Resolved, that the American Bar Association amend the ABA Model Rules of Professional Conduct consistent with the following principles:

...No. 2. A lawyer should be permitted to share legal fees with a nonlawyer, subject to certain safeguards that prevent erosion of the core values of the legal profession.

With this momentous recommendation released this past June, an ABA commission formed to study the issue of multidisciplinary practice has suggested a new course and direction for the legal community. The ramifications are enormous and the debate surrounding the recommendation is just beginning.

BACKGROUND
Perhaps the current confrontation within the profession was inevitable. For years there have been lawyers working within organizations alongside nonlawyers while offering services that appear similar, if not identical, to traditional legal services. This has been the case particularly within the large accounting firms where the provision of these types of services has exploded in the past decade. Those who practice in the area of tax law have felt this transition perhaps more than any other segment of the bar, even to the point of seeing Congress recognize a privilege of confidentiality between accountants and their clients. The lawyers participating in such business organizations continue to take the position that they are not practicing law, for to do so would be to admit violations of Rule 5.4 of the Minnesota Rules of Professional Conduct. Indeed as Phil Cole argues elsewhere in this issue, "a major thrust of the commission's report is to bring the lawyers practicing law in these MDPs back into the fold as practicing lawyers."

Rule 5.4 addresses the professional independence of a lawyer and essentially prohibits fee-sharing with nonlawyers, law partnerships with nonlawyers, and the relinquishing of decision making or control to nonlawyers. Given the increasing hiring of attorneys by the "Big Five" accounting firms and the increasing involvement of lawyers and nonlawyers in business arrangements in other settings, conflict within the profession was bound to emerge.

THE ABA POSITION
The Commission on Multidisciplinary Practice, formed in August of 1998, heard over 60 hours of testimony from 56 witnesses in addition to receiving and reviewing the written testimony of additional parties. Much of the debate centered on the "threats posed to large law firms by 'Big Five' accounting giants." However, one observer said that the testimony seemed to indicate that "multidisciplinary practices may actually have the most impact on sole and small firm practice...in areas such as tax, family law and elder care" where some lawyers "want to form closer ties with accountants, counselors, and financial advisors." Such a change likely would affect many segments of the profession; nevertheless, large law and accounting firms, particularly those firms with an international practice, would likely feel the greatest impact...and perhaps reap the largest benefit. It should be remembered that much of the impetus for the creation of the commission was the presence of MDPs in other countries, particularly in Western Europe.

The commission concluded, "with appropriate safeguards a lawyer can deliver legal services to the clients of an MDP without endangering the core values of the legal profession or the interests they are designed to protect." While acknowledging the "principal arguments raised in the past...specifically professional independence of judgment, the protection of confidential client information, and loyalty to the client through the avoidance of conflicts of interest," the commission nevertheless concluded that there were "appropriate safeguards" available to address such concerns. As it pertains to fee-sharing, the apparent safeguard for the lawyer is to "take special care that payment for legal services and funds received on behalf of a legal services client are clearly designated as such and segregated from other funds of the MDP" subject to an "administrative audit process." With respect to professional independence, the commission recommends, among other changes, that "a lawyer who is supervised by a nonlawyer may not use as a defense to a violation of the Rules of Professional Conduct the fact that the lawyer acted in accordance with the nonlawyer's resolution of a question of professional duty." In other words, the safe harbor provided for a subordinate lawyer in Rule 5.2 (subordinate lawyer held not to have violated the Rules of Professional Conduct if that lawyer acted in accordance with supervisory lawyer's reasonable resolution of arguable question of professional duty) is not available to the lawyer who is supervised by a nonlawyer.

Whether or not these "appropriate safeguards" (and others suggested) are sufficient is arguable. What is perhaps more telling about these procedures, along with others recommended by the commission, is the direction they take us. Rather than focusing on professional independence, we seem to be conceding the impossibility of meeting that "core value." Instead, we appear to be reaching for the semblance of regulations, accepting form over substance, perhaps ignoring the likelihood that such additional regulations will prove ineffective once, in Phil Cole's formulation, the "eco-

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nomic and cultural control of the delivery of legal services is ceded to large, well-capi-
talized business organizations.”

THE RESPONSE

While many observers believe that the
recommended changes will inevitably
result in a loss of professional indepen-
dence, others argue that the impact is far
greater: that the legal profession is throw-
ing in the towel on law as a “profession”
and will henceforth be known as the legal
“business.” Some suggest these changes
have already occurred and that all the
ABA commission has done is to recognize
this and open the barn door, since closing
it when the animals have left long ago
seems pointless. Still others point out that
such changes put “lawyers outside the
mega-accounting firms at a competitive
disadvantage” and that the result will be
that accounting firms such as
“PricewaterhouseCoopers could have a
full-service law firm here in America”
resulting in “a dramatic effect on the del-
vivery of legal services... in a relatively short
amount of time.”

The individual states have begun to
respond. The New York State Bar
Association passed a resolution on June 26
expressing concern that such changes will
“adversely and irreparably affect the in-
pendence and other fundamental principles
of the legal profession.” For that reason,
among others, the association announced
opposition to “any changes in existing regu-
lations prohibiting attorneys from practicing
law in MDPs, in the absence of a sufficient
demonstration that such changes are in the
best interests of clients and society and do
not undermine or dilute the integrity of the
delivery of legal services by the legal profes-
sion.” Before the ABA House of Delegates
decided on August 10 to defer action on the
issue pending further study, both the Florida
and Ohio bars, as well as the MSBA, had
urged that the matter should be studied and
debated further.

MSBA President Wood Foster has formed
a task force to study the issue and report back
to the members. The task force, whose
members are listed on page 13 of this issue,
includes both proponents and opponents of
the ABA recommendation and includes pri-
vate practitioners, public lawyers, and a rep-
resentative from this office.

CONCLUSION

It appears likely that at some point in
the future observers will look back upon
the resolution of this issue as a pivotal
moment in the history of the legal profes-
sion. Here in Minnesota we should listen
to advocates and critics of the ABA pro-
posal and take our time before considering
what course of action benefits our clients,
protects the public, and best serves our
profession.

NOTES

1. ABA Commission on Multidisciplinary
   Practice, Report and Recommendation,
2. MRPC 5.4 Professional Independence of a
   Lawyer:
   (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,