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**LEGAL SERVICES PROVISION
THROUGH MULTIDISCIPLINARY
PRACTICE—ENCOURAGING HOLISTIC
ADVOCACY WHILE PROTECTING
ETHICAL INTERESTS**

STACY L. BRUSTIN*

INTRODUCTION

Barbara Davis has three kids—Michael is six, Kristie is three, and Alexis is ten months old. Ms. Davis receives public assistance to support herself and her three children. She attends a job training program sponsored by a community college and is three courses away from receiving her certification in child development. She hopes to find a job and get off of public assistance within a year. The program is full time, five days a week. She relies on public transportation to get her kids to school and to get to her job training program.

Ms. Davis found out about the job training program from her case manager at The Community Center, a neighborhood organization located a few blocks from her apartment. Ms. Davis first went to The Community Center to get medical care for her kids. She could make an appointment with a doctor rather than waiting for hours as she had done in other clinics and emergency rooms.

As a patient of the medical clinic, she was entitled to use all of the services offered at The Community Center. She ob-

* Assistant Professor of Law, The Catholic University of America, Columbus School of Law. B.A., Tufts University; J.D., Harvard University. Professor Brustin teaches in the General Practice Clinic, one of three clinical programs offered through Columbus Community Legal Services. I would like to thank Vicki Szybillo and Megan Annitto who provided invaluable research assistance. I would also like to thank Jeff Gutman, Catherine Klein, and Nick Brustin for generously sharing their insights on various drafts of this Article. This Article was supported by a summer research grant from The Catholic University of America, Columbus School of Law.

tained two large bags of food once a month. She selected clothes and shoes from the second-hand clothing donations available on site, and she met with a caseworker. She expressed concerns to the caseworker about the difficulties her son, Michael, was having in school. She had requested that the school evaluate him to see if he had some type of learning problem, but school officials did not respond to her request. The caseworker sent her upstairs to make an appointment with someone in the legal clinic. She met with a lawyer at The Community Center who handles special education cases and the lawyer has been advocating on her behalf with the school system.

Since she began pursuing a legal case against the school system, Ms. Davis has become more aware of neighbors and friends who are having problems with the schools. She thought it would be helpful to talk with other parents about how to deal with these issues, but her apartment was too small to hold a meeting. She called the caseworker and asked whether they could have a gathering in one of the meeting spaces at The Community Center. The caseworker was very enthusiastic about the idea, and the group has been meeting monthly to discuss ways to improve local schools.

Multiservice organizations such as The Community Center¹ provide holistic, one-stop shopping to clients who face problems that require a multidisciplinary solution. Clients at these organizations are often struggling financially as well as emotionally. Rather than going from one non-profit agency to another in search of medical, legal, or social work services, they are able to access the services they need in one convenient location. The service providers working with these clients communicate with one another and thereby ensure quality, coordinated care. While multidisciplinary organizations such as The Community Center exist throughout the country,² this form of service delivery remains relatively rare.

1. The Community Center is a fictitious organization modeled after multidisciplinary services centers, which exist in Washington, D.C., and other parts of the country, whose mission is to provide one-stop, holistic services to low-income clients. Barbara Davis is a fictional client whose experiences reflect those of individuals receiving services in these types of multidisciplinary organizations.

2. See Louise G. Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices for People*, 7 CLINICAL L. REV. 227, 229 (2000).

Attorneys representing low-income individuals typically practice in organizations that only offer legal services. Clients needing non-legal services are referred to other agencies³ and often spend vast amounts of time and energy trying to obtain assistance. Some travel great distances, spending precious resources, to cover the transportation costs. Others simply go without needed services because the financial and emotional costs of accessing services are too great. Rather than working with clients in a holistic fashion to resolve their many complicated problems and interrelated issues, service providers often work in a vacuum.⁴

Most services address only "legal problems" or "medical problems" or "financial problems," and advocates rarely join forces to provide comprehensive assistance in one locale. When problems are addressed in such a narrow fashion, the solutions identified are bound to be limited. This limited focus also keeps clients who live in the same community and share common interests separated from one another and impedes their ability to generate ideas for addressing issues affecting their own community.

This separation of legal assistance from other vital services is not merely a reflection of shortsighted planning or lack of will. It flows from the Rules of Professional Responsibility governing attorney conduct. In every state and United States territory except for the District of Columbia, lawyers are expressly prohibited from creating partnerships and sharing fees with non-lawyers.⁵ The American Bar Association (ABA) House of Delegates, in July 2000, voted to retain the prohibition on

3. See Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123, 2144-45 (1999) (arguing that in recent times the practice of poverty law has moved away from collaboration with other disciplines and become more "atomistic").

4. See Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529, 1547 (1995). In his critique of traditional legal services practice, Feldman laments that legal services lawyers do not recognize that members of other disciplines could help lawyers acquire a broader, more comprehensive understanding of problems related to poverty. He comments that he knows of "no field program that has on staff, or even on a continuing consulting basis, an economist, psychologist, public administrator, planner, or person trained in educational policy and assessment or health care delivery." *Id.*

5. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.4 (2002) (The ABA House of Delegates revised Model Rule 5.4 to include a limited exception authorizing lawyers to share court-awarded legal fees with non-profit organizations that employ, retain, or recommend employment of the lawyer).

partnerships or fee-sharing between lawyers and nonlawyers contained in the Model Rules of Professional Conduct.⁶

Currently, the United States legal community is debating whether to adopt the ABA position or to expand ethical rules to allow for multidisciplinary practice (MDP). The recent push to expand the rules regarding multidisciplinary practice is often associated with the "Big Five" accounting firms. These firms are interested in offering a package of services, including legal services, to customers in the United States, and they have vigorously advocated for rules changes.⁷ While the impetus for change has come from the heights of the corporate business world, the ramifications of such changes on legal services practice for those living in poverty are significant. Discussion of the impact of rules prohibiting MDP on non-profit service organizations providing legal assistance,⁸ however, has been largely ab-

6. AMERICAN BAR ASS'N, REVISED RECOMMENDATION 10F (July 2000), available at <http://www.abanet.org/cpr/mdprecom10f.html>.

7. John Gibeaut, *Squeeze Play*, A.B.A. J., Feb. 1998, at 42-43. According to Gibeaut, the momentum for change began in the early 1990s when the Big Five accounting firms availed themselves of more lenient European regulatory schemes and began engaging in the practice of law in Europe. For a discussion of the "Big Five" firms, see *infra* notes 68-69. Other terms used to refer to multidisciplinary practice in the private sector include "firm diversification." See Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 FORDHAM L. REV. 559 (1992).

8. In this Article, the terms "non-profit legal services organization" or "non-profit agency" refer to organizations which provide direct legal services to individuals or groups and qualify for tax exempt status under Internal Revenue Code Section 501(c)(3) because they are organized and operated for a charitable purpose. Section 501(c)(3) authorizes tax exemption for an organization when:

no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in . . . , any political campaign on behalf of (or in opposition to) any candidate for public office.

I.R.C. § 501(c)(3). The term "charitable" is defined in the *Code of Federal Regulations* as including:

[r]elief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.

26 C.F.R. § 1.501(c)(3)-1(d)(2) (2002).

sent from the debate.⁹

This Article examines the current debate on MDP in the context of legal services provision in a non-profit setting and suggests ways for advocates and non-profit organizations to reap the benefits of multidisciplinary practice while avoiding the potential ethical pitfalls of such arrangements. Part I of the Article outlines the benefits of using a multidisciplinary model to address the legal needs of clients who are traditionally marginalized from the United States legal system. Part II explores the ethical debate surrounding multidisciplinary practice and analyzes whether the current rules of professional conduct prohibiting multidisciplinary practice apply to non-profit organizations. Part III urges states to authorize MDP for non-profit, tax exempt organizations engaged in direct legal services provision to low-income and other vulnerable client populations regardless of whether states adopt full-scale MDP for the private sector. This section offers recommendations for changes to the ethical rules and suggests organizational policies and practices that accommodate and encourage the growth of multidisciplinary non-profit practice without sacrificing ethical protection for clients or the public interest.¹⁰

I. EFFICACY OF THE MULTIDISCIPLINARY MODEL IN ADDRESSING PRESSING SOCIAL PROBLEMS

Non-profit MDPs offer a panoply of services to clients whose problems require a multidisciplinary solution. While many of these non-profit organizations provide a combination of medical, counseling, and social services, some agencies also

9. *But see* Louise Trubek, Memorandum to the Wisconsin Board of Bar Governors in Response to the Report of the Comm'n on Multidisciplinary Practice (June 18, 1999), *available at* <http://www.abanet.org/cpr/trubek.html>; Wayne Moore, American Association of Retired Persons (AARP), Oral testimony at the Hearing of the Comm'n on Multidisciplinary Practice in Washington, D.C. (Mar. 11, 1999), *available at* <http://www.abanet.org/cpr/moore1.html>; Theodore Debro, Statement at the Hearing of the Comm'n on Multidisciplinary Practice (Feb. 12, 2000), *available at* <http://www.abanet.org/cpr/debro2.html>.

10. *See* David Luban, *Asking the Right Question*, 72 TEMP. L. REV. 839, 841-42 (1999) (arguing that the debate surrounding multidisciplinary practice has focused largely on protection of clients and failed to address how MDP will impact the public interest).

offer legal assistance.¹¹ Non-profit MDPs offer one-stop shopping to clients whose complex problems do not often allow them to seek services in multiple locations. By housing a variety of services under one roof, professionals of different disciplines can bring their skills and expertise to bear upon the complex problems that clients face and develop more comprehensive, effective solutions.

A. *Benefits of Non-Profit MDP Practice*

Lawyers engaged in multidisciplinary practice extol its many virtues. A multidisciplinary model can respond to the myriad needs of those who are poor or marginalized by their social, medical, or psychological circumstances.¹² Those who live in poverty are often isolated and lack access to resources and support systems.¹³ Offering a package of services in one accessible location allows for greater efficiency and continuity of care. Clients do not have to travel from one agency to another to receive services, but can take care of all or most of their needs in a single, familiar place. Clients who would otherwise forego services because they do not have the time or

11. See Leigh Goodmark, *Can Poverty Lawyers Play Well with Others? Including Legal Services in Integrated, School-Based Service Delivery Programs*, 4 GEO. J. ON FIGHTING POVERTY 243, 253 (1997).

12. Galowitz, *supra* note 3, at 2130. See AMERICAN BAR ASS'N, COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES, Appendix: The Challenges Facing the Legal Profession in the 21st Century (July 2000) (discussing the testimony of Theodore Debro, President of Consumers for Affordable and Reliable Services of Alabama during a public hearing held by the Commission). Mr. Debro emphasized that the legal needs of poor and moderate-income individuals go largely unmet. See Debro, *supra* note 9. He articulated the belief that MDPs can play a significant role in gathering the talents of a variety of professionals and applying these talents to the challenging socio-legal problems which poor and moderate income clients face. *Id.* at 13.

13. Goodmark, *supra* note 11, at 244.

The guiding principle behind rethinking the provision of legal services for the poor should be that in addition to addressing immediate legal crises, we can and should help our clients escape their isolation by helping them with access to the services and support systems that they need. We should attempt to empower our clients by giving them the tools to alter their lives, the lives of their families, and the futures of their neighborhoods. Ultimately, our efforts should help them escape their poverty. To provide this range of services requires an admission that many attorneys are not willing to make: We cannot do it all. Lawyers lack the training and the time to provide many of these services.

Id. (citation omitted).

money to follow up on referrals to agencies throughout the city or region can receive the services they need.¹⁴

A multidisciplinary approach provides an ideal way to address complex social issues such as domestic violence,¹⁵ HIV,¹⁶ concerns facing the elderly,¹⁷ community economic development,¹⁸ and poverty more generally.¹⁹ Professionals from different disciplines can use their skills to develop more comprehensive solutions for clients. Doctors and other medical professionals can use their expertise to provide quality prenatal care for women, basic preventative primary care to children, ongoing treatment for those who are HIV-positive, and pain management services for elderly clients with chronic illnesses. Psychologists and social workers can provide therapy and counseling to individuals in crisis. These services complement the types of remedies a lawyer might secure for a client. For example, a lawyer who obtains a restraining order for a client experiencing domestic violence has addressed one narrow aspect of the problem. The client will most likely need counseling, financial assistance, and possibly medical treatment—all services a lawyer cannot provide.²⁰

14. *Id.*

15. See Trubek & Farnham, *supra* note 2, at 247–48; Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality*, 7 CLINICAL L. REV. 403, 405 (2001); see also Stacy Brustin, *Expanding Our Vision of Legal Services Representation—The Hermanas Unidas Project*, 1 AM. U. J. GENDER L. 39 (1993).

16. See, e.g., Jeffrey Selbin & Mark Del Monte, *A Waiting Room of Their Own: The Family Care Network as a Model for Providing Gender-Specific Legal Services to Women with HIV*, 5 DUKE J. GENDER L. & POLY 103 (1998); Randy Retkin et al., *Attorneys and Social Workers Collaborating in HIV Care: Breaking New Ground*, 24 FORDHAM URB. L.J. 533, 546–48 (1997).

17. See Heather A. Wydra, Note, *Keeping Secrets Within the Team: Maintaining Client Confidentiality While Offering Interdisciplinary Services to the Elderly Client*, 62 FORDHAM L. REV. 1517, 1533 (1994) (“Lawyer-nonlawyer partnerships are ideal for providing interdisciplinary services to the elderly client.”); see also Karen Bassuk & Janet Lessem, *Collaboration of Social Workers and Attorneys in Geriatric Community Based Organizations*, 13 NAELA Q. 17 (2000); Christina T. Pierce et al., *Social Work and Law: A Model for Implementing Social Services in a Law Office*, 13 NAELA Q. 3, 6–7 (2000).

18. Trubek & Farnham, *supra* note 2, at 249–56.

19. See Goodmark, *supra* note 11, at 245.

20. In addition, collaboration between lawyers and mental health professionals enables an organization to address the needs of its staff in a more comprehensive way. Mental health professionals, for example, might spend a portion of their time providing guidance and support to lawyers and other staff who are

The professionals within an organization can also assist and train one another in order to enhance the overall quality of services provided to clients. Social workers, for example, can use their training in interviewing, evaluation of client needs, assessment of mental state, crisis intervention, case management, and referral to assist as well as train lawyers to serve their clients more effectively.²¹

Professionals within the MDP can help clients identify issues and resources that the client may not have initially identified because s/he was viewing his or her problem narrowly, as a "legal" problem or a "medical" problem. For example, a social worker or case manager who has gained the trust of a client might be able to identify unanticipated legal ramifications of a problem and encourage an otherwise reluctant client to seek legal assistance within the organization.²²

Not only are such multidisciplinary services desirable, but in some cases, they may be ethically required.²³ For example, scholar and practitioner Jean Koh Peters argues that mental health professionals must help lawyers determine the competency and capacity of children, evaluate what is in the child's best interest, and assist lawyers in counseling kids about difficult and emotionally painful legal options.²⁴ While such collaboration does not have to take place within the walls of one organization, such a structure would certainly facilitate the coordination and make it easier for child clients who do not have the ability or resources to navigate among multiple service providers.

An interdisciplinary model also has the potential to encourage lawyers to create innovative programs that not only respond to the perceived needs of client communities but also actively involve clients in bringing about social change. An MDP can offer a physical space and technical assistance which members of a community can use to voice concerns, provide

experiencing the stress and burn-out characteristic of crisis-oriented, high-volume poverty practice. See Retkin et al., *supra* note 16, at 549.

21. See Galowitz, *supra* note 3, at 2126-28.

22. See Trubek & Farnham, *supra* note 2, at 257 (labeling this breaking down of barriers using a multidisciplinary approach "stealth law"); St. Joan, *supra* note 15, at 405.

23. Jean Koh Peters, *Concrete Strategies for Managing Ethically-Based Conflicts Between Children's Lawyers and Consulting Social Workers Who Serve the Same Client*, KY. CHILDREN'S RTS. J., Mar. 1991, at 15-16.

24. *Id.* at 17.

support to one another,²⁵ organize their neighbors and friends, and take steps to fight poverty, domestic violence, discrimination, or any other form of oppression they are experiencing. Staff of the MDP, whether they be lawyers, social workers, community organizers, or doctors can assist members of the community in these undertakings. The directors of MDPs can take guidance from those members of the community most directly affected by the issues the MDP aims to address. Clients and other members of the community can take a more active role in shaping the direction the organization will take.

B. History of Non-Profit Multidisciplinary Collaboration

Multidisciplinary collaborations between lawyers and nonlawyers designed to serve low-income communities are not new.²⁶ Social workers and lawyers, for example, have collaborated on projects throughout the twentieth century. During the formation of legal aid societies in the early 1900s, social workers and lawyers debated about whether to join forces and, if so, how best to structure the joint venture.²⁷ Collaborations between lawyers and nonlawyers expanded during the 1960s when private foundations and the government began funding programs offering legal services in conjunction with other types of services.²⁸ For example, in 1963, the Ford Foundation funded a program that hired lawyers to work as employees of a non-profit organization providing a variety of services to the low-income community in New Haven, Connecticut.²⁹ Around the same time, the President's Committee on Juvenile Delin-

25. See, e.g., Brustin, *supra* note 15, at 55.

26. Galowitz, *supra* note 3, at 2130 (discussing the history of social workers employed at legal services offices). She points out that one type of structure which received federal funding in the 1960s included incorporating legal services programs into multiservice centers. *Id.* (citing Alan W. Houseman, *Political Lessons: Legal Services for the Poor—A Commentary*, 83 GEO. L.J. 1669, 1671 (1995)).

27. Trubek & Farnham, *supra* note 2, at 229.

28. EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM 21-22 (1974). In an effort to assist those living in impoverished urban areas, Ford created the "gray areas program" in which it planned to use funding to establish decentralized service centers.

29. In 1963, legal departments opened in two neighborhood multiservice centers in New Haven operated by Community Progress, Inc., a non-profit corporation. This collaboration, however, was very short lived. The non-profit agency came under political pressure when the legal services program became involved in a controversial criminal case and the organization suspended the legal services program. *Id.* at 22-23.

quency provided financial support to a non-profit, multiservice organization in New York City in which lawyers and social workers joined forces to provide assistance to juveniles and their families.³⁰ Since the 1960s, multidisciplinary programs offering legal services have emerged throughout the country.³¹

C. *Structure of Non-Profit MDPs That Offer Legal Services*

Non-profit MDPs that provide direct legal services can be found in a variety of settings. Some of these programs are housed in neighborhood schools,³² local health clinics, or hospitals,³³ while others function as independent non-profit organizations.³⁴ Multidisciplinary projects have also emerged in law school clinical programs.³⁵

The structure of non-profit, multidisciplinary programs offering legal services varies. The organization may house several clinics, including a legal clinic, under one roof. In these organizations, the legal component of the program is simply one of the services offered. Other multidisciplinary programs are primarily legal in focus although they are staffed by both lawyers and nonlawyers. The goal of the organization may be

30. The organization, Mobilization for Youth, created a legal unit within the agency to provide juveniles and their families access to legal services. *Id.* at 23-25. See also Galowitz, *supra* note 3, at 2131 n.34 (citing Jose Nazario, *Confronting the System: How Social Workers Can Challenge—and Change—the Laws*, PRAC. DIG., Fall 1984, at 4, 5) (according to Nazario, a social worker at Mobilization for Youth, at one point there were twelve attorneys and seven social workers working on the project)).

31. See *supra* notes 15-19.

32. Goodmark, *supra* note 11, at 247. One model for addressing poverty in a multifaceted way focuses on school-linked services. These programs are based on the premise that "[p]lacing family-centered services in schools acknowledges the impact that non-educational problems have on a child's ability to learn, and provides a central organizing mechanism that helps avoid fragmentation of services and facilitates access to services." *Id.* at 251.

33. *Id.* at 251, 266.

34. *Id.* (discussing Zacchaeus/Bread for the City).

35. For example, Fordham University School of Law, Family & Child Protection Clinic; University of District of Columbia; David Clarke School of Law; University of Denver Domestic Violence Clinic; East Bay Community Law Center, HIV/AIDS Law Project, *cited in* LOUISE G. TRUBEK & JENNIFER J. FARNHAM, *HOW TO CREATE AND SUSTAIN A SUCCESSFUL SOCIAL JUSTICE COLLABORATIVE* (2000). The University of Maryland Clinical Law Office also uses a multidisciplinary model. See THE UNIVERSITY OF MARYLAND SCHOOL OF LAW GUIDELINES REGARDING CONFIDENTIALITY FOR SOCIAL WORK STUDENTS IN THE CLINICAL LAW OFFICE (on file with the author).

to offer holistic services to clients, but most clients who come to the agency receive legal assistance. The social workers and other nonlawyers in the organization offer clients case management or counseling services that may or may not be related to the client's legal case.

