). When undertaking a new law-related matter or a new legal matter, the lawyer will be required to conduct a check for conflicts of interest that includes all law firm clients as well as all customers of the law-related business, and their respective related and adverse persons.

When a lawyer provides both legal services and law-related services to a client-customer, and if relations sour between the lawyer and the client-customer relative to the law-related services—perhaps because the client-customer is dissatisfied with the services or is not current on its account—the lawyer side of the relationship may suffer. The lawyer’s anticipation of such a problem may rise to the level of a “significant risk” that representation of the client will be limited. However, an anticipated or actual limitation on the lawyer’s legal representation must be material before it creates a conflict of interest under Rule 1.7(a)(2).
If such a conflict arises, the lawyer must either decline or withdraw from the representation or seek to obtain the client’s informed consent\(^2\) to undertake or continue the representation despite the conflict, if the conflict is consentable under Rule 1.7(b).\(^3\)

A lawyer may not be able to obtain client consent when he or she provides legal services and law-related services in the same transaction and the customer has agreed to pay a commission for the law-related services. In some jurisdictions, a lawyer representing a party in a real estate transaction may not serve as a real estate broker in the same transaction due to an inherent and irreconcilable conflict between the broker’s personal interest in receiving a commission upon consummation of the sale and the lawyer’s interest in protecting a client even if it means advising against the sale. See In re Roth, 577 A.2d 490 (N.J. 1990); New York State Op. 752 (Feb. 22, 2002); N.Y. Cnty. Lawyers Ass'n Comm. on Prof. Ethics Question No. 685, “Dual Practice: Conflict of Interest” (1991); R.I. Ethics Advisory Panel Op. 96-29 (Nov. 14, 1996). But see Wis. Op. E-86-3 (undated) (with client’s informed consent, lawyer may receive both legal fee and real estate brokerage fee for services in same transaction).

The Committee believes that in limited circumstances, a lawyer may act as a lawyer and a broker in the same transaction. To do so, however, the lawyer would have to (a) act as lawyer and broker for the same party, (b) reasonably believe that he or she will be able to provide competent and diligent representation to the client, and (c) obtain the client’s informed consent, confirmed in writing, consistent with the requirements of Colo. RPC 1.7(b). The lawyer also would have to comply with Rule 1.8(a), discussed below. See, e.g., S.C. Bar Ethics Advisory Op. 95-04 (1995).

5. Colo. RPC 1.8(a): Business transactions with a client

As stated above, Colo. RPC 1.8(a) regulates “business transactions” between a lawyer and a client. Comment [5] to Rule 5.7 states: “When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).” Rule 1.8(a) will be applicable whether or not

\(^2\) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Colo. RPC 1.0(e).

\(^3\) (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. the representation is not prohibited by law;
3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
4. each affected client gives informed consent, confirmed in writing.
the services provided by the lawyer to the client in the other business are law-related services and, thus, whether or not the lawyer is otherwise subject to the Rules.

6. **Colo. RPC 1.8(f): Accepting compensation from a third party**

   Rule 1.8(f) prohibits a lawyer from accepting payment for representing a client from anyone other than a client unless “(1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6. Comment [10] to Rule 5.7 calls attention to Rule 1.8(f) as a rule that must be considered and followed when the Rules apply to the provision of law-related services.

7. **Colo. RPC 5.4: Professional independence of a lawyer**

   Rule 5.4(a) prohibits a lawyer or law firm from sharing legal fees with a nonlawyer, except, as relevant here, by means of a law firm compensation or retirement plan. When, under the preceding analysis, a lawyer is subject to the Rules in respect to the provision of law-related services, the revenue generated by the business is considered legal fees, and the lawyer may not directly share it with a nonlawyer except through a compensation or retirement plan.

   Similarly, Rule 5.4(b) prohibits a lawyer from forming a “partnership” with a nonlawyer “if any of the activities of the partnership consist of the practice of law.” Although the Rules do not define the term “partnership” as used in Rule 5.4(b), other jurisdictions have interpreted the term expansively in this context to include entities in addition to partnerships. Ariz. Op. No. 93-01 (1993) (term “partnership” construed broadly); S.C. Bar Ethics Advisory Op. 93-05 (1993) (“Rule 5.4(b) applies not only to partnerships, but also to other organizations that lawyers are involved in managing.”). Accordingly, if a lawyer is subject to the entirety of the Rules when providing law-related services, the lawyer may not form a partnership with a nonlawyer that includes the provision of law-related services.

   Further, Rule 5.4(d) prohibits a nonlawyer from owning an interest in a law firm operated as a “professional company,” as that term is defined in Colorado Rule of Civil Procedure 265(e). When a lawyer is subject to the Colo. RPC in providing law-related services, the law-related business is considered a professional company and, in these circumstances, a lawyer may not permit a nonlawyer to own any part of that business.

8. **Colo. RPC 7.1—7.3: Information about legal services, including advertising and solicitation**

   * Rule 1.0(c) defines “law firm” as “denot[ing] a partnership, professional company, or other entity or a sole proprietorship through which a lawyer or lawyers render legal services; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.” Although only individual lawyers are subject to professional discipline for Colo. RPC violations, and the Rules generally impose obligations only on individual lawyers, Rule 5.4(a) expressly includes law firms in its prohibition against sharing fees with nonlawyers.
When a lawyer is subject to the Rules with respect to law-related services, communications regarding those law-related services must comply with Rules 7.1, 7.2, and 7.3. See Colo. RPC 5.7, cmt. [10] (specifically mentioning the applicability of these Rules). In these circumstances, the Rules treat communications about the law-related business as though they were communications about a lawyer’s legal services.

Rule 7.1(a) would prohibit a lawyer providing law-related services from making false and misleading communications, including communications that (a) are misleading because of omitted information, (b) compare the law-related services with the services of other businesses in ways that cannot be substantiated, and (c) are likely to create unjustified expectations about the services provided by the law-related business. Rule 7.1(c) contains proscriptions on the method and appearance of written communications mailed to prospective clients.

Rule 7.2(b) prohibits a lawyer from “giv[ing] anything of value to a person for recommending the lawyer’s services,” except for reasonable advertising costs and other exceptions not relevant here. In addition to Rule 1.5(e), discussed above, Rule 7.2(b) prohibits a lawyer operating a law-related business from paying referral fees.

Rule 7.3 regulates lawyer solicitation of individual prospective clients. If a lawyer who provides law-related services has not succeeded, under Rule 5.7, in avoiding the application of the Rules to those services, the lawyer will be prohibited from soliciting prospective customers in person, or by telephone or “real-time” electronic contact such as a chat room, unless the prospective client is a lawyer, a family member or someone with whom the lawyer had a “prior professional relationship.” Accord Busby v. JRHBW Realty, Inc., Civil No. 2:04-CV-2799-VEH, 2006 WL 5325733 * 7 (N.D. Ala. July 20, 2006).

Rule 7.3(c) and (d) will restrict the lawyer’s written, recorded, or electronic solicitation activities within thirty days of a related personal injury or death and will require the lawyer to designate such communications as advertising material.

* On January 1, 2008, substantial amendments to the Colorado Rules of Professional Conduct became effective. The text of Colo. RPC 1.7, Conflict of Interest: Current Clients, was significantly modified. However, the ABA Ethics 2000 Commission reported that it intended no substantive changes in the rule, and that the changes were intended for clarification purposes only. The Committee agrees that the changes to Rule 1.7 are not substantive and do not alter the conflict analysis. Rather, the changes to Rule 1.7 merely alter the procedure through which informed consent must be obtained. Accordingly, the changes to Rule 1.7 do not alter the analysis or conclusions contained in this Formal Opinion. The Subcommittee recommends appending this legend to the following Formal Opinions: 45 (Representation of client by part-time judge), 46 (Municipal attorney, representation of defendants), 58 (Water rights, representation of multiple clients), 97 (Ethics considerations where an attorney or the attorney’s partner serves on the board of a public entity), 98 (Ethical Responsibilities of Lawyers who Engage in other Business), 109 (Acquiring an ownership interest in a client), 115 (Collaborative Law).
Ethical Issues with respect to Law Firm Ownership and Ancillary Practice

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ABSTRACT

This program will discuss the current state of nonlawyer ownership of law firms (“MDP”); the history, current state, and future of the performance of non-legal services (or “law-related services”) by law firms (“ancillary practice”) under the Rules of Professional Conduct; and what law firms should be doing now to prepare for changes in this area. These written materials are intended to provide some background on these topics, and to identify recent developments, particularly with respect to California’s consideration of changes to its version of Rule 5.4.

Many commentators have expressed that the practice of law and the role of the lawyer in society is at a critical point in time juncture. Opponents of innovative practice models have warned that multidisciplinary practice (“MDP”) and ancillary practice initiatives are “inconsistent” with the legal profession’s “core values” of the legal profession, principally among them, the professional independence of the lawyer from the influence of nonlawyers, the duty of loyalty to the clients, and client confidentiality. But proponents of these innovative practice models look at the evolving world where clients and the general public (including clients) are demanding ready access to legal assistance, and find the unsubstantiated “core values” arguments, which have little if any empirical support, to be an unsatisfactory fait accompli.

I. Defining the “Practice of Law.”

Any discussion of multidisciplinary practice, ancillary businesses, and innovative practice models necessarily must wrestle with the issue of what constitutes “the practice of law.” However, that question is not one easily answered and even the ABA Model Rules recognize that the answer varies by jurisdiction. In fact, ABA Model Rule 5.5, Comment 7, recognizes the
inconsistency among jurisdictions in defining “the practice of law”: “The definition of the practice of law is established by law and varies from one jurisdiction to another.” The difficulty in defining “the practice of law” becomes more pronounced when considering what a nonlawyer may be permitted to do and what is the exclusive domain of a licensed lawyer. For example, the ABA Center for Professional Responsibility’s “Task Force on the Model Definition of the Practice of Law,” stated as part of its “Model Definition Challenge”:

The Association’s interest in the parameters of the practice of law has been highlighted in recent years by the work of the Commission on Nonlawyer Practice and the Commission on Multidisciplinary Practice. The common thread in the work of these entities has been the revelation that there are an increasing number of situations where nonlawyers are providing services that are difficult to categorize under current statutes and case law as being, or not being, the delivery of legal services. This growing gray area may be partially responsible for the spotty enforcement of unauthorized practice of law statutes across the nation and arguably an increasing number of attendant problems related to the delivery of services by nonlawyers. Recently a number of jurisdictions, most prominently Washington, Arizona and the District of Columbia, have taken steps to codify a definition of the practice of law so as to attack these trends.¹

With the ABA having left the definition of “the practice of law” to the various states, definitions will necessarily vary—Kentucky, for example, has defined “the practice of law” in its Supreme Court Rules (SCR 3.020) as “:

The practice of law is any service rendered involving legal knowledge or legal advice,whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services. But nothing herein shall prevent any natural person not holding himself out as a practicing attorney from drawing any instrument to which he is a party without consideration unto himself therefor. .…” Kentucky SCR 3.020. An appearance in the small claims division of the district court by a person who is an officer of or who is regularly employed in a managerial capacity by a corporation or partnership which is a party to the litigation in which the appearance is made shall not be considered as unauthorized practice of law.

The Colorado Supreme Court has recognized the difficulty in defining the practice of law, noting in Denver Bar Assoc. v. Public Utilities Comm., 391 P.2d 467, 471 (Colo. 1964):

There is no wholly satisfactory definition as to what constitutes the practice of law; it is not easy to give an all-inclusive definition. We believe that generally one who acts in a representative capacity in protecting, enforcing, or defending the

¹ ABA Task Force on the Model Definition of the Practice of Law, Model Definition Challenge, https://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_challenge/ (last visited on Aug. 11, 2019).
legal rights and duties of another and in counselling, advising and assisting him in connection with these rights and duties is engaged in the practice of law. Difficulty arises too in the application of the definition.

Indeed, there is also less certainty as to what constitutes the “unauthorized practice of law.” It is also difficult to define. Nonlawyers, who do not hold a license to practice law in any jurisdiction, are providing services that, if done by a lawyer, may well be considered the “practice of law” or, at a minimum, a “law-related service.”

The “practice of law” may be characterized as the “provision of legal services” and the “attorney-client relationship” may be characterized as a relationship between an attorney and another person in connection with which the attorney is providing legal services. Because these definitions inform several different considerations (e.g., the duties an attorney owes a client, the availability of the evidentiary attorney-client privilege, and the proscription on unauthorized practice of law by a non-lawyer to name three), it has been almost impossible to define the practice of law, and even if such a definition were possible the dynamic nature of services on offer ensures that such definition would have a limited shelf life. As stated in the Restatement (Third) of the Law Governing Lawyers § 4 (2000), cmt. c (“Delineation of unauthorized practice.”):

The definitions and tests employed by courts to delineate unauthorized practice by nonlawyers have been vague or conclusory, while jurisdictions have differed significantly in describing what constitutes unauthorized practice in particular areas.

Certain activities, such as the representation of another person in litigation, are generally proscribed. Even in that area, many jurisdictions recognize exceptions for such matters as small-claims and landlord-tenant tribunals and certain proceedings in administrative agencies. Moreover, many jurisdictions have authorized law students and others not admitted in the state to represent indigent persons or others as part of clinical legal-education programs.

Controversy has surrounded many out-of-court activities such as advising on estate planning by bank trust officers, advising on estate planning by insurance agents, stock brokers, or benefit-plan and similar consultants, filling out or providing guidance on forms for property transactions by real-estate agents, title companies, and closing-service companies, and selling books or individual forms containing instructions on self-help legal services or accompanied by personal, nonlawyer assistance on filling them.
who are licensed in one jurisdiction may, through the use of technology and travel, be providing
legal services to clients when situated geographically in a jurisdiction in which the lawyer is not
licensed. Whether jurisdictions are willing to admit it or not, the lines are
becoming ever blurrier as to what constitutes “the practice of law,” and therefore, what constitutes the “unauthorized practice of law.”

