Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate The Future of the Profession: A Symposium on Multidisciplinary Practice

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The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate

Bruce A. Green†

I. INTRODUCTION

Many of the legal profession’s disciplinary rules are of venerable lineage. For example, the provisions of contemporary disciplinary codes concerning conflicts of interest1 derive from the 1908 Canons of Professional Ethics (Canons), which, in turn, can be traced back to late nineteenth century state ethics codes,2 to mid-nineteenth-century lectures and writings,3 and to

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1. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).
3. See, e.g., DAVID HOFFMAN, A COURSE OF LEGAL STUDY 753 (2d ed. 1836), reprinted in SHAFFER, supra note 2, at 114; GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 109-10 (5th ed. 1884). See generally Russell G. Pearce, Rediscovering the Republican Origins of the Legal Ethics Codes, 6 GEO. J. LEGAL ETHICS 241 (1992) (describing the influence of Sharswood's
earlier common-law agency principles. Although lawyers today disagree about what the precise contours of the conflict rules should be, these rules embody basic principles of loyalty, competence and confidentiality that are fundamental, traditional, and universally supported by lawyers. These are defining principles for the practice of law. They are among the core values of the legal profession.

The same cannot be said of the principles underlying the particular disciplinary rules that lie at the center of the debate about multidisciplinary practice. These rules are of relatively


5. For example, there is disagreement about whether the conflict rules should allow for screening. See Green, supra note 4, at 118 n.173 (citing commentary).

6. The current debate about multidisciplinary practice was sparked by the work of the Big Five accounting firms which employ thousands of lawyers to assist in rendering services to their clients. It led the American Bar Association to appoint a Commission to study and make recommendations concerning the subject. See COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS’N, REPORT (1999), available at <http://www.abanet.org/cpr/mdpreport.html> [hereinafter REPORT].

The debate appears to be close kin to one waged several years ago on the subject of “ancillary businesses”—that is, whether and under what circumstances lawyers and law firms should be able to provide law-related services such as selling insurance, lobbying, preparing tax returns, providing counseling, or providing such services as financial planning or accounting. See generally Dennis J. Block et al., Model Rule of Professional Conduct 5.7: Its Origin and Interpretation, 5 GEO. J. LEGAL ETHICS 739 (1992); Stephen R. Ripps, Law Firm Ownership of Ancillary Businesses In Ohio—A New Era?, 27 AKRON L. REV. 1 (1993); Ted Schneyer, Policymaking and the Perils of Professionalism: The ABA’s Ancillary Business Debate as a Case Study, 35 ARIZ. L. REV. 363 (1993).

In truth, the idea of multidisciplinary practice is nothing new, and credit for the idea goes to the solo practitioners, who for years have contemplated bringing legal assistance and other forms of professional assistance under one roof, either by themselves engaging in dual professional practice—that is, practicing law in conjunction with another profession, see generally LAWRENCE J. RAIFMAN & JEAN A. HINLICKY, ETHICAL ISSUES IN DUAL PROFESSIONAL PRACTICE 1 (1982)—or by entering into a formal arrangement with a member of another profession to provide legal services and other professional services to their clients. As this Article discusses, ethics rules, as drafted by the American Bar Association (ABA) and interpreted by bar association ethics opinions, blocked their way, however. For more than 80 years, bar committees
recent vintage. They provide that lawyers may not be employed by a corporation to render services to third parties,7 that lawyers and nonlawyers may not enter into partnerships to render legal services,8 that lawyers may not share legal fees with nonlawyers,9 and that lawyers may not aid nonlawyers in the unauthorized practice of law.10 The premise of these rules is essentially that, when lawyers practice law, they must avoid the corrupting influence of nonlawyers (other than, of course, their own clients); clients are best served by lawyers who preserve their "professional independence" by avoiding unholy alliances with the laity.11

Although this principle, equating professional independence with professional isolation, is neither fundamental, nor defining, nor universally shared by lawyers, those who oppose multidisciplinary practice rally under the banner of core values. Their argument is not that the restrictions embody core values, but that they protect core values such as "independence of judgment, loyalty to the client, preservation of confidences, competence, avoiding improper solicitation, and support for pro bono activities and improving the legal system."12 They raise the specter that, if the disciplinary restrictions are loosened to allow lawyers to ally more freely with other professionals—for example, to allow lawyers to practice law as partners and employees of accountants, or to allow elder law attorneys and social workers to become partners—lawyers are likely to succumb to the improper influence of their nonlawyers allies, sell out their clients, divulge client confidences, represent clients ineptly, violate solicitation rules, and disregard their public obligations. Opponents argue that, at the very least, advocates of

have consistently held that lawyers' rules of professional conduct foreclose multidisciplinary practices and partnerships, thereby discouraging individual lawyers from either personally rendering multiple professional services or teaming up with accountants, social workers, real estate and insurance brokers, and other licensed professionals and business people. See infra notes 97-153 and accompanying text.

8. See id. Rule 5.4(b).
10. See id. Rule 5.5(b).
reform should have the "burden of proof" on the question of whether the profession's core values could be preserved under a less restrictive regulatory regime. So far, the organized bar has tended to accept this argument, challenging proponents of multidisciplinary practice to prove that lawyers who ally with accountants or other professionals will continue to adhere to the legal profession's most fundamental norms.¹³

Perhaps it would be fair to assign reformers this burden if the applicable disciplinary restrictions had been devised in response to demonstrated harm caused by nonlawyers' exercise of influence over lawyers. A presumption in favor of the existing rules might also be warranted if the actual motivation for the restrictions had been to protect the legal profession's basic values rather than to thwart competition, or if the need for restrictions of this nature could fairly be characterized as a matter of popular wisdom, given the persuasiveness of the core values rationale for the restrictions or, at the very least, the legal profession's undivided and undeviating adherence to this rationale. As this Article discusses, however, the restrictions on multidisciplinary practice and the core values rationale for them have a more equivocal history.

II. THE STATUTORY ANTECEDENT TO THE CONTEMPORARY DISCIPLINARY RESTRICTIONS: NEW YORK'S EXCLUSION OF CORPORATIONS FROM THE PRACTICE OF LAW

At the turn of the twentieth century, when the ABA drafted its first ethics code, the Canons,¹⁴ the ABA did not identify a professional obligation to avoid lay influence. Yet, the disciplinary rules that now restrict multidisciplinary practice do have early analogues. For example, in 1768, Boston

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¹³. On August 10, 1999, the ABA House of Delegates adopted a resolution sponsored by the Florida Bar providing:

RESOLVED, That the American Bar Association make no change, addition or amendment to the Model Rules of Professional Conduct which permits a lawyer to offer legal services through a multidisciplinary practice unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients.


¹⁴. CANONS OF PROFESSIONAL ETHICS (1908).
lawyers agreed on a set of rules for self-governance that included a pledge not to assist in the prosecution of actions brought by individuals who were not regularly admitted to practice law in the county. But the common-law judicial decisions, the writings of nineteenth-century lawyers, and the late nineteenth-century state ethics codes were essentially silent on this subject of professional associations between lawyers and laymen and, consequently, the original Canons contained no provision specifically addressing it.

Although the general concern about professionalism underlying the eventual restrictions animated many of the original Canons, the particular concern about lawyer-nonlawyer alliances was just bubbling to the surface as the Canons neared completion. The impetus was the practice of law by corporations. In 1908, it was apparently a hornbook principle of agency law that corporations could employ lawyers to represent

15. See Suffolk County Bar Book 1770-1805, at 10 (1882). The lawyers agreed that:

The gentlemen of the bar of the county of Essex esteeming it detrimental to the public, that persons not regularly admitted and sworn as attorneys should receive the countenance of the barristers and attorneys who are of this county and are regular practisers, agree unanimously that they will not enter, argue, or in any manner assist in the prosecution of actions brought by such persons without the consent of the bar.

Id. The restriction appears to apply equally to attorneys practicing in other counties as well as to nonattorneys.

16. This is unsurprising given that, in the nineteenth century, restrictions on nonlawyers' practice generally did not extend much beyond courtroom representation and barriers to entry into the legal profession were low. Since anyone could provide legal assistance outside the courtroom and virtually anyone could qualify to do so inside the courtroom, the distinction between lawyers and nonlawyers was not of great significance. The late nineteenth century "professionalism project" began with efforts to raise the standards for qualifying for a law license and to expand the areas of practice from which nonlawyers would be excluded. Only in the early twentieth century, as the distinction between lawyers and nonlawyers became of increased practical importance, did the organized bar focus on lawyers' professional relationships with nonlawyers.


18. Analogous concerns associated with the rise of the medical profession at the turn of the century led to both American Medical Association ethical restrictions and state statutory restrictions on doctors' associations with corporations. See generally Jeffrey F. Chase-Lubitz, The Corporate Practice of Medicine Doctrine: An Anachronism in the Modern Health Care Industry, 40 Vand. L. Rev. 445 (1987). The medical profession was forced to liberalize its restrictions in the mid-1970s because of the Federal Trade Commission's application of the antitrust law. Id. at 475-78.
third parties in litigation.\textsuperscript{19} The following year, however, at the bar's prompting, New York adopted a penal law designed to remove corporations from the field of law.\textsuperscript{20} The new law made it a misdemeanor for a corporation to practice law, "to render or furnish legal services or advice, or to furnish attorneys or counsel or to render legal services of any kind."\textsuperscript{21}

Samuel Marsh, a New York lawyer, received credited for originating this legislation.\textsuperscript{22} In a letter to the editor of the New York Law Journal published on February 26, 1909, Marsh called attention "to the unusual activity of several business corporations in soliciting and obtaining agreements retaining them to institute and prosecute legal proceedings for the collection of claims of various kinds . . . ."\textsuperscript{23} Marsh urged state and local bar associations to "lose no time in securing amendatory legislation" to remove corporations from the field.\textsuperscript{24}

When he wrote the letter, Marsh claimed no personal familiarity with the actual practice of corporations that had entered the field of law. His understanding was based on his review of one corporation's certificate of incorporation and on newspaper advertisements for corporations offering to provide assistance on legal matters.\textsuperscript{25} What prompted his letter was an appellate decision reported about a week earlier referring to a corporation that had undertaken to prosecute condemnation proceedings on behalf of another party.\textsuperscript{26} The court had been indifferent to the corporation's role.\textsuperscript{27}

Marsh asserted that the corporations' work was unlawful under existing statutes which provided that only duly licensed
attorneys were permitted to represent parties to a litigation.\textsuperscript{28} He did not presuppose, however, that the corporations' clients were receiving advice from laymen or that laymen were appearing on clients' behalf in court. On the contrary, he acknowledged that the corporations hired licensed attorneys to conduct the litigation and appear as counsel of record.\textsuperscript{29} But Marsh insisted that this merely aggravated the illegality.\textsuperscript{30} He argued that even if the legal work was handled by lawyers on their staff, the corporations were, in effect, practicing law, contrary to statutory provisions which confine legal practice to individuals who have studied law, passed rigorous examinations as to their legal knowledge and character, and submitted to judicial regulation.\textsuperscript{31}

As commentators have noted, this argument was logically unsound.\textsuperscript{32} Although lawyers were allied with corporations, in that the lawyers were employed by them or contracted with them to receive referrals, it did not follow that the corporations were "practicing law." Corporations did not appear in court—licensed attorneys did. The corporation's function was to attract clients and refer them to lawyers. That function could not have comprised the practice of law even under the broadest definition. In those days, the bar expected lawyers to obtain clients primarily by word of mouth—that is, through lay referrals. While the corporations, unlike friends and neighbors, may have profited by recommending lawyers, it does not follow

\textsuperscript{28} See id.