The degree to which services within these organizations are integrated or coordinated varies as well. In some organizations or programs, the professionals on staff work closely together, sharing information about clients and providing services in a coordinated fashion.³⁶ In other MDPs, professionals from different disciplines work in separate units within the organization and offer a variety of independent services to clients. In these organizations, service providers do not typically review cases as a team or provide services in a coordinated fashion.³⁷

Managerial control of non-profit MDPs generally rests, at least in part, with nonlawyers. Oftentimes, for example, a board of directors, comprised of lawyers and non-lawyers, oversees the general operation of the organization while an executive director and supervising attorneys oversee the day-to-day practice of law. The executive director, generally responsible for hiring and promotion, may or may not be an attorney.

36. This model of coordinated service provision is often referred to as "integrated service delivery." See Goodmark, *supra* note 11, at 243, 244, 247. Integrated service delivery programs attempt to address the root causes of social problems and prevent them from occurring in an intergenerational cycle. Such programs identify the numerous obstacles facing families and try to deal with these problems in a comprehensive fashion. Many of these programs attempt to be proactive rather than simply reacting to crises as they arise. As one commenter describes it, "[i]ntegrated service delivery programs feature collaboration between medical, mental health, and social work professionals and, most important, families, with each ceding some of their sovereignty in order to jointly provide for the family or child's welfare." *Id.* at 248; see also Tanya Nieman, *Using the Power of Technology to Create Community and Implement Holistic Approaches to Solving Clients' Problems*, The Equal Justice Network, available at <http://www.equaljustice.org/visions/TechConf/16-tanya.htm> (last visited Feb. 27, 2002).

37. At least one commentator uses the phrase "social justice collaboratives" to describe both integrated and non-integrated MDPs. Trubek and Farnham define social justice collaboratives as multidisciplinary practices in which "[t]he relationship to the client and among collaborators ranges from short-term service provision to a deeply integrated relationship. These relationships are characterized by frequent, ongoing interaction, commitment to the relationship and trust. Such MDPs have a clearly defined client group and a vision of how to meet the needs of that group." Trubek & Farnham, *supra* note 2, at 229.

D. Potential Costs of Non-Profit MDP Legal Services Provision

Despite the numerous benefits clients can reap from non-profit MDPs offering direct legal and non-legal services, the model raises concerns. First, some scholars have argued that organizations dominated by a variety of professionals run the risk of re-creating the types of intractable bureaucracies they were designed to counter.³⁸ The professionals within the organization, for example, may develop elaborate procedures for communicating with one another and end up making decisions about what is best for a particular client without sufficiently consulting with and counseling the client. The process for referring clients to the various programs *within* a non-profit multidisciplinary agency can become so cumbersome and complicated that the benefits of having "one-stop shopping" are effectively removed.

Second, and perhaps of greater concern, these MDP organizations arguably violate current ethical prohibitions on partnership and fee-sharing between lawyers and non-lawyers. These prohibitions exist in every state, and the extent to which they apply to non-profit MDPs engaged in direct legal services provision is somewhat unclear. This issue is more fully discussed in Part II of this Article. At a minimum, it is likely that these ethical prohibitions inhibit the widespread development of MDP non-profits.³⁹

Finally, regardless of whether ethical prohibitions on MDP apply to lawyers practicing in non-profit MDPs, lawyers in these organizations are required to adhere to general ethical mandates regarding confidentiality, competence, loyalty to clients, and independence of professional judgment. However, the extent to which non-profit MDPs have adopted institutional mechanisms for ensuring ethical protection of legal clients varies. As a result, concerns arise as to whether lawyers in these organizations are sufficiently protecting the ethical interests of their clients.

38. Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529, 1576-77 (1995) (citing Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1318-34 (1964)).

39. See discussion *infra* Part II.

II. THE ETHICAL DEBATE ABOUT MULTIDISCIPLINARY PRACTICE

Ethical rules governing attorney conduct have inhibited the growth of multidisciplinary practice in the private sector, as well as in the non-profit sector.⁴⁰ Under the Rules of Professional Conduct, lawyers are prohibited from forming partnerships and sharing fees with nonlawyers. The Model Rules of Professional Conduct have recently been revised to allow lawyers, in limited circumstances, to engage in fee-sharing with non-profit organizations. The Model Rules, however, do not explicitly authorize the type of integrated, multidisciplinary service centers described in Part I of this Article. In addition, state ethical rules regarding partnerships and fee-sharing between lawyers and nonlawyers rarely mention non-profits, and therefore, it is not clear whether and to what extent these rules limit non-profit multidisciplinary practice.

A. *Ethical Constraints on Multidisciplinary Practice*

In every state and United States territory except for the District of Columbia,⁴¹ lawyers are prohibited from forming partnerships and sharing fees with non-lawyers.⁴² The Model

40. See AMERICAN BAR ASS'N, COMM'N ON MULTIDISCIPLINARY PRACTICE, FINAL REPORT, at 1 (June 1999); see also *infra* note 140.

41. Rule 5.4(b) of the D.C. Rules of Professional Conduct states as follows: 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.

D.C. RULES OF PROF'L CONDUCT R. 5.4(b) (1991).

42. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 10 (2000). Limitations on Nonlawyer Involvement in a Law Firm (1) A nonlawyer may not own any interest in a law firm, and a nonlawyer may not be empowered to or actually direct or control the professional activities of a lawyer in the firm. (2) A lawyer may not form a partnership or other business enterprise with a nonlawyer if any of the activities of the enter-

Rules of Professional Conduct articulate these general prohibitions. Recently, the ABA authorized a narrow exception to the fee-sharing prohibition, permitting lawyers to share court-awarded attorney's fees with non-profit organizations.⁴³ Apart from this limited exception, however, the Model Rules restrict multidisciplinary practice. According to Model Rule 5.4:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) *a lawyer may share court-awarded legal fees with a non-profit organization that employed, retained or recommended employment of the lawyer in the matter.*

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

prise consist of the practice of law. (3) A lawyer or law firm may not share legal fees with a person not admitted to practice as a lawyer *Id.* (noting three narrow exceptions to §10(3) that are unrelated to issues of non-profit MDPs).

43. MODEL RULES OF PROF'L CONDUCT R. 5.4(a)(4) (2002), as adopted by the ABA House of Delegates on Feb. 5, 2002.

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

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

(1) a nonlawyer owns any interest therein . . .

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

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.⁴⁴

While many states have adopted Model Rule 5.4 in part or in its entirety, some states continue to operate under the predecessor to the Model Rules, the Model Code of Professional Responsibility. Like the Model Rules, the disciplinary rules under the Model Code also prohibit multidisciplinary practice. DR 3-102(A) states that "a lawyer or law firm shall not share legal fees with a nonlawyer."⁴⁵ DR 3-103(A) states that "a lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."⁴⁶ DR 5-107(C) mandates that "[a] lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if . . . [a] non-lawyer has the right to direct or control the professional judgment of a lawyer."⁴⁷

The language of the rules appears to target the for-profit sector, but ambiguity remains because neither the Model Rules nor the Model Code squarely addresses whether the restrictions on MDP apply to lawyers providing direct legal services in non-profit, multidisciplinary organizations. The recent revision to Model Rule 5.4, authorizing lawyers to share court-

44. *Id.* at R. 5.4 (emphasis added).

45. MODEL CODE OF PROF'L RESPONSIBILITY DR 3-102(A) (1980).

46. *Id.* at DR 3-103(A).

47. PROF'L RESPONSIBILITY STANDARDS, RULES & STATUTES 444 (Dzienkowski ed., 1999-2000).

awarded legal fees with a non-profit organization, suggests that, in all other respects, the restrictions of Model Rule 5.4 apply to lawyers in non-profit organizations.

For example, the prohibition in section (a), forbidding a lawyer or law firm from sharing fees with a nonlawyer, applies to fees charged for services. Attorneys representing low-income clients in non-profit multidisciplinary centers often do not collect fees for their services; however, there are non-profit organizations that charge modest fees. These fees may be shared with non-lawyer personnel in organizations governed by boards comprised of lawyers and nonlawyers. By its breadth, Rule 5.4(a) suggests that such fee-sharing between lawyers and nonlawyers in a non-profit setting is prohibited, unless the fees are court-awarded.

Section (b) of Model Rule 5.4, prohibiting lawyers from forming partnerships with nonlawyers, seems to be directed toward formal partnerships created to generate profit. Nevertheless, partnership is not defined. The rule and the comments do not explicitly exempt lawyers who partner with nonlawyers and form a non-profit organization from the prohibition. In fact, section (d) of Rule 5.4 specifically limits the applicability of that particular provision to lawyers practicing for a profit. One could argue, therefore, that because 5.4(b) makes no such mention of profit status, its applicability is broader in scope.

The third provision of the rule, section (c), mandates that a lawyer must not allow a person who recommends, employs, or pays the lawyer to provide legal assistance for others to influence the lawyer's professional judgment. A disciplinary committee interpreting the scope of this provision conceivably could determine that lawyers representing clients in a full-scale MDP offering non-legal services independent of legal assistance were violating the ethical proscriptions in Rule 5.4 requiring lawyers to maintain sufficient independence of professional judgment. This scenario is even more likely where the executive director and/or senior managers in the organization are non-lawyers.

Section (d) of the rule specifically prohibits lawyers from practicing in a corporation or association "*authorized to practice law for a profit*" if nonlawyers own an interest or direct the

judgment of lawyers in the organization.⁴⁸ This language suggests that a different standard applies to lawyers practicing in non-profit corporations. This distinction may have been intended to allow the operation of non-profit legal services agencies governed by boards of directors comprised of lawyers and non-lawyers.⁴⁹ There is no suggestion, however, in the comment to the rule or the legislative history that this exception was designed to permit fully-integrated, non-profit multidisciplinary practice.

B. ABA and State Interpretation of the Applicability of Rule 5.4 to Non-Profit Organizations

In looking at the plain language of the Model Rules, state rules, ethical opinions, and court decisions, it becomes evident that there are differing interpretations as to the applicability of Rule 5.4 to non-profit multidisciplinary legal services practice.

The ABA and a few state ethics committees have issued opinions interpreting Rule 5.4 as having limited or no applicability to non-profits.⁵⁰ Other ethics boards have determined

48. MODEL RULES OF PROF'L CONDUCT R. 5.4(d) (2002), as adopted by the ABA House of Delegates on Feb. 5, 2002.

49. This theory is supported by the language in Canon 5 of the ABA Model Code, which precedes Disciplinary Rule 5-107 requiring independence of judgment and prohibiting lawyers from practicing in a for-profit organization in which a non-lawyer has the right to influence professional judgment. Canon 5 specifically addresses the issue of independent judgment in non-profit legal services organizations. EC 5-24 states as follows:

Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

MODEL CODE OF PROF'L RESPONSIBILITY EC 5-24 (1980).

50. The ABA Standing Committee on Ethics and Professional Responsibility issued an opinion stating that a staff attorney for a non-profit organization or an outside lawyer retained to undertake pro bono litigation may share court-awarded fees resulting from the representation with a sponsoring non-profit organization

and may agree in advance to share the fees or turn over the entire amount. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 374 (1993). The Committee concluded that while the language of Rule 5.4(a) might be read as technically applying to the non-profit organization, it would not further the purposes of the rule to impose this restriction. *Id.* at 1. The ABA Commission also pointed to Rule 5.4(d), which prohibits nonlawyer involvement in the practice of law conducted in for-profit corporations and associations, as supporting its position that non-profits can be treated differently from for-profit corporations. According to the Commission, "[t]his provision recognizes that even though a non-profit organization may well have an economic interest in securing sources of funds, including court-awarded attorney fees, to support its otherwise economically disinterested activities, the danger of improper lay interference in such circumstances is minimal." *Id.*

The reasoning behind the ABA opinion centers around independence of professional judgment. *Id.* The Commission on Ethics and Professional Responsibility concluded that a non-profit organization, by its nature, will be pursuing litigation that is serving some type of public purpose. While the organization may have an interest in obtaining attorney's fees, the possibility of obtaining a fee award is not the primary motivating force behind the litigation. Therefore, it is far less likely that the nonlawyer managers or board members would attempt to influence the lawyers than those in a for-profit corporation. *Id.* at 2. The opinion goes further and states that even if one concedes that organizations might have a financial incentive to control the course of the litigation, the fee-sharing arrangement itself does not give the staff attorney who is handling the case an incentive to yield to the pressures imposed by the non-profit organization because the staff attorney is presumably salaried and not economically dependent upon the fee award. *Id.* The Commission recognized that an attorney might have an incentive to allow the organization to influence his or her strategy because the attorney has an interest in retaining his or her job or pleasing superiors. *Id.* at 3. However, the Commission stated that Rule 5.4(c) which prohibits lawyers from allowing a person who hires, recommends, employs or pays the attorney to represent another to influence the lawyer's judgment is sufficient to ensure independence of judgment. *Id.* The Commission's interpretation of Rule 5.4 also rests on the fact that the fees to be shared were court-awarded. Any fee award is, in effect, a statement that a public purpose has been served by the litigation and the fees are likely to be calculated in a fair manner based upon actual work performed.

See also Cleveland Bar Ass'n Op. 141 (1979); Virginia State Bar Standing Comm. on Legal Ethics, Op. 1744 (2000), available at <http://www.vacle.org/opinions/1744.htm> (last visited Apr. 7, 2002). The ethics committee determined that a lawyer could share court-awarded attorney's fees with a non-profit, public interest organization that had enlisted a lawyer to handle a case on a pro bono basis. The public interest organization at issue was governed by a board comprised, at least in part, of nonlawyers. The committee noted that many public interest organizations depend upon court-awarded attorneys' fees as a major source of funding and it did not believe that Rule 5.4(a) was intended to curb this type of funding. The committee observed that Rule 5.4(d) refers specifically to for-profit associations, suggesting that 5.4 as a whole may have limited applicability to non-profit associations. The committee emphasized that the primary objective of Rule 5.4 is to ensure that lawyers maintain professional independence and there is little if any potential interference nonlawyers on a board might have in trying to protract the litigation in order to obtain increased fees when it knows that a court will ultimately be determining whether fees are warranted and whether the amount requested is reasonable.

that restrictions on fee-sharing between lawyers and nonlawyers apply to non-profit, public interest legal practices.⁵¹

The majority of states retain the language in 5.4(d) referring to for-profit corporations or associations and make no reference to non-profit organizations in either the rule or the comments.⁵² A few states have adopted versions of Rule 5.4 that, in

51. The Rhode Island Supreme Court Ethics Advisory Panel issued an opinion that prohibited the American Civil Liberties Union from sharing court-ordered attorneys' fees with private counsel enlisted to participate in litigation. The Ethics Panel strictly construed the language of the rules and found that while public policy may suggest that the practice be permitted, the ethics rules prohibit sharing of fees between lawyers and nonlawyers. R.I. Supreme Court Ethics Advisory Panel, Op. No. 2000-05, Request No. 801 (2000), *available at* <http://www.courts.state.ri.us/supreme/ethics/pdfadvisoryopinions/2000-5.pdf> (last visited Apr. 7, 2002).

Similarly, the Ethics Committee of the Maryland Bar issued an opinion stating that a national non-profit organization could not have its in-house counsel providing low cost legal services to consumers because the provision of such services would violate Rule 5.4. Md. State Bar Ass'n, Inc., Comm. on Ethics, Ethics Docket 00-43, Legal Services, Providing Legal Services to Consumer by Entity Not Controlled by Lawyers. *See also* ACLU v. Miller, 803 S.W. 2d 592 (Mo. 1991) (public interest organization could not enforce an agreement to split court awarded attorney fees because it would constitute impermissible fee-splitting arrangement between a lawyer and non-lawyer in Missouri); Me. Comm'n on Legal Ethics, Op. 69 (1986) (finding that a public interest litigation organization cannot permissibly enter into an agreement to share court awarded fees with an attorney who handles a case in which the organization is interested. In the situation described, the organization was not a law firm and was not composed of lawyers. The Commission, therefore, stated that the arrangement would be outside the bounds of permissible fee arrangements discussed in prior ABA Ethics Opinions. The opinion also states that the arrangement would violate Maine Bar Rule 3.3(e), which is unambiguous and does not permit splitting legal fees with nonlawyers outside three clear exceptions); Tex. Eth. Op. 503 (1995) (stating that a cooperating attorney cannot agree to share legal fees with a non-profit public interest organization where the non-profit organization referred the case to him and he has been awarded attorney's fees by the court or in settlement. The Committee stated that there is no exception in Texas Disciplinary Rules of Professional Conduct 5.04 that allows this kind of fee splitting arrangement.); Mass. Bar Comm. on Prof'l Ethics Op. 97-6 (1997); Ohio Adv. Op. 95-6 (1995), *available at* <http://www.ethics.state.oh.us/opinions/95-006.html#1> (last visited Apr. 7, 2002) (finding that where a non-profit organization refers a case to an attorney, the attorney may not share a percentage of legal fees with the organization).

52. *See* ARIZ. RULES OF PROF'L CONDUCT R. 5.4; ARK. RULES OF PROF'L CONDUCT R. 5.4; ILL. RULES OF PROF'L CONDUCT R. 5.4; IND. RULES OF PROF'L CONDUCT R. 5.4; KY. RULES OF PROF'L CONDUCT R. 5.4; LA. RULES OF PROF'L CONDUCT R. 5.4; MASS. RULES OF PROF'L CONDUCT 5.4; MD. RULES OF PROF'L CONDUCT R. 5.4; ME. CODE OF PROF'L RESPONSIBILITY R. 3.10; MINN. RULES OF PROF'L CONDUCT R. 5.4; MO. RULES OF PROF'L CONDUCT R. 5.4; N.D. RULES OF PROF'L CONDUCT R. 5.4; NEV. SUPREME COURT RULES R.SPR 188; N.M. RULES OF PROF'L CONDUCT R. 16-504; OKLA. RULES OF PROF'L CONDUCT R. 5.4; R.I. RULES OF PROF'L CONDUCT R. 5.4; S.C. RULES OF PROF'L CONDUCT R. 5.4; VA. RULES OF

that, in the plain language of their rule or in the comments to the rule, state that some of the provisions of 5.4 apply to non-profits. For example, Texas and Colorado suggest that Rule 5.4(c), prohibiting those who employ or pay a lawyer from interfering in the lawyer's professional judgment, applies to non-profit legal services organizations.⁵³ Utah, on the other hand, explicitly authorizes, in its state ethical rules, legal practice in a non-profit corporation as long as those running the non-profit do not interfere with the professional judgment of the lawyers on staff.⁵⁴ In some jurisdictions, statutory restrictions inhibit multidisciplinary practice and no exception is made for non-profits. For example, Rhode Island has criminal statutes that

PROF'L CONDUCT R. 5.4; VT. RULES OF PROF'L CONDUCT R. 5.4; WIS. SUPREME COURT RULES R. 20:5.4; W. VA. RULES OF PROF'L CONDUCT R. 5.4; *see also* PA. RULES OF PROF'L CONDUCT R. 5.4, which essentially adopts the language of Model Rule 5.4 but adds a provision stating that the prohibition in section (d)(1)(2) and (4) "shall not apply to a lawyer employed in the legal department of a corporation or other organization." *Id.*

53. *See* TEX. RULES OF PROF'L CONDUCT R. 5.04 cmt. 6; COLO. RULES OF PROF'L CONDUCT R. 5.4. Comment 6 to Texas's Rule 5.04, for example, points out that the professional judgment of lawyers can be compromised in organizations that are not technically covered by 5.4. The comment, using language akin to the language in EC 5-24, discusses legal aid offices governed by boards of directors consisting of lawyers and nonlawyers as an example and states "a lawyer should not accept or continue employment with such an organization unless the board sets only broad policies and does not interfere in the relationship of the lawyer and the individual client that the lawyer serves." TEX. RULES OF PROF'L CONDUCT R. 5.04, cmt. 6. The comment further adopts the language of EC 5-24 and states "[w]henever a lawyer is employed by an organization, a written agreement that defines the relationship between the lawyer and the organization and that provides for the lawyer's professional independence is desirable since it may serve to prevent misunderstanding as to their respective roles." *Id.* *See also* N.J. RULES OF PROF'L CONDUCT R. 5.4 (the Comment to New Jersey's Rule of Professional Conduct 5.4 states that the prefatory language to the rule, i.e., "Except as otherwise provided by Court Rules" is intended to account for charitable and legal services corporations.).

Similarly, Colorado's Rule 5.4 includes the language of EC 5-24 regarding legal aid offices and the need for lawyers to maintain independence of professional judgment. COLO. RULES OF PROF'L CONDUCT R. 5.4.

