Mississippi College Law Review

Volume 32
Issue 2 *Vol. 32 Iss. 2*

Article 5

2014

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Custom Citation
32 Miss. C. L. Rev. 267 (2013-2014)

VARIATIONS ON NONLAWYER OWNERSHIP OF LAW FIRMS: THE FULL MONTY, ACCOMMODATION OR THE (ABA) STONEWALL?

*Charles S. Doskow**

I. INTRODUCTION

In 1981, the Kutak Commission, as part of its revision of the American Bar Association's ("ABA") Model Rules of Professional Responsibility ("Model Rules"), proposed a rule that would have modified Rule 5.4(d)'s flat ban on nonlawyers having an ownership interest in a law firm.[1] In a floor debate, the reporter for the commission was asked whether the change would allow Sears Roebuck to open a law office.[2] His response was in the affirmative.[3]

The result was a firm rejection of the proposal by the ABA's House of Delegates.[4] Although other proposals to modify the rule have been offered since[5], the rule remains unchanged.[6] The ABA's contemporary attention to revision, the Ethics 20/20 Commission ("20/20 Commission"), last year issued for comment a draft discussion modifying the rule, then chose to sidestep the issue completely, saying that such a proposal would dominate discussion and prevent full consideration of its other proposed rules.[7]

The ABA thus remains adamant in its opposition to the acquisition of ownership interests by nonlawyers, despite the acceptance of the practice by the English and Australian bars, as well as the District of Columbia bar.[8]

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1. Milton C. Regan, Jr., *Lawyers, Symbols, and Money: Outside Investment in Law Firms*, 27 PENN. ST. INT'L L. REV. 407, 416 (2008).

2. *Id.*

3. *Id.*

4. 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, 98 (2000). Opposition to nonlawyers ownership is sometimes referred to as "Fear of Sears." Tyler Cobb, *Have Your Cake and Eat It Too! Appropriately Harnessing the Advantages of Nonlawyer Ownership*, 54 ARIZ. L. REV. 765, 775 (2012).

5. *For Comment: Discussion Paper on Alternative Law Practice Structures*, ABA (Dec. 2, 2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf.

6. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2012).

7. James Podgers, *Clear Track: Ethics 20/20 Commission Can Now Address Issues of Fee-Splitting with Non-Lawyers*, A.B.A. J. (Oct. 1, 2012, 2:30 AM), http://www.abajournal.com/magazine/article/clear_track_ethics_20_20_commission_can_now_address_issues_of_fee-splitting/.

8. On April 16, 2012, the co-heads of the ABA ethics committee opined that no basis existed for recommending a change in the policy. Joe Palazzolo, *ABA:'Case Has Not Been Made' for Nonlawyer*

This article will consider several aspects of the prohibition. It will first address the rule and consider its role in the protection of the public. It will then review the jurisdictions that have modified the rule, considering the models adopted and addressing the effect, if any, these changes have had on each of the three jurisdictions involved. Included in this discussion is the ABA 20/20 Commission proposal that has not been adopted. It will then consider the litigation pending in New York attacking the rule on constitutional grounds. We will conclude by opining that the rule should be modified by an amendment similar to the District of Columbia approach.

The Model Rules are written in accord with the ABA's view of the world, that of a legal landscape dominated by large law partnerships.[9] While the rules in some provisions acknowledge that other forms of legal practice exist, they are often not entirely appropriate for lawyers employed in other contexts. Their application must be modified to apply to lawyers in the military, or those employed full time by business corporations or accounting firms.[10] Rule 5.4(c) and 5.4(d) ignore the fact that those lawyers have superiors with interests other than the practice of law, and in fact, have the right and duty to direct the lawyer's activities.[11]

None of these organizations would be affected in any way by a rule allowing nonlawyer investment in law firms. As has been pointed out, lawyers can obtain necessary financing by borrowing.[12] The question suggests itself: Is a stockholder in a greater position to improperly influence a lawyers' judgment than a creditor?

The principal concerns expressed over allowing nonlawyers ownership of part of a law practice can be summarized as the danger of compromising the lawyer's independent judgment[13] and concern over confidentiality. Neither concern should be fatal. Comparison with the role of a creditor

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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.

9. For example, the last three presidents of the ABA are from firms that have 200, 450 and 175 lawyers; the one before them was from White and Case.

10. *See* Dzienkowski & Peroni, *supra* note 4, at 94-95.

11. The Restatement of The Law Governing Lawyers Third reflects this nonapplication in the in-house counsel context:

> [I]n applying [nonlawyer interest or control] prohibition, certain areas of nonapplication are recognized. Plainly a nonlawyer may direct the activities of lawyers when the nonlawyer is a client or an agent of a client in the matter [ref] such as a nonlawyer officer of a corporation who directs the activities of a lawyer in the office of inside legal counsel of the organization.

RESTAT. (THIRD) OF THE LAW GOVERNING LAWYERS § 10, cmt. c (2000).

12. Cobb, *supra* note 4, at 778. "Opponents argue that debt financing is most conducive for controlled and sustainable law firm growth." (citing Neal Solomon, *In Focus: Business of Law, Economic Principles Drive Mergers Among U.S. Firms - Most Recent Law Firm Growth Has Occurred Due to Branching via M&A*, NAT'L L.J., Sept. 25, 2005, at S2; *see also* L. Harold Levinson, *Independent Law Firms That Practice Law Only: Society's Need, the Legal Profession's Responsibility*, 51 OHIO ST. L.J. 229, 248 (1990).

