THE CHANGING NATURE OF THE LAW FIRM: AMENDING MODEL RULE 5.4 TO ALLOW FOR ALTERNATIVE BUSINESS STRUCTURES RESULTING IN NONLAWYER OWNERSHIP OF LAW FIRMS

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I. INTRODUCTION

From 1996 to 2008, employment in America's legal services industry grew consistently.[1] A reasonable inference can be made that attorneys were hired due to industry-wide firm success, which likely involved an abundance of profits—or at least enough to keep the doors open—from emerging and recurring clients. However—at the risk of sounding cliché—it is inevitable that all good things must come to an end, and the steady growth in employment of the legal services industry is no exception.

Employment in America's law industry declined each year from 2008 to 2010.[2] Additionally, the 250 biggest law firms in America terminated more than 9,500 lawyers in 2009 and 2010 alone.[3] Furthermore, although the economy has slightly improved since 2010, the job market for attorneys does not appear to be advancing in the same way. A recent nationwide poll revealed that only 55% of law school graduates from the class of 2011 had full-time jobs that required a law degree within nine months following graduation.[4] This drastic weakening of the job market for new and seasoned attorneys alike has left those affiliated with the industry searching for an explanation on how things could have become so bad so quickly.[5]

Three trends have been identified as the causes of significant cuts in employment, and legal analysts anticipate that these trends will continue for the foreseeable future.[6] First, and likely due to the recent economic downturn, clients have placed emphasis on keeping their bills low, and

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[1] *Law Firms: A Less Gilded Future*, ECONOMIST, May 7, 2011, at 74, 74.

[2] *Id.*

[3] *Id.*

[4] Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL ST. J., June 25, 2012, at A2.

[5] *See Law Firms: A Less Gilded Future*, *supra* note 1, at 74.

[6] *Id*.

they have demonstrated this by negotiating alternative fee arrangements and demanding frequently that partners complete work because they are more efficient.[7] Second, the globalization of the industry has resulted in leading firms being required to find ways to extend their reach globally so they can better compete.[8] Finally, technological advances have made the business model of the traditional law firm less sustainable.[9] These developments leave the modern law firm with one unavoidable option: Come to terms with changes in the industry and find ways to adapt, or be left behind.

Richard Susskind stressed in his book, *The Future of the Law: Facing the Challenges of Information Technology*,[10] the idea that today's lawyers must come up with new, innovative techniques to provide legal services and meet client demands.[11] The author proclaims that "lawyers' failure to embrace the techniques and applications of IT . . . will result . . . in their providing a substantial disservice to the community."[12] Susskind goes on to anticipate radical changes for lawyers, and he even predicts the end of routine legal functions that are the norm within the industry today.[13]

In 2008, Mr. Susskind contributed additional literature with his book *The End of Lawyers?: Rethinking the Nature of Legal Services*.[14] In this text, Susskind predicts that the "liberalization of the legal market" will result in new sources of financing for law firms and a new breed of professional leaders and financiers who seek to avoid the traditional law firm business model.[15] Additionally, Susskind discusses disruptive legal technologies, which could forever defy legal convention by replacing the traditional work of attorneys.[16] Finally, Susskind foresees five types of

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] RICHARD SUSSKIND, THE FUTURE OF LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY (1996).

[11] *Id.* at 2.

[12] *Id.* at 3.

[13] *Id.* at 4.

[14] RICHARD SUSSKIND, THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES (2008).

[15] *Id.* at 270.

[16] *Id.*

future lawyers,[17] with the most stimulating being the "legal hybrid."[18] The legal hybrid is described as one who is "multi-disciplinary," with numerous areas of expertise extending into related disciplines.[19] This stems from the reality that many lawyers already serve dual roles, such as project managers, strategy and management consultants, market experts, and deal-brokers.[20]

Susskind's revolutionary thinking begs the question of whether significant changes within the traditional law firm are not only unavoidable, but also appropriate. Based on the current status of the legal services industry, it is difficult to ignore Susskind's theories. The combination of a poor job market for inexperienced and veteran attorneys alike, and a legal services market faced with substantial technological advances, globalization, and the emergence of clients demanding increased efficiency and reduced costs, makes one fact abundantly clear: Modern law firms must change.[21] As such, the American Bar Association (ABA) must take measures to encourage progress by allowing firms to structure themselves in ways that have been prohibited in the past.

This Comment suggests that the ABA take one specific measure at this time in an effort to improve upon the current business model traditional law firms employ: amend Model Rule of Professional Conduct Rule 5.4 (Model Rule), creating alternative business structures that allow nonlawyers to hold management roles in law firms.[22] An amendment to Model Rule 5.4 will result in inexpensive and improved legal services, will allow attorneys to take advantage of advances in technology and the globalization of the market, and will reduce the cost of law firm financing by minimizing reliance on external sources.[23] The proposed amendment to Model Rule 5.4 permits nonlawyers to own no more than a certain, limited percentage of the firm, requires that nonlawyers pass a "fit to own" test, and allows the firm to participate only in the practice of law.[24]

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[17] *Id.* at 271–73. The five types of lawyers are the "expert trusted adviser," the "enhanced practitioner," the "legal knowledge engineer," the "legal risk manager," and the "legal hybrid." *Id.*

[18] *Id.* at 273.

[19] *Id.*

[20] *Id.*

[21] *Law Firms: A Less Gilded Future*, *supra* note 1, at 74.

[22] *See infra* Part VI.

[23] *See infra* Part V.B.

[24] *See infra* Part V.A.

This proposal is significant, especially when considering the strong opposition from those who fear reform. Those resisting modification are primarily concerned that an amendment will result in interference with the lawyer's independent judgment, and with the prioritization of profits and shareholders over clients.[25] Furthermore, opponents worry that, upon modification, the practice of law will be tainted in such a way that lawyers are no longer considered professionals.[26] While these concerns are important and relevant, they will be addressed in detail near the end of this Comment.[27]

This Comment begins with critical background information regarding the development of the ABA's Model Rules and information concerning the growing popularity of law firm involvement in business and activities suggesting strong profit motives.[28] Next, this Comment discusses recent domestic developments that are driving the vigorous debate in the United States regarding a potential amendment of Model Rule 5.4.[29] Then, this Comment describes various international developments, including recent legislation in England, Canada, and Australia, allowing for the behavior sought by those who desire modification.[30] Finally, this Comment analyzes the potential benefits resulting from amendment and balances those benefits against the chief concerns of those who oppose modification.[31]

II. BACKGROUND

A. The Origin of Model Rule 5.4 and Discussed Modifications

1. Model Rule 5.4 and Disciplinary Rules from the Model Code of Professional Responsibility

Model Rule 5.4 is properly identified as the rule governing the "Professional Independence of a Lawyer."[32] The relevant language of the rule states: "A lawyer or law firm shall not share legal fees with a

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[25] Jennifer Smith, *Law Firms Split over Nonlawyer Investors*, WALL ST. J., Apr. 1, 2012, at B1.

[26] Patrick F. Fischer, *Should Lawyers Be Able to Partner with Nonlawyers and Split Fees?*, OHIOLAWYER, Nov./Dec. 2012, at 3, 3.

[27] *See infra* Part V.C.

[28] *See infra* Part II.

[29] *See infra* Part III.

[30] *See infra* Part IV.

[31] *See infra* Part V.

[32] MODEL RULES OF PROF'L CONDUCT R. 5.4 (2013).

nonlawyer . . . ." [33] Furthermore, the Model Code of Professional Responsibility (Model Code), the forerunner to the Model Rules, provides disciplinary rules that are similar to Model Rule 5.4,[34] mandating that "[a] lawyer or law firm shall not share legal fees with a non-lawyer . . . "[35] and that "[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."[36]

It is important to note that both the ABA's Model Rules and Disciplinary Rules are merely suggestions and are not binding on any jurisdiction.[37] Therefore, each jurisdiction is free to implement rules that stray from the ABA's guideline.[38] However, all fifty states currently prohibit partnerships or profit sharing with nonlawyers, and only the District of Columbia currently allows nonlawyer ownership under certain conditions.[39]

2. The Creation of the Model Rules of Professional Conduct

In a process that took six years, the Commission on Evaluation of Professional Standards (Kutak Commission) developed the Model Rules of Professional Conduct.[40] Named after its chairman, Robert J. Kutak, the Kutak Commission originally submitted its final proposed Model Rules to the ABA in 1982.[41] Interestingly, the Kutak Commission's initial proposal for Model Rule 5.4 allowed for nonlawyer participation in law firms, stating that "[a] lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer . . . ."[42] Certain conditions would have been imposed, but the

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[33] *Id.* R. 5.4(a).

