WILL LAW FIRMS GO PUBLIC?

Roberta S. Karmel, Brooklyn Law School
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BY ROBERTA S. KARMEL*

Law in the United States is a big business and big law firms (Big Law) are a global business. The legal profession has evolved from solo practitioners and small general partnerships, practicing primarily in a single state and regulated by the courts of that state, to a more complicated, and segmented, industry ranging from traditional small partnerships to giant multi-state and multi-country organizations. Yet, in the current Great Recession, Big Law is under serious economic stress, epitomized by the bankruptcy of the venerable Dewey & LeBoeuf firm.¹ In addition, the high cost of legal services has led to a lack of affordable representation for many individuals and small businesses.

These developments have led to two related questions: should law firms be allowed to accept equity capital from non-lawyers; and should lawyers be allowed to practice in firms with non-lawyers. These questions have been percolating for a number of years, and have been under consideration by the American Bar Association’s (ABA) Commission on Ethics 20/20 (Ethics Commission).² Although the Ethics Commission has now decided not to propose changes to ABA policy on non-lawyer ownership of law

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* Roberta S. Karmel is Centennial Professor of Law and Co-Director of the Dennis J. Block Center for the Study of International Business Law at Brooklyn Law School. She is a former Commissioner of the Securities and Exchange Commission. A summer research grant from Brooklyn Law School was of assistance in the preparation of this article. The author gratefully acknowledges the research assistance of Brooklyn Law School Students Michael Russo and Margaret Corchado. The author thanks her colleagues Professors Anita Bernstein, Cynthia Godsoe and Nelson Tebbe for their helpful comments and members of the faculty of Touro Law School, where she delivered this article at a Colloquium.


firms, this non-decision will not end debate about how to finance the law business. This is in part because the United Kingdom (U.K.), Australia and other jurisdictions have already changed their regulatory frameworks for lawyers to allow the infusion of outside capital into law firms, and Big Law will find global competitive pressures to expand and compete with UK and Australian firms difficult to resist. In addition, charges that legal ethics rules preventing law firms from experimenting with different types of business organizations are anti-competitive are likely to persist and receive a sympathetic hearing in some quarters, and possibly some courts.

The American Lawyer has been tracking the growth of Big Law for a quarter of a century. The total gross revenues of the 100 largest firms (“Am Law 100”) have multiplied from $7 billion to $71 billion. Yet, there have been significant changes in the law firm model and the identity of the firms in the Am Law 100. Growth has come largely from the movement of lateral partners, and 11 of the 1986 top 20 are no longer in the top 20. Nevertheless, 7 of the firms on the 1986 list increased their revenues per lawyer by 300% or more, and 13 increased their revenues per lawyer by over 250%. This growth far exceeded the growth of other income earners in the United States, where per capita GDP grew only at an annualized rate of 3.9%. Further, although this growth had been slowing since 2008, in 2011 gross revenue, revenue per lawyer and profits per

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6 Id.
8 Id.
partner all rose by single digits for the Am Law 100.  

Four firms had 2011 gross revenues in excess of $2 billion, and another 13 firms had gross revenues in excess of $1 billion.

Also, 22 firms employed over 1,000 lawyers; 5 over 2000.

This continued growth of Big Law should be counterbalanced against the decline in the profitability of the legal profession generally. In 2007 and 2008, the legal services sector shed 40,000 jobs. Further, a number of large firms collapsed into bankruptcy or closed their doors. One lesson of these failures was that financing through bank debt was problematic, and so some law firms have turned to third party funding in the form of hedge fund investment in litigation.

This Article will argue that (even if law firms retain the form of partnerships) they eventually will accept investments from third parties, and possibly even go public, but this development could lead to a loss of professionalism, as it has with other industries, and could also lead to the end of self-regulation. While the changes that are coming to the legal profession are being and will continue to be resisted, for both good and bad reasons, it would be wise for the bar to think through what kind of regulation would best serve clients, the public and the profession in the future. This Article will discuss (in Part I) legal ethics rules regarding law firm organization and the work of the Ethics Commission; (in Part II) the changes to the regulation of lawyers in the United Kingdom, Australia and elsewhere; (in Part III) litigation attacking current ethics rules regarding outside investments in law firms; (in Part IV) the evolution of other industries from

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10 *Id.*
11 *Id.*
12 Cox, *supra* note 4, at 516.
13 *Id.* at 520-22.
14 *Id.* at 524-25.
closely held partnerships or mutual organizations to large public companies, specifically investment banking and stock exchanges; and (in Part V) will speculate about the future of the legal profession and conclude.

I. RULES OF PROFESSIONAL CONDUCT

A. AMERICAN BAR ASSOCIATION RULES

ABA Model Rule 5.4 provides that: “A lawyer or law firm shall not share legal fees with a nonlawyer,” and “shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.” Similarly, Rule 5.4 of the New York Rules of Professional Conduct provides that “A lawyer or law firm shall not share legal fees with a nonlawyer” and “[a] lawyer shall not practice with or in the form of an entity authorized to practice law for profit, if: a nonlawyer owns any interest therein . . .” These bans on multidisciplinary practice and non-lawyer ownership of law firm partnership interests are of long standing.

The American Law Institute’s Restatement of the Law Governing Lawyers similarly provides:

A nonlawyer may not own any interest in a law firm, and a nonlawyer may not be empowered to or actually direct or control the professional activities of a lawyer in the firm . . . A lawyer may not form a partnership or other business enterprise with a nonlawyer if any of the activities of the enterprise consist of the practice of law.15

Rule 5.4 is a standard promulgated by the ABA and the ABA is a voluntary bar association. It is not a government agency, and it does not have delegated governmental authority.16 It is more like a trade association than a self-regulatory organization, and not all lawyers belong to the ABA. However, state bar associations and courts have

15 RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 10 (2000).
incorporated this standard into their disciplinary rules, although not all states have done so uniformly.

The prohibitions against multidisciplinary practices and non-lawyer investments in law firms have been justified as necessary to preserve independence and professionalism, to avoid conflicts of interest and to preserve a lawyer’s duties to clients, especially the duty of confidentiality, and to the courts.17 Nevertheless, these bans are also anti-competitive. They stand in the way of the provision of low cost legal services in certain areas susceptible to commoditization, and they prevent clients from obtaining combined services from lawyers and other professionals.18 This is because the bans prevent firms from reaching an optimum size for the provision of higher quality and lower priced services, and to compete with non-lawyer organizations. Further, lawyers are unable to realize the present economic value of their reputations through the sale of stock or other ownership interests.19 The basic concern animating the ethics rules is that permitting non-lawyer ownership or direction would subject lawyers to meeting the goals of the non-lawyers rather than meeting their duties to clients.20 In other words, business pressures would trump professionalism.

The organized bar has feared that large accounting firms would combine with law firms on the one hand,21 and that Walmart would provide legal services to customers on the other hand.22 But these realistic fears are not an adequate basis for preserving ethics rules that prevent law firms from obtaining capital for expansion, investment in new

17 Renee Newman Knake, Democratizing the Delivery of Legal Services, 73 OHIO ST. L.J. 1, 15 (2012).
18 See id. at 16.
20 Id.
22 See Knake, supra note 17, at 38-40.
technologies, financing of contingency fee cases or other experiments in the delivery of legal services. If these ethics rules are to be preserved, they need to be justified as necessary to maintain the independence and professionalism of lawyers. Although this may be a valid justification, in view of the existing shift of the legal profession from a profession to a business, the public distrust of lawyers and client dissatisfaction with the cost of legal services, the professional values protected by current ethics rules needs to be spelled out.

Unfortunately, for many years the ABA has neither articulated why the ethics rules should be preserved, nor proposed changes to the rules. In 1998, the ABA Multidisciplinary Commission (MDP Commission) began to study and report on the extent to which U.S. lawyers and law firms should be allowed to enter into “alternative law practice structures in which non-lawyers have an ownership interest” and “whether such practices could operate in a manner that is consistent with the American legal profession’s core values.” The impetus for the work of the MDP Commission was that the large accounting firms had consulting practices that performed work similar to the provision of legal services. One year after its creation, the MDP Commission issued a report to the ABA House of Delegates recommending that the ABA ethics rules be changed to permit multidisciplinary practices conditioned on safeguards to ensure that the

core values of the legal profession be maintained.\textsuperscript{26} However, the ABA House of Delegates rejected the recommendation and resolved not to change or amend the Model Rules to allow lawyers to offer legal services through multidisciplinary practices “until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession’s tradition of loyalty to clients.”\textsuperscript{27}

The MDP Commission continued to study and accept comments on these issues, and in July 2000, issued a new report to the House of Delegates again recommending changes to the Model Rules but with “more restrictions on proposed multidisciplinary practices” then before.\textsuperscript{28} The key change in the new report was that “only lawyer-controlled MDPs would be permitted under the new recommendation.”\textsuperscript{29} The House again rejected the MDP Commission’s recommendation stating that “[t]he sharing of legal fees with nonlawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession” and the rule prohibiting such sharing of fees should not be revised.\textsuperscript{30}

Recently, legal reforms abroad allowing multidisciplinary practices and alternative business structures have prompted reconsideration of these issues by the Ethics Commission.\textsuperscript{31} The principles guiding the Commission’s deliberations are “protection of the public; preservation of core professional values; and maintenance of a strong, independent and self-regulated profession.”\textsuperscript{32} At its February 2011 meeting in

\begin{flushleft}
\textsuperscript{26} \textit{Id.} at 6.
\textsuperscript{27} \textit{Id.} (quoting Report to ABA House of Delegates 10B (as revised) (August 1999)).
\textsuperscript{28} \textit{Id.} (quoting Report to ABA House of Delegates 117 (July 2000)).
\textsuperscript{29} \textit{Id.} at 6.
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} Ethics Comm’n Request for Comment of April 2011, at 7.
\textsuperscript{32} \textit{Id.} at 1.
\end{flushleft}
Atlanta, the Commission took two options for alternative business structures off the table. These were: passive equity investment in law firms and the public trading of law firm interests. ³³ When the Commission released its April 5, 2011 Issues Paper, it requested comments on just three of the five alternative business models it originally considered: lawyer/non-lawyer partnerships with a cap on non-lawyer ownership; lawyer/non-lawyer partnerships without such a cap; firms with lawyers and non-lawyers that offer both legal and non-legal services. ³⁴

However, in June 2011, the Commission “eliminated further consideration of the third approach set out in the Issues Paper” – multidisciplinary practices “in which lawyers offer legal services and nonlawyers offer other professional services to clients who may or may not also be using the firm’s legal services.” ³⁵ This decision was in line with the ABA’s consideration and strong rejection of the proposal to permit multidisciplinary practices back in 1999 and 2000.

