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"Professionalism" as Pathology: The ABA's Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities

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**“PROFESSIONALISM” AS PATHOLOGY:
THE ABA’S LATEST POLICY DEBATE ON
NONLAWYER OWNERSHIP OF LAW
PRACTICE ENTITIES**

*Ted Schneyer**

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INTRODUCTION

In August 2009, then-ABA President Carolyn Lamm established the ABA Commission on Ethics 20/20 to review the Model Rules of Professional Conduct (Model Rules), to consider whether changes were called for in light of the "globalization" of law practice and rapid developments in law-practice technology, and to make appropriate recommendations to the ABA House of Delegates.¹ In May 2012, the

* Milton O. Riepe Professor of Law Emeritus, University of Arizona James E. Rogers College of Law. This Article draws on my work since Fall 2009 as a member of the ABA Commission on Ethics 20/20. Thanks to Carolyn Lamm for appointing me; to Commission Co-Chairs Jamie Gorelick and Michael Traynor; to the other commissioners, liaisons, reporters, and counsel, from whom I learned much; and to

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Commission submitted for consideration by the ABA House of Delegates proposed changes in the Model Rules and their accompanying Comments on six topics,² and on August 6, 2012 the House adopted all six proposals.³ This Article concerns a proposal the Commission decided *not* to submit to the House.

To facilitate its work, the Commission formed seven working groups consisting of commission members and representatives from the ABA and other bar entities. Each group was to study a particular subject and develop recommendations.⁴ One of the subjects was

all those at the ABA Center for Professional Responsibility for making things run so smoothly. My pleasure in working with these colleagues more than offsets my real disappointment in learning that, in the face of enormous changes in law practice and its regulation in the United States and elsewhere, much of the American bar apparently remains strongly opposed even to experimentation with a highly restricted form of nonlawyer ownership of law firms. Thanks also to Michele DeStefano for her comments on an early draft of this Article.

1. See James Podgers, *Firm Hand for Firm Times*, A.B.A. J., Aug. 2009, at 63, 63–64. President Lamm also indicated that the Commission should take account of changes in federal regulation, U.S. trade agreements, and changes in how other countries regulate lawyers. *Id.* The project was prompted by the perception that changes in these domains, and in the legal services market generally, are transforming law practice in ways the profession could not anticipate in 2002, the year of the last major overhaul of the Model Rules. See ABA COMM’N ON ETHICS 20/20, ABA COMMISSION ON ETHICS 20/20 INTRODUCTION AND OVERVIEW 1–2 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.aut_hcheckdam.pdf. For a description of the Commission’s work and process, see *id.* at 2–3. For information about Commission members, see *About Us*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html (last visited Feb. 1, 2013).

2. See *ABA Adopts Policy on Ethics in the Profession, Criminal Justice Reforms and Civil Standards in Immigration Detention*, ABA NOW (Aug. 7, 2012), <http://www.abanow.org/2012/08/aba-adopts-policy-on-ethics-in-the-profession>. The six Resolutions adopted (designated 105A–F) concern, respectively: law practice technology and confidentiality, technology and client development, ethical implications of outsourcing legal work, the detection of conflicts of interest when lawyers move from one firm to another, law practice pending bar admission, and bar admission by motion. See *Work Product*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/work_product.html (last visited Feb. 1, 2013).

3. See *Work Product*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/work_product.html (last visited Feb. 1, 2013). The Commission concluded its work in February 2013, when it proposed and the House adopted changes on four additional topics. See Leigh Jones, *ABA Ethics Commission Closes Chapter on Rule Revisions*, NAT’L L.J. (Feb. 14, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202588381157&ABA_ethics_commission_closes_chapter_on_rule_revisions&slreturn=20130309134731.

4. See ABA COMM’N ON ETHICS 20/20, *supra* note 1, at 3 n.9.

Alternative Law Practice Structures (ALPS),⁵ which are for-profit entities in which lawyers practice law but which, unlike traditional law firms, are owned at least in part by nonlawyers. I served as a commission member and as co-chair of the ALPS Working Group.⁶ Our primary task was to consider whether the Model Rules should be amended to permit lawyers to practice law in ALPS.

For decades, American lawyers have been barred from (1) sharing legal fees with nonlawyers, (2) forming a partnership with nonlawyers if any of its activities constitute the practice of law, and (3) practicing law in a firm that is authorized to do so for profit, if a nonlawyer is a director or officer of the firm or has the right to direct or control a lawyer's exercise of professional judgment.⁷ Today, Rule 5.4 of the ABA Model Rules of Professional Conduct, and analogous rules in every U.S. jurisdiction except the District of Columbia, continue to proscribe these activities.⁸ But recent regulatory reforms abroad, most notably in Australia and the United Kingdom (U.K.), permit lawyers, under certain conditions, to practice in firms that have nonlawyer-owners. With those developments in mind, the key issue the ALPS Working Group was asked to consider was whether ALPS

5. *Id.* This group was initially called the Working Group on Alternative Business Structures (ABS), the more common term, especially abroad. The name change was cosmetic, the word "business" apparently being seen as pejorative. The other working groups were asked to address issues related to: new technologies; outsourcing; conflicts of interest, uniformity, and choice of law; alternative litigation financing; law firm ratings and rankings; and inbound foreign lawyers.

6. Other members of the ALPS Working Group were George W. Jones (Co-Chair and Commissioner); Jeffrey Golden (Commissioner); Roberta Cooper Ramo (Commissioner); Professor Carole Silver (Commissioner); Chief Justice Gerald W. VanderWalle (Commissioner); Donald B. Hilliker (ABA Center for Professional Responsibility); Kathleen J. Hopkins (ABA General Practice, Solo and Small-Firm Division); George Ripplinger (ABA Standing Committee on Ethics and Professional Responsibility); Wallace E. "Gene" Shipp, Jr. (National Organization of Bar Counsel); and Robert D. Welden (ABA Standing Committee on Professional Discipline). Professor Paul D. Paton served as the Working Group's Reporter, with the participation of Professor Andrew Perlman, the Commission Reporter. Elyn S. Rosen from the ABA Center for Professional Responsibility served as Commission Counsel and Art Garwin, Deputy Director of the Center, also provided counsel.

7. These bans were originally added to the ABA's first ethics code, THE CANONS OF PROFESSIONAL ETHICS, in 1928. See CANONS OF PROF'L ETHICS Canons 33-35 (1963).

8. See MODEL RULES OF PROF'L CONDUCT R. 5.4(a)-(b), (d) (2009). For the District of Columbia version of Rule 5.4, which has permitted a limited form of nonlawyer ownership since 1991, see *infra* note 15. For brief descriptions of the rules banning nonlawyer ownership in a sampling of U.S. jurisdictions, see STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 346-49 (2012).

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could operate in a manner consistent with the “core values” of the American legal profession.⁹

The Working Group studied the history of ABA policy on nonlawyer ownership, as well as the experience with ALPS in the District of Columbia and abroad. It identified five kinds of ALPS, all of which are now permissible in the United Kingdom and Australia.¹⁰ They are (1) law firms¹¹ wholly or partly owned by passive investors (e.g., a department store chain); (2) law firms that raise capital by issuing stock to outsiders; (3) multidisciplinary practices (MDPs), i.e., firms that have lawyer- and nonlawyer-owners who are all active in firm operations, with the nonlawyers providing nonlegal services to their own clients; (4) law firms owned in part by nonlawyers whose role is limited to helping firm lawyers provide legal services; and (5) law firms owned in part by nonlawyers whose role is limited as in alternative 4, but with further restrictions.¹²

By June 2011, the Commission had rejected the first three alternatives¹³ without looking closely at the novel measures the

9. See ABA COMM’N ON ETHICS 20/20, PRELIMINARY ISSUES OUTLINE 6 (2009), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/preliminary_issues_outline.authcheckdam.pdf. The American legal profession has no official set of “core values,” but competence, confidentiality, loyalty, independent professional judgment, preserving professional “self-regulation,” and promoting access to justice are often cited. See, e.g., *MDP Recommendation—Center for Professional Responsibility*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html (last visited Feb. 1, 2013) (offering a similar list).

10. For the Working Group’s summary of the key regulatory changes that now permit nonlawyer ownership in Australia and the U.K., see ABA Commission on Ethics 20/20 Working Group on Alternative Business Structures, Issues Paper Concerning Alternative Business Practices 7–10, 13–15 (Apr. 5, 2011) (unpublished manuscript) [hereinafter ALPS Issues Paper], available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf.

11. In this Article the term “law firms” refers to private entities that provide only legal services.

12. ALPS Issues Paper, *supra* note 10, at 17–19.

13. See *ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms*, ABA Now (Apr. 16, 2012), <http://www.abanow.org/2012/04/aba-commission-on-ethics-2020-will-not-propose-changes-to-aba-policy-prohibiting-nonlawyer-ownership-of-law-firms/> [hereinafter *No Change in ABA Policy on Nonlawyer Ownership*]. This was not surprising because these are the alternatives that differ most radically from traditional law firms. Moreover, as recently as 2000, the House of Delegates had not only rejected a proposal to permit lawyers to practice in MDPs, but more broadly resolved that the “sharing of legal fees with nonlawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession.” *MDP Recommendation—Center for Professional Responsibility*, *supra* note 9. Like

British and Australian authorities were taking to prevent nonlawyer-owners from interfering with the lawyers' exercise of professional judgment or otherwise putting core values at undue risk.¹⁴ But, the Commission did ask the ALPS Working Group to draft for further consideration a version of Rule 5.4 that would follow the District of Columbia model,¹⁵ but with two further restrictions: a percentage cap

the Founding Fathers, the House held this truth to be self-evident. But the House resolution had potential implications for all five alternatives; it could be read to treat each "core value" as an absolute, brooking no compromise. On that reading, *no* proposal to permit nonlawyer ownership, *however limited*, which *might* pose even a *slight* risk of compromising a *single* "core value" could ever pass muster—even if it might substantially benefit clients and the public in other respects and some bar constituencies supported it.

14. However, the Working Group did inform the Commission about these measures. See ALPS Issues Paper, *supra* note 10, at 7–10, 13–15. And the Commission received information from British and Australian authorities about the controls built into the Legal Services Act of 2007 and implementing regulations. See Letter from Chris Kenney, Chief Executive of the Legal Services Board, to Stephen N. Zack, ABA President (May 27, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/kenny_issuespaperconcerningalternativebusinessstructures.authcheckdam.pdf; Letter from Charles Plant, Chair of the Bd. of the Solicitors Regulation Auth., to Foreign Bars and Regulators (June 27, 2011) (on file with author); Statement by John Wooton, President of the Law Soc'y of Eng. & Wales, to the ABA Comm'n on Ethics 20/20 (August 5, 2011) (on file with author); see also Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 FORDHAM L. REV. 2791, 2816–17 & nn.141–45 (2012) (concluding that the controls in place in Australia and the U.K. demonstrate that regulators there are mindful of the importance of protecting core values).

15. See D.C. RULES OF PROF'L CONDUCT R. 5.4 (2007). That rule, like the ABA rule is captioned "Professional Independence of a Lawyer," and provides in pertinent part that:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

....

(4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b) . . .

....