[34] MODEL CODE OF PROF'L RESPONSIBILITY DR 3-102 (1969); *id.* DR 3-103 (1969).

[35] *Id.* DR 3-102.

[36] *Id.* DR 3-103(A).

[37] *See* MORTIMER D. SCHWARTZ ET AL., PROBLEMS IN LEGAL ETHICS 51 (10th ed. 2012).

[38] *Id.*

[39] Joseph Ax, *NY Bar Considers Allowing Non-Lawyers to Invest in Law Firms*, REUTERS (Feb. 2, 2012), https://1.next.westlaw.com/Document/I2d0b3ea0956611e19fefb85885c303b5/View/FullText.html.

[40] WORKING GRP. ON ALT. BUS. STRUCTURES, ABA COMM'N ON ETHICS 20/20, FOR COMMENT: ISSUES PAPER CONCERNING ALTERNATIVE BUSINESS STRUCTURES 4 (Apr. 5, 2011) [hereinafter ISSUES PAPER], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf.

[41] Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 384 (1988).

[42] *Id.*

fact this was proposed shows how close the ABA came to adopting a policy that completely strayed from its Disciplinary Rules and current Model Rules.[43]

The Kutak Commission's 1982 proposal was supplemented with the commission's explanation that the practice of law had changed, and it was necessary for the rules to change to meet modern concerns.[44] Additionally, the notes accompanying the proposed rule provided that the commission "intended [Model] Rule 5.4 to encourage 'the development of new methods of providing legal services.'"[45] While this reasoning and these ideas appear sound in a modern context, the ABA was not ready to embrace the commission's sentiment at that time.[46] At the February 1983 meeting of the House of Delegates—the ABA's policy setting body—the Kutak Commission's proposal was rejected.[47]

The ABA Committee on Unauthorized Practice of Law was the first division of the ABA to disagree with the Kutak Commission's proposed Model Rule 5.4.[48] In a powerful and influential statement, the committee identified the following concerns:

> The Commission's proposed Rule 5.4 fails to confront numerous needs for adequate client protection, including insuring the competence to judge the quality of the ultimate legal product, protecting the client-lawyer relationship and files in the event of the resignation or discharge of an employee, minimizing the impact of compensation structures on potential conflicts of loyalty to the client and to the employer, and preventing other incursions by an unqualified owner or manager into the lawyer's sphere of judgment and duty.[49]

Furthermore, the committee discussed *Florida Bar v. Consolidated Business & Legal Forms, Inc.*,[50] a landmark Florida Supreme Court decision, which held that a company offering legal services through attorneys who were managed by nonlawyer officers provided an ownership

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[43] *Id.*

[44] *Id.* at 386.

[45] *Id.* at 388.

[46] *Id.*

[47] *Id.* at 391.

[48] *Id.* at 390.

[49] *Id.* (internal quotation marks omitted).

[50] 386 So. 2d 797 (Fla. 1980).

structure that was incompatible with the legitimate practice of law.[51] Based on the strong opposition from the ABA Committee on Unauthorized Practice of Law, and case law directly contrary to the Kutak Commission's proposal, it is evident why the proposed rules were struck down.

Subsequently, a revised version of Model Rule 5.4 was adopted in 1983, along with the rest of the Model Rules.[52] The Rule remains largely unchanged today, including the ban on nonlawyer partnerships and fee sharing with nonlawyers.[53]

3. The 1998 Commission on Multidisciplinary Practice

In August 1998, the president of the ABA appointed a twelve-person Commission on Multidisciplinary Practice to study potential alternative business structures.[54] The motivation for organizing the commission stemmed from concerns that remain prevalent today.[55] Specifically, the commission noted that "[r]evolutionary advances in technology and information sharing, the globalization of the capital and financial services markets, and more expansive government regulation of commercial and private activities have reshaped client demands for legal advice and advocacy."[56] As early as 1998, progressivity in the marketplace required a proportional response from the ABA in amending its Model Rules.[57] In fact, at that time, the issue of amending Model Rule 5.4 was described by the ABA as "the most important issue to face the legal profession this century."[58]

The commission submitted a background paper to the House of Delegates at the ABA's 1999 midyear meeting.[59] In creating this report, the commission heard testimony and received written comments stating that the Model Rules should be amended to allow for multidisciplinary

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[51] *See id.* at 800.

[52] ISSUES PAPER, *supra* note 40, at 5.

[53] *Id.*

[54] ABA Comm'n on Multidisciplinary Practice, *Background Paper on Multidisciplinary Practice: Issues and Developments*, PROF. LAW., Fall 1998, *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/multicomreport0199.html.

[55] *See id.*

[56] *Id.*

[57] *See id.*

[58] *Id.*

[59] *Id.*

practices.[60] The consensus was that these changes would benefit not only lawyers, but also members of the public.[61] Thus, when the commission submitted its report to the House of Delegates, a recommendation was made that Model Rule 5.4 be amended to allow for multidisciplinary practices.[62]

Despite this advice, the House of Delegates stated that "the [ABA] would make no change, addition, or amendment [permitting] a lawyer to offer legal services through a multidisciplinary practice, unless and until additional stud[ies]" showed that these measures would be beneficial.[63] As a result, the commission took additional testimony, received substantial written comments, and returned with a new report in July 2000.[64] The amended report not only recommended change, but also provided additional conditions and restrictions to further limit attorneys who wished to provide legal services through a multidisciplinary practice.[65] Yet again, the House of Delegates rejected the recommendation.[66]

Unfortunately, despite the proposal of the Kutak Commission in 1982, the proposal of the Commission on Multidisciplinary Practice in 1999, and the revised proposal set forth by the same commission in 2000, the Model Rules remain unchanged.[67] Thus, Model Rule 5.4 continues to restrict the ability of attorneys to form alternative business structures permitting nonlawyer management profit sharing.[68]

B. Attorney Involvement in Nonlegal Ventures: An Emphasis on Profits

1. Ancillary Business

Throughout a discussion regarding modification to Model Rule 5.4 lies the reality that, in several businesses, lawyers and nonlawyers alike are

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[60] ISSUES PAPER, *supra* note 40, at 5.

[61] *Id.* at 5–6.

[62] *Id.* at 6.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] Kellye M. Gordon, *Friend or Foe: The Role of Multidisciplinary Practices in a Changing Legal Profession*, 36 IND. L. REV. 1363, 1367–69 (2003).

[68] JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES, & STATUTES 79 (abr. ed. 2012).

working side by side.[69] Inevitably, this results in nonlawyers participating in the business at a level reserved exclusively for licensed attorneys.[70] Additionally, this business activity causes law firms and attorneys to get involved with business that is nonlegal in nature.[71] This type of work, known as "ancillary business," often stems from law firms doing work on behalf of subsidiaries of the firm that do not handle legal work, internal consulting units, and various partnership ventures.[72]

Lawyer involvement in ancillary business allows law firms to provide a more extensive range of services for clients more efficiently.[73] However, increased firm involvement in ancillary business imposes simultaneous obligations. Today, law firms are required to take extra precautions while handling ancillary business to ensure that they are complying with the Model Rules and other ethical guidelines.[74] The ABA publically opposed attorney involvement in ancillary business, which increased the amount of attention given to the issue.[75] The ABA, which previously formed a task force to study ancillary business, made its opposition known by "recommend[ing] that non-lawyers be denied partnership status" in businesses that significantly provide legal services, stressing that "greater emphasis should be placed on the sanctity of the profession than on lucrative opportunities for multidisciplinary expansion."[76]

Despite the ABA's staunch opposition to ancillary business, advocates have urged the ABA to elevate substance over form when considering the reality of the modern law firm.[77] Specifically, advocates have argued that "lawyers have been involved in business ventures[, both legal and nonlegal in nature,] for many years."[78] Moreover, those who actively support ancillary business and an amendment to Model Rule 5.4 point to the fact that "non-lawyers already help guide business decisions at many law firms

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[69] *See* Stephen R. Ripps, *Law Firm Ownership of Ancillary Businesses in Ohio—A New Era?*, 27 AKRON L. REV. 1, 1 (1993).