II. Non-Lawyer Partners and the Practice of LawMultidisciplinary Practice (“MDP”).

The concept of multidisciplinary practice, or MDP, involves lawyers and nonlawyers
owning an entity together to provide services, legal and nonlegal, to clients. ABA Model Rule
5.4 currently prohibits such an MDP has been defined as:

[A] partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more

out in connection with legal procedures such as obtaining a marriage dissolution. The position of bar associations has
traditionally been that nonlawyer provision of such services denies the person served the benefit of such legal measures as
the attorney-client privilege, the benefits of such extraordinary duties as that of confidentiality of client information and the
protection against conflicts of interest, and the protection of such measures as those regulating lawyer trust accounts and requiring
lawyers to supervise nonlawyer personnel. Several jurisdictions
recognize that many such services can be provided by nonlawyers
without significant risk of incompetent service. That actual
experience in several states with extensive nonlawyer provision of
traditional legal services indicates no significant risk of harm to
consumers of such services, that persons in need of legal services
may be significantly aided in obtaining assistance at a much lower
price than would be entailed by segregating out a portion of a
transaction to be handled by a lawyer for a fee, and that many
persons can ill afford, and most persons are at least
inconvenienced by, the typically higher cost of lawyer services. In
addition, traditional common-law and statutory consumer-
protection measures offer significant protection to consumers of
such nonlawyer services.
other professional firms to provide services, and there is a direct or indirect sharing of profits as part of the arrangement.\(^3\)

Such an arrangement is currently prohibited under the ABA Model Rules, specifically ABA Model Rule 5.4, entitled “Professional Independence of a Lawyer.” Rule 5.4(a) prohibits the lawyer from sharing legal fees with a nonlawyer except within the confines of very limited, enumerated exceptions. The Rule prohibits a lawyer from forming “a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.” See ABA Model Rule 5.4(a). ABA Model Rule 5.4(c) prohibits a lawyer from permitting “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 services.” and ABA Model Rule 5.4(d) likewise provides: prohibits the lawyer from involving the nonlawyer in ownership or management of the law firm. Such

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

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

\((2)\) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

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

See ABA Model Rule 5.4(d). As the Comments to ABA Model Rule 5.4 explain, these “traditional limitations” on the sharing of fees with nonlawyers and the prohibitions against allowing nonlawyer third parties to direct or control a lawyer’s professional independence and professional judgment in representing a client. See ABA Model Rule 5.4, Comments 1 and 2.


\(^4\) See also Restatement (Third) of the Law Governing Lawyers § 10 (2000) § 10 (Limitations on Nonlawyer Involvement in a Law Firm).
The ABA has resisted efforts to change its stance on Model Rule 5.4. As chronicled by Jayne R. Reardon in her article “Alternative Business Structures: Good for the Public, Good for Lawyers,” the ABA House of Delegates has “soundly rejected” any attempt to change Model Rule 5.4’s “anti-fee-sharing rule.” The history Reardon recounts includes the ABA’s rejection of both the Kutak Commission’s recommendations to allow multidisciplinary practice and the ABA Commission on Multidisciplinary Practice’s recommendations in 1999; the ABA Commission on Ethics 20/20’s statement that it would not propose changing the existing prohibitions on nonlawyer ownership, but would continue investigating the possibility of fee splitting between lawyers and nonlawyers, a position the Commission later abandoned; and the ABA Commission on the Future of Legal Services, which did not even recommend a change to the House of Delegates. Even so, integration among lawyer and nonlawyer service providers, however, is happening in the rest of the world, and ABA Model Rule 5.4 may be adversely affecting the ability of the American lawyer to compete. Critics of the more traditional stance argue that strict adherence to Model Rule 5.4 stifles innovation, limits the lawyer’s or law firm’s access to capital necessary to invest in and develop new technologies, and — from a client-service perspective — hampers the ability to provide effective legal services to a large percentage of the population who simply cannot afford to hire lawyers.

Some jurisdictions are taking a more proactive modern approach. For example, the D.C. Bar’s version of Rule 5.4 allows lawyers to enter partnerships with nonlawyers so as to provide legal services to clients. Specifically, D.C. Rule 5.4(b) provides:

(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:

1. The partnership or organization has as its sole purpose providing legal services to clients;
2. All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;
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;
4. The foregoing conditions are set forth in writing.


Id., at pp. 315-318.
D.C. Rule 5.4(b)(1) would not permit the entity to provide true multidisciplinary services to the client while being owned or managed, in part, by the nonlawyer, and under D.C. Rule 5.4(b)(3), the lawyers with financial interest and/or managerial authority are responsible for making “reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that” the nonlawyer conforms “to the Rules of Professional Conduct.” See D.C. Rule 5.1(a).

Comments to D.C. Rule 5.4 explain the rationale and justification for the shift away from the ABA Model Rule 5.4 approach:

[2] Traditionally, the canons of legal ethics and disciplinary rules prohibited lawyers from practicing law in a partnership that includes nonlawyers or in any other organization where a nonlawyer is a shareholder, director, or officer. Notwithstanding these strictures, the profession implicitly recognized exceptions for lawyers who work for corporate law departments, insurance companies, and legal service organizations.

[3] As the demand increased for a broad range of professional services from a single source, lawyers employed professionals from other disciplines to work for them. So long as the nonlawyers remained employees of the lawyers, these relationships did not violate the disciplinary rules. However, when lawyers and nonlawyers considered forming partnerships and professional corporations to provide a combination of legal and other services to the public, they faced serious obstacles under the former rules.

[4] This rule rejects an absolute prohibition against lawyers and nonlawyers joining together to provide collaborative services, but continues to impose traditional ethical requirements with respect to the organization thus created. Thus, a lawyer may practice law in an organization where nonlawyers hold a financial interest or exercise managerial authority, but only if the conditions set forth in subparagraphs (b)(1), (b)(2), and (b)(3) are satisfied, and pursuant to subparagraph (b)(4), satisfaction of these conditions is set forth in a written instrument. The requirement of a writing helps ensure that these important conditions are not overlooked in establishing the organizational structure of entities in which nonlawyers enjoy an ownership or managerial role equivalent to that of a partner in a traditional law firm.

* * *

[7] As the introductory portion of paragraph (b) makes clear, the purpose of liberalizing the Rules regarding the possession of a financial interest or the exercise of management authority by a nonlawyer is to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. For example, the rule permits economists to work in a firm with antitrust or public utilities practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counseling clients, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others who use accountants’ services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions. In all of these situations, the professionals
may be given financial interests or managerial responsibility, so long as all of the requirements of paragraph (c) are met.

See D.C. Rule 5.4, Comments 2-4 and 7.2

ABA Formal Op. 464 (Aug. 19, 2013) addresses, in part, the issue of the division of legal fees with lawyers who practice in firms where it is ethically permissible to share legal fees with nonlawyers. More specifically, the Opinion addresses whether a lawyer subject to the Model Rules may divide a legal fee with another lawyer or law firm practicing in a jurisdiction where the other lawyer or law firm might eventually distribute some portion of that fee to a nonlawyer. ABA Formal Op. 464, at 1. Recognizing, for example, that D.C. Rule 5.4(b) allows partial nonlawyer ownership, ABA Formal Op. 464 states:

The possibility that the District of Columbia firm may, or may not, eventually "share" some fraction of that firm's portion of the fee with a nonlawyer should not expose the lawyer in the Model Rules jurisdiction to discipline. The lawyer subject to the Model Rules has complied with those rules. The compensation system of the District of Columbia firm does not threaten the application of Model Rule 5.4(a) within the Model Rules jurisdiction, and there is no reason to attempt to enforce Model Rule 5.4(a) in the District of Columbia.

ABA Formal Op. 464, at p. 3. At the same time, the Opinion is quick to acknowledge that the situation presented in ABA Formal Op. 464 differs from that presented in ABA Formal Op. 91-360 (July 11, 1991), which confirmed the prohibition against partnerships with nonlawyers and explained that, if a lawyer is licensed in both a jurisdiction that allows such partnerships and one that does not, the lawyer must comply with the more restrictive jurisdiction's rules. It has been noted that:

The ABA carefully constructed its hypothetical in Formal Opinion 464 to avoid confronting the broad conclusions of its earlier opinion. In Opinion 464, a lawyer in a Model Rules jurisdiction determines that she needs the assistance of a District of Columbia law firm. The opinion never states where the matter is pending but says that it involves "federal government contracts," a subject concerning which the Model Rules attorney needs specialized knowledge which she or her firm does not otherwise possess. Read one way, Opinion 464 allows only for a Model Rules-based lawyer to come to the District of Columbia for specialized expertise and share fees with a D.C. firm, even though that firm has a nonlawyer partner.3

2 D.C. Rule 5.4(c), referenced in Comment 7, addresses the profession's "core value" of the independence of a lawyer's professional judgment: "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."

Washington state, with its Rule 5.9, is another jurisdiction that has allowed limited nonlawyer ownership interests in law firms by “Limited License Legal Technicians.” And Effective as of April 14, 2015, Rule 5.9 of the Washington Rules of Professional Conduct (“Wash. RPC”) 5.9 (“Business Structures involving LLLT and Lawyer Ownership”) provides:

(a) Notwithstanding the provisions of Rule 5.4, a lawyer may;

(1) share fees with an LLLT who is in the same firm as the lawyer;

(2) form a partnership with an LLLT where the activities of the partnership consist of the practice of law or;

(3) practice with or in the form of a professional corporation, association, or other business structure authorized to practice law for a profit in which an LLLT owns an interest or serves as a corporate director or officer or occupies a position of similar responsibility.

(b) A lawyer and an LLLT may practice in a jointly owned firm or other business structure authorized by paragraph (a) of this rule only if;

(1) LLLTs do not direct or regulate any lawyer’s professional judgment in rendering legal services;

(2) LLLTs have no direct supervisory authority over any lawyer;

(3) LLLTs do not possess a majority ownership interest or exercise controlling managerial authority in the firm; and

(4) lawyers with managerial authority in the firm expressly undertake responsibility for the conduct of LLLT partners or owners to the same extent they are responsible for the conduct of lawyers in the firm under Rule 5.1.

LLLT is a “Limited License Legal Technician,” which Washington APR 28(B)(4) defines as: “a person qualified by education, training, and work experience who is authorized to engage in the limited practice of law in approved practice areas of law as specified by this rule and related regulations,” and specifically licensed by the Washington Supreme Court to assist currently in “divorce, child custody, and other family law matters.”

The Washington State Bar reports that, on May 1, 2019, the Washington Supreme Court adopted amendments to Washington Admission to Practice Rule 28 regarding “Limited Practice Rule for Limited License Technicians.” See Washington State Bar website re: “Limited License Legal Technicians” https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians (last visited on Aug 12, 2019). APR 28(A) explains: “The purpose of this rule is to authorize certain persons to render limited legal assistance or advice in approved practice areas of law. … This rule is intended to permit trained Limited License Legal
Importantly too for this discussion, pursuant to Rule 5.9 of the Washington Limited License Legal Technician Rules of Professional Conduct ("Wash. LLLT RPC"), an LLLT may share fees with a lawyer who is in the same firm, may form a partnership with a lawyer where the partnership’s activities consist of the practice of law, and may “practice with or in the form of a professional corporation, association, or other business structure authorized to practice law for a profit in which a lawyer owns an interest or serves as a corporate director or officer or occupies a position of similar responsibility.” See Wash. LLLT RPC 5.9(a); see also Wash. RPC 5.9(a)(1).

Washington LLLT RPC 5.9(b) also provides: “An LLLT and a lawyer may practice in a jointly owned firm or other business structure authorized by paragraph (a) of this Rule only if: (1) LLLTs do not direct or regulate any lawyer’s professional judgment in rendering legal services; (2) LLLTs have no direct supervisory authority over any lawyer; (3) LLLTs do not possess a majority ownership interest or exercise controlling managerial authority in the firm; and (4) lawyers with managerial authority in the firm expressly undertake responsibility for the conduct of LLLT partners or owners to the same extent they are responsible for the conduct of lawyers in the firm under Lawyer RPC 5.1.”

As a result, Washington LLLT RPC, Rule 5.9(b), likely addresses a number of the “core principle” concerns that have been advanced about nonlawyer ownership interests in law firms and sharing of legal fees with nonlawyers.

California is currently investigating possible changes to the permissible delivery of legal services, and its so as to “increase access to justice for all Californians by responsibly harnessing the power of technology.” The State Bar of California has formed a “Task Force on Technicians to provide limited legal assistance under carefully regulated circumstances in ways that expand the affordability of quality legal assistance which protects the public interest.”

See also Wash. LLLT RPC Rule 5.9, Comment 2 (“In addition to expressly authorizing intra-firm fee sharing and business structures between LLLTs and lawyers in paragraph (a), paragraph (b) of the Rule sets forth limitations on the role of LLLTs in jointly owned firms, specifying that regardless of an LLLT’s ownership interest in such a firm, the business may not be structured in a way that permits LLLTs directly or indirectly to supervise lawyers or to otherwise direct or regulate a lawyer’s independent professional judgment. This includes a limitation on LLLTs possessing a majority ownership interest or controlling managerial authority in a jointly owned firm, a structure that could result indirectly in nonlawyer decision-making affecting the professional independence of lawyers. Lawyer managers, by contrast, will be required to undertake responsibility for a firm’s LLLT owners by expressly assuming responsibility for their conduct to the same extent as they are responsible for the conduct of firm lawyers.”).