As a result of the February and June 2011 narrowing of possible options for consideration, the Commission “narrowed further consideration of [alternative law practice structures]” to just the “first two options identified in the [April 2011] Issues Paper.” ³⁶

The two options left were:

1. [t]he approach taken by the District of Columbia, which permits lawyers to share legal fees with nonlawyers where the lawyers practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by one or more nonlawyers who provide services that assist the firm in providing legal services to clients, under certain conditions, but without a cap on nonlawyer ownership; and

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³³ Id. at 2.
³⁴ This third option is allowed in the District of Columbia. Id. at 17.
³⁶ Id. at 5.
(2) a narrower version of the District of Columbia approach, which would permit lawyers to become partners with (and share fees with) nonlawyers . . . under narrowly defined circumstances.  

This rather narrow inquiry did not result in sufficient support for revising the ABA rules, so the Ethics Commission “decided not to develop a proposal on whether non-lawyers should be allowed to have some form of limited ownership interest in U.S. law firms.”

Indeed, most comments to the Ethics Commission were negative. Nine General Counsel for large multinational corporations vigorously opposed changes to Rule 5.4 on several grounds. First, there was no demonstrated need for change. Second, any non-lawyer ownership of law firms would undermine the attorney-client relationship, especially the duty of confidentiality. Third, the General Counsel were “deeply troubled by a proposed change that would only further undermine the tradition that law is a profession rather than a business.” Finally, the General Counsel expressed the view that nonlawyer ownership of law firms could undermine the judicial and self-regulatory oversight of the legal profession and lead to government regulation.

Professor Thomas Morgan submitted a contrary comment, based on the reality that law is no longer practiced primarily by individuals, but rather by institutions, and

37 Id.
38 Podgers, supra note 3.
40 Id. at 2-3.
41 Id. at 3-4. On the issue of how confidentiality might be undermined by outside capital, see http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111019_draft_alf_white paperposting .authcheckdam.pdf.
42 Id. at 4-5. Considering the source, this comment is a bit rich. General Counsel of large companies enjoy stock options, which has made them not too different from other corporate executives, and their work can sometimes become a profit center.
43 Comment of Nine General Counsel, supra note 39, at 5-6.
therefore the ethics rules of the profession are out of date. Therefore the distinction that it is “lawful for lawyers to employ nonlawyers but not to become their partner if any of the services would traditionally be viewed as practicing law . . . is a distinction without a difference.”

Second, there are three reasons why law firms might legitimately sell equity. First, they have traditionally paid out profits instead of retaining earnings. Second, selling equity could create a liquid market in firm shares for the benefit of departing partners. Third, a more lasting institutional character for a modern firm could be created for “brand identity and its reputation for ethics and quality.”

Despite the decision of the Ethics Committee not to go forward with changes to Rule 5.4, in the summer of 2012, a resolution was presented to the ABA House of Delegates asking for reaffirmance of its stand against nonlawyer ownership of law firms. This issue came up in the context of fee-sharing arrangements between lawyers and nonlawyers in jurisdictions that allow nonlawyer investment in law firms, especially the U.K., Australia and Canada. The Ethics Commission has requested comment on how to resolve conflicts of law between ethics rules in different jurisdictions. This could lead to recognition of nonlawyer ownership of firms where it is allowed. The resolution regarding reaffirmance of nonlawyer ownership of firms was so controversial that 92 people asked to speak for or against it, but only four people spoke before the House voted

45 Id. at 4.
46 Id. at 5-6.
49 Cassens, supra note 47 (statement of Lawrence Fox).
to postpone the resolution indefinitely. Nevertheless, this issue will not go away, in part because it is tied to the conflict of law issue at firms where there are partners from the U.K. and partners from a U.S. jurisdiction.

It would appear that the opposition by the ABA to non-lawyer participation in law firms, either in the form of multidisciplinary practices or equity investment may be driven at least as much by economic protectionism as a need to protect the core values of the profession. In addition, the ABA and many members of the legal profession are wary of threats to self-regulation. Although non-lawyer participation in law firm governance could undermine professional judgment, is the threat of control by equity investors necessarily more pernicious than the threat of control by bank lenders? In-house counsels who work for corporations may claim that the corporation is their client, but they are nevertheless subject to control by their corporate employers. The threat to maintaining client confidentiality is a legitimate concern, but this threat is already present when lawyers work with non-lawyers in connection with the representation of clients. What the bar and other policy makers should consider is whether some of the benefits of non-lawyer involvement in law firms might outweigh the dangers that the core values of the profession could be undermined, and what mechanisms could be devised to protect those core values in the face of changes to the organization of law firms.

B. NEW YORK RULES

50 Id.
51 Note 48, supra.
53 Id. at 608-09.
54 Id. It is somewhat ironic that one of the strongest comments against changes in the ethics rules came from general counsel from some of the largest corporation in the United States. Note 43, supra.
55 Andrews, note 52 supra, at 615-16.
In the late 1990s the New York State Bar Association, along with the ABA and other bar organizations, was considering whether demand for multidisciplinary practice firms should lead to changes in ethics rules. As a result, the New York ethics rules were revised in recognition of the need for law firms sometimes to provide clients with non-legal services, and the difficulty of distinguishing between legal and non-legal services in certain situations.

Rule 5.7 of the New York Rules of Professional Conduct\(^56\) envisions a firm controlled by lawyers, but requires that if non-legal services are provided to a client: the recipient must be made aware of any services not subject to the attorney-client relationship; when the client cannot distinguish between legal and non-legal services, the relationship shall be subject to lawyer professional ethics rules; and any non-lawyers in the firm may not affect a lawyer’s professional judgment or compromise a lawyer’s professional responsibilities.\(^57\) A second change in the code allows a lawyer or law firm to enter into a contractual relationship with a non-lawyer professional or firm.\(^58\) This rule is stricter than the rule allowing non-lawyers to join a law firm and provide non-legal services because, among other things, it is limited to contracts with only five professionals: architects; certified public accountants; professional engineers; surveyors; and certified social workers. Neither of these rules would permit non-lawyer ownership or investments in a law firm.

As will be explained below, it is now legal in the U.K. and some other jurisdictions for nonlawyer supervisors and owners to be included as principals of a law


\(^{57}\) Cone, supra note 21, at 418.

\(^{58}\) N.Y. RULES OF PROF. CONDUCT R. 5.8.
firm. When a law firm asked for guidance for the New York State Bar Association whether a New York law firm could become employees of a U.K. entity which included nonlawyers, the Committee on Professional Ethics responded in the negative: “The inquiry is governed by Rule 5.4(a), which forbids a lawyer from sharing fees with a nonlawyer, and Rule 5.4(d), which forbids a lawyer from practicing law for profit with an entity that includes a non-lawyer owner or member. These provisions would clearly be violated by the proposed arrangement.”

The Philadelphia Bar Association Professional Guidance Committee reached a contrary conclusion, deciding that if lawyers in jurisdictions outside Pennsylvania permit fee sharing with nonlawyers in accordance with their own bar rules, it is permissible for Pennsylvania lawyers to share fees with them, even though they cannot share fees with nonlawyers in the state. It is this conflict in the views of two important jurisdictions that has led the Ethics Committee to consider how conflict of laws should apply to firms which have partners from jurisdictions with different ethical rules.

C. DISTRICT OF COLUMBIA BAR RULES

1. History of District of Columbia Professional Conduct Rule 5.4

In the years that followed the ABA’s 1983 adoption of the Model Rules, many states adopted professional rules for their own jurisdictions that were similar or identical to the ABA’s Rules. Many states adopted the ABA’s Model Rules verbatim. The District
of Columbia, however, departed drastically from the trend of most other states\(^\text{61}\) when it considered adopting the proposed Rule 5.4 that had been rejected by the ABA.

The D.C. Bar had come to recognize “an increasing demand for a broad range of professional services from a single provider.”\(^\text{62}\) As Mark Lynch, member of the D.C. Bar Legal Ethics Committee (“Ethics Committee”) and author of the D.C. Bar Rule 5.4 later explained, “the committee perceived a market demand for one-stop shopping – for collaborative services of lawyers with such other professionals as accountants, lobbyists, social workers and economists.”\(^\text{63}\) Dissatisfaction with Rule 3-103, which limited partnerships between lawyers and non-lawyers to providing non-legal services, led Mark Lynch to advocate a proposed change in the rule.\(^\text{64}\) Chairman Jordan of the Ethics Committee ultimately presented a proposed Rule 5.4 to the D.C. Board of Governors in 1986 that was identical to the version rejected by the ABA.\(^\text{65}\)

\(^{61}\) North Dakota was the only other jurisdiction to consider adopting the version of Rule 5.4 rejected by the ABA. See Bradley G. Johnson, Ready or Not, Here They Come: Why the ABA Should Amend the Model Rules to Accommodate Multidisciplinary Practices, 57 WASH. & LEE L. REV. 951, 963-64 (2000).


\(^{63}\) Gilbert & Lempert, The NonLawyer Partner: Moderate Proposals Deserve a Chance, 2 GEO. J. LEGAL ETHICS 383, 394 (1988) (quoting Interview with Mark Lynch (Oct. 4, 1988)). The idea of “one-stop shopping,” at least with regard to lawyers employing non-lawyer professionals to provide non-lawyer services to clients, was not an unfamiliar concept to the D.C. Bar. In 1980, the D.C. Ethics Committee had issued an opinion stating that “[i]t is ethically proper for a lawyer, law firm or professional corporation, while engaging in the practice of law, also to offer and furnish services of other professionals, such as (in this case) psychologists, social workers and family counselors.” Id. (citing D.C. Bar Code of Professional Responsibility and Opinions of the D.C. Bar Legal Ethics Comm. [hereinafter D.C. Bar Code and Opinions], Op. 93 (Dec. 24, 1980)). Despite this opinion, D.C. Disciplinary Rule 3-103 continued to prohibit a lawyer from having “a non-lawyer as a partner in an enterprise which involves the practice of law (even though it may involve other activities as well).” Id.

\(^{64}\) Id. at 393 n. 43. Further fueling Lynch’s suggestion was the fact that, over the years, the Ethics Committee “had received numerous inquiries from people who wanted collaborative services between lawyers and other professionals.” Id. (quoting Minutes of the D.C. Bar Board of Governors, at 26-27 (Feb. 25, 1986)).