13. Model Rule 5.4(d)(3) provides: "[a] lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for profit, if: (c) a nonlawyer has the right to direct or control the professional judgment of the lawyer." Comment 2 to the Rule refers to "traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another." MODEL RULES OF PROF'L CONDUCT R. 5.4 cmt. 2 (2012). The key word would appear to be "traditional."

suggests that these obligations can be met by lawyers simply following the rules they are obligated to follow in any business form.

One of the advantages of law as a profession is the ease of entry. Very little or no capital is required to open a one-person law office, or even a two or three person firm. Such startup practices do not appear to be candidates for infusions of investment capital. This suggests that the rule itself presently has a very limited application. But that application is directly relevant to the dominating considerations of the ABA, those of the large law firms.

II. THE RULE

Model Rule 5.4(d) (Professional Independence of a Lawyer) nests comfortably in Chapter 5 (Law Firms and Associations) of the Rules. Rule 5.4(d) provides:

> (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
>
> (1) a nonlawyer owns any interest therein, [exception for fiduciaries];
>
> (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
>
> (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.[14]

The comment to the rule makes reference to "traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another."[15]

The history of the rule suggests its limitations. In 1928, Canon 33 was added to the ABA Canons of Professional Ethics.[16] It recommended that lawyers not partner with nonlawyers if any part of the partnership involved the practice of law.[17] The Model Code made the rule mandatory in 1969.[18] In 1983, it became Rule 5.4 of the Model Rules. The Rule was said to reflect the "professional policy" of the legal profession.[19]

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14. MODEL RULES OF PROF'L CONDUCT R. 5.4.

15. MODEL RULES OF PROF'L CONDUCT R. 5.4 cmt. 2. Rules 5.4(b) and 5.5(b) have been upheld against First Amendment challenges. Lawline v. Am. Bar Ass'n, 956 F.2d 1378, 1387 (7th Cir. 1992); Turner v. Am. Bar Ass'n, 407 F. Supp. 451, 479 (N.D. Tex. 1975).

16. Dzienkowski & Peroni, *supra* note 4, at 96.

17. ABA CANONS OF PROF'L ETHICS Canon 33 (1928).

18. MODEL CODE OF PROF'L RESPONSIBILITY R. 3-102(a) (1969).

19. MODEL RULES OF PROF'L CONDUCT R. 5.4 cmt. 1 (2012).

Consideration of possible amelioration of the flat ban resulted from ABA attention to multidisciplinary practice ("MDP"). At the ABA's August 1999 meeting, the Commission on Multidisciplinary Practice made the recommendation that would have allowed lawyers and nonlawyers to offer MDP services to the public, but recommended the bar impose regulation on nonlawyer controlled providers of MDP.[20] In 1999 and 2000, proposals that would have allowed MDPs to exist in the United States would have also ameliorated the restriction, but such recommendations were rejected by the ABA.[21] Almost contemporaneously both the District of Columbia and North Dakota proposed allowing nonlawyers to own membership interests in law firms.[22] The ABA successfully defeated the idea in North Dakota, but could not prevent the District of Columbia from adopting the proposal.[23]

In 1991, the MDP issue was resolved by the adoption of Rule 5.7.[24] Rule 5.7 (Responsibilities Regarding Law-Related Services) subjects the lawyer to the Model Rules if such services are provided "in circumstances that are not distinct from the lawyer's provision of legal services to the client," or the lawyer fails to take reasonable measures to assure that the client is aware that it does not receive the benefit of the Rules protection.[25] The ABA thus recognizes that it does not exercise control over a lawyer's activities outside the practice of law (at least if they avoid Rule 8.4's strictures) unless a client could be confused by the offering of the nonlegal services. This solution avoids the prohibition on equity participation by nonlawyers by segregating their activities when in conjunction with counsel. It thus avoids affecting the prohibition of a direct ownership interest in law practice.

The ultimate question with respect to every rule governing the legal profession is whether it serves the interest of the regulatory universe: protection of the public. A rule that only prevents lawyers from being unduly influenced by considerations irrelevant to their performance of legal services is only indirectly connected to a client interest. The lawyer's duty is to serve his clients. Rules that simply reinforce that obligation by prohibiting conduct only marginally relevant to it should be held to serious scrutiny. In this case, the prime motivation for maintaining the rule inviolate appears to be the ABA's attempt to preserve its own image of the legal profession, one which has been rendered obsolete by many of the changes in our society's competitive landscape.[26]

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20. Dzienkowski & Peroni, *supra* note 4, at 85.

21. *Id.* at 86–87.

22. *Id.* at 98.

23. *Id.* at 99; D.C. RULES OF PROF'L CONDUCT R. 5.4 (1988).

24. MODEL RULES OF PROF'L CONDUCT R. 5.7 (2012).

25. *Id.*

26. Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 479 (1988) (invalidating a rule against targeted direct mail solicitation, is one of the series of cases which disapproved state bar regulations on constitutional grounds). The key case is Bates v. State Bar of Ariz., 433 U.S. 350, 378-79, 383 (1978), which struck down flat prohibitions on lawyer price advertising.