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 2.

[75] *Id.* at 3.

[76] *Id.*

[77] *Id.* at 5.

[78] *Id.*

and are partners in all but name."[79] Similar to the ABA's resistance to change regarding Model Rule 5.4, the ABA is again taking an anachronistic position by supporting a system blinded to modern attorney involvement in ancillary business.

2. Law Firms as Businesses

With major changes occurring in the external environment in which law firms operate, the legal profession appears to be "big business," motivated by profit and expansion.[80] One legal scholar has even openly referred to a law firm as a business, as opposed to a professional practice, and has gone on to define a business as a profit-oriented enterprise.[81] The economic reality of increased competition in the marketplace has resulted in a heightened emphasis on bottom-line margins.[82] As a result, it is common for many law firms to place an emphasis on minimum billable hours each year to ensure that the firm is profitable.[83] These profits are typically enjoyed by partners of the firm, and inevitably become a major focal point for law firms.[84]

It is apparent that the modern law firm emphasizes profitability and, as such, more frequently conducts itself just like any business.[85] Therefore, a rule restricting this natural progression, as Model Rule 5.4 does, simply cannot stand. To allow otherwise would thwart progress and turn a blind eye to modern realities. On the one hand, rules protecting the sanctity of the profession from the "morals of the market" seem like a good thing. However, to think that law firms are incapable of upholding the sanctity of the profession and providing improved legal services while simultaneously maintaining a desire to make money is highly speculative. Furthermore, the ABA has not accepted the reality of the modern law firm, and it has

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[79] Joe Palazzolo, *ABA: 'Case Has Not Been Made' for Nonlawyer Ownership*, WALL ST. J.L. BLOG (Apr. 17, 2012, 1:50 PM), http://blogs.wsj.com/law/2012/04/17/aba-case-has-not-been-made-for-nonlawyer-ownership/.

[80] Ripps, *supra* note 69, at 1.

[81] L. Harold Levinson, *Independent Law Firms that Practice Law Only: Society's Need, the Legal Profession's Responsibility*, 51 OHIO ST. L.J. 229, 231 (1990).

[82] Ripps, *supra* note 69, at 1.

[83] Susan Saab Fortney, *An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 64 TEX. B.J. 1060, 1064 (2001).

[84] *Id.*

[85] Ripps, *supra* note 69, at 1.

rejected modification for reasons that have not been fully explained.[86] Rather than taking this position, the ABA must recognize the benefits of allowing collaboration between the legal profession and other complimentary professions, which only enhance the quality of legal services available to clients.

III. RECENT DOMESTIC DEVELOPMENTS

A. The District of Columbia Model Rule of Professional Conduct Rule 5.4

1. Background on the D.C. Rule

Independent law firms, individual states, and even the ABA, in forming a task force, have recently given consideration to a potential amendment to Model Rule 5.4.[87] Ultimately, a motivating factor for this interest is an admiration for the approach taken in the District of Columbia (D.C.), which has permitted nonlawyer ownership and profit sharing with nonlawyers in law firms for over twenty years.[88]

In 1988, D.C. became the first jurisdiction in the United States to adopt a rule of professional conduct (D.C. Rule) allowing nonlawyers to become partners in law firms.[89] The adoption of this rule has come with an abundance of benefits for attorneys and law firms in the region.[90] Over the past two decades, attorneys at D.C. law firms have had numerous opportunities to work with experienced professionals whom they would be restricted from sharing profits with under the ABA's Model Rules.[91] Common examples of nonlawyers partnering and profit sharing include architects as partners at land-use firms, social workers at family law firms, scientists at intellectual property firms, and even doctors who help find cases for personal injury firms.[92] The idea behind these business structures is that, if a law firm specializes in a certain area of law, counsel for the

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[86] JAMIE S. GORELICK & MICHAEL TRAYNOR, FOR COMMENT: DISCUSSION PAPER ON ALTERNATIVE LAW PRACTICE STRUCTURES 1 (Dec. 2, 2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf

[87] Catherine Ho, *Can Someone Who Is Not a Lawyer Own Part of a Law Firm? Only in D.C.*, WASH. POST (Apr. 8, 2012), http://articles.washingtonpost.com/2012-04-08/business/35452887_1_law-firms-lawyers-wilmerhale.

[88] *Id.*

[89] Ripps, *supra* note 69, at 2–3.

[90] *Id.* at 5.

[91] *Id.*

[92] Ho, *supra* note 87.

firm benefits significantly from the expertise of the experienced professionals while litigating a case.[93]

Another apparent benefit for the legal marketplace in D.C. arises from the interest of law firms in locating and opening offices within the D.C area.[94] The unique D.C. Rule attracts the interest of firms and attorneys located outside the region, who seek to practice law in D.C. so that they may work with nonlawyer partners.[95]

While the development of the D.C. Rule occurred more than twenty years ago,[96] proponents of a modification to Model Rule 5.4 often point to the D.C. Rule as evidence that a successful change is feasible.[97] Another strong point for advocates of modification is that no D.C. law firm with nonlawyer partners has ever faced disciplinary action concerning nonlawyers interfering with the professional judgment of lawyers.[98]

2. Relevant Language of the D.C. Rule

As recently as April 2011, an ABA working group considered implementation of a modified version of Model Rule 5.4 that was essentially identical to the D.C. Rule.[99] In doing so, the working group identified the D.C. Rule as "Lawyer/Non-lawyer Partnerships with No Cap on Nonlawyers Ownership."[100] D.C. Rule 5.4 is properly known as the rule governing the "Professional Independence of a Lawyer."[101] In pertinent part, section 5.4(b) provides:

> 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 non-lawyer . . . but only if:
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> 1. The partnership or organization has as its sole purpose providing legal services to clients;

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[93] Ripps, *supra* note 69, at 5.

[94] Ho, *supra* note 87.

[95] *Id.*

[96] *Id.*

[97] *See id.*; *see also* ISSUES PAPER, *supra* note 40 at 1, 17.

[98] Ho, *supra* note 87.

[99] ISSUES PAPER, *supra* note 40, at 17.

[100] *Id.*

[101] D.C. RULES OF PROF'L CONDUCT R. 5.4 (1991).

> 2. All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;
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> 3. The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the non-lawyer participants to the same extent as if non-lawyer participants were lawyers . . . ;
>
> 4. The foregoing conditions are set forth in writing.[102]

The D.C. Rule precisely identifies the conditions that must be satisfied for a lawyer to practice legally in a firm with nonlawyer managers or owners who share in the firm's profits.[103] Furthermore, the D.C. Rule provides that "[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."[104] This segment of the D.C. Rule addresses and, most importantly, combats the common misconception that a lawyer's professional judgment will be compromised as a result of nonlawyer ownership.[105]

The D.C. Rule indicates that law firms have not been hindered, attorneys have not let their professional judgments be compromised, and the legal profession as a whole has not lost any viability under circumstances in which nonlawyers have been permitted to serve as partners of law firms and share in the firm's profits. Therefore, proponents of amending Model Rule 5.4 can use the D.C. Rule as a realistic and viable alternative to the current rule.

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[102] *Id.* R. 5.4(b).

[103] *See id.*

[104] *Id.* R. 5.4(c).

[105] *Id.* R. 5.4 cmt.

B. North Carolina and North Dakota Consider Alternative Business Structures

1. Alternative Business Structures in North Carolina

North Carolina is the most recent state to consider alternative business structures.[106] Currently, there is a bill pending in the North Carolina General Assembly that would permit nonlawyer ownership of up to 49% of a law firm.[107] This is a major development for those who support an amendment to Model Rule 5.4. While hybrid models have emerged in the United States to avoid Model Rule 5.4, very few states have actually taken the steps necessary to implement a rule permitting nonlawyer ownership.[108] It is also important to note that the North Carolina bill differs from the D.C. Rule, which maintains no cap on nonlawyer ownership.[109] This moderate proposal indicates willingness to meet the ABA halfway and find a common ground in which nonlawyers may be partners, but the controlling interest ultimately remains in the hands of attorneys.