54. UTAH RULES OF PROF'L CONDUCT R. 5.4(e). The rule provides that "[a] lawyer may practice in a non-profit corporation which is established to serve the public interest provided that the nonlawyer directors and officers of such corporation do not interfere with the independent professional judgment of the lawyer." The comment goes on to clarify that "[t]he rule is intended to prevent lay interference with the attorney-client relationship in non-profit public interest law firms." *Id.* at R. 5.4(e) cmt. The comment further explains that "[t]ypically, these organizations are structured so that a lay board of directors decides to undertake or fund a case or category of cases on behalf of a third party. The organization thus becomes the payor or provider of legal services for others." *Id.*

restrict the practice of law and the collection of legal fees to licensed attorneys.⁵⁵ The Rhode Island Supreme Court recently rejected a petition to amend Rule 5.4(a) and allow lawyers to share court-awarded fees with sponsoring non-profit organizations. The court stated that the proposed amendment would violate the state's criminal statute and contravene public policy as determined by the state legislature.⁵⁶

It is apparent from the language of state ethical rules, comments, and ethical opinions that any exception made for lawyers in non-profit organizations to engage in fee-sharing or practice with nonlawyers contemplates a non-profit public interest law firm or organization engaged *solely* in the provision of legal services. There is no indication that Rule 5.4 authorizes lawyers in non-profit agencies to practice alongside nonlawyer professionals who are providing services independent of the legal assistance which the lawyers are providing. In other words, the rules as written or interpreted do not authorize lawyers in non-profits to engage in full-scale MDP.

C. The Exception to the Rule—The District of Columbia

The District of Columbia is the only jurisdiction that has expressly authorized some form of legal services MDP. In 1991, the District of Columbia adopted a version of Rule 5.4 that reflects a more flexible approach to the issue of fee-sharing and partnership between lawyers and nonlawyers.⁵⁷ The rule authorizes lawyers to partner with nonlawyers and share fees under the following circumstances:

Rule 5.4 Professional Independence of a Lawyer

(a) a lawyer or law firm shall not share legal fees with a nonlawyer, except that:

....

55. R.I. GEN. LAWS §§ 11-27-3, 11-27-6, and 11-27-10 (2001).

56. See *In re Rule Amendments to Rules 5.4(a) and 7.2 (c) of the Rules of Professional Conduct*, R.I., No. 2000-436-M.P. (Feb. 15, 2002); see also 70 U.S. LAW WEEK 2573 (2002). The court further justified its action based on concerns that individuals would take advantage of the fee-sharing exception and create profitable lawyer referral enterprises in the guise of non-profit organizations.

57. See D.C. Bar Legal Ethics Comm., Op. 233 (1993) (discussing the payment of "success fees" to nonlawyer consultants).

(4) sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b).

(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.⁵⁸

The comment to the rule recognizes that while historically ethical rules prohibited lawyers from practicing with nonlawyers, "the profession implicitly recognized exceptions for lawyers who work for corporate law departments, insurance companies, and *legal service organizations*."⁵⁹ The comment goes on to state that lawyers have also hired nonlawyers to provide a variety of services that clients seek. If the lawyer retained these individuals as employees, then the lawyer was ethically free and clear to practice. The lawyer, however, could not create a partnership with such a professional without running afoul of the rules.⁶⁰ D.C.'s Rule 5.4(b) changes this historical reality. The clear intent of the rule is to allow a lawyer

58. D.C. RULES OF PROF'L CONDUCT, R. 5.4.

59. *Id.* at R. 5.4 cmt. 2 (emphasis added).

60. *Id.* at cmt. 3.

to form a partnership with a nonlawyer in order to provide essential services to clients already receiving legal services. For example, a lawyer and a psychologist can form a partnership and provide their services in a family law firm. Similarly, an accountant and a lawyer could provide accounting services and legal services respectively in a tax law firm.⁶¹

The District of Columbia has expanded the scope of Rule 5.4 to apply not only to formal partnerships in which a financial interest is held by a nonlawyer, but also to "other form[s] 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."⁶² A non-profit MDP that offers legal services and is managed by a nonlawyer executive director would meet the definition set out in D.C. Rule 5.4(b).

The D.C. rule, however, does not go so far as to allow truly multidisciplinary practice. D.C. Rule 5.4 allows lawyers to practice with other professionals whose services will assist lawyers in providing legal services to clients.⁶³ The rule mandates that the sole purpose of the partnership or organization be the provision of legal services.⁶⁴ An organization that provides services unrelated to the provision of legal assistance does not seem to be permitted under D.C.'s version of Rule 5.4. While the D.C. rule loosens the restrictions on multidisciplinary practice, non-profit organizations that provide services in addition to and independent of legal services are arguably not covered under the rule.

61. *Id.* at cmt. 7. ("[T]he 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, . . . and professional managers to serve as office managers, executive directors, or in similar positions.").

62. *Id.* at R. 5.4(b) (emphasis added).

63. *Id.*

64. *Id.* at R. 5.4(b)(1). The original proposal to revise Rule 5.4 was broader in scope and did not require that the sole purpose of the organization or firm be legal in nature. See Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 396 (1988).

D. Efforts to End Ethical Prohibitions on MDP—The ABA Debate

During the last twenty years, attorneys and other professionals have urged the American Bar Association to liberalize the ethical rules prohibiting multidisciplinary practice. While the impetus behind these reform efforts has come from the private sector, they have implications for those providing legal services in a non-profit setting.

The first major effort to change the prohibitions against MDPs took place in the early 1980s.⁶⁵ The Kutak Commission of the American Bar Association, which drafted the original ABA Model Rules of Professional Conduct, recommended that the ABA adopt a version of Rule 5.4 that would allow a variety of business arrangements between lawyers and nonlawyers.⁶⁶ In 1983, the ABA House of Delegates rejected this proposal and adopted the current version of Model Rule 5.4 banning partnerships and fee-sharing arrangements between lawyers and nonlawyers.⁶⁷

In 1998, the ABA began to revisit the MDP issue. Spurred by fears that the world's largest accounting firms⁶⁸ were providing legal services and engaging in the unauthorized practice of law,⁶⁹ the ABA created the Commission on Multidisciplinary

65. The original ABA Canon of Ethics governing lawyers' conduct, adopted in 1908, did not bar fee-sharing or partnerships between lawyers and nonlawyers. The first prohibition on MDP was enacted by the ABA in 1928 with the adoption of Canons 33–35. See Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 240–41 (2000).

66. See Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 875–77 (1999).

67. See *id.* at 876.

68. The largest accounting firms are often referred to as the "Big Five." The five firms include: KPMG International; Ernst & Young; Arthur Andersen; Deloitte, Touche & Tohmatsu; and PricewaterhouseCoopers.

69. The Big Five accounting firms employ legions of lawyers and have affiliated with law firms throughout Europe to provide their clients with a wide complement of services traditionally provided by law firms. The accounting firms also employ large numbers of lawyers in the United States who provide traditional services such as auditing, tax advice, and business management as well as estate planning, litigation support, and valuation and business planning advice. These lawyers do not hold themselves out as lawyers practicing law, but the work is similar to that done in many law firms. See Terry, *supra* note 66, at 878–82. Some suggest that the Big Five accounting firms are already practicing law in the United States. See Lawrence J. Fox, Memorandum to the Comm'n on Multidisciplinary Practice (July 8, 1999), available at <http://www.abanet.org/cpr/fox4.html>.

Practice to make recommendations about whether and how such multidisciplinary enterprises should be regulated.⁷⁰ During a two-year period, the Commission held public hearings throughout the United States. While the large accounting firms vigorously advocated for the relaxation of ethical restrictions on MDP, the ensuing debate also engaged lawyers from many sectors of the legal profession.⁷¹

Proponents of MDP argue that such practice reflects the changing marketplace and global economy.⁷² It is increasingly difficult for corporations to distinguish between "legal" issues and "business" issues.⁷³ The accounting firms argue that clients should have one-stop shopping available to them and that MDPs are essential to permit efficient and effective integration, coordination, and delivery of services.⁷⁴ Further, proponents argue that MDPs have existed throughout Europe, Australia, and Canada and have successfully met the multifaceted demands of their clients.⁷⁵

This debate not only rages in the international arena, but also permeates all levels of law practice in the United States. One can find small firm lawyers and solo practitioners aligned on both sides of the MDP debate. Those in favor of MDPs ar-

Others question whether there is sufficient independence in the control and operation of law firms affiliated with accounting firms. See Memorandum from Bernard Wolfman, Comment on Report and Recommendations of ABA Commission on Multidisciplinary Practice (July 21, 1999), available at <http://www.abanet.org/cpr/wolfman3.html> (this memorandum was presented at a hearing of the ABA Comm'n on Multidisciplinary Practice, Feb. 12, 2000).

70. See Terry, *supra* note 66, at 877-78.

71. See American Bar Ass'n, Center for Professional Responsibility, at <http://www.abanet.org/cpr/multicom.html> (last visited Apr. 7, 2002).

72. See Debra Baker, *Voices From the Other Side: Accounting Firm Calls for Changes in Lawyer Conduct Rules*, A.B.A. J., Apr. 1999, at 83; Melinda Merk & Patrick Schmidt, Written remarks for ABA Network (Feb. 12, 2000), available at <http://www.abanet.org/cpr/yld.html>; George Abbott, Statement for ABA Network (Feb. 12, 2000), available at <http://www.abanet.org/cpr/abbott.html>.

73. See Katherine Oberly, Oral remarks before the ABA Comm'n on Multidisciplinary Practice (Feb. 4, 1999), available at <http://www.abanet.org/cpr/oberly2.html>.

74. Baker, *supra* note 72, at 83; Richard Spivak, Testimony before Open Hearing of Comm'n on Multidisciplinary Practice (Washington, D.C., Mar. 12, 1999), available at <http://www.abanet.org/cpr/spivak2.html>.

75. See Irwin L. Treiger & William J. Lipton, Written remarks submitted to the Comm'n on Multidisciplinary Practice (Washington, D.C., Mar. 11, 1999), available at <http://www.abanet.org/cpr/treiger1.html>. Some European countries, such as Germany and the Netherlands, expressly authorize fully-integrated MDPs. See Terry, *supra* note 66 at 883-84; see also Laurel S. Terry, *German MDPs: Lessons to Learn*, 84 MINN. L. REV. 1547 (2000).

gue that multidisciplinary practice offers convenience to clients and may be the key to the economic survival of small practices.⁷⁶ They worry that financial planners, accountants, and alternative dispute resolution professionals are increasingly attracting clients away from the services of attorneys. Many small firm attorneys and solo practitioners in the United States believe that the formation of MDPs will enable clients to contract for all needed services in one location and all professionals involved will benefit.⁷⁷ Other small firm lawyers and solo practitioners, however, express fears that MDPs will obliterate small practice. They argue that large companies and franchises will offer a multitude of services, including legal services, and small practices will not be able to compete.⁷⁸

Opponents of MDPs also argue that the proposed changes will compromise client confidentiality, particularly given the differing duties non-legal professionals have to preserve confidentiality.⁷⁹ Accountants, for example, who are engaged in audits of financial statements of publicly traded companies have obligations to report problems they uncover.⁸⁰ In addition, the conflict of interest rules for lawyers are stricter in some respects than those for accountants.⁸¹ Accounting firms will

76. Jill Schachner Chanen, *MDP: The View From Main Street: Solos and Small Firms Have Their Own Concerns about Non-Lawyer Partners*, 85 A.B.A. J. 76, 76 (1999); Phillip Matthew Stinson, Statement at the MDP Comm'n Hearing, Cleveland, Ohio (Oct. 9, 1999), available at <http://www.abanet.org/cpr/stinson.html>. Attorneys in a small firm in Florida specializing in elder law want to join forces with a CPA and money manager in order to provide comprehensive services to clients. Under the current rules, they are prohibited from forming such a venture. See Gibeaut, *supra* note 7, at 46.

77. Scholars such as Jean Koh Peters have argued that attorneys representing children are ethically bound to cooperate with nonlawyers such as social workers in order to assess the capacity of the child, to understand what is in the child's best interest, and to interview, counsel and prepare the child for testifying. Koh Peters, *supra* note 23, at 15-16. While such cooperation does not require that lawyers and social workers practice together in the same organization, such proximity facilitates the collaboration. As Koh Peters points out, however, such collaboration can lead to conflict and she offers suggestions for managing these conflicts. *Id.*; see also Lora H. Weber, Written remarks presented at the MDP Comm'n Hearing (Washington, D.C., Mar. 11, 1999), available at <http://www.abanet.org/cpr/weber1.html>.

78. See Chanen, *supra* note 76, at 77; Robert L. Ostertag, Testimony at the MDP Comm'n Hearing, Cleveland, Ohio (Oct. 9, 1999), available at <http://www.abanet.org/cpr/ostertag.html>.

79. See Terry, *supra* note 66, at 892.

80. See John Gibeaut, *MDP in SEC Crosshairs: Accounting Firms May Cool Their Urge to Merge*, 86 A.B.A. J. 16, 16 (2000).

81. See Gibeaut, *supra* note 7, at 47; Wolfman, *supra* note 69.

sometimes represent all parties to a corporate merger or acquisition with the clients' consent, while such representation is forbidden to lawyers.⁸²

There is further concern that non-lawyers in MDPs might be compelled by law or subpoena to divulge information that a lawyer would be prohibited from divulging.⁸³ Clients who are the victims of domestic violence or elder abuse, for example, might disclose the situation to an attorney believing that the information will remain confidential. A social worker partnering with the attorney in an MDP might discover such information and be obligated by state statute to report the information.⁸⁴ Others voice concern that MDP will erode the attorney-client privilege.⁸⁵ Once information is disclosed to other professionals, the client may no longer be able to claim the attorney-client privilege (although other privileges may apply, i.e. doctor-patient, clergy-parishioner, social worker- or psychologist-patient) or the exception for agents of the attorney.⁸⁶

Opponents also fear that the independence lawyers have to make judgments and devise strategies for their cases will be compromised by the involvement of other professionals.⁸⁷ Some

82. See Robert Page, Written Remarks submitted to the MDP Comm'n Hearing (Washington, D.C., Mar. 11, 1999), available at <http://www.abanet.org/cpr/page1.html>.

83. See Lawrence Fox, Written remarks submitted to the Comm'n on Multidisciplinary Practice (Feb. 4, 1999), available at <http://www.abanet.org/cpr/fox1.html> (discussing differences in the standards which lawyers and accountants must adhere to regarding disclosure of confidential information).

84. However, several states require universal reporting of child abuse. Those obligated to report under state statutes include attorneys. Robert O. Mosteller, *Child Abuse Reporting Laws & Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203 (1992) (stating that twenty-two states have enacted statutes which require attorney reporting of child abuse).

85. This evidentiary privilege shields lawyers from having to divulge confidential information given to them by their clients. The attorney-client privilege bars the disclosure of documents that contain confidential communications between attorneys and clients, and neither the attorney nor the client may be compelled to disclose them. However, a lawyer can be compelled to disclose information if it can be shown that the confidential information was actually disclosed to a third party. See Gary T. Johnson, Address to the Assembly of the Michigan State Bar Association (Jan. 22, 2000); Steven C. Krane, Testimony before Comm'n on Multidisciplinary Practice (Aug. 8, 1999), available at <http://www.abanet.org/cpr/krane.html>.

86. See Wydra, *supra* note 17, at 1541-43.

87. Gary T. Johnson, Paper presented to the Assembly of the Michigan State Bar Ass'n, Lansing, Michigan (Jan. 22, 2000), available at <http://www.abanet.org/cpr/johnson2.html>.

believe that the sharing of fees, for example, may allow the bottom line to control, rather than concern for clients.⁸⁸ These opponents believe that market forces should not take precedence over core principles of the legal profession.⁸⁹ There is a worry that lawyers may develop conflicting fiduciary duties, one to the client and one to the nonlawyer partner.⁹⁰ Further, some express concern that the proliferation of MDPs will result in nonlawyers engaging in the unauthorized practice of law.⁹¹

After two years of public hearings and investigation,⁹² the Commission recommended, in its July 2000 report, that the ABA revise the Model Rules of Professional Conduct to allow lawyers and nonlawyers to engage in limited forms of multidisciplinary practice.⁹³ Once again, however, the ABA rejected the proposal and, on July 11, 2000, upheld the ban on multidisciplinary practice. The ABA House of Delegates urged jurisdictions around the country to resist the move toward MDP and to revise their ethical rules so as to "preserve the core values of the legal profession."⁹⁴ These core values include:

88. See *In Matter of Bragg*, 1997 WL 215942, at *9 (Cal. Bar Ct., Apr. 28, 1997). "The fundamental concern addressed by the prohibition against fee-splitting with a non-lawyer is the risk posed by the possibility of control by nonlawyers more interested in personal profit than the client's welfare." (citing *In re Arnoff*, 586 P.2d 960 (Cal. 1978)); Ostertag, *supra* note 78.

89. John Gibeaut, *MDP Debate Still Alive*, 85 A.B.A. J. 84, 84 (Oct. 1999).

90. See Chanen, *supra* note 76, at 76; Ostertag, *supra* note 78.

91. Jay G. Foonberg, Testimony before the Comm'n on Multidisciplinary Practice (Feb. 6, 1999), available at <http://www.abanet.org/cpr/foonberg.html>.

92. After its first year of investigation, the Commission recommended that the ABA House of Delegates adopt a resolution to revise Rule 5.4 to allow multidisciplinary practice. The ABA chose not to vote on the issue and, instead, adopted a resolution in favor of additional study of the MDP issue. Numerous states created their own commissions and began studying the issue. The ABA Commission held additional public hearings and received written comments from individuals and organizations throughout the legal profession.

93. AMERICAN BAR ASS'N, COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES (July 2000). The Commission recommended that "[l]awyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services (Multidisciplinary Practice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services." *Id.* at 1. The recommendation defines "nonlawyer professionals" as "members of recognized professions or other disciplines that are governed by ethical standards." The Commission further recommended that passive investment in a MDP be prohibited.

94. AMERICAN BAR ASS'N, THE HOUSE ADOPTED REVISED RECOMMENDATION 10F (July 11, 2000), available at <http://www.abanet.org/cpr/multicom.html>.

- (a) the lawyer's duty of undivided loyalty to the client;
- (b) the lawyer's duty competently to exercise independent legal judgment for the benefit of the client;
- (c) the lawyer's duty to hold client confidences inviolate;
- (d) the lawyer's duty to avoid conflicts of interest with the client;
- (e) 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
- (f) the lawyer's duty to promote access to justice.⁹⁵

The recommendation adopted in July 2000 states that fee-sharing between lawyers and nonlawyers as well as nonlawyer managerial control over entities practicing law are inconsistent with the core values of the profession.⁹⁶

Following the rejection of the MDP proposal, the ABA Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct issued a report in November 2000 recommending that Model Rule 5.4(a) be amended to allow a lawyer to "share court-awarded legal fees with a non-profit organization that employed, retained or recommended employment of the lawyer in the matter."⁹⁷ In explaining this change, the reporter to the commission noted that the Commission believed that the risk of interfering with independence of professional judgment is less in a non-profit organization than in a for-profit organiza-

95. *Id.*

96. *Id.* The core values referred to throughout the MDP debate include independence of professional judgment, protection of confidential client information, loyalty to client through avoidance of conflicts of interest, competence, and pro bono publico obligations. *Id.* The Recommendation does not urge the prohibition of contractual relationships between lawyers and nonlawyers for the provision of non-legal services. However, the Recommendation does require that the ABA Standing Committee on Ethics and Professional Responsibility review the Model Rules of Professional Conduct and recommend rules changes that require lawyers to safeguard the core values of the profession when they enter strategic, contractual alliances with nonlawyers. *Id.*

97. AMERICAN BAR ASS'N, COMM'N ON EVALUATION OF THE RULES OF PROF'L CONDUCT, REPORT WITH RECOMMENDATION TO THE HOUSE OF DELEGATES, at 221, 223 (Nov. 2000), available at <http://www.abanet.org/cpr/ethics2k.html>.

tion.⁹⁸ As discussed earlier, the ABA House of Delegates approved this change to Rule 5.4 on February 5, 2002.⁹⁹

E. The Debate Lives On in Local Arenas

The debate has now shifted from the national stage to the local arena. As the ABA Commission undertook its investigation and the issue received more public attention, states started forming their own commissions and task forces to study MDP. As of March 5, 2002, at least forty-four states and the District of Columbia had established committees to study the MDP issue.¹⁰⁰ In ten states, the commissions and/or bars have come out in favor of MDP,¹⁰¹ twenty have rejected MDP,¹⁰² ten commissions continue to study the issue,¹⁰³ one commission is divided,¹⁰⁴ and one has decided to take no formal position on the issue.¹⁰⁵

Those commissions that have recommended adoption of MDP have expressed support for differing models. Some recommend MDPs in which lawyers control the practice and

98. *Id.* at 223. The Commission agreed with the position taken in Formal Opinion 93-374 of the ABA Standing Committee on Ethics and Professional Responsibility and explained that some states ethics committees felt constrained by the existing language of 5.4 prohibiting fee-sharing even though they may have agreed with the policy rationales for allowing lawyers affiliated with non-profits to engage in such practice. Therefore, the Commission thought it was necessary to modify the language of 5.4 to expressly allow such fee-sharing arrangements. *See also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 374 (1993).