III. JURISDICTIONS THAT HAVE MODIFIED THE RULE

Three common-law jurisdictions have relaxed their rules with respect to ownership by nonlawyers: Australia, Great Britain, and the District of Columbia.[27] Australia has gone the greatest distance: law firms have actually issued stock in public offerings. Both the English and the District of Columbia rules are intended to allow nonlawyer professionals within the firm to share ownership interests. Neither contemplates the raising of outside capital.

A. Australia

The most dramatic vision of the world that the future may bring was the 2007 initial public offering ("IPO") on the Australian Stock Exchange of the law firm of Slater & Gordon.[28] The Australian model is the Full Monty.

Law firms can become an Incorporated Legal Practice ("ILP") by registering with the Australian Securities & Investment Commission.[29] The ILP is then covered by the SEC, the Legal Practices Act, and the Corporations Act. It can raise funds like any other corporation.[30] The partners become "solicitor directors," with at least one of whom is responsible for the firm's provision of legal services, and has disciplinary responsibilities for the firm's conduct.[31] The Australian model "allows law firms, whether or not multidisciplinary, to incorporate, where all those involved must comply with the ethical obligations and regulatory requirements of lawyers, whether or not they are lawyers."[32] The authorizations were designed to allow law firms to make public offerings of their stock.

The first such offering was by the Australian firm of Slater & Gordon.[33] Its IPO generated $49 million Australian dollars.[34] After the IPO, the vendor shareholders, partners in the firm, owned 63 percent.[35] All the outside shares were held by "professional and institutional investors."[36] The prospectus for the offering is over 100 pages long. One page of "Investment Highlights" details four positive factors: "Powerful Brand,"

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27. The initial early actions of the Australian and English bars are discussed in detail by Milton C. Regan, Jr. Regan, *supra* note 1, at 407.

28. *Id.*

29. *Id.* at 409 (citing Steven Mark & Georgina Cowdroy, *Incorporated Legal Practices—A new Era in the Provision of Legal Services in the State of New South Wales*, 22 PENN ST. INT'L L. REV. 671, 674 (2004)).

30. Regan, *supra* note 1, at 409.

31. *Id.*

32. Email from Steve Mark, Comm'r, Office of Legal Services, to author (Feb. 13, 2013, 09:26 PM) (on file with author).

33. Regan, *supra* note 1, at 411.

34. *Id.* at 412. The Australian dollar trades within about one nickel of the U.S. dollar.

35. *Id.*

36. *Id.* There has since been a registration of stock issued to an employee stock ownership fund.

"Strong Business Base," "Attractive Financial Fundamentals," and "Excellent Growth Prospects."[37] Growth prospects include "a number of potential acquisition candidates."[38]

The "Letter from the Chair" states:

> Our growth to date has been funded internally by key shareholders and through debt. This Offer provides an opportunity for those key shareholders who have provided that funding to sell down part of their holding in Slater & Gordon. In addition, we are seeking an injection of capital to accelerate the delivery of our growth strategy.[39]

The "Investment Overview" acknowledges that a law firm may differ from other investments under "Key risks":

> Conflict of duties—Lawyers have a primary duty to the courts and a secondary duty to their clients. These duties are paramount given the nature of the Company's business as an Incorporated Legal Practice. There could be circumstances in which the lawyers of Slater & Gordon are required to act in accordance with these duties and contrary to other corporate responsibilities and against the interests of Shareholders or the short-term profitability of the Company.[40]

The Australian Legal Profession Act of 2004 (New South Wales) prohibits "disqualified persons" from having a financial interest in an ILP. The Supreme Court can disqualify an individual from managing a legal practice corporation.[41] The disqualifying conditions are not limited.[42] The Act refers to the individual's conduct in any corporate involvement, and "any other matters the Court considers appropriate."[43]

Slater & Gordon's offering at $1.00/share was successful; it jumped to $1.71 within ten days.[44] The second firm to list, Integrated Legal Holdings ("ILH"), was not so fortunate. Its IPO occurred one day after a major market break, and the share price quickly fell from fifty cents to thirty-

37. Andrew Grech, SLATER & GORDON LIMITED PROSPECTUS 8 (Apr. 13, 2007), http://www.slatergordon.com.au/files/editor_upload/File/prospectus/Prospectus.pdf.

38. *Id.*

39. *Id.* at 10.

40. *Id.* at 14. Is this consideration very different from a standard business entity that declines an invitation to participate in an illegal transaction that could generate short-term profits but would violate the law and could endanger the longer-range profit outlook?

41. *Legal Profession Act 2004* (NSW) s 1.2.4 (Austl.), *available at* http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/s4.html#disqualified_person.