\(^{65}\) Id. at 394.
When the proposal came before the D.C. Board of Governors in February of that year, several Board Members expressed reservations about the proposed Rule, which did not originally include a provision that the partnership be limited to the practice of law.\textsuperscript{66} Board Member Jamie Gorelick\textsuperscript{67} was concerned with whether non-lawyer partners would “recognize potential conflicts between clients,”\textsuperscript{68} and whether they would “give conflicts the same sensitive treatment that a lawyer is required to give.”\textsuperscript{69} Gorelick also worried that if a lawyer “did not control the flow of information in such an enterprise,” a court might refuse to recognize the well-established attorney-client privilege or work product protection.\textsuperscript{70} In addition, Board Members questioned whether the proposed Rule 5.4 could “adequately protect against acts by the non-lawyer partner which, if they were done by a lawyer, would violate the rules of professional conduct.”\textsuperscript{71} Board Members noted that such protection was already in place in the traditional lawyer/non-lawyer employer-employee relationship. Ultimately, these concerns coupled with an all around fear that adoption of the Rule would “pave[ ] the way for conglomerates of lawyers and non-lawyers,” led the Jordan Committee to modify the Rule to limit “the activities of the partnership to the practice of law.”\textsuperscript{72}

\textsuperscript{66} Proposed Rule 5.4 originally allowed lawyer/non-lawyer partnerships only if: (1) there was no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; (2) the confidences and secrets of the lawyer’s clients were protected as required by DC Bar Rule 1.6; (3) the arrangement did not involve advertising or personal contact with prospective clients by the non-lawyer, as prohibited by DC Bar Rule 7.1; (4) the arrangement did not result in charging a fee that violated DC Bar Rule 1.5; and (5) the foregoing conditions were set forth in writing. Id.

\textsuperscript{67} Gorelick was President of the D.C. Bar from 1992-93 and is currently on the Ethics Commission of the ABA. See www.willmerhale.com.

\textsuperscript{68} Gilbert & Lempert, supra note 63, at 394.

\textsuperscript{69} Id. at 395.

\textsuperscript{70} Id.

\textsuperscript{71} Id.

\textsuperscript{72} Id. According to an interview with Chairman Jordan after the Rule’s adoption, the idea was “let’s try this for awhile. Let’s not fundamentally change the nature of the institutions providing legal services.” Id. at 396 (quoting Interview with Robert Jordan, Chairman of the Jordan Commission for the D.C. Bar (Dec. 1, 1987)). President-elect of the D.C. Bar at the time, Paul Friedman, Esq., expressed reservations similar to
Another bout of skepticism – this time through the media outlets -- occurred after the D.C. Board of Governors submitted its proposed Rules of Professional Conduct to the D.C. Court of Appeals in November 1986. The *National Law Journal* and *Business Week* both released articles in January of 1987 discussing the so-called “Fear of Sears.” This was part of the same sentiment that had doomed the proposed Rule 5.4 in the ABA House of Delegates and it involved an overwhelming fear that the Bar Association rules could allow firms eventually to go public and would “pave the way for such retailers as Sears, Roebuck & Co. to add legal counseling to their array of services.”

In the end, the D.C. Court of Appeals approved the D.C. Rule with the added clarification that a lawyer may practice law in a partnership in which the financial interest or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients. In addition, the Court of Appeals added several comments to the Rule describing the types of lawyer/non-lawyer partnerships the D.C. Bar had in mind. These partnerships included those between economists and antitrust lawyers, CPA’s and tax attorneys, and psychologists and family law practitioners. The additional comments

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73 Id. at 398; *See* David A. Koplan, *Ethics Change in Works: Want to Invest in a Law Firm?*, NAT’L LAW J., Jan. 19, 1987, at 1; Paula Dwyer, *Soon Anybody May Be Able to Own a Law Firm*, BUS. WK., Jan. 26, 1987, at 42. This outcry from the media caused the Jordan Committee to submit a supplementary petition to the D.C. Court of Appeals clarifying the proposed Rule 5.4. Adams & Matheson, * supra* note 23, at 12. The petition stated that “[t]here was no thought that proposed Rule 5.4 should permit any organization or entity to effectively acquire and control a law firm.” *Id.* (quoting Supplementary Petition of the Board of Governors of the D.C. Bar Regarding the Adoption of Rules of Professional Conduct and Related Comments, at 4-5 (Sept. 11, 1987)). According to Chairman Jordan, the purpose “was to permit nonlawyer professionals to practice their professional skills in cooperation with lawyers in a firm limited to delivery of legal services.” Gilbert & Lempert, * supra* note 63, at 399 (quoting Memorandum of Robert Jordan to the D.C. Court of Appeals, at 63 (March 4, 1987).

74 Gilbert & Lempert, * supra* note 63, at 399 (emphasis in original).
“banish[ed] the Sears, Roebuck specter” once and for all and final adoption of the rule occurred on March 1, 1990.\footnote{Id. at 399-400.}

2. Effects of Professional Conduct D. C. Rule 5.4 Since Its Adoption in 1991

In a Report and Recommendation of the District of Columbia Bar Special Committee on Multidisciplinary Practice issued in the late 1990’s, the Committee reviewed the effects of Rule 5.4 since its adoption and stated:

Nearly a decade of experience under the 1991 version of Rule 5.4 has produced no evidence in the District of Columbia that lawyers are unable to honor their professional obligations when they offer legal services within the framework of organizations in which non-lawyers hold an ownership interest or exercise managerial authority.\footnote{Report and Recommendation of the District of Columbia Bar Special Comm. on Multidisciplinary Practice, Proposed Rule 5.4: Professional Independence of a Lawyer, D.C. BAR, http://www.dcbar.org/inside_the_bar/structure/reports/special_committee_on_multidisciplinary_practice/rule5_4.cfm (last visited Sept. 9, 2012).}

In addition, no disciplinary action under D.C. Rule 5.4(b) has been taken against any lawyer of the D.C. Bar since it became effective in 1991.\footnote{Laurel S. Terry, A Primer on MDPS: Should the “No” Rule Become a New Rule?, 72 TEMP. L. REV. 869, 875 (1999) (citing Testimony of D.C. Ethics Counsel Susan Gilbert (Nov. 12, 1998)).}

Despite the seeming freedom granted to lawyers in D.C. who wish to form partnerships with non-lawyers, many law firms in D.C. have never taken advantage of Rule 5.4. The rule’s limiting condition requiring such partnerships provide legal services as their sole purpose has proved to be a “major stumbling block.”\footnote{Mary C. Daly, Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services From Lawyers in a Multidisciplinary Partnership, 13 GEO. J. LEGAL ETHICS 217, 244 (2000).} The scope of the rule was even further limited when D.C. adopted ABA Ethics Committee Formal Opinion 91-360, issued in July 1991, which prohibits multi-jurisdictional law firms from having non-lawyer partners in their D.C. office.\footnote{Terry, supra note 77, at 875. As such, even those multi-state law firms that wish to take advantage of Rule 5.4 are inevitably prevented from doing so and the availability of the rule is left to “D.C.-based...
3. Consulting Subsidiaries of Arnold & Porter LLP

Some of the impetus for the change in the rules of the D.C. Bar came from Arnold & Porter, LLP, which experimented with mixing the practice of law with other professional services through ownership of three consulting firm subsidiaries. None of these ventures proved permanent, however. The first, APCO Associates Inc., was created in 1984 as a wholly owned subsidiary of Arnold & Porter LLP. APCO began as a multidisciplinary practice that dealt with public affairs, government relations and strategic communications.\(^{80}\) APCO was eventually sold in 1991 to Grey Advertising. On September 24, 2008, APCO announced its management concluded a buyout from Grey Global making it “one of the largest privately owned consulting firms in the public affairs and strategic communications industry.”\(^{81}\)

Around the same time Arnold & Porter opened APCO, it formed another subsidiary called MPC & Associations. MPC was a real estate development consulting firm “that worked primarily with colleges, universities, and other large nonprofit institutions on major real estate projects.”\(^{82}\) MPC evolved because of the “extensive work” Arnold & Porter had already been doing in its representation of non-profit institutional clients for which the firm was “retained to deal with exceedingly complex,

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\(^{80}\) Statement of James W. Jones, Center for Professional Responsibility, AMERICAN BAR ASSOCIATION [hereinafter Jones Statement], http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/jones1.html (last visited Sept. 9, 2012). According to Jones, who served as Vice-Chairman and General Counsel of APCO:

> APCO was conceived as a vehicle for broadening the scope of services offered by Arnold & Porter to its clients and as a means for offering services in a more efficient and cost-effective manner. It grew out of the conviction that – at least for certain types of matters – an interdisciplinary approach combining the skills of lawyers and non-lawyer professionals could lead to better and more creative solutions for client problems. \(\text{Id.}\)

\(^{81}\) Grey Global Group Inc., Current Report (Form 8-K) (September 28, 2004).

\(^{82}\) Jones Statement, \(\text{supra}\) note 80.
sprawling real estate projects.” MPC was eventually sold to Sallie Mae, but scant information about the sale is publicly available.

Arnold & Porter also opened a financial industry consulting firm called The Secura Group in 1987. The Group served commercial banks and thrift institutions, as well as investors of those entities. The Secura Group was created to complement Arnold & Porter’s large bank regulatory practice and in 1989, James F. Fitzpatrick of Arnold & Porter stated “there is great synergism between our bank regulatory practice and Secura. There is a significant overlap in client base, and one group helps spin off business for the other.”

Fitzpatrick noted at the time, however, that “particular attention must be paid to the ethical requirements that clients requesting non-legal services have full opportunity to go wherever they want for the legal component of those services.” The Secura Group eventually purchased Arnold & Porter’s interest in the Group in 1993 and it is no longer a subsidiary of Arnold & Porter.

When Vice-Chairman and General Counsel of APCO James Jones made his statement to the ABA Commission on Multidisciplinary Practice on February 6, 1999, he said that when Arnold & Porter created their subsidiaries, the “impact of the Model Rules of Professional Conduct on their structure and operations was far from clear.” Thus, in order to ensure that the subsidiaries did not run afoul of the ABA professional ethics rules, Arnold & Porter put several elements into place. For example, Arnold & Porter required that all promotional literature and retainer agreements disclose the fact that the

84 Id. at 468.
85 Id.
87 Jones Statement, supra note 80.
consulting firms were subsidiaries of Arnold & Porter, and that the consulting clients were under no obligation to use Arnold & Porter’s legal services. The promotional materials also had to be pre-approved by Arnold & Porter’s ethics committee “using principles consistent with those applicable in the legal profession.”

Arnold & Porter also held each subsidiary to “the same ethical requirements – in terms of conflicts of interest, protection of client confidences, advertising of services, etc. – that applied to the law firm itself.” In addition, any questions concerning these issues were “required to be resolved by the firm’s ethics committee and not by the subsidiary company.”