99. *See supra* note 43 and accompanying text.

100. According to information made available through the American Bar Association, Idaho and Mississippi have since disbanded their committees without issuing reports. Alaska, Hawaii, Louisiana, Massachusetts, Nevada, and Vermont have not formed committees. *See* American Bar Ass'n, Center for Professional Responsibility, MDP Information (Apr. 24, 2002), at http://www.abanet.org/cpr/mdp_state_summ.html [hereinafter MDP Information].

101. Arizona, California, Colorado, District of Columbia, Georgia, Maine, Minnesota, North Carolina, South Dakota, and Virginia. *See* MDP Information, *supra* note 100.

102. Arkansas, Delaware, Florida, Illinois, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, and West Virginia. *See* MDP Information, *supra* note 100.

103. Alabama, Connecticut, Michigan, Montana, New Hampshire, New Mexico, North Dakota, Oklahoma, Wisconsin, and Wyoming. *See* MDP Information, *supra* note 100.

104. Washington. *See* MDP Information, *supra* note 100.

105. Missouri. *See* MDP Information, *supra* note 100.

maintain majority ownership.¹⁰⁶ Other states do not go as far and, instead, advocate for an MDP model in which lawyers have significant control (not necessarily majority or supermajority).¹⁰⁷ Others recommend that nonlawyer professionals within the MDP be members of recognized professions or members of disciplines governed by ethical rules.¹⁰⁸ Some adopt the D.C. model that requires that the MDP's sole or primary purpose be the delivery of legal services.¹⁰⁹ At least one state commission has recommended that MDPs offer only nonlitigation oriented services in order to avoid breach of confidentiality.¹¹⁰ This same state endorses a certification process by which any MDP offering legal services must be certified by the state's highest court.¹¹¹

Some of the commissions that have rejected MDP outline alternative ways in which lawyers can work with nonlawyers to provide comprehensive legal representation.¹¹² These alternatives include the development of ancillary businesses and contractual relationships with nonlawyers.¹¹³ Nevertheless, the states rejecting MDP are clear in their view that full scale, integrated MDP should be prohibited. In order to protect against MDP, these states support heightened enforcement of unauthorized practice of law restrictions.¹¹⁴

106. Maine State Bar Ass'n Task Force on the Future of the Practice of Law, Preliminary Report. See MDP Information, *supra* note 100. Minnesota State Bar Ass'n Multidisciplinary Task Force Report, May 23, 2000. *Id.*

107. Denver Bar Ass'n and Colorado Bar Ass'n Joint Task Force Report on Multidisciplinary Practice, adopted by the Board of Governors of the Colorado Bar Ass'n on May 6, 2000. See MDP Information, *supra* note 100.

108. Minnesota State Bar Ass'n Multidisciplinary Task Force Report, *supra* note 106; North Carolina Bar Ass'n Multidisciplinary Practice Task Force Report; South Carolina Bar Task Force on Multidisciplinary Practice Report. See MDP Information, *supra* note 100.

109. North Carolina Bar Ass'n Multidisciplinary Practice Task Force Report. See MDP Information, *supra* note 100.

110. South Carolina Bar Task Force on Multidisciplinary Practice Report. See MDP Information, *supra* note 100.

111. See MDP Information, *supra* note 100.

112. See, e.g., N.Y. STATE BAR ASS'N SPECIAL COMM. ON THE LAW GOVERNING FIRM STRUCTURE AND OPERATION, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, at 352-55 (2000).

113. *Id.*

114. See discussion *infra* note 117 and accompanying text concerning the New York State Bar Association; Illinois State Bar Association resolution to support the ABA recommendation to continue prohibition on MDP; State Bar of Michigan Multidisciplinary Practice Committee Report; New Jersey State Bar As-

On one side of the MDP spectrum is New York.¹¹⁵ The New York State Bar Association rejected the concept of MDP and maintained the current division of practice between lawyers and non-legal professionals.¹¹⁶ The committee charged with investigating MDP recommended that New York retain its prohibition against lawyers sharing fees or acquiring ownership interest with nonlawyers.¹¹⁷ The rejection of full-scale MDP was based largely on concerns that lawyers' professional judgment and independence would be compromised if nonlawyers, motivated by profit and unfettered by rules of professional conduct, retained management interest in a firm's law practice.

The committee issued a report proposing that the Bar Association adopt a new ethical rule governing contractual relationships between lawyers and nonlegal professionals.¹¹⁸ The proposal allows lawyers to enter into contracts or arrangements with other non-legal professionals to share office space, refer clients to one another, and split administrative overhead costs. Lawyers must ensure, however, that the nonlawyers with whom they enter into such partnerships belong to a profession which requires its members to attain a reasonable level of higher education and which requires adherence to standards of professional conduct.¹¹⁹

On the other side of the spectrum is, once again, the District of Columbia. The D.C. Bar's Special Committee on Mul-

sociation MDP Committee Report; Rhode Island Bar Association Ad Hoc Committee on Multi-Disciplinary Practice Report adopted by the Rhode Island Bar Association House of Delegates.

115. The New York State Bar Association was a primary sponsor of the anti-MDP resolution ultimately approved by the ABA House of Delegates.

116. Press Release, N.Y. State Bar Ass'n, N.Y. State Bar Association Casts Skeptical Eye on Efforts to Allow Lawyers to Partner with Other Professionals (June 29, 1999) (on file with author).

117. The Committee, charged with investigating the MDP issue and making a recommendation, issued a report which the New York State Bar House of Delegates approved on June 24, 2000. See N.Y. STATE BAR ASS'N SPECIAL COMM. ON THE LAW GOVERNING FIRM STRUCTURE AND OPERATION, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS (2000). This committee was chaired by Robert MacCrate and the recommendations contained in the report were placed on the agenda of the ABA House of Delegates annual meeting scheduled for July 10-11, 2000, as a counter proposal to the ABA Comm'n on Multidisciplinary Practice's recommendation.

118. *Id.* at 352-55.

119. *Id.*

tidisciplinary Practice issued a final report advocating that the rules allowing sharing of legal fees be expanded to accommodate full-scale multidisciplinary practice.¹²⁰ The Committee reiterated that D.C. Rule 5.4 already allows fee-sharing with non-lawyers in a law firm or organization engaged solely in legal practice,¹²¹ and found no evidence to suggest that the more expansive D.C. rule has harmed the public or the profession.¹²² The Committee acknowledged that multidisciplinary practice already exists and suggested that the Bar should deal with the issue in a forthright manner.¹²³ Providers and consumers of legal services should be permitted to decide whether a multidisciplinary form of practice meets their needs.¹²⁴

The Committee reasoned that rules can be devised which authorize multidisciplinary practice while safeguarding lawyer independence, preventing conflicts of interest, and protecting confidentiality.¹²⁵ They recommended that MDPs implement procedures designed to provide: (1) adequate notice to prospective clients of the multidisciplinary nature of the practice,¹²⁶ (2) mechanisms for checking conflicts against the entire client database of an MDP firm,¹²⁷ and (3) organization of lawyers into a separate unit within the MDP to ensure independence and protection of client confidentiality.¹²⁸ As with most reports on multidisciplinary practice, the D.C. Bar Committee's report does not explicitly address non-profit MDPs.

F. The Invisibility of Non-Profit Legal Services Practice in the MDP Debate

Significant numbers of non-profit MDPs operate throughout the country,¹²⁹ yet this breed of multidisciplinary practice

120. REPORT AND RECOMMENDATION OF THE D.C. BAR SPECIAL COMM. ON MULTIDISCIPLINARY PRACTICE, Oct. 23, 2001, at 2, 3, 13.

121. *Id.* at 2, 6.

122. *Id.* at 7.

123. *Id.* at 14.

124. *Id.* at 16. "Multidisciplinary service organizations may emerge as the wave of the future or simply as one of a number of vehicles for providing professional services" *Id.*

125. *Id.* at 13, PROPOSED D.C. RULE OF PROF'L CONDUCT R. 5.4 (appended to Committee's final report).

126. *Id.* at 16-17.

127. *Id.* at 20.

128. *Id.* at 25.

129. *See supra* notes 15-19 and accompanying text.

remained largely invisible during the lengthy ABA debate.¹³⁰ The reports and recommendations emerging from state MDP commissions rarely mention the existence of non-profit MDPs.¹³¹ To date, there has been no significant discussion as to whether lawyers providing legal services in non-profit organizations should be subject to the restrictions contained in the state equivalents of Rule 5.4. There has been no analysis of how non-profit MDPs fare when measured against the core values of the legal profession most frequently discussed in the for-profit MDP debate: confidentiality, freedom from conflicts of interest, competence, and independence of professional judgment. The underlying assumption is that public interest, non-profit law practice is to be treated somewhat differently than for-profit law practice, but, once again, state commissions and ethics boards are not recommending explicit exemptions or clarifications for non-profit MDPs.

The invisibility of the non-profit MDP issue in the national and local debates has the potential to harm both clients and the legal profession more generally. It is in the non-profit arena that MDPs exist in the United States.¹³² Some of the

130. Some of the concerns or issues relevant to non-profit legal services practices were raised in Memorandum from Louise Trubek, *supra* note 9; Oral Testimony of Wayne Moore, *supra* note 9; Statement of Theodore Debro, *supra* note 9.

131. At least two states and the District of Columbia, however, have received input from the non-profit community on the MDP issue. In its report, the Minnesota State Bar Association Multidisciplinary Practice Task Force states that public interest groups have shared their view with the Task Force that MDP would benefit poor, disenfranchised clients who generally do not have access to legal representation. See Minnesota State Bar Association Multidisciplinary Practice Task Force Report and Recommendations as adopted by the MSBA General Assembly, June 23, 2000, at 5. The report cites a letter of support for MDP from Urban League President, Clarence Hightower. *Id.* at 5. The Virginia State Bar/Virginia Bar Association Joint Comm'n on Multidisciplinary Practice devoted an entire meeting of the Commission to the issue of non-profits and MDP, and heard testimony regarding how MDP is currently used or could be used to improve access to legal services. Minutes of the VSB/VBA Joint Comm'n on Multidisciplinary Practice (Nov. 28, 2000), available at http://www.vsb.vipnet.org/mdp/minutes/minutes_112800.html. The D.C. Bar Special Committee on Multidisciplinary Practice received written comments from the author of this article on May 1, 2001 regarding regulation of non-profit MDPs (on file with author).

132. See Retkin et al., *supra* note 16 at 547-48.

In the field of AIDS law, many attorneys are housed in multi-service AIDS organizations rather than separate legal aid or non-profit law offices. . . . [L]egal services have become part of a host of other services that the multi-service organization provides. There are at least sixteen

most innovative legal service programs in the country operate in a multidisciplinary practice setting.¹³³ These programs offer a potentially significant advance in the way legal services are provided to low-income and other marginalized communities. However, these practices arguably violate current ethical standards in many states. While those regulating the legal profession have not taken enforcement action against these organizations, the potential for such enforcement remains viable. In addition, the current ambiguity of the rules as applied to non-profits inhibits both the expansion of current programs and the development of new non-profit MDPs. Finally, current ethical rules offer no guidance to non-profit organizations and the lawyers working within them as to the safeguards that must be in place to protect clients. As a result, the most well intentioned non-profit MDPs may unknowingly be engaging in practices which impinge upon the ethical interests of their clients.¹³⁴

III. FORMING NON-PROFIT MULTIDISCIPLINARY LEGAL SERVICES PRACTICE TO SERVE THOSE MOST IN NEED— BALANCING COMPREHENSIVE SERVICE AND ETHICAL PROTECTION

Non-profit MDPs contribute greatly to the legal profession's efforts to improve and broaden the access of low-income and marginalized members of our society to legal services.¹³⁵

multi-service organizations in the United States that have a legal service component.

Id. (citing AMERICAN BAR ASS'N AIDS COORDINATION PROJECT, DIRECTORY OF LEGAL RESOURCES FOR PEOPLE WITH AIDS AND HIV 2 (2d ed. 1997)).

133. See Goodmark, *supra* note 11; Selbin & Del Monte, *supra* note 16.

134. In addition, by ignoring non-profit MDPs, the United States legal community is missing an opportunity to study the efficacy of multidisciplinary practice in general. During the ABA debate, many opponents of MDP argued that the legal profession should not remove the limits on multidisciplinary practice without gathering concrete evidence that such practice can successfully protect the core values of the profession. While many distinctions can be drawn between for-profit and non-profit MDPs, there are still many lessons to be learned from existing non-profit MDPs.

135. In order to acquire a better understanding of whether non-profit multidisciplinary practice actually offers benefits to clients while protecting clients' ethical interests, I studied three non-profit MDPs in Washington, D.C. I interviewed lawyers and social workers in each organization during July and August 2000. Each agency offers legal services within a broader, multiservice organization. I focused on Washington, D.C. principally because of its broad ethical rules regarding lawyers practicing with nonlawyers. I was interested to see whether these more relaxed rules had encouraged the development of more

The Model Rules of Professional Conduct, as well as the Model Code of Professional Responsibility, however, generally prohibit this form of integrated, multidisciplinary legal practice.¹³⁶ As discussed in Part II, some states tacitly recognize an exception to the rule for those providing legal service through legal aid organizations governed by boards comprised of lawyers and

these more relaxed rules had encouraged the development of more comprehensive service models.

Although D.C. Rule 5.4 allows lawyers and nonlawyers to partner and share fees in certain circumstances, the rule imposes limitations as well. As discussed earlier, the primary limitation is that, under D.C. Rule 5.4(b)(1), any organization or law firm must have as its sole purpose the provision of legal services. The organizations I studied are not strictly legal in nature. They are multidisciplinary centers offering a variety of services to clients. It is arguable that the structure of these organizations violates D.C. Rule 5.4. While an implicit exemption may exist for those providing legal services within a non-profit, public interest setting, such an exemption is not articulated in the rule or in the comment to the rule. Therefore, I have chosen not to identify the D.C. agencies or name the individuals I interviewed. Instead, I have given the organizations fictitious names to protect their identities. I refer to these organizations as: New Beginnings, The Community Center, and Strengthening Families.

The three organizations share the same general mission: to help those in need using a holistic, multidisciplinary approach to problem solving. Despite the shared objective, each organization focuses on different social issues and offers clients a different package of services. These organizations help their clients deal with a wide range of problems including domestic violence, HIV, and homelessness. The lawyers and social workers in each program strongly believe that the types of intractable social problems they are trying to deal with can best be fully addressed using a multidisciplinary, multiservice approach.

Both the legal directors and the social work supervisors I interviewed believe that multidisciplinary service offers important advantages to clients. They suggested that MDP provides more consistency of care. Clients know that they can receive a variety of services and they will be treated with respect. Rather than having to search out three or four different agencies to meet their needs, clients can turn to one resource. This leads more clients to follow through with counseling, medical care, or legal assistance. As one social worker noted, a holistic approach is more likely to lead to true intervention on behalf of the client. This, in turn, helps individuals "not just survive, but thrive."

In analyzing the three non-profit MDPs in D.C., I focused on the core values of the legal profession most frequently discussed in the debate on MDP: confidentiality, freedom from conflicts of interest, competence, and independence of professional judgment. I examined the physical set up of the organizations, the internal office procedures, the interrelationships among programs, and the training of staff. While the legal services programs within each organization had taken steps to ensure that they are maintaining high ethical standards, the degree to which they preserved confidentiality, freedom from conflicts of interest, competence, and independence of professional judgment varied among the three organizations.

136. See e.g. MODEL RULES OF PROFESSIONAL CONDUCT R. 5.4(a)(4) (authorizes a narrow exception to the prohibition on fee-sharing and permits lawyers to share court-awarded attorney's fees with non-profit organizations).

nonlawyers.¹³⁷ A few jurisdictions have explicitly articulated an exception and authorize lawyers to engage in such legal aid practice.¹³⁸ No state has gone so far, however, as to expressly allow lawyers to engage in non-profit legal services practice in a multidisciplinary organization whose purpose and mission is not purely legal in nature.

Regardless of whether the ABA or the states are willing to adopt full-scale MDP for the private sector, it is time for the legal profession to recognize and validate non-profit MDPs organized for a charitable purpose and engaged in providing legal services to low-income and other marginalized communities. Rules changes designed to accommodate such practice will not only benefit existing MDP organizations and their clients,¹³⁹ but will also allow lawyers who have been constrained by current ethical prohibitions to develop new, innovative MDP organizations designed to assist those most in need.¹⁴⁰ This section addresses many of the arguments against MDPs and suggests ways in which the ethical rules should be modified to accommodate non-profit MDP and address concerns regarding client confidentiality, conflicts of interest, competence, and independence of professional judgment.¹⁴¹ Finally, this section discusses the policies and practices that non-profit MDPs might adopt to strengthen compliance with ethical standards.

137. See *supra* note 53 and accompanying text.

138. See *supra* note 54 and accompanying text.

139. New Beginnings is an example of an organization in which the executive director would like to develop more non-legal programs, yet the director is worried that taking such steps could be interpreted as a violation of Rule 5.4.

140. NLADA Conference 2000, Panel on Multidisciplinary Practice. Many lawyers who attended the panel expressed an interest in developing multidisciplinary practice programs, but voiced concern that such practices violate ethical rules.

141. There is debate as to whether it is prudent to modify ethical rules or make exceptions to ethical rules for lawyers working in legal services organizations representing low-income clients. See, e.g., Bruce A. Green, *Foreword: Rationing Lawyers: Ethical and Professional Issues in the Delivery of Legal Services to Low-Income Clients*, 67 *FORDHAM L. REV.* 1713, 1718–19, 1722–26 (1999). Some scholars and practitioners caution against treating legal services for the poor differently than any other form of legal practice. They worry that differential treatment will translate into inferior or substandard services for low-income clients. Others argue that a different approach is critical if we are genuinely interested in addressing the huge, unmet need for services among the poor. See Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 *UCLA L. REV.* 1101 (1990).

A. By Removing Profit From the Equation, Many of the Traditional Arguments Against MDPs Do Not Apply

Many of the strenuous objections to MDP center around fee-sharing and nonlawyer ownership interest. The fear, as articulated in the New York State Bar Association Commission Report, is that nonlawyers, motivated by profit and unfettered by rules of professional conduct, will impair the judgment and independence of lawyers within the organization.¹⁴² The bottom line rather than protection of client interests will control.¹⁴³

It is less likely that the economic bottom line will control in an agency organized specifically to serve a public, charitable purpose rather than a private interest. An organization that, in order to retain its tax exempt status, is prohibited from allowing any of its net earnings to inure to the benefit of any private shareholder or individual¹⁴⁴ is not subject to the same type of pressure inherent in an organization in which such individual financial benefit is not only allowed, but encouraged.¹⁴⁵

This is not to say that economic incentives are nonexistent in a non-profit, charitable organization. Incentives to raise funds and increase salaries of staff and administrators within the organization could lead nonlawyers to attempt to improperly influence the judgment of lawyers within the organization. Other pressures, such as the desire to acquire more political power within a community or to enhance the reputation of the MDP in a particular region, might result in nonlawyer interference with professional legal judgment.

The board of directors, however, that ultimately oversees the operations of these non-profit organizations, will not stand

142. N.Y. STATE BAR ASS'N SPECIAL COMM. ON THE LAW GOVERNING FIRM STRUCTURE AND OPERATION, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, at 377-80 (2000).

143. Some authors suggest that this argument rings hollow in light of the current profit-driven environment of law firms in which partners "focus closely on bottom line profitability, implement corporate-like organizational structures, and reward rainmaking more than legal skills." Daly, *supra* note 65, at 271.

144. See discussion *supra* note 8.

145. In recommending that Rule 5.4 be modified to allow limited fee-sharing between lawyers and non-profit organizations, the Ethics 2000 Commission acknowledged that the threat to independence of professional judgment was less in the non-profit context. See AMERICAN BAR ASS'N, COMM'N ON EVALUATION OF THE RULES OF PROF'L CONDUCT, *supra* note 97, at 223.

to profit individually from the fundraising efforts of the staff. The overall charitable objective of the organization and the demands funders will place on the organization to demonstrate that it is carrying out its charitable mission are likely to check unbridled efforts to acquire funds or improperly pressure attorneys within the organization. The history of the governance of legal services organizations during the last thirty years has demonstrated that lawyers can maintain independence of professional judgment even though they may be ultimately accountable to a board of directors comprised, at least in part, of nonlawyers.¹⁴⁶

Some have raised concerns that unprincipled, enterprising individuals might attempt to structure a profit-making business as a "non-profit" organization in order to benefit from fee-sharing loopholes.¹⁴⁷ Currently, however, the ethical rules in some jurisdictions allow lawyers to contract with ancillary businesses and afford opportunities for legitimate expansion and coordination of services.¹⁴⁸ Therefore, nonlawyers looking to take advantage of fee-sharing exceptions might not find lawyers to partner with who are interested in risking disciplinary action for violating Rule 5.4 when legitimate collaborative arrangements are available. In addition, and perhaps more significantly, those who attempt to disguise a profit making venture as a non-profit organization in order to avail themselves of fee-sharing exceptions run the risk of attracting the attention of the Internal Revenue Service.