42. *Id.*

43. *Id.*

44. Susannah Moran, *New Listing Rocked by Turbulence*, THE AUSTRALIAN, (Aug. 24, 2007, 12:00 AM), http://www.theaustralian.com.au/business/legal-affairs/new-listing-rocked-by-turbulence/story-e6frg97x-1111114254116.

eight cents, losing about one quarter of its value.[45] ILH is an entirely different model from Slater & Gordon, basing its growth entirely on acquisitions, considering as many as 89 firms as targets.[46]

The Legal Services Commissioner, writing in the Australian Journal of the Professional Lawyer, emphasizes that the law firm would not be liable to its shareholders if it allowed its professional responsibilities to "subjugate the interests of its shareholders" because its hierarchy of duties is clearly set forth in its prospectus and other documentation.[47]

It should be noted that the Australian ownership rules were accompanied by a comprehensive program of self-assessment by incorporated firms. An article analyzing the results of that program have found that it has reduced complaints against law firms by a significant number.[48] A key difference is that the regulatory system described applies to law firms, rather than individual lawyers as in American state regulation of the profession.[49]

B. Great Britain

The Legal Services Act of 2007 (the "Act") authorized the creation of "Alternative Business Structures," law firms in which there is a non-lawyer either as a manager or with an ownership interest.[50] The law allows these entities to provide services other than the practice of law.[51] Concern over lack of competition, and the existence of restrictive practices led to the adoption of the reforms.[52] The result has been a revolution in the structure of law practice. Within the first year of the Act becoming effective, 36 licenses were granted within its first year, with another 100 in the regulatory pipeline.[53]

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45. *Id.*

46. *Id.*

47. Steve Mark, *Views from an Australian Regulator*, 2009 J. PROF. LAW 45, 55 (2009). "Slater & Gordon's constituent documents and shareholder agreements clearly specified the duty to the court was the primary duty, the duty to clients was the second duty, and the duty to shareholders was third." *Id.* The article goes into great detail with respect to the regulatory aspects of nonlawyers ownership. It concludes, "I am happy to state that the legal ethics sky has not fallen in Australia and I see no indication that it ever will. Long live Chicken Little!" *Id.* at 63. On February 13, 2013, Mr. Mark advised the author by email that his views of the Australian experience have not changed since his 2009 article. Email from Steve Mark, Comm'r, Office of Legal Services, to author (Feb. 13, 2013, 09:26 PM) (on file with author).

48. Christine Parker et al., *Regulating Law Firm Ethics Management: An Empirical Assessment of the Regulation of Incorporated Legal Practices in New South Wales*, 37 J.L. SOC'Y 466, 485-86 (2010).

49. *Id.*

50. Regan, *supra* note 1, at 413.

51. *Id.* (citing Sir David Clementi, *Review of the Regulatory Framework For Legal Services in England and Wales: Final Report* (2004), http://www.legal-services-review.org.uk/content/report/report-chap.pdf.)

52. *Alternative Business Structures: United Kingdom*, LSUC GAZETTE (Dec. 27, 2012), http://www.lawsocietygazette.ca/news/alternative-business-structures-united-kingdom/.

53. Neil Rose, *Future of Law: Big Brands and Alternative Business Structures*, THE GUARDIAN (Oct. 12, 2012. 9:20 PM), http://www.guardian.co.uk/law/2012/oct/12/brands-alternative-business-structures.

The Act allows outside investment, but limits the participation of "managers" to a 25 percent ownership interest.[54] Managers must be individuals, not "corporate persons" and must be approved under Regulation 3,[55] which contains a laundry list of disqualifying factors, including criminal convictions and business malefactions and setbacks.[56] An additional requirement applies to nonlawyers who hold ten percent or more of the firm's ownership interest.[57] The Act calls this a "restricted interest," and requires that the interest does not "compromise regulatory objectives."[58] The Act thus imposes both maximum ownership proportions and character requirements on nonlawyers participating in management or ownership.[59]

The British law amendment was popularly known as the "Tesco Law" while it was under consideration, because it was rumored that Tesco, a retail chain, planned to offer legal services in its outlets.[60] Tesco has since declined to do so, but other major British retailers are gearing up to enter the market.[61] It has been reported that two other retail chains have serious plans to participate in the market.[62] One super-retailer, the Co-operative Group,[63] has already expanded its services, and has diversified into family law. It plans to hire 3,000 attorneys to practice family law in England and Wales.[64]

Less anxious to participate in the altered market are the big city downtown firms (The Magic Circle). One survey indicates that 77 of the 100 largest firms reject private equity as a funding source.[65]

Every ABS is required to have a lawyer compliance officer to assure compliance with legal ethics, and a second compliance officer for finance and administration.[66] In view of the short time these reforms have been in

54. *Law Firm Ownership – Fitness to Own Threshold Test*, http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/law_firm_ownership_threshold_test_uk.pdf (last viewed Oct. 6, 2013).

55. To be an owner a non-lawyer must also be a manager of the entity. Legal Services Act, c. 29 (2007), *available at* http://www.legislation.gov.uk/ukpga/2007/29/pdfs/ukpga_20070029_en.pdf.

56. The regulation provides: "Rationale—The fundamental purpose of the approval process is to protect the public and the public's confidence in the legal profession, in that in order to grant approval the SRA [Solicitors Regulation Authority] must be satisfied that a non-lawyer is suitable to be involved in the provision of legal services and to exercise influence over a recognized body." *Law Firm Ownership – Fitness to Own Threshold Test*, *available at* http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/law_firm_ownership_threshold_test_uk.pdf (last visited Oct. 6, 2013).

57. Legal Services Act, *supra* note 55.

58. Regan, *supra* note 1, at 414.

59. *Id.* It is referred to as a "fit to own" test.

