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Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?

by

THOMAS R. ANDREWS*

Several years ago, Steven Brill reported in the *American Lawyer* that “Wall Street’s Sullivan & Cromwell and Shearson Lehman/American Express have begun secret negotiations aimed at a deal in which S & C would become the first law firm to be acquired by a financial services conglomerate.”¹ As the article went on to make clear, the report was a “complete fiction. There [was] no such deal in the works.”² Indeed, Brill remarked that “the idea in its totality is off the wall for many reasons.”³ Nevertheless, he noted that “step by step, the elements of the [merger] scenario and the principles underlying them all make sense—which is a vivid commentary of sorts about where we are and where we’re going in the legal business.”⁴ More recently, Mr. Brill composed variations on the same theme when he suggested, for a variety of reasons, that it might make good economic sense for some of the large law firms, such as Skadden, Arps, Slate, Meagher & Flom, or Gibson, Dunn & Crutcher, to go public, as have some prominent members of the New York Stock Exchange.⁵

Mr. Brill is not alone in finding the idea of broader ownership of law firms attractive. Not long ago, Paula Dwyer reported in *Business Week* that “soon anybody may be able to own a law firm.”⁶ Dwyer commented

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1. Brill, *War of the Tombstones*, AM. LAW., Mar. 1985, at 1.
2. *Id.* at 14.
3. *Id.*
4. *Id.*
5. Brill, *Psst—Wanna Buy a Hot Stock?*, AM. LAW., Nov. 1987, at 3.
6. Dwyer, *Soon Anybody May Be Able to Own a Law Firm*, BUS. WK., Jan. 26, 1987, at 42 (emphasis omitted).

that developments in two bar associations "could pave the way for such retailers as Sears, Roebuck & Co. to add legal counseling to their array of services."⁷ She quoted Stephen Gillers, of New York University, as predicting that "[e]ventually the distribution of legal services will be no different from any other product."⁸

These stories make good copy. But are they really any more than wishful thinking by business entrepreneurs?⁹ For at least sixty years nonlawyers have been prohibited from offering their nonlegal talents in a business combination with lawyers practicing law.¹⁰ Moreover, when the ABA's new model rules were adopted in 1983, the ABA considered carefully but rejected a proposal that would have lifted the traditional ban on nonlawyer ownership of a law business.¹¹ Nonetheless, the point of each article was that the relevant restrictions in the ethical rules are on their way out.

Commentators have given considerable attention to the unauthorized practice of law by nonlawyers,¹² and to the offering of legal services by nonprofit institutions.¹³ The focus of this Article differs: it is *the practice of law by lawyers for profit in a business partially owned or controlled by nonlawyers*.¹⁴ The difference is important. For even if it is

7. *Id.*

8. *Id.*

9. In fairness to Brill and Dwyer, each was careful to point out that lawyers' ethical rules pose an obstacle to the kind of development predicted. Brill noted that the merger envisioned was "dependent on S & C successfully moving to overturn current Code of Professional Responsibility rules prohibiting nonlawyers from sharing in lawyers' fees . . ." Brill, *supra* note 1, at 1. In his more recent suggestion that law firms should consider going public, he concedes that the idea assumes that the current prohibitions in the lawyer ethical codes could be "erased." Brill, *supra* note 5, at 3. Dwyer's article focused on the attempts in North Dakota and the District of Columbia to eliminate the rules prohibiting nonlawyers from owning law firms. Dwyer, *supra* note 6, at 42.

10. *See infra* section I.

11. *See infra* section I(B)(3).

12. *See, e.g.*, UNAUTHORIZED PRACTICE DECISIONS (G. Brand ed. 1937); UNAUTHORIZED PRACTICE HANDBOOK (J. Fischer & D. Lachmann eds. 1972); C. WOLFRAM, MODERN LEGAL ETHICS 824-49 (1986); Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159; Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

13. *See, e.g.*, B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 233-50 (1970).

14. The subject of this Article has received new interest recently as a result of the ABA's consideration and rejection of reform in this area. *See* COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, PROPOSED FINAL DRAFT: AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT 176-78 (1981) [hereinafter PROPOSED FINAL DRAFT]. Recently, Professors Hazard, Hodes, and Wolfram have discussed the ABA's rejection of reform. 1 G. HAZARD, JR. & W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 468-77 (1987) [hereinafter HAZARD & HODES];

agreed that lawyers should be licensed, and that those who cannot meet the licensing requirements should be prohibited from practicing law, it does not follow intuitively or necessarily that nonlawyers should be prohibited from offering their nonlegal resources and talents *in a business combination with lawyers practicing law*.

In section I the Article discusses the content and history of rules prohibiting the combination of nonlawyers with lawyers in a partnership. Section II then examines the arguments that traditionally have been advanced in support of these prohibitions. The section concludes that the prohibitions cannot be justified as necessary for protection of legal services because less restrictive alternatives are available. Indeed, the existing rules seem to owe their surprising tenacity more to the fact that they serve the profession's economic self-interest than to any public purpose. In section III the Article argues that the prohibitions are no longer justified, if they ever were. Moreover, the section shows that there is a need and demand for innovative arrangements between lawyers and nonlawyers that would provide multidisciplinary services to the public, and that would provide infusions of capital to serve the public better and more efficiently. The existing prohibitions, however, inhibit such arrangements. Finally, section IV examines alternative approaches to reform at the state and federal level.

I. Historical Background

A. Unauthorized Practice by Nonlaw Corporations Offering the Services of Lawyers

(1) *Unauthorized Practice in the States*

Prohibitions against nonlawyers practicing law have been common in this country for at least a hundred years.¹⁵ The New York provisions are representative of those adopted around the turn of the century.¹⁶ At least as early as 1899, the New York Penal Code prohibited anyone from

C. WOLFRAM, *supra* note 12, at 879; see also Gilbert & Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383 (1988) (allowing nonlawyers to participate in law firms could improve legal services); Note, *Legalizing Nonlawyer Proprietorship in the Legal Clinic Industry: Reform in the Public Interest*, 9 HOFSTRA L. REV. 625 (1981) (authored by Gerhardt M. Nielsen) (proposing alternatives to the blanket suppression of lay ownership in the legal field).

15. Christensen, *supra* note 12, at 159-201. In a comprehensive study of the unauthorized practice of law movement published in 1980, Barlow Christensen found that 5 states had unauthorized practice legislation purporting to go back to the mid-1800s, and another 17 states had legislation dating from the period 1870 to 1920. *Id.* at 180 & nn.113, 114 & 117.

16. See UNAUTHORIZED PRACTICE HANDBOOK, *supra* note 12, at 3-110 (collecting and excerpting unauthorized practice legislation).

practicing as an attorney or making it a business to practice as such "without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state."¹⁷ In 1909, the Penal Code was amended further to prohibit corporations and voluntary associations from practicing law or furnishing attorneys, legal advice, or "legal services of any kind in actions or proceedings of any nature or in any other way or manner."¹⁸

The most significant feature of the unauthorized practice legislation, for our purposes, is that it not only prohibited the unauthorized practice of law by nonlawyers, but it also prohibited nonlawyers from combining with lawyers to offer the lawyer's services for profit. As we shall see, the significance of this legislation cannot be fully understood until the parallel restrictions on lawyers are considered. Nevertheless, the unauthorized practice legislation has served as a deterrent against nonlawyer business organizations that have attempted, in one way or another, to market the services of attorneys to the public.

Although enforcement of such restrictions over the years has been only sporadic, the message sent by the occasional court decisions is nonetheless clear.¹⁹ Perhaps the most influential opinion was *In re Co-operative Law Co.*,²⁰ an early New York case. The petitioner was a business corporation organized for profit to provide legal services to its subscribers by the employment of "a staff of competent attorneys and counsellors at law."²¹ The court concluded that the corporation was illegal even under the law as it existed prior to the amendment of the 1909 New York statute, which explicitly prohibited corporations from offering such serv-

17. N.Y. PENAL CODE § 270, *reprinted in* 4 THE CONSOLIDATED LAWS OF THE STATE OF NEW YORK 2709-10 (1909) (indicating that § 270 derived from Laws 1898, ch. 165, § 4, as amended by Laws 1899, ch. 225, § 2) (current version at N.Y. JUD. LAW § 478 (McKinney Supp. 1987)). The New York Penal Code also made it a misdemeanor for any attorney "knowingly [to] permit any person, not being his general law partner or a clerk in his office, to sue out any process or to prosecute or defend any action in his name." N.Y. PENAL CODE § 277 (1909) (current version at N.Y. JUD. LAW § 492 (McKinney 1983)). But notwithstanding such provisions in New York, or elsewhere, the unauthorized practice statutes were aimed primarily at nonlawyers. It remained for the professional associations to regulate the conduct of the lawyers themselves.

18. *See* N.Y. PENAL CODE § 280 (1925) (indicating provision added by Laws 1909, ch. 483) (current version at N.Y. JUD. LAW § 495 (McKinney 1983)).

19. It might be more accurate to describe enforcement as "episodic" since bar enthusiasm for enforcing the unauthorized practice laws seems to have waxed and waned. *See* Christensen, *supra* note 12, at 175-201. But even though the general enthusiasm for unauthorized practice enforcement may have peaked sometime in the 1950s or 1960s, there continue to be just enough unauthorized practice *business* cases to suggest that the laws on the books still carry a significant enforcement threat.

20. 198 N.Y. 479, 92 N.E. 15 (1910).

21. *Id.* at 481, 92 N.E. at 15.

ices. The court gave four principal grounds for this conclusion: (1) corporations cannot become members of the bar and they should not be able to do indirectly what they cannot do directly; (2) an attorney employed by a corporation would be responsible to the corporation rather than to the client of the corporation; (3) the corporation might be controlled wholly by nonlawyers and organized simply to make money; (4) the public would have no remedy to protect itself from the corporation.²²

Co-operative Law has been widely influential since 1910 both in result and reasoning.²³ Its conclusion that corporations owned or controlled in part by nonlawyers may not offer the services of lawyers to the public has been followed, in one form or another, in practically every American jurisdiction.²⁴

Occasionally, as in *Co-operative Law*, the business enjoined has been established for the sole purpose of providing legal services to the public.²⁵ More frequently, however, the provision of lawyers' services by enterprises owned or controlled by nonlawyers has been incidental to another business carried on by the enterprise.²⁶ Thus, banks have been enjoined repeatedly from selling the services of their in-house attorneys to customers to prepare wills, trusts, or real estate documents; to handle foreclo-

22. *Id.* at 483-84, 92 N.E. at 16.

23. *See, e.g.*, State Bar Ass'n of Conn. v. Connecticut Bank & Trust Co., 145 Conn. 222, 235-36, 140 A.2d 863, 870-71 (1958); Illinois State Bar Ass'n v. United Mineworkers, 35 Ill. 2d 112, 120-21, 219 N.E.2d 503, 508 (1966); *In re* Opinion of the Justices, 289 Mass. 607, 614 & n.1, 194 N.E. 313, 317 & n.1 (1935); *In re* Educ. Law Center, 86 N.J. 124, 134, 429 A.2d 1051, 1056 (1981); Carter v. Berberian, 434 A.2d 255, 256 (R.I. 1981); State ex rel. Lundin v. Merchants Protective Corp., 105 Wash. 12, 17, 177 P. 694, 696 (1919).

24. *See* 62 REPORTS OF THE A.B.A. 769, 779 (1937) (Report of Standing Committee on Unauthorized Practice of the Law) ("Probably nothing is better settled than that a corporation cannot render legal services for or practice law in respect of the affairs of another although it may do so by employing a lawyer.").

25. *See, e.g.*, Florida Bar v. Consolidated Business & Legal Forms, Inc., 386 So. 2d 797, 801 (Fla. 1980) (for-profit corporation set up to provide legal services to the public through full time lawyer employees); Cuyahoga County Bar Ass'n v. Gold Shield, Inc., 52 Ohio Misc. 105, 112, 369 N.E.2d 1232, 1237 (C.P. Cuyahoga County 1975) (for-profit corporation designed to provide legal services at a discount in return for an annual "membership" fee and 10% of the legal fees paid to participating lawyers by members).

26. Occasionally courts have allowed nonlawyers to provide legal advice or services (*i.e.*, to practice law) on the theory that the services are incidental to the nonlawyer's primary business. *See, e.g.*, Creekmore v. Izard, 367 S.W.2d 419 (Ark. 1963) (filling in standard forms by realtor); Ingham County Bar Ass'n v. Walter Neller Co., 342 Mich. 214, 69 N.W.2d 713 (1955) (same); Auerbacher v. Wood, 139 N.J. Eq. 599, 53 A.2d 800 (1947) (advice on labor relations), *aff'd*, 142 N.J. Eq. 484, 59 A.2d 863 (1948); Bar Ass'n of Tenn. v. Union Planters Title Guar. Co., 46 Tenn. App. 100, 326 S.W.2d 767 (1959) (drafting documents incidental to title business). The "incidental theory," however, has never been accepted widely. *See* cases collected in UNAUTHORIZED PRACTICE HANDBOOK, *supra* note 12, at 132-38.

suers; or to appear on behalf of customers in probate proceedings.²⁷ The provision of a lawyer's services by collection agencies to creditor customers also has been found to be an unauthorized practice of law by the collection agency.²⁸ Moreover, the same result has been reached for nonlaw businesses providing lawyers to handle workers compensation claims,²⁹ patent applications,³⁰ bond issues,³¹ landlord claims,³² mortgage processing,³³ title opinions,³⁴ business incorporation,³⁵ condemnation proceedings,³⁶ tax audits,³⁷ heir claims,³⁸ and real estate tax assessment proceedings.³⁹

(2) *The Role of Bar Associations in the Policing of Unauthorized Practice*

Not surprisingly, the bar associations played an active role in promoting restrictions against the offering of lawyers' services by nonlawyers. One of the first initiatives in this direction was taken by the New York County Lawyers' Association as early as 1914, when it established a committee to combat the unauthorized practice of law.⁴⁰ By 1940, approximately 400 state and local bar associations had similar committees.⁴¹ Some of these committees issued advisory opinions on what would constitute the unauthorized practice of law, and occasionally these

27. See, e.g., *State Bar Ass'n of Conn. v. Connecticut Bank & Trust Co.*, 145 Conn. 222, 140 A.2d 863 (1958); *People v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N.E. 901 (1931); *Grand Rapids Bar Ass'n v. Denkema*, 290 Mich. 56, 287 N.W. 377 (1939).

28. E.g., *J. H. Marshall & Assocs., Inc. v. Burleson*, 313 A.2d 587 (D.C. 1974); *Kentucky Bar Ass'n v. Tiller*, 641 S.W.2d 421 (Ky. 1982); *State ex rel. State Bar of Wis. v. Bonded Collections, Inc.*, 36 Wis. 2d 643, 154 N.W.2d 250 (1967). See generally Annotation, *Operations of Collection Agency as Unauthorized Practice of Law*, 27 A.L.R.3d 1152, 1157-61 (1969). In some jurisdictions, however, collection agencies have been permitted to hire and direct attorneys for the collection of accounts by taking an assignment of the customers claim and thus becoming, at least ostensibly, the "real party in interest." See, e.g., *Washington State Bar Ass'n v. Merchants Rating & Adjusting Co.*, 183 Wash. 611, 49 P.2d 26 (1935).

29. *People v. Goodman*, 366 Ill. 346, 8 N.E.2d 941, cert. denied, 302 U.S. 728 (1937).

30. *People ex rel. Lefkowitz v. Lawrence Peska Assocs., Inc.*, 90 Misc. 2d 59, 393 N.Y.S.2d 650 (N.Y. Sup. Ct. 1977); *Marshall v. New Inventor's Club*, 117 N.E.2d 737 (Ohio C.P. 1953).

31. *Wayne v. Murphy-Favre & Co.*, 56 Idaho 788, 59 P.2d 721 (1936).

32. *Unger v. Landlords' Management Corp.*, 114 N.J. Eq. 68, 168 A. 229 (1933).

33. *In re L.R.*, 7 N.J. 390, 81 A.2d 725 (1951).

34. *Steer v. Land Title Guar. & Trust Co.*, 113 N.E.2d 763 (Ohio C.P. 1953).

35. *In re Pace*, 170 A.D. 818, 156 N.Y.S. 641 (App. Div. 1915).

36. *In re Bensel*, 68 Misc. 70, 124 N.Y.S. 726 (N.Y. Sup. Ct. 1910).

37. *Lowell Bar Ass'n v. Loeb*, 315 Mass. 176, 52 N.E.2d 27 (1943). But see *infra* section III(D)(1), for a discussion of the accounting profession.

38. *In re Tuthill*, 256 A.D. 539, 10 N.Y.S.2d 643 (App. Div. 1939).

39. *Stack v. P.G. Garage, Inc.*, 7 N.J. 118, 80 A.2d 545 (1951); *People ex rel. Trojan Realty Co. v. Purdy*, 174 A.D. 702, 162 N.Y.S. 56 (App. Div. 1916).

40. Christensen, *supra* note 12, at 189.

41. *Id.*

opinions were quite influential nationally.⁴² State bar associations also appeared as the plaintiff in court actions seeking to enjoin the unauthorized practice of law.⁴³

In addition to the activities of state and local bar associations, for many years the ABA was one of the primary moving forces behind attempts to outlaw and police the unauthorized practice of law.⁴⁴ From 1930 until 1984 the Association maintained a Standing Committee on Unauthorized Practice of Law, which published a periodical entitled the *Unauthorized Practice News* and occasionally issued opinions.⁴⁵ One of the ABA Committee's informative opinions, for example, was promulgated after the passage of ERISA in an attempt to clarify the proper role of nonlawyer professionals in the pension plan area. One of the practices of nonlawyers that was singled out for attention was the provision of legal services through lawyer employees of a nonlaw business. The ABA's position was unequivocal:

Nonlawyers should not hold themselves out as lawyers or as substitutes for lawyers by stating or suggesting . . . that they will perform any necessary legal services, such as: legal drafting, representing clients before courts or government agencies, or interpreting statutes, regulations, or rulings. *Because lawyer-employees of companies offering such plans may perform legal services only on behalf of the employer and not on behalf of the employer's clients or customers, the Committee believes that references in promotional materials to legal experts or legal expertise are misleading.*⁴⁶

42. In 1975, for example, the Unlawful Practice of Law Committee of the New York State Bar issued an advisory opinion that it was improper for lay persons to provide advice or services of a legal nature in connection with the design and drafting of employee benefit plans. Unlawful Practice Comm., N.Y. State Bar Ass'n, Advisory Op. 28 (1975), *reprinted in* 47 N.Y. St. B.J. 707 (1975). This opinion became the focus of national hearings held by the ABA and was ultimately influential in shaping the ABA's position on the matter. ABA Standing Comm. on Unauthorized Practice of Law, Employee Benefit Planning Informative Opinion A, at 2-3 (1977) [hereinafter Informative Opinion A], *reprinted in* Pens. Rep. (BNA) No. 159, at R-16 (Oct. 17, 1977).

43. *See, e.g.*, cases cited *supra* notes 27-28.

44. *See generally* C. WOLFRAM, *supra* note 12, at 825-27 (The ABA engaged in an "explicit campaign . . . to encourage state and local bar associations to form their own unauthorized practice committees."); Christensen, *supra* note 12, at 189-90 (The Special Committee on the Unauthorized Practice of Law created in 1930 was "a catalyst and unifying force in the campaign against unauthorized practice."); Rhode, *supra* note 12, at 8-11 (history of ABA enforcement techniques).

45. *See* Rhode, *supra* note 12, at 8. The Committee was set up in 1930, 55 REPORTS OF THE A.B.A. 94 (1930) (proceedings of 53d Annual Meeting, 5th Session), and disbanded in 1984. ABA/BNA, LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 381 (1984) [hereinafter LAWYERS' MANUAL].

46. Informative Opinion A, *supra* note 42, at R-16 (emphasis added).

Thus, through its Unauthorized Practice Committee, the ABA actively has sought to prevent nonlawyers from participating in the business of law, even when the practice of law itself is to be done only by lawyers.⁴⁷

B. Restrictions on Lawyer Collaboration with Nonlawyers in the Lawyer Ethics Codes

(1) *The ABA Canons of Ethics*

The prohibitions on lawyers allowing nonlawyer financial or managerial involvement in the business of law first appeared in the ethics codes around 1928. In that year, the ABA added Canons 33 through 45 to the Canons of Ethics.⁴⁸ Canon 33, which dealt generally with partnerships, provided, in part:

In the formation of partnerships for the practice of law, no person should be admitted who is not a member of the legal profession, duly authorized to practice, and amenable to professional discipline. No person should be held out as a practitioner or member who is not so admitted Partnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where a part of the partnership business consists of the practice of law.⁴⁹

Two other canons adopted in 1928 contained corollary provisions. Canon 34 provided that “[n]o division of fees for legal services is proper, *except with another lawyer*, based upon a division of service or responsibility.”⁵⁰ Canon 35 provided that “[t]he professional services of a lawyer should not be controlled or exploited *by any lay agency, personal or corporate*, which intervenes between client and lawyer He should avoid

47. Between 1937 and 1978, the ABA also negotiated interprofessional “Statements of Principles” with other professions, including accountants, architects, banks, claims adjusters, collection agencies, insurers, engineers, publishers, title companies, realtors, and social workers. A compilation of these statements may be found in VII MARTINDALE-HUBBELL LAW DIRECTORY 71M-90M (110th ed. 1978). They attempted to chart out the appropriate sphere of activity for each profession vis-à-vis the legal profession, and to ensure that nonlawyers did not tread on the practice of law. Many have been rescinded, apparently as a result of concern that they may violate the antitrust laws. 105 REPORTS OF THE A.B.A. 291, 382, 637, 789 (1979); *see also* United States v. New York County Lawyers’ Ass’n, 1981-2 Trade Cas. (CCH) ¶ 64,371 (S.D.N.Y. 1981) (consent decree enjoining bar association from adopting statements of principles delineating practice of nonlawyer corporate fiduciaries); Podgers, *Statements of Principles: Are They on the Way Out?*, 66 A.B.A. J. 129, 129 (1980) (commenting on rescission by the State Bar of California Board of Governors of approximately 20 statements of principles).

48. 53 REPORTS OF THE A.B.A. 119-30 (1928) (proceedings of the 51st Annual Meeting).

49. *Id.* at 778.

50. *Id.* (emphasis added).

all relations which direct the performance of his duties in the interest of such intermediary."⁵¹

The precise origin of these interrelated provisions is unclear.⁵² It is clear, however, that they expressed the combined wisdom of legislature, bench, and bar. In 1926, the ABA Special Committee on Supplementing the Canons of Professional Ethics published and circulated an annotated version of the Canons compiling materials from various sources that shed light on the Canons that were adopted two years later.⁵³ In an introductory section, the Special Committee noted that the Canons did not define the practice of law, and then went on to quote extensively from a 1920 report issued by a committee of the Conference of Delegates of Bar Associations (Delegates Report).⁵⁴ The material quoted from the Delegates Report included several paragraphs condemning professional associations between lawyers and nonlawyers.⁵⁵ The Delegates Report, itself, collected thirty-six pages of excerpts from court decisions and statutes on the unauthorized practice of law, including the New York statutes discussed above.⁵⁶ Finally, the *Annotated Canons* contained a number of opinions of the ABA Committee on Professional Ethics and Grievances,⁵⁷ and a digest of numerous ethics opinions of the Committee on Professional Ethics of the New York County Lawyers' Association.⁵⁸

51. *Id.* at 779 (emphasis added).

52. The first sentence quoted from Canon 33, and the sentences quoted from Canons 34 and 35 were adopted as proposed by the ABA committee appointed to propose supplements to the existing canons. 52 REPORTS OF THE A.B.A. 379 (1927) (Report of the Special Committee on Supplementing the Canons of Professional Ethics). Evidently the additional language in Canon 33 was added after the Committee's 1927 report, but there is no additional indication in the official reports as to when or why this addition was made.

53. ABA SPECIAL COMMITTEE ON SUPPLEMENTING THE CANONS OF PROFESSIONAL ETHICS, ANNOTATED CANONS 10 (1926) [hereinafter ANNOTATED CANONS].

54. *Id.* at 8-15.

55. *Id.* at 10-11 (quoting Report of the Special Committee of the Conference of Bar Association Delegates to Prepare a Brief for the Use of State and Local Bar Associations (1920) [hereinafter Delegates Report] (emphasis added)). The material quoted from the Delegates Report is discussed in detail *infra* section II.

56. Delegates Report, *supra* note 55, at 12-48; see *supra* notes 17-18 and accompanying text.

57. ANNOTATED CANONS, *supra* note 53, at 85-94. One of the ABA Opinions, Formal Op. 8 (1925), reprinted in 50 REPORTS OF THE A.B.A. 518, 520-21 (1925), concluded that a "lay agency is not entitled to practice law . . . indirectly, by employing licensed attorneys to carry on that portion of its activities for it" because the lay person would thus be exploiting the lawyer, sharing the lawyer's professional responsibility, and sharing the lawyer's fees. ANNOTATED CANONS, *supra* note 53, at 91-94. The Opinion relied on the *In re Co-operative Law and Merchants Protective Corp.* cases, among others.