D. THREATS TO THE RULES

Even if bar associations do not alter traditional ethics rules prohibiting multidisciplinary firms or ownership of interests in law firms by non-lawyers, the financing of law firms is likely to change, either due to international competition, which will be discussed below, by changing business practices on the ground, or as a result of lawsuits challenging the ethics rules. Competition from other professionals is also a factor in the changing complexion of the legal services industry. Although accounting and consulting firms eschew the idea that they are providing legal advice, the line between such services is often a line in the sand. This is particularly true because of the emphasis on compliance, corporate governance and risk management systems in financial and other businesses. Further, it has long been true with regard to tax law practice.

Prior to 2002, the U.S. Securities and Exchange Commission (“SEC”) did not stop accounting firms from providing consulting services to their audit clients. Although

88 Id.
89 Id.
90 Id.
91 Andrews, supra note 52, at 632-36.
the SEC was empowered to define independence in terms of the filing and certification of financial statements by independent auditors, Congress had not given the SEC the specific authority to regulate auditing standards.92 Early attempts by the SEC to place limits on accounting firms’ ability to provide consulting services to audit clients were unsuccessful because of “contentious arguments between the Big Five accounting firms and the SEC.”93

After the fall of Enron and a number of other corporate and accounting scandals shook the financial industry in 2001, Congress passed the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley”),94 which created new and enhanced standards for the accounting profession. In addition to creating the Public Accounting Oversight Board (“PCAOB”) and granting it the power to establish rules and regulations governing the accounting profession, Sarbanes-Oxley granted the SEC the authority to adopt its own rules to “expand the requirements of auditor independence.”95 Section 201(a) of Sarbanes-Oxley96 effectively put an end to the multidisciplinary practices “that had been cultivated by the Big Five accounting firms” prior to 2002.97 This provision makes it unlawful for a registered public accounting firm that is performing an audit for an issuer, to provide certain non-audit services to that issuer, contemporaneously with the audit. The prohibited non-audit services include legal services.98 Although the list of non-audit

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93 Id. at 552.
95 Anello, supra note 87, at 555.
97 Anello, supra note 87, at 561.
98 Sarbanes-Oxley prohibits auditors from performing non-audit services to their clients, including: (1) bookkeeping or other services related to the accounting records or financial statements of the audit client; (2) financial information systems design and implementation; (3) appraisal or valuation services, fairness opinions, or contribution-in-kind reports; (4) actuarial services; (5) internal audit outsourcing services; (6)
services is extensive, it does not prohibit the contemporaneous performance of tax consulting services so long as pre-approval is received from the issuer’s accounting board. In addition, the PCAOB may add to the list of prohibited services, “any other service that the Board determines, by regulation, is impermissible.”

While accounting firms therefore are limited in their ability to provide consulting services to audit clients, they can provide services to other clients and the big accounting firms have developed sophisticated consulting practices. So have independent consulting organizations. For example, Deloitte, one of the big four accounting firms, has an affiliated firm called Deloitte Financial Advisory Services LLP that advises clients on a variety of matters that overlap with the advice given by business lawyers, including: managing business controversies and disputes; executing deals, and maintaining regulatory compliance. In addition, Deloitte advertises for legal services employees in corporate law, corporate governance, corporate reorganizations, private equity and venture capital and other categories that overlap with services provided to clients by law firms. Accenture, a publicly traded consulting firm that spun off from Arthur Anderson, another large accounting firm, likewise advertizes for its Legal Services Group.

These activities do not mean that Deloitte or Accenture are engaging in the illegal practice of law, but rather that legal services are not confined to the courtroom, and the

management functions or human resources; (7) broker or dealer, investment adviser, or investment banking services; and (8) legal services and expert services unrelated to the audit. 15 U.S.C. § 78j-1(g).

99 Id.


giving of legal advice in connection with business transactions and compliance matters is
difficult to distinguish from management consulting. Even in litigation, consulting
organizations provide expert legal as well as other professional experts. These services
overlap with the services provided by business lawyers, and law firms experiencing
economic stress may decide they should be competing with accountants and consultants
in advising corporations and other businesses. This was the pressure that led to changes
in the ethics rules of the D.C. bar a number of years ago.

Outsourcing of legal work to lawyers and nonlawyers and the utilization of
nonlawyers with regard to the work of large law firms has raised some questions about
nonlawyer participation in the provision of legal services and its impact on ethical rules.
These issues were addressed by the Ethics Commission and resulted in some minor
modifications to Rules 1.1 Competence, 5.3 Responsibilities Regarding Nonlawyer
Assistance, and 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law.
The Ethics Committee suggested only minor changes in the rules, but it submitted an
interesting Report on outsourcing. The Report emphasized appropriate supervision and
the ban on assisting in the unauthorized practice of law.

The widespread use of temporary lawyers from agencies and the outsourcing of
legal work can be justified under ethics rules because law firm partners supervise these
independent contractors. But what is the justification when the independent contractors
combine to provide legal services directly to clients? A very interesting example of such
a firm is Axiom Global, Inc. (“Axiom”), a long-term legal placement agency, which has
450 temporary attorneys. Although it began by supplying lawyers to the financial

104 House of Delegate Resolution 105C Adopted, ABA NOW,
services industry, it changed its business model after 2008 and now does outsourcing work for large corporations such as Hewlett-Packard Co., Kraft Foods and Vodaphone. Some of the legal work for these businesses was formerly done in house. “Since its inception, Axiom has been the beneficiary of more than $30 million in venture capital.”\textsuperscript{105} Because it is a corporation with non-lawyer investors, it is limited by the rules of ethics so that it is unable to render legal opinions, represent a client in court, take a company public or lead a major corporate transaction.\textsuperscript{106} Nevertheless, Axiom is competing directly with business lawyers and it is being financed by nonlawyers. Axiom’s business model could possibly be defended pursuant to cases upholding pre-paid group legal services or the right of non-profit groups to provide services to their members.\textsuperscript{107} Another development that is undermining current ethics rules is the financing of claims and contingency fees in plaintiff side lawsuits. Banks, hedge funds and private investors are bankrolling lawsuits with loans that have high interest rates. If the case is successful, the loans are repaid out of the proceeds of the recovery.\textsuperscript{108} Although these investments are loans rather than equity, so they do not directly contravene ethical prohibitions against non-lawyer investments in law firms, questions have been raised.

\textsuperscript{107}See Andrews, \textit{ supra} note 52, at 636-40. An important distinction is that Axiom is an openly for-profit corporation.  
about investor control of the lawsuits and whether the duty of confidentiality has been breached.\textsuperscript{109}

Litigation attacking current ethics rules is underway and under contemplation. This litigation will be discussed below. Although this litigation has been premised on constitutional grounds, it is unclear what constitutional rights are impinged upon by the rules preventing non-lawyer investment in law firms or multidisciplinary practices.\textsuperscript{110} Yet, a very interesting article has argued that preventing corporations from owning law firms violates the First Amendment.\textsuperscript{111} Another possible attack on the prohibitions of equity investment in law firms by nonlawyers is under the antitrust laws.

In view of the deregulation of other industries, specifically investment banking and stock exchanges, which will be discussed below, and the rationale for reforms in the U.K. and Australia, challenges under the antitrust laws may also be made, but such challenges face substantial problems because of the involvement of the courts in lawyer regulation.

\section*{II. REGULATION OF LAWYERS ABROAD}

\subsection*{A. IN THE U.K. AND WALES}

The Legal Services Act of 2007 (``LS Act'')\textsuperscript{112} reformed the regulation of lawyers in the U.K. and Wales to encourage competition and deal with consumer complaints. The LS Act provides for the creation of alternative business structures (``ABS'') for law firms permitting lawyers and non-lawyers to work together, and allowing for external

\textsuperscript{109} Id.


\textsuperscript{111} Knake, supra note 17.

investment in firms. The predicate for this reform was a December 2004 Report by Sir David Clementi ("Clementi Report")\(^\text{113}\) commissioned "[t]o consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector."\(^\text{114}\) Sir David was also instructed to recommend a new framework for the regulation of the legal profession pursuant to a reformed structure. This commission resulted from a report by the Department for Constitutional Affairs that had reached the conclusion that the UK regulatory framework for lawyers was "outdated, inflexible, over-complex and insufficiently accountable or transparent."\(^\text{115}\)

There are two premises that underlay the Clementi Report and the LS Act that stand in the way of similar reform by the ABA. The first premise is a rejection of the idea that the roles of lawyers as professionals and as business people conflict. According to Sir David, "[a]cess to justice requires not only that the legal advice given is sound, but also the presence of business skills necessary to provide a cost-effective service in a consumer friendly way."\(^\text{116}\) The second premise is a rejection of self-regulation that lacks significant government oversight and has no nonlawyer involvement.

The Clementi Report comes to a number of important conclusions regarding multi-disciplinary practices and outside ownership of such firms. It concludes that outside ownership of law firms should be permitted. Sir David expressed the view that "[s]uch ownership should be subject to a ‘fit to own’ test; but the main focus of the

\(^{113}\) SIR DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES: FINAL REPORT (2004) [hereinafter CLEMENTI REPORT].

\(^{114}\) Id. at 1.

\(^{115}\) Id.

\(^{116}\) Id. at 5.
regulatory authorities should be upon the identity of the management team. . .”\textsuperscript{117} This type of ownership was already permitted with regard to conveyancing services, and the Report proposed that “subject to proper safeguards . . . it should now be permitted in other areas of the legal services market.”\textsuperscript{118}

The Report was more equivocal on the subject of multi-disciplinary practices “which bring together lawyers and other professionals to provide legal and other services to third parties.”\textsuperscript{119} It recognized that were many issues to be resolved before such practices could be permitted and regulated, but it suggested that a new regulatory system would be a step on the way to allowing multi-disciplinary practices.

The LS Act implemented the Clementi Report by establishing the Legal Services Board (“LSB”) and Office for Legal Complaints (“OLC”) for the regulation of lawyers, enabling firms to explore new ways of organizing their legal businesses. The LSB was designed to provide proportionate, independent oversight, while approved regulators, such as the Law Society, The General Council of the Bar and Councils for specialists such as conveyancers, have responsibility for day to day regulation. Although this is a continuation of self-regulation of lawyers, the LSB is a government body overseeing the self-regulatory organizations. The LSB Chairman and non-executive Board members are appointed by the Lord Chancellor in consultation with the Chief Justice. The LSB is accountable to Parliament through the Lord Chancellor and the Ministry of Justice.\textsuperscript{120}

\textsuperscript{117} CLEMENTI REPORT, supra note 113, at 138.
\textsuperscript{118} Id. at 139.
\textsuperscript{119} Id.
The LS Act makes provision for the licensing of new business structures or ABSs. An ABS is a firm in which a non-lawyer is a manager of the firm or has an ownership interest in the firm. Also, a firm can be an ABS where another body is a manager of the firm or has an ownership interest in the firm. A non-lawyer is a person who is not authorized to carry out “reserved legal activities.” In order for a firm to become an ABS, it must be approved by a licensing authority such as the LSB or a day-to-day self-regulatory organization.