Importantly, the bill ensures that nonlawyer partners will not interfere with the professional judgment of lawyers.[110] The bill specifically forbids nonlicensed shareholders from interfering with the exercise of professional judgment by licensed attorneys while the attorneys are representing clients.[111] Moreover, the bill addresses the chief concern of those who oppose an amendment to Model Rule 5.4: the idea that attorneys will let their duty to shareholders take priority over the duty they owe to their clients.[112] The North Carolina bill emphasizes that, if there is an inconsistency or conflict between duties owed to the court, clients, and shareholders, the duty to the court prevails over all other duties, followed by the duty to the client, which prevails over the duty to shareholders.[113] On its face, the North Carolina bill appears to be a victory for proponents

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[106] Richard Granat, *Should Law Firms Be Owned by Non-Lawyer Investors?*, ELAWYERING BLOG (May 19, 2011, 1:41 PM), http://www.elawyeringredux.com/2011/05/articles/competition/should-law-firms-be-owned-by-nonlawyer-investors/.

[107] *An Act to Allow Nonattorney Ownership of Professional Corporation Law Firms, Subject to Certain Requirements*, S. 254, 2011–2012 Gen. Assemb., Reg. Sess. (N.C. 2011) (unenacted).

[108] *See* Ho, *supra* note 87.

[109] N.C. S. 254.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

of modification and a step toward achieving the ultimate goal of amending the ABA's Model Rules.[114]

2. Alternative Business Structures in North Dakota

In a not-so-recent development, the State of North Dakota also considered nonlawyer ownership of law firms around the same time the D.C. Rule went into effect.[115] In 1987, the North Dakota Supreme Court struck down a bill that was similar to the D.C. Rule.[116] The North Dakota bill was a major development at the time, as the State of North Dakota was once the only jurisdiction outside of D.C. to have its highest court consider a request for nonlawyer ownership.[117] However, since the North Dakota Supreme Court rejected alternative business structures, forty-four states have formed committees to study alternative business structures.[118]

C. New York Personal Injury Firm Jacoby & Meyers Files Suit

1. Jacoby & Meyers's Place in the Industry

Jacoby & Meyers is a prominent and successful firm that is well known within the legal services industry.[119] The firm has been called "America's Largest Full Service Consumer Law Firm" and recently celebrated its fortieth anniversary.[120] Jacoby & Meyers has been regarded as the first law firm to advertise, "the first multi-branch, multi-state law firm" to make it a priority to provide affordable legal services to its clients, and even the first firm to "accept payment by credit card," showing the trust and faith that the partners of the firm had in the credit of their clients.[121] The firm began in California and expanded in 1979, becoming a

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[114] *See* Daniel Fisher, *North Carolina Bill Would Let Non-Lawyers Invest in Law Firms*, FORBES (Mar. 11, 2011, 8:22 AM), http://www.forbes.com/sites/danielfisher/2011/03/11/north-carolina-bill-would-let-non-lawyers-invest-in-law-firms/.

[115] Ripps, *supra* note 69, at 4.

[116] *Id.*

[117] *Id.*

[118] ISSUES PAPER, *supra* note 40, at 7.

[119] *See* Robin Rainer, *America's Largest Full Service Consumer Law Firm Celebrates 40 Years of Innovation*, PRWEB (Sept. 13, 2012), http://www.prweb.com/releases/2012/9/prweb9900164.htm.

[120] *Id.*

[121] *Id.*

national firm by opening offices in New York and New Jersey.[122] Today, Jacoby & Meyers has 310 attorneys in the United States.[123]

Jacoby & Meyers has cemented its place as a cornerstone in the industry by taking measures to accommodate its client's financial needs while simultaneously providing quality legal services for several years.[124] Thus, when Jacoby & Meyers filed federal lawsuits in New York, New Jersey, and Connecticut in 2011, seeking to amend the rules that "curtail[ed] its ability to raise capital from outside investors," it was no surprise that the issue of amending Model Rule 5.4 gained increased attention throughout the legal community.[125]

2. Jacoby & Meyers v. Presiding Justices

Expressing an immediate need to raise capital, Jacoby & Meyers filed suit in May 2011 to amend New York Model Rule 5.4 (New York Rule), which states that a lawyer may not practice in a business in which a "non-lawyer owns any interest."[126] Jacoby & Myers claimed that it had several outside investors lined up, including Anthony Costa, Philip Guarnieri, and Michael Ostrow—directors and co-chief executives of ES Bancshares, a holding company for Empire State Bank.[127] Jacoby & Myers asserted that the New York Rule restricted its ability to raise capital to cover expansion and technology costs without relying on bank loans, which come with high interest rates and hinder efforts to provide affordable legal services to clients.[128]

United States District Judge Lewis Kaplan dismissed the suit, finding that Jacoby & Myers lacked standing to bring the case.[129] More precisely, Judge Kaplan ruled that Jacoby & Myers had no injury in fact, stating that the firm could not show that the New York Rule had harmed the firm, and declared that a ruling on the matter would constitute an impermissible

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[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] Basil Katz, *Law Firm to Renew Challenge to State Investment Rule*, REUTERS (Nov. 3, 2011), https://a.next.westlaw.com/Document/I2b23dcd0956d11e19fefb85885c303b5/View/FullText.html.

[127] *US Judge Tosses Lawsuit on Law Firm Ownership Ban*, REUTERS (Mar. 8, 2012, 6:58 PM), http://www.reuters.com/article/2012/03/08/jacobymeyers-idUSL2E8E8EHF20120308.

[128] Smith, *supra* note 25, at B5.

[129] *US Judge Tosses Lawsuit on Law Firm Ownership Ban*, *supra* note 127.

advisory opinion.[130] Upon dismissal, Kaplan noted that Jacoby & Myers was engaging in a Sisyphean task, "pushing a huge rock uphill," and indicated it would be unlikely that Jacoby & Myers would be given the opportunity to argue the merits of the case in federal court.[131] Unfazed, Jeffrey Carton, legal counsel for Jacoby & Myers, said his client plans to appeal Judge Kaplan's decision.[132]

The persistence of Jacoby & Meyers in challenging the New York Rule provides a key example of attorneys and law firms making efforts to demonstrate that the Model Rules, which are supposed to be in place to protect and benefit legal professionals, are actually hindering attorneys and law firms.

D. ABA Commission on Ethics 20/20 Forms Working Group on Alternative Business Structures

1. Commission Objectives and Considerations

Since the creation of the ABA Commission on Ethics 20/20 (Commission) in 2009, whether to permit nonlawyer ownership and profit sharing in law firms has been considered an extremely challenging and controversial issue.[133] As such, the Commission developed a working group to examine the impact of globalization and technology on the legal profession.[134] The Commission was asked to consider how core principles of the legal profession, such as client and public protection, could be managed while simultaneously giving lawyers the ability to participate on a level playing field in a global legal services marketplace by permitting the use of different alternative business structures.[135] Specifically, the Commission made it a priority to study whether law firms should be able to structure themselves in ways not currently permitted due to restrictions imposed by Model Rule 5.4.[136]

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[130] *Id.*

[131] Katz, *supra* note 126.

[132] *US Judge Tosses Lawsuit on Law Firm Ownership Ban*, *supra* note 127.

[133] James Podgers, *Ethics 20/20 Edges Toward Decision on Endorsement of Versions of Alternative Law Practice Structures*, A.B.A. J. (Dec. 2, 2011, 3:46 PM), http://www.abajournal.com/news/article/ethics_20_20_edges_toward_decision_on_endorsement_of_versions_alternative/.

[134] ISSUES PAPER, *supra* note 40, at 1.