An additional concern raised by MDP opponents is that large, corporate MDPs would be unwieldy, and it would become very difficult to monitor their compliance with ethical rules.¹⁴⁹ Non-profit organizations offering legal services, however, tend to be smaller and more manageable than some of the corporate

146. See Daly, *supra* note 65, at 271.

147. See In re Rule Amendments to Rules 5.4(a) and 7.2 (c) of the Rules of Professional Conduct, R.I., No. 2000-436-M.P., 2-15-02.

148. See, e.g., 22 N.Y. COMP. CODES R. & REGS. § 1200; D.C. RULES OF PROF'L CONDUCT R. 1.7 cmt. 25; Kan. Bar Ass'n Ethics Advisory Comm., Op. 00-05 (2001), reported in *Attorneys—Conflict of Interest: Attorney May Join Ancillary Company Provided Law Practice is Kept Separate*, 70 U.S.L.W. 2143 (Dec. 4, 2001). The ABA's Standing Committee on Ethics and Professional Responsibility proposed changes to Model Rule 7.2 (c) to clarify that lawyers can enter into referral arrangements with nonlawyer professional service providers. *Attorneys—Multidisciplinary Practice: ABA Ethics Committee Proposes Rule Change Allowing Multidisciplinary Referral Pacts*, 70 U.S.L.W. 2331-32 (Dec. 4, 2001).

149. See Terry, *supra* note 66, at 892.

MDPs that exist or are envisioned. It is easier to maintain conflicts systems in non-profits, for example, because individual practitioners are less likely to bring in clients from former practices (as routinely happens in private practice) and non-profits providing direct legal services rarely have offices in multiple jurisdictions.

Much of the debate around MDP moves beyond concern for compliance with ethical standards and focuses on self-preservation for lawyers.¹⁵⁰ Some fear that the advent of MDP will lead to the demise of the legal profession as we know it. They worry that the ensuing competition would enable large corporate conglomerates to swallow up small, medium, and large law firms alike. These concerns are not at issue in a non-profit setting. Existing legal services organizations would not be threatened by the growth of non-profit MDPs.¹⁵¹ On the contrary, these MDPs would help fill a huge unmet need for legal assistance.¹⁵² Encouraging the development of non-profit MDP would facilitate greater access to legal representation for those least able to afford it.

Finally, MDP skeptics suggest that there is little research that demonstrates a demand in the private sector for one-stop shopping.¹⁵³ These skeptics argue that even if there is a demand, there is little evidence to show that MDPs would effectively satisfy such demand.¹⁵⁴ There is, however, a good deal of research and anecdotal evidence to suggest that a significant demand for holistic, integrated services in low-income and other marginalized communities exists and that an MDP model

150. See John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *FORDHAM L. REV.* 83, 89 (2000).

151. Although a large MDP offering a variety of services might end up attracting clients away from smaller programs offering one type of limited service, particularly in a small community.

152. The American Bar Association has voiced great concern about the dearth of legal services available to indigent and working class individuals. See AMERICAN BAR ASS'N, CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, *AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE—FINAL REPORT ON THE IMPLICATIONS OF THE COMPREHENSIVE LEGAL NEEDS STUDY* (1996).

153. See Steven C. Krane, N.Y. State Bar Association, Written testimony before the ABA Comm'n on Multidisciplinary Practice (Aug. 8, 1999); see also Bernard Wolfman, Written testimony before the ABA Comm'n on Multidisciplinary Practice (Feb. 12, 2000).

154. *Id.*

is highly effective in addressing the myriad needs of these clients.¹⁵⁵

Once the profit element is removed from the equation, the most frequently cited risks of MDP are greatly diminished. As discussed in Part I, however, the risks are not removed altogether. Concerns regarding client confidentiality, conflicts of interest, competence, and independence of judgment remain, but these concerns can be addressed if the Rules of Professional Conduct are clarified and if organizations implement procedures designed to protect the ethical interests of clients.

B. Modifying the Ethical Rules

While non-profit MDP organizations provide critical services to those experiencing economic, health, or family crisis, their efforts are complicated by the fact that the organizations employ lawyers who have a host of ethical duties to the clients they serve. Lawyers practicing in a multidisciplinary setting must straddle a line between allowing for innovation to address the socio-psychological-medical-economic-legal dimensions of complex social problems such as poverty, while maintaining basic ethical protection of clients regardless of their socioeconomic status.¹⁵⁶

In fact, it may be more important to ensure that principles of confidentiality, independence of judgment, competence, and conflicts of interest are upheld by lawyers for the poor because low-income clients have little choice as to who will represent them.¹⁵⁷ The ability of an individual to give meaningful consent, for example, may be compromised if s/he has no economic flexibility to pick and choose an attorney.¹⁵⁸ If clients believe that the likelihood of representation by an attorney rests with their giving consent to the lawyer to share information with

155. See discussion *supra* Part I.

156. For example, the legal directors of New Beginnings, The Community Center, and Strengthening Families are mindful of their ethical obligations and have instituted measures to protect their clients. Nevertheless, each organization has room for improvement. There are policies and practices that these organizations could implement which would strengthen the ethical protections afforded to clients receiving legal assistance.

157. See St. Joan, *supra* note 15, at 405.

158. Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 358-59 (1978).

other professionals within the agency, they may consent whether or not they truly believe it is in their best interests.

Therefore, while it is essential to develop new models for dealing with complex problems affecting low-income and marginalized communities—models which may require courts, legislatures, and bar associations to make explicit exceptions to ethical rules and statutes governing traditional law practice—it is also critical to ensure that these models protect basic tenets of the rules of professional responsibility. Rule changes authorizing lawyers and nonlawyers to practice together in non-profit MDPs should require lawyers to protect confidentiality, avoid conflicts of interest, ensure competence, and maintain independence of professional judgment so that clients are assured of ethical and zealous legal representation.¹⁵⁹ Comments to ethical rules should provide guidance to lawyers and nonlawyers alike as to how to carry out such directives. Non-lawyer managers may not have a clear understanding of the ethical standards lawyers must adhere to in representing clients and the implications these standards have for MDPs.¹⁶⁰ Lawyers in MDPs could use revised ethical rules and the comments to such rules to educate non-lawyer colleagues and managers about the need for adherence to the standards.

Arguably, this educative role will be of little value if non-lawyers are not subject to discipline for violation of the rules. Some jurisdictions have expanded the scope of the rules and begun to regulate organizations providing legal services, not simply individual attorneys.¹⁶¹ However, even in those jurisdic-

159. Whether the goal of legal services for the poor should be to assure a level of representation akin to the representation those who can pay for legal services receive is a widely debated question. See, e.g., Lucie White, *Specially Tailored Legal Services for Low-Income Persons in the Age of Wealth Inequality: Pragmatism or Capitulation?*, 67 *FORDHAM L. REV.* 2573 (1999); Tremblay, *supra* note 141, at 1101.

160. The legal director of The Community Center stated that nonlawyer staff do not understand the ethical restrictions lawyers are bound to follow. Interview with author, in Washington D.C. (July 12, 2000). The legal director of Strengthening Families highlighted several areas of tension experienced as a result of practicing in an organization run by nonlawyers. The legal director explained that nonlawyers have differing views on confidentiality and conflict of interest. Those who make decisions at the top do not understand some of the constraints under which lawyers operate. Interview with author in Washington D.C. (July 13, 2000).

161. AMERICAN BAR ASS'N, COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES, at 11 n.14, 12 n.15 (July 2000) (citing N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-102(A), 22 NYCRR 1200.3(A)) ("A lawyer

tions that have not taken this step, several incentives would operate to encourage compliance. Nonlawyer directors and managers will not want to risk the reputation of the organization, nor jeopardize funding or incur liability in a potential civil lawsuit because ethical standards have lapsed.¹⁶² Therefore, explicit guidance about confidentiality, conflicts of interest, competence, and independence of professional judgment in the non-profit MDP setting will enable MDPs to expand legal services provision while protecting important ethical principles.

1. States Rejecting MDP Should Create an Exception for Non-Profits and States Authorizing MDP Should Clarify that Non-Profits Must Maintain Ethical Protections

The American Bar Association has declined to change the Model Rules of Professional Conduct to allow for the development of full-scale MDPs. The debate has now moved to the states. While many states seem to be following in the footsteps of the ABA and continuing their prohibitions on MDP, some states are considering loosening the current restrictions and allowing certain forms of MDP. In either case, states should (1) adopt changes to Rule 5.4 which clearly authorize non-profit MDP, and (2) provide guidance in the comment section to the rule regarding the steps non-profit organizations should take to safeguard the ethical interests of clients.

Several state commissions and bar associations have adopted the ABA position and recommended that prohibitions in state versions of Rule 5.4 remain unchanged.¹⁶³ The state commissions that have come out against for-profit MDP have not addressed the issue of non-profit MDP legal services provision.¹⁶⁴ Those states should adopt express exceptions to the

or law firm shall not"); DR 5-101(E), 22 NYCRR '1200.24(E) ("A law firm shall keep records . . . and shall have a policy."); N.J. Rules of Disciplinary Jurisdiction, Rule 1:20-1(a) ("Every attorney and entity authorized to practice law . . . shall be subject to the disciplinary jurisdiction of the Supreme Court . . .").

162. See AMERICAN BAR ASS'N, COMM'N ON MULTIDISCIPLINARY PRACTICE, *supra* note 161, at 6.

163. See discussion *supra* note 100.

164. AMERICAN BAR ASS'N, COMM'N ON MULTIDISCIPLINARY PRACTICE, *supra* note 161, at 10. The Commission acknowledged that the proposals it was making to accommodate MDP would help address the complex, multidisciplinary and often unmet legal needs of low-income individuals, citing testimony presented

ethical prohibitions of Rule 5.4 to allow lawyers to practice with nonlawyers in non-profit MDP organizations. In addition, these states should offer guidance to non-profit MDPs, in the comment section of the rule, as to the parameters of ethical practice.¹⁶⁵

For those states whose MDP commissions or state bars are seriously considering a modification of Rule 5.4 to authorize some form of multidisciplinary practice,¹⁶⁶ guidance must still be provided to non-profit MDPs as to how to preserve the core values of the legal profession. The drafters of any rule changes should incorporate this guidance into the comment section explaining any modified rules. The comment should address confidentiality, conflicts of interest, competence, and independence of professional judgment. The comment should include references to non-profit MDPs in order to reinforce the notion that those in the non-profit sector are required to abide by the same ethical standards as lawyers in the private sector.

An ethical rule authorizing non-profit MDP should clarify that lawyers and nonlawyers within such an organization may share fees. The rule should also adopt the recently revised Model Rule 5.4(a)(4) that allows a lawyer to share court-awarded legal fees with a non-profit organization that retained or employed the lawyer. In addition, the rule should clearly state that all lawyers practicing in a non-profit MDP must abide by the Rules of Professional Conduct. It would be worthwhile to emphasize that regardless of the structure of the non-profit organization, lawyers must ensure that confidentiality, loyalty to clients, freedom from conflicts of interest, and competence are maintained. Furthermore, the rule itself should clarify, for the benefit of lawyers and nonlawyer managers, that lawyers must not permit nonlawyers to interfere with or influence the professional judgment of the lawyer.

by representatives from Consumers for Affordable and Reliable Services of Alabama, The Consumers Alliance of the Southeast and the Association for the Advancement of Retired Persons (AARP).

165. Depending upon the comprehensiveness of the revisions to Rule 5.4 adopted, it might be necessary to review additional rules and make changes to protect the ethical interests of non-profit MDP clients. These rules would include: Rule 1.6 (confidentiality), Rules 1.7–1.10 (conflicts of interest), Rules 5.1–5.3 (responsibilities of supervisory and subordinate lawyers, legal assistants) and Rule 5.5 (unauthorized practice of law).

166. See *supra* notes 101, 103 and accompanying text.

The comment to the rule should guide non-profit MDPs engaged in the provision of legal services as to how to uphold the core principle of confidentiality. A jurisdiction might adopt language in the comment akin to that proposed by the ABA MDP Commission in its 1999 report.¹⁶⁷ The Commission suggests that any comment to a rule authorizing MDP should instruct lawyers to do the following: (1) ensure that confidential information is inaccessible to members of the MDP who are not engaged in legal services representation; (2) inform clients about the differing reporting obligations of professionals in the MDP; (3) ensure that any communications which the lawyer intends to be kept protected under attorney-client privilege meet jurisdictional prerequisites for such privilege; (4) inform the client that all communications within the MDP may not fall under attorney-client privilege; and (5) ensure that all nonlawyers assisting the lawyer in providing legal services abide by the ethical standards governing lawyers.¹⁶⁸

In addition, the comment should clarify that each MDP must develop procedures for shielding protected client information from those individuals within the MDP obligated by law to disclose such information. If the jurisdiction permits screens to be used to address conflicts, then the comment might refer to ethical opinions that offer guidance on how to develop an effective screen. For those jurisdictions that do not generally permit the use of screens, an exception should be created to allow for screening in non-profit MDPs as a means to encourage clients to avail themselves of the multiple services available within the organization while protecting the client's legal interests.¹⁶⁹

In terms of client counseling, the comment should indicate that lawyers or members of the legal staff must advise clients about the pros and cons of information sharing between lawyers and non-lawyers within the organization and ensure that clients knowingly agree to such information sharing.¹⁷⁰ If the

167. AMERICAN BAR ASS'N, COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES (June 1999).

168. *Id.*; see also *id.* at Appendix A, Proposed Comment to Rule 1.6 Confidentiality of Information.

169. For a fuller discussion of the use of screens, see *infra* notes 243-248 and accompanying text.

170. Others have suggested that exceptions to confidentiality for inter-professional communication designed to benefit vulnerable clients such as the elderly are necessary. Proponents of such changes argue that the attorney can still

client does not want the lawyer or legal department to share information, then procedures should be instituted to ensure that confidential information is shielded from those in the organization engaged in providing nonlegal services.

The comment should clarify that the rule requires lawyers to develop mechanisms for identifying potential conflicts of interest that could compromise the representation of current or former legal clients.¹⁷¹ The ABA Commission on MDP recommended, in both 1999 and 2000, that all clients of the MDP, whether or not they are receiving legal services, should be considered clients of the lawyers in the MDP for purposes of conflict of interest screening.¹⁷² This is the most cautious approach to take, although this approach could significantly limit services to low-income residents of small communities in which the non-profit MDP may be the only source of services available.

Finally, the comment should give guidance as to how a non-profit MDP might ensure that lawyers exercise independent and professional judgment. For example, the comment should encourage non-profit MDPs to develop a separate legal department or program and designate a lawyer to coordinate the legal practice of the organization. A lawyer should be responsible for hiring, firing, and supervising all attorneys. For those organizations that only employ one attorney, the organization would need to develop a mechanism by which the attorney can receive supervision or guidance from other attorneys.

2. The Ethical Rules Should Not Limit the Structure of Non-Profit MDPs

As discussed in Part II.E, state commissions in favor of MDP have endorsed a variety of models. The two main issues on which proponents of MDP differ are the extent to which lawyers should maintain control (financial and otherwise) of

make choices about which information to divulge and can refrain from disclosing information which the client has expressly requested remain confidential or information which another professional may have a statutory duty to report. See Wydra, *supra* note 17, at 1537.

171. See discussion *infra* Part III.C.2.

172. AMERICAN BAR ASS'N, COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES, at 5 (July 2000); AMERICAN BAR ASS'N, COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES, Recommendation, at 8 (June 1999).

the organization and whether to limit the types of professionals who may provide services in an MDP. Limiting managerial control to lawyers and restricting the types of professionals eligible to collaborate with lawyers undermines the effectiveness of a non-profit, multidisciplinary, holistic practice.

Any ethical rule that a state adopts either authorizing MDP generally or exempting non-profit organizations from a ban on MDPs should not impose a requirement that lawyers control the organization or that the organization's primary purpose be legal in nature. A requirement that lawyers control the MDP is not necessary to protect independence of professional judgment, since an organization can institute policies and practices to ensure that lawyers retain professional independence. Requiring lawyer control of the MDP could inhibit the development of non-profit MDPs and thereby inhibit access to legal services. Nonlawyers who are currently managing non-profit MDPs or nonlawyers interested in starting new MDPs might simply stop offering legal services in order to avoid violating the Rules of Professional Conduct. In addition, one must attribute a large share of the creativity and innovation that non-profit MDPs have demonstrated in Washington, D.C. and around the country to the vision of nonlawyers who founded and manage many of these multiservice centers. A "lawyer control" rule would create a forced hierarchy among professionals, which could impede the collaboration and coordination that are the hallmark of multidisciplinary practice.

A requirement that the primary purpose of the non-profit MDP be legal in nature in order for the organization to provide legal services would also greatly limit the ability of the organization to serve those living in poverty or crisis.¹⁷³ The efficacy of non-profit MDPs lies in the variety of services these agencies can offer in one location to members of society whose problems are complex and whose abilities to access services are extremely limited. An individual who needs a variety of services may only have the energy or financial ability to go to one office. A non-profit MDP whose sole or primary purpose is to provide legal services would only be able to address one narrow area of concern. An individual might not even seek services from such

173. This view is shared by the legal directors at Strengthening Families, The Community Center, and New Beginnings. All three are concerned that the restriction in D.C. Rule 5.4 limiting multidisciplinary practice to organizations whose sole purpose is legal in nature disserves clients.

an organization because s/he has not identified his or her problem as legal in nature. It is only through interaction with another professional, such as a doctor or therapist, that this person might identify a concern as one requiring a legal remedy.

Similarly, rule changes designed to accommodate non-profit MDPs should not limit the types of professionals allowed to work in these organizations.¹⁷⁴ This restrictive approach was adopted in June 2000 by the ABA Commission on MDP that ultimately recommended that an MDP be comprised solely of individuals from recognized professions who are required to adhere to a published set of ethical standards.¹⁷⁵ Some states have adhered to the ABA Commission recommendations.¹⁷⁶

Requiring non-profit MDPs to hire only members of recognized professions adhering to published ethical standards would prevent non-profits from hiring social service workers, career counselors, community organizers, policy analysts, and others who may be instrumental to achieving the objectives of the organization. Most, if not all, of these individuals could be required to abide by the rules of confidentiality imposed under the Rules of Professional Responsibility governing attorneys. In situations where this is not practical, for example, when community organizers or social service providers work with groups, clients can be fully informed as to the boundaries of confidentiality.

In light of the need for and the ability of non-profit MDPs to address the myriad of complex problems faced by low-income communities and individuals in crisis, states should not impose

174. One of the legal directors I interviewed suggested that if lawyers were limited to practicing only with members of recognized professions that adhere to ethical standards, then the development of innovative, valuable MDP projects would be inhibited. Individuals such as community organizers, social service workers, and child care professionals play an integral role in the development of MDPs designed to bring comprehensive, neighborhood based services and should not be prevented from working alongside lawyers in MDPs.

175. AMERICAN BAR ASS'N, COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES, at 1 (July 2000).

The Commission has weighed carefully the merits of whether, as some have suggested, there should be any limitation on the vocation of the nonlawyer members of an MDP. It has concluded that the interests of the public would best be protected by defining "professional services" to mean "services rendered by a member of a recognized profession or other discipline that is governed by ethical standards."

Id.

176. See *supra* note 106.

limitations regarding control of the organization, scope of the practice, or composition of the organization's personnel.