60. John Eligon, *Selling Pieces of Law Firms to Investors*, THE N.Y. TIMES (Oct. 28, 2011), http://travel.nytimes.com/2011/10/29/business/selling-pieces-of-law-firms-to-investors.html?pagewanted=all&_r=0; *see also 'Tesco Law' Allows Legal Services in Supermarkets,* BBC NEWS UK (March 28, 2012, 9:28 PM), http://www.bbc.uk/news/uk-17538006 (Indicating that three licenses have been granted).

61. Rose, *supra* note 53.

62. *Tesco Law*, *supra* note 60.

63. Other super-retailer names not familiar to Americans include "the AA, Saga, Direct Line, and BT." ("the big brands will not be denied"). Rose, *supra* note 53. A private equity firm, Duke Street, has made a major investment in Plexus Law, part of the Parabis Group. *Alternative Business Structures*, *supra* note 52.

64. *Id.*

65. *Id.*

66. *Id.*

effect, it is not possible to make judgments with respect to any effect on the practice of law itself.

"Put it all together and actually a remarkable amount has happened in a short period of time" reports the Guardian, on the activities the new law has spawned.[67] And "[t]here is panic among some lawyers at what the future holds for them."[68]

C. *District of Columbia*

The District of Columbia in 1988 amended its version of Rule 5.4, adding (b):

> (b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or management 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.[69]

The rule then restates Model Rule 5.4:

> (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 services.[70]

The comment to the rule points out that in rejecting an absolute prohibition on collaborative services, it "continues to impose traditional ethical requirements with respect to the organization thus created."[71]

But the comment makes it clear that a purely financial investment is not permitted. The rule is intended only to allow professionals to work

67. Rose, *supra* note 53.
68. *Id.*
69. D.C. RULES OF PROF'L CONDUCT R. 5.4(b) (1988).
70. *Id.* at R. 5.4(c).
71. *Id.* at R. 5.4 cmt. 4.

within a law firm without being limited to the role of an employee.[72] The specter of Sears Roebuck is thus expressly precluded.

The 20/20 Commission requested the District of Columbia's Rules Review Committee comment on the choice of law provisions where a D.C. lawyer or firm is dividing legal fees with a firm in a jurisdiction that does not allow nonlawyers ownership.[73] The suggestion was made that a comment be added to Model Rule 1.5 referring to Rule 8.5, the Rules' choice of law provision, and that 8.5 be amended to make it clear that standard choice of law provisions would apply to this situation.[74] Ultimately no action was taken; presumably 8.5 protects D.C. lawyers.

IV. THE ABA DECLINES TO DANCE

The ABA's 20/20 Commission was created to undertake a comprehensive review of the Model Rules, and recommend changes needed, in part, to reflect developments in the world in which lawyers practice. Its "Discussion Paper on Alternative Law Practice Structures" was intended to be an extensive review of the need for change mandated by technological developments and "the increasingly global nature of law practice."[75] It was, the paper said, guided by the principles of protection of the public, "preserving core professional values, and maintaining a strong, independent and self–regulated profession."[76]

The 20/20 commission rejected ideas for publicly traded law firm stock, allowing outside capital or passive equity investment, or multidisciplinary practices.[77] The initial resolution suggested amendments ameliorating rules with "very stringent restrictions:" firms would be limited to legal services; nonlawyer owners would have to be active in the firm; they could only support the work of lawyers; there would be a percentage limit on nonlawyer ownership; and the written agreement of nonlawyers to adhere to the attorney rules of conduct, and, lastly, lawyers would be responsible for nonlawyers character and compliance.[78] The Working Group eliminated outside investment and public trading from consideration. Ultimately, comment was sought on two closely related suggestions: "Limited

72. *Id.* at R. 5.4 cmt. 7, 8 (examples cited include economists, public utility practitioners, psychologists, psychiatric social workers).

73. An opinion of the Philadelphia Bar Association Professional Guidance Committee expressly allows such a division absent knowledge that the local lawyer knows that the "other" (D.C.) lawyer has violated the D.C. Rules. Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2010-7 (2010), *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2010-7Final.pdf

74. *Comment on ABA 20/20 Commission's Draft Proposal on Choice of Law Issues Associated with Fee Division Between Lawyers in Different Firms (New Comment [9] to Model Rule 1.5)*, DC BAR (Oct. 17, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/dc_rules_of_professional_conduct_review_committee_model_rule_1_5.authcheckdam.pdf.

75. *For Comment: Discussion Paper*, *supra* note 5.

76. *Id.*

77. *ABA Commission on Ethics 20/20 Issues Discussion Paper on Alternative Law Practice Structures*, ABA Now (Dec. 2, 2011), http://www.abanow.org/2011/12/aba-commission-on-ethics-2020-issues-discussion-paper-on-alternative-law-practice-structures/; *see also* Cobb, *supra* note 4, at 786.

78. *Id.*

Lawyer/Nonlawyer Partnerships with a Cap on Nonlawyer Ownership," and "Limited Lawyer/Nonlawyer Partnerships with No Cap on Nonlawyer Ownership."[79]

The Working Group adopted the first option, limiting the firm to legal work, and limiting nonlawyers to minority status, with a cap.[80] The cap on nonlawyer equity mandated that lawyers maintain "controlling financial interest and voting power."[81] The negatives noted by the Commission were concern that its adoption could endanger the nature of regulation of the profession "by expanding the scope of professional regulation of lawyers, thus making external regulation more likely."[82] It also questioned whether there is demand for such changes.