A licensed body must have a Head of Legal Practice who is a lawyer, and is responsible for ensuring that the firm and its lawyers comply with duties imposed by the licensing authority and the LS Act. A licensed body must also have a Head of Finance and Administration who is responsible for ensuring that the firm complies with rules made by a licensing body regarding accounts. Further, a licensed body must have arrangements in place to ensure that lawyers comply with “professional principles.” These principles require authorized persons to act with independence and integrity; to maintain proper work standards; to act in the best interests of their clients; to comply with their duties to a court to act with independence in the interests of justice; and to keep their clients’ affairs confidential. The licensing authority must approve each non-lawyer’s holding of 10% or more of shares in a firm, even if the shares are publicly traded.

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121 "Reserved activities" include: exercise of rights of audience; conduct of litigation; certain activities concerning land registration; probate activities; notarial activities; and administration of oaths. See Legal Services Act, supra note 112, at pt. 3, § 12.
122 Id. at pt. 5, § 73.
123 Id. at pt. 5, § 91.
124 Id. at pt. 5, § 92.
125 Id. at pt. 3, § 17.
126 Id. at pt. 1, § 1.
127 Id. at sched. 13, pt. 1.
Such a holder must be a “fit and proper” person and may not compromise regulatory objectives or the firm’s ability to fulfill duties imposed by the licensing authority.\textsuperscript{128}

The Law Society has set forth the potential benefits and risks of becoming an ABS.\textsuperscript{129} Advantages include that equity can be raised from a broader base of potential persons, including non-solicitor employees.\textsuperscript{130} Further, equity can be raised from outside the legal sector without the need for non-lawyer involvement at the management level so a wider range of services to clients can be provided than by a traditional law firm.\textsuperscript{131} Balanced against these advantages are potential risks to the firm’s culture.\textsuperscript{132} Also, many foreign jurisdictions may not accept the ABS model and the firm may be inhibited in providing services through an overseas office.\textsuperscript{133} The level of control of an outside investment and whether such control could interfere with the firm’s ability to act in its clients’ best interests needs to be considered.\textsuperscript{134} Although ABS firms are not limited in the services they can provide, an ABS firm needs to consider whether offering certain services, such as audit services, might conflict with a duty of confidentiality.\textsuperscript{135}

One of the fears that lawyers express regarding nonlawyer investment in law firms is that large corporations could own law firms. Such a development has happened in the U.K., where London-based WHSmith stores are hosting legal kiosks through a partnership with QualitySolicitors. Londoners can therefore obtain routine legal

\textsuperscript{128} \textit{Id.}
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.}
assistance where they buy stationery supplies and newspapers, in such matters as divorces, wills and real estate transactions.\textsuperscript{136}

\textbf{B. IN AUSTRALIA}

Australia’s reform of the legal profession preceded the UK’s reform. The Legal Profession Act of 2004 authorized law firms to incorporate, and also to obtain investments from non-lawyers.\textsuperscript{137} Although each province in Australia has its own law regarding the regulation of lawyers, all have adopted the New South Wales legislation for “incorporated legal practices” (ILP) based on the Model Laws for the Legal Profession promulgated by the Law Council of Australia in 2004. This development occurred primarily to increase competition for legal services and secondarily, to create a law-firm structure that would enable partners to have limited liability.

The Australian government was interested in applying competition policy to the legal services industry in order to make the Australian capital markets attractive in a global economy.\textsuperscript{138} The legal profession was interested in obtaining limited liability for lawyers and an ability to do business in a governance form that would be more flexible than a traditional general partnership.\textsuperscript{139} The Australian reform therefore permitted law firms to do business as multi-disciplinary partnerships, as corporations, and even go public. In May 2007 Slater & Gordon, an Australian personal injury litigation law firm,

\textsuperscript{136} Knake, supra note 17, at 7.
\textsuperscript{139} Id. at 76.
became the first law firm in the world to make a public offering and then it listed on the
Australian stock exchange (ASX). 140

Opponents of the Australian law reform were concerned about threats to attorneys’ ethical duties, especially the duties of confidentiality, privilege, independence
and competence.” 141 These concerns are addressed in the Legal Profession Act. An incorporated legal practice (“ILP”) may provide legal and other lawful services, have
external investors, and list on the ASX. 142 Prior to providing legal services, an ILP must
give written notice to the Law Society of its intention to do so. 143 Additionally, an ILP
must also comply with the Australian Federal Corporations Act, and must register with
the Australian Securities & Investment Commission. 144 An ILP must appoint at least one
legal practitioner who must ensure that appropriate management systems are
implemented and maintained that allow the ILP to provide legal services in accordance
with the professional obligations of legal practitioners. 145 Although an incorporated legal
practice may engage in non-legal businesses, where there are conflicts of interest between
legal practitioners and others, the duties of the lawyers trump the interests of third
parties. 146

The Slater & Gordon prospectus discussed the firm’s regulation and how it would
deal with conflicts of interest. First, it sets forth its principles of corporate governance as:
“fulfilling Slater & Gordon’s duties to the Court and to its clients; providing meaningful

140 Peter Lattman, Slater & Gordon: The World’s First Publicly Traded Law Firm, WALL STREET JOURNAL
firm/.
141 Petzold, supra note 138, at 78.
142 Ethics Comm’n Request for Comment of April 2011, at 9.
143 Legal Profession Act 2004, § 137.
144 Ethics Comm’n Request for Comment of April 2011, at 9.
145 Id.
146 Id.
employment for employees; providing services of value to clients; and generating rewards for Shareholders, in a way that contributes to the welfare of the community.”

Then, the prospectus explains that if there is a conflict of interest between those duties, resolution of the conflict will be as follows: “the duty to the Court will prevail over all other duties, and the duty to the client will prevail over the Company’s other corporate responsibilities and duty to shareholders.”

Because the ASX recommends that a majority of the board of a listed company should be independent directors, the Slater & Gordon board is not composed of its lawyer-shareholders, and under Australian regulations pertaining to incorporated law firms, only one director need be a legal practitioner. Slater & Gordon seems to have prospered as a publicly traded law firm, and in January 2012, it purchased the U.K. firm of Russell Jones & Walker and entered the U.K. legal services market.

C. IN CANADA

In Canada, certain regulations adopted in three provinces allow for modified forms of MDPs. Two common law provinces, Ontario and British Columbia have adopted regulations that permit MDPs, but with significant restrictions. Quebec, which is a civil law jurisdiction, has adopted a more liberal MDP regime. However, none of these provinces currently allow for outside ownership of law firms.

1. The Canadian Bar Association and the Debate over MDPs in Canada

148 Slater & Gordon to enter UK market with £54m purchase of Russell Jones & Walker, LEGAL FUTURES (January 30, 2012), http://www.legalfutures.co.uk/latest-news/slater-gordon-to-enter-uk-market-with54m-purchase-of-Russell-Jones-Walker. This combination was approved on April 27, 2012 by the Solicitors Regulation. www.rjw.co.uk.
149 Ethics Comm’n Request for Comment of April 2011, at 11.
150 Id.
In Canada, governance of the legal profession lies within the provincial Law Societies acting under statute. While the Canadian Bar Association (CBA) does not regulate the practice of law, like the ABA, it plays a significant role in developing the codes of professional conduct. In 1997, the CBA established its International Practice of Law (IPL) Committee to monitor the “activities, negotiations and developments regarding the globalization of legal practice and the trend towards multi-disciplinary practices through NAFTA, the World Trade Organization (WTO), and the International Bar Association.”

The IPL’s position on MDPs reversed course three times in a short period. First, in 1998 the IPL recommended that “MDPs should not be permitted to provide legal services to clients” unless they were controlled by lawyers. However, in August 2000, the IPL changed its position and the CBA Council approved a “final” resolution that permitted lawyers to engage in “business arrangements in which individuals with different professional qualifications practice together . . . to combine different skills to provide a broad range of advice to consumers.” This resolution allowed lawyers to participate in MDPs even if such MDPs were not controlled by lawyers. Additionally, the resolution did not limit the services that MDPs could provide to services of a legal nature. Then, in a “stark reversal,” the CBA council “clarified” the resolution in February 2001 with a further resolution that restricted the

152 Id. (citing About the Canadian Bar Association, http://www.cba.org/CBA/about/main).
153 Id. at 2212 (citing Canadian Bar Ass’n, Special Comm. On the Int’l Practice of Law, Multi-Disciplinary Practices: An Interim Report, at I (1998)).
154 Id.
155 Canadian Bar Ass’n, Council Res. 00-03-A (2000).
157 Paton, supra note 151, at 2213.
158 Id.
MDP regime by requiring that lawyers have “effective control over the MDP.”\(^{159}\) The CBA Council provided that effective control would ensure that MDPs would be in “continuing compliance with the core values, ethical and statutory obligations, standards and rules of professional conduct of the legal profession.”\(^{160}\)

The CBAs final position seems to be have been the product of “political intrigue and overt manipulation” by the Law Society of Upper Canada (LSUC), which is the provincial regulator of the province of Ontario.\(^{161}\) This is because LSUC had already adopted an MPD regime significantly more restrictive than the CBAs initial position.\(^{162}\) Thus, “when it became clear that [LSUC] would be embarrassed by having the CBA sanction a far more liberal regime for MDPS than the one that LSUC had already imposed while purportedly acting ‘in the public interest’ LSUC representatives embarked on an ultimately successful campaign through the legal press and at the CBA itself to have the will of the CBA national counsel reversed and a narrower MDP regime with a lawyer-control requirement adopted.”\(^{163}\)

2. Ontario

MDPs have been permitted in Ontario since LSUC adopted By-Law 25 on April 30, 1999.\(^{164}\) This regulation exists today, in much its same form, under By-Law 7.\(^{165}\) Part III of By-Law 7 sets forth the rules governing MDPs in Ontario. A lawyer (“licensee”)
can form a partnership or other association (but not a corporation) with a nonlawyer professional “for the purpose of permitting the licensee to provide to clients the services of the professional” if certain conditions are met.\(^{166}\) Prior to entering into such an arrangement, the licensee must apply to LSUC and be approved.\(^{167}\) The non-lawyer professional must be of good character, and “qualified to practice a profession, trade or occupation that supports or supplements the practice of law or the provision of legal services.”\(^{168}\) Additionally, the licensee must retain “effective control” over the professional’s practice insofar as the professional is providing services to the clients of the partnership or association.\(^{169}\) Further, the professional must agree to comply with the society’s rules, regulations and policies, and must agree not to practice his profession, trade or occupation, except to provide services to the clients of the partnership or association.\(^{170}\) Any independent practice of the professional’s occupation must be performed outside the premises of the partnership or association.\(^{171}\)