58. ANNOTATED CANONS *supra* note 53, at 94-112; 50 REPORTS OF THE A.B.A. 85-112 (1925); e.g., Opinions of the Comm. on Professional Ethics of the N.Y. County Lawyers' Ass'n, Op. 201 (1922) (concluding that it was professionally improper for a lawyer to form a

Clearly all of these materials were influential in the drafting of the business canons.⁵⁹

Although the new business canons seem to have expressed a consensus of legislature, bench, and bar, they were not without their opponents. The drafting committee noted that "there is substantial difference of view in the profession respecting its recommendations as to partnerships, division of fees, intermediaries, and the bonding of lawyers."⁶⁰ One member of the Committee filed a Minority Report, in which he expressed the opinion that "aside from professional policy, I think that there is nothing inherently 'unethical' in the formation of partnerships between lawyers engaged in certain kinds of work and an expert engineer, student of finance, or some other form of expert."⁶¹ But this member ended up voting for the prohibition of such partnerships "[a]s a matter of professional policy."⁶² No other explanation of the grounds for or against the provisions are to be found in the official reports.

Regardless of this "substantial difference of view," the language adopted in 1928 to restrict lawyer business associations with nonlawyers remained remarkably unchanged in the years that followed.⁶³ During

partnership with a certified public accountant for the practice of public accounting and tax report service), *reprinted in* 3 OPINIONS: COMMITTEES ON PROFESSIONAL ETHICS (1980) [hereinafter STATE OPINIONS].

59. The ABA Special Committee noted in its 1927 Report that information and recommendations were sought from each bar association, but that "[t]he results of this effort were disappointing, as little information was received from these sources, outside of New York City. The two leading bar associations in New York City, however, reprint and circulate the answers of their committees to inquiries for advice, and these were readily accessible." 52 REPORTS OF THE A.B.A. 374 (1927). Among the most influential figures were Charles Boston and Henry Jessup, both of New York. Boston chaired the Special Committee on Supplementing the Canons and compiled the *Annotated Canons* that was circulated in 1926. ANNOTATED CANONS, *supra* note 53, at iv, 4. Jessup was a member of the New York County Lawyers' Association Ethics Committee from 1908 until 1924, a member of the Special Committee on Supplementing the Canons, and also had been chairman of the ABA Committee on Legal Ethics and Grievances. *Id.* at iv; H. JESSUP, *THE PROFESSIONAL IDEALS OF THE LAWYER: A STUDY OF LEGAL ETHICS* xxvi (1925). In 1925, Jessup published a work on legal ethics in which he opined that ethical difficulties arise

when those desiring so to associate themselves [in a partnership to practice law] are not all members of the same Bar, *or are not all members of any Bar* The reason lies not only in the inherent nature of the profession, but also in that of a partnership, which assumes sharing of liabilities, work, and profits. The lawyer must not share his professional compensation with laymen.

Id. at 20. Jessup cited as authority and reproduced ethics opinion 201 of the New York County Bar Ethics Committee, which is quoted above. *Id.* at 20, 198. Jessup reproduced all of the New York County Bar's ethics opinions in his book. *Id.* at 104-212.

60. 52 REPORTS OF THE A.B.A. 378 (1927).

61. *Id.* at 388 (Minority Report of F. W. Grinnel).

62. *Id.*

63. In 1937, Canon 47 was adopted, which broadly prohibited a lawyer from permitting

the forty years that the Canons were in force, they were interpreted consistently by the ABA Committee on Professional Ethics and Grievances to prohibit nearly any form of business association between lawyers and nonlawyers that offered legal services to the public. The most important of these ABA opinions struggled with the problem of lawyers who were employed by or in partnership with nonlawyers, such as patent agents or accountants, who were entitled to practice law to a limited extent under federal law, regardless of their lack of state bar membership.⁶⁴ For example, in Formal Opinion 297 issued in 1961, the Committee addressed the situation in which a lawyer is employed by an accounting firm:

When a lawyer-employee advises his lay employer in regard to a matter pertaining to the affairs of a client of the employer and the giving of such advice by the lawyer-employee directly to the client would involve him in the practice of law, the lawyer is proceeding in violation of *Canon 35* when he operates through his employer as an intermediary.⁶⁵

Only if the lawyer completely disassociates himself from the practice of law and refrains from holding himself out as a lawyer could he participate in a business enterprise with such nonlawyers.⁶⁶

The Committee also made clear during this time period that there was nothing in the business restrictions that was unique to the partner-

"his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate." 62 REPORTS OF THE A.B.A. 353, 767 (1937).

64. ABA Comm. on Professional Ethics, Formal Op. 297 (1961) (accountant), *reprinted in ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS WITH THE CANONS OF PROFESSIONAL ETHICS ANNOTATED AND CANONS OF JUDICIAL ETHICS ANNOTATED* 652, 654 (1967) [hereinafter ABA OPINIONS]; *see also* ABA Comm. on Professional Ethics and Grievances, Formal Op. 269 (1945) (certified public accountant), *reprinted in ABA OPINIONS, supra*, at 598; ABA Comm. on Professional Ethics and Grievances, Formal Op. 257 (1944) (patent agent), *reprinted in ABA OPINIONS, supra*, at 567; ABA Comm. on Professional Ethics and Grievances, Formal Op. 239 (1942) (certified public accountant), *reprinted in ABA OPINIONS, supra*, at 536-37; ABA Comm. on Professional Ethics and Grievances, Formal Op. 225 (1941) (collection agency), *reprinted in ABA OPINIONS, supra*, at 516; ABA Comm. on Professional Ethics and Grievances, Formal Op. 201 (1940) (patent application representative), *reprinted in ABA OPINIONS, supra*, at 484; ABA Comm. on Professional Ethics and Grievances, Formal Op. 35 (1931) (collection agency), *reprinted in ABA OPINIONS, supra*, at 278; ABA Comm. on Professional Ethics and Grievances, Formal Op. 32 (1931) (patent application prosecutor), *reprinted in ABA OPINIONS, supra*, at 276; ABA Comm. on Professional Ethics and Grievances, Formal Op. 31 (1931) (attorney may not accept employment from a corporation to prepare articles, by-laws, and papers for exchange of stock), *reprinted in ABA OPINIONS, supra*, at 275.

65. ABA Comm. on Professional Ethics, Formal Op. 297 (1961), *reprinted in ABA OPINIONS, supra* note 64, at 652-54.

66. ABA Comm. on Professional Ethics and Grievances, Formal Op. 269 (1945), *reprinted in ABA OPINIONS, supra* note 64, at 598; ABA Comm. on Professional Ethics and Grievances, Formal Op. 239 (1942), *reprinted in ABA OPINIONS, supra* note 64, at 536-37.

ship form of law practice. In Formal Opinion 303, the Committee recognized that professional law corporations had federal income tax benefits, and approved of them under certain conditions.⁶⁷ Among the conditions were restrictions on nonlawyer involvement analogous to the ban on law partnerships with nonlawyers.⁶⁸ In justifying these restrictions, the Committee explained that "the substance of an arrangement is controlling, not the form."⁶⁹

(2) *The ABA Model Code of Professional Responsibility*

a. The 1969 Model Code

In 1969, the Canons were replaced by a new Model Code of Professional Responsibility (Model Code).⁷⁰ Within five years of the ABA's adoption of the Model Code, practically every state in the union had adopted it either officially or unofficially.⁷¹ Although the format and the content of the old Canons changed dramatically in the new Model Code, the content of the restrictions on lawyer-nonlawyer business associations did not. The last sentence of Canon 33 became Disciplinary Rule (DR) 3-103(A): "A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law."⁷² Canon 34, prohibiting fee-splitting, became DR 3-102(A): "A lawyer or law firm shall not share legal fees with a non-lawyer . . ."⁷³ Canon 47

67. ABA Comm. on Professional Ethics, Formal Op. 303 (1961), *reprinted in* ABA OPINIONS, *supra* note 64, at 661.

68. *Id.* For the precise form of these restrictions, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(C) (1980) [hereinafter MODEL CODE]. See *infra* note 72.

69. ABA Comm. on Professional Ethics, Formal Op. 303 (1961), *reprinted in* ABA OPINIONS, *supra* note 64, at 662. The Committee continued:

Canon 33 prohibits the formation of a partnership . . . between lawyers and non-lawyers. This prohibition would likewise apply to the practice of law in any other form. Permanent beneficial and voting rights in the organization set up to practice law, whatever its form, must be restricted to lawyers while the organization is engaged in the practice of law.

Id.

70. 94 REPORTS OF THE A.B.A. 389-92, 729 (1969).

71. C. WOLFRAM, *supra* note 12, at 56-57.

72. MODEL CODE, *supra* note 68, DR 3-103(A). One new addition to the Model Code was the extension of the ban on partnerships with nonlawyers to legal practice by a professional corporation. DR 5-107(C) prohibited a lawyer from practicing with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A non-lawyer owns any interest therein, . . .

(2) A non-lawyer is a corporate director or officer thereof; or

(3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.

Id. DR 5-107(C).

73. *Id.* DR 3-102(A).

became DR 3-101(A): "A lawyer shall not aid a non-lawyer in the unauthorized practice of law."⁷⁴

Canon 35, prohibiting lawyers from allowing a nonlawyer to control or exploit the lawyer's services, did not survive in the new Model Code as a distinct rule, but its message is reiterated in several different contexts. DR 5-107(C) prohibits a professional corporation in which a nonlawyer has the right to direct or control a lawyer's professional judgment.⁷⁵ In addition, DR 5-107(B) prohibits a person who recommends, employs, or pays a lawyer to render legal service for another "to direct or regulate his professional judgment."⁷⁶ Finally, Ethical Consideration (EC) 3-3 makes clear that the Disciplinary Rules prohibit a lawyer "from submitting to the control of others in the exercise of his judgment."⁷⁷

An important addition in the Model Code was the attempt to provide some justification for the bans on nonlawyer involvement in the business of law. Because nonlawyers were not subject to "the requirements and regulations imposed upon members of the legal profession"⁷⁸ the bans were considered necessary to assure the public of integrity, competence, loyalty, and confidentiality in the delivery of legal services.⁷⁹

During the deliberations on the Model Code, there seems to have been no significant debate as to the propriety of continuing the business prohibitions contained in the prior Canons. One indicator of the ABA's mood is found in the debate over a new and related provision dealing with lawyer involvement with *nonprofit* organizations that "recommend[], furnish[] or pay[] for legal services."⁸⁰ In a series of landmark decisions in the 1960s and 1970s, the Supreme Court had established the right of such lay organizations to provide legal services to members and beneficiaries.⁸¹ Although the ABA understood the need to recognize these decisions, the proposed rule did so only grudgingly. DR 2-103(D) permitted involvement with such organizations "only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities."⁸² When the proposed DR 2-103(D) was being consid-

74. *Id.* DR 3-101(A).

75. *Id.* DR 5-107(C).

76. *Id.*

77. *Id.* EC 3-3.

78. *Id.* EC 3-1.

79. *Id.* EC 3-1 to 3-3.

80. *Id.* DR 2-103(D)(4).

81. *See, e.g.,* United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971); United Mine Workers of Am. v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

82. 94 REPORTS OF THE A.B.A. 390 (1969).

ered by the ABA House of Delegates, a substitute was proposed that would have (1) allowed profit-making institutions to furnish legal services to members or beneficiaries *provided the organization did not derive any profit from the legal services*; (2) allowed such an organization even if its sole purpose was the furnishing of legal services; and (3) specified certain safeguards to protect the clients of a lawyer dealing with such an organization.⁸³ The substitute was opposed, however, by the Chairman of the ABA Section of General Practice, who claimed to have surveyed more than 9,000 members on the subject. He objected that if the substitute were adopted,

the laymen will run the practice, and not the lawyers. All the evils that you can imagine will result from allowing laymen to run the law practice and not the lawyers: loss of the independence of the Bar, loss of the traditional client-lawyer relationship, the encroachment of advertising, solicitation and the morals of the marketplace, a reduction in the quality of legal services.⁸⁴

Another member echoed these remarks by warning that the substitute amendment "would permit any lawyer employed by the lay agency who has given advice to a layman in the performance of the lawyer's duties for that group, then to accept employment and fees from that layman."⁸⁵ Not surprisingly, the substitute amendment was rejected.⁸⁶ Clearly this was not the occasion for a full and open debate on the propriety of restrictions on nonlawyer involvement in law practice *for profit*.

Nonetheless, in 1975 the Model Code was amended to permit profit-making entities to furnish legal services to members or beneficiaries *provided that the entity does not derive any profit from the legal services*.⁸⁷

83. *Id.* at 390-91; see also Sutton, *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255, 307-10 (1970) (summarizing the substance of and significant differences between the two proposals).

84. 94 REPORTS OF THE A.B.A. 391 (1969)(remarks by William J. Fuchs of Philadelphia). In what may be one of the more remarkable exchanges in this whole debate, a Mr. Chesterfield Smith of Lakeland, Florida, is said to have "pooh-poohed Mr. Fuchs's objections": "We have let people spread what they call in Florida heifer dust over the issue that shouldn't have heifer dust spread over it." *Id.*

85. *Id.* at 392 (remarks by Henry Pitts of Chicago); see also Pitts, *Group Legal Services: A Plan to Huckster Professional Services*, 55 A.B.A. J. 633, 633 (1969) (charging that the same proposals were "a design for the destruction of an independent Bar, . . . contrary to fundamental and essential canons of a true profession, . . . totally unrealistic and inadequate, and . . . an invitation to uncontrollable exploitation of lawyers by lay agencies—to the detriment of the public we are committed to serve.").

86. 94 REPORTS OF THE A.B.A. 392 (1969).

87. MODEL CODE, *supra* note 68, DR 2-103(D)(4)(A). The new rule permitted a lawyer to assist a nonlawyer organization that was to furnish her legal services to others provided that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers

This amendment was substantially the same as that rejected in 1969.⁸⁸ Apparently at the request of the President of the ABA, no opposition to this recommended change was voiced, and it passed without meaningful debate.⁸⁹ According to the drafting committee, however, the prohibition on the derivation of profit by the lay organization was based on a concern that otherwise the lay organization might interfere with the exercise of the lawyer's professional judgment.⁹⁰

b. Ethics Committee Interpretive Opinions

The ABA Committee on Ethics and Professional Responsibility has infrequently addressed the prohibitions on lawyer partnerships with nonlawyers since the adoption of the Model Code. In Informal Opinion 1241, the Committee again was asked whether a lawyer properly could form a partnership with a nonlawyer licensed to practice before the Internal Revenue Service if the activities of the partnership were limited to those permitted pursuant to Treasury Department Circular 230.⁹¹ The Committee concluded that "[t]he practice by a lawyer of representing others before the Internal Revenue Service is the practice of law If a lawyer were to form a partnership with an enrolled agent when such

employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

Id.

88. See C. WOLFRAM, *supra* note 12, at 912-14.

89. The *Reports of the ABA* indicate that President Fellers requested that no amendments be offered to the Committee's Recommendation from the floor. 100 REPORTS OF THE A.B.A. 247 (1975) (House of Delegates Proceedings, 2d Session, Midyear Meeting).

90. Ad Hoc Study Group, American Bar Association, *Section and Committee Reports to the House of Delegates, Report No. 110*, app. A at 5 (Feb. 24-25, 1975), reprinted in AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 76 (1979). In explaining this provision, the Ad Hoc Committee stated:

This provision is premised upon the connection between the realization of profit by a lay organization from the rendition of legal services by a lawyer and the potential for interference with the independent exercise of the lawyer's professional judgment to enhance that profit. It is so drafted, however, as to embrace profit-making organizations where the lawyers rendering the services are free of such control by the organization as might result in interference with the independent exercise of professional judgment. Thus profit-making organizations providing legal services to members or beneficiaries could not do so through lawyers employed by them but they could recommend lawyers provided they did not direct or supervise them This provision is not intended to bar service under employers' plans for employees; it simply induces such plans to be effected through nonprofit-organizations.

Id.

91. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1241 (1973), reprinted in 2 ABA COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL ETHICS OPINIONS 495 (1975) [hereinafter INFORMAL ETHICS]. On the federal authorization of nonlawyers to practice before the I.R.S., see 31 C.F.R. §§ 10.3, 10.4 (1987).

work by the lawyer was involved, DR 3-103 would be violated."⁹² The Committee acknowledged that its prior opinions

suggest that if the lawyer does not hold himself out as a lawyer or maintain a law office, he properly (at least in theory) may form a partnership with an enrolled agent for the purpose of practicing before the Internal Revenue Service, provided that the activities of the partnership are limited to those which do not constitute the practice of law. However, as a practical matter, it is difficult if not impossible for the Committee to visualize such a situation, and if any part of its activities could be construed to constitute the practice of law, such a partnership would be improper.⁹³

A complete understanding of the import of this opinion is only possible if one understands what would constitute the "practice of law." Neither the Canons nor the Model Code attempted to define "practice of law."⁹⁴ But the ABA Ethics Committee has taken the position that a lawyer is "practicing law" whether she is engaged in law practice per se, or in another "law-related" occupation, "[i]f the . . . occupation is so law-related that the work of the lawyer in such occupation will involve, inseparably, the practice of law."⁹⁵ Among the occupations that the Committee considered to be so "law-related" as to involve "inseparably" the practice of law if carried on by a lawyer were those of "marriage counselor, accountant, labor relations consultant, real estate broker, or mortgage broker."⁹⁶

When this breathtaking view of what constitutes the "practice of law" by a lawyer is read together with Informal Opinion 1241 and Formal Opinion 303, one can only conclude that according to the ABA Committee, a lawyer may not form any kind of for-profit business organization in which a nonlawyer has a financial or managerial role if the

92. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1241 (1973), reprinted in 2 INFORMAL ETHICS, *supra* note 91, at 495.

93. *Id.*

94. The Model Code did offer this much:

Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client

MODEL CODE, *supra* note 68, EC 3-5.

95. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972), reprinted in ABA COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, FORMAL AND INFORMAL ETHICS OPINIONS 62, 65 (1985) [hereinafter FORMAL AND INFORMAL OPINIONS].

96. *Id.*; see also ABA Comm. on Professional Ethics, Informal Op. 775 (1965) (lawyer engaged in real estate business), reprinted in INFORMAL ETHICS, *supra* note 91, at 366, 369; ABA Comm. on Professional Ethics, Formal Op. 297 (1961) (lawyer engaged in accounting practice), reprinted in ABA OPINIONS, *supra* note 64, at 652, 654-55.

business of the organization is law or law-related.⁹⁷ As discussed later, this is a surprising conclusion that is very difficult for the ABA to reconcile with existing practice by lawyers.⁹⁸ Nevertheless, this seems to be the logical consequence of the ABA's opinions.

(3) *The ABA Model Rules of Professional Conduct*

In 1983 the ABA's ethics code underwent yet another major revision with the adoption of the Model Rules of Professional Conduct (Model Rules).⁹⁹ The 1983 Model Rules have been adopted, with amendments, in at least thirty states.¹⁰⁰ Once again, the changes to the ethics codes did not extend to the prohibitions on nonlawyer involvement in the business of law.¹⁰¹ These 1983 rules, however, unlike their predecessors, were the subject of critical reexamination by the drafting committee and of public debate within the ABA House of Delegates.

Before proposing a new set of ethical rules, the ABA Commission on Evaluation of Professional Standards, known as the "Kutak Commission,"¹⁰² spent five years reviewing and reformulating the prior Model Code of Professional Responsibility.¹⁰³ The subject of nonlawyer involvement in the business of law prompted one of the most radical of the Commission's proposals. As proposed by the Commission, Rule 5.4 would have provided that:

97. *But see* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1445 (1980) (involving a business organization—with two lawyers and one nonlawyer as the shareholders—that provided sophisticated economic and economic-related analysis to lawyers, and suggesting that the enterprise did not violate Canon 3 of the Code because the "final responsibility and supervisory powers remain with the attorney who hires this corporation"), *reprinted in* FORMAL AND INFORMAL OPINIONS, *supra* note 95, at 353, 354.

98. *See infra* section III(D).

99. A.B.A. CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE A.B.A. HOUSE OF DELEGATES ii (1987) [hereinafter ABA LEGISLATIVE HISTORY]; 108 REPORTS OF THE A.B.A. 778 (1983) (House of Delegates Proceedings).

100. 1 LAWYERS' MANUAL, *supra* note 45, § 01:3-01:4 (Supp. Dec. 21, 1988).

101. DR 3-103(A), prohibiting law partnerships between lawyers and nonlawyers, was re-adopted verbatim as Model Rule 5.4(b). MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(b) (1983) [hereinafter MODEL RULES]. Similarly, the analogue for professional corporations, DR 5-107(C), was re-adopted as Model Rule 5.4(d). MODEL RULES, *supra*, Rule 5.4(d). DR 3-102(A), prohibiting fee-splitting with a nonlawyer, became Model Rule 5.4(a). MODEL RULES, *supra*, Rule 5.4(a). Finally, DR 3-101(A), enjoining a lawyer from aiding the unauthorized practice of law, became Model Rule 5.5(b), different in form but not in content: "A lawyer shall not . . . assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." MODEL RULES, *supra*, Rule 5.5(b).

102. During most of the Commission's existence, it was chaired by Robert J. Kutak, hence the popular name. Mr. Kutak, however, died in 1983 and was replaced as Chairman by Robert W. Meserve. ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 3-5 (1984).

103. *Id.*

A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if:

- (a) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;
- (b) Information relating to representation of a client is protected as required by Rule 1.6;
- (c) The organization does not engage in advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so by Rule 7.2 or Rule 7.3; and
- (d) The arrangement does not result in charging a fee that violates Rule 1.5.¹⁰⁴

The Commission's justification for this proposed change was spelled out in the commentary that accompanied the proposed rule, and in the "Legal Background" section circulated with drafts of its proposals. The comment pointed out that "[g]iven the complex variety of modern legal services," all of which "raise problems concerning the client-lawyer relationship . . . it is impractical to define organizational forms that uniquely can guarantee compliance with the Rules of Professional Conduct."¹⁰⁵ The "Legal Background" section was much more critical of the traditional rules:

To prohibit all intermediary arrangements is to assume that the lawyer's professional judgment is impeded by the fact of being employed by a lay organization The assumed equivalence between employment and interference with the lawyer's professional judgment is at best tenuous Applications of unauthorized practice principles, only tenuously related to substantial ethical concerns raised by intermediary relationships, may be viewed as economic protectionism for traditional legal service organizations

The exceptions to per se prohibitions on legal service arrangements involving nonlawyers have substantially eroded the general rule, leading to inconsistent treatment of various methods of organization on the basis of form or sponsorship. Adherence to the traditional prohibi-

104. 107 REPORTS OF THE A.B.A. 886-87 (1982) (Report of the Commission on Evaluation of Professional Standards).

105. *Id.* Among the variety of legal services organizations that the Commission noted were:

multimember partnerships, firms employing paraprofessionals and professionals of other disciplines, professional corporations, insurance companies that employ counsel who represent insureds, law departments of organizations, and group legal service organizations in which nonlawyers, or lawyers acting in a managerial capacity, may be directors or have managerial responsibility. Many modern law firms employ nonlawyers to exercise broad managerial authority in the operation of the firm.

Id.

tions has impeded development of new methods of providing legal services.¹⁰⁶

Nonetheless, when proposed Rule 5.4 came before the House of Delegates for consideration, it was opposed vociferously on several grounds: (1) the Commission proposal would permit Sears, Montgomery Ward, H & R Block, or the Big Eight accounting firms, to open law offices in competition with traditional law firms;¹⁰⁷ (2) nonlawyer ownership of law firms would interfere with the lawyer's professional independence;¹⁰⁸ (3) nonlawyer ownership would destroy the lawyer's ability to be a "professional" regardless of the economic cost;¹⁰⁹ and (4) the proposed change would have a fundamental but unknown effect on the legal pro-

106. PROPOSED FINAL DRAFT, *supra* note 14, at 176-78 (citations omitted).

107. *See, e.g.*, Unedited Transcript of ABA House of Delegates Session 28, 37, 45-48 (Feb. 8, 1983) (remarks by Al Conant, Bob Hawkins, and James Bierbower) [hereinafter HOD Transcript] (on file at *The Hastings Law Journal*). Al Conant, for example, remarked: "You each have a constituency. How will you explain to the sole practitioner who finds himself in competition with Sears why you voted for this? How will you explain to the man in the mid-size firm who is being put out of business by the big eight law [sic] firms? How will you explain that?" *Id.* at 48.

The HOD Transcript from which quotations are made in this Article is necessarily unofficial since the ABA has not released an official transcript to the public.

108. *See id.* at 33, 36, 38, 41, 44, 46-47 (remarks by Frank Rosiny, Al Conant, Charles Kettlewell, Tony Palermo, and Bob Hawkins). Mr. Hawkins, for example, stated:

I cannot conceive that a lawyer can maintain his independence and his independent judgment over a period of time when he's on a salary from a corporation that's looking over his shoulder at his results in terms of profit. Now if you wish to destroy our profession as we've known it . . . if you want to destroy it, the young lawyer's opportunities in this country to enjoy the same professional independence that you and I have known, then . . . support the Commission.

Id. at 46-47. Mr. Conant suggested the proposal was a breach of the golden rule: "The one who has the gold makes the rules, and the one [who] has the gold under existing 5.4, is going to be a non-lawyer." *Id.* at 38.