(b) A lawyer may practice in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

(1) The partnership or organization has as its sole purpose providing legal services to clients;

(2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;

(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants [i.e., owners] to the same extent as if nonlawyer participants were lawyers under Rule 5.1; [and]

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on nonlawyer ownership in order to maintain lawyer control, and a requirement that the law partners conduct a character inquiry to assess the capacity of prospective nonlawyer-owners to act in a manner compatible with the lawyers’ duties.¹⁶ The Working Group produced a Draft Resolution meeting these criteria, and a supporting Draft Report, which, in December 2011, the Commission circulated together as a Discussion Paper for comment.¹⁷

(4) The foregoing conditions are set forth in writing.

Id.

16. See James Podgers, *Summer Job: Ethics 20/20 Commission Shelves Nonlawyer Ownership, Focuses on Other Proposals*, A.B.A. J., June 2012, at 27, 27.

17. The Draft Resolution called for amending Model Rule 5.4(a), which currently provides (with minor exceptions, irrelevant to ALPS) that a “lawyer or law firm shall not share legal fees with a nonlawyer.” MODEL RULES OF PROF’L CONDUCT R. 5.4(a) (2012). The Resolution would have created a new exception allowing such fee sharing “pursuant to [a new] paragraph (b).” Under new paragraph (b), a lawyer “may practice in a law firm in which individual nonlawyers . . . hold a financial interest,” but only if

- (1) the firm’s sole purpose is providing legal services to clients;
- (2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;
- (3) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct and agree in writing to undertake to conform their conduct to the Rules;
- (4) the lawyer partners in the law firm are responsible for those nonlawyers to the same extent as if the nonlawyers were partners under Rule 5.1;
- (5) the nonlawyers have no power to direct or control the professional judgment of a lawyer, and the financial and voting interests in the firm of any nonlawyer are less than the financial and voting interest of the individual lawyer or lawyers holding the greatest financial and voting interest in the firm; the aggregate of the financial and voting interests of the lawyers does not exceed [25%] of the firm total, and the aggregate of the financial and voting interests of all lawyers in the firm is equal to or greater than the percentage of voting interests required to take any action or for any approval;
- (6) the lawyer partners in the firm make reasonable efforts to establish that each nonlawyer with a financial interest in the firm is of good character, supported by evidence of the nonlawyer’s integrity and professionalism in the practice of his or her profession, trade, or occupation, and maintain records of such inquiry and its results; and
- (7) compliance with the foregoing conditions is set forth in writing.

ABA Comm’n on Ethics 20/20, Discussion Draft for Comment Alternative Law Practice Structures, app. at 1–2 (Dec. 2, 2011) (unpublished manuscript) [hereinafter ALPS Draft Resolution], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf. The Resolution also proposed ten new comments to Rule 5.4. See *id.* app. at 2–4. Readers interested in the data and other information the Working Group and staff collected in studying ALPS may wish to consult the accompanying report. *Id.* at 4–16.

Altogether, the Commission received more than thirty written submissions on the ALPS issue, chiefly comments responding to the Working Group's Discussion Paper or earlier Issues Paper.¹⁸ The Commission also took testimony at public hearings.¹⁹ This input included some support for the Draft Resolution²⁰ and some criticism that it did not go far enough in liberalizing Model Rule 5.4.²¹ But overall, the response was extremely negative, and *categorically* so; opponents wanted the Model Rules to continue to bar lawyers from practicing law in *any* firm owned in *any* form and to *any* degree by nonlawyers.²² In their view, the substantial measures to protect core values that were built into the Draft Resolution did not distinguish it

18. See *Alternative Law Practice Structures Comments Chart*, A.B.A., http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/alps_working_group_comments_chart.authcheckdam.pdf (last updated Aug. 28, 2012) [hereinafter *ALPS Comments Chart*]. Of the comments listed, the large majority came from bar groups or lawyers—four from other ABA entities, four from state bar associations, and fifteen from individual lawyers or groups of lawyers. Some of the comments in opposition to nonlawyer ownership are analyzed *infra* Part III.

19. See, e.g., Joan C. Rogers, *Ethics 20/20 Commission Remains Divided on Letting Nonlawyers Buy into Law Firms*, 28 *Law. Manual Prof'l Conduct* (ABA/BNA) 100 (Feb. 15, 2012) (reporting on comments made at a Commission hearing by New York State Bar Association President Vincent E. Doyle III and Lawrence J. Fox, an attorney at Drinker Biddle Reath in Philadelphia and longtime leader in ABA ethics debates). In a few cases, the Commission received more than one response from the same party.

20. See, e.g., Letter from Tracey L. Young & Robert S. Horuda, President & Vice President, Nat'l Fed'n of Paralegal Ass'ns, to ABA Comm'n on Ethics 20/20 (Jan. 27, 2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/nationalfederationparalegalassociations_alpsdiscussiondraft.authcheckdam.pdf.

21. Professor Tom Morgan, a longtime expert on the regulation of law practice, submitted extensive comments arguing that in view of the rapidly changing nature of law practice, the Working Group's Draft Resolution would permit too little non-lawyer ownership. See Letter from Thomas D. Morgan, Oppenheim Professor of Antitrust & Trade Regulation Law, The George Washington Univ. Law Sch., to ABA Comm'n on Ethics 20/20 (Jan. 30, 2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/morgan_alpsdiscussiondraft.authcheckdam.pdf; see also Letter from Thomas M. Gordon, Legal & Policy Dir., Consumers for a Responsive Legal Sys., to ABA Comm'n on Ethics 20/20 (Jan. 30, 2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/responsivelaw_alpsdiscussiondraft.authcheckdam.pdf (calling it unfortunate that the Commission was rejecting MDPs as well as "the more open approach to non-lawyer participation now practiced in the United Kingdom and Australia").

22. See *infra* Part III (analyzing many of the negative comments).

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from earlier and more radical proposals to permit lawyers to practice in MDPs or law firms owned by outside investors.²³

In the wake of this response, the Commission decided not to recommend to the House any change in the Model Rules that would permit lawyers to practice law in firms with nonlawyer owners. On April 16, 2012, Commission Co-Chairs Jamie Gorelick and Michael Traynor issued a press release announcing the decision.²⁴ Gorelick told the ABA Journal that the Commission made its decision “on the merits,” and she and Traynor “indicated that the feedback [received] *from other bar associations and individual members of the profession did not suggest a groundswell of support for revising the ABA Model Rules . . . to permit a limited form of nonlawyer ownership.*”²⁵ The first statement is a matter of interpretation. And the two statements, taken together, suggest that, for the Commission, deciding against recommending the Draft Resolution on the “merits” meant heeding the profession’s predominately negative attitude toward all forms of nonlawyer ownership of law practices.²⁶

23. See *infra* Part III.B.

24. ABA NOW, *supra* note 13. I supported the ALPS Working Group’s Draft Resolution and hoped the Commission would recommend it to the House even though it was unlikely to be adopted. In my view, the ABA’s public responsibility as a rule maker for the practice of law cut in favor of having the delegates consider the matter and articulate their positions. But with only limited information available on the experience with similar rules in the District of Columbia and the United Kingdom, *cf. infra* Part III, it proved very difficult to convince skeptics that clients and lawyers could benefit substantially if the ABA and state supreme courts adopted such a hedged proposal. I do not fault other commissioners for thinking at that point that the game was not worth the candle. Commissioners more savvy than I about ABA politics worried that the House would not only reject the proposal without productive debate, but would also become less supportive of worthy Commission proposals on other matters.

25. Podgers, *supra* note 16, at 27 (emphasis added). As of August 2012, however, the Commission had not ruled out preparing an informational White Paper on nonlawyer ownership to submit to the House, and it was still considering whether to propose choice-of-law rules for determining the propriety of fee-sharing arrangements between lawyers practicing in a jurisdiction that forbids sharing legal fees with nonlawyers, on one hand, and law firms with nonlawyer-owners in the District of Columbia and in foreign countries where nonlawyer ownership is permitted. See *id.* at 28. The Commission ultimately decided against the White Paper and the choice-of-law proposal.

26. This is not to say that the Commission heard only from lawyers and bar associations. It invited public comment on the Discussion Paper but received a disappointing response from outside the profession. See ALPS Comments Chart, *supra* note 18 (citing a list of comments and commentators compiled by the Commission staff). By contrast, the ABA Commission on Multidisciplinary Practice, in the short period between November 1998 and August 1999, heard testimony and received submissions on whether to permit lawyers to practice in MDPs from more

The nature of that negative reaction is revealed in the remarkably uniform rhetoric that opponents used to express their opposition. The opponents' rhetoric, rather than the merits of the Resolution, is the subject of this Article, which describes and criticizes that rhetoric. More broadly, it places the rhetoric in historical context by reviewing ABA and state bar policy and policymaking over time not only on the issue of nonlawyer ownership, but also on other issues concerning what Gary Munneke usefully called "business entanglements with nonlawyers."²⁷ And it suggests that the predominant bar discourse on "entanglement" issues over time reflects troubling weaknesses in bar policymaking and, consequently, in our system of "professional self-regulation," in which the mainstream bar and the state supreme courts, working in tandem, choose the ethics rules that govern law practice.

My historical review reveals constant reliance over time on virtually the same rhetorical tools that the opponents of the ALPS Draft Resolution used in expressing their views to the 20/20 Commission. I call those tools, collectively, the "idiom of professionalism."²⁸ This Article identifies and criticizes the main features of the idiom as it has evolved to date. It also shows that although the idiom has often won the day in internal ABA policy

than ninety parties with a much broader range of backgrounds. See *Appendix B: Witnesses at ABA Commission on Multidisciplinary Practice Hearings*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpappendixb.html (last visited Feb. 1, 2013). Of course, that commission dealt solely with MDP issues. The 20/20 Commission had a much broader charge and could only devote limited attention to ALPS.

27. See Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 FORDHAM L. REV. 559, 576 (1992). I recognize that for many readers "business entanglements with nonlawyers" is an unfamiliar, even awkward phrase. In some cases, one could just as well speak of "the business aspects of law practice." But the arrangements I claim the bar has treated as *business* entanglements often concern forms of collaboration between lawyers and nonlawyers that many people might not think of as involving the business aspects of law practice.

28. I first used the term "idiom of professionalism" in criticizing the rhetoric that proponents used to convince the ABA House of Delegates in 1991 to adopt a Model Rule that barred lawyers and law firms from owning and operating "ancillary businesses." Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363, 365-67, 372-90 (1993). The ancillary business debate is discussed *infra* Part II.C.3. Russell Pearce has used the term "ideology of professionalism" in much the same way as I use the term "idiom of professionalism." See Russell G. Pearce, *Law Day 2050: Post-Professionalism, Moral Leadership, and the Law as Business Paradigm*, 27 FLA. ST. U. L. REV. 9, 16 (1999). But I prefer the word "idiom" because it connotes a form of discourse that has hardened into a stable, recurrent pattern.

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debates, those victories have become vulnerable to subsequent legal attack in external forums. Based on that analysis, this Article questions the capacity of idiom-based arguments to promote sound and stable policies on issues concerning lawyers’ “business entanglements with nonlawyers.”²⁹

This Article proceeds as follows: Part I lays a foundation for a critical review of the rhetoric lawyers and bar entities used in opposing the Working Group’s Draft Resolution on nonlawyer ownership. It traces the development and deployment of the idiom of professionalism from the early twentieth century to date.