In addition, LSUC adopted By-Law 32 on May 24, 2001 to regulate affiliations between law firms and other service providers.\(^{172}\) Today, By-Law 32 exists in its original form in Part IV of By-Law 7, which regulates “affiliated” law firms.\(^{173}\) This regulation came about due to what the Futures Task Force labeled as the “captive law firm model.”\(^{174}\) The concern was with the presence of Donahue & Partners, a law firm

\(^{166}\) Id.
\(^{167}\) Id.
\(^{168}\) Id.
\(^{169}\) Id. Effective control requires that “the license may, without the agreement of the professional, take any action necessary to ensure that the licensee complies with [the societies rules, regulations and policies].”
\(^{170}\) Id.
\(^{171}\) Id.
\(^{172}\) By-Law No. 32 (Law Soc’y of Upper Can. 2001) (repealed 2007). By-Law No. 32 was also repealed on May 1, 2007 and exists today under By-Law No. 7 Part IV. See Paton, supra note 145 at 2220.
\(^{174}\) Paton, supra note 145 at 2220.
established in Ontario by the accounting firm Ernst & Young, as well as other law firms “captive” to Big Five accounting firms in Europe.\textsuperscript{175} As a result, By-Law 7 imposes a notification requirement, and various restrictions, on a licensee that “affiliates with an affiliated entity.”\textsuperscript{176} A licensee “affiliates with an affiliated entity when the licensee on a regular basis joins with the affiliated entity in the delivery or promotion and delivery of the services of the licensee and the services of the affiliated entity.”\textsuperscript{177} A licensee who is involved in such an arrangement must own and maintain control over the professional business through which the licensee practices law or provides legal services.\textsuperscript{178} Additionally, there must be a physical segregation of the premises from which the legal services are delivered from those used by the affiliated entity for the delivery of its nonlegal services, “other than those that are delivered by the affiliated entity jointly with the legal services of the manager or group.”\textsuperscript{179} Finally, no fee splitting or profit sharing is permitted between the law firm and the affiliated entity, and the conflicts clearance requirements are such that a system must search for clients in both the law firm and the affiliated firm.\textsuperscript{180}

3. British Columbia

In 2001, The Law Society of British Columbia (LSBC) contemplated a much more liberal regime than the one adopted in Ontario. In fact, the governors of the LSBC (benchers) rejected a more restrictive approach stating: “A restrictive approach may

\textsuperscript{175} Paton, supra note 145 at 2220.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id. Further, it requires notification to the board, and an annual filing that must include information on the financial arrangement that exists between the lawyer and the affiliated entity, and other arrangements including the ownership, management, control, and compliance with the rules, regulations and policies of the society. Id.
\textsuperscript{180} Id.
preclude sensible and economic arrangements between lawyers and members of other occupations that may serve the public well.”

However, although these proposed rule changes received a majority of the bencher’s votes, a two-thirds majority was necessary to adopt the resolution. The resolution was rejected based on the protecting the “core values” of the profession as well as what the benchers called a “lack of demand within the profession for such a regulatory scheme.”

The LSBC did not adopt any MDP regime until recently in 2010 when it adopted Rules 2-23.1 to 2-23.12 into its practice rules. The rules adopted by LSBC function in much the same way as MDPs in Ontario. For example, the lawyer member of the MDP must obtain express permission by the LSBC to enter into the MDP. The non-lawyer members of the MDP must be of “good character and repute.” Additionally, all members must agree in writing that the lawyer members of the MPD will have actual control over the delivery of legal services, and that non-lawyer members will not interfere with the lawyer’s obligation to the rules regulations and polices of the LSBC.

In October 2011, the LSBC requested that Independence and Self-Governance Committee (Committee) examine the debate surrounding ABSs (including models with outside ownership) and outline their views on whether or not they should be adopted in

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182 Paton, supra note 145 at 2225.
185 LSBC Practice Rules, 2.23.2(1)(b).
186 LSBC Practice Rules, 2.23.2(1)(c).
187 LSBC Practice Rules, 2.23.2(1)(d).
British Columbia.\textsuperscript{188} The committee expressed their concern about “the lack of empirical evidence given by proponents of ABSs and [their belief] that if the only demonstrable effect of ABSs was to enrich the legal profession or those who invested in it, the image of the profession and the law society would be tarnished.”\textsuperscript{189} Thus, the committee urged that “some considerable caution needs to be exercised to ensure that there is a public value in ABSs (such as improving access to legal services) and that valuable public protections that currently exist (such as client confidentiality, an absence of conflicts of interest, and the public right to an independent lawyer) are not lost.”\textsuperscript{190} The committee concluded that “some outside ownership in law firms could be considered, provided it is properly regulated and that lawyers remain in control of the provision of the legal services offered.”\textsuperscript{191} However, the committee rejected the notion that law firms be put up for public sale through securities markets, because they were “not convinced that there are benefits to users of legal services that outweigh identified risks.”\textsuperscript{192} Although the Committee recommended that the LSBC give “serious consideration to ABSs,” they suggested that the LSBC wait and see what happens elsewhere: “[The LSBC] should await the outcome of the debate currently underway through the American Bar Association [England, and Australia].”\textsuperscript{193}

4. Quebec

In Quebec, the Code des professions (Professional Code) was amended with regulations in 2010 to provide for a more liberal MDP regime than that which exists in

\textsuperscript{188} THE LAW SOCIETY OF BRITISH COLUMBIA, Alternative Business Structures in the Legal Profession: Preliminary Discussion and Recommendations, October 21, 2011.
\textsuperscript{189} Id. at 1.
\textsuperscript{190} Id. at 2.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} Id.
Ontario and British Columbia. The regulations in Quebec require only “a simple majority ownership by members of the Barreau du Quebec of the firm through which the professional services are provided.” Membership of non lawyers is “restricted to those members of various other recognized professional bodies (including actuaries, patent agents, and members of the Chambre de l’assurance de dommages) [damage insurance adjusters and brokers] or the Chambre de la securite financiere [financial planners and insurance agents], but the regulation does not require that their activities ‘support or supplement the practice of law’ in the manner of the Ontario and British Columbia MDP rules.”

MDPs are required “to provide an undertaking to the Barreau du Quebec that in essence ensures that all members of the partnership comply with rules of law so as to permit the lawyer members to carry on their professional activities, particularly as regards the following:”

a) professional secrecy, the confidentiality of information contained in client files and the preservation thereof;
b) professional independence;
c) the prevention of situations of conflict of interests;
d) activities reserved for advocates;
e) liability insurance;
f) professional inspections;
g) advertising;
h) billing and trust accounts; and
i) access by the syndic of the Barreau to this undertaking and, if applicable, to every contract or agreement regarding a [member of the Barreau].

195 Ethics Comm’n Request for Comment of April 2011, at 12.
196 Ethics Comm’n Request for Comment of April 2011, at 12.
197 Ethics Comm’n Request for Comment of April 2011, at 12 (citing Quebec Professional Code, at Schedule B (s.3)).
D. OTHER JURISDICTIONS

Jurisdictions in addition to Australia and the U.K. have been considering whether to permit multidisciplinary practices and ownership of interests in law firms by non-lawyers. In Europe, in particular, various countries are studying whether to liberalize restrictions on the practice of law. France, Spain and Scotland have studies or proposals in this regard.\textsuperscript{198}

The Organization of Economic Cooperation and Development (OECD) released a report in 2007 questioning the regulation of the legal profession.\textsuperscript{199} This report asserted that regulation and self-regulation of the legal profession appear “to serve mainly the private interests of the profession rather than broader consumer interests.”\textsuperscript{200} The report found the restrictions on ownership and management of law firms difficult to justify because these restrictions limit the available sources of capital for a law firm, and spreading the risk by allowing more widespread ownership could reduce prices to clients. Also, prohibiting non-lawyer management may “stifle more efficient and innovative methods of delivering legal services to consumers.”\textsuperscript{201} Further, the OECD rejected the argument that financial control of law firms by non-lawyers would improperly influence lawyers by putting commercial interests ahead of client interests “since lawyers are not less driven by profits than their commercial counterparts.”\textsuperscript{202} This OECD Report seems to have had a greater impact in Europe than elsewhere, but the United States is a member of the OECD and so its views regarding competition should be heeded.

\begin{itemize}
\item[198] Cox, \textit{supra} note 4 at 538-39.
\item[200] \textit{Id.} at 9.
\item[201] \textit{Id.} at 50.
\item[202] \textit{Id.}
\end{itemize}
III. THE JACOBY AND MEYERS LITIGATION

On May 18, 2011, Jacoby & Meyers, LLP (“Plaintiffs”) filed a complaint in the United States District Court for the Southern District of New York against the Presiding Justices of the First, Second, Third and Fourth Departments of the Appellate Division of the Supreme Court of the State of New York (“N.Y. Defendants”), challenging ABA Rule 5.4 and its state law counterparts on a variety of constitutional grounds. The Plaintiffs challenged Rule 5.4 of the New York Rules of Professional Conduct, which prohibits lawyers from practicing law for profit in an entity in which a non-lawyer has an ownership interest. A similar complaint was filed on the same day against the Justices of the Supreme Court of New Jersey (N.J. Defendants) in the United States District Court for the District of New Jersey and against the Judges of the Connecticut Superior Court of the United States District Court for the District of Connecticut.