[135] *Id.*

[136] *Id.*

While the Commission was asked to consider the feasibility and benefits of alternative business structures as a whole, alternative business structures can take many different forms.[137] Therefore, an additional inquiry became what particular alternative business structures the Commission would consider and what structures it would deem as unrealistic options.[138] At its meeting in February 2011, the Commission declined further consideration of two possible alternative business structures: passive equity investment in law firms and the public trading of shares in law firms.[139] While both models have been present in international jurisdictions since July 2000, the Commission made the determination that neither would be appropriate for implementation in the United States.[140] This determination left the Commission with three possible approaches for consideration.[141]

The first option the Commission considered was limited lawyer/nonlawyer partnerships with a cap on nonlawyer ownership.[142] Under this approach, lawyers would be allowed to become partners with and share fees with nonlawyers, as long as the firm engages only in the practice of law, the nonlawyers own no more than a certain, limited percentage of the firm, and the nonlawyers pass a fit-to-own test.[143] The second option considered was lawyer/nonlawyer partnerships with no cap on nonlawyer ownership.[144] This model, known as the D.C. approach, is essentially the same as the first, but permits lawyers to engage in partnerships with no cap on nonlawyer ownership and does not require nonlawyers to pass a fit-to-own test.[145] Finally, the third option considered was to permit multidisciplinary practices that offer nonlegal services.[146] This most extreme differentiation from the current Model Rules allows law firms to provide both legal and nonlegal services, puts no cap on nonlawyer ownership, and does not require nonlawyers to pass a fit-to-own test.[147]

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[137] *Id.* at 17.
[138] *Id.* at 17, 19.
[139] *Id.* at 2.
[140] *Id.*
[141] *Id.* at 17.
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.* at 19.
[147] *Id.*

2. The ABA Makes a Decision on Nonlawyer Ownership

In April 2012, the ABA Commission on Ethics, which had originally formed the working group, pronounced the proposal "dead."[148] The good news for proponents of an amendment to Model Rule 5.4 is that the Commission indicated that it would continue to focus on the issues that an amendment to Model Rule 5.4 would potentially have corrected.[149] However, Jamie Gorelick and Michael Traynor, who both lead the Commission, recently stated: "[T]here does not appear to be a sufficient basis for recommending a change to ABA policy on nonlawyer ownership of law firms."[150] Unfortunately, Ms. Gorelick and Mr. Traynor remain tight-lipped regarding this position by merely stating that, for the time being, measures will not be taken.[151] Therefore, despite the working group's efforts, no proposal was actually ever presented to the House of Delegates and, regrettably, the situation remains unchanged.[152]

IV. RECENT INTERNATIONAL DEVELOPMENTS

Multiple countries have amended their rules to allow nonlawyer ownership and profit sharing between lawyers and nonlawyers. The most prominent of these will be discussed below.

A. A Brief Discussion of Comparative Law

Comparative law helps to explain how legal systems of different countries are related, as well as helps to explore the nature of the law and the potential for reform of legal landscapes.[153] Today, "[w]e live in a world where national boundaries are of diminishing significance in relation to technology, ecology, information, consumerism, entertainment, the arts, commerce, and ideas of human rights."[154] Globalization makes the world evermore interdependent and interconnected, exposing American law firms to the competition of a global market for legal systems and services.[155] Accordingly, greater interest in comparative legal studies is emerging, with

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[148] Palazzolo, *supra* note 79.

[149] Fischer, *supra* note 26, at 3.

[150] Palazzolo, *supra* note 79.

[151] *Id.*

[152] *Id.*

[153] MARY ANN GLENDON, PAOLO G. CAROZZA & COLIN B. PICKER, COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON WESTERN LAW 3 (3d ed. 2007).

[154] *Id.* at 2.

[155] *See id.* at 1–2.

the hope that identifying the best practices from international jurisdictions can offer an effective roadmap to domestic reform in the United States.[156]

Though this Comment provides a less than thorough analysis on comparative law, it indicates where further comparative legal research upon alternative business structures in England,[157] Australia,[158] and Canada[159] might lead to sound legal reforms in the United States.

B. Alternative Business Structures in England

America's legal system evolved from the English common law tradition.[160] As a result, these two legal traditions are quite similar, making a comparison between the two potentially valuable.[161] Additionally, much of the discussion regarding potential amendment to Model Rule 5.4 and the implementation of alternative business structures in the United States has come as a result of recent activity abroad permitting nonlawyer ownership of law firms.[162]

In 2007, England and Wales passed the Legal Services Act (LSA), which permits alternative business structures while setting forth several "regulatory objectives."[163] According to the LSA, alternative business structures may include lawyer and nonlawyer management and ownership, and those structures may either exclusively provide legal services or provide legal services in combination with nonlegal services.[164] Further, the LSA requires nonlawyer managers and owners to pass a fit-to-own test.[165] Some of the LSA's regulatory objectives include: "protecting and promoting the public interest; . . . improving access to justice; . . . promoting competition in the provision of services . . . ; [e]ncouraging an independent, strong, diverse and effective legal profession; . . . [and] promoting and maintaining adherence to the

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[156] *Id.*

[157] *See infra* Part IV.B.

[158] *See infra* Part IV.C.

[159] *See infra* Part IV.D.

[160] *See* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 557, 571 (2006) (arguing that what we think of as the common law comes from both England and the colonies, and that it coexisted at the time of the founding of the United States).

[161] *See id.*

[162] ISSUES PAPER, *supra* note 40, at 7.

[163] *Id.* at 13.

[164] *Id.*

[165] *Id.*

professional principles."[166] The LSA's regulatory objectives are particularly relevant because they reflect the goals of those who support modification in the United States.[167]

Of course, monumental changes in any profession rarely occur without coinciding increases in regulation. Accordingly, the LSA has resulted in the Legal Services Board, the chief regulatory body of the legal profession in England, designating the Solicitors Regulation Authority (SRA) to regulate alternative business structures.[168] The SRA ensures that all entities with nonlawyer managers or owners are licensed and any participants in an alternative business structure are authorized.[169] Penalties can be assessed against the alternative business structure, and against both lawyer and nonlawyer participants, for any violations of the LSA.[170] The increased emphasis on regulation in England is significant because amending Model Rule 5.4 would require similar measures in the United States to ensure that newly formed alternative business structures were aware of exactly where the proverbial line would be drawn, and the sanctions for crossing it.

Alternative business structures in England take two forms: the legal disciplinary practice (LDP) and the full alternative business structure.[171] The SRA rules and guidelines forbid nonlawyer owners in LDPs, only allowing for nonlawyer managers, and disallow the practice of nonlegal work.[172] Alternatively, full alternative business structures are not so limited.[173]

England first permitted LDPs on March 31, 2009.[174] An LDP only provides legal services and caps nonlawyer management at 25%.[175] As of June 2010, 254 LDPs were known to be in existence, with more than 70%

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[166] *Id.*

[167] *See id.* at 5–7.

[168] *Id.* at 17.

[169] *Id.*

[170] *Id.* at 13–14.

[171] *Id.* at 14.

[172] *Id.*

[173] *Id.*

[174] *Legal Disciplinary Practice*, LAW SOC'Y, at 1.2 (Apr. 6, 2011), http://www.lawsociety.org.uk/advice/practice-notes/legal-disciplinary-practice/.

[175] ISSUES PAPER, *supra* note 40, at 14.

of LDPs consisting of ten members or less.[176] To date, there have been no reported disciplinary problems with any LDP in England or Wales.[177]

While relatively moderate LDPs were the first type of alternative business structures in England and Wales, implementation of a full range of alternative business structures occurred in October 2011, at which time LDPs were able to transform themselves into full alternative business structures.[178] Unlike LDPs, full alternative business structures may have nonlawyer ownership and provide both nonlegal and legal services.[179] Furthermore, full alternative business structures must meet certain minimum requirements, such as having at least one nonlawyer and one lawyer owner/manager and using a "suitable regulatory model" in an effort to guarantee client protection.[180] Additionally, full alternative business structures require that nonlawyer owners do not interfere with a lawyer's professional duties and do not take any action ultimately causing a lawyer to breach such duties.[181]

C. Alternative Business Structures in Australia

Australia is another jurisdiction comparable to the American legal system because of how closely the Australian legal system reflects the English system.[182] Australian rules permitting multidisciplinary practices may serve as guidelines for the United States, should the ABA choose to amend Model Rule 5.4.

In 1994, New South Wales became the first common law jurisdiction in the world to allow multidisciplinary practices.[183] At that time, lawyers were required to hold at least a 51% ownership interest in the multidisciplinary partnership to ensure that these firms were subject to the same ethical rules as traditional law firms.[184] The 51% rule only lasted for a short time, as subsequent proposals abolished the rule, thus permitting incorporated legal practices (ILPs), including publicly traded law firms.[185]

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[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.* at 14–15.

[181] *Id.* at 15.

[182] *See* James A. Thomson, *American and Australian Constitutions: Continuing Adventures in Comparative Constitutional Law*, 30 J. MARSHALL L. REV. 627, 633 (1997).

[183] ISSUES PAPER, *supra* note 40, at 8.