Access Through Innovation of Legal Services,” has set forth MDP proposals, charging the Task Force with investigating and addressing three topics: (1) the definition of the “unauthorized practice of law”; (2) marketing, advertising, partnerships, and fee-splitting (including “partnerships with non-lawyers”); and (3) non-lawyer ownership or investment. California’s commissioning of this Task Force followed receipt of Professor William D. Henderson’s “Legal Market Landscape Report” on July 20, 2018.12

On July 11, 2019, the California Task Force issued its “Tentative Recommendations for Public Comment.” The Task Force noted that, in addressing its objectives, it should:

With a focus on preserving the client protection afforded by the legal profession’s core values of confidentiality, loyalty and independence of professional judgment, prepare a recommendation addressing the extent to which, if any, the State Bar should consider increasing access to legal services by individual consumers by implementing some form of entity regulation or other options for permitting non-lawyer ownership or investment in businesses engaged in the practice of law, including consideration of multidisciplinary practice models and alternative business structures.13


13 Henderson, William D., “Legal Market Landscape Report: Commissioned by the State Bar of California,” July 2018, attached as Attachment A to the July 19, 2018 Memorandum to Members of the California Bar, Board of Trustees, from Randall Difuruntorum, Program Manager, Professional Compliance, re: “State Bar Study of Online Delivery of Legal Services — Discussion of Preliminary Landscape Analysis.”

http://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000022382.pdf (last visited on Aug. 11, 2019).

With respect to Rule 5.4, the Task Force has proposed two distinct alternative amendments:

3.1 Adoption of a proposed amended rule 5.4 [Alternative 1] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. The Alternative 1 amendments would: (1) expand the existing exception for fee sharing with a nonlawyer that allows a lawyer to pay a court awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer in the matter; and (2) add a new exception that a lawyer may be a part of a firm in which a nonlawyer holds a financial interest, provided that the lawyer or law firm complies with certain requirements including among other requirements, that: the firm’s sole purpose is providing legal services to clients; the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients; and the nonlawyers have no power to direct or control the professional judgment of a lawyer.

3.2 Adoption of a proposed amended rule 5.4 [Alternative 2] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. Unlike the narrower Recommendation 3.1, the Alternative 2 approach would largely eliminate the longstanding general prohibition and substitute a permissive rule broadly permitting fee sharing with a nonlawyer provided that the lawyer or law firm complies with requirements intended to ensure that a client provides informed written consent to the lawyer’s fee sharing arrangement with a nonlawyer.\footnote{Id., at pp. 6-7.}

The Task Force has explained, with respect to Alternative 1 (3.1):

The proposed revisions to rule 5.4 Alternative 1 are intended to facilitate the ability of lawyers to enter into financial and professional relationships with nonlawyers who work in designing and implementing cutting-edge legal technology. Underlying the Task Force efforts is the understanding from discussions with legal technologists on the Task Force and otherwise, that a primary impediment to such relationships is the inability of lawyers to share in the profits that accrue from the delivery of legal services. The Task Force reasons that by expanding the kinds of situations under which nonlawyers can share in the profits and ownership of entities

\text{http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000024450.pdf} (last visited on Aug. 11, 2019).

\footnote{Id., at pp. 6-7.}
As to Alternative 2 (3.2), the Task Force describes this as intended to be “a major shift in rule 5.4 around ownership and fee sharing with very limited regulation,” and that:

The Task Force’s charter specifically identifies public interest may be better served by encouraging innovation in one-to-many solutions vs the current one-to-one legal model. One of the areas of focus within the Task Force charter is nonlawyer ownership or investment—a specific area the current rule 5.4 prohibits. Perhaps the most unique portion of the current Task Force and its charter is the actual makeup of the Task Force. It is by design a majority of non-attorneys, with the express purpose of the non-attorney majority to “ensure that the recommendations of the Task Force are focused on protecting the interest of the public.” Under the current rules, lawyers alone are responsible for the protection of clients—often resulting in such narrow and strict business models that a large majority of access to justice needs go unmet. The statistics evidencing the failure to meet the access to justice needs are immense and well documented.

The Alternative 2 proposed rule revision invites others who are not lawyers to the table to bring new knowledge, ideas, funding and ultimately change. In establishing ATILS, the State Bar of California sought new ideas, new leadership and new people to make the recommendations. This type of collaboration is absolutely the basis for increasing innovation. Rule changes that greatly increases the options for continued and regular collaboration is a vital step in truly increasing innovation for access to justice.

While the ABA appears uninterested in considering any changes to Rule 5.4 to allow any form of multidisciplinary practice or nonlawyer ownership interests in law firms, jurisdictions like the District of Columbia, Washington state, and California are—in the interest of providing better service to clients while, at the same time, including specific provisions in their

16 Id., at p. 20. The Task Force also explains: “It is important to note that paragraph (b) is substantially more limiting than what was proposed as a ‘multidisciplinary practice’ (MDP) by the ABA MDP Commission in 1999. Rather, it is based on the revisions to ABA Model Rule 5.4 as proposed by the ABA Ethics 20/20 Commission, dated 12/2/2011. Paragraph (b) only permits nonlawyer partners/owners of the firm to ‘assist’ the firm’s lawyers in the firm’s sole purpose of providing legal services. Under an MDP, the nonlawyer owners could separately and independently provide services of a nonlegal nature, e.g., accounting or financial planning services, that are not necessarily related to the provision of legal services.” Id., at p. 21.

17 Id., at p. 22.
alternatives to protect the “core principles of the profession,” such as a lawyer’s professional independence, are actively investigating and implementing Rule 5.4 alternatives.\(^\text{18}\)

Perhaps too, these jurisdictions will provide evidence to test the perceptions that the profession’s “core principles” will be harmed by involvement of nonlawyers in law firms. At the same time, if more states follow D.C.’s example in some form as some appear to be considering, then the United States will have a patchwork of states that allow MDP and those that do not. Because many law firms have multiple offices in different states and lawyers handle matters outside their home jurisdiction, there would be an ethics conundrum for the remaining ABA Model Rule 5.4-based states: to say nothing and disregard the concerns, or to enforce the Rules as written and create chaos.

III. Ancillary Business

“Ancillary business” may be broadly defined as any business other than the business of providing legal services. Rule 5.7 does not proscribe a law firm from performing ancillary business; it provides the extent to which the attorney-client protections owed by the law firm’s clients in legal matters will apply to services not traditionally considered legal services. In other words, when will a law firm be held to professional responsibility rules (including those governing confidentiality, conflicts of interest, and financial relationships) in providing services that could be provided by non-lawyers not subject to the Rules of Professional Conduct? It is difficult or impossible to define “the practice of law,” so defining the services encompassed within the definition of “ancillary business” is equally difficult. Ancillary businesses are businesses that may be conducted by nonlawyers without prosecution for unauthorized practice of law. As Model Rule 5.7(b) indicates, regulators are principally concerned with “services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.”

Rule 5.7 has a checkered history. Not a part of the Model Rules as adopted in response to the Kutak Commission Report (revised final draft, June 30, 1982), a version of Rule 5.7 was adopted in August 1991 prohibiting most ancillary services. That Rule was then rescinded in August 1992, only to be replaced in February 1994. Before its inclusion in the Ethics 2000 package, Rule 5.7 was adopted in some jurisdictions. Even before the Ethics 2000 revisions, many law firms were providing a wide variety of nonlegal services as ancillary businesses.

\(^\text{18}\) Still others are allowing (or at least considering) nonlawyer involvement in law firms or entities providing legal services. For example, the USPTO allows patent agents to have financial interests in law firms. (The law firm would have to either be a D.C. law firm or one that only appeared before the USPTO.) In addition, at least some jurisdictions allow U.S. lawyers to be partners with foreign lawyers.
The majority of U.S. jurisdictions – but not all states – have adopted a version of Rule 5.7. That does not mean that lawyers are prohibited from providing “law-related services” if licensed in jurisdictions that have not adopted a version of Rule 5.7, or that such a lawyer or law firm is necessarily subject to all of the Rules of Professional Conduct in conjunction with providing “law-related services” to a customer. Rather, it calls into question the extent to which a law firm may apply the Rules of Professional Conduct to a customer for non-legal but law-related services. Some would suggest, in the absence of a Rule 5.7 provision, the obviousness of the applicability of the Rules of Professional Conduct to any “law-related services” provided by a lawyer to either a client or a non-client customer. Others, however, would suggest that such an application would unnecessarily bestow upon the non-client customer the same rights afforded a client of the lawyer, and that such an application should be avoidable through written disclosure of the lack of an attorney-client relationship and the lack of the rights afforded to a client.

“Ancillary business” may be broadly defined as any business other than the business of providing legal services. It is difficult or impossible to define “the practice of law,” so defining the services encompassed within the definition of ancillary business is equally difficult. Ancillary businesses are businesses that may be conducted by nonlawyers without prosecution for unauthorized practice of law. As Model Rule 5.7(b) indicates, regulators are principally concerned with “services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.”

Ancillary business raises several questions. Should lawyers engaged in ancillary business be subject to the Model Rules? Does the answer to that question turn on whether the ancillary business is similar to the practice of law, such as professional counseling? May a lawyer conduct an ancillary business from the same firm that is providing legal services? Does a lawyer conducting an ancillary business have a heightened duty to provide information to clients about the nature of the services and, if the services do not constitute the practice of law, does the lawyer have a duty to ensure that the client understands that limitation?

Rule 5.7 has a checkered history. Not a part of the Model Rules as adopted in response to the Kutak Commission Report (revised final draft, June 30, 1982), a version of Rule 5.7 was adopted in August 1991 prohibiting most ancillary services. That rule Rule was then rescinded in August 1992, only to be replaced in February 1994. Before its inclusion in the Ethics 2000 package, Rule 5.7 was adopted in some jurisdictions. Even before the Ethics 2000 revisions, many law firms were providing a wide variety of nonlegal services as ancillary businesses. The history of the present Rule 5.7 is instructive in how changes in the manner of practice evolve.

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19 Model Rules, Rule 5.7(a).

20 Indiana, Maine, Massachusetts, North Dakota, Pennsylvania and the Virgin Islands.

First Approach (1991)

In 1991, by a close vote, the ABA House of Delegates amended the Model Rules to prohibit lawyers and law firms from engaging in certain kinds of ancillary businesses, by enacting new Model Rule 5.7. As adopted in 1991, Model Rule 5.7 provided:

(a) A lawyer shall not practice in a law firm which owns a controlling interest in, or operates, an entity which provides non-legal services which are ancillary to the practice of law, or otherwise provides such ancillary non-legal services, except as provided in paragraph (b).

(b) A lawyer may practice law in a law firm which provides non-legal services which are ancillary to the practice of law if:

1. The ancillary services are provided solely to clients of the law firm and are incidental to, in connection with and concurrent to, the provision of legal services by the law firm to such clients;

2. Such ancillary services are provided solely by employees of the law firm itself and not be a subsidiary or other affiliate of the law firm;

3. The law firm makes appropriate disclosure in writing to its clients; and

4. The law firm does not hold itself out as engaging in any non-legal activities except in conjunction with the provision of legal services as provided in this rule.

(c) One or more lawyers who engage in the practice of law in a law firm shall neither own a controlling interest in, nor operate, an entity which provides non-legal services which are ancillary to the practice of law, or otherwise provide such ancillary non-legal services, except that their firms may provide such services as provided in paragraph (b).

(d) Two or more lawyers who engage in the practice of law in separate law firms shall neither own a controlling interest in, nor operate, an entity which provides non-legal services
which are ancillary to the practice of law, nor otherwise provide such ancillary non-legal services. 22

The Rule would have prohibited lawyers and law firms from owning or controlling entities offering nonlegal services and limited the provision of ancillary services as part of the practice to clients receiving legal services. Thus, a law firm could offer notary services to a real estate client but could not offer investment advisory services to non-clients. Under this regime, the Model Rules would apply to all services (including nonlegal services) provided by the firm.

Repeal and Study (1992)

Model Rule 5.7 was controversial when adopted by the House, and was not adopted by any state. A year later, by a 190-183 vote, the House rescinded Model Rule 5.7 and formed a Committee on Ancillary Business to study the matter further. 23

Second Approach (1994)

When the Committee reported back to the House in 1994, it recommended the adoption of a rule that would not prohibit ancillary business, but would clearly subject the operation of ancillary businesses to the Model Rules. At its February 1994 meeting, the House accepted the recommendation and adopted Model Rule 5.7. As adopted in 1994, Model Rule 5.7 ("Responsibilities Regarding Law-Related Services") provided:

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients; or


(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term “law-related services” denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.24

The revised Model Rule provided an alternative, allowing a law firm to provide nonlegal services (limited by the Model Rule to services which might be performed in conjunction with and related to legal services) directly or through a controlled entity. If the services were performed through a controlled entity, they were not subject to the Model Rules if the client knew that the services being provided are not legal services. The Model Rule did not address the provision of services not related to the practice of law. The clear intent of the Model Rule was to ensure that the recipient of the services does not have a mistaken belief that the services provided do not afford the protections of the attorney-client relationship. As such, it recognized the ability of an attorney to order his or her relationship with an informed and competent client in this area. As a result of the structure of the Model Rule, it could have been read to regulate only services related to the practice of law because services unrelated to the practice of law do not involve the type of confusion about whether the client is receiving the benefit of the attorney-client relationship.