109. Mr. Kettlewell asked:

Is it cost-effect[ive] to provide full representation? Is it cost-effective to zealously represent your client? Is it cost-effective to spend enough time with your client to get the job properly done? I think the answer is no. But clearly as lawyers, as professionals, we must get the job done properly, and we must spend that time and we must do those things. But what about the business venturer who owns this firm, he who hires or fires the lawyers? They needn't view it that way. Now if the safeguards of the Commission were adequate, . . . fine. But [they] won't be, and I submit who is in trouble if there is a violation of these rules? Is it the venturer or the lawyer? It's the lawyer; the venturer isn't even under the jurisdiction.

Id. at 41-42. Mr. Rosiny declared that

the rule as proposed by the Commission is very unwise policy because if nothing else, it is demeaning to the profession, and this would wound the profession in a way, I submit, very similar to that which is occurring every day by virtue of lawyer advertising, but with a difference . . . [t]his Rule 5.4 . . . will be a self-inflicted wound.

Id. at 36.

fession.¹¹⁰ These arguments carried the day, and an amendment offered by the ABA Section on General Practice, which basically substituted the prior Model Code provisions for the Commission proposal, was adopted.¹¹¹

(4) Implementation of the Lawyer Ethics Codes in the States

The ABA, because it is only a professional association, has absolutely no authority over the practice of law anywhere in the country.¹¹² That authority, instead, is exercised primarily by the state court systems, and to a lesser extent by the state legislatures, and by the three branches of the federal government. Nonetheless, relevant portions of the ABA ethics codes have been copied or heavily relied upon by state courts and legislatures, and thus given the force of law. The process began with the ABA Canons. These were adopted formally as court rules in at least four states, and by legislation in three more.¹¹³ In many other states, however, the Canons were viewed by the courts as guidelines that "lawyers could ignore only at their peril."¹¹⁴ The 1969 ABA Model Code was implemented even more widely. Within five years of the ABA's adoption of the Model Code, practically every state in the union had adopted it

110. Al Conant stated:

I cannot tell you what those effects are, but I don't believe anyone can It also authorizes anyone else in the business world to get into the law business. Now is that good or bad? I don't know. Will it result in cheaper services to the consumer? I don't know, but nobody can tell you that it will. Will it result in better services to the consumer? I don't know. I doubt it, but no one can tell you that it will. Will it destroy the economic existence of individual lawyers? I don't know, but nobody can tell you that it won't. Will it affect the lawyer's independence of judgment? I don't know, but nobody can assure that it won't No one can tell you what the impact of 5.4 is going to be on the legal profession, but everyone can assure you, and you can assure yourself merely by reading it, that it is going to have a major impact and mark a fundamental change in the practice of law.

Id. at 37-38.

111. *Id.* at 49. For summaries of the debates, see ABA LEGISLATIVE HISTORY, *supra* note 99, at 159-64; 51 U.S.L.W. 2493 (1983).

112. Occasionally, it seems, the ABA overestimates its role in the rulemaking process. In Formal Opinion 325, for example, the Committee on Ethics and Professional Responsibility purported to "hold" that "in jurisdictions where the Code of Professional Responsibility is in effect a retirement plan may ethically be adopted by either a professional corporation or a law firm . . . even though contributions to it are based upon profit sharing." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 325 (1985), *reprinted in* FORMAL AND INFORMAL OPINIONS, *supra* note 95, at 58. Clearly the ABA has no authority to "hold" anything of the kind for jurisdictions which, in the exercise of their sovereign power, have chosen to adopt the ABA Model Code.

113. C. WOLFRAM, *supra* note 12, at 55-56.

114. *Id.* at 55.

either officially or unofficially.¹¹⁵ Finally, the 1983 Model Rules apparently have been adopted already, with amendments, in at least thirty states.¹¹⁶ Although the new rules have been amended substantially before adoption by many states, none of these amendments extend to the restrictions on nonlawyer involvement in the business of law.¹¹⁷ Thus, the ABA rules governing the association of lawyers and nonlawyers effectively have been made the governing law, either directly or indirectly, in most states.¹¹⁸

The state lawyer ethics codes provide the basis for the discipline of lawyers. While lawyers are not disciplined frequently for impermissibly practicing law with nonlawyers, the few reported cases make clear that the state business canons are enforced when they come before the courts.¹¹⁹ In one particularly influential decision, a lawyer who was vice-president of a bank foreclosed mortgages, conducted probate proceedings, and provided other legal services, including giving legal advice, to the bank and the bank's customers.¹²⁰ All his legal fees were turned over to the bank as bank income.¹²¹ The court held that this constituted unlawful practice of law by the bank and was misconduct by the lawyer.

115. *Id.* at 56-57.

116. 1 LAWYERS' MANUAL, *supra* note 45, § 01:3-01:4 (Supp. Dec. 21, 1988). Two other states have reviewed their ethical codes since 1983 and have decided to retain the prior code with some amendments. *Id.*

117. *See id.* § 01:11-01:30 (summarizing differences between state versions and ABA Model). As proposed to the North Dakota Supreme Court, the rules would have contained the Kutak Commission's proposed Rule 5.4 rather than the version that was ultimately borrowed by the House of Delegates from the 1969 Code. But the North Dakota Court rejected the proposal and opted for the ABA Model Version from the old Code. 3 LAWYERS' MANUAL, *supra* note 45, at 202. The form of the rules proposed by the District of Columbia Court of Appeals also would approximate the Kutak Commission proposed Rule 5.4, except that it would not allow a business organization owned by both lawyers and nonlawyers to do anything except practice law and nonlawyers would be required to perform professional services for the firm. *Proposed Rules of Professional Conduct and Related Comments*, D.C. BAR REP. 43-45 (Special Supp. Aug./Sept. 1988) [hereinafter *D.C. Proposed Rule*] (on file at *The Hastings Law Journal*).

118. Along with the ABA Model Rules, the ABA's ethics opinions interpreting those rules also have been very influential with the state courts. *See, e.g., Crawford v. State Bar of Cal.*, 54 Cal. 2d 659, 665-67, 355 P.2d 490, 493-94, 7 Cal. Rptr. 746, 749-50 (1960); *In re Rothman*, 12 N.J. 528, 550-56, 97 A.2d 621, 633-36 (1953).

119. *In re Cornelius*, 520 P.2d 76, 79 (Alaska 1974); *Florida Bar v. Goodrich*, 212 So. 2d 764, 765 (Fla. 1968); *Attorney Grievance Comm'n v. Martin*, 308 Md. 272, 281 518 A.2d 1050, 1054 (1987); *In re DeViny*, 255 N.W.2d 832, 833 (Minn. 1977); *In re Otterness*, 181 Minn. 254, 255, 232 N.W. 318, 319 (1930); *In re Mann*, No. 15542, slip op. (Nev. Mar. 30, 1984) (LEXIS, States library, Nev file); *Rothman*, 12 N.J. at 535, 97 A.2d at 625; *In re L.R.*, 7 N.J. 390, 392, 81 A.2d 725, 726 (1951); *In re Droker*, 59 Wash. 2d 707, 719-20, 370 P.2d 242, 248 (1962).

120. *Otterness*, 181 Minn. at 255, 232 N.W. at 319.

121. *Id.*

The lawyer was only censured severely, however, since he had a good record otherwise, no complaints had been made by clients, and he had severed his ties with the bank.¹²²

In addition to such court decisions, state bar association ethics committees have played a continuing advisory role by issuing ethics opinions on what forms of business enterprises are permissible for lawyers. While these opinions have no legal authority, they often are looked to for guidance by courts,¹²³ and certainly by lawyers seeking to avoid disciplinary proceedings. Here again the ABA ethics opinions have been quite influential with local bar committees, sometimes being adopted verbatim,¹²⁴ and sometimes simply being followed by the local committee.¹²⁵ Only rarely has a local bar association disagreed with the ABA ethics opinions.¹²⁶

As with the ABA ethics opinions, state and local bar ethics opinions repeatedly have made it clear in a variety of contexts that lawyers ethically may not form partnerships or other businesses with nonlawyers if any part of the business would involve the practice of law. Business associations between lawyers and accountants, in which the lawyer is to give tax or legal advice have been condemned regularly in local ethics opinions.¹²⁷ Relationships with collection agencies in which the collection agency acts as an intermediary with or partner of an attorney who prosecutes collection suits have been another source of disapproval.¹²⁸

122. *Id.*

123. *See, e.g.,* Crawford v. State Bar of Cal., 54 Cal. 2d 659, 664-67, 355 P.2d 490, 493-94, 7 Cal. Rptr. 746, 748-50 (1960); Rothman, 12 N.J. at 553-56, 97 A.2d at 635-36; Gardner v. North Carolina State Bar, 316 N.C. 285, 293-94, 341 S.E.2d 517, 522 (1986).

124. *See, e.g.,* N.Y. State Bar Ass'n, Op. 22 (1962), *reprinted in* 3 STATE OPINIONS, *supra* note 58 (adopting ABA Formal Opinions 297 & 305 verbatim); Wis. State Bar, Ethics Op. E-65-2, *reprinted in* WIS. STATE BAR BULL. 45 (Supp. June 1979) (adopting ABA Formal Opinion 297 verbatim).

125. *See e.g.,* N.Y. State Bar Ass'n, Op. 557 (1984), *reprinted in* 4 STATE OPINIONS, *supra* note 58.

126. *See e.g.,* Mass. Bar Ass'n Comm. on Professional Ethics, Op. 84-2 (1984), *reprinted in* LAWYERS' MANUAL, *supra* note 45, § 801:4608.

127. N.Y. State Bar Ass'n, Ethics Op. 557 (1984), *reprinted in* 4 STATE OPINIONS, *supra* note 58; *see also* Iowa State Bar, Ethics Op. 80-38 (1980), *noted in* LAWYERS' MANUAL, *supra* note 45, § 801:3602; Md. State Bar Ass'n, Ethics Op. 77-37 (1976) ("[N]o attorney may hold himself out to the public as a member of a firm performing legal services unless all members of the firm are also members of the Bar.") (on file at *The Hastings Law Journal*); N.Y. State Bar Ass'n, Op. (1967) (violation of Canon 35 for a lawyer who owns a tax service corporation to provide legal advice through the corporation to customers of its services), *reprinted in* 3 STATE OPINIONS, *supra* note 58; N.Y. County Lawyers' Ass'n, Ops. 427 (1954), 201 (1922) (impermissible for a lawyer to form a partnership with CPA for practice of public accounting and tax report service), *reprinted in* 3 STATE OPINIONS, *supra* note 58; Wis. State Bar, Ethics Op. E-65-2, *reprinted in* WIS. BAR BULL. 45 (Supp. June 1979).

128. N.Y. State Bar Ass'n, Ethics Op. 423 (1975), *reprinted in* 4 STATE OPINIONS, *supra*

In other ethics opinions, lawyers have been advised not to draft wills for bank clients as employees of the bank;¹²⁹ not to accept employment from a nonlawyer consulting firm that proposed to provide their counseling and legal representation to clients who have been discharged wrongfully;¹³⁰ not to set up a partnership with a nonlawyer to provide consulting services for small businesses in the area of affirmative action, contract negotiations, and other matters relating to the employer-employee relationship;¹³¹ not to form a partnership, or a joint venture, or a professional corporation, or a business corporation with nonlawyers that proposes to "provide total legal and financial services";¹³² not to prepare estate planning and life insurance proposals for customers of an insurance agency that is the lawyer's client;¹³³ and not to form a partnership with nonlawyer counselors to provide divorce mediation services.¹³⁴

C. Summary

The foregoing survey shows that the legal restrictions on nonlawyer involvement in the business of law remain firmly in place in practically every jurisdiction in the country. Indeed, despite two major revisions in the lawyer ethics codes, and major changes in the nature of law practice

note 57; *see also* Ill. State Bar Ass'n, Ethics Ops. 322(a), (b) (1969), 244 (1964), 181 (1959), 111 (1955), *reprinted in* ILLINOIS STATE BAR ASS'N, OPINIONS ON PROFESSIONAL ETHICS 5, 43, 79, 125-26 (1980) [hereinafter ILLINOIS OPINIONS]; N.Y. State Bar Ass'n, Ethics Op. 465 (1977), *reprinted in* 4 STATE OPINIONS, *supra* note 57; N.Y. County Lawyers' Ass'n, Ethics Ops. 98 (1916), 47 (1914), *reprinted in* 3 STATE OPINIONS, *supra* note 58; Wis. State Bar, Ethics Ops. E-61-1, E-65-3, E-72-2, *reprinted in* WIS. BAR BULL. 41-43, 46, 51 (Supp. June 1979).

129. Ill. State Bar Ass'n, Op. 261 (1965), *reprinted in* ILLINOIS OPINIONS, *supra* note 128, at 88.

130. Md. State Bar Ass'n, Ethics Op. 86-45 (1986).

131. Mo. Bar Advisory Comm., Informal Op. 3 (1981), *reprinted in* MO. BAR BULL. 3 (Dec. 1981); *see also* Md. State Bar Ass'n, Ethics Op. 82-14 (1981) (attorney should not become partners with or employees of nonlawyer "scientific professionals" selling advice to businessmen on the prevailing medical, scientific, and legal standards for employment) (on file at *The Hastings Law Journal*); Wis. State Bar, Ethics Mem. Op. 4/67 (lawyer should not form partnership with a nonlawyer to engage in labor-management relations work), *reprinted in* WIS. BAR BULL. 75 (Supp. June 1979).

132. Professional Ethics Comm'n of the Bd. of Overseers of the Me. Bar, Advisory Op. 79 (1987) (on file at *The Hastings Law Journal*); *see also* Wis. State Bar, Ethics Op. E-84-21, *reprinted in* 2 NAT'L REP. ON LEGAL ETHICS Wis: Opinions 10 (1985).

133. Ill. State Bar, Ethics Op. 474 (1975), *reprinted in* ILLINOIS OPINIONS, *supra* note 128, at 188; *see also* Ill. State Bar, Ethics Op. 167 (1958), *reprinted in* ILLINOIS OPINIONS, *supra* note 128, at 33.

134. Or. State Bar, Ethics Op. 488 (1983) (on file at *The Hastings Law Journal*); *see also* Conn. Bar, Formal Op. 35 (1982), *reprinted in* 56 CONN. BAR J. 498 (1982); N.Y. City Bar, Ethics Op. 1987-1 (1987), *reprinted in* 2 STATE OPINIONS, *supra* note 58; Nassau County (N.Y.) Bar, Ethics Op. 84-1 (1984), *reprinted in* 5 STATE OPINIONS, *supra* note 58.

over the last sixty years, those restrictions have shown themselves stubbornly resistant to change. Through a combination of statutes and judicial decision, nonlawyers are prohibited not only from practicing law directly, but also from forming partnerships or corporations that offer the services of lawyers to the public. Moreover, through ethical rules and interpretive opinions by courts and bar associations, lawyers similarly are prohibited from combining with or working for nonlawyers to offer the lawyers' services to the public. The Article now examines why these restrictions have remained such a stable feature of our legal landscape, and whether they can withstand scrutiny.

II. Critical Review of the Justifications Given for the Business Canons

The longstanding ban on the combination of lawyers with nonlawyers in a partnership that offers legal services has been justified by several arguments. One set of arguments posits a fundamental incompatibility between lawyers and nonlawyers. Chief among these is the argument that nonlawyers, if allowed to engage in the business of law, will be driven predominantly by a desire to make money, thus threatening the quality of legal services and the lawyers' ethical obligations. Another argument based on the notion of incompatibility is that nonlawyers are not subject to the rules of professional responsibility adopted in each jurisdiction. As such, the nonlawyers are not subject to discipline by the state courts, as are lawyers. A second set of arguments alleges that nonlawyer involvement in the business of law would cause lawyers to violate their ethical duties relating to independence, advertising, solicitation, and confidentiality. Finally, the rules are justified on grounds of economic protectionism. This section examines each of these justifications and concludes that they do not support the prohibition and that the current restrictions in the ethical rules should be modified.

A. A Fundamental Incompatibility Between Lawyers and Nonlawyers

The entrenched prohibitions on nonlawyer involvement in the business of law sometimes are defended on the ground that there is a fundamental incompatibility between lawyers and nonlawyers.

(1) The Nonlawyer as a Legal Fiction

Perhaps the most spurious of these arguments is directed at the practice of law by a corporation, as if that were attended by special evils. The argument holds that a corporation cannot by its nature practice law since "[i]t is not a natural person, [and] possesses neither learning, good

character, nor capacity to take an oath, or to preserve and occupy a personally confidential relation with a client."¹³⁵ This facile argument was made in the 1920 Delegates Report upon which the ABA relied when it first adopted the business canons.¹³⁶

While it is true that corporations cannot practice law in the sense that natural persons can, this is because corporations cannot do *anything* except through human beings serving as their agents. The important question is what we should allow corporations to do through their human agents. Now that lawyers are widely permitted to practice law as shareholders or employees of professional corporations, it should be obvious that there is nothing inherent in the nature of the corporation as a business form that precludes its shareholders and employees from practicing law. It is the step from the lawyer-owned and managed professional corporation to the traditional business corporation that occasions the difficulty. Should there be a rule against a corporation financed or managed in part by nonlawyers offering the services of lawyers to the public? The argument based on the fictional nature of the corporate person does not even suggest an answer to that question.

(2) *The Nonlawyer Cares Only About Profits*

A more common argument against allowing nonlawyer involvement in the business of law is that laymen, unlike lawyers, may be driven solely by a desire to make money. Sometimes this argument is aimed at practice in the corporate form only. For example, in *Co-operative Law* the court argued that if a lawyer were allowed to practice law on behalf of a corporation, "[h]is master would not be the client but the corporation, conducted it may be wholly by laymen, organized simply to make money There would be . . . no guide except the sordid purpose to earn money for stockholders."¹³⁷ At other times, the argument is directed generally at nonlawyers. As stated in the 1920 Report to the Delegates of Bar Associations, "[t]he sole inducement to the layman to practice law and do law business is the fee derived therefrom"¹³⁸ Interestingly, similar arguments were made by members of the ABA House of Delegates in 1983 when the House was debating the Kutak Commission's proposed Rule 5.4. One delegate argued that a nonlawyer business ven-

135. ANNOTATED CANONS, *supra* note 53, at 10.

136. The New York Court of Appeals also may have been guilty of the same argument in *Co-operative Law*. See *In re Co-operative Law Co.*, 198 N.Y. 479, 483-84, 92 N.E. 15, 16 (1910). Certainly the Massachusetts Supreme Court made the argument in *In re Opinion of the Justices*, 289 Mass. 607, 613-15, 194 N.E. 313, 317 (1935).

137. 198 N.Y. at 483-84, 92 N.E. at 16.

138. ANNOTATED CANONS, *supra* note 53, at 11.

turer in the business of law would ask only if the service were "cost-effective," not what it would require to perform a job properly.¹³⁹

There are several problems with this argument. First, it presupposes that the profit motive is bound to lead to inadequate or unethical legal services. No empirical support is offered for this assumption. Indeed, a great many lawyers have found that quality legal services do pay, and pay very well. Moreover, it is puzzling that this thesis is maintained in a society in which the profit motive otherwise is thought to lead to the production of goods and services for which there is consumer demand.¹⁴⁰ If the argument has any truth, it must serve as an indictment of our whole economy, or at least of the service economy.

Secondly, there is no reason to suppose that corporations or laymen engage in the "sordid" business of making money any more than do traditional law firms. Few lawyers would be in private practice if they did not anticipate being able to make money, whether for themselves, lawyer partners, lawyer shareholders, or lawyer associates. The argument implies that nonlawyer corporations may be organized "simply to make money," whereas law firms will not be. But there is nothing inherent in the nature of the law business to preclude lawyers from devoting themselves entirely to making money, any more than there is anything inherent in the nature of a nonlaw corporation that precludes the principals from recognizing other purposes than making money.

Finally, the argument based on incompatibility suffers from an oversimplistic, even arrogant, view of nonlawyers. Nonlawyers enter into other occupations and professions every day with inducements other than making money. There is no reason to suppose that the set of motivations will be any different if nonlawyers are permitted to enter into the law business. Indeed, one would suppose that nonlawyers employed by lawyers in the business of law, such as paralegals, economists, and lobbyists, would illustrate the truth of the point. This is not to deny that some nonlawyers will enter the business of law solely to make money; but the same can be said of many lawyers entering the business.

Even assuming that the public needs to be protected against professionals whose sole motivation is money, society already has devised various statutory and common-law rules to do just that.¹⁴¹ As the next

139. HOD Transcript, *supra* note 107, at 41-42.

140. See, e.g., A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS bk. I., § 7 (1776); G. STIGLER, THE THEORY OF PRICE 178-79 (4th ed. 1987).

141. The antitrust laws, for example, generally forbid monopolistic behavior and agreements in restraint of trade, 15 U.S.C. §§ 1, 2 (1987); the consumer protections laws forbid unfair and deceptive practices, *id.* § 45(a)(1); and the law of agency imposes duties of loyalty to clients, see, e.g., RESTATEMENT (SECOND) OF AGENCY §§ 387-98 (1958).

section explains, there is no reason to suppose that these rules cannot be applied successfully to nonlawyers engaged in the business of law.

(3) *Nonlawyers Are Not Subject to Regulation by the Courts*

The fact that nonlawyers are not subject to the rules of professional responsibility that regulate members of the bar is another argument offered in support of a ban on the business association of lawyers and nonlawyers. For example, the court in *Co-operative Law* argued that with the nonlawyer "[t]here would be no remedy by attachment or disbarment to protect the public from imposition or fraud, no stimulus to good conduct from the traditions of an ancient and honorable profession" ¹⁴² The problem of remedies is also a principal reason given for the prohibitions in the lawyer codes. Canon 33 of the ABA Canons counseled against forming partnerships with those not "amenable to professional discipline."¹⁴³ Ethical Consideration 3-1 of the 1969 Model Code of Professional Responsibility argued that "the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession."¹⁴⁴ Not surprisingly, this argument also was made against the Kutak Commission's proposed Rule 5.4 by a member of the House of Delegates.¹⁴⁵

It does not follow from the lack of bar regulation, however, that there would be no remedies against nonlawyers who are engaged in the business of law.¹⁴⁶ Nonlawyers, like lawyers, are subject to civil liability for breach of fiduciary duties and breach of duties of care owed to clients. Under the *Second Restatement of Torts*, for example, "one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of

142. *In re Co-operative Law Co.*, 198 N.Y. 479, 483-84, 92 N.E. 15, 16 (1910). Sometimes this argument, as well, has been aimed particularly at the practice of law by a corporation: "One engaged in the practice of law is subject to personal discipline for misconduct and to penalties for violating the duties of the profession that could not possibly attach to a corporate body." *State ex rel. Lundin v. Merchants Protective Corp.*, 105 Wash. 12, 17, 177 P. 694, 696 (1919).

143. 53 REPORTS OF THE A.B.A. 778 (1928) (Canons of Professional and Judicial Ethics).

144. 94 REPORTS OF THE A.B.A. 756 (1969) (Committee on Evaluation of Ethical Standards); MODEL CODE, *supra* note 68, EC 3-1; *see also id.* ECs 3-3, 3-4 (discussing the public interest served by regulating the legal profession).

145. "[W]ho is in trouble if there is a violation of these rules? . . . It's the lawyer; the [nonlawyer] isn't even under the jurisdiction." HOD Transcript, *supra* note 107, at 41-42 (remarks by Charles Kettlewell).

146. *See generally* Rhode, *supra* note 12, at 94-95 (nonlawyers still subject to civil liability stemming from common law, administrative regulation, or statute).

that profession or trade in good standing in similar communities."¹⁴⁷ Many jurisdictions have held that nonlawyers engaged in the unauthorized practice of law are subject to the same duty of care as lawyers.¹⁴⁸ Similarly, many of the ethical duties imposed by the various codes of professional responsibility parallel duties that exist under the law of crimes, torts, contracts, property, agency, or evidence.¹⁴⁹ Some nonlawyer professionals have comparable duties imposed on them under their own professional codes of conduct.¹⁵⁰ Remedies under consumer protection statutes also would be available both to public enforcement agencies and private individuals.¹⁵¹ In addition, some legal remedies, such as those available under the antitrust laws, might be more readily available against nonlawyers engaged in the business of law than against lawyers.¹⁵² In sum, while it might be true that there would be no remedy of disbarment against nonlawyers, it simply is not true that if nonlaw corporations could practice law that "[t]here would be no remedy . . . to protect the public from imposition or fraud."¹⁵³

Moreover, it is important to note that the propriety of permitting nonlawyers personally to perform legal services that they presently are not permitted to perform is not at issue here. Nonlawyers would remain subject to the unauthorized practice rules, which carry criminal penalties in many jurisdictions. Rather, we are exploring the propriety of allowing nonlawyers to combine with lawyers to offer the *lawyers'* services to the public. Those lawyers will continue to be subject not only to the same civil duties to which the nonlawyers would be subject, but also to the lawyer disciplinary rules. If those disciplinary rules are enforced against the lawyers working with the nonlawyers, the nonlawyers would need to respect the lawyers' ethical duties or they would find themselves without

147. RESTATEMENT (SECOND) OF TORTS § 299A (1965).

148. See, e.g., *Bowers v. Transamerica Title Insur. Co.*, 100 Wash. 2d 581, 587, 675 P.2d 193, 198 (1983); R. MALLIN & V. LEVIT, *LEGAL MALPRACTICE* § 79 (2d ed. 1981).