\textsuperscript{29} See Petitioner's Brief, supra note 22, at 5.

\textsuperscript{30} See id.

\textsuperscript{31} See id. Marsh noted:

It seems to me very strange ... that three or more persons who may never have had a law book in their hands, whose character may never have been subjected to the scrutiny of any court or other body, may, by merely signing and filing a certificate of incorporation ... become entitled to appear in judicial proceedings and conduct any litigation.

\textit{Id.} This argument was disingenuous since, as Marsh knew, it was lawyers who appeared in court and conducted the litigation.

Marsh also reasoned that the corporations' lawyers lacked legal authority to appear in court on behalf of the parties because the parties did not deal directly with the lawyers. See id. This argument was later to be abandoned in the face of the corporations' explanation that they merely referred lawyers to their subscribers, and that the lawyers in fact interacted directly with the clients. See infra notes 36, 38.

\textsuperscript{32} See I. Maurice Wormser, Frankenstein Incorporated 164 (1931) ("If corporations . . . are to be excluded from [the practice of law], the justification for doing so must be rested not on logic or sound theory but upon considerations of public policy and general welfare."); Andrews, supra note 11, at 600-01 (dismissing the argument as "spurious" and "facile").
profited by recommending lawyers, it does not follow that they were practicing law in doing so. Nonetheless, in the months that followed, the idea that by making referrals corporations were indirectly practicing law became the cornerstone of the bar's effort to beat back corporations that were encroaching on its turf.33

A mere two months elapsed from Marsh's call to arms until the New York legislature acted,34 by which point several existing corporations took alarm. These were well-capitalized companies which boasted reputable directors. They employed staff counsel to provide legal advice to clients or referred the clients to private lawyers. The companies did not believe that they represented the "evils" against which the legislation was directed.35 At least one of them, the Credit Clearing House, sent a representative to public hearings on the bills in an effort to dissuade Governor Charles Evans Hughes, the future Chief Justice of the United States, from signing them into law.36 Two

33. In later years, this argument remained a mainstay of the bar in its efforts against corporate involvement in the legal field. See, e.g., REPORT OF SPECIAL COMMITTEE OF THE CONFERENCE OF BAR ASSOCIATION DELEGATES TO PREPARE A BRIEF FOR THE USE OF STATE AND LOCAL BAR ASSOCIATIONS 5 (1920) [hereinafter REPORT OF SPECIAL COMMITTEE] ("That a corporation cannot practice law is axiomatic. It is not a natural person, it possesses neither learning, good character, nor capacity to take an oath, or to preserve and occupy a personally confidential relation with a client."); Definition by the Special Committee of the New York State Bar Ass'n, in REPORT OF SPECIAL COMMITTEE, supra, at 53 ("If the actual service of a lawyer is rendered in the performance of the task, the layman furnishing such service is practicing law—he is offering the service of persons presumably qualified to give expert advice in the field of law.").

34. Two bills were drafted, offered to the intermediate appellate court in Manhattan for review, modified slightly (apparently in response to the concerns of title companies and legal aid societies), then introduced by two members of the state assembly in March 1909. The legislature passed the laws in April 1909 in the waning hours of the legislative session without committee hearings and, apparently, without much fanfare. See Petitioner's Brief, supra note 22, at 2-6 (describing legislative history).

35. See Transcript of May 14, 1909 hearing upon Assembly Bill, number 1890, entitled "An Act to Amend the Penal Law, in Relation to Corporations Practicing Law" [hereinafter Transcript], in Petitioner's Appeal from Order at 23, In re Co-Operative Law Co., 92 N.E. 15 (N.Y. 1910) [hereinafter Appeal] (testimony of a representative of the Credit Clearing House) ("They are aiming at an evil which we all agree is an evil. They have provided a law in its terms so broad that it strikes down perfectly legitimate business as well as illegitimate business.").

36. As described by its representative, the company had been in business for half a century, had "a capital and surplus of eight hundred thousand dollars, and... men like Clarence Whitman and Sir Frederick Bordon as direc-
others, the Co-operative Law Company\textsuperscript{37} and the Associated Lawyers' Company,\textsuperscript{38} would later become the subject of litigation concerning the new law.\textsuperscript{39}

It was unclear whether the statutes were in fact directed at these companies. If Marsh, the legislative sponsors, the legislators who voted for the bill, or Governor Hughes meant categorically to remove established corporations such as these from the field of law, they may never have publicly owned up to it.

37. According to its court filings, the Co-operative Law Company was incorporated in 1901 for the purpose of "furnish[ing] to its subscribers legal advice and service" and, in connection with this, "operat[ing] . . . a staff of competent attorneys and counselors-at-law to give such advice; and to prosecute or defend, through such counsel, any claim or suit entrusted to its care by subscribers." Appeal, \textit{supra} note 35, at 5-6. Its officers and directors included bank officers, a physician, an officer of a grocers' association and a manufacturers' association—all chosen, according to the company, "from the prominent banking, commercial and professional interests of the city"—and its attorneys were said to be "men of ability and professional standing." \textit{Id.} at 6-8. As the company described its practice, subscribers paid a $10 annual fee which entitled them to receive legal advice from lawyers furnished by the corporation. \textit{See id.} at 8. Subscribers could then retain the company's lawyers for additional legal services as needed. The company's legal staff "transact[ed] . . . a general law business, including the prosecution and defence of suits; incorporation of business enterprises; drawing of contracts, leases and agreements; drawing and probating of wills, management of estates, etc." \textit{Id.} A significant aspect of this law practice related to "the collection of claims," including both the prosecution and defense of lawsuits to collect on debts. \textit{Id.} at 8-9. Litigation was brought or defended in the name of the company's managing attorney, not the company itself. \textit{See id.} at 9. The company's board of directors did not interfere in "the confidential relations of counsel to client," but supervised and controlled "matters of general policy" such as "the general schedule of fees for legal services," thereby "insur[ing] to clients of the Company efficient legal service at equitable rates." \textit{Id.} at 8.

38. The Associated Lawyers' Company was incorporated "to do a general law and collection business" and had a capital stock of $125,000. \textit{In re} Associated Lawyers' Co., 119 N.Y.S. 77, 77-78 (App. Div. 1909). All but five of its stockholders were practicing lawyers. \textit{Id.} The company's filings indicated that it employed as many as 6,000 practicing lawyers in various parts of the country, and "when suits need[ed] to be brought, they were entrusted specifically to lawyers who appear[ed] in their own name." \textit{Id.}

Indicating to the contrary was a letter secured by the Co-operative Law Company's managing attorney from the chairman of the Assembly Codes Committee a few days before the gubernatorial hearing. A provision of the penal statute could easily have been read to "grandfather" the reputable, established corporations, and perhaps even to allow the incorporation of new ones, subject to judicial approval. It appears that, as originally drafted, the law included a single exception for corporations "lawfully engaged in a business authorized by the provisions of any existing statute." As ultimately enacted, the exception extended, additionally, to corporations that examined and insured titles to real property, corporations that employed in-house lawyers to represent the corporation itself, and "organizations organized for benevolent or charitable purposes" to "assist[] persons without means in the pursuit of any civil remedy . . . whose existence, organization or incorporation may be approved by the appellate division," the state's intermediate appellate court. Although this exception was ambiguous, conceivably it would have allowed existing companies to obtain judicial approval to continue to direct business to lawyers. It might even have been read to allow a new corporation, established for a legitimate purpose other than the practice of law, to seek approval to direct business to lawyers incidental to its primary function. In either case, the courts might have established licensing standards for corporations and a mechanism for enforcing them, thereby subjecting the corporations to a regulatory regime comparable to the attorney licensing process.

40. The letter, included in the company's filings in the Court of Appeals, stated: "I am surprised to learn that any of the provisions of this bill will in any way hamper the work which the Co-operative Law Company has been doing since its organization in 1901. I have had ample opportunity to become acquainted with that work, and I most certainly would not have approved the . . . bill had I thought it would hamper your work." Appeal, supra note 35, at 14-15 (quoting letter of Assemblyman Charles F. Murphy).

41. Petitioner's Brief, supra note 22, at 4.

42. N.Y. PENAL LAW § 280 (1909).

43. Cf. Transcript, supra note 35, at 23 (testimony of a representative of the Credit Clearing House). The representative suggested that regulatory concerns about law practice by legitimate corporations: can be taken care of by providing that the organization of these companies shall be subject to the Supreme Court in the same way as the organization of charitable institutions, and if need be we should have
At a public hearing in the state capital, Governor Hughes expressed his plain understanding that an appellate court could authorize an established corporation to continue its work if the corporation was "lawfully engaged in its business, provided it obtains approval of the Appellate Division."44 Dismissing corporate representatives' fear that only legal aid societies would be able to seek judicial approval, Hughes observed, "[s]tarting with this being a penal statute, and taking the ordinary meanings of construction as they would be applied in the ordinary case directed against an alleged misdemeanor, I do not see at the moment any answer to the matter."45 Samuel Marsh, who was present at the hearing, concurred in this interpretation, stating, "I have no desire to interfere with anybody's legitimate business, and able counsel can very well conform to existing law."46 Neither Hughes nor Marsh suggested any reason why courts might lack authority to approve the ongoing existence of companies like those whose representatives appeared at the hearing. On the other hand, perhaps cagily, neither man affirmed that these companies should be granted judicial approval.

It was left to the state courts to determine whether to exempt established companies from the penal law's reach, and at first it appeared they would do so. In June 1909, three months before the law went into effect, the intermediate appellate court in Brooklyn, New York, authorized the Co-operative Law Company to continue its business pursuant to the terms of its certificate of incorporation.47 Four months later, however, the Manhattan appellate court, which had previously vetted the law, denied similar approval to the Associated Lawyers' Company.48 Contrary to Governor Hughes, it reasoned that "the only authority given to this court is to approve 'organizations organized for benevolent or charitable purposes,'"49 thereby rendering meaningless the exception for corporations whose business had been authorized by an existing statute. The court

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44. Id. at 18 (statement of Governor Hughes).
45. Id. at 25.
46. Id. at 24 (testimony of Mr. Marsh).
47. See In re Co-operative Law Co., 92 N.E. 15, 16 (N.Y. 1910).
49. Id. at 78 (quoting NEW YORK PENAL LAW § 280 (1909)).
opined that it had never been legal for a corporation "to procure attorneys for the transaction of the law business of its clients," and the statute did nothing more than eliminate doubts on that score.\(^5\) With the Manhattan court's opinion in hand, Charles J. McDer\-mott, the chairman of the Brooklyn Bar Association's Committee on Grievances, moved personally and on the bar's behalf to vacate the Brooklyn court's order in favor of the Co-operative Law Company.\(^5\)

As the case wended its way to the state's highest court, the bar's anticompetitive motivations came to the fore. McDer\-mott's primary concern was that the corporations' work "is disadvantageous and unfair to me as a practising member of the bar of this state and others similarly situated" who had spent "both time any money" to obtain a law license.\(^5\) The principal unfairness he identified was that corporations could obtain clients by advertising, while it was not "proper" for lawyers to do so.\(^5\)

\(^{50}\) Id.