While only a few states have adopted Model Rule 5.7, several states in their ethics opinions recognized that many firms now engage in ancillary business.25 The experience of the


25See Colo. Bar Ass’n Ethics Comm., Formal Op. 98 (Dec. 14, 1996) (although Colorado has not adopted a rule addressing ancillary business, the fact that a Colorado attorney may be engaged in such activity is recognized in Model Rule 5.7); N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.5–b (2001) (provides rules for, and limitations on, ancillary businesses. New York has placed a similar proposal before the House for consideration at the 2002 Annual Meeting); Cal. Bar Ass’n, Formal Op. 141 (1995) (a lawyer or law firm could render nonlegal services to a client directly, through a nonlawyer employee, or through an entity in which the lawyer has an ownership interest, provided that the lawyer carefully complies with the Rules of Professional Conduct of the State Bar of California); Penn. Bar Ass’n Comm. on Legal Ethics and Prof’l
ABA in moving from a flat proscription to regulation based on the knowledge and understanding of the client should have provided a good lesson on how to address the issues presented by multidimensional practice. It didn’t.

**Ancillary Business and MDP (2000)**

In 2000, the House considered some aspects of ancillary business in connection with the MDP debates. The MDP Commission defined an MDP as a practice that would deliver “both

Responsibility, Informal Op. 92-45 (1992) (a law firm was not prohibited from forming a limited partnership or corporation to provide financial advisory and brokerage services); In re Unnamed Attorney, 645 A.2d 69 (N.H.1994) (New Hampshire version of Rule 1.15 authorized disciplinary authorities to audit financial records of title insurance companies because of strong nexus between New Hampshire lawyer and company); Ohio Sup. Ct. Bd. of Comm’rs on Grievances and Discipline, Op. 94-7 (1994) (an attorney or several attorneys within a law firm may own an ancillary business that provides law-related services, but must do so in a manner consistent with the Ohio Code of Professional Responsibility. The ancillary business must not engage in activities that would be prohibited as unauthorized practice of law. “It is improper for attorneys who own an ancillary business to require that customers of the business agree to legal representation by the attorneys or their law firm as a condition of engagement of the services of the ancillary business. If customers of the ancillary business need legal services, they may be informed that the attorneys can provide the legal representation, but they must also be informed of the ownership interest and encouraged to seek legal counsel of their own choice.”); see also Ohio Sup. Ct. Bd. of Comm’rs on Grievances and Discipline, Op. 90-23 (1990); Ohio Sup. Ct. Bd. of Comm’rs on Grievances and Discipline Op. 88-018 (1988); Stephen R. Ripps, Law Firm Ownership of Ancillary Businesses in Ohio — A New Era, 27 Akron L. Rev. 1, 17 (1993) (discussing Ohio State Bar Ass’n, Formal Op. 37 (1989)); Kan. Bar Ass’n Ethics Advisory Comm., Op. 92-04 (1992) (citing to 1991 version of Rule 5.7 and stating that a lawyer may provide title insurance services as ancillary business, provided that lawyer complies with rules of professional conduct including, but not limited to, rules on advertising, fee splitting, conflicts of interest and confidentiality); Tenn. Sup. Ct. Bd. of Prof’l Responsibility, Op. 94-F-135 (1994) (trust accounts of law-related ventures operated by lawyers subject to trust account provisions of DR 9-102); Fla. State Bar Ass’n Comm. on Professional Ethics, Op. 94-6 (1995) (law firm may operate mediation department within firm as long as mediation practice conducted in conformity with Florida Rules of Professional Conduct); S.C. Bar Ethics Advisory Comm., Op. 93-05 (1993) (law firm that provides legal services to retirement plans may own interest in, and refer clients to, ancillary business that provides services to retirement plans, if services provided do not constitute unauthorized practice of law and law firm complies with Rules 1.7 and 1.8).

*Multidimensional practice encompasses ancillary business, multidisciplinary practice, and multijurisdictional practice. See generally, Keatinge, note 1.*
legal and nonlegal professional services.” As initially formulated, the MDP Commission initially defined an MDP as:

[A] partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, including legal services, and there is a direct or indirect sharing of profits as part of the arrangement.²²

Under the initial definition, an MDP’s nonlegal activities were not limited to professional services or “law-related services.” This lead to much discussion of the law firm engaged in businesses such as tow truck operation or dry-cleaning. In an attempt to avoid muddying the issues surrounding MDP with those arguments, the MDP Commission redefined an MDP as “a practice that delivers both legal and nonlegal professional services,” thereby limiting the ancillary activities of an MDP to “professional services.” Neither of the MDP Commission’s definitions of MDP limited the activities of the MDP to “law related services.”²⁸

At the 2000 Annual meeting, the proposal of the MDP Commission was considered and soundly defeated in the House of Delegates. Before that meeting, Reports were filed by the MDP Commission (MDP Commission Report 2000)²⁹ and by the New York State Bar Association headed by former ABA President Robert MacCrate (MacCrate Report).³⁰ Among other things, the MacCrate Report addressed ancillary business, noting that, “Thus, lawyers have long recognized that there are circumstances in which it is advantageous to them and to their clients to provide integrated professional services on certain matters, and have taken steps over the past several years to create entities, within or under the control of their firms, to provide such services.”³¹ The MacCrate Report also noted that the ABA’s position on ancillary business was

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²³ Id.


²⁶ Id., at Chapter 4.
“ambiguous” and recommended an addition to the rule permitting ancillary business to make clear that the lawyer must not allow nonlawyer colleagues in the ancillary business to intrude upon the ability of the lawyer to exercise independent professional judgment on behalf of clients.\textsuperscript{22}

The MDP Commission Report 2000 did not address the question of ancillary business, focusing instead on the implications of a change to Model Rule 5.4. In response to the MDP Commission Report 2000, a group of state bar associations developed a “consensus”-anti-MDR resolution (Report 10F).\textsuperscript{24} Report 10F largely followed the recommendations in the MacCrate Report on many items, but chose not to adopt the MacCrate Report’s recommendation on ancillary business. In explaining the omission of the reference to ancillary business, the proponents of Report 10F stated:

The Recommendation makes one significant departure from the MacCrate Report, as it originally was issued. The MacCrate Report permits ancillary businesses by lawyers and law firms, so long as safeguards are in place to prevent the ownership or control of the practice of law by nonlawyers. The question of ancillary business, however, has been widely debated. Some jurisdictions permit lawyers to offer ancillary businesses, while most do not. We do not believe that the debate over multidisciplinary practice should reopen the question of ancillary business. For that reason, we commend the safeguards proposed by the MacCrate Report to the jurisdictions that permit ancillary business, but take no position on the question of whether to permit ancillary business.\textsuperscript{24}

In July 2000, Report 10F was adopted by the House, although it is unclear whether the adoption means that the ABA has reversed its position on ancillary business, decided to make its position neutral, or make no change at all.


\textsuperscript{22} Id. (citing William B. Dunn, Legal Ethics and Ancillary Business, 74 Mich. Bar J. 154 (1995)).


\textsuperscript{24} Id.
In its submission for final approval (Ethics 2000 Report), the American Bar Association Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000 Commission) proposed one change to the Model Rule and an addition to the Comment to clarify that the ancillary business conducted by a law firm no longer need be conducted through a separate entity.  The Reporter’s note to the version of Model Rule 5.7 simply notes that the Model Rule now allows attorneys to provide ancillary services directly as opposed to requiring that they be performed through a separate entity as the former Model Rule 5.7 had required.

The earlier version of the Reporter’s Explanation of Changes issued in 1999, which did not survive to the final Ethics 2000 Report, clearly indicates the relationship of ancillary business and MDP:

Multidisciplinary practice has already been approved by the ABA. The vehicle is Rule 5.7. The primary thing that makes Rule 5.7 multidisciplinary practice different from the phenomenon debated by the ABA in August 1999 is that Rule 5.7 entities are owned or controlled by lawyers.

The version of Rule 5.4 that is before you at this meeting is intended to address the issues of both Rules 5.4 and 5.7. Rule 5.7 might be repealed if a new Rule 5.4 is adopted; certainly, if Rule 5.4 is not altered sufficiently, it would seem wise to retain present Rule 5.7. Indeed, some may prefer retaining Rule 5.7 even if a new Rule 5.4 were adopted, arguing that Rule 5.4 deals with lawyers practicing with nonlawyers while this rule deals in part with lawyers practicing as nonlawyers.

Rule 5.7(b) defines “law-related services” as any services that “might reasonably be performed in conjunction with and in substance are related to the provision of legal services.”

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38 Id. at Model Rule 5.7, Reporter’s Explanation of Changes, available at http://www.abanet.org/cpr/e2k-rule57rem.html (last visited Nov. 1, 2002).
but that in themselves “are not prohibited as unauthorized practice of law when provided by a nonlawyer.” Comment [9] gives such examples as accounting services, financial planning, economic analysis, lobbying, and medical consulting. Many lawyers might be surprised that such services are inherently “in substance * * * related to the provision of legal services,” but we have the authority of Rule 5.7 to say it is so.

If the above services are provided by a law firm, the lawyer rules govern provision of the services. If they are provided by a separate entity “controlled by the lawyer individually or with [nonlawyers],” lawyer rules apply unless the lawyer takes “reasonable measures to assure” that customers of the separate entity know they are not getting legal services and do not have the “protections of the lawyer-client relationship.” According to Comment [2], Rule 5.7 applies to the provision of such law-related services “even when the lawyer does not provide any legal services” to the person that is to receive the client-type protection.

Rule 5.7’s focus on giving purchasers of services other than legal services the protections afforded clients duplicates what we propose for Rule 5.4. On the other hand, lawyers have long done more than practice law, and Rule 5.7 acknowledges the small-town lawyer who sells some insurance along with writing wills, as well as law firms doing mediation, and lawyers available to call up state legislators. Indeed, in the present multidisciplinary practice debate, a vote for repeal of Rule 5.7 without a change in Rule 5.4 would not be a neutral act. It might appear to close the door to a phenomenon the August debate revealed that some lawyers see as a good way to add value to the services they offer their clients.31

As adopted in 2002 by the House of Delegates as part of the Ethics 2000 package, Model Rule 5.7 eliminated the requirement that an ancillary business be conducted in a separate entity and added additional emphasis in the comment to the requirement that the attorney make clear that the recipient of the ancillary services does not enjoy an attorney-client relationship with respect to the ancillary services. The comment set forth above was replaced with a more prosaic explanation of the changes before the Ethics 2000 Report was brought before the House of Delegates for approval:

Paragraph (a)(2) has been broadened to cover all circumstances in which a lawyer’s provision of law-related services are distinct from the lawyer’s provision of legal services. This change, coupled with the changes to Comments [2] and [3], is intended to clarify that (1) there can be situations in which a law firm’s provision of law-related services will be distinct from the firm’s provision of legal services, even though rendered by the firm rather than a separate

31See Model Rules of Prof’l Conduct R. 5.7 reporter’s observations (Proposed Draft No. 1, Sept. 30, 1999).
entity, and (2) that in such circumstances the lawyer must comply with paragraph (a)(2). This change closes eliminates an unintended gap in the coverage of the Model Rule.

COMMENT:

[2] This change clarifies that a lawyer can directly provide law-related services in circumstances that are distinct from the lawyer’s provision of legal services. This precludes an overly restrictive reading of paragraph (a)(1) to the effect that the provision of law-related services could never be distinct from the provision of legal services if directly provided by a lawyer or law firm, rather than by a separate entity.

[3] The new sentence clarifies that paragraph (a)(2) applies in all cases in which the provision of law-related services is distinct from the provision of legal services within the meaning of paragraph (a)(1), without regard to whether the law-related services are provided directly by the lawyer or the lawyer’s firm or by a separate entity controlled by the lawyer or law firm.

* * *

[10] The Commission changed the reference to Rule 1.7(b) in light of changes that were made to that Rule.

Modifying the Attorney-Client Relationship through Agreement and Disclosure.

As between the attorney and the client, the rules of ethics may be thought of as agency with an attitude – a codification of the rules governing the agent’s duties to the principal.20

20 Compare, e.g., Restatement (Second) of Agency § 394 (1958) (“Unless otherwise agreed, an agent is subject to a duty not to act or to agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed.”) with Model Rules, Rule 1.7 (Conflict of Interest: Current Clients); Restatement (Second) of Agency § 395 (1958) (“Unless otherwise agreed, an agent is subject to a duty to the
While the Model Rules have always had provisions permitting the client to waive certain duties under some circumstances, the revision of Model Rule 1.0(e) as adopted by the ABA in 2002 provides a new definition of “informed consent.”

Model Rule 1.0(e) defines “informed consent” as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

This is the standard that must be met in order to modify the attorney’s duties to the client where the Model Rules permit such modification. Among the duties that the Model Rules permit to be modified are the duties related to the scope of representation, the disclosure of confidential information, conflicts of interest, transactions between lawyers and clients, the use of information relating to the representation of the client to the disadvantage of the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge.

with Model Rules, Rule 1.6 (Confidentiality of Information); Restatement (Second) of Agency § 396(b) (1958) (“Unless otherwise agreed, after the termination of the agency, the agent has a duty to the principal not to use or to disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal’s use or acquired by the agent in violation of duty.”) and Restatement (Second) of Agency § 396(d) (1958) (“Unless otherwise agreed, after the termination of the agency, the agent . . . has a duty to the principal not to take advantage of a still subsisting confidential relation created during the prior agency relation.”)

with Model Rules, Rule 1.9 (Duties to Former Clients).

41  Model Rules, Rule 1.0(e).

42  Compare Model Rules, Rule 1.0(e) (definition of “informed consent”) with Restatement (Second) of Agency § 376 (1957) (“The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made, except to the extent that fraud, duress, illegality, or the incapacity of one or both of the parties to the agreement modifies it or deprives it of legal effect.”).