149. C. WOLFRAM, *supra* note 12, at 49.

150. See *CODES OF PROFESSIONAL RESPONSIBILITY* (R. Gorlin ed. 1986) (reproducing professional ethics codes for health, education, government, and business professionals, as well as those for lawyers).

151. See, e.g., *Short v. Demopolis*, 103 Wash. 2d 52, 66, 691 P.2d 163, 171 (1984) (The "entrepreneurial aspects of the practice of law" are subject to the Washington Consumer Protection Act.).

152. Lawyer conduct that is authorized by state courts or codes of professional responsibility adopted by courts or legislatures, for example, generally would be exempt from antitrust liability under the state action exemption. *Hoover v. Ronwin*, 466 U.S. 558, 579-80 (1984); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 359-62 (1977). The same would not be true for nonlawyers who were not subject to extensive regulation by court rule. See *infra* text accompanying notes 229-31.

153. *In re Co-operative Law Co.*, 198 N.Y. 479, 483-84, 92 N.E. 15, 16 (1910).

lawyer partners or employees.¹⁵⁴ It would be to the lawyers' advantage, as well as to the nonlawyers', to ensure that the nonlawyers did not step over that line of unauthorized practice.

B. Likelihood that Lay Involvement Would Cause Lawyers to Violate Their Ethical Duties

Another set of arguments questions whether lawyers could comply with their ethical duties if nonlawyers were permitted to acquire financial or managerial interests in the business of law.

(1) *Nonlawyers Would Interfere with Lawyers' Professional Judgment*

One frequently made argument is that financial or managerial involvement would give the nonlawyer control over the lawyer and necessarily lead to interference with the lawyer's professional judgment. This rationale was used in *Co-operative Law* in the context of a corporation offering the services of lawyers. The court argued that "[t]he relation of attorney and client . . . cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation" because "[t]he corporation would control the litigation, the money earned would belong to the corporation, and the attorney would be responsible to the corporation only."¹⁵⁵ The concern for the lawyer's independence also was given as one of the reasons for the business canons in Ethical Consideration 3-3 of the 1969 Code.¹⁵⁶ Similarly, when the House of Delegates was considering the proposed Model Rules of Professional Conduct, one delegate stated, "I cannot conceive that a lawyer can maintain his independence and his independent judgment over a period of time when he's on a salary from a corporation that's looking over his shoulder at his results in terms of profit."¹⁵⁷ Another delegate quipped that the proposed abolition of the prohibitions would be a "breach of the

154. Note, *supra* note 14, at 657.

155. *Co-operative Law*, 198 N.Y. at 483-84, 92 N.E. at 16. The short response to this argument is that it need not be so. While it may well be true that the money earned for the services provided would belong to the corporation, as claimed, it simply does not follow that the corporation would "control" the representation, or that the attorney necessarily would be responsible only to the corporation. Certainly there is nothing inherent in the corporate form that would require this. Indeed, if there were, it is difficult to see how lawyers employed by law partnerships or corporations could maintain their professional responsibilities to their clients. The money they earn belongs to their employer organization, but they are expected to remain responsible to their client just the same.

156. EC 3-3 stated, in relevant part, that the rules "prohibit a lawyer . . . from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment." 94 REPORTS OF THE A.B.A. 756 (1969) (Committee on Evaluation of Professional Standards).

157. HOD Transcript, *supra* note 107, at 46-47 (remarks by Bob Hawkins).

golden rule. The one who has the gold makes the rules, and the one that has the gold under [then proposed] 5.4, is going to be a non-lawyer."¹⁵⁸ The commentary to Rule 5.4 as finally adopted by the ABA explains that the prohibitions on nonlawyer involvement "are to protect the lawyer's professional independence of judgment."¹⁵⁹

A few examples help to illustrate this potential conflict. Suppose that one partner of a lawyer-nonlawyer partnership is a real estate developer. The realtor may be trying to put together a real estate transaction for a client, and have a great deal of the firm's time, potential profits, and professional pride invested in it. In such a situation, the lawyer partner who is asked to evaluate the proposed transaction for compliance with the law will have a potential conflict of interest caused by her divided loyalty to partner and client. Or, suppose that a nonlawyer entrepreneur aiming to profit from the market for inexpensive, standardized legal services sets up a business organization that employs lawyers to provide such services. There may be a tendency on the part of the owner and management of such an organization to direct the lawyer employees to provide less complete services than are needed by some clients because the services are not "cost justified." Such pressures from the employer may create a potential conflict of interest for the lawyer who owes loyalty to the client, but also is worried about his job.

The possibility of interference with a lawyer's independent judgment cannot be denied. But our present system contains similar possibilities. Many lawyers work for a salary as associates for law firms in which they have no control or ownership interest. Their employers—the partners or lawyer shareholders—may be looking over the shoulders of those associates "in terms of profit" just as aggressively as would nonlawyers offering the services of these same lawyers. Notwithstanding these pressures, monetary and nonmonetary, we require and expect that such associates will comply with their professional duties. Model Rule 5.2(a), for example, provides that "[a subordinate] lawyer is bound by the rules of profes-

158. *Id.* at 38 (remarks by Al Conant).

159. MODEL RULES, *supra* note 101, Rule 5.4 comment. Christensen, who has probably studied the unauthorized practice of law area more than any other modern commentator, also has argued that the possibility of interference with the lawyer's professional independence in the interest of maximizing profit is the principal danger of nonlawyer involvement in the business of law. At one time, he was of the view that the risk of such danger justified a total ban on involvement of nonlawyers in the business of law "for profit." B. CHRISTENSEN, *supra* note 13, at 280. On the basis of a detailed historical survey of the unauthorized practice movement done ten years later, however, Christensen concluded that all unauthorized practice restrictions except those on the use of the titles "lawyer" and "attorney at law," and perhaps the privilege of appearing in court, should be abolished. Christensen, *supra* note 12, at 210.

sional conduct notwithstanding that the lawyer acts at the direction of another person.”¹⁶⁰

In order to justify a prophylactic rule prohibiting all involvement by nonlawyers in the business of law, those opposing nonlawyer involvement must show that somehow nonlawyer control is more pernicious, or more efficacious, in interfering with a lawyer's professional independence, than the control by supervising or employer attorneys that is allowed currently. Otherwise the general injunctions on professional independence should suffice. Yet, there is no evidence of such increased power in nonlawyers.¹⁶¹ Moreover, nonlawyers are allowed to exercise a comparable kind of control over lawyers in other contexts. Many lawyers working in the private sector, for example, are paid by nonlawyers to provide legal services to another. This may happen when a parent pays for a lawyer to assist a child; when insurance companies provide counsel to defend an insured; or when corporations pay the legal expenses to defend their employees. In these situations, the attorney looks to one party for payment, but owes her professional duties to another.

While these relationships undoubtedly present potential conflicts of interest, they are not prohibited altogether.¹⁶² We assume that a lawyer in many cases may be able to preserve professional independence even though someone else has a financial interest in the services rendered. Thus, Model Rule 5.4(c) provides that “[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.”¹⁶³ Model Rule 1.8(f) implies that a lawyer may accept compensation from one person for representing another so long as “there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship.”¹⁶⁴ Similarly, the conflicts rules require lawyers to decline to represent clients if

160. MODEL RULES, *supra* note 101, Rule 5.2(a).

161. Rhode, *supra* note 12, at 90-94. In Florida Bar v. Consolidated Business & Legal Forms, Inc., 386 So.2d 797, 798-800 (Fla. 1980), the referee did conclude that clients had received inadequate representation as a result of the inexperience of the employed lawyers, use of inadequate form pleadings, lack of proper attention, and insistence on payment before services were provided. While the court apparently believed that these deficiencies were caused because the corporation was organized by nonlawyers, there does not seem to be any warrant for such a conclusion in the case.

162. See generally ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 99-102 (1984) (discussing the legal background to Model Rule 1.8(f)).

163. MODEL RULES, *supra* note 101, Rule 5.4(c).

164. *Id.* Rule 1.8(f).

they reasonably should conclude that representation will be adversely affected by conflicting interests.¹⁶⁵

Another very different type of control over lawyers by nonlawyers occurs when a law firm in need of capital borrows funds from an institutional lender.¹⁶⁶ Such borrowing on occasion can be vital to the economic survival of a firm.¹⁶⁷ If a debtor firm wished to embark on a potentially costly piece of litigation—perhaps on a *pro bono* or contingency basis—there would be a potential for conflict with an institutional lender who concluded that the costly representation jeopardized the firm's ability to repay the loan. But again, such borrowing is not prohibited. We assume that the general conflicts rules will be sufficient to protect against interference with the lawyer's professional judgment in such cases.

Still another kind of control over lawyers by nonlawyers occurs when lawyers are employed by corporations or governmental bodies to work in legal departments. In an important sense, such employment is distinguishable from the situations above because the corporation or government is the lawyer's client.¹⁶⁸ As client, the employer has a broad

165. *Id.* Rule 1.7.

Even if the lawyer can conclude reasonably that the representation will not be affected adversely, she still must advise the client of the potential conflict, and obtain the client's consent to it before proceeding. *Id.* Thus, the general conflicts rules already require disclosure and client consent to any latent conflicts of interest. These conflicts rules would apply equally were nonlawyers involved in a cooperative enterprise with the lawyers, posing a potential conflict of interest. The disclosure obligation, by itself, should go a long way to ameliorating any potential injury to clients arising from the interests of the nonlawyer. Note, *supra* note 14, at 658. Professor Rhode has observed that attorneys are not "well, let alone ideally, situated to determine the risk that consumers are willing to assume in return for less expensive services." Rhode, *supra* note 12, at 61. Perhaps this is an area in which the burden should be on the profession to show why it should not leave the choice up to the consumer in the marketplace.

It may be objected that the situation in which someone else is paying for the services of a lawyer to represent another is distinguishable from that in which someone is hoping to profit from the lawyer's services. But that will depend upon who is paying for the lawyer, and the relationship of that person to the real client. If it is an insurance company, for example, the fee payer may well be hoping to profit, albeit indirectly, from the lawyer's services, because the whole purpose of hiring a lawyer may be to avoid financial liability and thereby to enhance or preserve profits.

166. The example is taken from HAZARD & HODES, *supra* note 14, at 473.

167. Shortly before its demise, the law firm of Finley, Kumble, Wagner, Underberg, Manley, Myerson & Casey was reported to have over \$53 million in outstanding bank loans. Brill, *Bye, Bye, Finley, Kumble*, AM. LAW., Sept. 1987, at 40. More recently it was reported that when it collapsed, the firm owed \$83 million to banks. Jensen, *Finley Report Reveals Scrutiny, Burglary*, 10 Nat'l L.J., Aug. 22, 1988, at 2, col. 2.

168. Model Rule 1.13 makes clear, as does the case law, that "[a] lawyer employed or retained by an organization represents the organization." MODEL RULES, *supra* note 101, Rule 1.13. *But see infra* text accompanying notes 279-94 (discussing lawyers employed by accounting firms).

entitlement to control the lawyer's rendering of professional services, at least as to the objectives of the representation.¹⁶⁹ In another respect, however, employment in the corporate and government sector creates problems for the lawyer's professional independence comparable to those that would exist if nonlawyers were entitled to offer lawyers' services to the public. For example, while the lawyer employed by a corporation generally takes orders only from a few of the corporation's duly authorized officers or employees, the lawyer is deemed to represent the organization as a whole.¹⁷⁰ If the lawyer concludes that her superiors are acting inconsistently with the best interests of the organizational client, the lawyer is expected to act in the best interests of the client.¹⁷¹ That is, the lawyer is expected to remain professionally independent, notwithstanding the financial or political interest of the corporate or governmental official who has hired or supervised the lawyer. The fact that we expect such professional independence of the organizational lawyer further undercuts the argument that such independence could not be maintained against nonlawyer employers in the business of law.

Significantly, the Supreme Court has found little support for the argument that nonlawyer involvement might impair a lawyer's professional independence in the context of nonprofit organizations that provide the services of lawyers to members. In three landmark cases, the Court upheld the right of labor unions to pay for or promote the services of particular lawyers for their members,¹⁷² and to provide such services through lawyers employed by the unions.¹⁷³ In each case, state bar associations opposed the arrangements on the ground that the interests of the union would diverge from those of the clients, and the lawyers' professional judgment would be impaired by the financial control exerted by the union. The opponents of such union involvement, however, were unable to come up with concrete evidence of injury to clients in any of the cases and the Supreme Court ultimately rejected the argument as only "theoretically imaginable."¹⁷⁴ As a direct result of these decisions, the ABA

169. Model Rule 1.2(a), for example, provides that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation." MODEL RULES, *supra* note 101, Rule 1.2(a) (emphasis added).

170. *Id.* Rule 1.13 & comment.

171. *Id.* Rules 1.13(b), (c).

172. *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 580 (1971); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 8 (1964); *cf.* *NAACP v. Button*, 371 U.S. 415 (1963) (establishing same principle for political organization).

173. *United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967).

174. *Id.* at 224.

and most states amended their professional codes to allow nonprofit entities to offer the services of lawyers.¹⁷⁵

Lay interference in professional judgment seems no more likely when the lay provider is motivated by monetary profit than when motivated by economic or political ideology.¹⁷⁶ Arguably there is less potential for interference when the nonlawyer's incentives are only monetary. For example, lawyers in private practice depend on satisfied clients for referrals and repeat business. Clients who conclude that their lawyer's independent judgment is compromised are not likely to be satisfied. Lawyers providing services to members of nonprofit institutions such as labor unions may not have the same dependence on satisfied clients, and may care more about satisfying the employing institution. Moreover, their ideological loyalty to the nonprofit institution may be more personal and intense than is the private attorney's attachment to money.

Those who claim that lay involvement in the business of law would be attended by grave conflicts of interest and interference with professional judgment, should be challenged to show why the potential problems are any more serious here than they are in the kinds of law practice currently allowed. Absent this showing, there is little reason to suppose that the existing conflicts rules will not serve to police lawyers who would engage in the business of law with nonlawyers.

Even assuming the potential for nonlawyer interference with a lawyer's professional judgment, it does not follow that a total prohibition of nonlawyer involvement in the business of law is justified. As the Kutak Commission showed, it is possible to draft a much narrower restriction that authorizes nonlawyer entrepreneurial involvement if and only if there is no such interference.¹⁷⁷ In effect, such a rule would impose an implicit restriction on every lawyer's contract with a nonlawyer partner preventing the nonlawyer from interfering with the lawyer's independence. Furthermore, the courts could require that an explicit provision respecting the lawyer's independence be included in any contract between a lawyer and a nonlawyer before they were permitted to form a business association that would offer the lawyer's services to others.¹⁷⁸ A comparable contractual commitment was recommended in the 1969

175. See *supra* text accompanying notes 80-90.

176. *In re Educ. Law Center*, 86 N.J. 124, 135, 429 A.2d 1051, 1057 (1981) ("[T]he corporation may place its own interests, whether political goals or profits, ahead of the interests of its clients."); Billings, *Legal Expense Insurers: Winning the Battle Against Indifferent Insurance Laws and Hostile Ethics Rules*, 19 FORUM 142, 151 (1983).

177. Rule 5.4(a) (Proposed Draft 1982), reprinted in 107 REPORTS OF THE A.B.A. 886 (1982).

178. Billings, *supra* note 176, at 151, 159.

Model Code to deal with the need for a lawyer to maintain professional independence when employed by an organization.¹⁷⁹ Indeed, a similar device was found workable by at least one court that wished to permit nonlawyer involvement in the provision of legal services, while still guarding against interference in the lawyer's independence.¹⁸⁰

(2) *Nonlawyers Would Engage in Inappropriate Advertising and Solicitation of Legal Business*

Another argument frequently made against allowing nonlawyer involvement in the business of law is that the nonlawyers necessarily would solicit legal business in violation of the advertising and solicitation rules. The 1920 Delegates Report, for example, argued:

The sole inducement to the layman to practice law and do law business is the fee derived therefrom, and to secure this recourse is had to the ordinary commercial, competitive business methods of solicitation and advertising thereby commercializing the profession of the law and the law business, undermining the ethical and professional standards, and destroying public confidence in the lawyers and the courts¹⁸¹

Similarly, many of the cases involving lawyer-nonlawyer partnerships or corporations have focused on advertising and solicitation as the primary evils involved.¹⁸²

To the extent that these arguments historically have focused on the evil of advertising per se, the Supreme Court's articulation of a constitutional right to advertise has rendered them largely obsolete.¹⁸³ Nonetheless, deceptive and misleading advertising is prohibited.¹⁸⁴ It still might be argued that advertising of legal services by nonlawyer partners or corporations inherently would be misleading, since at a minimum the public would be confused as to who is really furnishing the legal services. Per-

179. MODEL CODE, *supra* note 68, EC 5-24 provides: "Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles." See also Note, *supra* note 14, at 658 (advocating use of a contract to prevent lay person from interfering with attorney's professional activities and attorney-client relationship).

180. *In re Application of Am. Prepaid Legal Serv., Inc.*, No. 17132, slip op. at 1, 24 (Nev. Feb. 6, 1987); NEV. SUP. CT. R. 42.5(c).

181. ANNOTATED CANONS, *supra* note 53, at 11.

182. See, e.g., *In re Cornelius*, 520 P.2d 76, 85 (Alaska 1974); *Cuyahoga County Bar Ass'n v. Gold Shield, Inc.*, 52 Ohio Misc. 105, 113-14, 369 N.E.2d 1232, 1237 (C.P. Cuyahoga County 1975); *In re Droker*, 59 Wash. 2d 707, 715, 370 P.2d 242, 246 (1962); *State ex rel. Lundin v. Merchants Protective Corp.*, 105 Wash. 12, 15, 177 P. 694, 695 (1919).

183. See, e.g., *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1923 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 649 (1985); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 359 (1977).

184. See MODEL RULES, *supra* note 101, Rule 7.1.

haps more important, in person solicitation of legal business by lawyers is impermissible in most jurisdictions.¹⁸⁵ Yet, the argument is made that since nonlawyers are permitted to engage in such in person solicitation, lawyers in partnership with nonlawyers would escape the solicitation rules by having the nonlawyers conduct these promotional activities.

The short answer to these arguments is that to the extent that advertising and solicitation rules are applicable to lawyers, they should be enforced against law businesses containing nonlawyers as well. This, in fact, was the answer given by the Kutak Commission. It would have allowed nonlawyer involvement only so long as "the organization does not engage in advertising or personal contact with prospective clients, if a lawyer employed by the organization would be prohibited from doing so by Rule 7.2 or Rule 7.3."¹⁸⁶

Few would dispute, for example, that the rules against deceptive advertising are justified, whether applied to lawyer or nonlawyer. Therefore, if there is a danger that the public would be confused by the advertisement of legal services by nonlawyers, then such advertisers could be put to the burden of making their ads accurate, regardless of the greater restrictions potentially placed on their ability to advertise. Likewise, there is little reason to suppose that coercive personal solicitation when conducted by nonlawyers is any less deleterious than when engaged in by lawyers. Hence, lawyers could be prohibited from assisting or encouraging nonlawyers who engage in personal solicitation. Indeed, the existing rule prohibiting a lawyer from violating or attempting to violate the Rules "through the acts of another" probably is broad enough to constitute such a prohibition.¹⁸⁷

Even assuming that the advertising and solicitation rules were applied to nonlawyers involved in the business of law, there would still remain a wide area of nonlawyer-lawyer business cooperation that presently is closed. Business organizations in which both lawyers and nonlawyers held financial and managerial interests still could offer a package of legal and nonlegal services to the public through nondeceptive advertisements, and they could provide business to persons referred by satisfied customers and friends.

Nonetheless, the existing solicitation rules might be quite restrictive in one important respect. They might prohibit a lawyer from accepting a

185. *Id.* Rule 7.3; MODEL CODE, *supra* note 68, DR 2-103(A).

186. 107 REPORTS OF THE A.B.A. 886-87 (1982).

187. MODEL RULES, *supra* note 101, Rule 8.4(a). It might be appropriate, of course, to prohibit nonlawyers from engaging in such personal solicitation under the consumer protection acts, whether they are associated with lawyers or not.

“referral” from a nonlawyer partner or business associate who has been consulted by a client on a nonlegal matter. Ethical rules currently prohibit a lawyer from giving a person something of value to promote one’s legal services, that is, to solicit on one’s behalf.¹⁸⁸ These prohibitions might apply to referrals from a nonlawyer partner or business associate on the theory that the lawyer would be giving “something of value,” the lawyer’s association with the nonlawyer, in return for the referral.

In view of the analogous situation in a traditional law firm, this application of the solicitation rules makes little sense. Lawyers often personally solicit additional legal business from existing clients, and they routinely refer clients to other attorneys in their firm. The referring lawyer undoubtedly has a financial interest in the firm obtaining the additional business; and some clients may be pressured into consulting the lawyer or the lawyer’s partner on these additional matters. Moreover, the partner to whom another lawyer in the firm refers business is giving “something of value,” just as the lawyer in the nonlawyer-lawyer enterprise would. But we do not prohibit such intrafirm solicitation. Model Rule 7.3, for example, only prohibits solicitation “from a prospective client with whom the lawyer has no family or *prior professional relationship*.”¹⁸⁹ There has been no suggestion that it would be impermissible for a lawyer to accept a referral from another lawyer in the firm who properly has solicited business from an existing client. Presumably, this exception for existing and former clients serves clients’ interests well because it is often to the client’s advantage for a lawyer to pose additional legal matters that may need resolution, and to have the same firm handle the matter.

The same arguments that justify allowing this kind of intralaw firm solicitation justify allowing solicitation within the context of a lawyer-nonlawyer firm. To a certain extent, the public currently receives the benefit of a similar kind of solicitation and referral, even though lawyers and nonlawyers may not form partnerships. Lawyer and nonlawyer professionals establish informal referral arrangements all the time. Banks,

188. Model Rule 7.2(c), for example, provides that “[a] lawyer shall not give anything of value to a person for recommending the lawyer’s services.” *Id.* Rule 7.2(c).

189. *Id.* (emphasis added). The prior Model Code prohibits solicitation of business from “a non-lawyer who has not sought his advice regarding employment of a lawyer.” MODEL CODE, *supra* note 68, DR 2-103(A). It provides further that

[a] lawyer who has given unsolicited advice to a layman that he should obtain counsel . . . shall not accept employment resulting from that advice, except that: (1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

Id. DR 2-104(A).

realtors, and social workers, for example, refer clients to lawyers whose work they have found to be of high quality, and lawyers make similar referrals to nonlawyers. Often enough, the referral arrangements are reciprocal. One of the principal advantages of allowing nonlawyers to form business associations with lawyers would be that such informal associations could become institutionalized. Clients could be offered a more efficient and complete "one-stop" service, involving the expertise of lawyer and nonlawyer alike, without hiring several different firms. In order for this efficiency to be meaningful, however, the various professionals in such an enterprise must be free to refer clients from one to another. As for the evils of solicitation and potential conflicts of interest, the client who is aware of the lawyer or nonlawyer's business connections with other professionals should be in a better position to resist inappropriate solicitation and conflicts than one who is not.

In short, the arguments against allowing nonlawyer-lawyer association based on the dangers of solicitation can be accommodated simply by applying the existing advertising and solicitation rules to such associations. Insofar as the solicitation rules would preclude solicitations of legal business from existing or former clients of the firm, as a whole, they should be modified to allow such solicitation for the same reason that law firms are allowed to engage in it.

(3) Client Confidences Would Be Compromised

Another area in which nonlawyer involvement in the business of law is thought to create ethical risks is in the preservation of client confidences. Some have expressed concerns that nonlawyers associated with lawyers improperly might seek disclosure of client confidences. A 1987 ABA Staff Memorandum, for example, worried that nonlawyer directors might demand access to client confidences to aid the directors in formulating corporate strategy.¹⁹⁰ One also can envision a nonlawyer who properly has learned confidences in connection with work undertaken for a client, but who then improperly uses those confidences for personal gain or discloses them to third persons.

There is little reason to suppose, however, that clients would have any less protection of confidences than they do at present if the lawyers with whom they wish to deal were affiliated directly with the nonlawyers. A client, of course, is free to consent to the disclosure of confidences to

190. ABA Memorandum, Subject: Model Rule 5.4, at 7 (Apr. 22, 1987) (unpublished memorandum available from ABA).

persons other than the lawyer.¹⁹¹ Furthermore, under the current Model Rules, client consent to disclosure is implied insofar as is necessary "to carry out the representation."¹⁹² Presumably, a client would be deemed to have consented to disclosure of information to nonlawyer associates at the outset of the relationship, to the extent necessary to carry out the representation.¹⁹³ Even now, if a client does not wish disclosure of confidences to a lawyer's partners and associates (whether or not they are lawyers), he can instruct the lawyer not to disclose, and the lawyer is bound by this instruction and subject to discipline for unauthorized use or disclosure.¹⁹⁴ In turn, the nonlawyers should be liable for unauthorized use or disclosure of information to third persons either as agents of the attorney associate, or as agents of the client, or both.¹⁹⁵

To a considerable extent, this problem is already encountered routinely by lawyers who need to enlist the help of nonlawyers with whom they are not associated formally. For example, lawyers will retain accountants, economists, and other nonlawyer experts to help with a given representation. While these professionals are not subject to the lawyer's professional regulation, some are subject to an ethical duty imposed by their own professional regulations to maintain such confidences.¹⁹⁶ Moreover, when such professionals are employed directly by the client, they also owe duties as agents of the client not to profit from the client's confidences.¹⁹⁷ Alternatively, if they are hired by the lawyer on behalf of the client, they may owe a duty of loyalty to the employing attorney not to disclose confidential information. The attorney-client privilege also should extend to nonlawyers to whom confidences are disclosed in order to provide legal advice to the client.¹⁹⁸ Finally, even if nonlawyers do not have as broad a duty of confidentiality under traditional agency rules

191. Model Rule 1.6(a), for example, allows a lawyer to disclose confidences with the client's consent after consultation. MODEL RULES, *supra* note 101, Rule 1.6.