3. State or Judicial Oversight of Non-Profit MDPs Is Unnecessary

Some advocates for MDP in the private sector have suggested that special rules or regulatory schemes be created to monitor the MDP organization itself, not merely the attorneys working within the organization.¹⁷⁷ The ABA Commission on Multidisciplinary Practice, for example, in its 1999 Recommendation to the ABA House of Delegates, proposed a regulatory scheme. An MDP controlled by nonlawyers would be required to submit a written document to the highest court in the jurisdiction and affirm that the MDP would (1) protect the independent professional judgment of its lawyers, and (2) ensure that lawyers and those assisting them in delivering legal services abide by the rules of professional conduct. The proposed recommendation requires the MDP to develop, maintain, and enforce procedures designed to protect the lawyers' independent professional judgment. The MDP must review these procedures annually and certify that it is complying with all requirements. Under the ABA Commission proposal, the MDP must also agree to permit the court to conduct an administrative audit of the organization to assure compliance. If the MDP fails to comply with the conditions enumerated, the court can revoke the organization's permission to deliver legal services.¹⁷⁸

Oversight proposals have also come from those advocating for public sector MDPs. Louise Trubek and Jennifer Farnham, for example, suggest that one approach for reforming the ethical rules to accommodate multidisciplinary organizations that

177. See Dzienkowski & Peroni, *supra* note 150, at 202-04.

178. AMERICAN BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, Recommendation, at 2-3 (1999); *see also* AMERICAN BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, Appendix A, Illustrations of Possible Amendments to the Model Rules of Professional Conduct Rule 5.8 Responsibilities of a Lawyer in a Multidisciplinary Practice Firm, at 5 (1999). In its final report in 2000, however, the ABA Commission on MDP acknowledged that they had received numerous comments arguing that the proposed regulatory process would not work. They decided against such a system and, instead, proposed regulation of individual lawyers. The Commission suggested that states debating whether to change the rules regarding lawyer partnership with nonlawyers consider the pros and cons of implementing a certification and audit process. AMERICAN BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, at 6 (2000).

serve low-income clients would be to develop a system for approving "social justice collaboratives." Those organizations that meet the criteria would be subject to different procedures and exceptions under existing ethical codes.¹⁷⁹ Organizations receiving approval as "social justice collaboratives" would use certified protocols to help them develop office policies and would be required to evaluate client satisfaction.¹⁸⁰

Special regulation of non-profit MDPs is unnecessary. Requiring lawyers (and those assisting them) within the organization to comply with all rules of professional conduct, including revised rules and comments addressing ethical obligations in non-profit MDP practice, should be sufficient to ensure compliance. As discussed in Part III.B, once the obligations on lawyers practicing in non-profit MDPs are clear, nonlawyers who direct multidisciplinary organizations will have a strong incentive to ensure that the attorneys within the organization are in compliance; otherwise, they risk the organization's reputation, jeopardize funding, face the weakening or demise of their legal programs due to disciplinary action, and incur possible liability in malpractice actions.¹⁸¹

Multidisciplinary programs offering legal assistance to low-income clients have been in existence in significant numbers for many years. There is no evidence to suggest that these practices have bred the types of problems that would justify creating an additional layer of bureaucratic oversight. Instead, as I witnessed while studying three such organizations, there is a need to develop rules and comments that clearly delineate and offer guidance on the ethical responsibilities of lawyers practicing in such settings. Clarification of ethical standards will encourage lawyers in non-profit MDPs to meet ethical

179. Trubek & Farnham, *supra* note 2, at 268-70.

180. *Id.* at 269. The authors discuss other models for treating law practices delivering services to low and moderate-income clients differently than those serving higher income clients. *Id.* They cite Wisconsin as a state that has a separate regulatory process overseeing group and pre-paid legal services plans. *Id.* The system ensures quality using an oversight committee and a consumer grievance process. *Id.*

181. The pressure to abide by the rules of professional responsibility will be stronger if courts take action against fraudulent organizations that claim to be non-profit MDPs serving the public interest but in actuality are engaged in other activities. Lawyers involved in organizations which claim to provide one-stop shopping but are merely collecting a fee for referring clients to for-profit attorneys or coercing clients to receive nonlegal services as a condition of continuing legal representation, for example, must be held accountable.

standards and will enable nonlawyers in those MDPs to understand the obligations under which lawyers must operate. The MDP can then use the ethical parameters set out in the rules to fashion institutional policies and practices that facilitate compliance with the standards and protect the ethical interests of clients receiving legal assistance.

C. Policies and Practices for Protecting Clients Receiving Legal Services Within a Non-Profit Multidisciplinary Service Organization

The following section discusses issues that arise in non-profit MDPs related to confidentiality, conflicts of interest, competence, and independence of professional judgment and suggests policies and procedures a non-profit MDP providing legal services might implement to protect the ethical interests of clients.¹⁸² This discussion is not meant to be an exhaustive guide. The mission of the organization, the client base it serves (including whether the organization serves individual or group clients), and the types of social problems it addresses will influence the design of the policies. In addition, legal and non-legal directors of these organizations must look to various professional ethical codes as well as state and local statutory reporting obligations and evidentiary privileges in order to devise ap-

182. Proponents of MPD, as well as bar associations studying the issue, have proposed suggested practices needed to address potential ethical problems that might arise in multidisciplinary practice. Although many of the suggestions are targeted toward for-profit entities, they are applicable to non-profit MDPs as well.

For example, in January 1999, the New York State Bar Association's Special Committee on Multidisciplinary Practice and the Legal Profession recommended that (1) MDP clients sign a document indicating they understand the multidisciplinary nature of the organization; (2) clients seeking legal service within the MDP sign a separate retainer which assures the client that the organization will maintain client confidentiality and adhere to conflict of interest rules set out by the various professions; (3) MDPs develop written policies which ensure that lawyers will maintain independent professional judgment, client confidences will be protected, the MPD will abide by all state laws governing legal services practice, and lawyers will be held responsible for violations which nonlawyers commit related to legal services; (4) MDPs develop clear conflict of interest procedures to prevent conflicts between clients of lawyers and clients of nonlawyers within the MDP; (5) at the beginning of a relationship with a new client the MDP should establish whether the services which the client needs involve the practice of law and, if so, involve an attorney from the outset. N.Y. STATE BAR ASS'N, REPORT OF THE SPECIAL COMMITTEE ON MULTIDISCIPLINARY PRACTICE AND THE LEGAL PROFESSION, at 31-32 (Jan. 8, 1999), available at <http://www.nysba.org/whatsnew/multidiscrpt.html>.

propriate and comprehensive office policies. The following guidelines, however, provide an overview of the factors and procedures a non-profit MDP should consider when drafting internal policy and procedures.

1. Confidentiality

A lawyer's obligation to maintain client confidentiality is a central tenet of the Rules of Professional Conduct.¹⁸³ A lawyer may not reveal information related to the representation of a client unless the client consents, after consultation with the lawyer, to the disclosure of such information.¹⁸⁴ This ethical principle is grounded in practical realities. Clients are more likely to seek legal counsel, develop trust in their lawyers, and reveal essential information if they believe that the lawyers will keep the revelations confidential. Those administering non-profit MDPs need to take concrete steps to ensure that the mission and structure of the organization do not inhibit a lawyer's ability to maintain client confidentiality.

a. Agreements Among Lawyers and Nonlawyers Within an Organization—Ethical Standards to Be Followed

When forming non-profit MDPs, those responsible for running the organization should establish understandings or agreements about information sharing among staff, preferably

183. MODEL RULES OF PROF'L CONDUCT R. 1.6:

Confidentiality of Information (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b); (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to secure legal advice about the lawyer's compliance with these Rules; (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (4) to comply with other law or a court order.

(as revised and adopted by the ABA House of Delegates on Feb. 5, 2002).

184. *Id.*

in writing, at the outset.¹⁸⁵ One key issue to address is that of client confidentiality. Lawyers practicing in a non-profit MDP must agree on the types of information that will be kept strictly confidential and take steps to ensure that this information will not be shared with nonlawyer staff members without the client's consent.¹⁸⁶ Similarly, doctors, psychologists, social workers, and social service workers must clarify the types of information they will or will not disclose without the client's consent.¹⁸⁷

Cross-disciplinary communication and training are essential for an MDP committed to both holistic advocacy *and* ethical protection of clients. All staff of an organization need to be familiar with the ethical responsibilities and reporting requirements imposed upon other professionals working at the agency. Using the ethical rules and comments to guide the training, lawyers within the organization must educate nonlawyers about the ethical rules under which lawyers operate.¹⁸⁸ Such training engenders better understanding among staff, enhanced service to clients, and fewer ethical crises.

It is advisable that all nonlawyer employees be required to adhere to the standards of confidentiality imposed on attorneys so far as these standards are consistent with each professional's ethical obligations under the law (i.e., social workers

185. See Retkin et al., *supra* note 16, at 562. "The process of creating these guidelines is likely to bring to the surface misunderstandings and assumptions among professionals." *Id.* Retkin recommends that the agency develop written documents for both staff and clients explaining the roles of staff members and the procedures to be followed in carrying out the mission of the organization. *Id.*

186. The attorneys and the social workers at New Beginnings routinely share information about cases. This information sharing takes place informally as well as during regularly held staff meetings. During staff meetings, if there is an issue which the lawyers need to discuss outside the presence of social workers, the social workers leave toward the end of the meeting and the lawyers continue the discussion in private. Interview with Agency Social Worker, Washington D.C. (Aug. 2000).

187. See, e.g., Goodmark, *supra* note 11, at 261 (discussing the need to clarify the boundaries of confidentiality when establishing a legal services component as part of a school based integrated service program).

188. Retkin et al., *supra* note 16, at 542 ("To effectively assist clients in resolving legal problems, including health care directives and permanency plans, social workers need awareness of the laws and policies impacting on their clients' lives, as well as the legal processes that clients must navigate to resolve conflicts. Likewise, to ensure that legal options are viable in light of their clients' familial, cultural and economic situations, attorneys assisting clients with HIV can benefit from a better understanding both of their clients' psychological needs, and the public welfare system and community services their clients use.").

might still have a statutory obligation to report suspected child abuse).¹⁸⁹ Such a policy protects clients, particularly when there are individuals employed by the MDP who may not be required to adhere to ethical standards, and it protects the organization whose attorneys are required to protect confidential information from unauthorized disclosure.¹⁹⁰

b. Informing Clients About the Boundaries of Confidential Communication

It is essential that clients seeking legal services from an MDP understand, at the outset, the multidisciplinary nature of the organization and the boundaries, if any, of confidential communication.¹⁹¹ If lawyers within the organization work in partnership with social workers, doctors, psychologists, case managers, and other types of community workers, then retainer agreements should explain this practice.¹⁹² Clients

189. This is the approach taken by New Beginnings. Interview with Executive Director, Washington D.C. (July 11, 2000). See Retkin et al., *supra* note 16, at 553 ("The privilege is not waived, nor does it violate the lawyer's ethical duty of confidentiality, if client information is shared with employees of the lawyer, including administrators, messengers, and typists Although untested, one of the best hopes of maintaining the privilege for clients after the disclosure of confidential information to social workers and others, would be to characterize such disclosure as necessary for the provision of legal services, i.e., their technical knowledge is necessary to resolve the legal matter.").

190. "A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt 15.

191. New Beginnings has taken care to ensure that its clients are informed as to the differing obligations regarding confidentiality which lawyers and social workers may have, particularly in terms of reporting suspected child abuse or neglect. Clients who sign retainers for legal services must also sign an acknowledgment of understanding regarding social workers' obligations to report suspected abuse or neglect. See Interview with Agency Social Worker, *supra* note 186.

192. New Beginnings uses a legal retainer form that advises the client that information will be shared among the staff and will remain confidential. In addition, social workers on staff sign an agreement stating that they will adhere to the standards imposed upon attorneys under the D.C. Rules of Professional Conduct (with the exception of certain reporting requirements imposed on social workers). See Interview with Agency Social Worker, *supra* note 186.

Lawyers must be sensitive to the fact that many clients have limited reading capabilities and policies should generally be explained verbally rather than simply relying on the client to read the documents. In addition, the documents themselves need to be phrased in simple, straightforward language.

should provide informed consent to cross-disciplinary information sharing.¹⁹³ Some organizations use a general retainer for all services provided while having the client fill out an additional retainer for legal services. Other organizations have different contracts or agreements they use for each specific service provided. Regardless of the method used, all clients seeking legal assistance should understand and sign a retainer for legal services that outlines the unique aspects of multidisciplinary practice.

To provide another layer of protection for the clients who obtain legal services from an MDP, lawyers should ask the clients to sign a separate release authorizing the lawyer to speak with nonlawyer staff members about the case.¹⁹⁴ Further, the client should be informed that s/he may, at any time, expressly prohibit the lawyer from divulging information.¹⁹⁵ Many staff members will have similar ethical obligations to maintain confidentiality and testimonial privilege, but these obligations do not extend to all professions. Thus, the client should be informed about any limitations on confidentiality.¹⁹⁶

The attorney should inform the client that other professionals may have a statutory duty to report certain types of be-

193. According to the Model Rules of Professional Conduct, as revised by the ABA in February 2002, in order to ensure that a client is providing informed consent, "[t]he lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives." MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 6.

194. New Beginnings takes this approach. See Interview with Agency Social Worker, *supra* note 186; see also Trubek & Farnham, *supra* note 2, at 240, 248 (The authors discuss organizations working with "at-risk" families as well as groups working with domestic violence survivors which use protocols to obtain information from clients and have clients sign release consent forms that explain differing statutory reporting obligations and require the client to authorize information sharing among professionals in an organization.).

195. If an organization wanted to take a more cautious approach, rather than having the client sign a general release, the agency could adopt a policy requiring the lawyer to obtain the client's permission to speak with a nonlawyer on staff when the need arises during the course of the representation rather than at the outset of the representation.

196. Clients need to understand the limits of confidentiality in group as well as individual interactions with nonlawyers in an MDP. If a lawyer refers a client to a workshop taking place at the MDP, the lawyer needs to inform the client that just because the lawyer is making the referral does not mean that all disclosures made during the workshop will remain confidential.

havior or conduct.¹⁹⁷ The safest approach for protecting confidentiality is to explain this to a client at the outset of the representation.¹⁹⁸ Some suggest that having this conversation at

197. In a non-profit organization, this issue most typically arises in the context of mandatory reporting of child abuse. See St. Joan, *supra* note 15, at 425-30; Trubek & Farnham, *supra* note 2, at 248. One can also envision a reporting conflict arising between lawyers and accountants regarding disclosure of audit findings in community economic development projects sponsored by MDPs.

Non-profit organizations and law school clinical programs currently working in collaboration with social workers have devised differing procedures to address confidentiality issues. These programs have developed materials to inform office personnel as well as clients about these issues.

At the University of Denver, for example, attorneys and student lawyers in the Domestic Violence Civil Justice Project collaborate with a social worker and social work interns on cases in which the clients have consented to such collaboration. Memorandum from Jacqueline St. Joan, Director of Clinical Programs at University of Denver, Notice of the Student Law Office Confidentiality Wall, *reprinted in* TRUBEK & FARNHAM, *supra* note 35, at 55-58. The Student Law Office at the University of Denver developed policies to create confidentiality walls in situations where a client has divulged information regarding child abuse and neglect. *Id.*

All employees, student lawyers, and social work interns are advised that an attorney/student lawyer must initially interview the client alone and advise her of the attorney-client privilege; identify benefits and risks of working with a social worker/intern; explain legal definitions of child abuse and neglect; determine whether there has been abuse in the past; and outline the client's options. *Id.* These options include: (1) declining to work with a social worker and keeping all information inside the confidentiality wall (i.e., case files are marked and social workers/interns are prohibited from reviewing these files); or (2) working with social workers/interns and disclosing information that both social workers and lawyers will keep confidential, but withholding any information from social workers that a social worker would be obligated to report and maintaining this information within the confidentiality wall in a separate case file. *Id.* Clients are also instructed to first discuss information regarding future abuse or neglect and the client's options with the attorney. In an effort to protect client identity, student attorneys are prohibited from discussing "hypothetical" child abuse and neglect scenarios based on facts from their cases with social workers or social work interns working in the clinic. *Id.*

The University of Maryland School of Law has issued Guidelines Regarding Confidentiality for Social Work Students in the Clinical Law Office which outlines the attorney's duty to maintain confidentiality and discusses the three situations under Maryland law in which a social worker is obligated to report (in situations of child abuse and neglect, abuse of a vulnerable adult, and situations in which a client threatens to harm himself or others). THE UNIVERSITY OF MARYLAND SCHOOL OF LAW GUIDELINES REGARDING CONFIDENTIALITY FOR SOCIAL WORK STUDENTS IN THE CLINICAL LAW OFFICE (on file with the author). Student attorneys are instructed to discuss potential breaches of confidentiality with the attorney supervisor and client before referring the case for social work services. After advising the client of these issues, the client signs a confidentiality contract which outlines the confidentiality policy and situations in which a confidence may be disclosed. *Id.*

198. See, e.g., Family Options Project Client Consent Form, *reprinted in* TRUBEK & FARNHAM, *supra* note 35, at 68. The Family Options Program in Chi-

such an early stage can inhibit the building of rapport between the client and the lawyer and the client and the social worker.¹⁹⁹ Clients may not be able to understand the distinction between lawyers' obligations and social workers' obligations and the client may decide that the safest course of action is not to divulge much information. This risk has to be weighed against the possibility that a client will unknowingly reveal information to a professional at the MDP who is obligated to report.²⁰⁰

State ethics boards have addressed the reporting issue and the need to inform clients of the differing obligations of lawyers and social workers. The D.C. Bar Legal Ethics Committee, for example, issued an opinion discussing the duties of a lawyer who employs a social worker whose legal obligations include reporting suspected child abuse.²⁰¹ According to the Committee, "[t]he inconsistent duties of the social worker and the lawyer—the social worker to report under the child abuse and neglect law, the lawyer to assure that confidences and secrets of a client are preserved—require that the lawyer take steps to assure that the client understands the inconsistency."²⁰²

In other words, the client should understand that just because an organization provides legal services does not mean that all information disclosed within the walls of the organization remains absolutely confidential. At the same time, the lawyer should also advise the client of comparable duties of confidentiality other professionals may have and assure the client that, except for certain reporting requirements, these professionals are required to keep information confidential.

cago, Illinois has clients sign a consent form that includes a section on Child Abuse and Neglect Reporting. The form states that "[s]ocial workers are among the professionals who are mandated to report suspected instances of child abuse and neglect to DCFS." *Id.*

199. The social workers that I interviewed at all three non-profit MDPs raised this concern.

200. See Retkin et al., *supra* note 16, at 555–56. For a more complete discussion of issues to address and procedures to adopt when lawyers collaborate with social workers, see Galowitz, *supra* note 3; Peters, *supra* note 23; Lisa A. Stanger, *Conflicts Between Attorneys and Social Workers Representing Children in Delinquency Proceedings*, 65 *FORDHAM L. REV.* 1123 (1996).

201. D.C. Bar Ass'n Legal Ethics Comm., Op. No. 282, *Duties of Lawyer Employing A Social Worker Who is Obligated to Report Child Abuse*, reported in 126 *DAILY WASH. L. REP.* 1445 (July 31, 1998).

202. *Id.* at 1447 (citing D.C. CODE OF PROF'L CONDUCT R. 1.4(b) (stating that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation")).

c. *Attorney-Client Privilege*

In forming a non-profit MDP, lawyers must ensure that attorney-client privilege can be protected and that clients are aware of the limits of the privilege.²⁰³ A client or an attorney may invoke the attorney-client privilege and prevent the disclosure of (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.²⁰⁴ It is critical that the ability to prevent the disclosure of confidential communications through discovery or at trial remains protected.

While a lawyer's communication with his or her agents is privileged, discussions the lawyer has with non-lawyer professionals that are not designed to assist the attorney in providing legal assistance to the client do not fall under the privilege.²⁰⁵

203. The importance of maintaining attorney-client privilege in MDP settings was emphasized by the ABA Commission on MDP. See AMERICAN BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, Appendix A, Illustration of Amendments Needed to Model Rule 1.6 Confidentiality of Information cmt. 25, at 3 (1999).

A lawyer in an MDP should take special care to avoid endangering the privilege by either the lawyer's own conduct or that of the MDP itself, or its nonlawyer members, and should take such measures as shall be necessary to prevent disclosure of confidential information to members of the MDP who are not providing services in connection with the delivery of the legal services to the client.

Id.

204. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000). The communication may be expressed verbally or in writing. *Id.* § 69. The privileged persons between whom such communication takes place include "the client (including a prospective client), the lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation." *Id.* § 70. A communication is made *in confidence*, if "at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person . . . or another person with whom communications are protected under a similar privilege." *Id.* § 71. The requirement that the communication be made for the purpose of obtaining or providing legal assistance for the client is satisfied if the communication is "made to or to assist a person: (1) who is a lawyer or who the client or prospective client reasonably believes to be a lawyer; and (2) whom the client or prospective client consults for the purpose of obtaining legal assistance." *Id.* § 72.

205. Wydra, *supra* note 17, at 1542-44. "Third-party professionals may be considered agents where they act as conduits of information between the attorney and the client or otherwise aid in the rendition of legal services." *Id.* at 1542.