43  Model Rules, Rule 1.2(c).

44  Id., at R. 1.6(a).

45  Id., at R. 1.7(b)(4).

46  Id., at R. 1.8(a)(3).
the receipt of payment for representing a client from anyone other than the client,\(^{47}\) the obtaining of consent to settlement where the lawyer represents more than one client,\(^{48}\) the representation of a new client in the same or a substantially related matter in which the new client’s interests are materially adverse to the interests of the former client,\(^{49}\) the representation of a new client before a former governmental employer,\(^{50}\) the representation of any party that had appeared before the lawyer as a judge or arbitrator,\(^{51}\) the representation of a new client adverse to a prospective client,\(^{52}\) and the provision of a third-party evaluation which will affect the client’s interests materially and adversely.\(^{53}\) While some of the Model Rules require that the informed consent be “confirmed in writing,”\(^{54}\) or signed by the client,\(^{55}\) the Model Rules now provide a definition of “informed consent,” which requires disclosure and explanation by the lawyer and intelligent assent by the client. The comment to Model Rule 1.0 confirms that the degree of explanation necessary for informed consent will vary depending upon the experience of the client and whether the client is represented by other counsel.\(^{56}\)

The majority of U.S. jurisdictions — but not all states — have adopted a version of Rule 5.7. That does not necessarily mean that lawyers are prohibited to provide from providing “law-related services” if licensed in jurisdictions that have not adopted a version of Rule 5.7, or that such a lawyer or law firm is necessarily subject to all of the Rules of Professional Conduct in conjunction with providing “law-related services” to a customer. Some would suggest, in the absence of a Rule 5.7 provision, the obviousness of the applicability of the Rules of Professional Conduct to any “law-related services” provided by a lawyer to either a client or a non-client

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\(^{47}\) Id., at R. 1.8(b).

\(^{48}\) Id., at R. 1.8(f).

\(^{49}\) Id., at R. 1.8(g).

\(^{50}\) Id., at R. 1.9(a).

\(^{51}\) Id., at R. 1.11(a)(2).

\(^{52}\) Id., at R. 1.12(a).

\(^{53}\) Id., at R. 1.18(a).

\(^{54}\) Id., at R. 2.3(b).

\(^{55}\) See, e.g., id., at R. 1.7(a) and R. 1.9(a).

\(^{56}\) See, e.g., id., at R. 1.8(a) and R. 1.8(g).

\(^{57}\) Id., at R. 1.0 cmt. 6.
customer. Others, however, would suggest that such an application would unnecessarily bestow upon the non-client customer the same rights afforded a client of the lawyer, and that such an application should be avoidable through written disclosure of the lack of an attorney-client relationship and the lack of the rights afforded to a client.

One of the benefits of the MDP debates before the House was the focus on what constitutes the “core values” of the profession. The Resolution ultimately adopted by the House defined the core values as: the lawyer’s duty of undivided loyalty to the client; the lawyer’s duty to competently exercise independent legal judgment for the benefit of the client; the lawyer’s duty to hold client confidences inviolate; the lawyer’s duty to avoid conflicts of interest with the client; the lawyer’s duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice; and the lawyer’s duty to promote access to justice.

It is interesting that under the Model Rules those “core values” about which the critics of MDP spoke most vehemently, the duties to the client of loyalty, confidentiality, and freedom from conflict may, with some limitations, be waived. A client may also limit the scope of representation with informed consent, provided the limitation is reasonable under the circumstances. It is not clear where in the Model Rules the duty to maintain the legal profession as a single profession exists. To the extent this is a duty to protect the client, it is subsumed in the lawyer’s duty of loyalty. To the extent it is a duty to protect the profession from competition as a trade, presumably it is reflected in Model Rules 5.4 and 5.5, which, as noted below, do not provide for waivers. The duty to provide pro bono services continues to be aspirational. Thus, all of the Model Rules comprising core values relating to the attorney’s relationship with the client are waivable to some extent.

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58 Report 10F, supra note 28; see supra note 67.
59 Model Rules, Rule 1.8.
60 Id., at R. 1.6.
61 Id., at R. 1.7 and R. 1.8.
62 Id., at R. 1.2(c).
63 One might note that the righteous indignation with which the MJP addresses the possibility of federal rather than state regulation of the profession suggests that we are really trying to maintain the practice of law as fifty-one separate professions.
64 Model Rules, at R. 6.1.
The Model Rules also provide a disclosure-based approach to relationships that do not constitute attorney-client relationships. Under the Model Rules, a lawyer has a duty to ensure that where no attorney-client relationship exists, the persons with whom the lawyer is dealing understand that fact. This situation arises where the lawyer is acting as an arbitrator or mediator, or, as noted above, where the lawyer is providing ancillary services. In an environment in which fewer and fewer professional services are provided only by lawyers and where lawyers are providing a broader array of professional services, much of the definition of the practice of law may turn on whether the “client” believes that it has an attorney-client relationship with the professional.

The justification for the limitations imposed on multidimensional practice in general, and MDP in particular, are loftily propounded as being based on the need to protect the core values of the profession, particularly as they relate to the client. Nonetheless, both the Model Rules and actual practice have indicated that each of the “core values” relating to the client relationship are subject to modification by agreement. On the other hand, rules such as Model Rule 5.4, which proscribes behavior that has no direct adverse impact on the client but merely removes the lawyer from participating in a structure which might cause the lawyer to breach other duties, is not subject to waiver by informed consent. This seems irrational. For example, if a client can intelligently waive such core values as confidentiality and conflicts of interest in the traditional attorney-client relationship, should that client not be entitled to intelligently waive the risk of conflicts or the protection of confidentiality that may exist in an MDP? The Model Rules governing multidimensional practice appear to be moving in this direction, with the rules governing strategic alliances and ancillary business both imposing a disclosure obligation on the attorney. To the extent that the Model Rules move toward allowing the lawyer to practice in a multidimensional manner provided the client is informed of the limitations or risks such form of practice may entail, they are moving toward what has often been the practice with sophisticated clients, where the client knows the limitation, for example that a particular lawyer is not licensed in the state in which he needs to perform the services or that a nonlawyer is performing a particular type of service.

**\textsuperscript{65}** Id., at R. 2.4(b) ("A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.").

**\textsuperscript{66}** Id., at R. 5.7(a)(2) (requiring the lawyer providing law-related services to “take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.").
Ethical Issues with respect to Law Firm Ownership and Ancillary Practice

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This program will discuss the current state of nonlawyer ownership of law firms (“MDP”); the history, current state, and future of the performance of non-legal services (or “law-related services”) by law firms (“ancillary practice”) under the Rules of Professional Conduct; and what law firms should be doing now to prepare for changes in this area. These written materials are intended to provide some background on these topics, and to identify recent developments, particularly with respect to California’s consideration of changes to its version of Rule 5.4.

Many commentators have expressed that the practice of law and the role of the lawyer in society is at critical point in time. Opponents of innovative practice models have warned that MDP and ancillary practice initiatives are “inconsistent” with the “core values” of the legal profession, principally among them, the professional independence of the lawyer from the influence of nonlawyers, the duty of loyalty to the clients, and client confidentiality. But proponents of those innovative practice models look at the evolving world where clients and the general public are demanding readier access to legal assistance, and find the unsubstantiated “core values” arguments, which have little if any empirical support, to be an unsatisfactory fait accompli.

I. Defining the “Practice of Law.”

Any discussion of multidisciplinary practice, ancillary businesses, and innovative practice models necessarily wrestles with the issue of what constitutes “the practice of law.” However, that question is not one easily answered. In fact, ABA Model Rule 5.5, Comment 2, recognizes the inconsistency among jurisdictions in defining “the practice of law”: “The definition of the practice of law is established by law and varies from one jurisdiction to another.” The difficulty in defining “the practice of law” becomes more pronounced when considering what a
nonlawyer may be permitted to do and what is the exclusive domain of a licensed lawyer. For example, the ABA Center for Professional Responsibility’s “Task Force on the Model Definition of the Practice of Law,” stated as part of its “Model Definition Challenge”:

The Association’s interest in the parameters of the practice of law has been highlighted in recent years by the work of the Commission on Nonlawyer Practice and the Commission on Multidisciplinary Practice. The common thread in the work of these entities has been the revelation that there are an increasing number of situations where nonlawyers are providing services that are difficult to categorize under current statutes and case law as being, or not being, the delivery of legal services. This growing gray area may be partially responsible for the spotty enforcement of unauthorized practice of law statutes across the nation and arguably an increasing number of attendant problems related to the delivery of services by nonlawyers. Recently a number of jurisdictions, most prominently Washington, Arizona and the District of Columbia, have taken steps to codify a definition of the practice of law so as to attack these trends.¹

With the ABA having left the definition of “the practice of law” to the various states, definitions will necessarily vary. Kentucky has defined “the practice of law” in its Supreme Court Rules (SCR 3.020):

The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services. But nothing herein shall prevent any natural person not holding himself out as a practicing attorney from drawing any instrument to which he is a party without consideration unto himself therefor. An appearance in the small claims division of the district court by a person who is an officer of or who is regularly employed in a managerial capacity by a corporation or partnership which is a party to the litigation in which the appearance is made shall not be considered as unauthorized practice of law.

¹ ABA Task Force on the Model Definition of the Practice of Law, Model Definition Challenge. https://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_challenge/ (last visited on Aug. 11, 2019).
The Colorado Supreme Court has recognized the difficulty in defining the practice of law, noting in *Denver Bar Assoc. v. Public Utilities Comm.*, 391 P.2d 467, 471 (Colo. 1964):

> There is no wholly satisfactory definition as to what constitutes the practice of law; it is not easy to give an all-inclusive definition. We believe that generally one who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counselling, advising and assisting him in connection with these rights and duties is engaged in the practice of law. Difficulty arises too in the application of the definition.

Indeed, there is also less certainty as to what constitutes the “unauthorized practice of law.” Nonlawyers, who do not hold a license to practice law in any jurisdiction, are providing services that, if done by a lawyer, may well be considered “the practice of law” or, at a minimum, a “law-related service.” Lawers who are licensed in one jurisdiction may, through

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2 The “practice of law” law may be characterized as the “provision of legal services” and the “attorney-client relationship” may be characterized as a relationship between an attorney and another person in connection with which the attorney is providing legal services. Because these definitions inform several different considerations (e.g., the duties an attorney owes a client, the availability of the evidentiary attorney-client privilege, and the proscription on unauthorized practice of law by a non-lawyer to name three), it has been almost impossible to define the practice of law, and even if such a definition were possible the dynamic nature of services on offer ensures that such definition would have a limited shelf life. As stated in the Restatement (Third) of the Law Governing Lawyers § 4 (2000), cmt c. (“Delineation of unauthorized practice.”):

> The definitions and tests employed by courts to delineate unauthorized practice by nonlawyers have been vague or conclusory, while jurisdictions have differed significantly in describing what constitutes unauthorized practice in particular areas.

Certain activities, such as the representation of another person in litigation, are generally proscribed. Even in that area, many jurisdictions recognize exceptions for such matters as small-claims and landlord-tenant tribunals and certain proceedings in administrative agencies. Moreover, many jurisdictions have authorized law students and others not admitted in the state to represent indigent persons or others as part of clinical legal-education programs.
the use of technology and travel, be providing legal services to clients when situated geographically in a jurisdiction in which the lawyer is not licensed. Suffice it to say, whether jurisdictions are willing to admit it or not, the lines are becoming ever blurrier as to what constitutes “the practice of law,” and therefore, what constitutes the “unauthorized practice of law.”

II. Multidisciplinary Practice (“MDP”).

The concept of multidisciplinary practice, or MDP, involves lawyers and nonlawyers owning an entity together to provide services, legal and nonlegal, to clients. MDP has been defined as:

Controversy has surrounded many out-of-court activities such as advising on estate planning by bank trust officers, advising on estate planning by insurance agents, stock brokers, or benefit-plan and similar consultants, filling out or providing guidance on forms for property transactions by real-estate agents, title companies, and closing-service companies, and selling books or individual forms containing instructions on self-help legal services or accompanied by personal, nonlawyer assistance on filling them out in connection with legal procedures such as obtaining a marriage dissolution. The position of bar associations has traditionally been that nonlawyer provision of such services denies the person served the benefit of such legal measures as the attorney-client privilege, the benefits of such extraordinary duties as that of confidentiality of client information and the protection against conflicts of interest, and the protection of such measures as those regulating lawyer trust accounts and requiring lawyers to supervise nonlawyer personnel. Several jurisdictions recognize that many such services can be provided by nonlawyers without significant risk of incompetent service, that actual experience in several states with extensive nonlawyer provision of traditional legal services indicates no significant risk of harm to consumers of such services, that persons in need of legal services may be significantly aided in obtaining assistance at a much lower price than would be entailed by segregating out a portion of a transaction to be handled by a lawyer for a fee, and that many persons can ill afford, and most persons are at least inconvenienced by, the typically higher cost of lawyer services. In addition, traditional common-law and statutory consumer-protection measures offer significant protection to consumers of such nonlawyer services.
[A] partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, and there is a direct or indirect sharing of profits as part of the arrangement.3

Such an arrangement is currently prohibited under the ABA Model Rules, specifically ABA Model Rule 5.4 entitled “Professional Independence of a Lawyer.” Rule 5.4(a) prohibits the lawyer from sharing legal fees with a nonlawyer except within the confines of very limited, enumerated exceptions. The Rule prohibits a lawyer from forming “a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.” See ABA Model Rule 5.4(a). ABA Model Rule 5.4(c) prohibits a lawyer from permitting “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 services.”4 ABA Model Rule 5.4(d) likewise provides:

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

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

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

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

See ABA Model Rule 5.4(d). As the Comments to ABA Model Rule 5.4 explain, these “traditional limitations” on the sharing of fees with nonlawyers and the prohibition against allowing nonlawyer third parties to direct or control a lawyer are ostensibly meant to protect the lawyer’s professional independence and professional judgment in representing a client. See ABA Model Rule 5.4, Comments 1 and 2.