192. *Id.*

193. *Id.*

194. *Id.* Rule 1.6 comment ("A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, *except to the extent that the client's instructions or special circumstances limit that authority.*") (emphasis added).

195. RESTATEMENT (SECOND) AGENCY §§ 343, 379, 380 (1958); R. MALLIN & V. LEVIT, *supra* note 148, § 35.

196. *See, e.g.*, Rule 301 of the American Institute of Certified Public Accountants, Inc., Rules of Conduct of the Code of Professional Ethics, *reprinted in* CODES OF PROFESSIONAL RESPONSIBILITY 239 (R. Gorlin ed. 1986) ("A member shall not disclose any confidential information obtained in the course of a professional engagement except with the consent of the client"); American Society of Chartered Life Underwriters, Code of Ethics, Guide 1.2, *reprinted in* CODES OF PROFESSIONAL RESPONSIBILITY, *supra*, at 266.

197. RESTATEMENT (SECOND) OF AGENCY § 388 (1958).

198. 8 J. WIGMORE, EVIDENCE §§ 2301, 2317 (1961).

as is imposed under the lawyer ethics codes,¹⁹⁹ nonlawyer professionals are free to agree to a broader duty of confidentiality as a contractual matter.

Furthermore, client confidences would continue to be protected by several existing professional rules. The lawyer who has been retained would continue to be bound by the ethical duty to maintain client confidences, the duty to ensure that nonlawyer assistants comply with the lawyer's professional duties,²⁰⁰ and the general rule that prohibits a lawyer from violating the confidentiality rule "through the acts of another."²⁰¹ The lawyer also would be legally liable for malpractice if any of the lawyer's partners disclosed confidences to the injury of a client.²⁰² Even if there were any uncertainty as to the lawyer's ethical responsibility for unauthorized disclosures by nonlawyer business associates, the ethical rules could be amended to make this clear, as was proposed by the Kutak Commission.²⁰³ Or lawyers who form such business associations with nonlawyers could be required to bind their business organization contractually to maintain client confidences.²⁰⁴

C. Economic Protectionism

Although economic protectionism often can be read between the lines of the justifications given for excluding nonlawyers from the business of law, it rarely is expressed publicly.²⁰⁵ It did surface as early as 1920, when the Delegates Report complained that

[t]he layman, a natural person or corporate, may only compete with the lawyer in the practice of law and the doing of law business by orally soliciting and advertising to do it more expeditiously, faithfully, intelligently, and at less expense than the lawyer, thereby imputing to the lawyer slothfulness, infidelity, and extortion.²⁰⁶

This justification was voiced more recently during the debates over the Kutak proposal that the prohibitions be abolished. One frequently mentioned reason for opposing the Kutak proposal was that it would allow

199. C. WOLFRAM, *supra* note 12, at 242.

200. MODEL RULES, *supra* note 101, Rule 5.3.

201. *Id.* Rule 8.4(a).

202. RESTATEMENT (SECOND) OF AGENCY §§ 213, 214 (1958); R. MALLIN & V. LEVIT, *supra* note 148, §§ 33, 35.

203. MODEL RULES, *supra* note 101, Rule 5.4(b) (Proposed Draft 1982), *reprinted in* 107 REPORTS OF THE A.B.A. 886-87 (1982).

204. HAZARD & HODES, *supra* note 14, at 470; Billings, *supra* note 176, at 151, 159.

205. Interestingly, Professors Hazard and Hodes refer to economic protectionism as the "hidden rationale" behind the business canons. HAZARD & HODES, *supra* note 14, at 471.

206. ANNOTATED CANONS, *supra* note 53, at 10-11 (quoting REPORT OF THE CONFERENCE OF DELEGATES OF BAR ASSOCIATIONS (1920)).

national corporations such as Sears, H & R Block, Montgomery Ward, or the Big Eight accounting firms to open up for-profit law offices.²⁰⁷ According to one delegate, this would result in a form of ruinous competition:

You each have a constituency. How will you explain to the sole practitioner who finds himself with competition with Sears why you voted for this? How will you explain to the man in the mid-size firm who is being put out of business by the big eight law [sic] firm? How will you explain that. I submit to you you cannot on the evidence that has been brought to you by the Commission, because there has been no such evidence.²⁰⁸

Whether protectionist sentiments did, in fact, play an important role in defeating the Kutak proposal, they are not a legitimate justification for the current prohibitions in light of the antitrust laws. For nearly a hundred years, federal law has prohibited "combination[s] . . . in restraint of trade or commerce . . ."²⁰⁹ According to Areeda and Turner, "[t]he economic objective of a pro-competitive policy is to maximize consumer economic welfare through efficiency in the use and allocation of scarce resources, and via progressiveness in the development of new productive techniques and new products that can put those resources to better use."²¹⁰

The antitrust laws have been held applicable to the rules established by state bar associations. For many years, the legal profession assumed that it was not engaged in "trade or commerce" as contemplated by the federal antitrust laws. But the Supreme Court soundly rejected that contention in the 1975 case of *Goldfarb v. Virginia State Bar*,²¹¹ when it held that minimum fee schedules published by a Virginia county bar association, and enforced by the state bar, constituted illegal price-fixing under section 1 of the Sherman Act.

Generally industry self-regulation, such as that engaged in by the legal profession, is evaluated for antitrust purposes under the rubric of the group boycott.²¹² A "group boycott" may be described as a con-

207. HOD Transcript, *supra* note 107, at 28, 37, 46-48.

208. *Id.* at 48-49 (remarks by Al Conant). Interestingly, the ABA does not mention the concern about competition as one of the reasons for rejecting the Kutak proposal in its "official" legislative history of the rules. ABA LEGISLATIVE HISTORY, *supra* note 99, at 160. The contemporaneous Bureau of National Affairs report is more accurate. 51 U.S.L.W. 2493 (1983).

209. Sherman Antitrust Act, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (1987)).

210. 1 P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 7 (1978).

211. 421 U.S. 773, 791-93 (1975).

212. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 88 (1977).

certed effort by one group of persons to exclude others from their business.²¹³ Because the rules that this Article has been analyzing exclude nonlawyers from the business of law, they constitute a group boycott. Group boycotts such as this probably would be tested under a rule of reason analysis and would be illegal only if found to suppress competition.²¹⁴ Moreover, a group boycott may be exempt from the antitrust laws if it is mandated by state action.

The case law shows, however, that the rules under examination here would be found to violate the antitrust laws if they were not mandated by the state. In *Surety Title Insurance Agency, Inc. v. Virginia State Bar*, a title company challenged opinions by the Unauthorized Practice of Law Committee of the Virginia State Bar to the effect that nonlawyers conducting title searches without the assistance or supervision of lawyers would be engaged in the unauthorized practice of law.²¹⁵ The trial court held the bar activity constituted a classic illegal group boycott violative of the antitrust laws regardless of whether it was evaluated under a per se rule or a rule of reason test, and regardless of whether the plaintiff could show an anticompetitive purpose.²¹⁶ Although the trial court's decision in *Surety Title* was reversed on appeal, the soundness of the court's conclusion as to the bar's conduct, had it been the conduct of purely private parties, was not thrown in doubt.

The antitrust cases involving the legal profession have been reinforced in the last ten years by cases involving other "learned" professions. In *National Society of Professional Engineers v. United States*,²¹⁷ for example, both the District of Columbia Circuit and the Supreme Court affirmed the trial court's conclusion that the Society's Code of Ethics rule, which prohibited competitive bidding for engineering services, violated section 1 of the Sherman Act. In particular, the Supreme Court rejected the Society's defenses that (1) the rule was justified on the ground that competition would jeopardize public safety, and (2) its right to promulgate the rule was protected by the first amendment.²¹⁸

213. *Id.* § 83.

214. *Wilk v. American Medical Ass'n*, 719 F.2d 207, 222 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984).

215. 431 F. Supp. 298, 302 (E.D. Va. 1977), *vacated and remanded on other grounds*, 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978).

216. *Id.* at 303-04, 304 n.8, 307-08; *see also Justice Department Dismisses Antitrust Suit Against American Bar Association*, 64 A.B.A. J. 1538 (Oct. 1978) [hereinafter *Justice Dep't*] (Justice Dep't memorandum cites dramatic changes in legal and regulatory climate of lawyer advertising).

217. 435 U.S. 679 (1978), *aff'g* 555 F.2d 978 (D.C. Cir. 1977).

218. *Id.* at 696-98.

In *American Medical Association v. Federal Trade Commission*,²¹⁹ the FTC alleged that the AMA, through its Principles of Medical Ethics and its Opinions and Reports interpreting those Principles, had kept physicians from adopting more economically efficient business formats and that these restraints had had an adverse effect on competition in violation of the Federal Trade Act.²²⁰ In addressing the restrictions on business associations with nonphysicians, the FTC concluded:

[T]he organizational impediments at issue here preclude on their face a wide variety of professional ventures by physicians that may involve some financial or other type of association with non-physicians (be they lay persons or other health care professionals). It is difficult to see how such sweeping ethical proscriptions are needed to prevent deception or to prevent non-physicians from having undue influence over medical procedures, and, not surprisingly, respondent offers no satisfactory explanation.²²¹

Ultimately, the FTC issued a cease and desist order enjoining the AMA from restricting participation by nonphysicians in the ownership or management of organizations offering physicians' services.²²² The Second Circuit affirmed²²³ and that decision was affirmed later by an equally divided Supreme Court.

In *Federal Trade Commission v. Indiana Federation of Dentists*,²²⁴ the Supreme Court affirmed an FTC order finding that the Federation's "work rule" forbidding its members from submitting x-rays to dental insurers in conjunction with claims forms constituted an unfair method of competition under section 5 of the Federal Trade Commission Act, and a violation of section 1 of the Sherman Act. Again, the Court did not accept the "learned professions" argument, rejecting the Federation's defense that the rule was justified by the need to ensure fully adequate care for patients and that only dentists were competent to evaluate the diagnostic significance of x-rays.²²⁵

Finally, in *Wilk v. American Medical Association*²²⁶ a federal district court in Illinois recently found that the AMA's boycott of chiropractors, through its Principles of Medical Ethics and other activities, violated sec-

219. 638 F.2d 443 (2d Cir. 1980), *aff'd mem. by an equally divided court*, 455 U.S. 676 (1982).

220. *American Medical Ass'n*, 94 F.T.C. Decisions 701, 1017-18 (1979).

221. *Id.* at 1018 (footnote omitted); see also Clanton, *The FTC and the Professions*, 52 ANTITRUST L.J. 209, 219-20 (1983) (discussing application of antitrust laws to medical profession).

222. *American Medical Ass'n*, 638 F.2d at 450.

223. *Id.* at 453; 455 U.S. 676.

224. 476 U.S. 447 (1986).

225. *Id.* at 462-65.

226. 671 F. Supp. 1465 (N.D. Ill. 1987), *on remand from* 719 F.2d 207 (7th Cir. 1983).

tion 1 of the Sherman Act. Once again, a court rejected the Association's claim that the boycott was justified in order to protect patients.²²⁷

In view of these cases, it is hardly surprising that the FTC has taken the position that the lawyer ethics rules prohibiting lawyers from forming legal services firms with nonlawyers should be abolished. In a series of letters and petitions addressed to state courts before which proposed revisions of ethics codes were or are pending, the FTC has urged the courts to reject these restrictions. Relying on its examinations of similar restrictions in the medical and optometric professions, the Commission has argued that

Proposed Rule 5.4 would limit the ability of lawyers to establish multidisciplinary practices with other professionals, such as psychologists or accountants, to deal efficiently with both the legal and nonlegal aspects of specific problems. [It] . . . also would appear to bar lawyers from including any lay persons, such as marketing directors, as partners in their law firms. Finally, such a restriction would appear to prohibit corporate practice, and thereby prevent the use of potentially efficient business formats. . . .

Proposed Rule 5.4 might limit potentially procompetitive professional ventures, innovative business formats, and perhaps some forms of prepaid legal services. [It] . . . might prevent lawyers from achieving savings in marketing that could be passed on to consumers. For example, the proposed rule would not permit a retailer such as Sears to employ attorneys to provide legal services to the public. If attorneys were permitted to enter into such an arrangement, it would be feasible for them to advertise on a national scale and share advertising time with other Sears service providers, such as its insurance, stock brokerage, and realty subsidiaries.²²⁸

Unfortunately, while the existing rules governing the relations between lawyers and nonlawyers are incompatible with federal antitrust policy, they have escaped enforcement because of the state action defense. Under that doctrine, anticompetitive activities carried out by private parties pursuant to a clearly articulated state policy that is supervised actively by the state generally have been held exempt from the federal antitrust laws.²²⁹ The state action exemption has been held to shelter lawyer rules of professional conduct when they have been adopted

227. *Id.* at 1481-85; see *infra* text accompanying notes 369-70.

228. Letter from Jeffrey I. Zuckerman, Director of FTC Bureau of Competition, to Robert F. Stephen, Chief Justice of the Supreme Court of Kentucky 5-6 (June 8, 1987). Similar letters have been sent by the FTC to courts or bar committees considering rule changes in North Dakota, Hawaii, Alabama, Wisconsin, Oklahoma, Georgia, Massachusetts, West Virginia, and Florida. (copies available from the author); see also C. WOLFRAM, *supra* note 12, at 898 n.36 (FTC investigation of bar association restrictions on collaborative enterprises between lawyers and nonlawyers).

229. Patrick v. Burget, 108 S. Ct. 1658, 1662-63 (1988); Hoover v. Ronwin, 466 U.S. 558,

by a state supreme court.²³⁰ Thus, state court action adopting Rule 5.4, or its predecessors under the older Code, would be immune from prosecution or private action under the antitrust laws. Furthermore, bar activity that is taken pursuant to a "clearly articulated and affirmatively expressed state policy," or otherwise ratified by a state supreme court, probably would be exempt, provided that the state diligently supervises the activity.²³¹

Even assuming that the states have the power to retain the current restrictions, however, it does not follow that they *should retain them*. The primary goal in state regulation of the legal profession ought to be the public welfare. As the Supreme Court has stated, the states have broad power to regulate the practice of professions "as part of their power to protect the public health, safety and other valid interests."²³² If, as this Article has argued, the traditional arguments based upon protection of clients or the public generally are inadequate to justify the rules excluding nonlawyer involvement in the business of law, what other "valid interest" can there be? Protection of the economic well-being of the profession is not such a valid interest.

D. Summary

Traditionally, the opponents of lay involvement in the business of law have presupposed that the potential for public harm is so serious in this area as to justify a prophylactic rule prohibiting such involvement. No empirical evidence, however, is available to show that the potential for harm would become a reality if the prohibitions were lifted. Indeed, comprehensive studies of the case law in the unauthorized practice area have failed to disclose significant public harm resulting from such practice.²³³ Moreover, there are other ethical rules in place to regulate law-

567-70 (1984); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 359-60 (1977); *Parker v. Brown*, 317 U.S. 341, 250-51 (1943).

230. *Bates*, 433 U.S. at 360.

231. See *Patrick*, 108 S. Ct. at 1663; *Hoover*, 466 U.S. at 567-70. This is not to say, however, that some bar association activities—particularly those of local county bar associations or state bar committees that occur without court supervision or mandate—may not be vulnerable. On August 19, 1988, a 51-page complaint was filed in the federal court for the Northern District of Illinois by a public interest organization called "Lawline" against the American Bar Association, the Illinois State Bar Association, and the Chicago Bar Association alleging, among other things, that their activities in enforcing the business canons violate the federal antitrust laws. Complaint, *Lawline v. American Bar Ass'n*, (N.D. Ill. filed Aug. 19, 1988) (No. 88C7203).

232. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975).

233. *United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217, 222-24 (1967); Christensen, *supra* note 12, at 215.

yers, and there are legal rules binding on lawyers and nonlawyers alike. In the absence of any showing that harm is likely to result from increased lay involvement in the business of law, these ethical and legal rules should be regarded as sufficient to protect the public from the dangers that have been feared from lay participation. Even if these rules are found inadequate, they can be amended to deal with the potential risks from nonlawyer involvement in a way that is far less restrictive than the present absolute ban. More limited rules, most of them already present in the lawyer codes, will suffice to protect attorney independence, client confidentiality, and the consumer's freedom of choice—the interests that are potentially at risk in this area.

One justification—economic protectionism—is rarely heard in public, but undoubtedly has played an important role in practice in preserving the business restrictions on lay involvement. That justification, however, is incompatible with our national policy against anticompetitive economic behavior.

III. Affirmative Reasons for Supposing that Participation by Nonlawyers Would Be in the Public Interest

In the recent debates over the Kutak proposal to abolish the exclusion of nonlawyers from the business of law, one member of the House of Delegates argued that the proposal should be rejected because no one could say for sure what effect it would have: whether it would affect lawyers' independence; whether it would destroy the economic existence of some lawyers; or whether it would lead to cheaper or better services.²³⁴ The foregoing discussion has argued that nonlawyer involvement need not impair lawyers' independence, and that the question whether it would destroy the economic existence of some lawyers should be irrelevant as a matter of public policy. The delegate's argument also suggests, however, that there is no reasonable basis for believing that removing the present restrictions would result in cheaper and better services to the consumer. This section responds to that suggestion by showing that there is a need and demand for innovative arrangements between lawyers and nonlawyers that would provide multidisciplinary services to the public, and would provide infusions of capital to enable these organizations to serve the public better and more efficiently. Unfortunately, the restrictions excluding nonlawyers from the business of law are operating as a restraint on such innovation.

234. HOD Transcript, *supra* note 107, at 37-38 (remarks by Al Conant).

A. The Need for the Multidisciplinary Firm

Perhaps the most serious impediment imposed by the traditional restrictions is in the development of the "multidisciplinary firm." The idea the multidisciplinary firm recognizes is that the law is increasingly inter-related to many fields that traditionally have been viewed as "nonlegal," such as economics, business, engineering, management, medicine, and psychology. A multidisciplinary firm could offer expertise not only in the law, but also in one or more of these law related fields.

There are many potential benefits to clients from a multidisciplinary firm.²³⁵ In the traditional law firm, there is inevitably a tendency to analyze a problem solely in terms of its legal aspect and for the lawyers to attempt to solve the problem with whatever training they may have. This may have one of two potentially harmful consequences: (1) the lawyers may fail to perceive or may ignore important nonlegal aspects; or (2) the lawyers may identify the nonlegal aspect of a client's problem, but may attempt to solve it themselves without adequate nonlegal training, rather than referring the client elsewhere. In the multidisciplinary firm, this need not happen. In the first instance, the firm would have the ability to diagnose more accurately whether a given client's problem is strictly speaking a "legal" one, or, for example, an economic, psychological, or scientific one, or a combination of fields. Then, instead of referring the client to another firm or professional for the nonlegal needs, the multidisciplinary firm itself could provide those services. Thus, the firm could address all aspects of the client's problem, rather than only the so-called "legal aspect."

Even if a traditional law firm had the competence to diagnose the presence of nonlegal problems, and the prudence to refer the client to other professionals for the solution of those problems in which it lacked the necessary expertise, the multidisciplinary firm would be able to provide the required services to the client more efficiently and economically. The client would not need to find and work with two or more unrelated firms; much of the information required to solve the client's problem would need to be obtained only once; and the professionals themselves would find it much easier to collaborate if they were in the same firm than if they were in different firms. There also may be managerial and

235. See generally Evans & Wolfson, *Cui Bono—Who Benefits from Improved Access to Legal Services*, in *LAWYERS AND THE CONSUMER INTEREST* 24-25 (R. Evans & M. Trebilcock eds. 1982) (lawyers may keep work that could be done more efficiently and expertly by a specialist in another field); Quinn, *Multidisciplinary Legal Services and Preventive Regulation*, in *LAWYERS AND THE CONSUMER INTEREST*, *supra*, at 329 (multidisciplinary firms have many advantages, but are limited severely by the current disciplinary rules).

administrative economies of scale for the multidisciplinary firm offering a variety of services.²³⁶

There can be little doubt that there is a market for such a multidisciplinary firm. Indeed, to a certain extent, law firms have begun to provide multidisciplinary services despite the existing constraints on nonlawyer involvement in management and ownership of law firms. First, law firms have begun hiring nonlawyer professionals as employees to provide law-related professional services.²³⁷ This clearly is permissible under the rules.²³⁸ But it suffers from the inherent limitation of all employment relationships: the nonlawyer professional is relegated to a permanent employee status.²³⁹ He is prohibited expressly from owning a financial interest in the firm if its practice includes law, or from otherwise "sharing" legal fees with lawyers in the firm.²⁴⁰ These prohibitions are softened, to some extent, by the proviso that "a lawyer or law firm may include nonlawyer employees in a compensation . . . plan, even though the plan is based in whole or in part on a profit-sharing arrangement."²⁴¹ But profit sharing is not the same as ownership. It does not carry with it the same sense of professional status or financial responsibility for the work of the firm. Moreover, the rules continue to preclude a nonlawyer from having the managerial responsibility of a full partner.²⁴²

It is, of course, impossible to know to what extent current restrictions discourage nonlawyers from accepting employment with law firms. One suspects that the likelihood of this occurrence increases the more experienced and qualified the nonlawyer professional.²⁴³ For example, a

236. Quinn, *supra* note 235, at 334.

237. Lauter, *Using Non-Lawyers: "Outsiders" Who Work for Firms*, Nat'l L.J., Feb. 6, 1984, at 1, col. 4.

238. EC 3-6 of the 1969 Code advised that delegation of tasks to "clerks, secretaries, and other lay persons" was proper provided "the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product." 94 REPORTS OF THE A.B.A. 756 (1969); *see also* ABA Comm. on Professional Ethics, Formal Op. 316 (1967), *reprinted in* FORMAL AND INFORMAL OPINIONS, *supra* note 95, at 7-8. Such employment has become so commonplace that the current Model Rules do not even address its permissibility, confining themselves instead to delineating the lawyer's responsibility for the nonlawyer's work. MODEL RULES, *supra* note 101, Rule 5.3.

239. Quinn, *supra* note 235, at 339.

240. MODEL RULES, *supra* note 101, Rules 5.4(a), (b), (d)(1).

241. *Id.* Rule 5.4(a)(3); *see also* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1440 (1979) (when compensation structure relates to net profits, rather than to particular fees, it does not constitute fee-splitting with a nonlawyer), *reprinted in* FORMAL AND INFORMAL OPINIONS, *supra* note 95, at 341.

242. *See* ABA Comm. on Professional Ethics, Formal Op. 316 (1967), *reprinted in* FORMAL AND INFORMAL OPINIONS, *supra* note 95, at 7-8; ABA Comm. on Professional Ethics, Formal Op. 303 (1961), *reprinted in* ABA OPINIONS, *supra* note 64, at 661.

243. Quinn, *supra* note 235, at 339. Arthur Rothkopf, of Hogan & Hartson, commented

psychiatrist might hesitate to enter into a multidisciplinary enterprise with a lawyer—perhaps to offer mediation or other psychological and legal services—unless she were given equal status with the lawyer. If these surmises are correct, then the relegation of the nonlawyer to an employee status stands in the way of the most potentially valuable multidisciplinary innovations.

Another way in which lawyers have begun to offer multidisciplinary services is by setting up so-called “nonlaw” affiliate businesses.²⁴⁴ In the last five years, at least fifteen major firms across the country have established affiliate businesses offering consulting and other services in such areas as economics, education, management, energy, international business, employee benefits, finance, real estate, and advertising.²⁴⁵ Clearly this trend is occurring to meet the demand for multidisciplinary services.²⁴⁶

There are several problems, however, with law firm diversification. First, the ethical permissibility of such nonlaw affiliates has never been addressed squarely in any of the ethical codes, and it has only been addressed sporadically in the ethics opinions.²⁴⁷ The jurisdiction most tol-

at a recent symposium that his firm set up its health care affiliate as a separate enterprise because the person who wished to run it “wanted to run his own organization . . . [He] did not want to be an employee of Hogan & Hartson after having been an employee of a Big Eight firm.” Transcript of Proceedings of Conference Sponsored by the American Lawyer, *The 80s Shakeout: An Update* 381 (June 1, 1987) [hereinafter American Lawyer Transcript].

244. See, e.g., Saltonstall & Lane, *Consultancies Develop with Specialties, Client Needs*, Nat'l L.J., June 6, 1988, at 25, col. 1; Lewin, *Outside Ventures Transform Law Firms*, N.Y. Times, Feb. 11, 1987, at D1, col. 3; Stille, *The Lure of Bigger Profits: When Law Firms Start Their Own Businesses*, Nat'l L.J., Oct. 21, 1985, at 1, col. 1.

245. Saltonstall & Lane, *supra* note 244, at 25, col. 1; Lewin, *supra* note 244, at D7, col. 1; Stille, *supra* note 244, at 1, col. 1.