Part I.A considers Julius Henry Cohen’s early contributions to the idiom in his classic work on legal ethics, *The Law: Business or Profession?*³⁰ Part I.B describes the use and elaboration of the idiom between 1920 and 1980, both in ABA policy debates concerning the rules that should govern lawyers’ business entanglements and, more recently, in the bar’s advocacy when defending such rules against legal challenges after the rules were adopted. In addition to nonlawyer ownership of entities in which lawyers practice law, the “entanglements” I discuss include working for businesses as in-house counsel, providing legal services through group legal services plans, advertising for clients, and charging clients less for legal services than bar-issued minimum fee schedules prescribe. Part I.C documents the further use and hardening of the idiom in three ABA debates in the Model Rules era, debates that set the stage for the 20/20 Commission’s consideration of ALPS. Two of those debates also

29. Because the ABA is a private association with no authority to make legally binding rules, one might consider this topic unimportant. But even though ABA ethics rules become positive law only if adopted by courts and agencies, the ABA, by dint of its influence, is the principal lawgiver in the regime lawyers call “professional self-regulation.” For example, by 1972, only two years after the ABA issued its Code of Professional Responsibility, most state supreme courts had adopted it, often verbatim, to govern lawyers in their jurisdictions. *See Report of the ABA Special Commission to Secure Adoption of the Code of Professional Responsibility*, 97 A.B.A. REP. 268 (1972). Today, the high court in every state but California has adopted the Model Rules of Professional Conduct, albeit with local amendments. With such influence, the ABA’s rulemaking deserves close scrutiny. The ABA itself has acknowledged this as early as 1919, when it resolved to develop its policy recommendations in the manner expected of a “quasi-public association.” *See CORINNE GILB, HIDDEN HIERARCHIES: THE PROFESSIONS AND GOVERNMENT* 216 (1966). I believe that ABA policymaking in the realm of legal ethics is especially “affected with a public interest.”

30. JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* (2d ed. 1924). The book was first published in 1916, but citations in this Article are to the 1924 edition, which included a lengthy postscript updating developments.

concerned whether to permit lawyers to practice law in ALPS. The third concerned whether to bar lawyers from owning or operating firms that provide “nonlegal services which are ancillary to the practice of law” and from practicing law in firms that own or operate “ancillary businesses.”³¹

From the historical material in Part I, Part II distills six elements of the idiom of professionalism. Part II shows that those elements were salient in the comments the 20/20 Commission received from lawyers and bar entities that opposed the Working Group’s recommendation of a modest relaxation of the ban on lawyers practicing in ALPS. And it criticizes the opponents’ deployment of those elements in their comments.

While Parts I and II identify and criticize various idiom-based arguments, Part III offers a more general statement of the overarching problems I associate with the repeated invocation of such arguments—and little else—in two settings: one internal to the bar, the other external. Internally, bar constituents make idiom-based arguments in an effort to win the day for their preferred outcomes in ABA debates concerning the rules that should govern the business aspects of law practice.³² Externally, the bar recycles those arguments to defend idiom-based bar rules and policies when they are later challenged in legal forums in which the bar does not have what Bruce Green has called the bar’s “enormous home field advantage.”³³

The internal problem is that the constant resort to idiom-based arguments in bar debates on the rules that should govern lawyers’ business entanglements tends to forestall serious efforts to assess the specific risks and benefits of the entanglements at issue. The external problem stems from the fact that ABA rulemaking on lawyers’ business entanglements has often produced categorical bans that are grounded in idiom-based rather than evidence-based arguments.

31. See Schneyer, *supra* note 28, at 364.

32. I have not found this pattern in evidence in the policymaking process that resulted in authorizing lawyers in England and Wales to practice law in a broad range of ALPS. See Legal Services Act 2007, c. 29 (U.K.). The executive and legislative branches of the British government established and controlled that process, but engaged in painstaking studies of the legal services market and sought and received substantial input from the British legal profession(s). Of course, the very different process that led to that result may have drawbacks of its own, an issue requiring comparative analysis beyond the scope of this Article.

33. Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1156 (2000).

Those bans have proven in recent decades to be highly vulnerable to legal challenge, as evidenced by the Supreme Court decisions striking down bans on lawyer advertising³⁴ and declaring that bar-issued minimum fee schedules unlawfully restrain trade.³⁵ These external “interventions” put in question the ABA’s legitimacy as the principal ethics rule-maker for law practice. Whether the same fate will befall the ABA’s categorical ban on all nonlawyer ownership of law practice entities remains to be seen, but recent developments suggest that the risk is far from negligible and that the ABA should be focusing more on how to regulate nonlawyer ownership than on preserving the ban.³⁶

My experience on the 20/20 Commission leads me to think these problems deserve more attention from bar leaders than they have received. For if reliance on “professionalism” as a mantra in bar policymaking on the business aspects of law practice continues unabated, the upshot for the American legal profession in a time of dramatic changes in law practice and its regulation might well be to diminish the ABA’s influence as a “private legislature” for law practice, and further erode what was once the primacy of professional self-regulation in the governance of law practice. These consequences would be deeply ironic because preserving the bar’s privilege of self-regulation is one of the core values the idiom of professionalism treats as sacrosanct.

I. THE FORMATION AND ELABORATION OF THE IDIOM OF PROFESSIONALISM

A. Julius Henry Cohen’s Early Articulation of Key Elements

Julius Henry Cohen’s *The Law: Business or Profession?* was the first systematic attempt in the United States to define the elements of lawyer professionalism and consider what they entail for law practice and the regulatory mission of the bar.

The book is organized around two fundamental ideas. The first is Cohen’s insistence on drawing in the starkest terms the distinction between “profession” and “business.” He was not satisfied to treat the two concepts as ideal types at the poles of a continuum, for that

34. See *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *infra* notes 91–95 and accompanying text.

35. See *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975); *infra* notes 89–90 and accompanying text.

36. The ban is now coming under legal attack. See *infra* notes 224–25 and accompanying text.

would suggest that *real* lawyers and businessmen were hybrids, occupying somewhat different but largely overlapping positions along the continuum. Instead, he treated the distinction as a dichotomy based on a fundamental difference in motivation. For Cohen, to be a professional was to be motivated by an ethic of service in fulfilling a vital social function; to be in business was to be motivated by profits.³⁷ This is clear from his approving quotation of a passage from R.H. Tawney's *The Acquisitive Society*,³⁸ which Cohen wished "could be put in the hands of every law student."³⁹ "A Profession," Tawney wrote:

may be defined most simply as a trade which is organized . . . for the performance of a function. It is not simply a collection of individuals who get a living . . . by the same kind of work. Nor is it merely a group which is organized exclusively for the economic protection of its members It is a body of men who carry on their work in accordance with rules designed to enforce certain standards . . . for the better service of the public. . . . [I]t assumes certain responsibilities for the competence of its members [and] deliberately prohibits certain kinds of conduct on the ground that, though they may be profitable to the individual, they . . . bring into disrepute the organization to which he belongs. While some of its rules are . . . designed primarily to prevent the economic standards of the profession [from] being lowered by *unscrupulous competition*, others have as their main object to [ensure] that no member of the profession shall have any but a purely professional interest in his work, by excluding the incentive of speculative profit.⁴⁰

This orientation shaped Cohen's views about the ethical norms that should govern law practice. For example, he opposed lawyer advertising,⁴¹ practicing law through "corporate intermediaries,"⁴² and

37. In passing, Cohen did express the hope that business ethics were moving toward a service orientation. See COHEN, *supra* note 30, at 40. But Cohen's concern was that "while one part of society has been professionalizing commerce, another has been commercializing the profession." *Id.* at 43.

38. RICHARD HENRY TAWNEY, *THE ACQUISITIVE SOCIETY* (1920). Tawney was an English economic historian, social critic, and Christian socialist. His contemporary, French sociologist Emile Durkheim, had a similar understanding of the professions. See EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* 1–41 (1958).

39. COHEN, *supra* note 30, at 331.

40. TAWNEY, *supra* note 38, at 93 (emphasis added).

41. COHEN, *supra* note 30, at 173–200, 348–49.

42. See *id.* at 264–76 (title and trust companies); *id.* at 299–301 (collection agencies); *id.* at 302–08 (trade associations). As Bruce Green has shown, the salient motive behind barring lawyers from representing clients obtained through corporate

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using “runners” to solicit clients.⁴³ To insulate lawyers from the corrupting influence of business, Cohen also urged them to devote themselves solely to the practice of law.⁴⁴

intermediaries in the early 1900s was protectionism. The chief criticism was that the arrangement gave lawyers who worked for or with corporate intermediaries an unfair competitive edge over lawyers who did not, because the intermediaries attracted clients for their lawyers through advertising and solicitation, which other lawyers—the true professionals—considered an improper entanglement with the business practice of marketing. *See* Green, *supra* note 33, at 1126 n.52. Cohen himself voiced this criticism. *See* COHEN, *supra* note 30, at 174–75. Today, of course, the rules of legal ethics permit lawyers to advertise, so the original rationale for barring lawyers from practicing through corporate intermediaries is no longer serviceable. But practicing through corporate intermediaries is still banned as the sharing of legal fees with nonlawyers, which is thought to compromise a lawyer’s exercise of independent judgment on behalf of clients. *See* MODEL RULES OF PROF’L CONDUCT R. 5.4(a) (2012); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 374 (1993). The bar also continued in modern times to regard practicing law through a corporate intermediary as improperly assisting the intermediary in the unauthorized practice of law. *See, e.g.*, ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 297 (1961); ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 1181 (1971). Though Cohen himself embraced this argument, *see* COHEN, *supra* note 30, at 246–60, it seems clearly to be a makeweight, because the legal services in question are performed by licensed attorneys.

43. *See* COHEN, *supra* note 30, at 200. Cohen was also ambivalent at best about the growing tendency of lawyers to specialize. Not only might the further division of legal labor undermine professional solidarity, but emerging specialties often brought lawyers into closer contact with business clients and, thus, commercial values. *See id.* at 31–32 (approving of Woodrow Wilson’s views on this point).

44. *See id.* at 15. Cohen quoted with approval a New York judge who opined that an attorney should

primarily reserve himself for his profession only[, where] he is held to the highest standard of ethical and moral uprightness and fair dealing. There seems to be no good reason why a lawyer should be allowed to be honest as a lawyer and dishonest as a business man. If he desires to go into business he must . . . see that his dealings as a business man are as upright as . . . his dealings [as a lawyer].

Id. Today, the many lawyers who have dual occupations would see such remarks as an unjustified assault on their professionalism. Yet a similar sentiment may still serve as a basis for barring law firms from having nonlawyer partners even if those partners are limited to helping the lawyers provide legal services. If the ban were lifted, the nonlawyers who became law firm partners would often be economists, social workers, environmental engineers, nurses, tax accountants, and the like, many of whom would already have worked in law firms as employees. *See* James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A “Radical” Proposal to Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159, 1177 (2000) (noting that since the late 1970s, the systematic hiring of nonlawyers in these fields to assist lawyers in delivering legal services has steadily increased). Experts in such fields view themselves, and are viewed by others, as professionals. Why presume that they would be more driven by *the profit motive* to behave unethically than today’s lawyers, or would press lawyers in their firm to do so? It appears that many lawyers today either relegate these other professionals to the business side of

Cohen's second fundamental point was that the line between business and profession must be *policed* in order to keep lawyers on the professional side, especially in large cities, where lawyers were growing in number and more heterogeneous.⁴⁵ Under these conditions, informally socializing lawyers to embrace professional values would not suffice. Regulation was also needed for the bar to maintain and vouch for the trustworthiness and competence of lawyers generally. As Cohen famously put it, "we [lawyers] are all in a boat. The sins of one of us are the sins of all of us. Come, gentlemen, let us clean house."⁴⁶

Cohen also had a clear idea about *how* the line should be policed. Two things were needed: a comprehensive set of practice norms to govern all lawyers (but only lawyers), and institutions to promote compliance.⁴⁷ In Cohen's view, both needs had to be filled by the increasingly organized bar (i.e., the profession in its corporate form), because ethical problems that members of a profession encounter in practice must be solved "by those who encountered them."⁴⁸

Cohen's dichotomy, or consider them less professional than lawyers, or consider the legal profession's core values unique. This is the thrust of the ABA House of Delegates pronouncement, when rejecting a proposal to allow a lawyer to practice in MDPs in 2000, that the "sharing of legal fees with nonlawyers and allowing nonlawyers to own and control firms engaged in the practice of law are inconsistent with the core values of the legal profession." *MDP Recommendation—Center for Professional Responsibility*, *supra* note 9.