The Commission's review of the District of Columbia's experience was positive. In fact, the Commission was advised that there have been no disciplinary cases involving interference with lawyers' professional judgment by nonlawyers with an ownership interest since nonlawyer ownership was first permitted. There is simply no evidence that the perceived risk of interference has materialized.[83] The ABA Working Group analyzed the District of Columbia model "and found no evidence of ethical violations, complaints or other adverse consequences" since it has been in effect.[84]

But even the modest proposal of the Working Group was considered too radical to offer at the ABA House of Delegate's annual meeting.[85] Concern surfaced that its controversial nature would dominate discussion, and might prejudice the adoption of other proposals.[86]

Professor Gillers, in his comprehensive analysis of the changes that "information technology and fading borders" have visited on lawyer regulation, includes among his eleven recommendations for meeting these issues, "Permit Nonlawyers to Have Equity Interests and Management Authority in For-Profit Law Firms."[87] He proposes changes like those of the District of Columbia, allowing nonlawyers working in the firm to have an ownership interest.[88] The obvious benefits seen include incentives for nonlawyers professionals to attain status other than that of an employee.[89]

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79. *For Comment: Issues Paper Concerning Alternative Business Structures*, ABA (April 5, 2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf.

80. *For Comment: Discussion Paper*, *supra* note 5.

81. *For Comment: Issues Paper*, *supra* note 79.

82. *Id.*

83. The report found "[T]he District of Columbia model appears to have worked there without adverse effects . . . ." *Id.*

84. Cobb, *supra* note 4, at 788.

85. Podgers, *supra* note 7.

86. *Id.*

87. Stephen Gillers, *A Profession If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953, 1007–08 (2012).

88. *Id.* at 1008.

89. *Id.* at 1010. Professor Gillers regards the risks of nonlawyers leading a firm "astray," as manageable by a combination of the English and D.C. rules. *Id.* at 1011.

The Australian, British, and the District of Columbia/ aborted ABA proposal represent three possible approaches to allowing ownership by nonlawyers. The unwillingness of the ABA to accept the concept has precluded any of these models from modifying the black-letter rule of the Model Rules.

V. LAWSUIT CHALLENGES THE RULE

Change may come from another direction. It is possible that the courts, or a court, may find that the ABA rule, as applied, violates either constitutional or antitrust law. The states can individually elect not to adopt 5.4(d), as the District of Columbia has done. Pressure on the ABA from law firms or competing accounting firms may cause it to reconsider.

Jacoby & Meyers is a law firm founded in California in 1972 in its own words "to ensure that people of modest or average means, who often could not afford to hire a lawyer, had a practical alternative to obtain competent, qualified counsel at reasonable rates."[90] The business model was a storefront.[91] It currently has a nationwide network of offices, with presence in New York, Alabama, Florida and Arizona.[92]

On May 18, 2011, Jacoby & Meyers filed suit in Federal District Court in New York to enjoin the enforcement of Rule 5.4 against it and others.[93] In the words of its complaint, it seeks "to free itself of the shackles that currently encumber its ability to raise capital and to ensure that American law firms are able to compete on the global stage."[94]

The firm further argues that the rule "imposes higher capital costs and thus impairs their ability to expand what they [sic] characterize as their mission to provide lower cost legal services to those who cannot afford more traditional lawyers."[95] The complaint alleges that the rule is void for vagueness, violates the dormant commerce clause, the due process clause, the equal protection clause, the takings clause, and the free speech requirement of the First Amendment.[96] The nominal defendants are the presiding

90. Complaint at ¶17, Jacoby & Meyers, LLP v. Presiding Justices, 847 F. Supp. 2d 590 (S.D.N.Y. 2012) (No. 11 Civ. 3387).

91. Plaintiff Jacoby & Meyers Law Offices, LLP's Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint at 4, Jacoby & Meyers, LLP v. Presiding Justices, 847 F. Supp. 2d 590 (S.D.N.Y. 2012) (11 Civ. 3387).

92. *Id.* at 5.

93. Suits have also been filed in Connecticut and New Jersey. *See* Jacoby & Meyers Law Offices, LLP v. Superior Court, 3:11-cv-00817-CFD (D. Conn. 2011).

94. Complaint at 4, Jacoby & Meyers Law Offices, LLP v. Superior Court, 3:11-cv-00817-CFD (D. Conn. 2011). The firm's Memorandum of Law in Opposition to Defendant's Motion to Dismiss Complaint says: The practice of law in the United States is at serious risk of falling behind the rest of the world . . . By this action, Jacoby & Meyers seeks to ensure that the American judicial system keeps pace with its international counterparts. Perhaps more importantly, it seeks to do away with an antiquated rule that was designed as law practice protectionism." Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint at 1, Jacoby & Meyers, LLP v. Presiding Justices, 847 F. Supp. 2d 590 (S.D.N.Y. 2012) (11 Civ. 3387).

95. *Id.* at 2.