\(^{51}\) See In re Co-operative Law Co., 120 N.Y.S. 1120 (App. Div. 1909); Appeal, supra note 35, at 31 (affidavit of Charles J. McDer\-mott).

\(^{52}\) Appeal, supra note 35, at 34 (affidavit of Charles J. McDer\-mott). He argued:

[All]owing said Co-operative Law Company to conduct [its] business is disadvantageous and unfair to me as a practising member of the bar of this state and others similarly situated, in that such a corporation is able, by means of its corporate capacity, powers, and associations, to solicit and advertise for business and thus in a manner and to an extent, not proper or possible in the case of an individual lawyer, to obtain business, and to have work of a legal character performed by persons not admitted to practise law in this state. . . . I, as well as other members of the bar of this state, have been required to pass an examination and to have educational and other qualifications requiring a fixed period of study and the expenditure of both time and money, before obtaining a license to practise law in this state; whereas said Co-operative Law Company is now and have been in fact practising law without any preliminary qualification except the observance of the formality of incorporation and the making of an application to this Court.

\(^{53}\) Id. The quoted passage reflects two additional concerns. The first is that corporations assigned legal work to individuals who were not members of the state bar (here, it was unclear whether the complaint was about work performed by laymen, by out-of-state lawyers, or both). The other was that the mechanism for authorizing corporations to practice—namely, incorporation and court authorization—were not as effective as the attorney licensing process to ensure that the corporation was qualified to render the services it offered. There was no suggestion, however, that clients were less well served by the lawyers whom the corporation furnished than by lawyers whom the client might have retained directly.
Insofar as the corporations simply earned income by marketing lawyers’ services, it is not inevitable that their work would have been economically disadvantageous to lawyers. Conceivably, lawyers who otherwise would have been waiting idly for clients to walk in the door, or who would have spent uncompensated time marketing themselves in the indirect ways then permitted, would receive a steadier stream of clients. If they did not use the referrals solely as a way to attract clients for their nonlawyers services, the corporations might have profited from this service, but the lawyers would not necessarily have been disadvantaged. In effect, lawyers would have transferred the distasteful marketing function to corporations, which could perform it more efficiently, thereby leaving lawyers in the same or better financial condition and, at the same time, promoting professionalism by reducing lawyers’ role as business getters. Lawyers (or some lawyers) would have been disadvantaged only if, as might be anticipated, corporations used their bargaining power to drive down lawyers’ fees.

Although McDermott complained that the bar was at the mercy of corporations, in large measure the competition he feared was internecine: The segment of the bar that as a matter of professionalism would not accept referrals from corporations was at a competitive disadvantage vis-à-vis the “unprofessional” segment of the bar that was disposed to do so. His motion was another iteration of the professional elite’s efforts

54. For example, the lawyers may have paid the corporations for the referrals, shared a portion of their fees, or simply agreed to accept moderately lower fees from clients who were referred (thus allowing corporations to profit by charging clients a fee for making the referrals).

55. To the extent that they were dealing with individual clients, lawyers in a community—although in competition with each other—might collectively keep fees at a certain level, rather than lower their fees in order to secure business. This could have been achieved informally, as it arguably is today by personal injury lawyers who insist on a “standard” percentage in contingent-fee representation. See generally Lester Brickman, ABA Regulation of Contingency Fees: Money Talks, Ethics Walks, 65 FORDHAM L. REV. 247 (1998) (describing ABA Ethics Committee’s response to letter requesting advice about standard contingency fees in personal injury cases); Herbert M. Kritzer, The Wages of Risk: The Returns of Contingency Fee Legal Practice, 47 DEPAUL L. REV. 267, 287-88 (1998). This could even have been achieved formally via bar-association-recommended “fee schedules,” until the Supreme Court found the practice to be in violation of antitrust law. See generally Thomas D. Morgan, The Impact of Antitrust Law on the Legal Profession, 67 FORDHAM L. REV. 415 (1998). The professional cartel would have been less likely to withstand the bargaining power of corporations, which might promise a steady stream of clients to lawyers who lowered their fees, or the promise of economic security to a lawyer who would serve as a salaried employee.
early in the twentieth century to stave off competition through professional regulation.

It is no coincidence that advertising was at the heart of McDermott’s lament. As Jerold Auerbach has described, the Canon prohibiting lawyers from advertising, along with several others regulating lawyers’ role in the marketplace, reflected the class biases of the professional elite who controlled the bar associations; it was particularly directed at “struggling metropolitan solo lawyers”—increasingly, “foreign born lawyers,” regarded by the bar as of “inferior character”—“who worked in a highly competitive urban market with a transient clientele” and whose livelihood therefore depended on their ability to market their services. Like the ethical ban on advertising, the statutory ban on corporate law practice prevented foreign-born urban lawyers of supposedly inferior character from using offensive business practices to snatch clients away from well-bred lawyers who had the financial means to wait for clients to call and the social connections to ensure that clients would do so.

After the intermediate appellate court granted the bar’s motion and the Co-operative Law Company appealed to the state’s highest court, Samuel Marsh contributed a thirty-four-page memorandum of law explaining and defending the state legislation, thereby offering the most complete picture of the thinking behind the legislation. As before, Marsh drew on

56. JEROLD S. AUERBACH, UNEQUAL JUSTICE 43 (1976). For an examination of the professional elite’s hostility toward the urban personal injury bar in particular, see EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY 150-54 (1992).
57. AUERBACH, supra note 56, at 48.
58. Id. at 42-49. Auerbach explained:
The prohibition . . . instructed lawyers that success flowed from their “character and conduct,” not from aggressive solicitation. It thereby rewarded the lawyer whose law-firm partners and social contacts made advertising unnecessary at the same time that it attributed inferior character and unethical behavior to attorneys who could not afford to sit passively in their offices awaiting clients[]
Id. at 43.
59. See id.
61. See Appeal, supra note 35, at 1-2.
62. The memorandum was appended to a short brief filed by the state Attorney General, who had entered the case in support of the bar association’s position. See, Samuel Marsh, In re Rendition of Legal Services and Practices of the Law by Business Corporations (1909) [hereinafter Marsh, Rendition of
advertisements in the daily newspapers and stock certificates to set the stage against which the legislation was enacted.63 By 1909, according to Marsh, a very large number of corporations had been formed in New York State, and especially in New York City, for the purpose of rendering legal services.64 Marsh was far from explicit about why corporations' role in helping clients secure legal services should be a matter of public concern. He identified no cases in which the corporations' subscribers or "clients" had complained or been harmed.

To the extent that Marsh expressed his concerns explicitly, like McDermott, he saw the primary evil as unfair competition. Explaining the need for legislation addressing corporate involvement in the field of law, Marsh wrote:

Such legislation is of special importance to young men, ambitious to become lawyers through the methods prescribed by existing laws and to those who have obtained the necessary license and have taken up the practice as a profession. Corporations, such as have been heretofore described, present new, and to young lawyers, almost insuperable barriers to success.65

Legal Services], in Brief on Behalf of Attorney General, In re Co-operative Law Co., 92 N.E. 15 (N.Y. 1910).

63. See Marsh, Rendition of Legal Services, supra note 62, at 2-11.

64. According to Marsh, while some corporations provided general legal services, others confined themselves to specialized services or litigation, such as handling personal injury claims, collecting debts for merchants, conducting condemnation proceedings, or aiding in the administration and settlement of estates. Id. at 2. Some limited their practice to the city or the state, while others transacted business nationally. See id.

65. See id. at 26. Marsh's only other explicit concern applied principally, if not exclusively, to corporations rendering legal services through nonlawyers as distinguished from those furnishing lawyers to their customers. His argument was that members of the public may be misled to believe that they receive more protection by seeking legal services from a corporation than from a lawyer. See id. at 27. Marsh reasoned that the general public may think that certificates of incorporation have:

as much, if not greater, force as to [the corporations'] competency and legal right to do business as the certificate of admission or license of an attorney by the Supreme Court, while their apparent possession of capital . . . is also naturally accepted as showing a responsibility to a 'client' which few of the attorneys yearly admitted, or in fact most of all engaged in practice whenever admitted, possess.

Id. at 27. He argued that clients who deal with corporations are in truth "less protected" than those dealing directly with lawyers, since the court cannot summarily punish a corporation or attach its funds, as the court may with a lawyer. Id. This argument would not have applied with much force to a corporation that simply furnished legal assistance to its customers through staff lawyers or contract lawyers, since the lawyers themselves would be subject to judicial regulation—including disbarment—for improper acts. Moreover, at least as to these corporations, an outright ban on the delivery of legal services,
Marsh's reference to young men who took up "the practice [of law] as a profession" was telling, given the perennial debate over whether law is a "profession" or a "business." His implication was that the lawyers who regarded law as a profession would lose out to those who, treating law as a business, allied with profit-seeking corporations that touted lawyers' availability. The point was later made less subtly by Julius Henry Cohen, a prominent New York lawyer and public opponent of the corporations, in the form of a parable about the well-bred country lawyer and his low-borne city counterpart.

rather than more stringent regulation, would obviously have been overkill.


67. See ANDREW L. KAUFMAN, CARDozo 99 (1998). According to his obituary in 1950, Cohen was born in Brooklyn, New York in 1873, graduated from New York University in 1896, and was admitted to the New York Bar the following year. See Julius Cohen, 77, Lawyer 53 Years, N.Y. TIMES, Oct. 7, 1950, at 19. He served as counsel for the Transit Reform Committee of 100 from 1900 to 1905, as counsel for the Merchants Association, and from 1917 to 1942, as counsel to the New York Port Authority and its predecessor commission. See id. He was credited with promoting the arbitration of labor disputes in the garment industry beginning around 1910, served in various government positions, and was active in several bar associations. See id.; see also THOMAS ALPHEUS MASON: A FREE MAN'S LIFE 297-315 (1946) (describing Cohen's role in 1910 representation of garment manufacturers' association in labor dispute). Today, Cohen may be best remembered in legal academic literature for his role as chief spokesman in support of the Federal Arbitration Act. See generally JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW (1918); Julius Henry Cohen & Kenneth Dayton, The New Federal Arbitration Law, 12 VA. L. Rev. 265 (1926).

68. See generally Julius Henry Cohen, The Illegal Practice of the Law vs. The Unprofessional Practice of the Law 23 AM. LEGAL NEWS 5 (1912) [herein-The Illegal Practice].

69. We will say that you have made... enough to send your son through a university, through a law school, through a law office, and that, finally—maintaining always the standards of the profession which you yourself honor sufficiently to desire him enrolled in its ranks—your son reaches the age of twenty-five or twenty-six and opens up a law office in your city. His personal character, known to a few friends, his diligence at college (and possibly respect and friendship for you) bring him at first the small commercial litigation with which all lawyers of the preceding generation began their practice. Gradually (all the while, mind you, coming to "Dear Dad" for the occasional check to make up deficits in office expenses) he gets to be known, toward the thirties, as a keen, wide-awake chap, of knowledge in the law, good judgment, a fine adviser, a good trial lawyer, thoroughly trustworthy in all his dealings, respected by the courts and by his clients. Let us
Marsh's description of the corporations' promotional material merely hinted at other evils. Marsh noted that "[t]he corporate names are usually pretentious, and in some cases are suggestive of a charitable or protective nature, the word 'protective' being very often used." And, referring to promotional material offering the corporation's subscribers "advice upon all questions of law" for an annual fee of $10, Marsh observed, "the last few sentences differ little from the ancient quack advertisement 'Advice free, medicines full price.' Clients could be misled about the nature of the services rendered by these corporations. But Marsh did not identify any clients who claimed to have been gulled, and one gets the

say that by thirty-five or thirty-six he has built up the best commercial practice in your part of the country.