A significant concern raised by the legal directors in all three programs I studied is the extent to which attorney-client privilege covers information the client shares with nonlawyers in the agency. The director of New Beginnings be-

For example, one could envision a situation in which a lawyer practicing in an MDP represents a client in a landlord/tenant action. After having a brief conversation with the client about her employment situation, the lawyer decides to talk to a case manager within the MDP about finding job training services for the client. The job training issue is unrelated to the landlord/tenant matter, but in the course of the conversation, the lawyer reveals to the case manager that the client plans to move to another state. This piece of information is potentially relevant to the landlord/tenant case. The case manager makes a note of this conversation and, at a later date, the opposing counsel in the eviction action subpoenas the records. Assuming the case manager does not have an independent privilege, the lawyer or client may be prevented from invoking the attorney-client privilege.

believes that attorney-client privilege would cover communications with social workers in situations where the social workers were utilizing therapy and case management services as a means of helping to prepare the legal case. However, both the director and the social worker acknowledged that many clients seek social work services before they become involved with the legal system. The social worker at New Beginnings indicated that she does not see herself as providing services geared to prepare cases for litigation or to assist attorneys in carrying out their legal duties. Although all social workers at New Beginnings are required to adhere to the legal code of ethics, it appears that there are situations in which attorney-client privilege would not protect communications between the client and nonlawyer staff of the agency. Social workers have an independent privilege that would most likely protect the communication, but there are other staff members at New Beginnings who do not have a privilege to assert. To date, however, there has never been a situation in which an opposing party attempted to discover information or compel testimony from a nonlawyer at New Beginnings. See Interview with Executive Director, *supra* note 189; Interview with Agency Social Worker, *supra* note 186.

The Community Center and Strengthening Families have had situations in which the medical staff or social workers are directly assisting with the preparation of a legal case. In these situations, the legal directors believe that attorney-client privilege is preserved. However, in many cases there is no connection between the provision of legal and non-legal services and it would be hard to make an argument for attorney-client privilege. There is no written policy regarding whether social workers or other nonlawyers are supposed to adhere to the attorneys' rules of professional conduct. Neither legal clinic has had to contend with an opposing attorney requesting information in discovery or at trial regarding conversations with other professionals at the organization. Interview with Legal Director of The Community Center, Washington D.C. (July 12, 2000); Interview with Legal Director of Strengthening Families, Washington D.C. (July 13, 2000).

The directors in all three organizations are not overly concerned about the issue of attorney-client privilege because the doctors and social workers with whom the clients are dealing have independent evidentiary privileges which they can assert if asked to divulge information about the client.

Similarly, conversations the client has with non-lawyer professionals on issues unrelated to the legal representation would not be protected. For example, suppose that in the course of representing a client in a consumer protection case, the lawyer discovers that the client is pregnant and refers her to a workshop on prenatal nutrition sponsored by the MDP social services department. The attorney is making the referral to assist the client, but the referral has no connection to the consumer action. Any information the client reveals to the facilitators of the nutrition workshop would not be protected by attorney-client privilege. The client, if not fully informed ahead of time, might assume that because the workshop is taking place in the same building where the lawyer's office is located, everything she says to other employees within the organization is protected from disclosure to the opposing party in the consumer case. The client's expectations of confidentiality may be greater in the MDP setting than they would be if a lawyer in a legal services agency had referred the client to a workshop held at a different agency.

As these examples illustrate, lawyers providing legal services in a MDP must be cautious when disclosing information to non-lawyers, especially in cases involving litigation or the possibility of litigation, because the information is not protected by privilege unless the nonlawyer has an independent privilege²⁰⁶ or would be considered an agent of the attorney.²⁰⁷ Lawyers should advise their clients that not all professionals

206. See *People v. Mitchell*, 448 N.Y.S.2d 332 (N.Y. App. Div. 1982) (holding that the lower court did not err when admitting the testimony of two secretaries and a paralegal employed by defendant's counsel. The secretaries and paralegal testified at defendant's trial concerning statements made by the defendant to them in the common waiting room shared by the defendant's attorney and another lawyer. The defendant made the statements while the attorney was away from the office and before the defendant consulted with him on the matter.). See also *Blumenthal v. Drudge*, 186 F.R.D. 236 (D.C. Cir. 1999) (communications by journalists in a defamation action were not covered by attorney-client privilege where the communications were seen by the president of a civil rights organization, despite the claim that the president was retained for litigation purposes.). The case discusses the parameters of attorney-client privilege with regard to nonlawyers and states that "extension of the privilege to nonlawyers, however, must be 'strictly confined within the narrowest possible limits consistent with the logic of its principle' and should only occur when 'the communication [was] made in confidence for the purposes of obtaining legal advice from the lawyer.'" *Id.* at 243 (citing *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corporation*, 5 F.3d 1508, 1514 (D.C. Cir. 1993)).

207. See Wydra, *supra* note 17, at 1537, 1541-44.

providing services within the MDP have the same privileges as lawyers, and therefore, the clients must be cautious when revealing potentially incriminating information to these professionals.

One way to protect against the rupturing of the attorney-client privilege is to ensure that the only other professionals working in the MDP are professionals who have testimonial privileges. This, however, might significantly limit the types of programs and services the agency would be able to offer and thereby dilute the holistic nature of the MDP.

The physical arrangement of the legal services practice within the MDP also impacts the issue of attorney-client privilege. A communication made between the attorney and the client (and the agents of either) will only be considered to be confidential and, therefore, entitled to the protection of the privilege if "the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person."²⁰⁸ If the physical space is arranged in such a way that a conversation between a lawyer and a client can be overheard by nonlawyers who do not have an independent privilege and who are not agents of the attorney, then the communication may not be protected from disclosure. Similarly, if these nonlawyers have access to paper files, computer files, or other communications, then the attorney client privilege may be jeopardized.

Within an MDP it is important to maintain separate filing systems to ensure that information relayed to the attorney or the legal staff of an organization remains confidential. The safest course of action would require the agency to have locked file cabinets placed in the attorneys' offices or work spaces.²⁰⁹

208. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 71 (2000).

209. The ABA Model Rules currently allow lawyers to share office space with nonlawyers as long as certain conditions are met such as the need to preserve client confidentiality. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002). MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1980). See, e.g., A. David Tammelleo, *Are You Representing Your Firm as a Partnership When It's Not?*, 36-MAR R.I. B.J. 14, 18 (1988) (suggesting there are concrete ways to set up filing systems, phone systems, and other office equipment and layout to ensure that client confidences are protected from nonlawyers).

All three organizations I surveyed maintain separate files for legal clients and clients of other programs within the agency. Non-confidential file documents can be copied by lawyers for social workers or doctors and vice versa. At Strengthening Families, open legal case files are kept in large, locked file cabinets outside of the lawyers' offices. In addition to protecting case files, the legal direc-

Similarly, the office needs to have adequate private meeting space where lawyers and staff of the legal program can meet with clients.²¹⁰ In the interest of preserving confidentiality, the organization should ensure that workspace is set up so that attorneys and other members of the legal staff can discuss cases with clients or other parties over the telephone and not be overheard by third parties who are not bound by rules of confidentiality or privilege. Communications by fax and via e-mail must be protected and lawyers and legal staff should have secured access to computers and voice mail.²¹¹ Those administering an MDP should try to balance the need to design a workspace that protects confidentiality with the need to facilitate interdisciplinary communication and training. Physical layout does not need to be done in such a way as to isolate or marginalize the legal department.²¹²

tor at Strengthening Families has placed the printer, fax machine, and shredder in a separate, enclosed room in the legal clinic area. This room can be locked.

210. Strengthening Families has taken great pains to ensure that the legal staff has private office space. Originally, offices throughout the building were to be divided by partitions. The legal staff insisted on walls to ensure confidentiality and maintenance of attorney-client privilege (i.e. to prevent a client or other individual who may be in a lawyer's office from overhearing information about other clients). There are several offices for attorneys and a conference/interview room available for use. All offices/conference rooms have doors. See Interview with Legal Director of Strengthening Families, *supra* note 205.

211. There may be more risk of inadvertent disclosure of privileged communications where attorneys and other professionals are working in the same office. With regard to inadvertent disclosures of privileged documents, courts are not in agreement about which standard should be used. See Ben Delsa, *E-Mail and the Attorney Client Privilege: Simple E-mail in Confidence*, 59 LA. L. REV. 935 (1999). There are three tests that courts have used to decide whether attorney-client privilege is waived by the inadvertent production of a privileged document. *Id.* at 953. These tests are: the "strict test," the "middle test," and the "lenient test." *Id.* (citing Roberta Harding, *Waiver: A Comprehensive Analysis of a Consequence of Inadvertently Producing Documents Protected by the Attorney-Client Privilege*, 42 CATH. U. L. REV. 465, 471-74 (1993)). Under the strict test, any communication that is disclosed to a third party loses privilege, even if the disclosure is "unintentional or inadvertent." *Id.* at 954. Under the middle test, courts use different factors to analyze whether privilege has been waived due to an inadvertent disclosure. Courts will look at: "precautions taken to prevent inadvertent disclosure in view of the extent of document production," the number of inadvertent disclosures made; the extent of disclosures and delay in rectifying it; and whether there are overriding interests of justice that should serve to maintain privilege and relieve a party of the error. *Id.* at 955. Finally, under the lenient test, courts find that inadvertent production [of] privileged documents is not enough to waive attorney-client privilege. See *id.* at 954.

212. Strengthening Families, for example, has the legal department housed in one area of the building yet members of the legal staff can easily consult with staff members in other programs because of the close proximity between depart-

2. Conflicts of Interest

Lawyers practicing in a non-profit MDP must safeguard against conflicts of interests. Conflict of interest rules differ among jurisdictions. These rules are premised on the principle that a lawyer's undivided loyalty to a client is paramount.²¹³ The rules discuss three types of conflicts which attorneys must either avoid or, under certain circumstances, for which attorneys must obtain consent of clients before proceeding with the representation: concurrent conflicts, successive conflicts, and imputed conflicts. This section discusses the obligations that the legal department of any non-profit MDP has to identify and address these different types of conflicts. In addition, it raises questions and offers suggestions for identifying conflicts that might arise between clients receiving legal services and clients receiving non-legal services within the MDP.

The legal department within a non-profit MDP must have a mechanism for identifying concurrent conflicts.²¹⁴ Model Rule 1.7, which addresses concurrent conflicts,²¹⁵ requires that a lawyer not represent a client if the representation of the client is directly adverse to another client's interests or if there is a significant risk that the representation may be materially limited by the lawyer's responsibilities to another client, a former client, a third party, or the lawyer's own interests.²¹⁶ These

ments. The legal staff work in offices rather than in cubicles and they have private meeting space for client interviews. See Interview with Legal Director of Strengthening Families, *supra* note 205.

213. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2002) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.").

214. See *id.* at cmt. 3 ("To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. . . . Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule.").

215. MODEL RULES OF PROF'L CONDUCT R. 1.8 (2000), also addresses concurrent conflicts and prohibits lawyers from engaging in a variety of activities with current clients.

216. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1)(2) (2002). "Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests." *Id.* at cmt. 8. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 (2000) ("[a] conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be

prohibitions may be eased if: (1) the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each affected client; (2) the representation does not violate any law; (3) the lawyer will not be asserting a claim by one client against another client in the same litigation or proceeding before a tribunal; and (4) each client affected by the conflict gives informed consent in writing.²¹⁷

At a minimum, the legal department within an MDP would be required to handle the concurrent conflicts issue as would any other law office. If any lawyer within the legal department was representing a client and a party adverse to the client sought legal representation, all lawyers within the legal department would be precluded from representing the prospective client unless consensual waiver of the conflict was permitted and obtained.²¹⁸

materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.").

217. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1)-(4) (2002). Model Rule 1.0 explains that "Confirmed in writing,' when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter." See *supra* note 193 for the definition of "informed consent."

Model Rule 1.7, as revised by the ABA House of Delegates in February 2002, departs from the previous rule and establishes that certain conflicts are nonconsentable. *Id.* cmts. 14-17, 23. Some states have adopted ethical rules that delineate nonconsentable conflicts while other states adhere to the more liberal approach reflected in the former model rule. See, e.g., D.C. RULES OF PROF'L CONDUCT R. 1.7(a) (1991) (a lawyer shall not advance two or more adverse positions in the same matter). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 (2000), stating:

(1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by Section 121 if each affected client or former client gives informed consent to the lawyer's representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client. (2) Notwithstanding the informed consent of each affected client or former client, a lawyer may not represent a client if: (a) the representation is prohibited by law; (b) one client will assert a claim against the other in the same litigation; or (c) in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.

Id.

218. It is important to note that under current law in most jurisdictions, simultaneous conflicts problems *cannot* be remedied through the use of screening mechanisms. See DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 513 (2d ed.

Successive conflicts arise when an attorney attempts to represent a client whose interests may conflict with the interests of a former client.²¹⁹ Under the Model Rules, an attorney can only represent a new client whose interests are materially adverse to the interests of a former client if the new matter is not substantially related to the matter involving the former client or if the former client provides informed consent to the representation, confirmed in writing.²²⁰ According to the comment to the Model Rules, "[t]he underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question."²²¹ The lawyer may not use confidential information acquired in the earlier representation against the former client.²²²

In order to decide whether there exists a substantial relationship between the current and former matters, one must determine whether it is reasonable to infer that an attorney might have received confidential information relevant to the current matter.²²³ If a successive conflict exists, all members of

1995). See, e.g., *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1318-21 (7th Cir. 1978).

219. See RHODE & LUBAN, *supra* note 218, at 518.

220. See MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (2002) (which provides "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."). See RHODE & LUBAN, *supra* note 218, at 522-23; *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 222-25, 227-29 (7th Cir. 1978); *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953).

221. MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 2.

222. *Id.* at R. 1.9(c).

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to the client.

Id.

223. See MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 3 (2002).

Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

Id.; see also *Westinghouse*, 588 F.2d at 224.

the legal department of the MDP would be precluded from representing the client absent consent of the former client or legal authority permitting screening of the conflict.²²⁴ The legal department would need to implement a system that could identify successive conflicts.

An imputed conflict arises when an attorney attempts to represent a client whose interests are adverse to the interests of a client of the attorney's former firm, if the attorney had acquired confidential information about the former client.²²⁵ Whether the attorney has acquired confidential information is a factual question. If the attorney had access to all files in the previous firm and attorneys routinely discussed cases of the firm, then the attorney might be found to be privy to information about all of the firm's clients.²²⁶ A client affected by the imputed conflict may waive his or her rights to have the attorney at issue disqualified.²²⁷ The comment to Model Rule 1.10, Imputation of Conflicts of Interest, states that legal services organizations are within the ambit of firms or organizations subject to the limitations set out in Rule 1.10.²²⁸

224. See MODEL RULES OF PROF'L CONDUCT R. 1.10 (2002).

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Id.

225. See MODEL RULES OF PROF'L CONDUCT R. 1.9(b) (2002).

A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

Id. Comment 5 to the Rule suggests that a lawyer would be disqualified under this rule when he or she has *actual* knowledge of protected information. *Id.* at cmt. 5.

226. See MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 6 (2002). The comment clarifies that in an inquiry into whether a lawyer has actual knowledge of protected information "the burden of proof should rest upon the firm whose disqualification is sought." *Id.*

227. MODEL RULES OF PROF'L CONDUCT R. 1.9(b)(2), 1.10(c) (2002). If the client is an organization rather than an individual, then Rule 1.13 is also applicable.

228. MODEL RULES OF PROF'L CONDUCT R. 1.10 cmt. 1 (2002). See also *id.* R. 1.0. Comment 4 to Rule 1.0 suggests that questions can arise as to how to define or determine whether some or all of the lawyers in a legal aid or legal services or-

The recently revised Model Rules of Professional Conduct contain a new rule relating to a lawyer's duty to prospective clients.²²⁹ Rule 1.18 clarifies that conflicts of interest can arise which might prohibit a lawyer or a firm from representing a party whose interests are materially adverse to those of a prospective client in the same or a substantially related matter.²³⁰ Such a circumstance, however, would only arise if the lawyer who interviewed the prospective client obtained information that could be significantly harmful if used in the matter.²³¹ In addition, the rule outlines situations in which the firm may represent a client whose interests are adverse to the prospective client's so long as the firm establishes adequate procedures to screen the disqualifying lawyer from participating in the matter.²³² Lawyers practicing in legal services organizations are required to implement systems that can detect and adequately address conflicts arising from duties to prospective clients.

In practical terms, it is important for those in an MDP to understand the ramifications of conflict of interest problems for clients. Failure to identify and remedy a conflict of interest problem in a litigation context can result in a judge disqualify-

ganization constitute "a firm" subject to imputation. The comment states that "[d]epending upon the structure of the organization [referring to legal aid and legal services organizations], the entire organization or different components of it may constitute a firm or firms for purposes of these Rules." *Id.* R. 1.0 cmt. 4. The original Model Rules of Professional Conduct (currently adopted in many states) was more definitive and suggested that in the context of legal aid offices, lawyers working in the same unit of the organization would be considered part of the firm, but lawyers working in other units may not be. Whether the lawyers are considered to be associates would depend on the rule at issue and the facts such as whether all lawyers have access to client information. See ANN. MODEL RULES OF PROF'L CONDUCT R. 1.10 cmt. 3 (1999).

229. MODEL RULES OF PROF'L CONDUCT R. 1.18 (2002). The rule defines a prospective client as "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter . . ." *Id.*

230. MODEL RULES OF PROF'L CONDUCT R. 1.18(c).

231. *Id.*

232. *Id.* Any disqualification under this provision is imputed to all lawyers in the firm unless, pursuant to paragraph (d), (1) the affected client and prospective client give informed consent (confirmed in writing); or (2) the lawyer who acquired the information took steps to avoid receiving more disqualifying information than necessary to determine whether to undertake the representation and (3) the disqualified lawyer is adequately screened from participating in the matter. In addition, the disqualified lawyer may not receive any portion of the fee generated from the matter and the prospective client must be notified, in writing, of the screening measures. See *infra* notes 243-248 and accompanying text.

ing the MDP attorney from representing a client at the outset of the representation or during the course of the representation.²³³ Once this takes place, a client has to find a new attorney, a difficult task for low-income and marginalized litigants. In addition, if a court finds that the attorney had access to confidential information that s/he used against the opposing party, then the court will not allow the attorney to provide work product information to any new attorney that the client may be able to retain.²³⁴ All of this results in added delay and harm to the client. In addition, once an attorney is disqualified, a disciplinary proceeding and/or malpractice action can follow.

The conflicts issues become thornier when one considers whether clients of nonlawyer professionals in the organization must be considered clients of the legal department for purposes of screening for conflicts of interests. Can a lawyer, for example, agree to represent an individual in the legal department whose interests are adverse to a client receiving counseling services in the social work department of the organization?²³⁵ One could envision a scenario, for example, in which a client seeks mental health counseling at the MDP because she is having problems with her marriage. The husband then comes to the MDP, and an attorney in the legal department, without realizing that the wife is receiving counseling at the MDP, agrees to represent the husband in a divorce and custody action. When the wife discovers that the MDP is representing her husband, she retains a lawyer from another legal aid office who moves to have the MDP lawyer disqualified because there is a conflict of interest. The lawyer argues that the MDP attorney has access to confidential information about the wife.

Arguably, a move to disqualify the MDP attorney may be more likely to occur in theory rather than in practice. The MDP, however, does not want to create an environment in which parties whose interests conflict are providing confidential information to different service providers within the same organization. Similarly, the MDP would not want to have a litigation situation in which a mental health provider is de-

233. See RHODE & LUBAN, *supra* note 218, at 475.

234. *Id.*

235. See Retkin et al., *supra* note 16, at 540–41 (explaining that the issue gets even more complicated if one department of the MDP represents groups or families, and a conflict arises between an individual represented in the legal department and a group receiving services in another department).

posed or cross-examined by a lawyer from the legal department of the same MDP.

The most prudent approach is to treat all clients of the MDP as clients of the lawyers for purposes of identifying or imputing conflicts.²³⁶ In using such an approach, the lawyers in the MDP would treat the nonlawyers in the organizations as though they were the attorneys' agents, partners, or employees.²³⁷ The lawyers could decide not to represent an individual if the prospective case conflicted with a matter involving a client receiving services in another branch of the MDP unless the initial client consented²³⁸ or an adequate screening procedure²³⁹

236. This is the approach advocated by the ABA Comm'n on Multidisciplinary Practice when it issued its initial recommendations to the ABA House of Delegates in 1999. See AMERICAN BAR ASS'N, COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES, Recommendation (August 1999), available at <http://www.abanet.org/cpr/mdprecommendation.html>.

In connection with the delivery of legal services, all clients of an MDP should be treated as the lawyer's clients for purposes of conflicts of interest and imputation in the same manner as if the MDP were a law firm and all employees, partners, shareholders or the like were lawyers.