96. *See* Complaint, Jacoby & Meyers, LLP v. Presiding Justices, 847 F. Supp. 2d 590 (S.D.N.Y. 2011) (11 Civ. 3387).

judges of the four New York judicial departments, represented by the state Attorney General. A motion was quickly filed to dismiss the complaint.[97]

A highly skeptical District Court held that the plaintiff lacked standing.[98] That decision was subsequently reversed by the Second Circuit Court of Appeals, and remanded on grounds not involving the substantive question sought to be litigated.[99] The tactical and procedural considerations that governed the dismissal and remand are not relevant to our subject, but the filings of Jacoby & Meyers, in its opposition to the motion, set forth in detail its most forceful argument against the legality of the ABA rule.[100]

There appear to be two possible arguments for invalidating the rule: a First Amendment argument that the rule inhibits some protected right of speech or association, or the consumerist argument that the rule inhibits the delivery of legal services, particularly to low income and middle class persons.

Much of the progress made against the restrictive practices of the organized state bars has been made under the First Amendment.[101] The Supreme Court's efforts to make legal services more available to the public began during the 1960's, and continued unabated until *Florida Bar v. Went for It, Inc.*[102] State bar rules limiting lawyer advertising and practices were held to violate the lawyers' first Amendment rights,[103] although the inhibition of the delivery of legal services, at least to the middle class, was a dominant consideration.[104]

Jacoby & Meyers will need to convince the courts that rule 5.4(d) seriously inhibits the delivery of legal services, and that the First amendment interests impacted are not only those of the lawyers, but, more importantly, of the consumers of legal services.[105] The firm's invocation of the First Amendment rests on cases holding that states could not constitutionally limit legal services by limiting the right of the NAACP lawyers to associate

97. *See* Motion to Dismiss at 1, Jacoby & Meyers, LLP v. Presiding Justices, 847 F. Supp. 2d 590 (S.D.N.Y. 2012) (11 Civ. 3387).

98. Jacoby & Meyers, LLP v. Presiding Justices, 847 F. Supp. 2d 590, 598 (S.D.N.Y. 2012). The district court amused itself by citing a New Yorker article written at the peak of the 2008 market collapse that detailed the demise of investment banks which had become publicly traded and were then failing. *Id.* at 591. *See also* James Surowiecki, *Public Humiliation*, THE NEW YORKER (Sept. 29, 2008), http://www.newyorker.com/talk/financial/2008/09/29/080929ta_talk_surowiecki. The reference was the only citation in the court's grant of the motion. *Jacoby & Meyers, LLP*, 847 F. Supp. 2d at 590.

99. Jacoby & Meyers, LLP v. Presiding Justices, 488 F. App'x 526, 527 (2d Cir. 2012).

100. Plaintiff Jacoby & Meyers Law Offices, LLP's Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint at 4, Jacoby & Meyers, LLP v. Presiding Justices, 847 F. Supp. 2d 590 (S.D.N.Y. 2012) (11 Civ. 3387).

101. Bates v. State Bar of Arizona, 433 U.S. 350 (1977), is the key case.

102. Florida Bar v. Went For It, Inc., 515 U.S. 618, 620 (1995).

103. *Bates*, 433 U.S. at 384.

104. *Id.* at 376.

105. Professor Knake makes this argument in her article. *See* Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1 (2012) (relying heavily on Citizens United v. Fed. Elec. Comm'n, 558 U.S. 310 (2010)). Her earlier article details the Supreme Court's jurisprudence, which has had a major effect on the delivery of legal services. *See* Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639 (2011).

and assist plaintiffs seeking redress of their constitutional rights.[106] Those cases established First Amendment rights to the use of the legal system. The Court referred to "freedom of speech, assembly and petition" invoking both the First and Fourteenth Amendments.[107]

The Opposition argues that *Citizens United* takes these cases to the next level.[108] It leaps to conclude that *Citizens United* held that corporations have rights of free speech identical to those of individuals.[109] It quotes language that "the Government may not suppress speech on the basis of the speaker's corporate identity."[110] Applying that language and holding to this case is quite a leap, and not a logical one. It is not the corporate *form* that invokes the bar rule precluding outside sources of financing. The plaintiff is free to practice law as a professional corporation, a limited liability partnership, or another form.[111] It is the activity plaintiff engages in that invokes the application of the rule. It is a far cry from vindicating the right of an entity to make a campaign statement to the right of a partnership organized for profit to raise outside capital. None of the other arguments raised by the firm in defense of its complaint appear to have much traction.[112]

Jacoby & Meyers, in giving the history of the firm, acknowledges the importance of *Bates v. State Bar of Arizona* in allowing the firm to advertise and, therefore, grow. *Bates* emphasized the lawyer's right to speak and the public's right to be informed.[113] Arguments based on increasing the public's access to legal services would to be the most likely to find acceptance.

Even persuading the American Bar Association to amend Model Rule 5.4 will not effectuate the change unless the states that follow the Model Rules decide to accept the amendment. The Model rules are influential, but they are not binding, and the regulatory agency in each state would have to adopt the change to make it law in that state, unless the courts accept a constitutional argument. So far there has been little or no interest shown by the states in moving to nonlawyer ownership. Rulemaking rests ultimately with the state supreme courts, although usually with some advisory body involved.[114] Most state high courts have held that setting the

106. NAACP v. Button, 371 U.S. 415, 428 (1963). Cases following *Button* upheld the rights of unions to associate lawyers to represent their members against state regulation. *See* Bhd. of R.R. Trainmen v. Va. State Bar, 377 U.S. 1 (1964); United Mine Workers of Am. Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217 (1967); United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971).