4 See also Restatement (Third) of the Law Governing Lawyers § 10 (2000) § 10 (Limitations on Nonlawyer Involvement in a Law Firm.).
The ABA has resisted efforts to change its stance on Model Rule 5.4. As chronicled by Jayne R. Reardon in her article “Alternative Business Structures: Good for the Public, Good for Lawyers,” the ABA House of Delegates has “soundly rejected” any attempt to change Model Rule 5.4’s “anti-fee-sharing rule.” The history Reardon recounts includes the ABA’s rejection of both the Kutak Commission’s recommendations to allow multidisciplinary practice and the ABA Commission on Multidisciplinary Practice’s recommendations in 1999; the ABA Commission on Ethics 20/20’s statement that it would not propose changing the existing prohibitions on nonlawyer ownership, but would continue investigating the possibility of fee splitting between lawyers and nonlawyers, a position the Commission later abandoned; and the ABA Commission on the Future of Legal Services, which did not even recommend a change to the House of Delegates.

Integration among lawyer and nonlawyer service providers, however, is happening in the rest of the world, and ABA Model Rule 5.4 may be adversely affecting the ability of the American lawyer to compete. Critics of the more traditional stance argue that strict adherence to Model Rule 5.4 stifles innovation, limits the lawyer’s or law firm’s access to capital necessary to invest in and develop new technologies, and – from a client service prospective – hampers the ability to provide effective legal services to a large percentage of the population who simply cannot afford to hire lawyers.

Some jurisdictions are taking a more proactive modern approach. For example, the D.C. Bar’s version of Rule 5.4 allows lawyers to enter partnerships with nonlawyers so as to provide legal services to clients. Specifically, D.C. Rule 5.4(b) provides:

(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:

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

(2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;

(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;

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5 Reardon, Jayne R., Alternative Business Structures: Good for the Public, Good for Lawyers, 7 St. Mary’s Journal of Legal Malpractice and Ethics 304, 315 (2017).

6 Id., at pp. 315-318.
(4) The foregoing conditions are set forth in writing.

D.C. Rule 5.4(b)(1) would not permit the entity to provide true multidisciplinary services to the client while being owned or managed, in part, by the nonlawyer, and under D.C. Rule 5.4(b)(3), the lawyers with financial interest and/or managerial authority are responsible for making “reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that” the nonlawyer conforms “to the Rules of Professional Conduct.” See D.C. Rule 5.1(a).

Comments to D.C. Rule 5.4 explain the rationale and justification for the shift away from the ABA Model Rule 5.4 approach:

[2] Traditionally, the canons of legal ethics and disciplinary rules prohibited lawyers from practicing law in a partnership that includes nonlawyers or in any other organization where a nonlawyer is a shareholder, director, or officer. Notwithstanding these strictures, the profession implicitly recognized exceptions for lawyers who work for corporate law departments, insurance companies, and legal service organizations.

[3] As the demand increased for a broad range of professional services from a single source, lawyers employed professionals from other disciplines to work for them. So long as the nonlawyers remained employees of the lawyers, these relationships did not violate the disciplinary rules. However, when lawyers and nonlawyers considered forming partnerships and professional corporations to provide a combination of legal and other services to the public, they faced serious obstacles under the former rules.

[4] This rule rejects an absolute prohibition against lawyers and nonlawyers joining together to provide collaborative services, but continues to impose traditional ethical requirements with respect to the organization thus created. Thus, a lawyer may practice law in an organization where nonlawyers hold a financial interest or exercise managerial authority, but only if the conditions set forth in subparagraphs (b)(1), (b)(2), and (b)(3) are satisfied, and pursuant to subparagraph (b)(4), satisfaction of these conditions is set forth in a written instrument. The requirement of a writing helps ensure that these important conditions are not overlooked in establishing the organizational structure of entities in which nonlawyers enjoy an ownership or managerial role equivalent to that of a partner in a traditional law firm.

* * *
[7] As the introductory portion of paragraph (b) makes clear, the purpose of liberalizing the Rules regarding the possession of a financial interest or the exercise of management authority by a nonlawyer is to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. For example, the rule permits economists to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counseling clients, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others who use accountants’ services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions. In all of these situations, the professionals may be given financial interests or managerial responsibility, so long as all of the requirements of paragraph (c) are met.

See D.C. Rule 5.4, Comments 2-4 and 7.  

ABA Formal Op. 464 (Aug. 19, 2013) addresses, in part, the issue of the division of legal fees with lawyers who practice in firms where it is ethically permissible to share legal fees with nonlawyers. More specifically, the Opinion addresses “whether a lawyer subject to the Model Rules may divide a legal fee with another lawyer or law firm practicing in a jurisdiction where the other lawyer or law firm might eventually distribute some portion of that fee to a nonlawyer.” ABA Formal Op. 464, at 1. Recognizing, for example, that D.C. Rule 5.4(b) allows partial nonlawyer ownership, ABA Formal Op. 464 states:

The possibility that the District of Columbia firm may, or may not, eventually “share” some fraction of that firm’s portion of the fee with a nonlawyer should not expose the lawyer in the Model Rules jurisdiction to discipline. The lawyer subject to the Model Rules has complied with those rules. The compensation system of the District of Columbia firm does not threaten the application of Model Rule 5.4(a) within the Model Rules jurisdiction, and there is no reason to attempt to enforce Model Rule 5.4(a) in the District of Columbia.

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7 D.C. Rule 5.4(c), referenced in Comment 7, addresses the profession’s “core value” of the independence of a lawyer’s professional judgment: “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.”
ABA Formal Op. 464, at p. 3. At the same time, the Opinion is quick to acknowledge that the situation presented in ABA Formal Op. 464 differs from that presented in ABA Formal Op. 91-360 (July 11, 1991), which confirmed the prohibition against partnerships with nonlawyers and explained that, if a lawyer is licensed in both a jurisdiction that allows such partnerships and one that does not, the lawyer must comply with the more restrictive jurisdiction’s rules. It has been noted that:

The ABA carefully constructed its hypothetical in Formal Opinion 464 to avoid confronting the broad conclusions of its earlier opinion. In Opinion 464, a lawyer in a Model Rules jurisdiction determines that she needs the assistance of a District of Columbia law firm. The opinion never states where the matter is pending but says that it involves “federal government contracts,” a subject concerning which the Model Rules attorney needs specialized knowledge which she or her firm does not otherwise possess. Read one way, Opinion 464 allows only for a Model Rules-based lawyer to come to the District of Columbia for specialized expertise and share fees with a D.C. firm, even though that firm has a nonlawyer partner.8

Washington state is another jurisdiction that has allowed limited nonlawyer ownership interests in law firms. Effective as of April 14, 2015, Rule 5.9 of the Washington Rules of Professional Conduct (“Wash. RPC”) 5.9 (“Business Structures involving LLLT and Lawyer Ownership”) provides:

(a) Notwithstanding the provisions of Rule 5.4, a lawyer may;

(1) share fees with an LLLT who is in the same firm as the lawyer;

(2) form a partnership with an LLLT where the activities of the partnership consist of the practice of law; or

(3) practice with or in the form of a professional corporation, association, or other business structure authorized to practice law for a profit in which an LLLT owns an interest or serves as a corporate director or officer or occupies a position of similar responsibility.

(b) A lawyer and an LLLT may practice in a jointly owned firm or other business structure authorized by paragraph (a) of this rule only if;

LLLs do not direct or regulate any lawyer's professional judgment in rendering legal services;

LLLs have no direct supervisory authority over any lawyer;

LLLs do not possess a majority ownership interest or exercise controlling managerial authority in the firm; and

lawyers with managerial authority in the firm expressly undertake responsibility for the conduct of LLL partners or owners to the same extent they are responsible for the conduct of lawyers in the firm under Rule 5.1.

LLL is a “Limited License Legal Technician,” which Washington APR 28(B)(4) defines as: “a person qualified by education, training, and work experience who is authorized to engage in the limited practice of law in approved practice areas of law as specified by this rule and related regulations,” and specifically licensed by the Washington Supreme Court to assist currently in “divorce, child custody, and other family law matters.”

Importantly too for this discussion, pursuant to Rule 5.9 of the Washington Limited License Legal Technician Rules of Professional Conduct (“Wash. LLLT RPC”), an LLLT may share fees with a lawyer who is in the same firm, may form a partnership with a lawyer where the partnership’s activities consist of the practice of law, and may “practice with or in the form of a professional corporation, association, or other business structure authorized to practice law for a profit in which a lawyer owns an interest or serves as a corporate director or officer or occupies a position of similar responsibility.” See Wash. LLLT RPC 5.9(a); see also Wash. RPC 5.9(a)(1).

Washington LLLT RPC 5.9(b) also provides: “An LLLT and a lawyer may practice in a jointly owned firm or other business structure authorized by paragraph (a) of this Rule only if: (1) LLLTs do not direct or regulate any lawyer's professional judgment in rendering legal services; (2) LLLTs have no direct supervisory authority over any lawyer; (3) LLLTs do not possess a majority ownership interest or exercise controlling managerial authority in the firm; and (4) lawyers with managerial authority in the firm expressly undertake responsibility for the

9 The Washington State Bar reports that, on May 1, 2019, the Washington Supreme Court adopted amendments to Washington Admission to Practice Rule 28 regarding “Limited Practice Rule for Limited License Technicians.” See Washington State Bar website re: “Limited License Legal Technicians.” https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians (last visited on Aug 12, 2019). APR 28(A) explains: “The purpose of this rule is to authorize certain persons to render limited legal assistance or advice in approved practice areas of law. ... This rule is intended to permit trained Limited License Legal Technicians to provide limited legal assistance under carefully regulated circumstances in ways that expand the affordability of quality legal assistance which protects the public interest.”
conduct of LLLT partners or owners to the same extent they are responsible for the conduct of lawyers in the firm under Lawyer RPC 5.1.”

As a result, Washington LLLT RPC, Rule 5.9(b), likely addresses a number of the “core principle” concerns that have been advanced about nonlawyer ownership interests in law firms and sharing of legal fees with nonlawyers.

California is currently investigating possible changes to the permissible delivery of legal services so as to “increase access to justice for all Californians by responsibly harnessing the power of technology.” The State Bar of California has formed a “Task Force on Access Through Innovation of Legal Services,” charging the Task Force with investigating and addressing three topics: (1) the definition of the “unauthorized practice of law”; (2) marketing, advertising, partnerships, and fee-splitting (including “partnerships with non-lawyers”); and (3) non-lawyer ownership or investment. California’s commissioning of this Task Force followed

See also Wash. LLLT RPC Rule 5.9, Comment 2 (“In addition to expressly authorizing intra-firm fee-sharing and business structures between LLLTs and lawyers in paragraph (a), paragraph (b) of the Rule sets forth limitations on the role of LLLTs in jointly owned firms, specifying that regardless of an LLLT’s ownership interest in such a firm, the business may not be structured in a way that permits LLLTs directly or indirectly to supervise lawyers or to otherwise direct or regulate a lawyer’s independent professional judgment. This includes a limitation on LLLTs possessing a majority ownership interest or controlling managerial authority in a jointly owned firm, a structure that could result indirectly in nonlawyer decision-making affecting the professional independence of lawyers. Lawyer managers, by contrast, will be required to undertake responsibility for a firm’s LLLT owners by expressly assuming responsibility for their conduct to the same extent as they are responsible for the conduct of firm lawyers.”).


receipt of Professor William D. Henderson’s “Legal Market Landscape Report” on July 20, 2018.13

On July 11, 2019, the California Task Force issued its “Tentative Recommendations for Public Comment.” The Task Force noted that, in addressing its objectives, it should:

With a focus on preserving the client protection afforded by the legal profession’s core values of confidentiality, loyalty and independence of professional judgment, prepare a recommendation addressing the extent to which, if any, the State Bar should consider increasing access to legal services by individual consumers by implementing some form of entity regulation or other options for permitting non lawyer ownership or investment in businesses engaged in the practice of law, including consideration of multidisciplinary practice models and alternative business structures.14

With respect to Rule 5.4, the Task Force has proposed two distinct alternative amendments:

3.1 - Adoption of a proposed amended rule 5.4 [Alternative 1] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. The Alternative 1 amendments would: (1) expand the existing exception for fee sharing with a nonlawyer that allows a lawyer to pay a court


awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer in the matter; and (2) add a new exception that a lawyer may be a part of a firm in which a nonlawyer holds a financial interest, provided that the lawyer or law firm complies with certain requirements including among other requirements, that: the firm's sole purpose is providing legal services to clients; the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients; and the nonlawyers have no power to direct or control the professional judgment of a lawyer.