[184] *Id.*

[185] *Id.*

ILPs are governed by the Legal Profession Act, which allows Australian legal practitioners to provide legal services alongside other service providers not required to be attorneys, but who provide lawful services.[186] Modern ILPs may have external investors and can even be listed on the Australian Stock Exchange, though the duty of a publicly traded ILP remains first to the court, then to the client, and then to shareholders.[187] This hierarchy of duty ensures that shareholders—whose primary concerns are profit and a positive return on investment—do not interfere with a lawyer's independent judgment.[188] On May 21, 2007, Slater & Gordon became the world's first publicly traded law firm, and it is currently listed on the Australian Stock Exchange.[189]

The majority of ILPs are small in size, often involving only three or more solicitors, but several large national firms have also recently incorporated.[190] Additionally, a number of different forms of ILPs are available.[191] One popular form involves ILPs that are complete service firms, providing a "one-stop shop" for clients seeking advice on property and financial services, and servicing clients concerned with the legal ramifications of their involvement with this type of business.[192] Currently, there are approximately seventy multidisciplinary partnerships in Australia that operate as complete service firms.[193]

Today, New South Wales has the largest number of law firms and practitioners of any state in Australia and, as of August 2010, over 20% of the legal profession in New South Wales consisted of alternative business structures.[194] Importantly, Australian legal practitioners have been using alternative business structures primarily as a result of the growing reality

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[186] *Id.* at 8–9.

[187] *Id.* at 9.

[188] *See* Steve Mark, *The Future Is Here: Globalisation and the Regulation of the Legal Profession*, OFFICE OF LEGAL SERVICES COMMISSIONER, at 10–11 (May 27, 2009), http://www.americanbar.org/content/dam/aba/migrated/cpr/regulation/steve_paper.authcheckdam.pdf.

[189] Peter Lattman, *Slater & Gordon: The World's First Publicly Traded Law Firm*, WALL ST. J.L. BLOG (May 22, 2007, 9:19 AM), http://blogs.wsj.com/law/2007/05/22/slater-gordon-the-worlds-first-publicly-traded-law-firm/.

[190] Mark, *supra* note 188, at 2.

[191] *Id.*

[192] *Id.*

[193] ISSUES PAPER, *supra* note 40, at 8.

[194] *Id.*

that the structure of the traditional law firm is no longer sufficient to meet the needs of many attorneys and clients.[195]

D. Alternative Business Structures in Canada

Canada is another country that has recently employed multidisciplinary practices, allowing nonlawyers and lawyers alike to hold management roles in law firms and to share in firm profits.[196] In the Canadian provinces of Ontario, British Columbia, and Quebec, the law permits multidisciplinary practices.[197] However, these multidisciplinary practices are not permitted to operate without substantial restrictions on management and services provided by the firm.[198] For example, the lawyers must have "effective control" of all legal services, and nonlawyer management may, at no time, provide any legal services to the public, unless they "support or supplement the practice of law by the [multidisciplinary practice]."[199]

By-Law 7 of the Law Society of Upper Canada—which regulates lawyers in Ontario—provides that a lawyer may form a partnership or other association with a nonlawyer professional if an application is submitted and several prerequisites are satisfied.[200] The lawyer must maintain "effective control" over the nonlawyer's professional practice, and some of the conditions that nonlawyers in a multidisciplinary practice must adhere to include a "good character requirement" and qualification in a profession that goes hand in hand with the practice of law.[201] Therefore, it is evident that, while Canada permits multidisciplinary practices, the partners who are attorneys must be in sole control of the operations and all legal work.[202] The regulation of "affiliated" law firms by the Law Society of Upper Canada further illustrates this point.[203] According to these rules, lawyer members in a multidisciplinary practice must own the professional business through which the lawyer practices law, must maintain control over all professional business, and must carry on the professional business

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[195] *Id.*
[196] *Id.* at 11.
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.*

at a location not otherwise used for the delivery of additional nonlegal services.[204]

V. ANALYSIS

A. Adopting Limited Lawyer/Nonlawyer Partnerships with a Cap on Nonlawyer Ownership

The ABA Commission on Ethics 20/20, with assistance from its working group on alternative business structures, considered three variations of alternative business structures before the previously proposed amendment to Model Rule 5.4 was pronounced dead.[205] The most intriguing model the Commission considered—and the one that appears the most likely to be adopted in the United States going forward—was an alternative business structure allowing for limited partnerships between a lawyer and nonlawyer with a cap on nonlawyer ownership.[206] This approach, the most modest of the three proposals, would require alternative business structures to engage solely in the practice of law, would permit only a limited percentage of nonlawyer ownership (which would always be less than 50%), and would require that each nonlawyer partner pass a fit-to-own test.[207]

This proposal is essentially modeled after the D.C. Rule—which has been implemented successfully for more than 20 years[208]—with the addition of more stringent restrictions.[209] More specifically, this proposal would adopt the D.C. Rule, but add a cap on nonlawyer ownership percentages, akin to the ethics rules used in England[210] and that which is anticipated in North Carolina.[211] Additionally, the proposed rule would take the D.C. Rule and add a fit-to-own test for nonlawyer partners, as used in England and Wales.[212]

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[204] *Id.* at 11–12.

[205] *Id.* at 17–19.

[206] *Id.* at 17.

[207] *Id.*

[208] Ho, *supra* note 87.

[209] Podgers, *supra* note 133.

[210] ISSUES PAPER, *supra* note 40, at 13.

[211] *An Act to Allow Nonattorney Ownership of Professional Corporation Law Firms, Subject to Certain Requirements*, S. 254, 2011–2012 Gen. Assemb., Reg. Sess. (N.C. 2011) (unenacted).

[212] ISSUES PAPER, *supra* note 40, at 13.

An amendment to Model Rule 5.4, which permits nonlawyers to own no more than a certain, limited percentage of the firm, requires that nonlawyers pass a fit-to-own test, and allows the firm to participate only in the practice of law, is a suitable approach that should be adopted by the ABA at this time.

B. Benefits of Limited Lawyer/Nonlawyer Partnerships with a Cap on Nonlawyer Ownership

To conclude that the stated amendment is necessary and appropriate, a balancing test must be conducted, weighing the apparent benefits of the proposed amendment to Model Rule 5.4 against the chief concerns advanced by those who fear modification. Additionally, examples of statutory language adopted abroad, and in the District of Columbia, must be identified to show that the concerns of those who oppose modification may be seriously alleviated by statute.

The first benefit of the proposed amendment to Model Rule 5.4 is that it is certain to reduce bank borrowing, which is typically accompanied by high interest rates and, therefore, an increased level of risk on debtor law firms.[213] While larger firms can usually raise capital, either through contributions from their own partners or from bank loans with prime interest rates, the smaller "boutique" law firms are forced to rely on bank loans with high interest when making an effort to break into the legal services industry.[214] Furthermore, banks typically require a personal guarantee of the firm's owners, which makes the risk on attorneys who are wishing to start their own firms even greater.[215]

This barrier to entry hinders the industry as a whole in two ways. First, since professionals wishing to start their own law firms may often see bank loans as unavoidable, they may be more hesitant to take the risk that accompanies a large bank loan at a high interest rate and, therefore, not enter the industry.[216] As a result, competition will be limited within the industry, and a decrease in competition will almost certainly be accompanied by a coincident decrease in the quality of legal services

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[213] *See* Smith, *supra* note 25.

[214] *Id.*

[215] Laura A. Calloway & David J. Bilinsky, *Financing a Law Practice*, GPSOLO, July/Aug. 2011, at 10, 13–14.

[216] *See id.*

provided as a whole.[217] Secondly, with fewer law firms entering the legal marketplace, the cost of legal services will remain high.[218] This Comment concludes that, with fewer firms entering the market because of the required reliance on bank lending, the reduced number of firms that are already in the market are free to charge higher rates.[219]

According to basic economics, an increase in demand accompanied by a decrease in supply will lead to higher prices.[220] Conversely, an increase in supply with the same demand will be accompanied by a decrease in price.[221] Therefore, since the current necessity for bank loans results in a reduced number of firms entering the industry, high rates billed out to the client for legal services are unavoidable. While this is a rather simplistic view of markets, this idea is only being set forth to indicate the obvious fact that an industry flooded with competition will result in the market participants charging lower prices than if the same industry had less competition.

The proposed amendment to Model Rule 5.4 allows for an increase in firm capital through internal measures, such as obtaining funds from investors who seek to hold management positions in the firm, as opposed to reliance on external sources of financing.[222] Therefore, an amendment to Model Rule 5.4 would certainly increase competition within the industry and decrease prices.