Now, there is in the same city the son of Thompson—of more or less shady reputation—who got through some law school or other of brief slain, where a diploma was passport enough to secure admission to the bar. He starts in, with little ability and with less character. Indolent yet crafty, he soon becomes known in your part of the country for what he really is, until he scarce can find a client in the county who will confide in him. Now comes along "The Lawyers' Touts, Inc.," whose particular business in life is to scour the country for law business, and they offer your son the attractive opportunity of representing in your city the trade agencies, the collection agencies, the trade associations of some of the large cities of the country—if he will but pay them on the basis of the business they secure for him. Of course, the proposition may not be put as bluntly as this. He will be asked to insert his card in a "directory." But everyone knows it is pure touting. . . . Your son, we will say, because he has been properly bred and trained, turns down the offer. Thompson's son accepts. Presently he is the leading bankruptcy lawyer in town and your son—has the character and respect of your community but not much else. Let us assume, however, that in spite of the unfair competition, your son continues to maintain his practice. Thompson's son, however, brings a new reputation to your community. You suddenly awaken to the fact that it is a place where men are readily petitioned into bankruptcy, where there are "quick settlements," and your friends . . . begin to think of the whole profession (which includes your son, do not forget) as . . . "a . . . hocus-pocus science, that smiles in yer face while it picks yer pocket . . . ."

COHEN, supra note 66, at 174-75. Cohen's parable suggests that, at least in his mind, what distinguished the professional elite's unworthy competitors was not so much religious or ethnic differences, or their adherence to the business rather than professional ethos (after all, in Cohen's story, the manufacturer respected the standards of the legal profession), but differences of social and economic class.

70. Marsh, Rendition of Legal Services, supra note 62, at 4.
71. Id. at 8-9.
72. Id. at 9.
73. Id.
impression that his larger complaint was simply that the corporate names and promotional materials were in bad taste. There was more than a hint about the need to preserve the practice of law as a profession and that the ubiquitous advertisements for corporations furnishing legal services were contrary to the legal profession’s values, which regarded advertising as demeaning.

After hearing argument, the court of appeals agreed with the intermediate court that the company could not secure court approval because it was not, and never had been, legally proper for a corporation to practice law. Echoing Marsh’s original argument, it reasoned that the practice of law is a personal right available only to individual members of the bar who had been found to have the requisite education and character, who had taken an oath of office, and who thereby had submitted to the court’s regulatory process. Since a corporation could not perform these conditions, “the practice of law is not a lawful business for a corporation to engage in.” Further, the court said, a corporation was forbidden from practicing law “indirectly.” Therefore, just as corporations had previously been forbidden from engaging in other “learned professions” such as medicine or dentistry by hiring doctors or dentists to act for them, corporations were forbidden from “hir[ing] lawyers to carry on the business of practicing law for it.”

Although much of its opinion was formalistic, the court also offered a policy justification for the legislation. The court’s theory essentially was that the corporations’ lay directors would corrupt the lawyers with whom they dealt, thereby causing the lawyers to seek profits at the expense of their clients’ interests and to ignore their obligation to aid in the administration of justice. At long last, the idea was elaborated

74. See id. at 6-7, 10 (noting repeatedly that, among the officers and directors of these corporations, lawyers were far outnumbered by laymen). Marsh also implied either that the legal services offered by the corporations might be rendered by nonlawyers or, arguably, that nonlawyers would improperly interfere with how lawyers advised or represented the clients. See id. But this also was, at most, an implication, and Marsh documented no cases in which clients had been advised by nonlawyers or ill-represented by lawyers.

75. See In re Co-operative Law Co., 92 N.E. 15, 16 (N.Y. 1910).

76. See id.

77. Id.

78. Id.

79. Id.

80. The court explained:
that a restriction on alliances between lawyers and laymen was meant to protect clients, not simply to protect the bar, or certain of its members, from competition or to protect the reputation of the bar as a whole. Of course, the court did not substantiate its premise that lawyers employed by corporations would subordinate their clients' interests to the mercenary interests of the corporations' lay directors. Further, this premise was somewhat at odds with the court's other belief that corporations must be excluded from the practice of law because they could not submit to the attorney licensing process. After all, if one were confident that the licensing process ensured that individuals admitted to the bar had the requisite character to practice law and, thus, would adhere to the legal profession's values, there would be little need to fear that lawyers would submit to the bad influence of laymen. Nonetheless, the court's avowed fear was to become the intellectual foundation for the disciplinary restrictions on multidisciplinary practice.

III. THE DEVELOPMENT OF DISCIPLINARY RULES

Over the two decades following enactment of the New York statutes, approximately half the states adopted similar laws, but this did not sound the death knell for corporations seeking to enter the field. Surveying the landscape in 1931, Fordham

The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation and not to the directions of the client. The corporation would control the litigation, the money earned would belong to the corporation, and the attorney would be responsible to the corporation only. His master would not be the client but the corporation, conducted it may be wholly by laymen, organized simply to make money and not to aid in the administration of justice which is the highest function of an attorney and counselor at law. The corporation might not have a lawyer among its stockholders, directors or officers. Its members might be without character, learning or standing. The bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest member became subject to the orders of a money-making corporation engaged not in conducting litigation for itself, but in the business of conducting litigation for others.

Id.

81. See id.
82. See id.
83. See WORMSER, supra note 32, at 164.
law professor I. Maurice Wormser, one of the period's preeminent corporations scholars, observed that:

the active practice of law in many fields is no longer a matter at all for attorneys. Title, insurance, trust, indemnity, collection and other corporations are spreading their tentacles over large segments of the lawyer's domain. It has been estimated that corporations to-day perform 60 per cent of corporate law work. 84

Wormser further noted that "[t]hese encroachments by corporations have caused much economic loss and consequent discontent among members of the bar,"85 but that laymen, particularly businessmen, found corporations preferable to lawyers,86 and not without reason.87

Against the background of public indifference to their cause, bar leaders rallied support among lawyers.88 Although

84. See id. at 164-65. Wormser continued:
Corporations themselves now generally are organized by corporations. In metropolitan newspapers can be read such advertisements as this: "Corporations organized, New York, New Jersey, §90. Delaware, §80. Includes fees and outfit." The defense of negligence suits has been taken over almost entirely by indemnity and insurance corporations. The handling of wills and estates is no longer the exclusive province of lawyers. Most estates and trusts today are administered by corporations . . . . Title searching has passed out of [the attorney's] hands into those of title and real estate companies, which assert they are more competent and responsible.

Id.

85. Id. at 165. He stated "Lawyers complain in particular that corporations are permitted to advertise whereas the ethics of their profession preclude them from doing so." Id.

86. Wormser noted:
[There] exists a strong sentiment among laymen in favor of the performance by corporations of many kinds of legal services which for years had been considered within the exclusive and licit domain of the lawyer. In certain types of readily standardized legal work the business man feels the superiority of the corporation is obvious. The community seemingly approves of the drafting of legal papers by title and trust companies and banks. It sanctions the common method of incorporating through large companies employed for that purpose rather than through lawyers or firms of lawyers . . . . The layman seems to feel that the lawyer is frequently careless and irresponsible.

Id. at 169-70.

87. Wormser observed:
[Corporations possess many attractive advantages, among them being large scale organization; the use of modern business methods; the standardization of certain types of legal work; their continuous, indeed perpetual life; business responsibility; wide experience and connections, as well as contacts superior to those possessed by the average attorney.

Id. at 171.

88. See Andrews, supra note 11, at 585 (discussing a 1920 ABA report
bar leaders continued to acknowledge that their motivation was primarily to protect lawyers' livelihood, they condemned the corporations (without a trace of irony) on the ground that "[t]he practice of law is not a business for commercial exploitation," and therefore must be practiced by professionals, not profit-driven entities. Bar leaders invoked the need to secure lawyers' professional independence as one reason why lawyers should not work with corporations, but their principal reason remained that corporations advertised the availability of legal services, a vice in which only lawyers without conscience

"condemning professional associations between lawyers and nonlawyers").

89. Cohen explained:
The one who suffers most through illegal practice of the law by collection agencies, is the young lawyer just admitted to the bar . . . . [T]he young lawyer who has studied his Code of Ethics and the authorities, finds himself at the peril of disbarment or criminal conviction, if he attempts to engage in a mercantile enterprise for the obtaining of business. Yet, he may find in the office adjoining his, a business man—not a lawyer—calling himself "COLLECTION AGENCY," circularizing, advertising, campaigning for clients to bring law suits, and offering all kinds of inducements.

Cohen, The Illegal Practice, supra note 68, at 15. He further noted:
It is not merely the growing practice of the young lawyer that suffers from these conditions, but the law practice that has been built up through years of earnest and faithful service to clients, suffers too. The mere fact that there exists in the field, men who offer to perform legal services "at bargain-counter rates," makes it attractive for even the oldest clients to "shop about," and if, in addition, eager soliciting lawyers, uninformed as to the danger to themselves, engage in like competition, the practice of the best commercial law office is bound to suffer in the long run.

Id.


91. See id.

92. See WORMSER, supra note 32, at 176-77 (describing report of New York County Lawyers' Association).

93. See, e.g., 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: STATEMENT AND BRIEF ON WHAT ACTS CONSTITUTE PRACTICE OF LAW AND WHAT CONSTITUTE UNLAWFUL PRACTICE THEREOF 6 (1920). The report explained:
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 law and the law business, undermining the ethical and professional standards, and destroying public confidence in the lawyers and the courts with a clamor for recall of judges and decisions. The layman, a natural person or corporate, may only compete with the lawyer in the
would indulge. Even among their fellows, this reasoning was not universally persuasive. But lawyers willing to defend alliances with corporations publicly were in the minority, and their straightforward defense of the practice as harmless lacked rhetorical force when measured against opponents' references to "bloodless" corporations and "professional prostitution" of their lawyers.

In the end, bar association leaders did not need to persuade the public or even fellow lawyers. Courts had given the organized bar (to an even greater extent than today) control over the instruments of lawyer regulation, allowing bar leaders to strike at corporations through the control of the processes of establishing and enforcing professional standards. Although the original Canons were silent on whether lawyers could be employed by corporations or otherwise collaborate with laymen, this was not an intractable problem. The organized bar devised another vehicle for formally elaborating professional standards: opinions published by a bar association concerning the propriety of specific lawyer conduct. The New York County Law-

practice of the law and the doing of law business by orally soliciting or advertising to do it more expeditiously, faithfully, intelligently, and at less expense than the lawyer, thereby imputing to the lawyer slothfulness, infidelity, and extortion. A loss of confidence in the courts and lawyers is a sign of governmental decline, and a forerunner of disintegration and anarchy.