246. William Isaac, who heads the Secura Group, a bank consulting partnership set up by Arnold & Porter, put it this way: “The law firm environment makes sense for what I’m doing. . . . We spin off legal work, and they spin off consulting work, so there’s synergy. And since we don’t do legal work, we’re not competing with them in any way, as we might have been at other kinds of institutions.” Lewin, *supra* note 244, at D1, col. 5. Another partner at Arnold & Porter, Myron Curzan, agrees that “[i]t gives you an edge if you can offer one-stop shopping to your clients.” Stille, *supra* note 244, at 21. Richard Noland, a partner at Sutherland, Asbill & Brennan, which has set up an energy consulting firm, commented that we frequently had situations where our clients would come to us and it would immediately become apparent that not only did they need legal services but they also had need of expert consulting services in these areas. . . . It became apparent to us that there was a real opportunity here to develop some additional business in the non-legal area by making available to our clients the services that they were seeking elsewhere.

American Lawyer Transcript, *supra* note 243, at 349 (remarks by Richard Noland).

247. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1445 (1980) (permissible for two lawyers and one economist to form corporation that would provide litigation support to lawyers), *reprinted in* FORMAL AND INFORMAL OPINIONS, *supra* note 95, at

erant of law firm diversification seems to be the District of Columbia. A 1985 District of Columbia ethics opinion dealt with the case of a lawyer who wanted to form a partnership or professional corporation with a nonlawyer lobbyist "for the purpose of assisting clients who seek government contracts."²⁴⁸ The lawyer was to set up a separate law practice to perform any legal work that clients of the nonlaw partnership might require. The opinion concluded that this arrangement was permissible "[s]o long as [the] partnership composed of a lawyer and a non-lawyer does not render legal services."²⁴⁹ Moreover, the lawyer was entitled to handle any legal work generated by the clients of the partnership if the lawyer maintained an independent professional judgment and maintained the clients' confidences.²⁵⁰ The ethics committee also concluded that solicitation of law business for the lawyer by the nonlaw partnership was permissible under the District of Columbia Ethics Code so long as the solicitation was not deceptive or the result of undue influence.²⁵¹

On its face, this opinion seems to open the door wide for the kind of law firm diversification that has been going on for the last several years. But the appearance is deceptive. First, the opinion necessarily is predicated on the assumption that the affiliate organization would not render "legal services." The likelihood that no such services would be rendered seems slim since the organization would be owned in whole or in part by lawyers, and, in most instances, would be giving advice in a "law-related" area such as lobbying, education, real estate, accounting, or financial consulting.²⁵² Second, while the opinion concludes that the affiliate would not violate the solicitation rules, the District of Columbia solicitation rule is much more liberal than that in most jurisdictions, and bans in person solicitation only if the solicitation involves deception or undue influence.²⁵³ Finally, the District of Columbia bar seems to be much more liberal in accepting such innovative law firm developments than other jurisdictions.²⁵⁴ Thus, the existing ethical restrictions on associa-

353 ; N.Y. State Bar Ass'n, Ethics Op. 536 (1981) (permissible for lawyers to organize a financial planning corporation in which they would be the sole shareholders and employees and to accept clients of the corporation as law clients, provided they did not use the corporation to engage in impermissible solicitation), *reprinted in* 4 STATE OPINIONS, *supra* note 58.

248. District of Columbia Bar Legal Ethics Comm., Op. 146, *reprinted in* 113 DAILY WASH. L. REP. 525 (Mar. 18, 1985) [hereinafter Opinion 146].

249. *Id.* at 530.

250. *Id.* at 529.

251. *Id.* at 530.

252. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972), *reprinted in* FORMAL AND INFORMAL OPINIONS, *supra* note 95, at 62.

253. District of Columbia Code of Professional Responsibility DR 2-103.

254. Opinion 146, *supra* note 248, at 530 n.2, ventured to question whether the relevant

tions between lawyers and nonlawyers in most jurisdictions will continue to operate as significant constraints on the way in which such affiliates are structured.²⁵⁵

Assuming, however, that such nonlaw affiliates are permitted to approximate the multidisciplinary firm described above and to provide equity and managerial roles to nonlawyers, one is forced to ask what the implications of such a movement are for the traditional prohibitions that remain in the ethical codes. As Stephen Brill stated at a recent conference, "[I]sn't all this elaborate bookkeeping and separation which, of course, is done for precisely the ethical code reasons . . . , isn't it all sort of a charade?"²⁵⁶ If the prohibitions can be circumvented by careful structuring of affiliate entities, then there is little justification left for the prohibitions found in the ethical codes.²⁵⁷ Moreover, there remain strong reasons for eliminating the restrictions. It must be assumed that it takes a certain size law firm to justify the expense of setting up a nonlaw affiliate. Thus, allowing covert circumvention of the rules by firm diversification favors the large, powerful urban law firms at the expense of the smaller law practices.

B. The Need for Professional Management

Quite apart from the need for multidisciplinary firms, there are a variety of other potential benefits to the legal profession and to society

interests in protecting a lawyer's professional independence and a client's confidences required the current blanket prohibition on law partnerships and corporations composed of both lawyers and nonlawyers. But it deferred to the District of Columbia committee considering whether to adopt the ABA Model Rules for resolution of this question. *Id.* Recently the District of Columbia Court of Appeals has proposed to depart significantly from ABA Model Rule 5.4 and to allow nonlawyers to have beneficial and managerial interests in law firms. The form of the rules proposed by the District of Columbia Court of Appeals would approximate the Kutak Commission Proposed Rule 5.4, *see supra* note 104, except that it would not allow a business organization owned by both lawyers and nonlawyers to do anything except practice law and nonlawyers would be required to perform professional services for the firm. *D.C. Proposed Rule, supra* note 117, at 44. *See generally* Gilbert & Lempert, *supra* note 14, at 392-400 (outlining the efforts at reform by the District of Columbia Bar Committee).

255. One lawyer who has been involved in such a diversification stated at a recent conference: "The reason, to a large degree, we've set it up the way we have is because of the ethical rules." American Lawyer Transcript, *supra* note 243, at 360 (remarks by Richard Noland). In particular, there seems to have been a real reluctance on the part of many law firms that have diversified to allow nonlawyers an ownership interest in the affiliates that have been created, notwithstanding that the affiliates routinely are characterized as "non-legal." The affiliates usually are set up as separate partnerships by the partners of the law firm with only lawyers or law firms as partners. *Id.* at 352-53, 389-91. *But see id.* at 371-72 (indicating that none of the managing partners of the Hogan & Hartson affiliate are lawyers, although the law firm is a limited partner whose consent is required for major actions).

256. *Id.* at 359.

257. HAZARD & HODES, *supra* note 14, at 477.

that might flow from abandoning the current restrictions. One such benefit would be the "professionalization" of law firm management. Professional managers may be far better than lawyers at determining how quality legal services may be delivered most efficiently and at the lowest cost to the consumer. Canadian economists, for example, have observed that historically there has been an underutilization of auxiliary or paraprofessional personnel and a correlative excessive and inefficient use of lawyers in the legal profession in that country.²⁵⁸ One reason suggested for this underutilization of paraprofessionals is that the professionals who provide the services are also, under prevailing regulatory regimes, the entrepreneurs.²⁵⁹ The problem, as one economist sees it, is that the entrepreneur-professionals "with idle time will tend to underuse auxiliaries and essentially 'featherbed' to hold up their own earnings."²⁶⁰ He suggests that the only way to remedy this misallocation of resources would be a shift in the identity of the entrepreneur: "[T]he critical point is that the management of at least some professional firms will have to be exercised by cost minimizers who are not simultaneously selling their own services to the firm."²⁶¹

To some extent, firms have begun to realize the value of professional management. In some firms, lawyers with particular training or talent for management have taken over the managerial reins. But lawyers with such training and talent are not as plentiful as they might be; and often firms rotate management among their partners as a task that needs to be done, but which few enjoy as much as practicing law. Other firms, however, have recognized the need to reach beyond their legal staff and have hired nonlawyers as office managers. Some nonlawyer managers may find the possibility of high salaries and profit-sharing arrangements attractive enough to justify taking such a position without the expectation of other entrepreneurial rewards, although the possibility of an ownership role would be much more meaningful to many professional managers.²⁶²

258. Evans & Wolfson, *supra* note 235, at 3, 13 & n.6; Zemans, *The Non-Lawyer as a Means of Providing Legal Services*, in *LAWYERS AND THE CONSUMER INTEREST*, *supra* note 235, at 268-76.

259. Evans, *Professionals and the Production Function: Can Competition Policy Improve Efficiency in the Licensed Professions?*, in *OCCUPATIONAL LICENSURE AND REGULATION* 225, 240-44 (S. Rottenberg ed. 1980); Evans & Wolfson, *supra* note 235, at 14.

260. Evans & Wolfson, *supra* note 235, at 14; *see also* Evans, *supra* note 259, at 248-49 (discussing prices charged by the lawyer-entrepreneur).

261. Evans, *supra* note 259, at 249; *see also* Evans & Wolfson, *supra* note 235, at 15, 24 (efficient use of auxiliary personnel will reduce the cost of services, but this will not happen while professionals are also entrepreneurs).

262. Brill, *supra* note 5, at 102.

The managerial authority of such nonlawyers necessarily is limited in other ways by the current ethical restrictions on nonlawyer involvement. The Model Rule on professional law corporations makes the point most explicitly. Not only are nonlawyers prohibited from being shareholders, they also are prohibited from serving as corporate directors or officers or from having a right to "direct or control the professional judgment of a lawyer."²⁶³ The restriction on serving as a director or officer seems to preclude a nonlawyer from having any real authority over decisions that matter to the firm's financial well-being. A director or officer, for example, normally would make decisions about how the firm's personnel resources are to be allocated, what sorts of new business the firm should try to attract, how to go about recruiting new lawyers and support staff, and which personnel to retain or terminate. Why nonlawyers should be excluded from such functions has never been explained satisfactorily. It is, of course, possible that a nonlawyer hired by a firm could be given such decisionmaking responsibility without calling him an officer or director. But this would clearly contravene the intent of the restriction, even if not its letter.

The restriction on nonlawyers "directing" or "controlling" a lawyer's professional judgment is slightly more complicated. It is justified insofar as it is designed to prevent a nonlawyer from *interfering with* the lawyer's exercise of her professional judgment in any particular representation. The restriction, however, is written more broadly than that. It is unclear as to what constitutes a lawyer's "professional judgment," and even more unclear as to what would constitute "direction" of such judgment. Would it be impermissible under this portion of the rule for a nonlawyer office manager to decide that the lawyers in the office should commit themselves to a certain amount of *pro bono* activity? Or that they should pursue certain specialties for which they have shown a particular talent? On one interpretation, these may not be matters of a lawyer's professional judgment at all, but rather matters of entrepreneurial judgment. But under another interpretation, they may fall within a lawyer's professional judgment. If so, then the rule may be unnecessarily restrictive without any compensating benefit grounded in protecting the integrity of law practice.

C. The Need for Capital

Another potential benefit that might flow from eliminating the restrictions on nonlawyer ownership of law firms is that law firms could

263. MODEL RULES, *supra* note 101, Rule 5.4(d).

raise capital from private nonlawyer investors, rather than borrowing necessary capital.²⁶⁴ Law firms might even "go public."²⁶⁵ Investors could provide working capital for innovative marketing, practice, and management strategies. Additionally, a firm could use such capital to initiate training programs for new lawyers, or for existing lawyers in new areas. It also could devote some of the capital to advertising or to innovative mechanisms for providing legal services to portions of the population that otherwise might not be served. It might even allocate some of this capital to financing *pro bono* activity.

The principal objections to allowing law firms to sell shares to nonlawyers have been discussed earlier,²⁶⁶ but two of them need to be reexamined briefly. First, it is feared that investors would put even more pressure than presently exists on the firm to maximize profits, thus driving down the quality of services and the ethical integrity of the lawyers in the firm. Although there is no empirical evidence for this prediction, there is reason for concern given our general knowledge of investor behavior. Nonetheless, there are less restrictive ways of responding to this concern than flat prohibition of such investments. Steven Brill has suggested, for example, that a prospectus issued by a firm seeking outside investors might be required to disclose that "maximizing shareholder return is not the firm's sole goal or even its constant priority."²⁶⁷ Once appropriate disclosures were made, the market would decide whether the shares were a good buy.²⁶⁸ If it decided that they are worth the risk, then the lawyers in the firm would be free to continue practicing law under the same ethical constraints as before, but without the same financial constraints.

The second objection is related to the first: the nonlawyer shareholders would so control the firm that they would interfere inevitably with the lawyers' exercise of professional judgment.²⁶⁹ As discussed ear-

264. R. BILLINGS, JR., PREPAID LEGAL SERVICES 152 (1981); C. WOLFRAM, *supra* note 12, at 878-79; Note, *supra* note 14, at 660. Joseph Flom, a senior partner at Skadden, Arps, Slate, Meagher & Flom, a large New York law firm, reports that the firm has more than \$100 million in capital tied up, about one-half of current annual revenues. Brill, *supra* note 5, at 102. He estimates that for a rapidly expanding firm such as his, this is just a fraction of the investment any other type of business would be making. He believes that the firm clearly could put much more to good use, and probably would, if the investment did not come directly out of partners' pockets. Other firms agree that they need to tie up capital at one-half to two-thirds of current revenue, but concede that most do not deploy that much. *Id.*

265. Brill, *supra* note 5, at 3.

266. See *supra* section II(A), (B).

267. Brill, *supra* note 5, at 102.

268. *Id.*

269. See *supra* section II(B)(1).

lier, it is questionable whether professional judgment would suffer as a result of nonlawyer control. Moreover, even if this is a legitimate concern there is a less restrictive alternative to the current flat prohibition. Any firm that wished to raise capital by publicly offering shares could be required to have two classes of stock, one for insiders, the lawyers who would retain control of the firm, and the other for outsiders who were attracted sufficiently to the firm as a financial investment, but with no real desire for control.²⁷⁰ Whether investors would find such stock attractive would be a question for the market.

D. The Need for Consistency

The final argument for allowing nonlawyer involvement in the business of law is one based on fundamental principles of fairness. Lon Fuller has described eloquently eight principles of legality towards which any good legal system must aspire.²⁷¹ One of the principles that he identified is that there should not be contradictions in the system.²⁷² Stated affirmatively, legal rules should be consistent with one another. Similarly, John Rawls has noted that consistency is a fundamental principle of formal justice, which is a precondition for the rule of law.²⁷³

Many of the foregoing criticisms of the existing business canons have been based on the observation that the present rules simply fail to treat similar cases similarly. For example, a lawyer is prohibited from working for a nonlawyer who offers the lawyer's services to the public, but she is not prohibited from representing one client while being paid by a third person. A lawyer is prohibited from raising capital by giving the "investor" a share of his law firm profits or assets, but he may borrow from nonlawyers to raise the same capital.²⁷⁴ A lawyer is prohibited from forming a partnership with a nonlawyer if the lawyer wants to practice law in the partnership, but she may hire a nonlawyer who is paid on a profit-sharing basis.²⁷⁵ Nonprofit organizations like unions are entitled to offer the services of lawyers to their members, but for-profit organiza-

270. Brill, *supra* note 5, at 3.

271. L. FULLER, *THE MORALITY OF LAW* 41-94 (rev. ed. 1969)

272. *Id.* at 65-70.

273. J. RAWLS, *A THEORY OF JUSTICE* 58-60 (1971). Specifically, Rawls stated:

The desire to follow rules impartially and consistently, to treat similar cases similarly, and to accept the consequences of the application of public norms is intimately connected with the desire, or at least the willingness, to recognize the rights and liberties of others and to share fairly in the benefits and burdens of social cooperation.

Id. at 60.

274. HAZARD & HODES, *supra* note 14, at 474.

275. *Id.* at 477.

tions are not.²⁷⁶ Thus, many situations that are functionally the same are treated differently, demonstrating a basic inconsistency in our lawyer codes with respect to the business canons.

There is a further problem of consistency, however, that must be explored. The most complex of the eight principles of legality enumerated by Professor Fuller is the requirement that there be "congruence between official action and declared rule."²⁷⁷ Similarly, John Rawls noted that "[o]ne kind of injustice is the failure of judges and others in authority to adhere to the appropriate rules or interpretations thereof in deciding claims."²⁷⁸ Most legal theorists would agree that regardless of the substantive wisdom of a particular rule, it is a separate indictment of the rule that it is not enforced consistently. It is that indictment of the rules prohibiting nonlawyer involvement in the business of law that now must be examined.

As has been shown in section I, those rules remain on the books in every American jurisdiction. When bar association ethics committees are asked to interpret those rules, they continue to make it clear that they mean what they say: partnerships between lawyers and nonlawyers are not allowed, and lawyers may not work for nonlawyers who are offering the lawyers' services to the public. Clearly these rules, as written, and as interpreted, act as a deterrent to the forms of business activity that have been discussed at some length. Nonetheless, despite the numerous bar ethics opinions that have been issued on these prohibitions over the last twenty years, they have been enforced only sporadically.

One explanation for the lack of enforcement might be that the prohibitions have been in place so long that there are few violations, and thus few occasions for cases to arise. There are, however, significant areas of practice in which nonlawyer involvement in the business of law has become endemic, revealing the inadequacy of this explanation. The first is in the accounting profession. The second is in the business of for-profit group legal services.

(1) The Practice of Law by Accounting Firms

Over thirty years ago, Dean Erwin Griswold of the Harvard Law School noted a phenomenon that, at the time, was apparently just developing: the large accounting firm that hired full-time lawyers to provide legal service to the firm's clients.²⁷⁹ Griswold viewed this as a "bad"

276. *Id.* at 477-78.

277. L. FULLER, *supra* note 271, at 81.

278. J. RAWLS, *supra* note 273, at 59.

279. Dean Griswold described the trend:

development, a "doubtful practice,"²⁸⁰ and questioned whether accounting firms could ethically employ lawyers to take care of the legal needs of the firm's clients.²⁸¹ At Griswold's suggestion and under his guidance, the ABA looked into these practices and issued a variety of statements that attempted to delineate the appropriate limits of lawyer involvement with accounting firms. Little, however, changed as a result of this early investigation.

Today, lawyers are employed routinely by accounting firms to advise accounting firm clients on tax matters.²⁸² Moreover, many of these lawyers go on to become principals of the accounting firms. While it is difficult to reconcile this practice with the prohibitions that have been discussed, two explanations are usually offered.

First, the accounting firms usually do not hold these lawyers out to their clientele as "practicing law" or as "lawyers."²⁸³ Instead, the lawyers are called members of the "tax department" or some similarly oblique term. Consequently, defenders of the practice contend there is no violation of the ethical rules prohibiting nonlawyers from offering the services of lawyers to the public, or those prohibiting partnerships between lawyers and nonlawyers.²⁸⁴ This explanation assumes, however, that one can avoid the prohibitions merely by changing a lawyer's title without changing the lawyer's actual job. That assumption has been rejected flatly by the ABA ethics opinions.²⁸⁵ Lawyers who interpret the tax laws and decisions for individual clients of the accounting firms are

Some of these firms, however, have I am told, law departments, where legal advice is given. Sometimes these law departments do extensive tax planning. When the accountants working for this firm . . . encounter what they feel to be a tax problem, they may not call in [an outside] lawyer, but rather send the whole matter to their firm's legal department Thus we have something developing which is pretty close to the corporate practice of law

Of course, an accounting firm could hire a lawyer to advise it on its own legal problems. But that is not the situation to which I refer. What I have in mind are lawyers who perform legal services for clients of the accounting firm.

Griswold, *A Further Look: Lawyers and Accountants*, 41 A.B.A. J. 1113, 1179 (1955) (excerpting remarks by Griswold at the annual meeting of the Section of Taxation of the ABA).

280. *Id.*

281. *Id.*

282. M. STEVENS, THE BIG EIGHT 143-45 (1981); *Lawyers and Certified Public Accountants: A Study of Interprofessional Relations*, 56 A.B.A. J. 776, 778 (1970) [hereinafter *Lawyers and CPAs*]; Middleton, *A Tense Time*, 69 A.B.A. J. 1020, 1020 (1983); American Lawyer Transcript, *supra* note 243, at 406.

283. M. STEVENS, *supra* note 282, at 144.

284. See, e.g., *Lawyers and CPAs*, *supra* note 282, at 778.

285. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1241 (1973), reprinted in 2 INFORMAL ETHICS, *supra* note 91, at 495; ABA Comm. on Professional Ethics, Formal Op. 297 (1961), reprinted in ABA OPINIONS, *supra* note 64, at 652, 654.

engaged in the "practice of law" by any accepted definition of the phrase.²⁸⁶ The only clear way in which a lawyer can avoid holding himself out as a lawyer is to withdraw from activities that constitute the practice of law.

The second justification that might be given for the employment of lawyers by accounting firms begins with the observation that you do not need to be a lawyer to advise clients on matters of federal tax law. For example, accountants who are not lawyers are entitled to advise their clients on matters of federal tax law. Thus, some might argue that there is an exception in the area of tax law to the usual prohibitions on lawyers combining with nonlawyers.

Like the first justification, however, this argument also contains a dubious premise: that the traditional prohibitions on lawyer collaboration with nonlawyers do not apply when the nonlawyers could carry on the activity without lawyer collaboration. Stated another way, the assumption is that lawyers may combine with nonlawyers in the practice of law when the activity, if carried on by the nonlawyers, would not constitute the unauthorized practice of law. Although this assumption may have much to recommend it as a policy matter, there is no authoritative support. In 1973, the ABA Committee on Ethics and Professional Responsibility rejected this precise contention.²⁸⁷ More recently, it also has been rejected by the ethics committees of several state bar associations, including that of New York State, where most of the large accounting firms are centered.²⁸⁸

This second possible defense for the practice of law by lawyers working for accounting firms faces another problem as well. The authorization for nonlawyers to practice tax law is narrow, limited by federal regulation to practice before the IRS and the Tax Court.²⁸⁹ In particu-

286. See MODEL CODE, *supra* note 68, EC 3-5; ABA Comm. on Professional Ethics and Professional Responsibility, Formal Op. 328 (1972), *reprinted in* FORMAL AND INFORMAL OPINIONS, *supra* note 95, at 62, 65. In an important early unauthorized practice decision, *Lowell Bar Ass'n v. Loeb*, 315 Mass. 176, 188-89, 52 N.E.2d 27, 34 (1943), the court held that the preparation of simple tax returns did not constitute the practice of law. But the court was careful to note that if the service provided involved "examination of statutes, judicial decisions, and departmental rulings, for the purpose of advising upon a question of law relative to taxation, and the rendering to a client of an opinion thereon," it clearly did constitute the practice of law. *Id.* at 187, 52 N.E.2d at 33.

287. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1241 (1973), *reprinted in* 2 INFORMAL ETHICS, *supra* note 91, at 495.

288. Professional Ethics Comm'n of the Bd. of Overseers of the Me. Bar, Op. 79 (1987), *digested in* 3 LAWYERS' MANUAL, *supra* note 45, at 187 (1987); N.Y. State Bar Ass'n, Ethics Op. 557 (1984), *reprinted in* 4 STATE OPINIONS, *supra* note 58; Wis. State Bar, Ethics Op. E-65-2 (1979), *reprinted in* WIS. B. BULL. 45 (Supp. June 1979).

289. See Pub. L. No. 89-332, 79 Stat. 1281 (1965); I.R.C. § 7452 (West 1967); 31 C.F.R.

lar, it does not encompass the practice of state tax law. Yet, accounting firms routinely advise clients not only about federal tax law, but also state tax law.²⁹⁰ Unless specific exception is made for accountants to practice state tax law by each state involved—and it is not²⁹¹—then the accounting firms do not have even the federal preemption argument to justify their offering of state law advice to the public.

In short, the widespread use of in-house lawyers by accounting firms to provide legal services to the public constitutes a flagrant disregard for the prohibitions on lawyer-nonlawyer collaboration. It cannot be reconciled doctrinally with the rules as declared by the state courts and state bar ethics committees. Yet, there have been few, if any, attempts to enforce the prohibitions against either the accounting profession or the lawyers employed by it.²⁹²

There are several possible explanations for nonenforcement in this area. First, there may be good policy reasons for not enforcing the prohibitions against a profession that, in effect, has been given a limited federal license to engage in the practice of law. As discussed earlier, one traditional justification for the prohibition is that nonlawyers might interfere with lawyers in the exercise of their professional judgment.²⁹³ This argument is particularly difficult to maintain since accountants are authorized to practice federal tax law. To the extent they are authorized to practice by themselves, they owe the same duties of professional care to their clients as do lawyers. Any “interference” that accountants might then offer to lawyers working with them would be more akin to the interaction between lawyers all working in the same law office.

Second, the bar associations aggressively attempted to exclude the accounting profession from the business of offering tax advice in the 1940s and 1950s, only to lose that battle as a matter of federal preemp-

§§ 10.3, 10.4 (1987). The treasury regulations are careful to point out that “[n]othing in the regulations in this part shall be construed as authorizing persons not members of the bar to practice law.” 31 C.F.R. § 10.32 (1987). Presumably this means only to disclaim any intent to authorize activities other than practice before the IRS. See Bittker, *Does Tax Practice by Accountants Constitute the Unauthorized Practice of Law?*, 25 J. TAX 184, 185 (1966).