In their original N.Y. Complaint, Plaintiffs set forth a lengthy list of reasons why Rule 5.4 is antiquated and should be changed. First, the rule prevents law firms from competing in today’s global marketplace, restricts public access to “affordable, quality representation,” and impedes law firms’ ability to raise “the capital necessary to pay for improvements in technology and infrastructure, and to expand its offices and hire additional personnel.” “The traditional modes of obtaining capital – through personal contributions of the partners and commercial bank loans – are unavailable to small firms like Jacoby & Meyers and, although the firm has had capital contribution offers from

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non-lawyer investors, they have been unable to take advantage of such offers due to the prohibitions of Rule 5.4.207

Second, the current ethical system “perpetuates economic inequity” between small law firms with no access to the capital markets, and those on Wall Street, as well as between Wall Street firms and firms in the U.K. and Australia, where lawyers are allowed to accept funding from non-lawyers.208 In the U.K. and Australia there are alternative safeguards in place to ensure that non-lawyer equity investors do not interfere with lawyers’ professional responsibilities and the system has worked well in both countries. 209

Third, one need only look to the practice of the District of Columbia, where lawyers may partner with non-lawyers, to see that the restrictions of Rule 5.4 are unwarranted. There has been no “violation of clients’ confidences” or “erosion of lawyers’ independent judgment” in D.C. 210 Indeed, the “claimed evils most often advanced by critics of outside, non lawyer investment . . . have not materialized in the wake of others’ efforts to allow such outside investments.”211 Finally, Rule 5.4 should no longer be enforced because there is “no compelling legal argument or public policy rationale” that exists to “prevent lawyers from raising capital in the same manner as any other business.”212

Because of these reasons, Plaintiffs’ first Complaint sought to enjoin the enforcement of Rule 5.4 against them and other similarly situated law firms, and a declaration that the Rule violates: (1) the Judiciary Law, (2) the Dormant Commerce Clause, (3) the Equal Protection and Due Process Clauses, (4) Plaintiffs’ First Amendment rights to free speech

207 Id. at ¶ 28.
208 Id. at ¶ 4.
209 Id. at ¶ 33.
210 Id. at ¶ 5.
211 Id.
212 Id. at ¶ 6.
and association, and (5) that the Rule constitutes a regulatory taking without compensation.213

The N.Y. Defendants subsequently moved to dismiss the Complaint on July 15, 2011 for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim upon which relief could be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). During the oral argument held before Judge Kaplan on February 7, 2012, the Court stated that Plaintiffs “faced a significant uphill battle to establish standing,” but that Plaintiffs’ claims were ripe and that the Court “should entertain the case rather than abstain.”214 Afterwards, Plaintiffs were granted leave to amend their complaint to correct certain procedural defects.” On November 23, 2011, Plaintiffs filed an Amended Complaint, naming Jacoby & Meyer USA, LLC as an additional Plaintiff, and thus rendered the Defendant’s first Motion to Dismiss moot.

The Amended Complaint reiterated the same policy arguments against Rule 5.4 as discussed above and stated that Jacoby & Meyers, LLP had recently created the LLC, Jacoby & Meyers USA, for the “express purpose of allowing non-lawyers to ‘own an interest’ in the entity through which Jacoby & Meyers is authorized to practice law for profit.”215 Plaintiffs stated that Jacoby & Meyers LLP was immediately prepared to “transfer all of its assets to Jacoby & Meyers USA, LLC and immediately obtain non-lawyer investment – as soon as Rule 5.4’s blanket suppression of non-lawyer ownership of an interest in law firms is declared unconstitutional and its enforcement permanently

213 Id.
In this way, the N.Y. Defendants could no longer claim that Plaintiffs’ inability to add a non-lawyer partner to their firm was barred by New York State Partnership Law, since their newly created entity was an LLC not subject to Partnership Law.  

On December 23, 2011, the N.Y. Defendants moved to dismiss the complaint. The bulk of the parties’ arguments concerned the procedural and jurisdictional aspects of Plaintiffs’ claims, and the defendants chose to address standing, ripeness, immunity and abstention. On March 8, 2012, Judge Kaplan of the Southern District Court of New York issued a decision holding that Plaintiffs did not have standing to raise the constitutional claims advanced in their complaint because they are a limited liability company and a limited liability partnership and as such, are a “corporation or voluntary association” within the meaning of Section 495 of the New York Judiciary Law. This bars Plaintiffs from obtaining non-lawyer ownership equity independently of Rule 5.4. As such, Plaintiffs had no standing to bring this suit and, because “the ruling that they seek would be a purely advisory declaration of the sort that is forbidden to federal courts under Article III of the U.S. Constitution” the action was dismissed. Accordingly, the merits of Plaintiffs claims against the N.Y. Defendants was never addressed by the Court.

Judge Sheridan took a different approach in the New Jersey case, where the N.J. Defendants also made a motion to dismiss. He held that it was best for the Court to restrain its authority in light of the rightful independence of the New Jersey Supreme

216 Id.

217 Defendants argued in their first Motion to Dismiss that Plaintiffs had no standing to sue because New York State Partnership Law, not Rule 5.4, prevented them from adding a non-lawyer partner to their firm. See Memorandum of Law in Support of Defendants’ Motion To Dismiss, Jacoby & Meyers, LLP v. Presiding Justices of First, Second, Third & Fourth Departments, Appellate Div. of Supreme Court of New York, 847 F. Supp. 2d 590 (S.D.N.Y. 2012) (2011 WL 7102194).

218 Jacoby & Myers, 847 F. Supp. 2d at 591.
Court over Rule 5.4(d), and therefore he denied the motion to dismiss and remitted the issue of whether an Alternative Business Structure, as proposed by Jacoby & Meyers for review and analysis to the New Jersey Supreme Court.

A motion to dismiss in Connecticut by the Connecticut defendants has not yet been decided.

Whether any rights protected either by the U.S. Constitution or the constitutions of the States of New York, New Jersey or Connecticut are abridged by the prohibition against partnerships or other forms of business organizations that include both lawyers and nonlawyers are complicated issues. For obvious political reasons, federal district court judges would rather not decide these questions in cases against state judges. Whether the U.S. Supreme Court might entertain these cases is another question.

In Goldfarb v. Virginia State Bar, the Supreme Court struck down suggested minimum fees for legal services imposed by the Virginia State bar. In Bates v. State Bar of Arizona, the Supreme Court struck down bans against lawyer advertising as contrary to the First Amendment. In NAACP v. Button, the Supreme Court held that the states could not ban the delivery of legal services through a nonprofit corporation. This precedent was then extended to permit unions to offer legal services to their members. In Citizens United v. FEC, the Supreme Court held that the Government may not suppress political speech by corporations. Whether these cases, and some related decisions amount to a theory that the First Amendment’s protections of speech, assembly

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223 130 S.Ct. 876 (2010).
and association make state prohibitions on business combinations between lawyers and nonlawyers unconstitutional has been argued by some\textsuperscript{224} and opposed by others.\textsuperscript{225}

The ABA appears to have determined that organizations that do not operate at a profit can provide legal services, but for profit entities cannot do so.\textsuperscript{226} Recently, many states have made provision for the incorporation of benefit and flexible purpose corporations, which straddle a space between for-profit and non-profit corporations. The benefit corporation commits its owners to pursue social or philanthropic objectives, although shareholder profits may also be pursued. However, there is no obligation to give shareholders priority.\textsuperscript{227} Flexible purpose corporations similarly would allow customers, the community or society to trump shareholder interests.\textsuperscript{228} If the bar were more serious about protecting professional values over protecting economic interests, it might consider adapting these corporate forms to law firms so that law firms could join with non-lawyers either as shareholders or in other capacities, but client interests would nevertheless trump shareholder interests. This would be similar to the way in which the regulation of law firms evolved in Australia.

Jacoby & Meyers did not sue for relief under the antitrust laws. At one time there was thought to be a “learned profession” exemption from the antitrust laws,\textsuperscript{229} but the Supreme Court rejected this concept in \textit{Goldfarb v. Virginia State Bar}.\textsuperscript{230} Nevertheless, in

\begin{thebibliography}{99}
\bibitem{226}See Andrews, note 51 \textit{supra}, at 589-90.
\bibitem{227}See, \textit{e.g.}, Cal. Corp. Code § 14620(d) (West 2011); N.Y. Bus. Corp. Law § 1707(1)-(3) (McKinney 2011).
\bibitem{228}See Cal. Corp. Code § 2602 (West 2011).
\bibitem{230}421 U.S. 773 (1975).
\end{thebibliography}
an earlier case, *Parker v. Brown*,\(^{231}\) the Court adopted the “state action” exemption from the antitrust laws in situations where state regulation required conduct the antitrust laws prohibited. This doctrine has generally protected legal ethics from attacks under the antitrust laws, except in cases involving blatant price fixing.\(^{232}\)

The restraint against nonlawyer and lawyer association in a law firm is a standard of a voluntary non-governmental organization, the ABA, and therefore is not sovereign action. Nevertheless, this ban has been adopted by state bar associations and generally is approved and enforced by the state courts. Whether this should make any difference is an interesting question, but it seems pertinent that the restrictions against equity investment in law firms by nonlawyers was abolished in the U.K. and Australia on antitrust grounds. In a different context, involving the membership rules of the New York Stock Exchange (“NYSE”), the U.S. Supreme Court held that there was an implied repeal of the antitrust laws by the federal securities laws only to the extent necessary to make securities regulation work.\(^{233}\) A similar rationale could perhaps be applied to Rule 5.4 of the ABA and the states that have adopted it. In other words, are these bans necessary to protect the core values of the legal profession or could these values be protected in other less anti-competitive ways?

**IV. THE EVOLUTION OF THE SECURITIES INDUSTRY**

Lawyers make much of their professionalism, “but to term them noncommercial is sanctimonious humbug.”\(^{234}\) Further, other industries have confronted the problem of eliminating restrictions on their form of organization and financing. In this part, this

\(^{231}\) 317 U.S. 341(1943).
\(^{234}\) *Bates*, 433 U.S. 350 at 369 n.19 (citing Tr. of Oral Arg. 64.)
Article will discuss the elimination of such restrictions on securities firms that were members of the NYSE and the NYSE itself. While the results of these changes in the organizational form of these firms have been both beneficial and detrimental, if lawyers find that alternative business structures are necessary, they will push for the abolition of absolute bans on lawyer-nonlawyer associations.

Until 1953, only individuals could be members of the NYSE, and all exchange member firms were required to do business as partnerships. Further, all member firms were required to be primarily engaged in a public securities business. The rationale for these regulations was related to the mutual form of exchange organization. When making a trade, an exchange member had to be trusted to stand behind the trade. Since all partners are liable for the debts of a partnership, the personal wealth of every firm partner guaranteed stock exchange trading contracts. This regime worked reasonably well when commission rates were fixed and all orders in exchange listed stocks were required to be executed over an exchange. In addition to contributing to the financial stability of the NYSE, these regulations kept institutions, who were the customers of exchange members, from becoming exchange members.

After the paperwork crisis on Wall Street in the 1960s, and the unfixing of stock exchange commission rates in 1975, it became apparent that the traditional regime of the brokerage firm partnership form was doomed. In the 1960s, over 150 securities firms

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237 Karmel, supra note 235 at 129-31.

238 See Moses v. Burgin, 445 F.2d 369 (1st Cir. 1971).
failed. In addition to the problems unleashed by the unfixing of brokerage commissions in the next decade, the structure of the underwriting business was challenged, and sales and trading with institutional customers became more important even to the wire houses.