45. See Charles A. Boston, *A Code of Legal Ethics*, 20 GREEN BAG 224, 227 (1908) (stating that in New York and other large cities after 1900, "there [was] no professional brotherhood; the Bar is too numerous and too heterogeneous").

46. COHEN, *supra* note 30, at 109.

47. *Id.* at 158–65.

48. *Id.* at 158 (quoting philosopher Felix Adler, founder of the Ethical Culture Society, who believed that each profession must solve its ethical problems by regularly applying its own ethical norms to concrete issues that arise in practice). To the same effect, see Herbert Harley, *Group Organizations Among Lawyers*, 101 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 34, 39 (1922). Skeptics today might suppose that Cohen's call for professional self-regulation was a strategy to stave off more onerous external regulation, but that would be a mistake; when Cohen wrote his book, external regulation was minimal at best. The immediate need was to fill a regulatory vacuum. Today, lawyers are subject to extensive external regulation, especially at the federal level. See John Leubsdorf, *Legal Ethics Fall Apart*, 57 BUFF. L. REV. 959 (2009) (identifying the broad range of federal laws and regulations that now govern lawyers specifically or as members of a broader class of service providers); Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559, 566–82 (2005) (same). The explosion of external regulations does not mean, however, that lawyers now accept a lesser role for self-regulation. On the contrary, the need to sanctify the preservation of self-regulation as a core value of the profession seems to be felt more

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Cohen was a pioneer in building the institutions of professional self-regulation.⁴⁹ He extolled the ABA Canons of Ethics, issued in 1908, as a milestone in the professionalization of lawyers, and was especially taken with the provision in Canon 12 that lawyers, when setting fees, should never forget that “the profession is a branch of the administration of justice and not a mere money-getting trade.”⁵⁰ He also served for years on the first bar association committee in the United States to issue advisory ethics opinions,⁵¹ supported Herbert Harley’s campaign for the creation of official, compulsory-membership bars at the state level,⁵² and participated in early bar efforts to curb the unauthorized practice of law.⁵³

Cohen was also an idealist, but not naïve. He acknowledged that some of the enthusiasm of his “brethren” for halting unauthorized practice stemmed from “an impulse to [ease] competition . . . for those who have paid . . . the heavy price of [getting an] education, of training and observ[ing] [the] ethical code of conduct governing the profession.”⁵⁴ Others might call this an impulse of protectionism, but Cohen insisted that “the *main* impulse” behind the bar’s efforts to deter unauthorized practice was to “preserve and keep clean” a profession that exists primarily for the benefit of the community.⁵⁵

In my view, Cohen’s take on the relative force of these two “impulses” to deter unauthorized practice exposes the soft underbelly of the idiom of professionalism. Cohen *had* to regard the community-minded impulse as the key. Giving the protectionist impulse more explanatory weight would have undermined his view of the business/profession distinction as a dichotomy based on motivation.

acutely than ever, motivated perhaps by a desire to stave off still more external regulation. *See, e.g., infra* note 138 and accompanying text.

49. The term “self-regulation” is a misnomer in the sense that the state supreme courts are deeply involved. Legislatures and executive branch agencies, however, are clearly outside the domain of self-regulation.

50. COHEN, *supra* note 30, at 204. Consistent with his emphasis on a service ethic as an element of professionalism, Cohen also encouraged lawyers to regard legal fees as honoraria, and was critical of contingent fees on the ground that they eroded lawyerly disinterestedness. *See id.* at 201–16.

51. *See id.* at 159–70 (discussing the origin and work of the New York County Lawyers Association’s Committee on Professional Ethics).

52. *See id.* at 155–56, 322. Harley headed the American Judicature Society.

53. *See id.* at 277–85.

54. *Id.* at 258; *see also* Pearce, *supra* note 28, at 17 (stating that the ideology of professionalism in Cohen’s day “conceded that flawed lawyers existed in significant numbers and that the invisible hand of reputation, while important . . . was insufficient to police the bar”).

55. *Id.* (emphasis added).

But, objectively speaking, who can say whether the community-minded impulse really predominated over protectionism in Cohen's day—or predominates now—in bar policymaking on the business aspects of law practice? And if, as I believe, this is often impossible to determine objectively, perhaps the case for allowing nonlawyers to own an interest in law firms should turn on assessing the specific risks and benefits of doing so (with built-in regulatory protections), rather than divining (and then impugning) the motives of those who support or oppose nonlawyer ownership—an assessment that might well require some experimentation with nonlawyer ownership.

In any event, I think Cohen was wise, and largely accurate, to call the protectionist motive an “impulse,” which suggests that, when protectionism does influence lawyers' views on regulating the business aspects of law practice, it does so unconsciously. Whenever lawyers and bar groups oppose rules permitting lawyers to practice in ALPS, cynics may assume they are consciously seeking to protect themselves and their law firms from new sources of competition. Though I support liberalizing the rules against nonlawyer ownership to some degree, I prefer to assume that the opposition is in good faith. But I wish the proponents of categorical bans on lawyers' various business entanglements would refrain in ABA debates from trying to score rhetorical points by accusing their opponents of being motivated simply by “greed” or a desire for profits, as sometimes happens.⁵⁶

Some activities that Cohen abhorred, such as lawyer advertising⁵⁷ or practicing law through a corporate intermediary,⁵⁸ might be defended on the ground that they promote competition in the legal services market and thereby reduce the cost of legal services and increase access to justice—supposedly a core value of the profession.⁵⁹ Cohen did not argue to the contrary. He simply viewed such competition as unprofessional. After praising the ABA's adoption of

56. See, e.g., *infra* note 147 and accompanying text (noting criticism launched by ABA President Stanley Chauvin, Jr. against law firms that opposed a proposed ban on law firm ownership and operation of ancillary businesses). In Cohen's terms, of course, arguments accusing the proponents of rule changes that would permit some form(s) of nonlawyer ownership of law practice entities of being moved by profit considerations amounts to impugning their professionalism.

57. See COHEN, *supra* note 30, at 173–200, 348–49.

58. See *id.* at 264–76.

59. See *MDP Recommendation—Center for Professional Responsibility*, *supra* note 9.

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its Canons of Ethics in 1908,⁶⁰ and speculating about why it had taken “so long for the . . . Bar to emerge from darkness [and] develop its own guild or collective impulse,”⁶¹ he cited the “pressure of competition” as a key obstacle.⁶² But his point was not that lawyers should be entitled to monopoly rents. Rather, he believed that professional solidarity, the “collective impulse,” was vital if the legal profession was to fulfill its social function, and he viewed the pressure of competition as antithetical to solidarity.⁶³ Whether those who support rules today that are likely to have anti-competitive effects do so for Cohen’s reason is, of course, a different question.

In sum, Cohen contributed at least four foundational ideas to what eventually became a full-blown idiom or ideology of professionalism. The first was his treatment of the business/profession distinction as a sharp dichotomy. That idea, when internalized by lawyers, might be expected to make them *categorically* oppose law practice in business-tinged ALPS rather than entertaining the possibility that ALPS, cabined by appropriate regulations, might yield net social benefits.⁶⁴ Cohen’s second idea was to ground the business/profession dichotomy on motives he considered to be in profound tension: profit-seeking in business versus public service in the legal profession. His third idea, a corollary of the second, was that market competition was a business phenomenon, inimical to professional solidarity, and, thus, a force that professional regulation should suppress, not promote. And his fourth contribution was a commitment to professional *self*-regulation under the auspices of the organized bar (acting in tandem with the state supreme courts).

60. See COHEN, *supra* note 30, at 155 (describing the Canons as doing more “to stimulate the improvement of professional standards of conduct than any event in the history of the American Bar”).

61. *Id.* at 107. Perhaps Cohen, taking a cue from Tawney, regarded competition between lawyers for clients as largely “unscrupulous.” See *supra* note 40 and accompanying text.

62. *Id.* at 110.

63. Indeed, Cohen was distrustful of competition generally. He argued against the rigid application of antitrust laws to efforts of business competitors to cooperate through their trade associations. See *generally* Julius Henry Cohen, *Ice*, 13 B.U. L. REV. 1 (1933).

64. One might draw an analogy to the legal history of lawyer advertising, where a Supreme Court decision in 1977 forced the ABA and the state supreme courts to lift their bans on lawyer advertising in favor of a regulatory approach. See *infra* Part I.B.2.c.

B. The Bar's Treatment of Lawyers' Business Entanglements from Cohen's Time to ABA Adoption of the Model Rules in 1983

1. *In-house Counsel*

As noted earlier, providing legal services through a corporate intermediary such as a trust company or collection agency was one of the ways lawyers become entangled with business that worried Cohen.⁶⁵ To this day, that arrangement violates prevailing rules of legal ethics.⁶⁶ But the fate of another entanglement that had a questionable ethical status as late as the 1920s—employment by a corporation to serve as in-house counsel to the company—has been quite different.

When an in-house lawyer provides legal services to the company that employs her, there is no *intermediary* between lawyer and client. Yet in-house lawyers are entangled in business in other ways. They are business employees, report to corporate officers who are agents of the client but not the client itself, and are often thought to be more beholden to those officers than are the company's outside counsel, who may have a whole portfolio of clients. In 1926, an ABA ethics opinion criticized in-house relationships on these grounds.⁶⁷ The opinion concluded that a lawyer employed as a bank officer may not render legal services to the bank, chiefly on the ground that the lawyer would inevitably lack the professional independence to discharge the duties lawyers owe to courts and the public.⁶⁸

Today, of course, in-house counsel are universally accepted in the United States.⁶⁹ But observers who would allow lawyers to practice

65. *See supra* note 42 and accompanying text.

66. This continues to be a disciplinable offense on the ground that it is a per se violation of the ban on sharing legal fees with nonlawyers, *see* MODEL RULES OF PROF'L CONDUCT R. 5.4(a) (2012), or constitutes assisting the intermediary in the unlawful practice of law. *See id.* R. 5.5(a) & cmt. 1.

67. *See* ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 10 (1926).

68. *Id.* (questioning how a lawyer, "being dependent on his employer's pleasure for his livelihood," could possibly exercise that independence of judgment and action that is "indispensable" to an advocate in court). Notice that here, in contrast to the case of a lawyer working for a corporate intermediary, what needs protection is not independence to exercise professional judgment *on behalf of* a client, but sufficient independence *from* the client's agents to discharge duties to others. One wonders whether the latter form of independence is a lesser concern to the bar than the former and, if so, whether that accounts for the acceptance of in-house lawyering.