290. *Bancroft v. Indemnity Insur. Co.*, 203 F. Supp. 49, 56 (W.D. La. 1962); M. STEVENS, *supra* note 282, at 149-50 (Arthur Young, like its competitors, offers a wide range of services including “[a]ssistance in state taxation, including representation of clients before state tax authorities.”)

291. See, e.g., *Agran v. Shapiro*, 127 Cal. App. 2d 807, 813-20, 273 P.2d 619, 623-27 (1954); *Kentucky State Bar Ass'n v. Bailey*, 409 S.W.2d 530, 530-311 (Ky. 1966); *Lowell Bar Ass'n v. Loeb*, 315 Mass. 176, 187, 52 N.E.2d 27, 33 (1943).

292. The research for this Article uncovered no unauthorized practice or lawyer disciplinary action arising out of such practice during the last 20 years.

293. See *supra* section II(B)(1).

tion in the federal tax area.²⁹⁴ One would suppose that the bar's incentive for policing the prohibitions on nonlawyer marketing of legal services in association with lawyers was reduced drastically once nonlawyers were entitled to proceed without the assistance of lawyers at all. In effect, the burden was shifted to the legal profession to demonstrate its value to the accounting profession, rather than the reverse. That burden could not be carried very effectively if the bar were to continue to insist on strict compliance with its traditional prohibitions on lawyer collaboration with nonlawyers because accountants might have settled for doing without lawyers altogether.

Finally, and probably most importantly, lawyers practicing with accountants provide precisely the kind of multidisciplinary services that should be available. There is clearly a consumer demand for such services in the tax area. The accounting firms that are able to offer the services of both lawyers and accountants probably have a competitive edge. Significantly, one does not find any evidence that lawyers working in such an environment have had their professional judgment or independence compromised by their nonlawyer employers and partners. Nor does one find any complaints that client confidences are being disclosed without consent. If such complaints were forthcoming, one can be sure that some restrictive action would have been taken by the bar.

Whatever the reasons that may have existed for not enforcing the traditional prohibitions in this area, the fact remains that no effort has been made to carve out a legal exception to those prohibitions for the accounting profession. On the contrary, many bar ethics opinions continue to indicate that the prohibitions apply fully to partnerships between lawyers and nonlawyer accountants.²⁹⁵ Yet, the provision of such legal services by accounting firms continues, providing a classic example of a case when official action does not match the declared rules. The defensibility of the rules themselves is weakened to that extent.

(2) *Prepaid Group Legal Services*

Another area of extensive nonlawyer involvement in the business of law is prepaid group legal services. Recently, it was estimated that about seventeen million Americans now are covered by some sort of prepaid

294. Prior to the Supreme Court's decision in *Sperry v. Florida*, 373 U.S. 379 (1963), there were a number of state cases finding that accountants offering tax advice were engaged in the unauthorized practice of law. See Bittker, *supra* note 289, at 184-85. At least one of these involved collaboration between a lawyer and nonlawyers. *Lowell Bar Ass'n*, 315 Mass. at 180, 52 N.E.2d at 30.

295. See *supra* note 127 and accompanying text.

legal service plan.²⁹⁶ This has become possible largely as a result of the Supreme Court's decisions upholding the right of nonprofit groups, such as unions and political organizations, to provide legal services to their members.²⁹⁷ Consequently, most of the plans are operated by or on behalf of these organizations.²⁹⁸

The developments in the area of for-profit plans are even more significant. Typically the participants in such plans pay a small monthly premium in return for the provider's guarantee of certain minimum legal services from a lawyer who has contracted with the plan providers.²⁹⁹ In the last several years, a number of for-profit plans have been initiated, and they are being marketed widely throughout the country.³⁰⁰ Montgomery Ward, for example, offers 3 separate legal services plans that now cover 500,000 persons in 41 states.³⁰¹ Prepaid Legal Services Inc., a publicly traded company based in Oklahoma, covers about 150,000 persons in 22 states.³⁰² Amway Corporation also is marketing plans, as are a number of insurance companies.³⁰³

Although there are no special ethical restrictions on such plans when marketed exclusively by lawyers, there is continuing uncertainty under the lawyer codes and the unauthorized practice rules as to the permissibility of for-profit prepaid legal services plans marketed by nonlawyers.³⁰⁴ The discussion in section I suggests that such marketing schemes ordinarily would be struck down as violative of those rules prohibiting collaboration between lawyers and nonlawyers.³⁰⁵ The rules continue to prohibit nonlawyer financial interests in the provision of legal services.³⁰⁶ They continue to prohibit fee-splitting between lawyers and nonlawyers.³⁰⁷ In those jurisdictions in which the 1969 Code of Professional Responsibility is still in force, the rules pertaining to for-profit pre-

296. Lewin, *Legal Advice: \$6.75 a Month*, N.Y. Times, Feb. 3, 1987, at D1, col. 3.

297. See *supra* text accompanying notes 172-75.

298. Lewin, *supra* note 296, at D1, col. 5.

299. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-355 (1987), reprinted in *LAWYERS' MANUAL*, *supra* note 45, § 901:111 (Supp. Jan. 20, 1987).

300. Lewin, *supra* note 296, at D8, col. 4.

301. Telephone interview with Anthony Clark, who is in charge of regulatory compliance for Montgomery Ward legal services plans (Nov. 17, 1987).

302. Lewin, *supra* note 296, at D1, col. 3.

303. Billings, *supra* note 176, at 145; Lewin, *supra* note 296, at D1, col. 3.

304. HAZARD & HODES, *supra* note 14, at 478; Billings, *supra* note 176, at 152-59.

305. See *Florida Bar v. Consolidated Business & Legal Forms, Inc.*, 386 So. 2d 797, 799 (Fla. 1980); *Cuyahoga County Bar Ass'n v. Gold Shield, Inc.*, 52 Ohio Misc. 105, 112-13, 369 N.E.2d 1232, 1237 (C.P. Cuyahoga County 1975); see *supra* text accompanying notes 20-24.

306. MODEL RULES, *supra* note 101, Rules 5.4(b), (d).

307. *Id.* Rule 5.4(a).

paid legal plans are so intricate that they almost defy understanding.³⁰⁸ They appear to prohibit a nonlawyer entrepreneur either from making a profit from the lawyer's services or, if the nonlawyer is to make profit, from employing, directing, supervising, or selecting the lawyer.³⁰⁹ The Model Rules have no special rule pertaining to such prepaid plans, so we are required to fall back on the general prohibitions on lay involvement with lawyers, the prohibitions on fee-splitting, and the prohibition against a lawyer's giving someone something of value to recommend his services.³¹⁰ Despite these various prohibitions, the marketing schemes are multiplying at an unprecedented rate.

In part, the explanation for this phenomenon lies in the fact that state insurance departments seem to have seized the initiative in this area, leaving bar associations and even the courts with prepaid legal service plans as a *fait accompli*.³¹¹ The most recent published count indicates that at least eleven states have insurance statutes that enable entrepreneurs to establish and market for-profit legal expense plans, and another twelve have insurance statutes allowing life insurance companies to market legal expense insurance.³¹² Many of the state courts apparently require annual reports to be filed for such plans.³¹³ These reporting requirements, however, give the courts no direct regulatory authority over those marketing the plans.³¹⁴ Moreover, as of 1981, only five states required their state bars to approve plans before they could operate, and even that approval authority was far from complete.³¹⁵ In the absence of express authority from the state court or legislature, state bars risk anti-trust liability if they attempt to regulate in this area. Consequently, a state bar is quite likely to defer to the relevant state insurance commissioner unless and until an ethics complaint is lodged against a participating attorney.³¹⁶

308. As Lon Fuller noted in *THE MORALITY OF LAW*, the clarity of law is "one of the most essential ingredients of legality." L. FULLER, *supra* note 271, at 63. The bar's intricate tinkering with the rules on prepaid legal plans thus may have "failed to make law" through lack of clarity as well.

309. MODEL CODE, *supra* note 68, DR 2-103 (D)(4)(a).

310. MODEL RULES, *supra* note 101, Rules 5.4, 7.2(c).

311. There is a threshold question whether prepaid legal plans constitute insurance. R. BILLINGS, *supra* note 264, at 404-05. But a number of jurisdictions have concluded that they do constitute insurance. *Id.*

312. *Id.* at 101 (Supp. 1987).

313. *Id.* at 432.

314. *Id.*

315. *Id.* Since that time, at least Nevada has instituted a rule requiring the state Supreme Court to certify prepaid legal service plans. NEV. SUP. CT. R. 42.5.

316. In 1988, the Washington State Bar Association released an informational bulletin in response to consumer questions about a prepaid legal services plan called "Legal Advantage"

Several authorities and commentators suggest that when for-profit prepaid legal service plans are reviewed closely under the existing lawyer ethics rules, they should be found permissible. Significantly, the ABA has concluded that lawyer participation in such plans does not violate the Model Rules.³¹⁷ For example, a recent opinion of the Nevada Supreme Court concluded that such a plan was not violative of the rule prohibiting such a marketing organization from "deriv[ing] a profit or commercial benefit from the rendition of legal services by the lawyer" because it was merely

mak[ing] a profit from the sales of prepaid legal service agreements. Petitioner has no direct interest in the amount of legal services provided by attorneys under their agreement with petitioner. Petitioner and its sales associates receive a portion of the monthly "premium" paid by plan participants, but they receive no commercial benefit from the actual rendition of legal services in a given case (other than the "goodwill" thus generated).³¹⁸

Other commentators concur that nonlawyers marketing legal service plans are not splitting fees impermissibly with the lawyers by receiving premium payments. They take the position that the portion of customer premiums retained by the entrepreneur pays for administrative, marketing, and other services provided by the entrepreneur, rather than for legal services.³¹⁹

being marketed in that state by the law firm of Jacoby & Myers to account holders of The Bon Marche department store. The bulletin disclaimed information as to what specific Washington attorneys were participating in the plan, disclaimed the authority to obtain that information from Jacoby & Myers, a non-Washington law firm, and referred readers to the state Attorney General's Office and the Insurance Commissioner's Office, "which may have jurisdiction over this conduct." Printed Statement by Washington State Bar (1988) (on file at *The Hastings Law Journal*).

317. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-355 (1987), reprinted in *LAWYERS' MANUAL*, *supra* note 45, 901:111, 901:115 (Supp. Jan. 20, 1987).

According to the ABA, "[t]he lawyer gives nothing of value to the plan sponsor other than the lawyer's agreement to provide legal services to subscribers in accordance with the plan provisions. Under these circumstances, the plan sponsor is compensating the lawyer; the lawyer is not compensating the plan." *Id.* at 901:114. Moreover, even if "the plan sponsor retains a portion of the subscriber's payment in excess of administrative costs of the plan to provide a profit for the plan sponsor," *Id.* at 901:115, the ABA's analysis of the history and rationale of Model Rule 5.4 indicated that this should not constitute impermissible fee-splitting with the lawyer. *Id.* In fairness, the ABA did not deny that such arrangements would constitute fee-splitting as commonly understood, but concluded instead, that it was not impermissible based on the history and rationale of the fee-splitting rule. *Id.* at 901:111.

318. *In re Application of Am. Prepaid Legal Serv., Inc.*, No. 17132, slip op. at 13 (Nev. Feb. 6, 1987). The plan was, however, found violative of other lawyer ethical rules. The court declined to approve the plan, but indicated amendments in the lawyer/plan contracts that might remedy the defects. *Id.* at 23-25.

319. Martin, *Ethical Guidelines for Legal Service Plans*, *CAL. LAW.*, Dec. 1985, at 19, 20-

This reasoning, while technically attractive, interprets the rules so narrowly as to rob them of their intended meaning. To suggest, as did the Nevada Supreme Court, that entrepreneurs are not profiting or receiving economic benefit from the provision of legal services by plan attorneys, but merely from the sale of legal service agreements, ignores the substance of the agreement, which is to provide legal services. The entrepreneur stands to profit by the sale of these agreements only to the extent that consumers find the legal services valuable. If the entrepreneur charges a premium and guarantees the customer certain "free" or "reduced cost" legal services in return for that premium, it simply means that the customer is paying for legal services, in whole or in part, with the premium. If lawyers agree to provide certain minimum services to the plan customers without sharing in the premium and without other direct monetary compensation, in return for their services being promoted by the entrepreneur, then it is the nonlawyer who is being compensated for the lawyer's services rather than the lawyer. This amounts to fee-splitting with nonlawyers in substance, if not in form. It also constitutes giving something of value (the lawyer's services) to another in return for that person recommending those services.³²⁰

The fact that these plans now are being operated as for-profit businesses is evidence that there is both a public need and a public demand for low cost legal protection. It is a charade to suggest, however, that they do not violate the letter of one or more of the existing rules restricting nonlawyer involvement in the business of law. Thus, the existence, and growing acceptance, of these plans illustrates once more that the rules prohibiting nonlawyer involvement in the business of law are not being enforced, and this serves as a further indictment of the rules' validity.

21; Telephone interview with Anthony Clark, in charge of regulatory compliance for Montgomery Ward legal services plans (Nov. 17, 1987).

320. On the matter of a lawyer giving something of value for a recommendation, there is a difference between the Model Code of Professional Responsibility and the Model Rules of Professional Conduct. Model Rule 7.2(c) flatly prohibits the practice except for "the usual charges of a *not-for-profit* lawyer referral service or other legal service organization." MODEL RULES, *supra* note 101, Rule 7.2(c) (emphasis added). Model Code Disciplinary Rule 2-103(B) also prohibits the practice, but contains an exception for "the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D)." MODEL CODE, *supra* note 68, DR 2-103. Even assuming that a contribution of free legal service to such an organization is within the meaning of "the usual and reasonable fees or dues," we have seen that the permission of for-profit plans in DR 2-103(D) is so restrictive as to be almost nonexistent.

E. Summary

There are sound reasons for allowing nonlawyer participation in the business of law. Law is so interwoven with other professional disciplines that it defies common sense to severely restrict their cooperation. This cooperation, which has developed as a matter of necessity between lawyers and nonlawyers in connection with individual representation, should be allowed on an institutional, or organizational level as well. Indeed, as the developments in the accounting profession and in prepaid legal plans demonstrate, institutional cooperation has developed in basic disregard of the existing lawyer prohibitions. Nonetheless, so long as the rules are in force, they chill other members of the various professions from pursuing their interest in such cooperation.

IV. The Road to Reform

A. Kutak Commission's Proposed Rule 5.4

The existing prohibitions on nonlawyer involvement in the business of law should be discarded and replaced with a more rational approach to nonlawyer-lawyer business cooperation. Most of the potential dangers of such business cooperation are already the subject of ethical rules that apply to all lawyers, regardless of the business format in which they practice.³²¹ But it would be understandable, given the history of resistance to reform in this area, if courts were to conclude that the potential dangers were serious enough to justify a special rule dealing with these business arrangements. A special rule would have the virtue of providing specific notice of the requirements imposed on lawyers going into business with nonlawyers. The Kutak Commission's proposed Rule 5.4 is an appropriate starting point.³²² The Commission's careful consideration of an appropriate substitute for the business canons found in the prior codes is entitled to more respect than it has received.

Proposed Rule 5.4, however, should be supplemented in at least two important respects. First, the rule explicitly should require the lawyer to obtain contractual commitments from the nonlawyer and the organization to comply with the duties imposed on the lawyer by the lawyers' ethics code. Ethical Consideration 5-24 of the 1969 Model Code recommended such written agreements whenever a lawyer is employed by a nonlawyer organization.³²³ This requirement would go a long way to

321. See section II(B).

322. See *supra* note 104.

323. 94 REPORTS OF THE A.B.A. 766 (1969); see *supra* note 179 and accompanying text.

wards meeting the concern that the nonlawyer is not susceptible to the bar's jurisdiction.

Second, the rule should require a standard disclosure to clients, advising them of the respective roles of the various professional and financial interests represented in the firm. Such a disclosure requirement would help to prevent a client from inadvertently being misled about which of the professionals in the firm were entitled to provide legal services, and which were entitled to provide other kinds of services. It also would alert the client to the potential conflict that the firm might have, for example, in handling other business for the client.

There may be other amendments that should be made to the Kutak Commission's proposed Rule 5.4, to provide further safeguards against the perceived dangers. It is important, however, that the rule not become so complicated and burdensome in practice as to make nonlawyer involvement with lawyers effectively impossible, while pretending to authorize it in principle.

B. The Potential for Reform by State Courts

The most direct route for reforming the existing prohibitions on nonlawyer involvement in the business of law would be through the highest courts of each state. State supreme courts generally have assumed the responsibility for regulating the practice of law within their jurisdiction. As part of the exercise of that responsibility, state courts have adopted and changed the lawyer codes of conduct. They also have been the courts of last appeal on most matters of attorney discipline under those codes. Finally, they have the job of adjudicating any claims brought under unauthorized practice legislation.

Unfortunately, the state courts have declined to modify the business canons over the years. Since the ABA promulgated its new Model Rules, which rejected the Kutak Commission's proposed Rule 5.4, only two jurisdictions, North Dakota and the District of Columbia, have considered adopting the Kutak proposal instead of the ABA Model Rule. The North Dakota Supreme Court declined to depart from the ABA Model Rule.³²⁴ The District of Columbia Court of Appeals has not yet taken final action on the rule proposed to it, which would allow nonlawyer partners or managers only if (1) the firm's "sole purpose" is the practice of law, and (2) the nonlawyer actually performs professional services in the firm.³²⁵ This rule is substantially more limited than the Kutak pro-

324. LAWYERS' MANUAL, *supra* note 45, at 202.

325. Rule 5.4(b), as currently proposed in the District of Columbia, would provide:
A lawyer may practice law in a partnership or other form of organization in which a

posal and clearly precludes the multidisciplinary firm, and the use of nonlawyers to obtain equity capital.

Presumably, courts that have adopted the new ABA rules have been persuaded by the traditional justifications given for the business canons, although the desire to conform to a single ABA model code must have played a significant role. In those jurisdictions that have not yet adopted the ABA's new Model Rules,³²⁶ the case against the old business canons should be made forcefully by interested parties during the period allowed for comments. Perhaps some of the states that have taken their time in acting on the new rules will be more receptive to the arguments for reform. But if the state activity over the last five years is any indication of what we can expect, the state court rulemaking process does not promise to be a very fruitful avenue for reform.

C. The Potential for Reform by State Legislatures

State legislatures are another place in which reform in this area logically might be expected to take place. Unlike the courts, which seem to depend very heavily, if not exclusively, upon the organized bar for recommendations of reform, state legislatures are responsive to a much wider set of interests. In the nineteenth century, legislative bodies were quite active in protecting the rights of nonlawyers to engage in some kinds of law practice.³²⁷ Then, beginning at the end of the last century and continuing to the present, unauthorized practice legislation was adopted in most states at the prompting of the legal profession. Nevertheless, a number of state legislatures have continued to reflect the dissatisfaction of the wider population with some of these unauthorized

financial interest is held or managerial authority is exercised by an individual nonlawyer *who performs professional services which assist the organization* in providing legal services to clients, but only if:

- (1) The partnership or organization has as its *sole purpose* providing legal services to clients;
- (2) All persons having such managerial authority or holding a financial interest undertake to abide by these rules of professional conduct;
- (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;
- (4) The foregoing conditions are set forth in writing.

D.C. Proposed Rules, supra note 117, at 44 (emphasis added).

326. The most recent published count suggests that 18 states plus the District of Columbia still have not adopted new legal ethics rules since the ABA approved its new model rules in 1983. 1 *LAWYERS' MANUAL, supra* note 45, § 01:3-01:4 (Supp. Dec. 21, 1988).

327. C. WOLFRAM, *supra* note 12, at 824-25.

practice rules by enacting statutes that have sought to permit nonlawyers to engage in certain limited kinds of law practice.³²⁸

The difficulty with any new statutory initiative in this area is that such legislation undoubtedly would conflict with the business canons that have been adopted universally by the state courts. While there would be no theoretical impediment to legislative action had the courts not been active in the area, the fact is that they have been active, and they are likely to be jealous of their territory. The ultimate question for the courts would be whether they should defer to the legislatures on matters regulating the entrepreneurial aspects of law practice even when such legislative activity is inconsistent with judicial rules. Such deference necessarily would require a much more restrictive view of the court's inherent power than seems typical in most American states.³²⁹ Many state courts have asserted that their inherent power to regulate the practice of law is of state constitutional stature, and is exclusive, enabling them to hold inconsistent legislative actions unconstitutional.³³⁰ Even courts that seem willing to share power with the legislature have suggested that a direct confrontation may not be tolerated.³³¹

The prospect of a stalemate between the legislative and judicial branches of state government, if the legislatures were to attempt to abrogate the effect of the business canons, is a very real one. Legislators facing this prospect are not likely to take such initiative unless they have some confidence that they could break the stalemate. Since the stalemate arises because the state courts locate their power to regulate the practice of law in the state constitutions, it can only be broken by an appeal to the

328. See, e.g., *Arizona State Bar v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 366 P.2d 1 (1961) (title company allowed to draft documents on property it handles); *Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980) (lay representation for unfair labor proceedings before hearing officer); *Idaho State Bar Ass'n v. Idaho Pub. Utils. Comm'n*, 102 Idaho 672, 637 P.2d 1168 (1981) (nonprofit organizations, utilities, and motor carriers with gross income less than \$100,000 may be represented by officers and other duly appointed representatives); *Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.*, 96 Wash. 2d 443, 635 P.2d 730 (1981) (striking down statute allowing lay persons involved in real estate transaction to select, prepare, and complete documents affecting their legal rights).

329. C. WOLFRAM, *supra* note 12, at 27. But see, e.g., *State Bar v. Galloway*, 124 Mich. App. 271, 281, 335 N.W.2d 475, 480 (1983) (inherent judicial power does not extend to authority over law practice in proceedings before Employment Security Commission). See generally Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783, 799-803 (1976) (discussing relationship between judiciary and legislature in regulating the legal profession).

330. See, e.g., *Bennion*, 96 Wash. 2d at 452-53, 635 P.2d at 735-36.

331. *Heslin v. Connecticut Law Clinic*, 190 Conn. 510, 527, 461 A.2d 938, 946 (1983) (reserving the question whether some legislation might conflict with the court's power to regulate the practice of law in such a way as to be unconstitutional).

general population to amend the state constitution to limit judicial power.³³² For this reason it is unlikely that reform will come from the legislatures.

D. The Potential for Reform by the Federal Government

(1) *Preemption of State Court Rules by the Federal Government*

As a potential agent for reform, the federal government has the benefit of the supremacy clause of the United States Constitution.³³³ In the exercise of its constitutional power, Congress is entitled to enact legislation that is inconsistent with and displaces state legislation and state court rules. Thus, in *Sperry v. Florida*, the Supreme Court held that Florida could not deny to nonlawyers the right to engage in patent practice when such a right had been conferred by federal Patent Office regulations enacted under express legislative authority.³³⁴

Federal preemption of state legislation requires the exercise of a legislative power that has been delegated to the federal government by the Constitution.³³⁵ In *Sperry*, for example, the constitutional power to "promote the Progress of Science and useful Arts" was being exercised.³³⁶ If Congress were to enact legislation to authorize nonlawyers to hold financial and managerial interests in law firms, its actions would be authorized by the federal power over interstate commerce.³³⁷ In particular, this power provides federal control over monopolies and restraints of trade through antitrust laws.³³⁸

As previously discussed, however, state court rules escape antitrust prosecution by virtue of the state action exemption. Nonetheless, since the state action exemption is rooted in the Court's interpretation of the congressional intent behind the Sherman Act, Congress could, if it chose, expressly authorize nonlawyer collaboration with lawyers in the business

332. In *Arizona State Bar*, 90 Ariz. at 94-95, 366 P.2d at 14-15, the Arizona Supreme Court held that title companies and real estate brokers were not entitled to prepare the legal documents necessary for real estate transactions, and it further held that the legislature was powerless to infringe on the court's right to determine who might practice law. The decision was overruled by a state constitutional amendment that passed by a four to one margin. C. WOLFRAM, *supra* note 12, at 842.

333. U.S. CONST. art. VI, cl. 2.

334. 373 U.S. 379, 385 (1963).

335. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 121 (2d ed. 1983).

336. *Sperry*, 373 U.S. at 401; U.S. CONST. art. I, § 8, cl. 8.

337. U.S. CONST. art. I, § 8, cl. 3: "Congress shall have power . . . To regulate commerce . . . among the several states."

338. *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 434-35 (1932).

of law and preempt inconsistent state action.³³⁹ But Congress would need to declare its intent to do so unmistakably. So far, it has shown no interest in taking an initiative in this area. Indeed, as explained below, congressional legislative activity has tended in the opposite direction.

By contrast, the Federal Trade Commission has for a number of years actively sought to eliminate restrictions on nonlawyer business involvement in the practice of law.³⁴⁰ Consequently, one would suppose that the greatest hope for reform by the federal government in this area lies with that agency. There are two ways in which the FTC might proceed. First, it might use its antitrust enforcement power to issue a cease and desist order against state bar disciplinary agencies to enjoin them from enforcing the business canons.³⁴¹ Second, it might use its rulemaking power to promulgate rules prohibiting enforcement of the state business canons.³⁴²

The FTC's exercise of its enforcement power, however, is likely to run into the same difficulty that a private antitrust action might: the state action exemption.³⁴³ Yet, the traditional rationale for exempting

339. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 598 (1976); *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

340. The FTC actively has lobbied the various state courts considering the new model rules in an attempt to persuade them not to adopt the restrictions on nonlawyer involvement. See *supra* text accompanying note 228. It also has successfully litigated a cease and desist order against the American Medical Association that involved comparable restrictions on nondoctor ownership interests in medical service organizations. *American Medical Ass'n v. Federal Trade Comm'n*, 638 F.2d 443, 450 (2d Cir. 1980), *aff'd by equally divided court*, 455 U.S. 676 (1982).