In 1953, the NYSE allowed its member firms to incorporate. Woodcock Hess & Co., and A.G. Becker & Co. were the first to do so and remain member firms. In 1959, Merrill Lynch, Pierce Fenner & Smith, a large, nationwide wire house catering to retail customers, incorporated. Donaldson, Lufkin & Jenrette, a firm that catered to institutional customers by executing their trades, also incorporated in 1959, and then it became a public company in 1971. Merrill Lynch soon followed with an initial public offering. These offerings were in response to a 1970 relaxation of the rules of the NYSE allowing member firms to go public.

These changes occurred because of the greatly increased need for capital required to run a securities business, and the financial needs of the securities industry generally. The number of customers and the volume of trading greatly increased, and firms were required to invest large amounts of money in computerizing their back offices. The partnership form of business organization could not raise sufficient capital to support the business of large firms. Subordinated loans, which were counted as regulatory capital,

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239 Charles G. Geist, WALL STREET A HISTORY 296 (1997).
240 Id. at 297-98.
were not a viable long term solution to business needs.\textsuperscript{246} The problems of partnership succession and the unwieldy nature of large securities firm partnerships also contributed to the need to incorporate and then go public.\textsuperscript{247}

Not all NYSE member firms incorporated and went public even when such an organization was allowed. Goldman Sachs remained a partnership until 1999, and was able to do so because it was enormously profitable, and it compelled partners to leave capital in the firm.\textsuperscript{248} Lazard Freres chose to remain a partnership for even longer, but eventually went public in May of 2005.\textsuperscript{249}

The impetus for going public was the need for capital. “Without adequate equity capital on their books, the investment banks could not underwrite enough deals or make their influence felt on Wall Street . . . Even when the firms had surplus capital, their futures were still not certain because as their partners retired, they withdrew their capital, shrinking the firms’ financial bases.”\textsuperscript{250} Another theory, espoused by Professors Morrison and Wilhelm, regarding the transformation of securities firm partnerships into large public corporations is that going public was a response to technological innovations in both information technology and finance.\textsuperscript{251}

According to this theory, partnerships “will not make capital investments when the costs of idle capital are sufficiently large; the going public decision therefore boils

\footnotesize{\textsuperscript{246} Several prospectus for brokerage firm public offerings stated that the proceeds of the offering would be used to retire subordinated loans. Under stock exchange rules, these loans could not be repaid if repayment would jeopardize a firm’s compliance with net capital regulations.  
\textsuperscript{247} Geisst, note 243, supra, at 226.  
\textsuperscript{248} Id. at 307-310.  
\textsuperscript{249} See 2005 Annual Report.  
\textsuperscript{250} Geisst, supra note 243, at 314-15.  
\textsuperscript{251} Alan D. Morrison & William J. Wilhelm, Jr. The Demise of Investment-Banking Partnerships: Theory and Evidence (July 2004), at 2.}
down to a trade-off between investment in human and physical capital.”252 In the 1960s, the increase in computer power allowed certain types of securities firms “to substitute computers for human capital with regard to such tasks as settling transactions, maintaining client balances and mailing confirmations.”253 Retail rather than wholesale firms took advantage of the opportunity to go public at this time. Later, the development of the microcomputer led to financial engineering and the creation of new products that decreased the bid/ask spread and therefore the wholesale firms needed additional financial capital and went public.254 For both retail and wholesale firms, competitive pressures to expand pushed them into becoming public companies, thereby substituting financial capital for human capital.255

Although the above thesis has some appeal, it is an incomplete analysis of why securities firms went public. An examination of the “Use of Proceeds” section of some of the early initial public offerings reflects that firms were concerned about the expected deregulation of stock exchange commission rates and increased capital requirements of their regulators.256 Although this explanation for the public offerings of wire houses fits to some extent into the Morrison and Wilhelm thesis, the prospectus for the initial public offering of Donaldson, Lufkin and Jenrette stated that proceeds from the offering would be used to support the firm’s block positioning activities, a business in which Goldman Sachs was also prominent. However, Goldman Sachs did not go public until much later.

252 Id. at 4.
253 Id.
254 Id. at 5.
255 Id. at 31-32.
The same economic pressures that led to the breakdown of the partnership form of organization for securities firms also led to the demutualization and public company status of the NYSE. The NYSE incorporated in 1971, although the SEC was concerned that this step would impair the effectiveness of the exchange as a self-regulatory organization (“SRO”). Nevertheless, the exchange continued to operate as a mutual organization for the benefit of its members until 2003, when scandals involving the chairman of the exchange and stock exchange specialists led to a board reorganization that positioned the exchange for a public offering. The exchange then went public through a reverse merger with Archipelago Holdings, Inc., thus side stepping long negotiations with the SEC with respect to a public offering that the NASD went through. This suited powerful members of the securities industry, which had invested large sums in electronic trading networks, and wished to break up the NYSE’s quasi-monopoly on trading listed securities.

As a result of the incorporation and public offerings of NYSE member firms and the NYSE itself, the securities industry has expanded and become part of the banking industry. Although this has enabled U.S. firms to compete with foreign universal banks, there is a serious question as to whether this growth has been beneficial to the capital markets. The financial meltdown of 2008 and the resulting reduction in the number of large U.S. banks that are players in the global markets may be the end game in the restructuring of the securities industry that began with the transformation of securities firms from partnerships to giant too-big-to-fail banks. Similarly, the fragmentation of the

259 Id.
260 See id. at167-68 (2008).
securities markets into fifty or more trading venues\textsuperscript{261} is the result of the destruction of the NYSE specialist system, which operated as a mutual company. Although these developments can be looked upon as the creative destruction of a capitalist system, many wonder whether the giant banks should be broken up, and also whether new regulation for the trading markets is necessary to alleviate the occurrence of “flash crashes.”\textsuperscript{262}

It is important to note that the securities industry is no longer self-regulated, except with regard to the regulatory oversight of brokerage firms by FINRA. This regulation primarily relates to responsibilities of broker-dealers to their customers. The NYSE is no longer a significant regulator, since it transferred most of its regulatory responsibilities to FINRA, and the largest securities firms became bank holding companies during the 2008 financial crisis and are now regulated primarily by the Federal Reserve Board.

\textbf{V. THE FUTURE OF LAW FIRMS}

The author has grave concerns about the present structure of the securities industry and the capital markets,\textsuperscript{263} and is not advocating that law firms traverse a similar path. Endless expansion in response to decreased profitability of core businesses is not necessarily a public benefit. Nevertheless, if Big Law begins to feel competitive pressures to reduce rates and costs and at the same time to expand, and needs capital in order to do so, it is likely that the ethics rules preventing non-lawyer ownership of firms will erode. It


\textsuperscript{263} See generally Roberta S. Karmel, \textit{Is the Public Utility Holding Company Act A Model For Breaking Up the Banks That Are Too-Big-To-Fail?}, 62 \textit{HASTINGS L. J.} 821 (2011).
is also possible that smaller firms or innovative organizations trying to serve low income
clients could upend Rule 5.4.\textsuperscript{264} Until now, law firms have financed growth and
operations through capital investments by their partners and loans from banks and other
sources. But these sources of funding require large outlays. Greenberg Traurig recently
made a capital call on its partners for $24 million.\textsuperscript{265} Dewey & LeBoeuf was bankrupted
by its large bank loans, and it was not the first law firm to find itself in such a difficult
situation.\textsuperscript{266} Firms that distribute 100 per cent of their profits rather than holding back
partnership capital for investment can face the same pressures that caused Dewey to
collapse.\textsuperscript{267}

Like the securities firms of the 1960s and 1970s, law firms have discovered that
some of the legal work previously done by associates can either be consigned to
computers or outsourced to less expensive lawyers. While it is unlikely that computers
will be able to argue cases before a jury, they are doing much of the discovery work
previously done by humans. If technology becomes more important in the provision of
legal services, and requires large capital outlays by firms, or if law firms become capital
hungry for other reasons, law firms may well follow the path of investment banking firms
and give up the advantages of the partnership form. Furthermore, is a law firm of 1,000
partners really an old fashioned general partnership or it simply a big business in

Although LegalZoom was held to be engaged in the unauthorized practice of law by providing legal
documents over the Internet, for do-it-yourself clients, and then editing them, providing the legal
documents was held not to be practicing law.

\textsuperscript{265} Debra Cassens Weiss, Greenberg Traurig Asks Partners to Pony Up More Cash in $24M Capital Call,

\textsuperscript{266} Rich Smith, How Dewey & LeBoeuf Became the Biggest Law Firm Bankruptcy Ever, DAILY FINANCE
(June 15, 2012), http://www.dailyfinance.com/2012/06/15/a-bankruptcy-you-might-applaud-bye-bye-
dewey-and-leboeuf/.

\textsuperscript{267} Paul Lippe, Is Your Firm Playing “Dewey Roulette”? , ABA JOURNAL (Aug. 15, 2012),
partnership form? Because of the LLP form of professional organization, not all partners are even any longer liable for the debts or malpractice of their putative partners. Neither are they paid in lock step arrangements. These firms are corporations in all but name, with centralized management and hierarchical arrangements. Some law firms would undoubtedly benefit from professional business management by non-lawyers.

My thesis is that sooner or later law firms will be allowed to raise equity capital, and the bar should prepare for this eventuality instead of denying it is a possibility. This could happen as the result of one state deciding that it will facilitate such a process, through legislation or action of the judiciary, or the Supreme Court or a state high court holding that current rules of legal ethics are uncompetitive or unconstitutional. Alternatively, the Department of Justice or the Federal Trade Commission could instigate action to revoke anti-competitive ABA rules. Should this happen, self-regulation will be affected, as it was in the securities industry when investment firms and exchanges went public and in the U.K. when ethical rules were changed to permit equity investments in law firms. Lawyers are already not entirely self-regulated as some government oversight by the SEC was imposed by Sarbanes-Oxley. Further, certain earmarks of lawyer professionalism, particularly independence and the duty of confidentiality, would need to be safeguarded or they could be lost. Considering how to preserve these values in the face of dynamic and changing business models for law firms is a large task that was initially embarked upon but not completed, by the Ethics

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268 Cf. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984) (reversing both district court and appellate court judgments to conclude that Title VII applies to the selection of candidates to a law firm partnership).
269 In 1987, the FTC argued that rules limiting lawyers and non-lawyers to join the same firm were incompatible with antitrust policy and sent letters urging courts and bar committees to change their rules. See Andrews, supra note 52, at 620.
270 See Security Industry SROs, supra, note 258, at 159-60, 196-97.
271 See 17 C.F.R. § 240.205.
Commission. Sooner or later, however, the legal profession will need to confront how to preserve its core values in the face of global competition and economic and technological challenges that may well lead to the need to raise capital from nonlawyers.