69. The early legitimization of in-house counsel may date to an ABA amendment to Canon 35 in 1928 and two ABA ethics opinions issued in 1931 that assumed that in-house lawyers were capable of withstanding pressures from company officials to

law in ALPS question why the imperative to protect lawyers’ independent professional judgment continues to serve as the ABA’s chief justification for a categorical ban on ALPS when, for decades, the same imperative has posed no obstacle to lawyers serving as in-house counsel.⁷⁰ Observers who see no principled basis for this distinction may chalk up the discrepancy to the power of corporate America to structure its relationships with counsel as it sees fit. They may also suspect that the role of “independent professional judgment” in ABA policy debates on the permissible ownership and management structure of firms in which lawyer practice law is largely rhetorical.⁷¹ On this view, “independence” may be a core value of the profession, but it also serves as a rhetorical tool in bar policymaking, invoked when it is expedient and set aside when it is not.

2. *Bar Rules and Policies on Lawyers’ Business Entanglements that the Supreme Court Struck Down in the 1960s and 1970s*

In the 1960s and 1970s, the ABA and the organized bar generally had to defend ethics restrictions on three more “entanglements,” and in doing so further developed the idiom of professionalism.

misbehave. *See* Green, *supra* note 33, at 1151 n.173. Lawyers today express even more confidence on this point based on the growing status and sophistication of in-house counsel. *See, e.g.*, Geoffrey C. Hazard, Jr., *Foreword: The Future of the Legal Profession*, 84 MINN. L. REV. 1083, 1090–91 (2000) (remarking on the changes in house-counsel’s status). In Europe, however, the ability of in-house lawyers to remain sufficiently independent of their client’s owners and managers has continued to be questioned. Lawyers who move in-house have had to give up their bar memberships and their communications with corporate officers on legal matters may not be protected by the attorney-client privilege. *See* Case C-550/07 P, *Akzo Nobel Chems. Ltd. v. European Comm’n*, 2010 E.C.R. I-08301 (holding that in-house counsel are not sufficiently “independent” of their corporate colleagues to make communications with them legally privileged).

70. *See* Jones & Manning, *supra* note 44, at 1196–97 (arguing that if the aim of Model Rule 5.4 is to maintain professional independence in any context where lawyers are supervised by, paid by, or report to nonlawyers, then the rule “must be dismissed as either grossly ineffective or cynically biased” because there are many arbitrary exceptions, including in-house counsel in corporations and government agencies, and staff attorneys whom liability insurers use to defend their insureds).

71. *Cf.* RICHARD L. ABEL, *AMERICAN LAWYERS* 9 (1989) (“Although the ‘independence’ of lawyers remains an unquestioned shibboleth, it may express nostalgia more than it describes contemporary reality.”).

a. *Defending the Ban on Lawyer Participation in Group Legal Services Plans*

By the 1930s, automobile clubs were offering legal services to their members, often on an insurance-like basis.⁷² Unions and other associations also developed plans to provide free or subsidized legal services as a benefit to their members, who typically had low-to-moderate incomes.⁷³ These group legal services (GLS) plans undoubtedly gave some people of modest means access to otherwise unavailable legal services. Yet the organized bar attacked the plans, claiming that they inevitably interfered with lawyer-client relationships because some or all of the lawyers' fees for service were paid not by the client, but by the organization of which the client was a member.⁷⁴ The bar also claimed that plan providers were engaged in unauthorized practice of law (UPL), which in turn made it improper for lawyers to participate. In other words, the bar treated even non-profit GLS plan providers as indistinguishable from corporate intermediaries.⁷⁵

72. See Jones & Manning, *supra* note 44, at 1173.

73. See *id.*

74. See ABEL, *supra* note 71, at 136. This was said to give plan providers undue leverage over the lawyers. However, there was no general rule against lawyers accepting legal fees paid by third parties. Parents, for example, could pay a lawyer to represent their children in, say, DUI cases. The risk of third-party interference with a lawyer-client relationship was, and continues to be, tolerated in such cases. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (2012) (permitting lawyers to accept payment from third parties for representing a client provided the client gives informed consent; there is no "interference with the lawyer's independence of professional judgment or with the client-lawyer relationship"; and confidential client information is protected).

75. See BARLOW F. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 256 (1970) (stating that before the 1960s, the profession's position on obtaining lawyers' services through intermediary arrangements was that "[a]ll intermediary arrangements except those—like legal aid—that have been exempted by definition—and those—like casualty insurance arrangements—that the profession has chosen not to look at as intermediary arrangements, [were] completely prohibited"). But, one might ask, "If the GLS plans were not-for-profit, why consider participating lawyers to be entangled with 'business?'" One answer might be that although *corporate* intermediaries were the paradigm, the bar saw no reason to make an exception for non-profit GLS plans, as it had for legal aid programs. See *id.* at 226 n.4. A better answer may turn on the fact that although some non-profit GLS plans had open panels, which enabled any lawyer in the service area to participate, others had closed panels. They contracted for services from a limited number of lawyers, which gave the plans some ability to ensure the quality of service. Many lawyers were hostile to closed-panel plans because they gave lawyers on the panel a competitive edge over others in the service area. This hearkened back to the unfair-competition objection

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There were skirmishes between the bar and GLS plan providers for years, until a series of Supreme Court decisions in the 1960s struck down state bans on non-profit GLS plans as inconsistent with constitutional guarantees of free speech and association.⁷⁶ For some time, the ABA resisted these decisions, especially as applied to closed-panel plans. As promulgated in 1969, for example, the ABA Model Code of Professional Responsibility permitted lawyers to cooperate with non-profit closed-panel plans, but *only* when “controlling constitutional interpretation . . . require[d] the allowance of such legal service activities.”⁷⁷

Gradually, however, the bar relented. In 1974, the Model Code was amended to give broad approval to open-panel plans, but closed-panel plans remained improper unless they complied with a maze of highly restrictive conditions.⁷⁸ A year later, Code rules were again liberalized in response to critical comments from the Antitrust Division of the Justice Department and to internal political pressure from rank-and-file ABA members who *wanted* the right to

to lawyers obtaining a competitive edge by working through a corporate intermediary that advertised for law clients. *See supra* note 42.

76. *See* *United Mine Workers of Am. v. Ill. State Bar Ass’n*, 389 U.S. 217 (1967) (protecting plan by which union provided services of a salaried lawyer to assist members in worker’s compensation cases); *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964) (upholding a union program that referred injured members to lawyers selected by the union); *NAACP v. Button*, 371 U.S. 415 (1963) (protecting a program in which staff attorneys assisted members and others in race discrimination cases). In unsuccessfully defending these cases, the bar pointed to no evidence that GLS plans were causing harm to clients, yet argued that the lay intermediary problem was “at the heart of the hazards associated with group legal services,” and a significant threat to “the quality of service” because it would result in conflicts of interest and interference with the ability of lawyers to exercise independent professional judgment on behalf of clients. *See* Howard C. Sorenson, *Bar Ethics: Guardian of the Profession*, *TRIAL*, Mar.–Apr. 1975, at 15.

77. MODEL CODE OF PROF’L RESPONSIBILITY DR 2-103(D)(5) (1969).

78. *See* MODEL CODE OF PROF’L RESPONSIBILITY DR 2-103(D)(5) (1974). Closed-panel plans might be thought to pose a greater risk to lawyer independence because lawyers on a closed-panel might be more dependent on their earnings from the plan than lawyers on an open panel. As late as the mid-1970s, however, some bar leaders made the anti-competitive argument that closed-panel plans posed a significant threat to “the existence of the vast majority of small law firms dependent upon middle income clientele.” Sorenson, *supra* note 76, at 15. This raises the question whether lawyers who have reason to believe that they need only worry about professional *self*-regulation will not hesitate to support bar policies with naked appeals to professional self-interest.

participate in closed-panel plans.⁷⁹ Finally, in 1987, four years after the ABA adopted the Model Rules, an ABA ethics opinion concluded that nothing in those rules categorically barred lawyers from participating as staff attorneys in a closed-panel, *for-profit* plan.⁸⁰

Today, one searches in vain for cases in which lawyers participating in GLS plans have been disciplined for permitting plan providers to interfere with their ability to exercise independent professional judgment on behalf of clients who were plan members. After decades of trouble-free *experience* with GLS plans, it is clear that the bar's concerns that they would compromise the exercise of independent judgment by plan lawyers and interfere with lawyer-client relationships were greatly exaggerated.

This sequence, culminating in a messy ABA retreat, provides several insights into the relationship between the bar's core values and the idiom of professionalism. First, it shows that core values are sometimes in tension with *one another*, in which case they should not be portrayed, as they often are in idiom-based arguments, as absolute values brooking no compromise. The Supreme Court's intervention to protect GLS plans by constitutionalizing the issue was a blow to the primacy of professional self-regulation, a core value. But it was a self-inflicted blow. The bar triggered the intervention by insisting on protecting another core value—lawyer independence—by applying the ban on practicing law through an intermediary even to lawyer participation in open-panel, non-profit GLS plans. This amounted to a conclusive presumption that plan sponsors would unduly interfere with the exercise of independent professional judgment by participating lawyers—with no evidence whatsoever to justify the presumption.

Second, as noted above, pressure from lawyers who wanted to participate in closed-panel plans was also a factor that motivated the ABA to “compromise” the core value of lawyer independence in the context of GLS plans.⁸¹ If and when a sizable bar constituency presses the ABA to relax the ban on nonlawyer ownership—thereby

79. See Ted Schneyer, *Multidisciplinary Practice, Professional Practice, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469, 1523 nn.213–14 (2000) (citing authorities).

80. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 355 (1987). Instead, the opinion sets forth guidelines under which it would be permissible to participate in closed-panel plans. *See id.*

81. See *supra* note 79 and accompanying text.

providing the essential “groundswell of support” for liberalization—we might see a similar contextualization of a once-categorical ban. But no bar constituency pressed the 20/20 Commission to relax the ban.

b. The Bar’s Defense of Minimum Fee Schedules

Minimum fee schedules are listings of minimum charges for various legal services which are recommended by the organized bar. They date back to the eighteenth century, but their promulgation and use increased markedly during the Great Depression in the 1930s.⁸² From then until 1970, bar association ethics opinions⁸³ and pronouncements of the state supreme courts⁸⁴ offered high-minded justifications for the schedules. But ethics opinions often included ominous warnings, for

82. See Wallace Rudolph, *The Law as a Trade*, 51 NEB. L. REV. 392, 398 (1972).

83. See, e.g., ABA Comm. on Prof’l Ethics, Formal Op. 302 (1961) (“The establishment of . . . recommended fee schedules by bar associations is a thoroughly laudable activity. The evils of fee cutting ought to be apparent to all members of the Bar. . . . When members of the Bar are induced to render legal services for inadequate compensation . . . the quality of the service rendered may be lowered, the welfare of the profession injured, and the administration of justice made less efficient [N]o lawyer should be put in the position of bidding competitively for clients.”). On a related point, an earlier ABA ethics opinion asserted that “lawyers’ competitive bidding for legal work would tend to reduce the profession to a mere money making business” and “lower the dignity of the profession.” ABA Comm. on Prof’l Ethics, Formal Op. 292 (1957). That opinion would have gratified Julius Henry Cohen, but would probably elicit derisive laughter from present-day lawyers whose firms vie in “beauty contests” for the business of corporate clients.