3.2 - Adoption of a proposed amended rule 5.4 [Alternative 2] “Financial and Similar Arrangements with Nonlawyers” which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. Unlike the narrower Recommendation 3.1, the Alternative 2 approach would largely eliminate the longstanding general prohibition and substitute a permissive rule broadly permitting fee sharing with a nonlawyer provided that the lawyer or law firm complies with requirements intended to ensure that a client provides informed written consent to the lawyer’s fee sharing arrangement with a nonlawyer.\textsuperscript{15}

The Task Force has explained, with respect to Alternative 1 (3.1):

The proposed revisions to rule 5.4 Alternative 1 are intended to facilitate the ability of lawyers to enter into financial and professional relationships with nonlawyers who work in designing and implementing cutting-edge legal technology. Underlying the Task Force efforts is the understanding, from discussions with legal technologists on the Task Force and otherwise, that a primary impediment to such relationships is the inability of lawyers to share in the profits that accrue from the delivery of legal services. The Task Force reasons that by expanding the kinds of situations under which nonlawyers can share in the profits and ownership of entities that deliver legal services, this deterrent to the adoption of technology will be removed and the concomitant

\textsuperscript{15} \textit{Id.}, at pp. 6-7.
practice efficiency enhancements will increase access to legal services.\(^\text{16}\)

As to Alternative 2 (3.2), the Task Force describes this as intended to be “a major shift in rule 5.4 around ownership and fee sharing with very limited regulation,” and that:

The Task Force’s charter specifically identifies public interest may be better served by encouraging innovation in one-to-many solutions vs the current one-to-one legal model. One of the areas of focus within the Task Force charter is nonlawyer ownership or investment - a specific area the current rule 5.4 prohibits. Perhaps the most unique portion of the current Task Force and its charter is the actual make-up of the Task Force. It is by design a majority of non-attorneys with the express purpose of the non-attorney majority to “ensure that the recommendations of the Task Force are focused on protecting the interest of the public.” Under the current rules, lawyers alone are responsible for the protection of clients - often resulting in such narrow and strict business models that a large majority of access to justice needs go unmet. The statistics evidencing the failure to meet the access to justice needs are immense and well documented.

The Alternative 2 proposed rule revision invites others who are not lawyers to the table to bring new knowledge, ideas, funding and ultimately change. In establishing ATILS, the State Bar of California sought new ideas, new leadership and new people to make the recommendations. This type of collaboration is absolutely the basis for increasing innovation. Rule changes that greatly increases the options for continued and regular collaboration is a vital step in truly increasing innovation for access to justice.\(^\text{17}\)

\(^{16}\) Id., at p. 20. The Task Force also explains: “It is important to note that paragraph (b) is substantially more limiting than what was proposed as a ‘multidisciplinary practice’ (MDP) by the ABA MDP Commission in 1999. Rather, it is based on the revisions to ABA Model Rule 5.4 as proposed by the ABA Ethics 20/20 Commission, dated 12/2/2011. Paragraph (b) only permits nonlawyer partners/owners of the firm to ‘assist’ the firm’s lawyers in the firm’s sole purpose of providing legal services. Under an MDP, the nonlawyer owners could separately and independently provide services of a nonlegal nature, e.g., accounting or financial planning services, that are not necessarily related to the provision of legal services.”). Id., at p. 21.

\(^{17}\) Id., at p. 22.
While the ABA appears uninterested in considering any changes to Rule 5.4 to allow any form of multidisciplinary practice or nonlawyer ownership interests in law firms, jurisdictions like the District of Columbia, Washington state, and California are – in the interest of providing better service to clients while, at the same time, including specific provisions in their alternatives to protect the “core principles of the profession,” such a lawyer’s professional independence – are actively investigating and implementing Rule 5.4 alternatives.\textsuperscript{18} Perhaps too, these jurisdictions will provide evidence to test the perceptions that the profession’s “core principles” will be harmed by involvement of nonlawyers in law firms. At the same time, if more states follow D.C.’s example in some form as some appear to be considering, then the United States will have a patchwork of states that allow MDP and those that do not. Because many law firms have multiple offices in different states and lawyers handle matters outside their home jurisdiction, there would be an ethics conundrum for the remaining ABA Model Rule 5.4-based states: to say nothing and disregard the concerns, or to enforce the Rules as written and create chaos.

\textbf{III. Ancillary Business.}

“ Ancillary business” may be broadly defined as any business other than the business of providing legal services. It is difficult or impossible to define the practice of law, so defining the services encompassed within the definition of ancillary business is equally difficult. Ancillary businesses are businesses that may be conducted by nonlawyers without prosecution for unauthorized practice of law. As Model Rule 5.7(b) indicates, regulators are principally concerned with “services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.”\textsuperscript{19} Ancillary business raises several questions. Should lawyers engaged in ancillary business be subject to the Model Rules? Does the answer to that question turn on whether the ancillary business is similar to the practice of law, such as professional counseling? May a lawyer conduct an ancillary business from the same firm that is providing legal services? Does a lawyer conducting an ancillary business have a heightened duty to provide information to clients about the nature of the services and, if the services do not constitute the practice of law, does the lawyer have a duty to ensure that the client understands that limitation?

Rule 5.7 has a checkered history. Not a part of the Model Rules as adopted in response to Kutak Commission Report (revised final draft, June 30, 1982), a version of Rule 5.7 was

\textsuperscript{18} Still others are allowing (or at least considering) nonlawyer involvement in law firms or entities providing legal services. For example, the USPTO allows patent agents to have financial interests in law firms. (The law firm would have to either be a D.C. law firm or one that only appeared before the USPTO.) In addition, at least some jurisdictions allow U.S. lawyers to be partners with foreign lawyers.

\textsuperscript{19} Model Rules, Rule 5.7(a).
adopted in August 1991 prohibiting most ancillary services. That rule was then rescinded in August 1992, only to be replaced in February 1994. Before its inclusion in the Ethics 2000 package, Rule 5.7 was adopted in some jurisdictions.20 Even before the Ethics 2000 revisions, many law firms were providing a wide variety of nonlegal services as ancillary businesses.21 The history of the present Rule 5.7 is instructive in how changes in the manner of practice evolve.

**First Approach (1991)**

In 1991, by a close vote, the ABA House of Delegates amended the Model Rules to prohibit lawyers and law firms from engaging in certain kinds of ancillary businesses, by enacting new Model Rule 5.7. As adopted in 1991, Model Rule 5.7 provided:

(a) A lawyer shall not practice in a law firm which owns a controlling interest in, or operates, an entity which provides nonlegal services which are ancillary to the practice of law, or otherwise provides such ancillary non-legal services, except as provided in paragraph (b).

(b) A lawyer may practice law in a law firm which provides non-legal services which are ancillary to the practice of law if:

   (1) The ancillary services are provided solely to clients of the law firm and are incidental to, in connection with and concurrent to, the provision of legal services by the law firm to such clients;

   (2) Such ancillary services are provided solely by employees of the law firm itself and not be a subsidiary or other affiliate of the law firm;

   (3) The law firm makes appropriate disclosure in writing to its clients; and

   (4) The law firm does not hold itself out as engaging in any non-legal activities except in conjunction with the provision of legal services as provided in this rule.

(c) One or more lawyers who engage in the practice of law in a law firm shall neither own a controlling interest in, nor operate,

20 Indiana, Maine, Massachusetts, North Dakota, Pennsylvania and the Virgin Islands.

an entity which provides non-legal services which are ancillary to the practice of law, nor otherwise provide such ancillary non-legal services, except that their firms may provide such services as provided in paragraph (b).

(d) Two or more lawyers who engage in the practice of law in separate law firms shall neither own a controlling interest in, nor operate, an entity which provides non-legal services which are ancillary to the practice of law, nor otherwise provide such ancillary non-legal services. ²²

The Rule would have prohibited lawyers and law firms from owning or controlling entities offering nonlegal services and limited the provision of ancillary services as part of the practice to clients receiving legal services. Thus, a law firm could offer notary services to a real estate client but could not offer investment advisory services to non-clients. Under this regime, the Model Rules would apply to all services (including nonlegal services) provided by the firm.

Repeal and Study (1992)

Model Rule 5.7 was controversial when adopted by the House, and was not adopted by any state. A year later, by a 190-183 vote, the House rescinded Model Rule 5.7 and formed a Committee on Ancillary Business to study the matter further. ²³

Second Approach (1994)

When the Committee reported back to the House in 1994, it recommended the adoption of a rule that would not prohibit ancillary business, but would clearly subject the operation of ancillary businesses to the Model Rules. At its February 1994 meeting, the House accepted the recommendation and adopted Model Rule 5.7. As adopted in 1994, Model Rule 5.7 (“Responsibilities Regarding Law-Related Services”) provided:

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients; or


(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term “law-related services” denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.24

The revised Model Rule provided an alternative, allowing a law firm to provide nonlegal services (limited by the Model Rule to services which might be performed in conjunction with and related to legal services) directly or through a controlled entity. If the services were performed through a controlled entity, they were not subject to the Model Rules if the client knows that the services being provided are not legal services. The Model Rule did not address the provision of services not related to the practice of law. The clear intent of the Model Rule was to ensure that the recipient of the services does not have a mistaken belief that the services provided do not afford the protections of the attorney-client relationship. As such, it recognized the ability of an attorney to order his or her relationship with an informed and competent client in this area. As a result of the structure of the Model Rule, it could have been read to regulate only services related to the practice of law because services unrelated to the practice of law do not involve the type of confusion about whether the client is receiving the benefit of the attorney-client relationship.

While only a few states have adopted Model Rule 5.7, several states in their ethics opinions recognized that many firms now engage in ancillary business.25 The experience of the


25 See Colo. Bar Ass’n Ethics Comm., Formal Op. 98 (Dec. 14, 1996) (although Colorado has not adopted a rule addressing ancillary business, the fact that a Colorado attorney may be engaged in such activity is recognized in Model Rule 5.7); N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.5–b (2001) (provides rules for, and limitations on, ancillary businesses. New York has placed a similar proposal before the House for consideration at the 2002 Annual Meeting); Cal. Bar Ass’n, Formal Op. 141 (1995) (a lawyer or law firm could render nonlegal services to a client directly, through a nonlawyer employee, or through an entity in which the lawyer has an ownership interest, provided that the lawyer carefully complies with the Rules of Professional Conduct of the State Bar of California); Penn. Bar Ass’n Comm. on Legal Ethics and Prof’l
ABA in moving from a flat proscription to regulation based on the knowledge and understanding of the client should have provided a good lesson on how to address the issues presented by multidimensional practice. It didn’t.

**Ancillary Business and MDP (2000)**

In 2000, the House considered some aspects of ancillary business in connection with the MDP debates. The MDP Commission defined an MDP as a practice that would deliver “both legal and nonlegal professional services.” As initially formulated, the MDP Commission initially defined an MDP as:

Responsibility, Informal Op. 92-45 (1992) (a law firm was not prohibited from forming a limited partnership or corporation to provide financial advisory and brokerage services); In re Unnamed Attorney, 645 A.2d 69 (N.H.1994) (New Hampshire version of Rule 1.15 authorized disciplinary authorities to audit financial records of title insurance company because of strong nexus between New Hampshire lawyer and company); Ohio Sup. Ct. Bd. of Comm’rs on Grievances and Discipline, Op. 94-7 (1994) (an attorney or several attorneys within a law firm may own an ancillary business that provides law-related services, but must do so in a manner consistent with the Ohio Code of Professional Responsibility. The ancillary business must not engage in activities that would be prohibited as unauthorized practice of law. “It is improper for attorneys who own an ancillary business to require that customers of the business agree to legal representation by the attorneys or their law firm as a condition of engagement of the services of the ancillary business. If customers of the ancillary business need legal services, they may be informed that the attorneys can provide the legal representation, but they must also be informed of the ownership interest and encouraged to seek legal counsel of their own choice.”); see also Ohio Sup. Ct. Bd. of Comm’rs on Grievances and Discipline, Op. 90-23 (1990); Ohio Sup. Ct. Bd. of Comm’rs on Grievances and Discipline Op. 88-018 (1988); Stephen R. Ripps, Law Firm Ownership of Ancillary Businesses in Ohio – A New Era, 27 Akron L. Rev. 1, 17 (1993) (discussing Ohio State Bar Ass’n, Formal Op. 37 (1989)); Kan. Bar Ass’n Ethics-Advisory Comm., Op. 92-04 (1992) (citing to 1991 version of Rule 5.7 and stating that a lawyer may provide title insurance services as ancillary business, provided that lawyer complies with rules of professional conduct including, but not limited to, rules on advertising, fee splitting, conflicts of interest and confidentiality); Tenn. Sup. Ct. Bd. of Prof’l Responsibility, Op. 94-F-135 (1994) (trust accounts of law-related ventures operated by lawyers subject to trust account provisions of DR 9-102); Fla. State Bar Ass’n Comm. on Professional Ethics, Op. 94-6 (1995) (law firm may operate mediation department within firm as long as mediation practice conducted in conformity with Florida Rules of Professional Conduct); S.C. Bar Ethics Advisory Comm., Op. 93-05 (1993) (law firm that provides legal services to retirement plans may own interest in, and refer clients to, ancillary business that provides services to retirement plans, if services provided do not constitute unauthorized practice of law and law firm complies with Rules 1.7 and 1.8).