341. The FTC's enforcement power is set out in § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1987).

342. The FTC has authority to promulgate substantive trade regulation rules proscribing "unfair methods of competition," *National Petroleum Refiners Ass'n v. Federal Trade Comm'n*, 482 F.2d 672 (D.C.Cir. 1973), *cert. denied*, 415 U.S. 951 (1974), and "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 57a(a)(1)(b) (1982).

343. See generally Clarkson & Muris, *The Federal Trade Commission and Occupational Regulation*, in OCCUPATIONAL LICENSURE AND REGULATION 107 (S. Rottenberg ed. 1980) (uncertain whether the FTC can preempt anticompetitive state law); Young & Troy, *Federal Trade Commission Preemption of State Regulation: A Reevaluation*, 12 SUFFOLK U.L. REV. 1248, 1263-65 (1978) ("The absence of case law and a clear congressional intent to preempt regulation requires an inquiry into whether any national policy is discernible to govern the issue of FTC preemption of state action."); Note, *The State Action Exemption and Antitrust Enforcement Under the Federal Trade Commission Act*, 89 HARV. L. REV. 715, 719 (1976) (Congress did not consider specifically whether the FTC Act should apply to state action); cf. FEDERAL TRADE COMMISSION, STAFF REPORT: PRESCRIPTION DRUG PRICE DISCLOSURES § VI(C) (1975) [hereinafter FTC STAFF REPORT].

Significantly, legislation was proposed in 1982 and again in 1983 that would have applied expressly the state action exemption doctrine to the FTC, but apparently none of it was able to command sufficient support even to reach the floor of either house. S. 1714, 98th Cong., 1st

state action from antitrust enforcement actions does not apply as forcefully when the enforcer is a federal agency with public investigative capability, special expertise in the antitrust area, and the ability to weigh the state's interest before choosing to proceed against anticompetitive practices.³⁴⁴ Nonetheless, the FTC apparently has proceeded for some time on the assumption that the state action doctrine does limit its authority to prosecute persons it believes are engaged in unfair trade practices.³⁴⁵ Unless and until the FTC changes its view of the law on this score, it is not likely to initiate reform through this means.

On the other hand, the FTC has taken the position that its rulemaking authority is not limited by the state action exemption. Accordingly, it has asserted the authority to preempt inconsistent state laws, including those designed to regulate licensed professionals.³⁴⁶ This position is supported by the federal Court of Appeals for the District of Columbia in *American Financial Services Association v. Federal Trade Commission*:³⁴⁷ "[W]hile Congress did not intend the Commission's regulations to 'occupy the field,' it did intend FTC rules to have that preemptive effect which flows naturally from a repugnancy between the Commission's valid enactments and state laws."³⁴⁸ While Congress could limit the

Sess. § 2(a) (1983); H.R. 2970, 98th Cong., 1st Sess. § 4 (1983); see S. REP. NO. 215, 98th Cong., 1st Sess. 10, 26 (1983); H.R. REP. NO. 156, 98th Cong., 1st Sess. 7, 20 (1983). For the views of one FTC commissioner on the various proposals, see Calvani, *An FTC Commissioner's View of Regulating Lawyers*, 70 A.B.A. J. 70 (Aug. 1984).

344. Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 DUKE L.J. 225, 231; Note, *supra* note 343, at 731-37; see also 1 P. AREEDA & D. TURNER, *supra* note 210, at 115-18 (arguing that congressional willingness to preempt state law through the FTC is inferred due to the special characteristics of the FTC).

345. Massachusetts Furniture & Piano Movers Ass'n, 102 F.T.C. 1176, 1214-21 (1983); *FTC Authorization: Hearings Before the Subcomm. for the Consumer of the Senate Comm. on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. 17, 27 (1985) (remarks by James C. Miller III, Chairman, FTC); *Reauthorization of the FTC: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. 14 (1982) (remarks by James C. Miller III, Chairman, FTC) [hereinafter 1982 Hearings]; *FTC Activities Concerning Professionals: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 1st Sess. 17 (1981) (remarks by David A. Clanton, Acting Chairman, FTC) [hereinafter 1981 Hearings]; Clanton, *The FTC and the Professions*, 52 ANTITRUST L.J. 209, 212 n.12 (1983).

346. 1981 Hearings, *supra* note 345, at 17-18; FTC STAFF REPORT, *supra* note 343, § VI(B), (C). As commentators have pointed out aptly, the state action exemption doctrine is simply a branch of preemption law. P. AREEDA & H. HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 83-86 (Supp. 1987).

347. 767 F.2d 957, 989-90 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986). Several commentators have argued, however, that the federalism interests in this area should require a much clearer statement of congressional intent than is presently in the Federal Trade Commission Act before the FTC is held to be entitled to preempt economic regulation by the states. P. AREEDA & D. TURNER, *supra* note 210, at 118; Young & Troy, *supra* note 343, at 1266-68.

348. *American Fin. Servs.*, 767 F.2d at 989-90.

FTC's authority to regulate licensed professionals, attempts to do so have not been successful.³⁴⁹ Thus, the FTC might attempt to preempt inconsistent state court and legislative rules that bar nonlawyer participation in the business of law through the use of its rulemaking authority.

Such an initiative by the Commission would be bound to provoke criticism from the organized bar and the individual states, jealous to preserve their respective interests. At issue are important federalism concerns. The federal government should not act lightly to displace well-entrenched state laws, especially in those areas that the states have "a compelling interest" in regulating.³⁵⁰ It follows even more forcefully that a federal agency, acting under a general grant of rulemaking authority, ought to be very cautious in exercising its preemptive authority.³⁵¹

Nevertheless, the FTC is well situated to institute reform in this area. Unlike state courts and bar associations, the FTC has special expertise in the antitrust area and has the power to investigate the economic effects of the existing rules. If it concludes that reform is necessary, it can initiate a rulemaking proceeding. The strength of the rulemaking process is that it provides a full opportunity for state interests to be heard and considered by the FTC.³⁵² Moreover, any Commission action would need to be supported by substantial evidence in the rulemaking record.³⁵³ This standard of review would give the courts ample opportunity to ensure that state interests were considered fully and weighed before an FTC rule would be found to have preempted the state rule.³⁵⁴ With these protections in mind, the Commission should take the initiative and attempt to dislodge the states from their attachment to the business canons.

349. Verkuil, *supra* note 344, at 225-27. Legislation was introduced in 1982 and 1983 that would have exempted, to varying degrees, state-regulated professionals from FTC jurisdiction, including FTC rulemaking authority. Senate Bill 2499, for example, would have removed FTC authority "to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce . . . regulating the activity of any practitioners of a profession whose members are licensed and regulated by a State as a condition of independent practice within a State." S. 2499, 97th Cong., 2d Sess. § 3 (1982); *see also* 1982 Hearings, *supra* note 345, at 19-21, 32-35; 1981 Hearings, *supra* note 345, at 15-18, 22-27. These legislative initiatives were unsuccessful and the FTC's authority to preempt inconsistent state law has since been affirmed. *American Fin. Servs.*, 767 F.2d at 989.

350. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792-93 (1975).

351. Verkuil, *supra* note 344, at 243-47.

352. Note, *supra* note 343, at 745-48.

353. *American Fin. Servs.*, 767 F.2d at 985-88; 15 U.S.C. 57a(e)(3)(A) (1982).

354. Note, *supra* note 343, at 749-51.

(2) *Litigation Against the ABA*

One alternative to preemptive federal legislation or rules would be an antitrust suit against the ABA for its promotion of anticompetitive business restrictions. There are a number of advantages to this course of action. First, because the ABA is a voluntary association with no governmental status, it cannot claim the protection of the state action defense. Second, even though individual state courts and legislatures would retain the protection of the state action defense and could continue to adopt anticompetitive business restrictions, eliminating the ABA's influence in this area through a successful antitrust suit would be a potent stimulus to reform at the state level.

Nonetheless, there are several obstacles in an antitrust suit brought against the ABA. One issue would be whether the ABA's activities in adopting, distributing, recommending, and interpreting the Model Rules would be sufficient to constitute a violation of the Sherman Act or the Federal Trade Commission Act. This was also an issue in a 1976 suit against the ABA alleging that the activities of the ABA restricting lawyer advertising violated section 1 of the Sherman Act.³⁵⁵ An important aspect of the Justice Department's lawsuit was its allegation that the ABA actively policed its 1969 Code.³⁵⁶ The ABA publicly denied this allegation, noting that "the Association has no power to restrain advertising. It merely promulgates a model code of professional conduct for consideration by the state bodies regulating the practice of law."³⁵⁷ Moreover, in response to this lawsuit, the ABA took a number of steps to lessen the restrictive effect of its activities in addition to its specific change of the advertising rules. It eliminated the requirement that members abide by the ABA ethics code.³⁵⁸ It also made clear that its code was purely a model, and was not intended to bind any individual lawyer.³⁵⁹ The Justice Department concluded that these changes, together

355. *United States v. American Bar Ass'n* (D.D.C. June 25, 1976), *complaint reprinted in* 62 A.B.A. J. 979, 980 (Aug. 1976). The Justice Department's complaint against the ABA largely was rendered moot by the Supreme Court's decision in *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977), that the restrictions on lawyer advertising violated the first amendment.

356. The government intended to introduce evidence concerning the adoption of the restrictive code provisions and the ABA activities that enhanced and reinforced them, including: (1) the requirement that ABA members abide by the provisions; (2) the operation of a program of surveillance and review to ensure that lawyers' conduct conformed to the ABA Code; (3) the issuance of interpretive opinions at the request of members or local bar officials; and (4) the advocacy of the widest possible adoption of restrictive advertising rules by state regulatory agencies. *Justice Dep't, supra* note 216, at 1540.

357. *Press Statement of President Walsh*, 62 A.B.A. J. 981, 981 (Aug. 1976).

358. *Justice Dep't, supra* note 216, at 1540.

359. *Id.*

with repeal of the rules banning advertising, "substantially eliminated the A.B.A.'s policing efforts."³⁶⁰ Since the Justice Department dismissed this suit, the ABA has taken other action to protect itself from antitrust exposure. It has rescinded many of its "statements of principles," which purported to delineate what nonlawyers could and could not do in law-related areas.³⁶¹ It also has discontinued the publication of *The Unauthorized Practice News*³⁶² and terminated its Committee on the Unauthorized Practice of Law.³⁶³

These changes would be relevant in any allegation that the ABA continues to enforce its business canons. The activities that the ABA has continued to perform, however, in adopting, distributing, recommending, and interpreting the business canons might still be sufficient to constitute a violation of the Sherman Act or the Federal Trade Commission Act. In *Goldfarb v. Virginia State Bar* the Supreme Court acknowledged that the state ethics opinions on minimum-fee schedules threatened professional discipline for habitual disregard of the fee schedules.³⁶⁴ The Court went on to suggest, however, that enforcement activity was not necessary to establish a violation of the antitrust laws: "Even without that threat the opinions would have constituted substantial reason to adhere to the schedules because attorneys could be expected to comply in order to assure that they did not discredit themselves by departing from professional norms, and perhaps betraying their professional oaths."³⁶⁵ This statement by the Court has led one federal court of appeals to conclude that "even without coercive enforcement, a court may find that members of an association promulgating guidelines sanctioning conduct in violation of § 1 participated in an agreement to engage in an illegal refusal to deal."³⁶⁶ In the last five years, the ABA has been active in urging the retention of the business canons by adopting, distributing, and advocating its "new" Model Rules, which retained the business restrictions without significant change. This activity may contravene section 1 of the Sherman Act.³⁶⁷ It is even more likely that it would be held to be a

360. *Id.* at 1541.

361. *See supra* note 47.

362. Goldberg, *Message from the Chairman*, 40 UNAUTHORIZED PRACTICE NEWS iii (1977).

363. 109 REPORTS OF THE A.B.A. 601, 700 (1984).

364. 421 U.S. 773, 791 n.21 (1975).

365. *Id.*

366. *Wilk v. American Medical Ass'n*, 719 F.2d 207, 230 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984).

367. This suggestion is likely to be tested in the near future. On August 19, 1988, a private antitrust action against the ABA, and other bar organizations, was filed by a public interest group in Illinois federal court. *Lawline v. American Bar Ass'n*, No. 88C7203 (N.D. Ill. filed

violation of the Federal Trade Commission Act in an action brought by the FTC.³⁶⁸

Another difficulty that might arise in any action against the ABA to enjoin its promotion of the business canons would be the Association's inevitable assertion that the business canons are justified by the need to protect clients. The Supreme Court left the door open to such a justification of otherwise anticompetitive conduct by its observation in *Goldfarb* that "[t]he public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."³⁶⁹ In cases subsequent to *Goldfarb*, however, the Court has not been very receptive to such public safety or public health justifications for restrictive professional rules.³⁷⁰ Moreover, even if one assumes that the bar has restricted business associations between lawyers and nonlawyers in order to protect clients, there are much less restrictive ways of satisfying that concern than the outright ban presently contained in the rules.³⁷¹

A final impediment to any action against the ABA, however, would be its assertion that its activities are protected by the first amendment. Under the *Noerr-Pennington* doctrine, collective action by businesses and associations aimed at petitioning legislative bodies, administrative agencies, or courts for action that may have anticompetitive effects is protected broadly from liability under the antitrust laws by virtue of the first amendment.³⁷² This doctrine is intertwined closely with the state action exemption, because if the petitions directed towards government are successful, and government acts do adopt the anticompetitive recommendations of the petitioner, then the state becomes a supervening cause of any

Aug. 19, 1988). The suit alleges that the ABA and the other defendants have, among other things, violated the Sherman Act by "the enforcement of a concerted refusal . . . to deal with non-lawyers, paraprofessionals, and paralegals, in any capacity other than as employer/employee." *Id.* at para. 55.

368. The Supreme Court has made it clear that concerted conduct that falls short of being a Sherman Act violation nevertheless may constitute an "unfair method of competition" under the Trade Commission Act. *Federal Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 708 (1948). "A major purpose of that Act . . . was to enable the Commission to restrain practices as 'unfair' which, although not yet having grown into Sherman Act dimensions would most likely do so if left unrestrained." *Id.*

369. 421 U.S. 773, 788 n.17 (1975).

370. *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 463-64 (1986); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 696 (1978).

371. *See supra* section II.

372. *California Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

competitive injury.³⁷³ On several occasions, therefore, the doctrine has been extended to protect the lobbying of private trade associations that adopt industry-wide codes that depend for their efficacy on adoption by state and local governments.³⁷⁴

As already noted, the ABA now takes the position that its Model Rules are simply recommendations for action by state governmental bodies regulating the practice of law and that its activities in connection with the rules, therefore, are protected constitutionally.³⁷⁵ In the last ten years the ABA has curtailed most of its efforts to implement its ethics code without the assistance of public bodies. Indeed, if the ABA's experience with adoption of the Model Rules is any indication, its influence with state supreme courts is sufficiently pervasive that it really does not need to resort to private self-help measures.³⁷⁶ Thus, the challenge to any antitrust plaintiff would be to show that the ABA's activities extend beyond mere exercise of the right to petition public bodies. Certainly, the ABA's ethics opinions interpreting its rules are addressed not just to public officials, but to the bar as a whole.³⁷⁷ An antitrust action recently filed in Illinois against the ABA and other defendants alleges that the ABA also has sought to restrain trade by public speeches relating to lawyer association with paralegals.³⁷⁸ Whether such activities are sufficient to constitute an antitrust violation, however, may depend on whether they were intended to influence only lawmakers. That is a factual inquiry beyond the scope of this Article.

E. Constitutional Arguments

Even if an antitrust action against the ABA succeeded, however, this would leave the business canons intact in jurisdictions where they have been promulgated by state action. Barring congressional or, per-

373. See generally P. AREEDA & H. HOVENKAMP, *supra* note 346, at 10 (even if a private party persuades the government to act, the government's decision to act, as an independent choice, is a supervening cause).

374. *Sessions Tank Lines, Inc. v. Joor Mfg., Inc.*, 1986-1 Trade Cas. (CCH) ¶ 66,989 (C.D. Cal. 1986); *Rush-Hampton Indus. v. Home Ventilating Inst.*, 419 F. Supp. 19, 25 (M.D. Fla. 1976); *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833 (N.D. Ill. 1983).

375. *Press Statement of President Walsh*, 62 A.B.A. J. 981 (Aug. 1976).

376. See 1 *LAWYERS' MANUAL*, *supra* note 45, § 01:3-1:4 (Supp. Dec. 21, 1988) (indicating that as of Dec. 1988, 30 states had adopted the new Model Rules, including the business canons).

377. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356 (1988) (interpreting applicability of Rule 5.4 to nonlawyer placement agencies supplying lawyers to law firms), *digested in* 4 *LAWYERS' MANUAL*, *supra* note 45, at 427-29 (1989).

378. *Lawline v. American Bar Ass'n*, No. 88C77203, at 30-32 (N.D. Ill. filed Aug. 19, 1988).

haps, FTC action, such rules will remain immune under the antitrust laws. The question naturally arises, therefore, whether there are constitutional grounds for overturning the state restrictions. As we have seen, the Supreme Court ruled, in a series of four cases decided between 1963 and 1971, that civil rights groups and labor unions have the right to provide legal services to their members.³⁷⁹ The right was based on "the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments."³⁸⁰

Each of the groups involved in these cases was nonprofit, and each was an organization of members united by interests independent of the members' need for legal services. Nothing in the cases suggests, however, that the rights announced are limited to such member organizations. The Court itself, in summarizing the four cases, declared that "[t]he common thread running through our [four] decisions . . . is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."³⁸¹ Commentary, therefore, has suggested that these decisions may support a more general first amendment right to association that is shared by for-profit enterprises such as those discussed in this Article.³⁸² Such constitutional arguments seem to have been the principal justification given the House of Delegates in defense of the Kutak proposals for reform of the business canons.³⁸³

When similar arguments have been asserted in support of for-profit nonlawyer enterprises, they have been rejected summarily by state courts. In *Gold Shield, Inc.*, for example, the Ohio court rejected the petitioner's reliance on the four Supreme Court legal services cases on the ground that in those cases, the legal services activities of the organizations were "only incidental to their primary purposes and activities," whereas the whole purpose and existence of the petitioner was to provide legal services and monetary profits for the corporation and its principals.³⁸⁴ In *Consolidated Business and Legal Forms*, the Florida Supreme Court rejected without discussion the petitioner's claim that associational

379. See *supra* notes 172-75 and accompanying text.

380. *United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217, 221-23 (1967).

381. *United Transp. Union v. State Bar*, 401 U.S. 576, 585 (1971).

382. Billings, *supra* note 176, at 157.

383. See HOD Transcript, *supra* note 107, at 34-35, 40, 42-45 (remarks by Michael Frank, Dennis Archer, and William McCalpin).

384. *Cuyahoga County Bar Ass'n v. Gold Shield, Inc.*, 52 Ohio Misc. 105, 111-12, 369 N.E.2d 1232, 1236 (C.P. Cuyahoga County 1975).

rights arising out of the first amendment, such as were upheld in the Supreme Court cases, were involved.³⁸⁵

A careful reading of the Supreme Court's cases also gives little reason to suppose that the legal services cases can be read broadly enough to encompass for-profit legal service organizations. First, in *Button* the Court acknowledged the extensive case law striking down nonlawyer legal service arrangements in which there was an element of pecuniary gain that might interfere with rendering legal services.³⁸⁶ While the Court claimed to "intimate no view" on the merits of these decisions, it did distinguish carefully the facts in *Button* from these cases on the ground that "no monetary stakes are involved, and so there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor."³⁸⁷

Only months after *Button* was decided, the Court was asked to strike down as violative of due process and equal protection a Kansas statute prohibiting the business of debt collection by nonlawyers.³⁸⁸ In an opinion by Justice Black, who joined the majority in *Button* and wrote the majority opinions in all three of its progeny, the Court emphatically refused to consider the wisdom of the state legislation.³⁸⁹ It also concluded that the equal protection clause did not forbid the state from limiting debt adjusting to lawyers.³⁹⁰ The state legislation was upheld and there was no mention of the associational rights upheld in *Button*.

None of the Supreme Court opinions extending *Button* to labor unions gives any direct suggestion that the first amendment rights established there would apply to legal services organizations set up by nonlawyers for profit. Nor do any of the Court's other decisions address the issue. Two Supreme Court decisions in a related area, however, do have some significance. In *North Dakota Pharmacy Board v. Snyder's Stores*, the Court was asked to strike down as violative of due process a North Dakota statute that required a majority of shares of a pharmacy company to be owned by pharmacists.³⁹¹ The Court declined to do so, refusing to engage in "substantive due process" to review the wisdom of state legislation.³⁹² In another decision, the Court affirmed without opin-

385. *Florida Bar v. Consolidated Business & Legal Forms, Inc.*, 386 So. 2d 797, 801 (Fla. 1980).

386. *NAACP v. Button*, 371 U.S. 415, 441-42 (1963).

387. *Id.* at 443.

388. *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

389. *Id.* at 731.

390. *Id.* at 732-33.

391. 414 U.S. 156, 157 n.1 (1974).

392. *Id.* at 165-66.

ion the decision of a three judge court in *Garcia v. Texas State Board of Medical Examiners*.³⁹³ In *Garcia*, a Texas law that required at least some of the incorporators of a Health Maintenance Organization to be licensed to practice medicine in Texas.³⁹⁴ The petitioners challenged the statute under the *Button* line of cases, but the three judge court rejected the analogy. "These cases involved the question of . . . whether the membership had the right to engage in association for the advancement of legitimate beliefs and ideas. The *Mine Workers* case does not hold that a corporation can practice law and is not applicable to the case at bar."³⁹⁵ The Court held that the Texas legislature was entitled to enact such legislation "to preserve the vitally important doctor-patient relationship, and prevent possible abuses resulting from lay person control of a corporation employing licensed physicians on a salaried basis."³⁹⁶

While neither of these decisions directly relates to arrangements between lawyers and nonlawyers, they do suggest, as Professor Wolfram has observed, that the *Button* line of cases rests "more on litigational (petition of grievances) rights than on associational freedoms."³⁹⁷ The *Garcia* rejection of the *Button* line of cases, and its crediting of the same argument that is made in support of the prohibitions on nonlawyer involvement in the business of law, are particularly relevant. Taken together with the summary rejection of the first amendment arguments in the *Gold Shield* and the *Consolidated Business and Legal Forms* cases, these decisions do not offer much prospect for a constitutional remedy against the prohibitions of nonlawyer involvement in the business of law.

Conclusion

Today there is a widely recognized need and demand for innovative arrangements between lawyers and nonlawyers that would provide multidisciplinary services to the public, and that would provide infusions of capital to enable such organizations to serve the public better and more efficiently. Unfortunately, rules prohibiting lay involvement in the business of law remain on the books in practically every jurisdiction in the United States. In reviewing the origins and history of these rules, one cannot help but conclude that they owe their surprising tenacity more to the fact that they serve the profession's economic self-interest than to any valid public purpose. Ordinarily such a conclusion would dictate vigor-

393. 421 U.S. 995 (1975), *aff'g mem.* 384 F. Supp. 434 (W.D. Tex. 1974).

394. 384 F. Supp. at 436.

395. *Id.* at 440.

396. *Id.*

397. C. WOLFRAM, *supra* note 12, at 901.

ous challenges to the rules based on the antitrust laws. These challenges might succeed against the ABA, and even against state and local bar associations that act without the sanction or mandate of the state. Insofar as they are aimed at state court or legislative rules, however, such challenges are doomed to fail because of the state action immunity doctrine.

This leaves only three serious avenues for reform. The first is the federal government. Only the FTC or Congress is able to displace the lawyer monopoly on any systematic basis. Federal action would have the advantage of immediately providing a unified rule for the legal profession that comports with the antitrust laws that apply to most other kinds of business activity.

The second avenue for reform is the ABA. Unfortunately, the ABA has never been a leader of reform in this area, and in 1983 the House of Delegates rejected the Kutak proposal that would have permitted non-lawyer involvement in the business of law. Nevertheless, if sufficient pressure is put upon the ABA by its membership, by the public, and, perhaps, by the federal government, it could be persuaded to take a second look at the Kutak proposal for reform of the business canons.

Finally, reform may come from the individual states. The state courts should reevaluate the business canons in light of the needs of contemporary society and recognize the need for change. While reform by the state courts would not offer as quick or as unified a response to this societal need as would federal reform or the leadership of the ABA, it would offer the opportunity for experimentation with a variety of business rules that are less restrictive than those that have been in force for the last sixty years.

It is only a matter of time before the business canons will be changed to meet the needs of contemporary society. Change may come as a result of federal preemption. It may come as a result of litigation and public outcry against the legal monopoly. Or it may come as a result of leadership by the bench and bar. The legal profession has always had something of a tarnished reputation with the public. Perhaps if lawyers were to take the initiative and acknowledge that they are prepared to work with others as full partners that reputation would be improved.