84. In 1960, the Wisconsin Supreme Court upheld the constitutionality of its order creating the mandatory-membership Wisconsin State Bar, and bolstered its decision with an appendix listing significant State Bar activities and “the public purposes served thereby.” *Lathrop v. Donohue*, 102 N.W.2d 404, 411 (Wis. 1960). One listed activity was the promulgation of a minimum fee schedule. What public purpose was supposedly served? “The present economic plight of the lawyers in this country,” the court wrote,

is one which has disturbed the bench and the bar. . . . [From] 1929 to 1951 the net income of lawyers increased but 58 percent, while . . . that of dentists rose 83 percent and that of physicians 157 percent. The quality of legal service which will be rendered to the public is likely to suffer if young men of ability are dissuaded from entering the profession because of the difficulty of securing an adequate financial reward to enable them to properly support themselves and their families.

Id. at 413–14. The capacity to view the protection of lawyers’ incomes as a public purpose rather than a matter of professional self-interest may be an ironic consequence of the bench and bar taking Cohen’s sharp distinction between the motive that drives business (profit) and the motive that drives the profession (public service) to mean that a bar association’s minimum fee schedule could not possibly be motivated by anything but the desire to serve, and serve well.

example, that “evidence that an attorney habitually charges less than the [fees] suggested [in a] minimum fee schedule . . . raises a presumption that such lawyer is guilty of misconduct.”⁸⁵

By 1972, the fee schedules were under attack. An article in the *ABA Journal*⁸⁶ suggested that minimum fee schedules were “not in the best interests of either the legal profession or society and that . . . [their] use . . . should cease.”⁸⁷ The danger of antitrust liability became clear when an antitrust scholar published an article asserting that the schedules were a deliberate effort by lawyers, especially economically marginal lawyers in a time of reduced demand for legal services, to fix prices and limit competition.⁸⁸ And in 1975, the Supreme Court intervened once again, declaring in *Goldfarb v. Virginia State Bar* that minimum fee schedules, backed by warnings that lawyers who “habitually” undercharge might be disciplined, restrained trade in violation of the Sherman Act.⁸⁹ The high-minded rationales for the schedules did not succeed in justifying them.

Once again the bar had discounted the significance of *competition* as a public value inscribed in law, even if not a core value of the profession. Although *Goldfarb* made it clear that a minimum fee schedule adopted by a state supreme court rather than a bar association would be immune from antitrust liability,⁹⁰ that has not happened. And, as with the Supreme Court’s earlier rejection of the ban on lawyers participating in GLS plans, there is no evidence that the death of minimum fee schedules has adversely affected the provision of legal services or, for that matter, the image lawyers have of themselves as professionals.

85. Va. State Bar Comm. on Legal Ethics, Op. No. 170 (May 28, 1971); *see also* ABA Comm. on Prof’l Ethics, Formal Op. 302 (1961) (“[T]he habitual charging of fees less than those established in . . . recommended minimum fee schedules . . . may be evidence of unethical conduct.”).

86. Richard J. Arnould & Robert N. Corley, *Fee Schedules Should Be Abolished*, A.B.A. J., July 1971, at 655.

87. *Id.* at 655. The article also noted that providing “a satisfactory standard of living for lawyers [and] establish[ing] [price] uniformity in order to prevent ‘shopping’ or price competition” were rationales the bar commonly invoked to justify the schedules. *Id.* at 656.

88. *See* Rudolph, *supra* note 82, at 398.

89. 421 U.S. 773 (1975). Years earlier, in an unguarded moment, the Virginia State Bar had openly supported the need for minimum fee schedules in terms of professional self-interest, declaring that “lawyers have slowly, but surely, been committing economic suicide as a profession.” *Id.* at 786 n.16, (quoting VA. STATE BAR, MINIMUM FEE SCHEDULE REPORT 3 (1962)).

90. *See id.* at 777–79.

c. The Bar’s Defense of the Ban on Lawyer Advertising

After the GLS cases and *Goldfarb*, the bar was on notice that ethics rules which stifle competition or limit access to legal services can and will be scrutinized for compliance with external law. Only two years after *Goldfarb*, the Supreme Court reinforced the point, striking down on First Amendment grounds the categorical ban on lawyer advertising in *Bates v. State Bar of Arizona*.⁹¹ In applying its First Amendment balancing test, the Court had to evaluate the Arizona State Bar’s justifications for the ban. According to the Court, the bar placed:

particular emphasis on the adverse effects that it feels price advertising will have on the legal profession. The key to professionalism, it is argued, is the sense of pride that involvement in the discipline generates. It is claimed that price advertising will bring about commercialization, which will undermine the attorney’s sense of dignity and self-worth. The hustle of the marketplace will adversely affect the profession’s service orientation, and irreparably damage the delicate balance between the lawyer’s need to earn and his obligation selflessly to serve. Advertising is also said to erode the client’s trust in his attorney: Once the client perceives that the lawyer is motivated by profit, his confidence that the lawyer is acting out of a commitment to the client’s welfare is jeopardized. And advertising is said to tarnish the dignified public image of the profession.⁹²

This defense of the advertising ban exemplifies the bar’s unsuccessful reliance on the idiom of professionalism to defend against legal challenges to ethics rules that ban lawyers from entangling themselves with business. The Supreme Court, operating outside the domain of professional self-regulation, wasn’t buying it. The Court called the “postulated connection” between advertising and the erosion of professionalism “severely strained,”⁹³ found the assertion that advertising would diminish lawyers’ reputations “open to question,”⁹⁴ and declared that the bar’s “belief that lawyers are somehow ‘above’ trade has become an anachronism.”⁹⁵

91. 433 U.S. 350 (1977).

92. *Id.* at 368. Call me cynical, but I can’t quite believe that before lawyer advertising was permitted it never dawned on clients that lawyers might be motivated, at least in part, by the prospect of earning profits.

93. *Id.*

94. *Id.* at 369. The Court noted that a profession that eschews advertising “while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients” may actually promote public “cynicism.”

Bates ended the advertising ban and ushered in an era of regulated lawyer advertising.⁹⁶ That era has not been free of disputes about the proper scope of regulation.⁹⁷ But *experience* with lawyer advertising since *Bates* shows that the bar's idiom-based arguments that striking down the ban would have disastrous consequences were overblown.

C. The ABA's Pre-20/20 Debates on Whether the Model Rules Should Permit Nonlawyer Ownership of Law Practice Entities and Lawyer or Law Firm Ownership of "Ancillary Businesses"

The final elaboration and hardening of the idiom of professionalism as it was deployed in the 20/20 Commission's ALPS debate occurred in three earlier ABA debates in the Model Rules era. Two concerned the ALPS issues the Commission later considered; the third concerned whether to adopt a proposed Model Rule barring *lawyers* from owning or operating entities that provide "non-legal services which are ancillary to the practice of law."

1. The Kutak Commission's ALPS Proposal

The ABA adopted the Model Rules in 1983. When the drafting body, the ABA Commission on Evaluation of Professional Standards (Kutak Commission),⁹⁸ submitted its proposed rules to the House, a radical provision permitting but regulating nonlawyer ownership of law practice entities was included. The Kutak Commission's 1981

Id. at 370–71. Moreover, in referring to the bar's "postulated connection" between advertising and "an erosion of professionalism," and calling the bar's assertion that advertising would diminish lawyers' reputations "open to question," the Court seemed to recognize an aspect of the idiom of professionalism not yet discussed in this Article, namely, reliance on vague "concerns" rather than empirically grounded (or at least potentially testable) propositions about the risks and benefits of the rules in question. *Cf. infra* Part I.C.3. *Bates* suggests that even if the idiom is rhetorically effective in internal bar policy debates, it will not necessarily win the day when the bar must defend its idiom-supported policies before external decision-makers. For a recent decision to the same effect, see *Alexander v. Cahill*, 634 F. Supp. 2d 239 (N.D.N.Y. 2007) (striking down portions of a New York rule regulating lawyer advertising, and criticizing the regulator for failing to identify the substantial government interest at stake, to show how the rule "directly and materially" furthered that interest, or prove that it was narrowly drawn).

95. *Bates*, 433 U.S. at 371–72.

96. See MODEL RULES OF PROF'L CONDUCT R. 7.1, 7.2(a), 7.3(b)–(c), 7.4 (2012).

97. See, e.g., Fla. Bar v. Went for It, Inc., 515 U.S. 618 (1995) (rejecting a constitutional challenge to Florida rules prohibiting lawyers from using direct mail to solicit personal injury clients within thirty days of their accident).

98. The drafting body is commonly called the Kutak Commission. Robert Kutak, the Commission chair from 1977 to 1983, died in 1983.

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Draft of Proposed Model Rule 5.4 would have permitted a lawyer to be “employed by an organization in which a financial interest is held or managerial authority is exercised by a non-lawyer . . . but only if the terms of the relationship provide in writing that”:

- (a) There is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship;
- (b) Information relating to representation of a client is protected as required by Rule 1.6;
- (c) The arrangement does not involve advertising or personal contact with prospective clients prohibited by Rule 7.2 or 7.3; and
- (d) The arrangement does not result in charging a fee that violates Rule 1.5.⁹⁹

To support this proposal, the Commission argued that (1) “[t]he assumed equivalence between [nonlawyer ownership] and interference with the lawyer’s professional judgment is at best tenuous”; (2) “exceptions to per se prohibitions on legal service arrangements involving nonlawyers have substantially eroded the general rule, leading to inconsistent treatment of various methods of organization”; and (3) “[a]dherence to the traditional prohibitions has impeded development of new methods of providing legal services.”¹⁰⁰

In the House debate, however, the Kutak proposal ran into a wall of objections expressed in the idiom of professionalism.¹⁰¹ One objection was that the rule would permit Sears, H & R Block, and large accounting firms to open law offices in *competition* with traditional law firms.¹⁰² Another was that the nonlawyer partners in

99. GILLERS, *supra* note 8, at 345 (quoting *Report of the Commission on Evaluation of Professional Standards*, in ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 886–87 (1982)).

100. MODEL RULES OF PROF’L CONDUCT R. 5.4 cmt. (Proposed Final Draft 1981). With its proposed Rule 5.4, the Kutak Commission served notice that by the 1980s not all bar leaders and constituencies continued to be committed to a categorical ban on nonlawyer ownership of entities in which lawyers practice law. The key point was not to abandon lawyer independence as a core value, but instead to protect that value with a rule prohibiting lawyers from acquiescing to interference rather than a rule conclusively presuming that interference would occur.

101. See Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules*, 40 HASTINGS L.J. 577, 595 (1989). Professor Andrews quotes some telling remarks expressing these objections from an unedited transcript of the House of Delegates’ session on February 3, 1983. See *id.* at 595 nn.107–10. That transcript was unofficial; the ABA did not release an official transcript.

102. See *id.* at 595 n.107 (statement of Al Conant) (“You each have a constituency. How will you explain to the sole practitioner who finds himself in competition with

MDPs would inevitably interfere with the professional independence of the firm's lawyers.¹⁰³ A third was that nonlawyer ownership would destroy the lawyer's ability to be *a professional regardless of the economic cost*.¹⁰⁴ A fourth was that the proposal was "unwise policy because if nothing else, it was *demeaning to the profession*."¹⁰⁵ And a fifth was that the change would have fundamental but unknowable effects on the legal profession.¹⁰⁶ These objections prevailed; a substitute amendment was adopted reaffirming the categorical bans on nonlawyer ownership and lawyers sharing legal fees with nonlawyers that had been added to the Canons in 1928 and were maintained in the Code of Professional Responsibility.¹⁰⁷

Sears why you voted for this? How will you explain to the man in the mid-size firm who is being put out of business by the big [accounting] firms?"). One consequence of having the rules of legal ethics decided in the first instance by the ABA rather than an external rulemaker may be that a toting up of lawyers' preferences tends to receive greater weight than more objective policy arguments. *See supra* note 25 and accompanying text (noting that the co-chairs of the 20/20 Commission cited the lack of a "groundswell of support" from the profession as a reason why the Commission decided not to recommend the Draft Resolution on ALPS to the House of Delegates).