The suggested amendment to Model Rule 5.4 will also allow law firms to be in a better position to meet client demands.[223] Law firms who typically only handle certain types of cases will be better equipped to provide the best possible legal services by having nonlawyer managers on staff whose business experience gives them expertise over a particular subject. For example, a law firm whose focus is land use planning could benefit from having partners who are architects or engineers.[224] This benefit is not merely a theory, but a concept proven in the District of

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[217] *See* Michael Abramowicz, *How Lawyers Compete*, REGULATION, Summer 2004, at 38, 38.

[218] *See generally* Reem Heakal, *Economics Basics: Supply and Demand*, INVESTOPEDIA, http://www.investopedia.com/university/economics/economics3.asp#axzz2LYyrGFmb (last visited Aug. 18, 2014) (explaining basic economic concepts regarding supply and demand).

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *See* Fischer, *supra* note 26, at 3.

[223] *Id.*

[224] *Id.*

Columbia, where, for example, law firms are known to have social workers at family law firms and scientists at intellectual property firms.[225]

Furthermore, law firms that employ nonlawyer professionals would be better equipped to litigate on behalf of their clients because the nonlawyer managers would likely have an enhanced understanding of the issues and could convey this information, educating the litigating attorneys.[226] Additionally, nonlawyer professionals would be more familiar with experts in the field who could be consulted for testimony or for help throughout the case.[227] Simply put, nonlawyer managers and owners of law firms could provide valuable insight acquired from their significant business experience within the given industry. It is only logical to think that the services offered by law firms would improve if law firms had managers with ample experience in the areas being litigated. The recommended amendment to Model Rule 5.4 allows for this type of conduct.

Finally, a substantial benefit resulting from the proposed amendment to Model Rule 5.4 is that it will improve upon the archaic model currently employed by the legal services industry by allowing attorneys to take advantage of changes in technology and information sharing, and by changing in accordance with globalization of the market.[228] Today, the idea that lawyers serve only clients in their locality is unrealistic due to continuous increases in national and global commerce.[229] In fact, most of the leading law firms have both a national and global presence.[230] Further, with the increasing mobility of our population and the ease of information sharing throughout the world, the reality is that lawyers will find it increasingly appealing to be licensed in multiple states and to practice with law firms throughout the country and the world.[231] These realities become extremely relevant when considering the current restrictions imposed by Model Rule 5.4.

Under Model Rule 5.4, questions arise as to whether an attorney, practicing primarily in a state that condemns nonlawyer management, has the ability to practice law simultaneously for an out-of-state or foreign law

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[225] Ho, *supra* note 87.

[226] *See* Palazzolo, *supra* note 79.

[227] *See id.*

[228] *See* SCHWARTZ ET AL., *supra* note 37, at 29.

[229] *Id.*

[230] *Id.*

[231] *Id.*

firm with nonlawyer managers or owners.[232] Moreover, it has even been noted that "American law firms doing business overseas are in a quandary over how to balance the more permissive rules on business structures in other countries and the more restrictive regulations in U.S. jurisdictions."[233] Recently, the New York State Bar's Committee on Professional Ethics ruled that a lawyer licensed in the State of New York cannot practice for an out-of-state law firm that employs nonlawyer managers or partners.[234] This recent ruling exemplifies the hindrance on lawyers who primarily practice in New York and who seek to practice with firms employing nonlawyer managers located in the District of Columbia, England, Canada, Wales, Australia, and probably the State of North Carolina.

It is likely that states will look to New York as a model and, inevitably, attorneys looking to take advantage of global and out-of-state opportunities will continue to be encumbered. "[T]he idea of non-lawyer ownership . . . is [said to be] gaining [substantial] traction in the broader legal community."[235] Until Model Rule 5.4 is amended, lawyers who practice in states that prohibit nonlawyer management or ownership will be significantly restricted when representing clients in other states, and from assisting other law firms.[236] Thus, a concern emerges: The more that individual states and various countries continue to allow nonlawyer management, the more attorneys from states who prohibit nonlawyer management will be restricted. As such, Model Rule 5.4 thwarts progress by restricting an attorney's ability to compete legally and share information globally.[237]

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[232] James Podgers, *Nonlawyer Ownership Interests in Law Firms Remains an Unsettled Issue for Ethics 20/20 Commission*, A.B.A. J. (Feb. 3, 2012, 8:21 PM), http://www.abajournal.com/news/article/nonlawyer_ownership_interests_in_law_firms_remains_an_unsettled_issue/.

[233] *Id.*

[234] Emily Fisher, *Does Nonlawyer Ownership of Firms Threaten the Independent Judgment of Lawyers?*, HILDEBRANDT INST. BLOG (Mar. 23, 2012), http://hildebrandtblog.com/2012/03/23/does-nonlawyer-ownership-of-firms-threaten-the-independent-judgment-of-lawyers/.

[235] *Id.*

[236] *Id.*

[237] *See* Marc Biamonte, *Multidisciplinary Practices: Must a Change to Model Rule 5.4 Apply to All Law Firms Uniformly?*, 42 B.C. L. REV. 1161, 1163, 1167 (2001) (explaining advocates' opinion regarding how nonlawyer professionals will enhance lawyers' ability to serve clients through more effective and cost-efficient representation).

C. Primary Concerns Regarding an Amendment to Model Rule 5.4 Allowing for Limited Lawyer/Nonlawyer Partnerships with a Cap on Nonlawyer Ownership

A proper discussion of an amendment to Model Rule 5.4 cannot be conducted without addressing the central concerns of those who oppose change. The first concern is that nonlawyer partners will encourage attorneys to put a newfound emphasis on maximizing profits, and this strong profit motive will come at the expense of the attorney's obligation to the client.[238] Essentially, many fear that those who support nonlawyer ownership are driven by greed and a lust for profits and nothing more.[239] IBM General Counsel Robert Weber made a particularly telling statement when asked about a potential amendment to Model Rule 5.4, saying, "I don't know if I'd call it greed, but it's in the greed ball park."[240] Weber went on to state that "the profession has grown more selfish in recent years and less focused on clients, which, in turn, has given the idea of outside ownership room to grow."[241] Others who have spoken out in opposition to an amendment include Lawrence J. Fox, a partner at a prominent Philadelphia law firm.[242] When asked about the proposal, Mr. Fox said, "Let's keep remembering the story of Arthur Anderson and Enron—how great firms can lose their way by chasing monetary gain."[243]

The concern is a real one. However, with some lawyers now charging more than $1,000 per hour, it is hard to argue that the legal profession is not also a commercial enterprise driven by profit motives.[244] Moreover, from 2007 to 2011, the hourly rate of partners charging at least $800 per hour increased at three times the rate of attorneys charging less than $300 per hour.[245] Ken Fowlie, executive director of a publicly traded Australian

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[238] Smith, *supra* note 25, at B1.

[239] Joe Palazzolo, *IBM General Counsel: Nonlawyer Ownership Is a Nonstarter*, WALL ST. J.L. BLOG (Feb. 14, 2012, 2:22 PM), http://blogs.wsj.com/law/2012/02/14/ibm-general-counsel-nonlawyer-ownership-is-a-nonstarter/.

[240] *Id.*

[241] *Id.*

[242] Smith, *supra* note 25, at B1.

[243] *Id.*

[244] *Id.*

[245] *ABA Steps Back from Proposal of Non-Lawyer Ownership of Law Firms*, JD JOURNAL (April 17, 2012), http://www.jdjournal.com/2012/04/17/aba-steps-back-from-proposal-of-non-lawyer-ownership-of-law-firms/#.

law firm, said the concern that an amendment to Model Rule 5.4 will result in attorneys prioritizing shareholders and profits over their clients "is drawn from the naïve belief that attorneys and partners aren't already motivated by profits."[246] For those who remain concerned, it is important to point out that these worries can be strongly alleviated by statute.