94. Id. For expressions of this view, see, for example, COHEN, supra note 66, at 176-77.

95. As one Missouri lawyer put it, in response to a 1914 survey about whether a lawyer-employee of a trust company may draw wills for the company's clients:

As I understand the case stated the [trust company], in its advertise-

ments and solicitations for business, proposes to furnish its patrons legal advice with very little or no cost to its, (the trust company's,) pa-
trons. The trust company pays its attorneys for services rendered to it either an annual salary or so much for services rendered in each particular case. It seems to me that the trust company has a perfect right to advertise for business in that way and so extend to its patrons the services of its skilled attorneys in the matter of drawing wills and deeds and that the trust company's attorneys are guilty of no ethical wrong as the attorneys do not advertise for the business and are not responsible for the advertisements or the attitude of the trust company toward its patrons.

Robins, supra note 90, at 112 (paraphrasing R.A. Mooneyham).

96. Id. at 113 (paraphrasing Charles L. Hays).

97. For commentary skeptical of the significance of bar ethics opinions in the context of professional regulation, see generally Jorge L. Carro, The Ethics Opinions of the Bar: A Valuable Contribution or an Exercise in Futility?, 26 IND. L. REV. 1 (1992); Ted Finman & Theodore Schneyer, The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the
yers' Association, the first bar association to establish a committee for this purpose, rendered its first opinion in 1912. A decade later, the Association of the Bar of the City of New York and the American Bar Association (ABA) followed suit.

In the first two decades following the publication of the Canons, the two New York bar associations issued opinions condemning a variety of professional relationships between lawyers and laymen. They held that lawyers are forbidden from forming partnerships with nonlawyers, including not only members of other professions but also out-of-state lawyers; that lawyers are forbidden from dividing fees with nonlawyers; and, consistent with the 1909 state statute, that corporations may not employ lawyers to render legal assistance. Although the bar's regulatory authority extended only to lawyers, and not to corporations and laymen, these opinions allowed the bar indirectly to restrict corporations by condemning lawyers who sought to collaborate with them.

The ABA's committee published two early opinions along similar lines, neither of which cited specific canons. The first, issued in 1925, deemed it unethical for a lawyer to be employed by an automobile club to provide legal services to its members. The committee reasoned that only lawyers are permit-

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99. See id. at 243 (indexing first opinion of New York County Lawyers' Association, published in December 1923); ABA Opinions of the Committee on Professional Ethics 1 (1967).

100. See N.Y. County Lawyers' Ass'n, Comm. on Professional Ethics, Op. 24 (1913), indexed in Maru, supra note 98, at 189 (stating that a New York lawyer may not form a partnership with an out-of-state lawyer); id. Op. 209 (1922), indexed in Maru, supra, note 98, at 207 (explaining that a New York lawyer may not form a partnership to engage in patent litigation with a patent attorney who is not a member of the New York Bar).


102. See id. Op. 36 (1914), indexed in Maru, supra note 98, at 190 (explaining that a nonlawyer printer of legal briefs may not expand into business of furnishing lawyers to write briefs); id. Op. 47 (1914), indexed in Maru, supra note 98, at 191-92 (noting that a lawyer may not be employed by a collection agency to perform legal services for its patrons); id. Op. 1 (1923), indexed in Maru, supra note 98, at 243 (stating that a lawyer may not accept an annual retainer from a membership corporation to defend its members or their families in legal actions).

ted to practice law, and the authority to do so cannot be delegated to laymen. Since lawyers may not share their responsibilities with laymen, they cannot share their fees with them. Further, it was likely that the lay agency with whom a lawyer formed a business relationship would solicit business, which lawyers themselves were forbidden from doing, or that the agency would "exploit [the lawyer's] professional services." For these reasons, the committee concluded, the proposed relationship is "abhorrent" and "derogatory to the dignity and self-respect of the profession."

The ABA's second opinion, issued a year later, held that a lawyer employed as a bank officer may not render legal services to the bank. The committee principally reasoned that, as an employee of the bank, the lawyer would lack the professional independence required of a lawyer, who owes duties to the court and the public, as well as the client. In effect, the bar employed the logic of the New York court in In re Co-operative Law Company to countermand the 1909 state legislation, which had specifically authorized in-house lawyers to represent the corporations that employed them.

In 1928, a special committee appointed to propose supplements to the Canons sought to codify the earlier opinions. Its proposals, which the ABA approved, provided for the adoption of new canons prohibiting a lawyer from entering into a

104. See id.
105. See id.
106. Id.
107. Id.
109. Id. The Committee provided:
As an employee [a salaried lawyer-trust officer's] only duty is to his employer. As a lawyer he owes a duty to the Court and to the public, as well as to his client. Can he consistently act in these dual capacities at one and the same time? Being dependent on his employer's pleasure for his livelihood, can he properly observe that independence of judgment and action that are indispensable to the advocate in court? . . . [The lawyer] must be free to exercise his independent judgment as an attorney for the benefit of the interests he represents, which he could not be expected to do while under the domination of a third party as its salaried servant.

Id.
110. See supra text accompanying note 42 (quoting the exception in the New York penal law).
partnership with a nonlawyer,\textsuperscript{112} from dividing fees for legal services with anyone other than another lawyer\textsuperscript{113} or from being employed by a corporation or other organization to render legal services to others.\textsuperscript{114} Of more than a dozen proposals made by the special committee, its chair identified these as the most controversial, explaining that there was "substantial difference of view in the profession respecting" them and that these differences were "radical and irreconcilable; they embrace extremes in both directions."\textsuperscript{115}

The special committee's report did not offer much justification for the proposed Canons other than to explain that considerable work went into developing them.\textsuperscript{116} However, a member of the special committee who dissented in small part from its recommendations offered that the proposals did not embody "fundamental ethical principles," but comprised "rules of conduct which, while they may be advisable, are yet rules of professional policy or expediency which are considered necessary or important to retain and protect the public confidence in the bar as a part of the administration of justice."\textsuperscript{117} He explained that "aside from professional policy... there is nothing inherently 'unethical' in the formation of partnerships between lawyers largely engaged in certain kinds of work and an expert engineer, student of finance, or some other form of expert," but that he had been persuaded "by the views and experiences of the other members of the committee" that it was necessary to

\textsuperscript{112} See CANONS OF PROFESSIONAL ETHICS Canon 33 (1928), reprinted in ABA OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 139 (1967).
\textsuperscript{113} See id. Canon 34 (1928) ("No division of fees for legal services is proper, except with another lawyer..."), reprinted in ABA OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 148 (1967). The provision included an exception allowing lawyers to share commissions with laymen who forwarded commercial claims for collection. See id. In the House of Delegates, Julius Henry Cohen argued that there was no principled distinction between this and other forms of fee splitting with nonlawyers. See 53 A.B.A. REP. 127-28 (1928). The distinction was defended, however, based on commercial lawyers' economic self-interest: "[W]e practicing commercial lawyers are anxious that our legal fees shall be undisturbed as far as the layman is concerned. We are not anxious, however, to have the practice of dividing the collection commission with a layman interfered with." Id. at 127.

\textsuperscript{114} CANONS OF PROFESSIONAL ETHICS Canon 35 (1928), reprinted in ABA OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 156 (1967).

\textsuperscript{115} Proposed Supplements, supra note 111, at 270.
\textsuperscript{116} See id. at 268-69.
\textsuperscript{117} Id. at 273.
restrict such relationships "[a]s a matter of professional policy."\textsuperscript{118}

From Professor Wormser's perspective, writing only three years later, the bar was fighting a rearguard action. Anticipating the report of the ABA Commission on Multidisciplinary Practice, authored almost 70 years later by Mary Daly, another Fordham law professor,\textsuperscript{119} Wormser argued:

The facts should be frankly recognized. To deny them is naïve and idle. Corporations to-day are practicing law, medicine and other professions. In some instances they are extremely active and successful. That this new development can be checked entirely is most doubtful. The best and most sensible method of dealing with the situation is to recognize it as a definite condition, to abandon theory and outworn precedents, and to impose on corporations engaged directly or indirectly in the practice of a profession the identical requirements that are imposed on members thereof.\textsuperscript{120}

Wormser reasoned "that the same standard of ethics required of a lawyer can be enforced against the attorney-employee of the corporation . . . . Whether the attorney is engaged in independent practice, or is a member of a law firm, or is employed by a fiduciary, his obligations surely are the same."\textsuperscript{121} According to Wormser, one ABA President had expressed precisely this view before taking office.\textsuperscript{122} But, with the adoption of the new Canons, it appears that the ABA was ideologically committed to a less sanguine view of lawyers' ability to maintain professional standards while collaborating with laymen.

IV. APPLICATIONS OF THE DISCIPLINARY RULES

The 1928 Canons gave ethics committees a textual basis for their opinions excluding nonlawyers from the field of law. As the bar's jurisprudence developed, the justifications for the restrictions were elaborated and refined. The opinions cited the need for professional independence increasingly, but by no means exclusively. For example, in 1931 the ABA issued five opinions citing the new Canons to condemn collaborations with nonlawyers.\textsuperscript{123} Typical of these was an opinion holding that a

\textsuperscript{118} Id.
\textsuperscript{119} See REPORT, supra note 6.
\textsuperscript{120} WORMSER, supra note 32, at 178.
\textsuperscript{121} Id. at 178-79.
\textsuperscript{122} See id.
\textsuperscript{123} See ABA Comm. on Professional Ethics and Grievances, Formal Op. 31 (1931) (stating that a lawyer may neither accept employment from a corporation for the purpose of preparing articles of incorporation, nor allow his
lawyer may not enter into a partnership with or be employed by a layman who was a "patent agent" admitted to prosecute patent claims in the Patent Office.\textsuperscript{124} Although the restriction against serving as an employee of a nonlawyer was explained by the need to prevent the lawyer's services from being "controlled or exploited by a layman or a lay agency,"\textsuperscript{125} the restriction against forming a partnership with a nonlawyer was explained differently: it protected members of the public who might be misled or deceived into thinking that the nonlawyer member of the partnership is in fact a lawyer.\textsuperscript{126}

Other ABA opinions followed, holding, for example, that a lawyer may not form a partnership with an accountant to give advice in tax matters and represent taxpayers in administrative proceedings;\textsuperscript{127} that an attorney may not be employed by or form a partnership with an accountant unless he ceases to hold himself out as a lay attorney and confines his practice to areas open to lay accountants;\textsuperscript{128} that, while a law firm may employ an accountant, it may not split fees with him;\textsuperscript{129} that a lawyer may not form a partnership with a layman to represent patent applicants before the United States Patent Office, even though the layman is permitted to render that service, because patent representation comprises the practice of law when performed by an attorney;\textsuperscript{130} and that lawyers may not practice in corporate form if any shareholder is a nonlawyer.\textsuperscript{131}