103. *See id.* at 595 n.108 (statement of Bob Hawkins) ("I cannot conceive that a lawyer can maintain his independence and independent judgment . . . when he's on a salary from [a firm] that's looking over his shoulder at his results in terms of profit. Now if you wish to destroy our profession as we've known it [or] the young lawyer's opportunities in this country to enjoy the same professional independence that you and I have known, then . . . support the Commission.").

104. *See id.* at 595 n.109 (statement of Charles Kettlewell) (arguing that it is not "cost-effect[ive]" to "provide full representation," to "zealously represent your client," or "spend enough time with your client to get the job done properly," but "as professionals, . . . we must do those things;" and if there is a violation of the ethics rules, "it is not the business venture who [sic] owns [the firm that will be disciplined, because] the business is [not under the] jurisdiction" of the state courts and bar). The fact that the rules of legal ethics only apply to, and are enforced against, lawyers is often cited as a reason to bar nonlawyers from owning entities in which lawyers practice law. *See, e.g.*, MODEL CODE OF PROF'L RESPONSIBILITY EC 3-1 (1983). But modern law firms already employ large numbers of nonlawyers, and the Model Rules make it clear that, for disciplinary purposes, law firm partners and other lawyers who supervise those nonlawyers must take reasonable measures to ensure that the nonlawyers conduct themselves in a manner consistent with the ethical duties of lawyers. *See* MODEL RULES OF PROF'L CONDUCT R. 5.3 (2012).

105. Andrews, *supra* note 101, at 595 n.109 (statement of Frank Rosiny) (emphasis added).

106. *See id.* at 595 n.110 (statement of Al Conant) ("No one can tell you what the impact of [the Kutak Commission's proposed Rule] 5.4 is going to be, but [if adopted] it is going to . . . mark a fundamental change in the practice of law."). This criticism seems to assume that the presently unknowable effects would all be bad, or that bad effects would predominate, or that any bad effects would be so grave and irreversible that the risks of bringing them about would never be worth running.

107. *See* GILLERS, *supra* note 8, at 344.

2. *Rejection of Proposals to Permit Lawyers to Practice in MDPs*

In 1998, the ABA president appointed a Commission on Multidisciplinary Practice (MDP Commission). In June 1999, after holding public hearings and receiving comments on the background materials it circulated, the MDP Commission filed a Recommendation and Report with the House of Delegates proposing that Model Rule 5.4 be amended to permit lawyers to share legal fees with nonlawyers in an MDP.¹⁰⁸

In August 1999, the House tabled that recommendation and resolved not to amend the Model Rules to permit lawyers to practice law in MDPs “*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.*”¹⁰⁹ This resolution was linked to the idiom of professionalism in at least two respects.

108. See Memorandum from the ABA Ad Hoc Comm. on Multidisciplinary Practice to the Officers and Council of the ABA Section of Bus. Law (Aug. 4, 1999), available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/adhocmemo.html. The MDP Commission defined an MDP as:

- a partnership, professional corporation, or other association or entity that
- (a) includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to clients other than the MDP itself, or
- (b) holds itself out to the public as providing nonlegal, as well as legal, services.

Id.

The Commission’s 1999 Recommendation did not propose specific amendments to the Model Rules but provided a framework that the ABA ethics committee or some other body could use to draft such amendments. For present purposes, the key points of the MDP Commission’s 1999 recommendation were that it would permit lawyers to practice in MDPs with nonlawyer partners, that the nonlawyers could provide nonlegal services to their own clients, and that the lawyers’ fees could be shared with the nonlawyers. While the version of Model Rule 5.4 that the Kutak Commission included in its 1981 proposed final draft would apparently have gone so far as to permit passive ownership by outsiders, see *supra* note 99 and accompanying text, the MDP Commission’s proposals did not. See ABA COMM’N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES (2000), available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpfinalrep2000.html (“5. Passive investment in a Multidisciplinary Practice should not be permitted.”).

109. *MDP Recommendation—Center for Professional Responsibility*, *supra* note 9 (emphasis added). According to one MDP Commission member, “[c]oncern about the supposed need to protect the majesty of the legal profession characterized much of the first wave of reactions to the [Commission’s 1999] Report.” Burnele V. Powell, *Flight from the Center: Is It Just or Just About Money?*, 84 MINN. L. REV. 1439, 1455 (2000). For Powell, the “highpoint” of this reaction was a speech to the House by

First, the “unless and until” clause amounts to a *presumption* against allowing nonlawyer ownership of entities in which lawyers practice law. Such presumptions have become an element of the idiom.¹¹⁰ But in hindsight, the earlier debates on the rules that should govern lawyers’ entanglements with business suggest that such presumptions are often unwarranted. Consider, for example, the bar’s history with group legal services plans.¹¹¹ The paucity of evidence of nonlawyer interference with lawyer’s professional judgment or of nonlawyer-induced disloyalty to clients in the decades since the Supreme Court struck down that ban suggests that the ABA was unjustified in presuming at the outset that allowing lawyers to participate in such plans would result in conflicts of interest and interference with lawyers’ ability to exercise independent professional judgment on behalf of clients.¹¹² In similar terms, Bruce Green has

attorney Larry Fox in support of a motion to table the Commission’s Recommendation and Report. In Powell’s colorful description, Mr. Fox:

recounted in almost mystical terms how he had recently dreamed about a world that was so horrifying in its portent that he had been left shaken and afraid for the future of the legal profession. Jeremiah-like, he had seen a future wrought with such danger for the legal profession that the only salvation lay in utter rejection of even the willingness to consider the subject of multidisciplinary practice.

What was the great evil that portended a plague on the profession? It was the very idea that the practice of law might be thought of as a “professional service” that could be rendered through an ownership structure involving principals who were not lawyers. As his dream dissolved into nightmare, Mr. Fox reported that he was horrified to discover that by . . . 2050, or so, law firms no longer existed. In their place, there had arisen—Scary! Scary!—MDPs. . . . It was a world in which those who were once known as lawyers now kowtowed to accountants.

Id. at 1455–56. The proposition that proposals to permit nonlawyer ownership of firms in which lawyers practice law are too dangerous for the House to even consider reappears in comments the 20/20 Commission received from opponents of the Draft Resolution on ALPS. *See, e.g.*, Letter from Richard L. Thies to ABA Comm’n on Ethics 20/20, at 4 (Feb. 23, 2012) [hereinafter Thies Letter], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/thies_alpsdiscussiondraft.authcheckdam.pdf (“The proposals that have been offered for consideration have been given great public distribution resulting in the public perception that the profession is interested in allowing non-lawyers to invest in law firms. The Commission should clearly state now that the profession is not for sale to the highest bidder.”).

110. *See infra* Part II.B.1.

111. *See supra* Part I.B.2.a.

112. *See supra* note 76. Nor have the bar’s dire prophecies that the profession, lawyer-client relations, and the quality of legal services would all suffer substantially as a result of permitting lawyer advertising and bringing an end to minimum-fee schedules, come to pass.

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criticized the bar’s presumption against all forms of nonlawyer ownership of entities in which lawyers practice law: given the “equivocal history” of the disciplinary rules at the heart of the MDP debate, Green wrote, “it might be argued that *opponents of change* should have the burden of proving that the existing [bans on nonlawyer ownership] are essential At the very least, the question ought to be debated . . . without any presumptions one way or the other.”¹¹³

In response to the August 1999 House resolution, the MDP Commission sought expert advice about the feasibility of conducting the sort of study the “unless-and-until” clause demanded. The advice was discouraging. The Institute for Social Research at the University of Michigan advised the Commission that terms like “the public interest,” “independence,” and “loyalty” could not be defined in a manner that was independent of perceptions.¹¹⁴ And economists who were consulted about the value of conducting market research to gauge the demand for MDP services advised that “there is only one way to find out if there is a demand, and that is to see if there *turns out to be a market*.”¹¹⁵ As a practical matter, then, although the Commission received expressions of support for MDPs from client

113. Green, *supra* note 33, at 1157–58 (emphasis added). Green also predicted at the time that the bar would “employ the rhetoric of lawyer independence and core professional values . . . to hide its efforts to promote lawyers’ economic dominance 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,” Green added:

proponents of multidisciplinary practice could embrace professionalism as justification for *reducing* regulation. After all, if one has faith in lawyers as professionals . . . 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 . . . as an attack on the unwarranted assumptions that lawyers are too weak to withstand the influence of nonlawyer collaborators.

Id. at 1156 (emphasis added).

114. ABA COMM’N ON MULTIDISCIPLINARY PRACTICE, *supra* note 108. This second report recommended more modest changes to permit lawyers to practice in MDPs, but the House rejected that proposal by a vote of 314 to 106. The House also disbanded the MDP Commission and adopted the sweeping resolution discussed in note 13 *supra*.

115. ABA COMM’N ON MULTIDISCIPLINARY PRACTICE, *supra* note 108 (emphasis added).

groups and some bar constituencies,¹¹⁶ the House's "unless and until" presumption proved to be irrebuttable, a "Catch-22."

Second, the House insisted that the Commission demonstrate that MDPs would both serve the public interest *and* not "sacrifice or compromise" lawyer independence and loyalty to clients.¹¹⁷ This seemed to imply either that the public interest can never be served by permitting a new law practice structure that poses *any* risk of compromising those core values or, alternatively, that no new structure that *could* provide public benefits (perhaps by reducing costs, promoting innovations in legal services, or improving access to justice), would be acceptable if it also put core values at any risk. The MDP Commission, in deciding to recommend changes that would permit but regulate MDPs, had obviously not taken either of those paths.

But what path did the MDP Commission take to reach its conclusion that MDPs should be permitted but regulated? John Matheson and Edward Adams have suggested that the Commission could perhaps have reached that conclusion using a methodology more consistent with general norms of public policymaking.¹¹⁸ The Commission, they observe, could have determined whether MDPs would place a burden on core values and, if so, determined whether MDPs would provide economic benefits to lawyers and clients and, if so, balanced the prospective economic benefits against the prospective harm to core values to see whether, with appropriate regulation, MDPs could be allowed.¹¹⁹ On this analysis, without ruling out every conceivable risk to core values, the Commission might have decided that at least some MDPs could be permitted.¹²⁰ The reaction

116. Client groups expressing support included the American Corporate Counsel Association (ACCA) (now the Association of Corporate Counsel) and several consumer organizations. *Id.* app. pt. A & nn.8–19. For further evidence of interest in MDPs among consumer groups and bar constituencies, see Lowell J. Noteboom, *Professions in Convergence: Taking the Next Step*, 84 MINN. L. REV. 1359, 1392–97 (2000).

117. *See supra* note 109 and accompanying text.

118. *See* John H. Matheson & Edward S. Adams, *Not "If" but "How": Reflecting on the ABA Commission's Recommendations on Multidisciplinary Practice*, 84 MINN. L. REV. 1269, 1289–90 (2000).