Jurisdictions that have permitted nonlawyer management and profit sharing have seen a unanimous change in the language of their rules, requiring attorneys to prioritize their duties to their clients and their duties to the courts over their duties to shareholders.[247] Therefore, it can be assumed that an amendment to Model Rule 5.4 would come with safeguards that help ensure attorneys prioritize their clients over shareholders. Thus, if an attorney takes action that is motivated by the desire for profit at the expense of a client's interest, the attorney will undoubtedly face sanctions. It is puzzling that attorneys who oppose modification for the previously stated reasons refuse to acknowledge how simple it would be to include in an amendment to Model Rule 5.4 a requirement that attorneys continue to rank their clients' interests and their duties to the court over the interests of nonlawyer managers, or else be subject to sanctions.

When referring to alternative business structures, one legal scholar has noted: "[T]here is sentiment among some lawyers in favor of such alliances and the rich potential for income that they offer, even if it is at the expense of losing or diminishing traditional client protections."[248] What this legal scholar—like those opposed to modification—does not seem to grasp is that alternative business structures do not have to come at the "expense of losing or diminishing traditional client protections."[249] The success of the D.C. Rule, which includes language requiring law firms to prioritize the interests of clients over shareholders, seems to prove this point.[250]

Another concern is that the involvement of nonlawyer managers and partners will infringe upon the lawyer's independent judgment.[251] More

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[246] Cynthia Hsu, *Should Law Firms Be Owned by Non-Lawyers?*, FINDLAW (Jan. 23, 2012, 4:56 AM), http://blogs.findlaw.com/strategist/2012/01/should-law-firms-be-owned-by-non-lawyers.html.

[247] D.C. RULES OF PROF'L CONDUCT R. 5.4(b)(1) (1991).

[248] Cindy Alberts Carson, *Under New Mismanagement: The Problem of Non-Lawyer Equity Partnership in Law Firms*, 7 GEO. J. LEGAL ETHICS 593, 593 (1994).

[249] *Id.*

[250] D.C. RULES OF PROF'L CONDUCT R. 5.4(b)(1) (1991).

[251] Fisher, *supra* note 234.

specifically, those opposed to modification fear that nonlawyer owners will introduce business interests that are external to the attorney-client relationship.[252] Advocates who resist change emphasize that attorneys are fiduciaries to the legal system and, therefore, it is crucial that lawyers perform their duties themselves without delegating them to others and that lawyers do what is necessary to preserve and maintain their independence.[253] The fear is that, upon modification, lawyers will be persuaded by their nonlawyer partner when making decisions on behalf of the client.[254]

The concern is fallacious. To begin, Model Rule 5.1(a) provides that alternative business structures may be sanctioned for failing to ensure that attorneys of the firm conform to the Model Rules.[255] According to Model Rule 5.1(a), "A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the [Model Rules]."[256] Therefore, even if nonlawyers held management roles in the firm, or were entitled to share in the profits, the firm could still be sanctioned if the partners allowed their independent judgment or the independent judgment of their associates at the firm to be interfered with in a way that did not conform to the Model Rules. Furthermore, Model Rule 5.1(b) extends the requirements of Model Rule 5.1(a) to lawyers who have direct supervisory authority over other attorneys but are not partners of the firm.[257] Thus, a lawyer in an alternative business structure would have great incentive to avoid interference with independent judgment. This system of self-governance plays a prominent role in the legal services industry, and there is no reason to anticipate that it would change because of the increased involvement of nonlawyer professionals.

Additionally, one legal scholar has questioned why the ABA is concerned that attorneys will not be able to maintain their independent judgment subsequent to modification while doctors maintain their independent judgment even though they are often faced with external

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[252] *Id.*

[253] Levinson, *supra* note 81, at 235.

[254] *Id.* at 242; Palazzolo, *supra* note 239.

[255] MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2013).

[256] *Id.*

[257] *Id.* R. 5.1(b).

influence.[258] Frequently, corporations will purchase the private practices of doctors and contract with doctors who once practiced independently.[259] As a consequence, doctors are regularly faced with pressure from external investors to cut costs and be more efficient.[260] Despite this pressure, it would be rare, egregious, and despicable to see a doctor put these concerns over the health of the patient. This analogy makes it apparent that, if we can trust those in the medical profession to maintain their fiduciary duty to patients despite external forces, one would hope that we could trust attorneys to do the same with their clients.

One final concern for those who fear an amendment to Model Rule 5.4 is that it will lead to the legal profession being conducted as a business or a trade as opposed to a profession.[261] As Judge Patrick F. Fischer has stated, "letting nonlawyers own law firms [and] share fees with lawyers is another step toward making lawyers into a trade rather than a profession—and I do not want to be a tradesman."[262] These concerns largely stem from greater worries that the values of the profession, such as undivided loyalty to clients, confidentiality, and the right of attorneys to maintain their independent judgment, will be effectively "sold" so that law firms have greater sources of capital and can better compete.[263]

Essentially, those who maintain the fear that the legal profession will become a trade are incapable of imagining a reality in which lawyers are both able to practice as professionals while maintaining adequate sources of capital and are aided by outside professionals in an effort to serve clients better. The idea that attorneys will crumble at any sign of external pressure gives the impression that attorneys are spineless and do not currently face situations in which pressure is extremely high. On a daily basis, as part of being a professional, attorneys are forced to make decisions not because it pleases others or because it may be the more profitable route, but because it is in the best interest of their client. Furthermore, attorneys face pressure from other attorneys at the firm, as well as judges and clients, and do so while acting lawfully in their client's best interest. Is it realistic to propose that, because lawyers may face increased pressure from those who seek a

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[258] Bernard Sharfman, *Modifying Model Rule 5.4 to Allow for Minority Ownership of Law Firms by Nonlawyers*, 13 GEO. J. LEGAL ETHICS 477, 489 (2000).

[259] *Id.*

[260] *Id.*

[261] Fischer, *supra* note 26, at 3.

[262] *Id.*

[263] *Id.*

financial gain, lawyers will seek to satisfy these nonlawyers at the expense of professionalism? If that is what those opposed to a modification to Model Rule 5.4 are advocating, their position appears highly speculative.

VI. CONCLUSION

The intended purpose of Model Rule 5.4, to maintain the professional independence of a lawyer, is admirable and absolutely worth pursuing.[264] However, Model Rule 5.4 attempts to accomplish this objective at the expense of attorneys, law firms, and ultimately, the client.[265] In its current form, Model Rule 5.4 prohibits attorneys from sharing legal fees with nonlawyers and forbids lawyers from forming partnerships with nonlawyers if the partnership is engaged in the practice of law.[266] Those opposed to modification theorize that Model Rule 5.4 ensures that lawyers are not influenced by nonlawyers in making decisions on behalf of their clients, and guarantees that lawyers will not put investors, shareholders, and the pursuit of profits above the best interests of clients.[267] Unfortunately, these theories ignore significant negative realities that can only be addressed through modification.

Some of the consequences resulting from enforcement of Model Rule 5.4 in its current form include requiring firms to increase bank borrowing at high interest rates,[268] thus decreasing competition in the marketplace and resulting in higher rates to clients, as well as prohibiting attorneys from having nonlawyer partners who are professionals with significant experience in litigated practice areas.[269] Most importantly, the modern law firm is being asked to restrict itself, by preventing attorneys from taking advantage of advances in technology and information sharing and by refusing to change with the globalization of the market.

As such, the stated amendment to Model Rule 5.4 appears both necessary and beneficial. Specifically, this Comment advises an amendment providing for limited lawyer/nonlawyer partnerships with a cap on nonlawyer ownership. This moderate proposal is not asking the

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[264] MODEL RULES OF PROF'L CONDUCT R. 5.4 cmt. 1 (2013).

[265] *See supra* Part III.C (noting, for example, the firm of Jacoby & Meyers was unable to raise needed capital due to Rule 5.4); *see also supra* Part V.

[266] MODEL RULES OF PROF'L CONDUCT R. 5.4 (2013).

[267] *See* Levinson, *supra* note 81, at 242.

[268] Fisher, *supra* note 114.

[269] Levinson, *supra* note 81, at 242 ("No doubt the law firm that branches out beyond the practice of law offers some advantages. These include . . . the intellectual benefit of an ongoing relationship between the lawyers and nonlaw experts in the firm . . . .").

ABA to adopt a rule completely at odds with its current policies, but is instead asking the ABA to take a progressive approach.

If nothing else, this Comment should indicate that more research needs to be conducted in consideration of a potential amendment to Model Rule 5.4. After all, "[t]he first step in solving any problem is recognizing that there is one."[270]

[270] *The Newsroom: We Just Decided To* (HBO June 24, 2012).