Although skepticism periodically surfaced within the bar, the ABA has officially adhered to the restrictions undergirding these opinions and, indeed, reinforced them in 1937 by adding a new canon forbidding a lawyer from aiding "the unauthorized

\begin{itemize}
  \item \textsuperscript{124} See id. Formal Op. 32.
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} See id.
  \item \textsuperscript{127} See ABA Comm. on Professional Ethics and Grievances, Formal Op. 239 (1942).
  \item \textsuperscript{128} See id. Formal Op. 269 (1945).
  \item \textsuperscript{129} See id. Formal Op. 272 (1946).
  \item \textsuperscript{130} See id. Formal Op. 201 (1940).
  \item \textsuperscript{131} See id. Formal Op. 303 (1961).
\end{itemize}
practice of law by any lay agency, personal or corporate."\textsuperscript{132} When it replaced the Canons with the Model Code of Professional Responsibility,\textsuperscript{133} the ABA retained this restriction\textsuperscript{134} along with those on dividing fees with nonlawyers,\textsuperscript{135} forming partnerships with nonlawyers,\textsuperscript{136} and practicing in an entity owned by a nonlawyer.\textsuperscript{137} Rejecting the recommendations of its drafting commission,\textsuperscript{138} the ABA did so again when it replaced the Model Code with the Model Rules of Professional Conduct,\textsuperscript{139} combining the latter restrictions in a single rule titled, "Professional Independence of a Lawyer."\textsuperscript{140}

Following the ABA's lead, state courts adopted ethics codes containing these restrictions and state and local ethics committees invoked them, typically in response to inquiries from small firm and solo practitioners, to place roadblocks in the way of lawyers who were seeking to ally with other professionals. For example, beginning in the early 1960s, the ethics committee of the New York State Bar Association developed an expansive body of doctrine on this subject,\textsuperscript{141} culminating in a succession of opinions in the 1990s which concluded that a lawyer may not: team up with a staff leasing company to assist clients in debt consolidation and financial planning,\textsuperscript{142} form a corporation with nonlawyers to assist homeowners in obtaining real estate

\textsuperscript{132} CANONS OF PROFESSIONAL ETHICS Canon 47 (1937).
\textsuperscript{133} MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1933).
\textsuperscript{134} See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-101(A) (1983).
\textsuperscript{135} See id. DR 3-102(A) ("A lawyer or law firm shall not share legal fees with a non-lawyer . . . ").
\textsuperscript{136} See id. 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.").
\textsuperscript{137} See id. DR 5-107(C) (providing that a lawyer may not practice with or in the form of a professional corporation or association if a nonlawyer has ownership, membership, or control).
\textsuperscript{138} See Andrews, supra note 11, at 593-96 (describing proposed Rule 5.4 and the bar's rejection of the proposal).
\textsuperscript{139} See MODEL RULES OF PROFESSIONAL CONDUCT Rules 5.4 & 5.5 (1983).
\textsuperscript{140} Id. Rule 5.4.
\textsuperscript{141} See, e.g., N.Y. State Bar Ass'n, Comm. on Professional Ethics, Op. 557 (1984) (holding that a lawyer and an accountant may not jointly prepare tax returns and give tax advice); id. Op. 438 (1976) (finding that a bank may require a borrower to pay the bank's attorney's fees, but an attorney may not divide the fees with the bank); id. Op. 22 (1962) (stating that if a lawyer enters a partnership with an accountant, he may not hold himself out as a lawyer).
tax deductions, join with a nonlawyer to represent homeowners in small claims proceedings, participate in a divorce mediation referral service that includes nonlawyers as well as lawyers, or participate in a program operated by a real estate broker to offer prospective home purchasers reduced closing costs.

Along the way, the purely formalistic rationale—that, by allying with a lawyer, the nonlawyers was in effect practicing law illegally—necessarily receded, since in many situations the nonlawyers would have been legally authorized to render the proposed service. Yet, even in these situations, recent opinions have sometimes resorted to a variation of this argument. For example, the New York State Bar held in 1984 that a lawyer may not form a professional relationship with an accountant who is not a lawyer because the lawyer would thereby “be enabling the accountant to hold himself out to his clients as offering legal services through the affiliated lawyer.” The committee acknowledged that the accountant was legally authorized to render services relating to taxation and tax planning, but stressed that when lawyers render the same services, they are engaged in the “practice of law.” This presented the danger, in the committee’s view, that clients who sought legal assistance from the professional association would be misled to believe that the accountant was assisting them as a lawyer, rather than as an accountant. Additionally, but only secondarily, the committee acknowledged the danger that the nonlawyer-accountant would “direct or control the lawyer’s professional judgment.”

As jurisprudence developed around the disciplinary restrictions, the opinions reflected an expanding conception of the practice of law, one which swept far beyond the traditional notion that lawyers’ work centers primarily on representing cli-

148. See id.
149. Out of a similar concern for protecting the public against deception, the committee further concluded the lawyer and accountant could not place their names together on letterhead, which might mislead clients to believe “that the lawyer and the accountant are practicing their respective professions together rather than independently.” Id.
150. Id.
ents in court and giving advice about legal causes of action and drafting certain legal documents.\textsuperscript{151} As the conception of law practice expanded, the distinction between legal services and other professional services became increasingly blurry.\textsuperscript{152} Lawyers now saw themselves competing with nonlawyers to render services, such as tax advice, financial planning, or mediation, that lawyers and nonlawyers alike were trained and authorized to provide. By forbidding lawyers—typically, solo practitioners and small firm practitioners—from allying with accountants and other professionals, the bar forced clients to make a choice: clients could hire a law firm (which was free to employ accountants, social workers and other professionals), or a firm of nonlawyers (which was forbidden from employing lawyers)—but not a single multidisciplinary partnership of lawyers and other professionals. The bar would have assumed that law firms would generally win out in this competition, at least when the client perceived some need for legal expertise.\textsuperscript{153}

Thus, over time, the effect of the bar association rulings became less to protect the professional elite from lower-class competitors than to protect all lawyers against competition from nonlawyers (which, of course, was the acknowledged motivation behind the restrictions at their inception) and, beyond that, to expand lawyers' turf.

V. THE CORE VALUES RATIONALE AND ITS EROSION

Bar associations have challenged proponents of multidisciplinary practice to demonstrate that the legal profession's core values, such as loyalty, competence, and confidentiality, will survive if the disciplinary rules are liberalized. The bar's premise is that the existing disciplinary rules are needed to

\begin{itemize}
  \item \textsuperscript{152} See, e.g., \textit{Note, Practice of Law—Drafting of Wills and Trust Declarations—Activities of Banks and Trust Companies}, 79 U. PA. L. REV. 96 (1930) (describing competing views as to whether drafting such documents as wills and bills of sale comprises the practice of law for purposes of statutes barring nonlawyers from engaging in law practice).
  \item \textsuperscript{153} Conversely, the bar probably assumed that if lawyers were free to ally with other professionals, clients would favor nonlawyer-dominated firms over both law firms and lawyer-dominated multidisciplinary partnerships. A client whose problem had a legal dimension would want some access to a lawyer. An organization largely comprised of nonlawyers would satisfy that need if it had a lawyer on staff, and at a lower cost than a law firm or lawyer-dominated firm.
\end{itemize}
protect core values. As the previous discussion makes clear, however, the core values rationale is a belated explanation for restrictions that, at their inception, were transparently motivated by the financial self-interest of the bar's leadership. Over the years, the restrictions on alliances with nonlawyers have been explained in various ways, such as that they are needed to prevent clients from being misled about the status of nonlawyers or to prevent lawyers from using nonlawyers to solicit business. Only recently have defenders united around the core values rationale, which remains a work-in-progress.

The rationale is still developing, in part, because only now has it come under a serious, open attack. With the exception of Wormser, early proponents of multidisciplinary practice did not provide a strong public rationale for encouraging alliances with nonlawyers; nor did their arguments have much rhetorical force. In the context of the challenge posed in the past few years by the Big Five accounting firms, however, reformers are far more effective than their predecessors. They appeal to the ideas of progress, innovation, client choice, and lawyer mobility, and portray opponents as hide-bound and protectionist. They pose the challenging question, "As long as the sophisticated client (e.g., a Fortune 500 company) clearly understands the nature of the service provider (e.g., a Big Five accounting firm) and how it is operating, why shouldn't the client have the option of receiving legal services and other professional services from a firm that is jointly owned and operated by lawyers and other professionals (i.e., accountants), and which, as thus constituted, may better serve the client's needs?"

The core values rationale supplies the following answer: "Even if the legal services were rendered exclusively by lawyers in the multidisciplinary firm, these lawyers could not be counted on to serve skillfully and in accordance with the legal profession's ethics rules, because they would be subject to pressure from the nonlawyers to cut corners. The clients should not be allowed to contract to accept service under a different set of norms from those governing the attorney-client relationship, or even to assume the risk that the lawyers would violate their duties to their clients, because their clients would have to be self-destructive or misguided to do so." As thus elaborated,

154. See supra text accompanying notes 83-94.
155. Cf. Lawrence J. Fox, Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs, 84 MINN. L. REV. 1097 (2000); Neil W. Hamilton, MDPs: View
the rationale rests on six premises, none of which has been tested empirically, and all of which are questionable solely as a matter of reason and experience.

The first two premises are interrelated. The first, "lawyers are better," implies that lawyers are better qualified than others to render legal services by virtue of their superior education and training. The second, "lawyers' rules are better," asserts that the legal profession's "licensing and disciplinary processes require adherence to a set of professional norms"—principally those governing the lawyer's duties of competence, loyalty, and confidentiality—"that establish the optimal terms for the relationship between professionals and those to whom they provide legal assistance." These assumptions were captured by the New York State ethics committee when it barred lawyers from entering into professional relationships with accountants: "[f]or the protection of the public, it is important that legal services be performed for clients only by duly licensed lawyers who have been found to possess the requisite legal training and moral character and who are governed by the high ethical standards of the legal profession." These assumptions are at the heart of statutes forbidding nonlawyers from engaging in the unauthorized practice of law as well as ethics rules prohibiting lawyers from either assisting nonlawyers in practicing law or allowing nonlawyers to influence how lawyers themselves practice law.

The third and fourth premises are also interrelated. One premise is "nonlawyers are corrupt." That is, even those nonlawyers who become professionally associated with lawyers will deviate from the lawyers' professional norms or ethics rules. This assumption has various explanations. Nonprofessionals ordinarily have not been trained to adhere to lawyers' professional standards and, even if they are trained, they are not subject to a licensing process that is meant to ensure their adherence to these standards. Moreover, some nonlawyer professionals, such as accountants or social workers, are taught an in-

the Big Picture, NAT'L L.J., Apr. 24, 2000 at A23.
157. Id.
159. See Denckla, supra note 151, at 2594 (explaining that the law rests on the assumption that "lawyers are both more competent and more scrupulous than nonlawyers would be in handling legal matters").
compatible set of standards and are required by their licensing authorities to adhere to them. At the turn of the twentieth century, lawyers' public-regarding ethos was considered antithetical to corporations' profit motive; strangely enough, in the context of the Big Five accounting firms, lawyers' client-centered duties, such as the duties of loyalty and zealous advocacy, are thought to be incompatible with accountants' public-regarding ethos (as reflected, for example, in the audit function).

The fifth premise is, "nonlawyers corrupt lawyers." That is, corrupt nonlawyers will induce the lawyers with whom they work to abrogate the legal profession's standards. This theme was sounded in the ABA's 1926 opinion holding that a lawyer could not provide legal assistance to the bank that employed him because he could not be expected to render independent judgment for the bank while "under [its] domination... as its salaried servant." Part of the premise is that nonlawyers are so lacking in respect for the lawyers' norms that, playing Delilah to the lawyer's Samson, they will pressure lawyers to go astray. Another part is that lawyers' professional independence is terribly fragile, so that lawyers will be susceptible to the others' influence.