107. *United Mine Workers*, 389 U.S. at 221–22.

108. Brief and Special Appendix for Plaintiff-Appellants at 20, Jacoby & Meyers, LLP v. Presiding Justices, 488 F. App'x 526, 527 (2d Cir. 2012) (12 Civ. 1377) (citing *Citizens United*, 558 U.S. at 310).

109. *Id.*

110. *Id.*

111. RESTAT. (THIRD) OF THE LAW GOVERNING LAWYERS § 9 cmt. b (2000).

112. The complaint seeks to be comprehensive, which is proper legal practice and no sin. To an academic eye, it ends up resembling the exam answer of a student who doesn't want to leave any doctrine out, no matter how tenuous the connection to the facts of the case.

113. *Bates*, 433 U.S. at 374.

114. *Id.* at 360-61.

rules governing the conduct of the legal profession is a function of the judicial branch of state government, and not of the legislature.[115]

VI. CONCLUSION

The ABA may be right to oppose change. If a stockholder is in fact a greater danger to a lawyer's integrity than a creditor, its opposition is consistent with the purposes of regulation. But the experience of those jurisdictions that have altered the rule suggests that the dangers may be more apparent than real.

Change in other areas has come slowly. It took several years and multiple efforts at amendment to adopt rules authorizing MDP. Change may be made inevitable by competitive forces, domestic and foreign. Pressures on law firms for capital, some arising from the cost of technology, can be influential. Other factors include the need or desire to open overseas offices, to fund the acquisition of other firms or practice groups, or to manage risk by relying on a capital base other than the wealth of its partners.[116]

The modern law firm no longer fits the image of the ABA rules. Should a law firm with two thousand employees, including one thousand lawyers, depend entirely on the assets of its partners and loans to finance its activities? Even without inside knowledge of the cash flow of such firms, the need for underlying financial stability may become acute.

Would raising outside capital involve the end of self-regulation of the profession? In Australia and Great Britain it has been accompanied by the addition of a new layer of regulation on bars that were, in any event, not self-regulating. Losing self-regulation is one of the brakes on the movement toward nonlawyer ownership, although that has not been the case in the District of Columbia.[117]

Professor Knake contends that the "blanket suppression of corporate law practice ownership" is vulnerable to First Amendment attack, although such ownership would be subject to regulation.[118]

The Jacoby & Meyers suit is a long shot. The New York Bar, and the New York courts do not appear sympathetic. None of the justices who were on the United States Supreme Court when *Bates* was decided in 1977 are on the bench today, and none of the justices now on the Court appears overly sympathetic to private practice.[119]

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115. Fred C. Zacharias & Bruce A. Been, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 94, 107 (2009) (noting that in some instances state legislatures make rules that supersede judicial rules).

116. Regan, *supra* note 1, at 422.

117. Cobb, *supra* note 4, at 788.

118. Knake, *supra* note 105, at 8 ("The First Amendment demands that bar authorities and other regulators embrace-not just explore-the concept of corporate law practice ownership and investment, particularly to the extent such arrangements can democratize law through the delivery of more accessible legal services."). She further suggests that if they do not, the courts or Congress will require it. *Id.* Maybe, the justices who decided *Bates* and its progeny are no longer on the Supreme Court bench.

119. It should be noted that Justice Kennedy wrote the dissent in *Florida Bar v. Went For It, Inc.*, exhibiting concern for the consumers of legal services. Florida Bar v. Went For It, Inc., 515 U.S. 618, 635 (1995). The dissent in that case finds it ironic that "for the first time since [*Bates*] the Court now orders

Rule 5.4(d) is parallel to other Model Rules that do not bar improper conduct, but prohibit a practice that could lead a lawyer to violate the rules. Ownership of a firm is not a public concern; the wrong prevented is the perceived influence on the lawyer to allow him/herself to be influenced to violate his/her duty of loyalty to the client's interest. As an indirect rule, 5.4 should be judged by the likelihood of damage to the public were it eliminated. Is it more likely that the existence of a shareholder interest would cause dereliction of duty than that the influence of a major financing entity, which is involved with the enterprise as a creditor, in the form of loans? The loans are, of course, entirely permissible.[120]

The final word may be that of Tyler Cobb, a proponent of nonlawyer ownership. He is explicit in his interpretation of the ABA's opposition. Reform, he contends, is a threat to the status quo with which the establishment is comfortable.[121]

It remains unclear what modicum of discomfort would flow from wide acceptance of the District of Columbia model.

a major retreat from the Constitutional guarantees of commercial speech in order to shield its own profession from public criticism." *Id.* at 644. *Went For It Inc.* upheld a Florida bar rule prohibiting lawyer contact of any kind with the survivors of a major disaster for thirty days immediately following it, emphasizing the consideration that solicitation during that period is damaging the image of the legal profession. *Id.* at 635.

120. *See* Cobb, *supra* note 4, for a persuasive argument that the concerns of threats to the lawyers' professional independence are exaggerated. Lawyers in every firm have concern over the firm's financial condition and outside rating. This is a fact of professional life regardless of the form of the organization.

121. *Id.* at 780 ("The rule as currently applied is archaic and functions as an undesirable prophylactic to preserve the elite cadre of white shoe lawyers."). Professor Gillers made a similar argument in 1985. Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 266–68 (1985).