Id.

237. At the time I surveyed the D.C. non-profit MDPs, the legal staff at The Community Center conducted conflicts checks against the entire database of clients (not limited to legal clients). They reported very few conflicts of interest problems or issues. However, there was no type of reverse conflicts of interest "cross check" to determine whether new clients seeking social work or other types of service had conflicts with the agency's existing legal clients. See Interview with Legal Director of The Community Center, *supra* note 205.

New Beginnings was in the process of creating a database of all clients (legal and non-legal) and developing a more comprehensive conflict check system. They planned to do cross-discipline conflicts checks, so that any new potential client would be screened to determine whether a conflict exists with anyone already receiving services at the center. The names of clients who have gone through the intake process—regardless of whether the lawyer or social worker determined they were eligible for services—will be entered into the database and considered a client for purposes of conflicts checks. See Interview with Executive Director, *supra* note 189.

238. Once again, it is important for lawyers working with low-income clients to recognize that the concept of consensual waiver of a conflict is fragile given the paucity of options available to poor clients. Clients must be made to feel that they truly can choose not to waive the conflict. If they believe that the attorney or other service provider will fail to provide services or will be upset about their choice, the client may feel pressured to waive the conflict due to fear of losing assistance all together. In addition, in some situations, confidentiality concerns related to the prospective client might prevent the lawyer or nonlawyer staff member from seeking consent from the first or former client and therefore, the lawyer might need to decline the new representation.

239. For a definition of "screening," see MODEL RULES OF PROF'L CONDUCT R. 1.0(k) ("Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are rea-

could be developed to shield the nonlawyer from participating in the legal matter or communicating with the legal staff regarding the matter.²⁴⁰

For many of the same reasons outlined above, the MDP could go a step further and develop a policy that requires all nonlawyers to refrain from providing services to someone whose interests are directly adverse to a current or former client of the legal department if it is believed that the services to be provided by the nonlawyers are substantially related to the legal matter and information received could be harmful to either the existing client or the prospective client.²⁴¹ For example, if the legal department is representing a mother in a custody action and the father of the child comes into the MDP seeking medical services for a chronic health condition, a substantial relationship would exist because the court will consider the physical health of the parties during the custody action.²⁴² A policy that requires the nonlawyer to refrain from providing services in such a circumstance would help prevent adversarial litigation situations from arising between employees of the same MDP and might prevent possible disqualifica-

sonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.”). The screening concept is further explained in Rule 1.0 cmts. 8, 9, 10.

240. The extent to which such screening is permitted varies and an organization would need to check the laws and ethical rules of the local jurisdiction to determine whether such screening is authorized.

Comments to the recently revised ethical rule on imputation of conflicts state that the imputation rule does not prohibit lawyers in a firm from representing a party if a nonlawyer in the firm, such as a secretary or paralegal, is prohibited from becoming involved in the matter because of a conflict of interest. If such a situation exists, the nonlawyer “ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect.” MODEL RULES OF PROF'L CONDUCT R. 1.10 cmt. 4 (2002). A difference arises in the MDP setting because the nonlawyers may not have a legal obligation to maintain confidentiality; however, as discussed *supra* Part.III.C.1, an organization could adopt ethical policies that require such a duty.

241. Rather than refraining from providing service to the prospective client, the MDP could obtain consent from both parties to waive the conflict. The agency's ability to obtain the waiver rests largely on whether the existing client and prospective client are willing to disclose that they are receiving or seeking assistance from the agency.

242. In addition, non-profit MDPs which provide legal services and auditing services to clients involved in community economic development projects should consider adopting a policy that prohibits the legal unit of the organization from advising clients for whom the MDP is providing auditing services, and vice versa. See Daly, *supra* note 65, at 270-71.

tion of the MDP attorney if a court were to find that a conflict of interest exists.

The importance of cross-checking for conflicts between departments is particularly evident in situations involving domestic violence. If an MDP offers legal assistance to victims of domestic violence, it is critical that such organizations have the capacity to identify whether the perpetrator of the abuse is seeking nonlegal services at the same organization. In order to protect the safety of the client of the legal department, the MDP should establish a protocol for declining nonlegal service in situations in which the safety of the client receiving legal services could be jeopardized, regardless of whether the nonlegal services are substantially related to the legal case.

In communities where few medical, mental health, or legal resources are available to low-income individuals, a restrictive policy requiring nonlawyers to deny service to individuals whose interests are adverse to existing legal clients could effectively deny health care or other critical services to individuals in serious need of assistance.²⁴³ Rather than denying service outright, the organization might develop screening mechanisms to identify potential conflicts and ensure that confidential information acquired about each party remains within the confines of the department providing services.²⁴⁴ If the professionals in the organization are working with groups or families, then special care must be taken to ensure that screening takes place to detect all potential conflicts.²⁴⁵

The screening mechanisms adopted must enable lawyers and nonlawyers to ensure that client information is inaccessi-

243. One can envision a situation in which the community where a non-profit MDP operates is so small that the resulting imputation of conflicts could eventually inhibit many in the community from receiving services they might otherwise be entitled to receive. In such situations, it might be necessary to offer legal services in a separate, non-MDP agency in order to serve the largest number of clients needing assistance.

244. See, e.g., St. Joan, *supra* note 197, at 55-58.

245. See TRUBEK & FARNHAM, *supra* note 35 (discussing the conflicts of interest which arise for organizations engaged in community economic development work). The Community Law Center in Baltimore, Maryland, for example, includes specific language in its retainer advising clients that the Center might have to withdraw if a conflict arises with a group they have previously represented. *Id.* at 79-80. Lawyers working in MDPs would need to develop similar language in retainers and waivers in order to resolve conflicts issues which could arise if the lawyer is representing a group or individual whose interests conflict with a group or individual represented by another professional in the organization.

ble to individuals working with clients whose interests are adverse. Ethical rules, ethical opinions, and court cases around the country identify elements of an effective screen.²⁴⁶ These screens are typically used to shield a disqualified lawyer or nonlawyer working in the firm from a particular legal matter. A screen should prevent:

(1) involvement in the matter by the individually disqualified lawyer, (2) discussion of the matter between the individually disqualified lawyer and any firm personnel involved in the representation, (3) access by the disqualified lawyer to any files (including electronically stored files) of the matter from which she is screened, and (4) access by the lawyers working on the matter to any files of the disqualified lawyer relating to the matter.²⁴⁷

There are several practical ways to implement a screen. For example, staff and affected clients should be notified in writing of the screen. Files should be labeled to clearly warn of the screen in effect and should be stored in a secured setting.²⁴⁸ Although the screens discussed in these opinions are used to prohibit lawyers with conflicts of interests from accessing par-

246. MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 9 defines a proper screening procedure as one in which

[t]he personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

Id.; see also D.C. Bar Ethics Op. 279 (March 18, 1998) (citing LaSalle Nat'l Bank, 703 F.2d 252, 259 (7th Cir. 1983); *Armstrong v. McAlpin*, 625 F.2d 433, 442-43 (2d Cir. 1980) (en banc), *vacated on other grounds*, 449 U.S. 1106 (1981)); MASS. RULES OF PROF'L CONDUCT R. 1.10(e).

247. D.C. Bar Ethics Op. 279, at 132 (Mar. 18, 1998).

248. *Id.* at 133.

ticular client matters, these screens could be used more broadly to prevent access to files by nonlawyers in a multidisciplinary organization. The effectiveness of the screen is dependent upon several structural factors. Perhaps the most significant factors are size and physical layout of the organization. A small organization may not have sufficient facilities to implement an effective screen.

While conflict of interest issues may not arise frequently in non-profit legal services practice, the ramifications of failing to address a conflict when it does arise can be disastrous for a client and harmful to the reputation and financial well being of the organization. Therefore, it is critical that non-profit MDPs implement mechanisms for identifying conflicts of interest and develop policies that give employees of the organization guidance as to the steps to take when a conflict arises.

3. Competence

The ethical rules governing lawyers underscore the need for competent representation of clients. Model Rule 1.1 requires that lawyers possess "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."²⁴⁹ It is critical that lawyers within a non-profit MDP receive the supervision, resources, and training necessary to enable them to practice law in a competent fashion. It is particularly important that nonlawyer administrators of MDPs be aware of these ethical proscriptions and ensure that there are senior lawyers or legal directors providing supervision and training to more inexperienced lawyers within the organization. Some non-profit organizations may only have one or two lawyers on staff. If attorneys are relatively inexperienced, the MDP should enter into an agreement with more experienced attorneys in other legal service organizations or law firms to provide training and supervision. An MDP should also consider creating a legal advisory board to assist in the professional development of MDP staff attorneys.²⁵⁰

249. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002).

250. Strengthening Families utilized a legal advisory board comprised of lawyers from the community who were available to offer information and advice to the legal staff of the organization. See Interview with Legal Director of Strengthening Families, *supra* note 205.

4. Independence of Professional Judgment

One of the core values of the legal profession identified in the Model Rules of Professional Conduct and cited throughout the debate on MDP is that of independence of professional judgment.²⁵¹ MDPs must devise policies and practices that preserve the independent professional judgment of lawyers within the organization.²⁵² It is particularly critical to implement such policies in organizations managed by nonlawyers.²⁵³

The ABA MDP Commission, in its July 2000 report, offered several concrete suggestions as to how to structure an MDP to ensure that lawyers have the "control and authority" necessary to maintain their professional independence.²⁵⁴ For example, organizations might require, as part of their bylaws or operating agreements, that lawyers remain solely responsible for making decisions related to providing legal service.²⁵⁵ In larger organizations, the report suggests that, at a minimum, the legal services providers in the MDP should be organized and supervised independently from other divisions of the MDP. Further, a lawyer-supervisor should have the responsibility for hiring and firing attorneys, determining attorney salaries, advising lawyers on ethical issues, and deciding how to staff and provide resources on legal matters.²⁵⁶ The report offers in-

251. See MODEL RULES OF PROF'L CONDUCT R 5.4 (2002).

252. Lawyers directly supervised all members of the legal staff at the three D.C. organizations that I studied. At Strengthening Families and The Community Center, there were separate directors (legal director, social work director, medical director) responsible for supervising each specialty clinic. At New Beginnings, the executive director was a lawyer. The executive director supervised the lawyers and legal interns, while also assuming overall responsibility for the agency's non-legal services. However, New Beginnings contracted with an experienced, licensed social worker who directly supervised social workers and social work interns. See Interview with Legal Director of Strengthening Families, *supra* note 205; Interview with Legal Director of The Community Center, *supra* note 205; Interview with Executive Director, *supra* note 189.

253. See Retkin et al., *supra* note 16, at 540.

254. AMERICAN BAR ASS'N, COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES, at 2 (July 2000), available at <http://www.abanet.org/cpr/mdpfinalrep2000.html>.

255. *Id.* at 2. The report refers specifically to small firms and ways to craft partnership or shareholder agreements to reflect the professional independence of lawyers. Some members of the Commission supported a mandate that lawyers comprise the majority of the ownership of an MDP. *Id.*

256. The legal directors of all three organizations I surveyed suggested that having lawyers in managerial positions within the organization influences the degree to which legal ethical concerns were understood and helped bridge under-

house corporate law departments and large government agencies as models for preserving lawyer independence within a larger organizational structure.²⁵⁷

Similarly, those forming an MDP must come to an explicit agreement about the services to be offered, such as what type of medical treatment doctors and nurses will provide, what type of cases the lawyers will be bringing, and what type of activities community organizers will undertake.²⁵⁸ To avoid conflict or compromising of professional independence in the future, the organization should develop a process by which to decide new issues related to the services the MDP will offer. The organization must address issues such as when to accept a case and when to withdraw from a particular case, keeping the differing ethical obligations imposed on lawyers and other professionals in mind.²⁵⁹

State ethics boards have weighed in on the issue of lawyer independence by requiring lawyers working for multiservice delivery agencies to adhere to the mandates of the Lawyer's

standing throughout the agency regarding professional responsibility issues. Two of the organizations currently had lawyers serving in management roles. The legal director of Strengthening Families stated that a lawyer had previously held a top management position in the organization and he was more receptive to ethical concerns raised by the legal department. See Interview with Legal Director of Strengthening Families, *supra* note 205; Interview with Legal Director of The Community Center, *supra* note 205; Interview with Executive Director, *supra* note 189.

257. See AMERICAN BAR ASS'N, COMM'N ON MULTIDISCIPLINARY PRACTICE, *supra* note 254.

258. See Goodmark, *supra* note 11 at 262 ("open communication and a clear agreement as to the parameters and subjects of representation are necessities" when forming school-based programs).

259. See Retkin et al., *supra* note 16, at 558-60 (discussing the differing approaches lawyers and social workers take when deciding whether to accept cases and whether to withdraw from cases).

One of the organizations I studied had experienced difficulties when attempting to terminate services to clients. The legal director at Strengthening Families described a situation in which a non-lawyer supervisor wanted to know why the legal staff had terminated representation of a client. The legal director explained that she was ethically prohibited from revealing why the termination had taken place. Although the manager did not like this response, he did not force the issue. In another situation, social workers and other social service providers in the agency decided to terminate the provision of services to a client, unless the client agreed to continue to take medication he was receiving for a psychiatric condition. The social workers wanted the lawyer in the legal program to terminate services as well. However, the legal director did not believe that there were grounds to withdraw from the case, and did not terminate the provision of services. Again, no one forced the issue, but the situation created tension between the lawyers and nonlawyers.

Code of Professional Responsibility whenever the policies of the multiservice agency conflict with the Code.²⁶⁰ The lawyer cannot permit the non-lawyer employer to influence or restrict his or her professional judgment.²⁶¹

A more subtle issue involving independence of professional judgment arises in the context of client counseling. Professionals will analyze a situation and offer advice framed by values, ethics, standards, and priorities emphasized within their particular professions. Social workers, for example, are ethically bound to evaluate the totality of circumstances and protect what they believe to be the client's best interest, while lawyers are mandated to zealously advocate for the client's wishes.²⁶² As a result, a client who sees a social worker may receive advice that would contradict the legal advice her attorney would offer. While the giving of contradictory advice can happen in any situation in which a client is receiving services from different professionals, the MDP context can minimize or exacerbate the problem depending upon the practice standards of the MDP. If the professionals within the MDP communicate regularly and effectively, there is a greater likelihood that the client will receive information and counseling about the "social work" option *and* the "legal option" in time to make a more informed decision than if she were receiving information from professionals at different agencies.

The lawyers and other professionals within an MDP, however, must remain vigilant and counsel clients fully about their options.²⁶³ The ease with which the lawyer and social worker

260. See Committee on Prof'l and Judicial Ethics, Association of the Bar of the City of New York, Formal Op. 2997-2 (1997) (committee found that lawyer employed by multiservice agency helping children must uphold the duty of confidentiality set forth in the N.Y. CODE OF PROF'L RESPONSIBILITY rather than adhering to any reporting obligation imposed upon other employees within the agency).

261. *Id.*

262. Koh Peters, *supra* note 23, at 18-19. See Stanger, *supra* note 200, at 1125-26; Galowitz, *supra* note 3, at 2140.

263. See Retkin et al., *supra* note 16, at 545-46 which states:

Social workers identify and facilitate the resolution of psychosocial problems (footnote omitted)

...

Attorneys are primarily concerned with resolving legal issues and disputes on behalf of their client (footnote omitted)

...

Is one approach better than the other? Both are viable professional alternatives when resolving individual and family problems with legal im-

can communicate within an MDP should not lead to their deciding that the "legal" approach or the "social work" approach makes the most sense rather than advising the client of the various alternatives.²⁶⁴ In other words, while an MDP may allow a lawyer to better counsel her client as to all legal and non-legal options available (as required by the rules of professional conduct), the MDP may also heighten the risk that a group of professionals discussing the courses of action available to a client will fail to relay all options to a client and, in effect, make the decision for the client.²⁶⁵

One of the most important elements needed to ensure independence of professional judgment is education, training, and supervision of all involved in the day-to-day operations of the MDP.²⁶⁶ Nonlawyer board members, managers, and staff need to fully understand the obligations of lawyers to give candid and independent advice. Nonlawyers may be less likely to intervene and pressure lawyers to change their strategies or stances regarding legal matters when they are trained about ethical standards, informed about how these standards play out in everyday practice, and warned about the consequences of failure to comply with these standards.

plications. The choice, however, should be the client's and should be based on an informed judgment of the two approaches.

Id. at 545-46.

264. The executive director of New Beginnings discussed a situation in which a client was receiving both legal and social work services at the agency. The social worker had met with the client and helped her devise a plan of action that, unbeknownst to the social worker, could have jeopardized part of the pending legal case. Fortunately, the lawyer and the social worker discussed the matter and were able to present various options to the client and let her decide which course of action to take. The client decided to take the steps necessary to protect her legal interests. The social worker and the lawyer did not simply decide which was the best course of action for the client to take, and then offer only one option. Rather, they presented both the "social work" option and the "legal" option, and the client made the decision. In this way, the attorney protected the client's ability to receive independent legal advice. See Interview with Executive Director, *supra* note 189.

265. See Koh Peters, *supra* note 23, at 19-23 (offering suggestions regarding how lawyers for children can address the professional conflicts which arise between lawyers and social workers).

266. See Retkin et al., *supra* note 16, at 543-60 (discussing the differences and similarities between attorneys and social workers in terms of training, definitions of professional roles, and approaches to client representation). See also Trubek & Farnham, *supra* note 2, at 258-59 ("Interaction between professionals can also reduce the skepticism each profession teaches: professional training often emphasizes the complexity of professional knowledge in a way that can reduce hope of finding solutions to real-world problems.").

CONCLUSION

The debate over MDP is taking place across the country. State and local bar associations are deciding whether they should follow the lead of the ABA and continue the ban on MDPs or authorize some form of fee-sharing and partnership between lawyers and nonlawyers. Yet both proponents and opponents of MDP have largely ignored the one type of MDP that has been in existence in fairly substantial numbers for some time—the non-profit MDP.

Many legal service providers around the country practice in non-profit multidisciplinary settings. These lawyers recognize that individuals experiencing economic, health, or family crises face a myriad of structural obstacles. They know that helping these clients resolve a narrow legal problem without addressing a variety of other pressing health, economic, and social concerns generates a superficial remedy. A non-profit MDP can draw upon the expertise of its diverse staff to offer comprehensive services to individual and group clients. In addition, these organizations can serve as incubators for community development and activism.

While non-profit MDPs have the potential to expand access to needed legal and non-legal services, the ethical rules in most jurisdictions across the country prohibit fee-sharing and partnerships between lawyers and nonlawyers. The rules also discourage management of legal services programs by nonlawyers. While some jurisdictions have acknowledged that an implicit exception to the MDP prohibition exists for legal services organizations whose boards of directors are comprised of lawyers and nonlawyers, only two jurisdictions have made this exception explicit. No jurisdiction has gone so far as to permit lawyers and nonlawyers to practice together in an organization whose sole or primary purpose is not purely legal in nature.

There are two compelling reasons for making the implicit exception for non-profit MDP explicit. First of all, failure to explicitly authorize non-profit MDP may inhibit the expansion of existing multidisciplinary programs and the creation of new organizations. As currently written, Rule 5.4 is, at best, a grey cloud looming above the heads of lawyers practicing in non-profit MDPs and, at worst, an obstacle to the development of new programs. Rather than discouraging the growth of non-profit MDPs, the legal profession should foster such multidisci-

plinary endeavors. These programs not only help meet the grave need for legal assistance for low-income individuals, but they offer a range of comprehensive services, in one location, to those who in our society least able to afford and access such services.

Secondly, more explicit guidance as to the ethical interests that must be protected in non-profit MDPs would benefit clients. While lawyers in non-profit MDPs are generally attentive to ethical considerations, there is room for improvement. Lawyers in these organizations can develop stronger mechanisms to ensure protection of client confidences, maintain competence, avoid conflicts of interest, and ensure independence of professional judgment. In addition, lawyers in MDPs could use revised rules and comments to educate non-lawyer colleagues and advocate for heightened adherence to the standards.

Those states which have decided to maintain the MDP prohibition should create an exception for non-profit 501(c)(3) MDP organizations providing direct legal services to low-income and other vulnerable client populations. States that expand or revise their rules to accommodate some form of MDP should offer guidance to non-profits as to the ethical boundaries that must be maintained within these organizations. These rules should not, however, limit the scope of non-profit MDPs or restrict the type of professionals permitted to practice within the organization. Such restrictions would significantly impair the non-profit MDP's ability to provide holistic advocacy to clients.

As the legal profession searches for innovative and effective means of expanding access to justice for the many in our society who are marginalized from the legal system, MDP offers one promising solution. The profession can and should craft reasonable ethical rules changes designed to authorize such practice while ensuring that clients of non-profit MDP organizations receive zealous and ethical legal representation.