The final premise is "lawyer norms are nonnegotiable." There are two parts to this assertion. The first is that a client can never make a rational, informed decision to authorize its lawyer to function under a different set of professional norms from those that, for the protection of clients, govern the lawyer-client relationship. Because the legal professional norms are superior, rational clients would not allow their lawyers to function differently; any client who did so would presumptively be self-destructive or the victim of overreaching. Thus, clients may not consent to representation that is "incompetent" or that involves "disloyalty" as defined by the rules governing lawyers' professional conduct. The second part of this principle is that a client can never make a rational, informed decision to retain lawyers who are allied with nonlawyers in ways currently

160. See, e.g., Statement of Position on Multidisciplinary Practice, supra note 12, at 594-95
161. See id.
forbidden by the ethics rules and bar associations. The premise is that the current restrictions on multidisciplinary practice are necessary to reduce the risk that lawyers will violate the norms governing the lawyer-client relationship. Accordingly, any client who consented to an arrangement forbidden by the professional regulations would be acting self-destructively or without sufficient comprehension of the risks.

Whether one finds these premises persuasive depends, no doubt, on one's intuitions. Are lawyers really so superior in their ability to assist clients whose problems in any way touch on the law? Are the bar's rules of conduct necessarily so superior to other professions' rules? Are nonlawyers so nefarious? Are lawyers so susceptible? Are clients so incapable of making intelligent, self-interested choices from an array of options?

If the practice of law were confined to courtroom advocacy, these premises, and the restrictions on multidisciplinary practice that build on them, would be considerably less controversial. With limited exceptions, only lawyers may represent clients in courtroom settings and their training uniquely qualifies them to do so well.164 There is a substantial public interest in requiring lawyers to adhere to the professional norms governing their work as advocates—norms which, to some extent, require lawyers to subordinate their clients' interests to those of

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164. See Bruce A. Green, Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment, 78 IOWA L. REV. 433, 489 (1993) (arguing that lawyers are not necessarily qualified to represent defendants in criminal cases, much less in capital cases) [hereinafter Green, Lethal Fiction]; cf. Alex J. Hurder, Nonlawyer Legal Assistance and Access to Justice, 67 FORDHAM L. REV. 2241, 2267 (1999) (identifying greater public interest in excluding representation by nonlawyers in connection with legal proceedings as compared with drafting documents or giving advice unrelated to litigation). To be sure, a substantial number of individuals are required to represent themselves in court because they cannot afford a lawyer. See Bruce A. Green, Rationing Lawyers: Ethical and Professional Issues in the Delivery of Legal Services to Low-Income Clients, 67 FORDHAM L. REV. 1713, 1713 (1998) ("By now, it is a commonplace observation that many people in this country cannot afford a lawyer to assist them in addressing their legal problems, either because they have very little money or because the cost of legal assistance is too high given the funds available to them."). There is nothing in the courts' experience with pro se litigants, however, to suggest that lawyers and nonlawyers are equally well qualified. See generally Margaret Martin Barry, Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?, 67 FORDHAM L. REV. 1879 (1999) (describing potential role of law school clinics in assisting pro se clients); Russell Engler, And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks, 67 FORDHAM L. REV. 1887 (1999) (describing potential role of judicial personnel in assisting pro se litigants).
the courts, the public, and third parties. In this setting, there may be greater reason to distrust nonlawyers, who may have an economic incentive to serve their clients' interests at the expense of applicable procedural and ethical rules and are not subject to a licensing system that serves as a counterweight. Further, even if it might be reasonable from some clients' perspective to take the risk that those who represent them will act contrary to the professional norms, it is not reasonable from the perspective of the public, which has an interest in the fair administration of justice.

This rationale becomes far less compelling, however, when one considers how broadly the practice of law has been construed. As noted earlier, the bar association opinions hold that many services that nonlawyers may lawfully provide comprise the practice of law when provided by lawyers. A 1971 New York State bar opinion listed the following occupations as examples: "accountant, collection agency, claims adjuster, labor relations consultant, business consultant, insurance agent, marriage counselor, real estate broker, income tax service, [or] loan or mortgage broker." When considering such services, the claim that lawyers are uniquely qualified has far less force, as does the claim that lawyers' professional standards are superior to those of accountants, social workers, and other licensed professionals. Likewise, one might be skeptical, in contexts outside advocacy, that nonlawyers would encourage lawyers with whom they work to serve clients inadequately or unethically. The relevant ethics rules, outside the advocacy setting, are principally those meant to protect the client. In this context, the nonlawyers' financial incentive would be to satisfy their clients, presumably by serving clients well. And, to the extent that clients might receive somewhat different services from lawyers who were allied with nonlawyers, there seems to be far less of a public interest in denying them that option.

VI. THE EROSION OF THE RESTRICTIONS

Since their heyday in the 1920s and 1930s, the restrictions on multidisciplinary practice have gradually been eroded. To a small extent, this has been occasioned by occurrences, such as the Supreme Court decisions permitting attorney advertise-

ing, over which the bar had no control and which do not undermine the contemporary, core values rationale for the restrictions. To a larger extent, however, the erosion of the restrictions—as part of what might be viewed as a common law process of developing ethics doctrine—calls into question the five premises that comprise the core values rationale.

First, the assumptions that lawyers have superior competence to render legal services and that they function under superior professional norms have been steadily eroded by laws authorizing nonlawyers to render services that the bar regards as the practice of law. In part, this is a result of the bar’s broad definition of legal services to include virtually anything that is remotely related to the law. As members of other professions receive training specifically tailored to particular personal or financial services—for example, psychological counseling or accounting services—it becomes increasingly hard to sustain the argument that lawyers’ general training in the law makes them best qualified to offer these services whenever the client’s

167. For example, in 1962, in one of its earliest opinions, the New York State ethics committee held that a lawyer may form a partnership with an accountant only if he ceases to practice law. See id. Op. 22 (1962). It was necessary, but not sufficient, that in the context of the accounting firm the lawyer did not hold himself out as a lawyer and rendered no services that “if rendered by one holding himself out as a lawyer would be deemed the practice of law.” Id. Additionally, to avoid using the accounting practice as a way of “touting” himself in violation of the advertising prohibition, the lawyer was forbidden from separately practicing law. See id.; cf. id. Op. 128 (1970); see also id. Op. 135 (1970). In 1971, following the adoption of the Code of Professional Responsibility, the committee reconsidered the latter restriction. It concluded that a lawyer may separately engage in another occupation, but held that the lawyer may not create the impression that the other occupation was related to his legal practice or use it to feed clients to his legal practice. See id. Op. 206 (1971). It adhered to this restriction until the Supreme Court struck down wholesale restrictions on lawyer advertising. See Bates v. State Bar, 433 U.S. 350, 364 (1977). See generally Kathleen M. Sullivan, The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights, 67 FORDHAM L. REV. 569 (1998). In light of Bates, the committee concluded that there was no longer any reason why a lawyer could not practice law and another occupation (e.g., a real estate brokerage business) from the same office. See N.Y. State Bar Ass’n, Comm. on Professional Ethics, Op. 493 (1978).

168. See generally Bruce A. Green, Doe v. Grievance Committee: On the Interpretation of Ethical Rules, 55 BROOK. L. REV. 485 (1989) (arguing that courts should take a common law approach to interpreting ethics rules rather than seeking to ascertain the drafters’ intent).

169. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972) (finding that psychology practice is related to the practice of law).
problem has some legal aspect. When spouses require a divorce mediator, is it really easier for a lawyer to develop the mediating skills than for a trained mediator to learn the necessary law? Moreover, even services that would seem to go to the core of legal practice have been opened to nonlawyers—for example, advocacy on behalf of clients in administrative proceedings or small claims court. Increasingly, the laws have come to reflect a premise that individuals other than lawyers can become qualified to render many law-related services. At the same time, the laws providing for the licensing of professionals, such as accountants and social workers, have chipped away at the assumption that the legal profession's norms are necessarily superior ones for professionals rendering law-related services.

Similarly, the bar associations' own rules and ethics opinions have eroded the assumptions that nonlawyers will derogate the legal profession's ethics standards and will influence lawyers with whom they work to abrogate these standards. For example, in 1928, only two years after holding that a lawyer may not provide legal services to the corporation that employs him because such an arrangement compromises lawyer independence, the ABA amended the Canons to permit a lawyer to serve as in-house corporate counsel. It might be explained that, because the corporate employer is also the client, the lawyer will not be pressured to subordinate the client's interests to those of a third party employer. But what of the danger that the corporate employer will pressure the lawyer to sacrifice professional obligations owed to the public? The assumption of the original opinion was that this pressure is greater where the lawyer has a single client who employs him than where the

170. Obviously, nonlawyers are not assumed to be qualified to render all legal services. For example, nonlawyers are forbidden from representing clients in most litigation—and criminal litigation in particular. See generally Green, Lethal Fiction, supra note 164.
171. Cf. Green, supra note 166.
172. See supra note 114 and accompanying text.
173. Canon 35, while generally forbidding a lawyer from being "controlled or exploited by any lay agency," included as an exception that "[a] lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested . . . ." ABA Comm. on Professional Ethics and Grievances, Formal Op. 35 (1931); see also id. Formal Op. 31 (1931) ("An attorney may properly, for a salary, devote his entire time to the performance of legal services for a corporation, provided the legal services performed concern only the corporation's own affairs . . . .").
lawyer, as outside counsel, may be retained by any number of clients.\footnote{174}{For cases suggesting the difficulty faced by in-house lawyers when their perceived professional obligations clash with the demands of their corporate employers, see, for example, Hull v. Celanese Corp., 513 F.2d 568, 571-72 (2d Cir. 1975); General Dynamics Corp. v. Superior Court of San Bernardino County, 876 P.2d 487, 490-94 (Cal. 1994); Balla v. Gambro, Inc., 584 N.E.2d 104, 108-112 (Ill. 1991). Of course, individual lawyers in law firms may face similar difficulties when their perceived obligations clash with the demands of their law firm employers. \textit{See, e.g.}, Lahr v. Fulbright & Jaworski, 164 F.R.D. 204, 206-08 (N.D. Tex. 1996); Wiede v. Skala, 609 N.E.2d 105, 108-09 (N.Y. 1992).} Two years later the ABA rejected this assumption, presumably because it determined that lawyers, as professionals, should be able to stand up to this pressure.