[A] partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, including legal services, and there is a direct or indirect sharing of profits as part of the arrangement.27

Under the initial definition, an MDP’s nonlegal activities were not limited to professional services or “law related services.” This lead to much discussion of the law firm engaged in businesses such as tow truck operation or dry-cleaning. In an attempt to avoid muddying the issues surrounding MDP with those arguments, the MDP Commission redefined an MDP as “a practice that delivers both legal and nonlegal professional services,” thereby limiting the ancillary activities of an MDP to “professional services.” Neither of the MDP Commission’s definitions of MDP limited the activities of the MDP to “law related services.” 28

At the 2000 Annual meeting, the proposal of the MDP Commission was considered and soundly defeated in the House of Delegates. Before that meeting, Reports were filed by the MDP Commission (MDP Commission Report 2000)29 and by the New York State Bar Association headed by former ABA President Robert MacCrate (MacCrate Report).30 Among other things, the MacCrate Report addressed ancillary business, noting that, “Thus, lawyers have long recognized that there are circumstances in which it is advantageous to them and to their clients to provide integrated professional services on certain matters, and have taken steps over the past several years to create entities, within or under the control of their firms, to provide such services.”31 The MacCrate Report also noted that the ABA’s position on ancillary business was “ambiguous” and recommended an addition to the rule permitting ancillary business to make clear that the lawyer must not allow nonlawyer colleagues in the ancillary business to intrude


28  Id.


31  Id., at Chapter 4.
upon the ability of the lawyer to exercise independent professional judgment on behalf of clients.\footnote{Id. (citing William B. Dunn, Legal Ethics and Ancillary Business, 74 Mich. Bar J. 154 (1995)).}


The Recommendation makes one significant departure from the MacCrate Report, as it originally was issued. The MacCrate Report permits ancillary businesses by lawyers and law firms, so long as safeguards are in place to prevent the ownership or control of the practice of law by nonlawyers. The question of ancillary business, however, has been widely debated. Some jurisdictions permit lawyers to offer ancillary businesses, while most do not. We do not believe that the debate over multidisciplinary practice should reopen the question of ancillary business. For that reason, we commend the safeguards proposed by the MacCrate Report to the jurisdictions that permit ancillary business, but take no position on the question of whether to permit ancillary business.\footnote{Id.}

In July 2000, Report 10F was adopted by the House, although it is unclear whether the adoption means that the ABA has reversed its position on ancillary business, decided to make its position neutral, or make no change at all.

\textbf{Ancillary Business and Ethics 2000 (1999-2002)}
In its submission for final approval (Ethics 2000 Report), the American Bar Association Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000 Commission) proposed one change to the Model Rule and an addition to the Comment to clarify that the ancillary business conducted by a law firm no longer need be conducted through a separate entity. The Reporter’s note to the version of Model Rule 5.7 simply notes that the Model Rule now allows attorneys to provide ancillary services directly as opposed to requiring that they be performed through a separate entity as the former Model Rule 5.7 had required.

The earlier version of the Reporter’s Explanation of Changes issued in 1999, which did not survive to the final Ethics 2000 Report, clearly indicates the relationship of ancillary business and MDP:

Multidisciplinary practice has already been approved by the ABA. The vehicle is Rule 5.7. The primary thing that makes Rule 5.7 multidisciplinary practice different from the phenomenon debated by the ABA in August 1999 is that Rule 5.7 entities are owned or controlled by lawyers.

The version of Rule 5.4 that is before you at this meeting is intended to address the issues of both Rules 5.4 and 5.7. Rule 5.7 might be repealed if a new Rule 5.4 is adopted; certainly, if Rule 5.4 is not altered sufficiently, it would seem wise to retain present Rule 5.7. Indeed, some may prefer retaining Rule 5.7 even if a new Rule 5.4 were adopted, arguing that Rule 5.4 deals with lawyers practicing with nonlawyers while this rule deals in part with lawyers practicing as nonlawyers.

Rule 5.7(b) defines “law related services” as any services that “might reasonably be performed in conjunction with and in substance are related to the provision of legal services” but that in


38 Id. at Model Rule 5.7, Reporter’s Explanation of Changes, available at http://www.abanet.org/cpr/e2k-rule57rem.html (last visited Nov. 1, 2002).
themselves “are not prohibited as unauthorized practice of law when provided by a nonlawyer.” Comment [9] gives such examples as accounting services, financial planning, economic analysis, lobbying, and medical consulting. Many lawyers might be surprised that such services are inherently “in substance * * * related to the provision of legal services,” but we have the authority of Rule 5.7 to say it is so.

If the above services are provided by a law firm, the lawyer rules govern provision of the services. If they are provided by a separate entity “controlled by the lawyer individually or with [nonlawyers],” lawyer rules apply unless the lawyer takes “reasonable measures to assure” that customers of the separate entity know they are not getting legal services and do not have the “protections of the lawyer-client relationship.” According to Comment [2], Rule 5.7 applies to the provision of such law-related services “even when the lawyer does not provide any legal services” to the person that is to receive the client-type protection.

Rule 5.7’s focus on giving purchasers of services other than legal services the protections afforded clients duplicates what we propose for Rule 5.4. On the other hand, lawyers have long done more than practice law, and Rule 5.7 acknowledges the small-town lawyer who sells some insurance along with writing wills, as well as law firms doing mediation, and lawyers available to call up state legislators. Indeed, in the present multidisciplinary practice debate, a vote for repeal of Rule 5.7 without a change in Rule 5.4 would not be a neutral act. It might appear to close the door to a phenomenon the August debate revealed that some lawyers see as a good way to add value to the services they offer their clients.39

As adopted in 2002 by the House of Delegates as part of the Ethics 2000 package, Model Rule 5.7 eliminated the requirement that an ancillary business be conducted in a separate entity and added additional emphasis in the comment to the requirement that the attorney make clear that the recipient of the ancillary services does not enjoy an attorney-client relationship with respect to the ancillary services. The comment set forth above was replaced with a more prosaic explanation of the changes before the Ethics 2000 Report was brought before the House of Delegates for approval:

Paragraph (a)(2) has been broadened to cover all circumstances in which a lawyer’s provision of law-related services are distinct from the lawyer’s provision of legal services. This change, coupled with the changes to Comments [2] and [3], is intended to clarify that (1) there can be situations in which a law firm’s provision of law-related services will be distinct from the firm’s provision of legal services, even though rendered by the firm rather than a separate entity, and (2) that in such circumstances the lawyer must comply with paragraph (a)(2). This change closes eliminates an unintended gap in the coverage of the Model Rule.

COMMENT:

[2] This change clarifies that a lawyer can directly provide law-related services in circumstances that are distinct from the lawyer’s provision of legal services. This precludes an overly restrictive reading of paragraph (a)(1) to the effect that the provision of law-related services could never be distinct from the provision of legal services if directly provided by a lawyer or law firm, rather than by a separate entity.

[3] The new sentence clarifies that paragraph (a)(2) applies in all cases in which the provision of law-related services is distinct from the provision of legal services within the meaning of paragraph (a)(1), without regard to whether the law-related services are provided directly by the lawyer or the lawyer’s firm or by a separate entity controlled by the lawyer or law firm.

* * *

[10] The Commission changed the reference to Rule 1.7(b) in light of changes that were made to that Rule.

Modifying the Attorney-Client Relationship through Agreement and Disclosure.

As between the attorney and the client, the rules of ethics may be thought of as agency with an attitude – a codification of the rules governing the agent’s duties to the principal.40

40 Compare, e.g., Restatement (Second) of Agency § 394 (1958) (“Unless otherwise agreed, an agent is subject to a duty not to act or to agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed.”) with Model Rules, Rule 1.7 (Conflict of Interest: Current Clients); Restatement (Second) of Agency § 395 (1958) (“Unless otherwise agreed, an agent is subject to a duty to the
While the Model Rules have always had provisions permitting the client to waive certain duties under some circumstances, the revision of Model Rule 1.0(e) as adopted by the ABA in 2002 provides a new definition of “informed consent.”\(^{41}\) Model Rule 1.0(e) defines “informed consent” as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”\(^{42}\)

This is the standard that must be met in order to modify the attorney’s duties to the client where the Model Rules permit such modification. Among the duties that the Model Rules permit to be modified are the duties related to the scope of representation,\(^{43}\) the disclosure of confidential information,\(^{44}\) conflicts of interest,\(^{45}\) transactions between lawyers and clients,\(^{46}\) the use of information relating to the representation of the client to the disadvantage of the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge.”) with Model Rules, Rule 1.6 (Confidentiality of Information); Restatement (Second) of Agency § 396(b) (1958) (“Unless otherwise agreed, after the termination of the agency, the agent has a duty to the principal not to use or to disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal’s use or acquired by the agent in violation of duty.”) and Restatement (Second) of Agency § 396(d) (1958) (“Unless otherwise agreed, after the termination of the agency, the agent . . . has a duty to the principal not to take advantage of a still subsisting confidential relation created during the prior agency relation.”) with Model Rules, Rule 1.9 (Duties to Former Clients).

\(^{41}\) Model Rules, Rule 1.0(e).

\(^{42}\) Compare Model Rules, Rule 1.0(e) (definition of “informed consent”) with Restatement (Second) of Agency § 376 (1957) (“The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made, except to the extent that fraud, duress, illegality, or the incapacity of one or both of the parties to the agreement modifies it or deprives it of legal effect.”).

\(^{43}\) Model Rules, Rule 1.2(c).

\(^{44}\) Id., at R. 1.6(a).

\(^{45}\) Id., at R. 1.7(b)(4).

\(^{46}\) Id., at R. 1.8(a)(3).
client, the receipt of payment for representing a client from anyone other than the client, the obtaining of consent to settlement where the lawyer represents more than one client, the representation of a new client in the same or a substantially related matter in which the new client’s interests are materially adverse to the interests of the former client, the representation of a new client before a former governmental employer, the representation of any party that had appeared before the lawyer as a judge or arbitrator, the representation of a new client adverse to a prospective client, and the provision of a third-party evaluation which will affect the client’s interests materially and adversely. While some of the Model Rules require that the informed consent be “confirmed in writing” or signed by the client, the Model Rules now provide a definition of “informed consent,” which requires disclosure and explanation by the lawyer and intelligent assent by the client. The comment to Model Rule 1.0 confirms that the degree of explanation necessary for informed consent will vary depending upon the experience of the client and whether the client is represented by other counsel.

One of the benefits of the MDP debates before the House was the focus on what constitutes the “core values” of the profession. The Resolution ultimately adopted by the House defined the core values as: the lawyer’s duty of undivided loyalty to the client; the lawyer’s duty to competently exercise independent legal judgment for the benefit of the client; the lawyer’s duty to hold client confidences inviolate; the lawyer’s duty to avoid conflicts of interest with the client; the lawyer’s duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen.

47 Id., at R. 1.8(b).
48 Id., at R. 1.8(f).
49 Id., at R. 1.8(g).
50 Id., at R. 1.9(a).
51 Id., at R. 1.11(a)(2).
52 Id., at R. 1.12(a).
53 Id., at R. 1.18(a).
54 Id., at R. 2.3(b).
55 See, e.g., id. at R. 1.7(a) and R. 1.9(a).
56 See, e.g., id. at R. 1.8(a) and R. 1.8(g).
57 Id., at R. 1.0 cmt. 6.
having special responsibility for the quality of justice; and the lawyer’s duty to promote access to justice.58

It is interesting that under the Model Rules those “core values” about which the critics of MDP spoke most vehemently, the duties to the client of loyalty,59 confidentiality,60 and freedom from conflict61 may, with some limitations, be waived. A client may also limit the scope of representation with informed consent, provided the limitation is reasonable under the circumstances.62 It is not clear where in the Model Rules the duty to maintain the legal profession as a single profession exists.63 To the extent this is a duty to protect the client, it is subsumed in the lawyer’s duty of loyalty. To the extent it is a duty to protect the profession from competition as a trade, presumably it is reflected in Model Rules 5.4 and 5.5, which, as noted below, do not provide for waivers. The duty to provide pro bono services continues to be aspirational.64 Thus, all of the Model Rules comprising core values relating to the attorney’s relationship with the client are waivable to some extent.

The Model Rules also provide a disclosure-based approach to relationships that do not constitute attorney-client relationships. Under the Model Rules, a lawyer has a duty to ensure that where no attorney-client relationship exists, the persons with whom the lawyer is dealing understand that fact. This situation arises where the lawyer is acting as an arbitrator or mediator,65 or, as noted above, where the lawyer is providing ancillary services.66 In an

58 Report 10F, supra note 28; see supra note 67.
59 Model Rules, Rule 1.8.
60 Id., at R. 1.6.
61 Id., at R. 1.7 and R. 1.8.
62 Id., at R. 1.2(c).
63 One might note that the righteous indignation with which the MJP addresses the possibility of federal rather than state regulation of the profession suggests that we are really trying to maintain the practice of law as fifty-one separate professions.
64 Model Rules, at R. 6.1.
65 Id., at R. 2.4(b) (“A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.”).
66 Id., at R. 5.7(a)(2) (requiring the lawyer providing law-related services to “take reasonable measures to assure that a person obtaining the law-related services knows that the
environment in which fewer and fewer professional services are provided only by lawyers and where lawyers are providing a broader array of professional services, much of the definition of the practice of law may turn on whether the “client” believes that it has an attorney-client relationship with the professional.

The justification for the limitations imposed on multidimensional practice in general, and MDP in particular, are loftily propounded as being based on the need to protect the core values of the profession, particularly as they relate to the client. Nonetheless, both the Model Rules and actual practice have indicated that each of the “core values” relating to the client relationship are subject to modification by agreement. On the other hand, rules such as Model Rule 5.4, which proscribes behavior that has no direct adverse impact on the client but merely removes the lawyer from participating in a structure which might cause the lawyer to breach other duties, is not subject to waiver by informed consent. This seems irrational. For example, if a client can intelligently waive such core values as confidentiality and conflicts of interest in the traditional attorney-client relationship, should that client not be entitled to intelligently waive the risk of conflicts or the protection of confidentiality that may exist in an MDP? The Model Rules governing multidimensional practice appear to be moving in this direction, with the rules governing strategic alliances and ancillary business both imposing a disclosure obligation on the attorney. To the extent that the Model Rules move toward allowing the lawyer to practice in a multidimensional manner provided the client is informed of the limitations or risks such form of practice may entail, they are moving toward what has often been the practice with sophisticated clients, where the client knows the limitation, for example that a particular lawyer is not licensed in the state in which he needs to perform the services or that a nonlawyer is performing a particular type of service.