Further inroads were made by later rules and opinions allowing lawyers to be employed by an entity or retained by a third party to represent a different client. For example, lawyers may be employed by insurance companies to represent policyholders,\footnote{175}{\textit{See generally} Nicole G. Tell, \textit{Note, Representing Police Officers and Municipalities: A Conflict of Interest for a Municipal Attorney in a [Section] 1983 Police Misconduct Suit}, 65 FORDHAM L. REV. 2525 (1997) (discussing obligations of municipal lawyers under conflict rules when representing municipal employees).} by social service agencies to represent the agencies' clients,\footnote{176}{\textit{See} Nancy J. Moore, \textit{Conflicts of Interest in the Representation of Children}, 64 FORDHAM L. REV. 1819, 1844-54 (1996) (addressing conflict of interest arising out of a parent's payment of a lawyer to represent a child); \textit{cf.} N.Y. State Bar Ass'n, Comm. on Professional Ethics, Op. 74 (1968) (finding that parents' attorney may not bring lawsuit on child's behalf against parents, but guardian ad litem appointed upon parents' application may retain a lawyer to bring the action).} or by the government to represent individuals.\footnote{177}{\textit{See} e.g., United States v. Weissman, 1997 U.S. Dist. LEXIS 12975, at *29 (S.D.N.Y. 1997); N.Y. State Bar Ass'n, Comm. on Professional Ethics, Op. 78 (1968) (stating that a corporation may reimburse employees for legal expenses relating to moves resulting from corporate personnel transfers).} Lawyers may accept compensation from third parties outside the employment context. For example, they may be compensated by a parent to represent a child,\footnote{178}{\textit{See} Alan W. Houseman, \textit{Restrictions by Funders and the Ethical P...}} by a corporation to represent a corporate officer or employee,\footnote{179}{\textit{See} Alan W. Houseman, \textit{Restrictions by Funders and the Ethical P...}} by the government to represent members of the public (including in proceedings adverse to the government),\footnote{180}{\textit{See} Alan W. Houseman, \textit{Restrictions by Funders and the Ethical P...}} or by any other third
party to represent another, as long as the lawyer avoids interference with her professional judgment and the attorney-client relationship, and as long as the client consents.\textsuperscript{181} These arrangements may be distinguished from multidisciplinary practices on the ground that the third party employer or payor does not \textit{profit} from the lawyer's services, but it is not obvious why this distinction matters. Doesn't the third party have the same incentive to influence how the lawyer carries out the engagement? Is the lawyer any less susceptible to the third party's influence?

Moreover, ethics rules and bar association opinions have permitted certain alliances between lawyers and nonlawyers for the purpose of rendering legal assistance. Lawyers are permitted to employ nonlawyers—for example, paralegals and secretaries—as long as the lawyers take reasonable measures to ensure that the nonlawyers act consistently with the lawyers' professional obligations.\textsuperscript{182} Further, the extent to which lawyers may delegate tasks to nonlawyers has expanded, in the words of the New York ethics committee, "[f]ueled by technological and economic change."\textsuperscript{183} Why can lawyers employ nonlawyers, but not themselves be employed by nonlawyers or enter partnerships with nonlawyers in order to serve others for compensation? One assumption may be that lawyers have more control over nonlawyers who work under their supervision. Thus, lawyers can avoid the improper influences of nonlawyers employees, but not those of nonlawyers employers and partners. Another assumption may be that nonlawyers acting under lawyers' supervision can be trusted to act consistently with lawyers' ethical obligations. In other words, nonlawyers are not invariably corrupt.

Other opinions, however, have permitted lawyers to form partnerships with professionals who function under different professional standards—namely, individuals authorized to

\textit{tice of Law}, 67 FORDHAM L. REV. 2187, 2202 (1999) (describing matters in which offices funded by the Legal Services Corporation may represent eligible clients); N.Y. State Bar Ass'n, Comm. on Professional Ethics, Op. 69 (1968) (addressing issues where lawyers are compensated by county to represent indigent clients in child welfare cases).

\textsuperscript{181} \textit{See} MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(A)(1) (1980).

\textsuperscript{182} \textit{See} MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3 (1983).

\textsuperscript{183} N.Y. State Bar Ass'n, Comm. on Professional Ethics, Op. 677 (1995) (holding that a lawyer may delegate attendance at a real estate closing to a paralegal, subject to certain conditions).
practice law in other states or countries. Bar association opinions permit a New York lawyer to form a partnership with an English barrister184 or a Japanese bengoshi.185 The assumption is that the training and ethical standards of these foreign lawyers are sufficiently similar to those of New York lawyers that one can be confident that the foreign lawyers will preserve client confidences and will not otherwise interfere with the New York lawyers' ability to uphold their professional obligations, which differ in certain respects from those of their foreign partners.186 Why can the same not be said of a New York accountant or a New York social worker? Are their professional obligations so different from those of New York lawyers—and to such a greater degree—that they cannot be trusted to respect their lawyer partners' professional obligations?

Leaving aside the question whether nonlawyers will seek to corrupt lawyers with whom they collaborate, the assumption that lawyers would submit to such influence is at odds with the most fundamental assumption of lawyer professionalism and self-regulation: that lawyers' professional training and character, as certified by the licensing process, together with the disciplinary process and other institutions of internal regulation, are sufficient to ensure lawyers' adherence to their professional obligations to clients and the public. Although lawyers often find themselves in situations where they might improperly serve their own interests at the expense of those of a client,187 or where clients pressure them to ignore obligations owed to the public or to the court, it is assumed that lawyers will act ethically.

Finally, inroads have been made into the premise that clients should never be permitted to negotiate for a lawyer to render services in accordance with standards different from those established by the Rules of Professional Conduct. A lawyer who is licensed in another profession may now offer both services to the public simultaneously.188 For example, a lawyer

186. See id. Op. 658 (1994) (stating that New York lawyers may enter into partnership with Swedish law firm provided they confirm that the partnership will not compromise their ability to uphold ethical standards).
187. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(c) (1983) (permitting contingent fee representation).
may practice law while also practicing as a licensed insurance broker. A member of the public may seek the lawyer's legal advice about what insurance products to purchase, in which case the lawyer must serve the client's interest in accordance with the legal profession's standards governing loyalty and competence. Alternatively, a member of the public may hire the lawyer as an insurance broker, in which case the lawyer-broker is not subject to the professional standards governing the attorney-client relationship. As long as it is clear to the client whether the lawyer is functioning as a lawyer or as a broker, the client is free to choose in which capacity he wants the attorney to act. One might ask why clients should not be able to choose in similar fashion whether to retain a lawyer practicing exclusively with lawyers or a lawyer practicing together with nonlawyers partners.

VII. SOME IMPLICATIONS FOR THE CURRENT DEBATE

If the past is prologue, then the previous examination of the disciplinary rules' origin and development has various implications for the contemporary debate. First, the crucial question for the organized bar as a whole will be how to promote lawyers' economic interests vis-à-vis nonlawyers. The bar will continue its effort to expand its professional turf while avoiding encroachment by nonlawyers. One might expect the Bar eventually to endorse a seeming compromise that serves these ends—for example, proposed amendments to the disciplinary restrictions to expand the possibility of lawyer-nonlawyer collaborations, but only in forms in which lawyers would be economically and professionally dominant.

189. Cf. Andrews, supra note 11, at 616-17 (identifying economic protectionism as likely explanation for bar's rejection of proposed Model Rule 5.4, which would have permitted alliances between lawyers and nonlawyers); see also Brickman, supra note 55, at 249 (arguing that ABA ethics committee's approach to contingency fees is motivated by bar's economic self-interest). Recent writings make clear that, for some lawyers, this remains the most important concern: "Multidisciplinary practices may be one of the solutions for small-firm survival," says [Charles] Robinson of Robinson & Chamberlain. "We are not protected by our licensure right now. We have the same set of issues the big firms do. We cannot compete." Jill Schachner Chanen, MDP: The View From Main Street, A.B.A. J., Dec. 1999, at 77, 77. Further, "[Bob] Ostertag [former president of the N.Y.S. Bar Association] says solo and small-firm practitioners would not be able to compete with a national retailer if a place like Sears, for example, started offering legal services through its stores." Id.
Second, the bar will employ the rhetoric of lawyer independence and core professional values and invoke concerns about nonlawyers' professional dominance, to hide its efforts to promote lawyers' economic dominance. This will be rhetoric only. There will be no serious effort to gather empirical evidence of whether clients will be ill-served or misled by new collaborations between lawyers and nonlawyers. Although the bar's rhetoric may have force, this probably will not be because of the strength of the underlying reasoning. Reason enough exists on both sides of the debate. Indeed, proponents of multidisciplinary practice could embrace professionalism as justification for reducing regulation. After all, if one has faith in lawyers as professionals, who by virtue of their training and character will adhere to the legal profession's core values, there is no compelling need for restrictions designed to protect lawyers from the pressures or inducements of nonlawyers who might lead them astray. The effort to reform the present disciplinary rules might be characterized not as an attack on professional values, but as an attack on the unwarranted assumption that lawyers are too weak to withstand the influence of nonlawyer collaborators.

Third, in pursuing its perceived economic interest, the bar will make the most of its enormous home field advantage. The relevant restrictions are, for the most part, disciplinary rules. The rules are drafted by bar associations, promulgated by courts, enforced by disciplinary or grievance committees, and interpreted by both courts and bar committees. These institutions are dominated by lawyers.

Finally, the debate within the bar will be shaped not only by the perceived economic interests of the bar as a whole, but also by the possibly distinct economic interests of its leaders. Just what those interests are is unclear, however, given the democratization of the organized bar over the course of the twentieth century. To the extent that the bar leadership is comprised of lawyers from large corporate firms, there may be considerable sympathy toward the Big Five accounting firms, which have the ability to retain the law firms or refer corporate clients to them. Other ABA leaders may also be sympathetic insofar as their bar association work is supported financially by the large accounting firms, as various work of the ABA has been in recent years. It may turn out this time around that the bar leaders are strongly divided. In that event, the multidisciplinary practice debate may pose a challenge to the concept of
the bar as a unified profession, less because of the external threat by accounting firms and other nonlawyer professionals to co-opt lawyers, than because of division within the organized bar itself.

CONCLUSION

The disciplinary rules restricting multidisciplinary practice are the direct lineal descendant of a 1909 New York State statute barring corporations from practicing law. Although substantial legal work was performed at the turn of the twentieth century by lawyers employed by corporations, the statute's proponents did not document cases of clients who were harmed by these lawyers' work or who expressed dissatisfaction with its quality. The effort to remove corporations from the field was spearheaded not by clients, but by lawyers whose motivations were, explicitly, to protect lawyers against competition from corporations and, at least implicitly, to protect the profession's native-born, middle- and upper-class elite against competition from lower-class, urban, immigrant practitioners. Insofar as the statute was also justified by the need to ensure that law was practiced in accordance with the legal profession's standards of conduct, the particular standard cited most often was the one prohibiting lawyer advertising, which itself grew out of the professional elite's desire to minimize competition from lower-class lawyers. This standard has since been eviscerated by the Supreme Court's First Amendment decisions, and would scarcely be counted among the core professional values.

Over time, as courts interpreted the state statute and as ethics opinions and disciplinary rules incorporated and then extended the state statutory restriction, the rationale for banning lawyer-nonlawyers alliances was refined. The concern for professional independence—that is, for protecting lawyers from the corrupting influence of nonlawyers who might influence them to sacrifice core professional values for the sake of financial gain—gradually took center stage. The asserted need for the restrictions, in order to preserve professional independence, was based less on experience than on reason or policy, however, and their need was open to question. As time went on, the underlying rationale and, to some degree, the restrictions themselves, were eroded.

Given this equivocal history, it might be argued that opponents of change should have the burden of proving that the existing provisions are essential in their present form. At the
very least, the question ought to be debated openly, honestly and fair-mindedly, without any presumptions one way or the other. At the same time, however, the history suggests that fair-minded debate is not inevitable: when it comes to matters of lawyer self-governance, reason easily becomes the servant of economic self-interest. The multidisciplinary practice debate offers the organized bar a test of whether it can overcome parochial self-interest to engage in fair-minded inquiry and debate regarding how multidisciplinary practices would actually serve clients.