119. *See id.*

120. *See id.* Of course, any conclusion reached by this route would probably be controversial because of disagreement about the weights to assign to the values and interests at stake. Interestingly, Matheson and Adams conclude from the MDP Commission's 1999 Report that the Commission did not use that methodology either. Instead, they argue, the Commission made the political judgment that clients, consumer groups and some lawyer constituencies "dictated a change" in MDP rules,

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of the House of Delegates to the MDP Commission’s 2000 Recommendation and Report, which presented a more limited proposal to permit MDPs,¹²¹ was equally hostile and, if anything, more portentous for any future ABA consideration of nonlawyer ownership of law practice entities. The House rejected that proposal by a vote of 314 to 106, disbanded the Commission, and resolved that “[j]urisdictions should retain and enforce laws that generally bar the practice of law by entities other than law firms”; that “[t]he sharing of legal fees with nonlawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession”; and that “[t]he law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law should not be revised.”¹²²

and *then* proceeded to consider what rules would “*best counter*” whatever “new ethical problems” MDPs would create. *Id.* at 1290 (emphasis added). Of course, that approach would arguably be inconsistent with the Commission’s charge to “determine what changes, *if any*, should be made to the Model Rules.” *Id.* at 1290–93 & n.104 (emphasis added).

121. The MDP Commission’s 2000 proposal called on the ABA to amend the Model Rules consistent with five principles:

1. Lawyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services (Multidisciplinary Practice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services. “Nonlawyer professionals” means members of recognized professions or other disciplines that are governed by ethical standards.
2. The Recommendation must be implemented in a manner that protects the public and preserves the core values of the legal profession, including competence, independence of professional judgment, protection of confidential client information, loyalty to the client through the avoidance of conflicts of interest, and *pro bono publico* obligations.
3. Regulatory authorities should enforce existing rules and adopt such additional enforcement procedures as are needed to implement these principles and to protect the public interest.
4. The prohibition on nonlawyers delivering legal services and the obligations of all lawyers to observe the rules of professional conduct should not be altered.
5. Passive investment in a Multidisciplinary Practice should not be permitted.

ABA COMM’N ON MULTIDISCIPLINARY PRACTICE, *supra* note 108.

122. *MDP Recommendation—Center for Professional Responsibility*, *supra* note 9.

3. *The Ancillary Business Debate*¹²³

In 1986, The ABA formed a commission to study the “question of professionalism.”¹²⁴ In its report to the House, the Commission on Professionalism stated that it was “disturbed by . . . increasing participation by lawyers in business activities.”¹²⁵ The Commission cited as an example a growing pattern of law firms operating businesses that provide services “ancillary to the practice of law.”¹²⁶ The Commission questioned whether practicing lawyers should become “active in the operation of any business,” asserted that “the greater the participation by lawyers in activities other than the practice of law, the less likely it is that the lawyer can capably discharge the obligations which our profession demands,”¹²⁷ and urged the ABA “to see what, if any, controls or prohibitions should be imposed.”¹²⁸

Two ABA units studied the ancillary business issue and developed rival policy proposals. In 1989, the ABA Special Coordinating

123. This section draws heavily on Schneyer, *supra* note 28.

124. ABA COMM’N ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/stanley_commission_report.authcheckdam.pdf. The Commission was largely funded by the ABA Litigation Section, *id.* at v, and was chaired by former ABA president Justin Stanley, *id.* at 82. It is often referred to as the Stanley Commission.

125. *Id.* at 30.

126. *Id.* at 31. In the 1980s, law firms, most notably in Washington, D.C., began to experiment with arrangements for providing their clients with the law-related services of professionals such as accountants, economists, lobbyists and environmental engineers. See Schneyer, *supra* note 28, at 364 n.9, 367 nn.21, 23 (citing sources). Some firms hired these nonlawyers directly, while others placed them in subsidiary consulting firms that provided services to the affiliated law firm’s clients and other customers. Law firms often considered the subsidiary form attractive because ethics rules barred lawyers from having nonlawyer-partners in their firms, but top-notch experts often preferred to participate in these ventures as principals. See James W. Jones, *The Challenge of Change: The Practice of Law in the Year 2000*, 41 VAND. L. REV. 683, 690 (1988). Government relations (i.e., lobbying) ancillaries were especially common in Washington. Stephanie B. Goldberg, *More Than the Law: Ancillary Business Growth Continues*, A.B.A. J., Mar. 1992, at 55.

127. Recall that this was Julius Henry Cohen’s view as well. See *supra* note 44 and accompanying text. This argument boils down to the idea that by taking time away from her law practice to operate an ancillary business, a lawyer puts two commonly cited core values of the legal profession at risk—competence and access to justice. In 1991, the ABA Litigation Section made this argument in its briefly successful campaign to prohibit law firms from owning and operating ancillary business. For my criticism of the argument, see Schneyer, *supra* note 28, at 373–74.

128. ABA COMM’N ON PROFESSIONALISM, *supra* note 124, at 31.

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Committee on Professionalism (SCCOP), which was created to implement the Professionalism Commission’s recommendations, appointed a Working Group on Ancillary Business Activities (WGABA).¹²⁹ The WGABA did not consider it within the ABA’s province to “declare, for all 700,000 American lawyers, what constitutes the only proper content of each of our particular ways of making a living.”¹³⁰ Anticipating that the ancillary business issue might call for ethics rulemaking, the WGABA chose to address what it considered the pertinent “regulatory issues,” but put aside “professionalism issues,” which it did not find “amenable to the ordinary apparatus of inquiry and study.”¹³¹ In other words, the WGABA treated the making of ethics rules to govern law practice as an inappropriate domain for arguments grounded on vague conceptions of professionalism. WGABA member Dennis Block dissented, arguing that the professionalism issues were “by far the most important” and could serve as a proper basis for ethics rules.¹³²

This methodological issue was joined when the Litigation Section set up its own Task Force on Ancillary Business Activities (TFABA), with Block as chair.¹³³ Driven by its professionalism concerns, the TFABA drew up a proposal for a Model Rule 5.7 that would ban all involvement by practicing lawyers in the delivery of ancillary services except those that a law firm provides in-house and in connection with a matter on which it was also providing a client with legal services.¹³⁴ If approved by the ABA and adopted by the state courts, such a rule would be a death-knell for ancillary-business subsidiaries, and would limit in-house programs as well.¹³⁵

129. Mark I. Harrison et al., *Debate Continues on Lawyers’ Role in “Ancillary” Business*, 2 PROF. LAW 1, 1 (1990). The WGABA was chaired by Phoenix attorney Mark Harrison, a former chair of the ABA Committee on Professional Discipline.

130. *Id.* at 4.

131. See Dennis J. Block et al., *Model Rule of Professional Conduct 5.7: Its Origin and Interpretation*, 5 GEO. J. LEGAL ETHICS 739, 781 (quoting a memorandum to the WGABA from its Reporter, Professor Daniel Reynolds). The decision to put “professionalism issues” aside suggests that by 1990, some ABA leaders saw the idiom of professionalism as a threat more than an aid to sound policymaking on the business aspects of law practice.

132. *Id.*

133. See *id.* at 793. For a list of TFABA members, most of whom were litigators at large firms without ancillary businesses, see *id.* at 793 n.243.

134. See *id.* at 797.

135. Interestingly, an early version of the proposal exempted sole practitioners from the ban on the ground that although many solos in rural areas had traditionally provided ancillary services that raise the same ethical issues as the newer large-firm programs, solo operations somehow do not “implicate serious professionalism”

Meanwhile, SCCOP and the WGABA concluded that ancillary businesses do pose certain ethical risks—the risk that clients (or customers) would be confused about whether they were entitled to the protections accorded in lawyer-client relationships, the risk of conflicts arising between a law client and an ancillary customer (or between two customers), and the risk that law firms might misuse one client or customer’s confidences to benefit another.¹³⁶ Convinced, however, that ancillary services benefit clients and that professionalism concerns did not justify a broad ban on ancillary businesses, SCCOP urged the ABA ethics committee to draft a proposal for a Model Rule 5.7 that would regulate rather than ban such businesses.¹³⁷ The ethics committee did so, and the rival versions of Rule 5.7 went to the House of Delegates for consideration in August 1991.

Shortly before the House took up the rival proposals, delegates from the Litigation Section sent their House colleagues a letter summing up the difference between the two proposals. The letter hearkened back to Cohen’s dichotomy. “In our opinion,” the authors wrote:

the resolution of [this] controversy goes to the heart of who we are as a profession and what we will become. . . . [Y]ou must decide whether we wish to continue as a self-regulating profession committed to both its traditional (and unique) ethical obligations and to *public service*, even at the cost of turning away some profits from non-legal ventures, as the Litigation Section . . . recommends. In the alternative, you may decide that the lawyer’s traditional ethical obligations should be supplanted by the ethics of the marketplace and that law firms should be allowed to become *profit-*

concerns.” *Id.* at 796. The final version that went to the House dropped this exemption, but only on the understanding that if the ban affected the long-standing provision of ancillary services by lawyers in certain states, those states could “grandfather” those services. *Id.* at 798. Justin Stanley, the chair of the Commission on Professionalism insisted there was a sound distinction here. “What is happening today,” he claimed, “is quite different from what has happened in the past. Then isolated acts of individual lawyers were involved. . . . Today . . . law firms as entities are involved in business activities. These activities . . . are based on prior economic policy decisions by the firms and *often involve large sums of money.*” Justin A. Stanley, *Lawyers in Business*, 8 N. ILL. U. L. REV. 17, 18 (1987) (emphasis added).

136. See Schneyer, *supra* note 28, at 371.

137. *Id.* at 371 & n.56 (citing ABA SPECIAL COORDINATING COMM. ON PROFESSIONALISM, SPECIAL REPORT TO THE HOUSE OF DELEGATES ON ANCILLARY BUSINESS ACTIVITIES OF LAWYERS AND LAW FIRMS 11–12 (1990)).

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oriented conglomerates like other businesses, as the [Ethics] Committee proposes.¹³⁸

Presented with this stark choice, the House voted 197 to 186 to strike a blow for professionalism. It adopted the Litigation Section’s Rule 5.7.¹³⁹ But opponents of the rule regrouped, and in August 1992 convinced the House to repeal the rule.¹⁴⁰ In 1994, the House adopted a very different version of Rule 5.7, one that was consistent with the ethics committee’s regulatory approach.¹⁴¹ Since then, the

138. Block et al., *supra* note 131, at 799 (quoting Letter from Judah Best et al. to ABA House of Delegates 3–4 (July 19, 1991)) (emphasis added).

139. As adopted in 1991 (but repealed in 1992) Model Rule 5.7 provided in pertinent part:

(a) A lawyer shall not practice law in a law firm which owns a controlling interest in, or operates, an entity which provides non-legal services which are ancillary to the practice of law, or otherwise provide such ancillary non-legal services, except as provided in paragraph (b).

(b) A lawyer may practice law in a law firm which provides non-legal services which are ancillary to the practice of law if:

(1) The ancillary services are provided solely to clients of the law firm and are incidental to, in connection with and concurrent to, the provision of legal services by the law firm to such clients;

(2) Such ancillary services are provided solely by employees of the law firm itself and not by a subsidiary or other affiliate of the law firm;

(3) The law firm makes appropriate disclosure in writing to its clients; and

(4) The law firm does not hold itself out as engaging in any non-legal activities except in conjunction with the provision of legal services, as provided in this rule.

MODEL RULES OF PROF’L CONDUCT R. 5.7 (repealed Aug. 1992).

140. See Don J. DeBenedictus, *House of Delegates: Close Vote Rescinds Provisions Against Ancillary Business*, A.B.A. J., Oct. 1992, at 110. This time the vote was 190 to 183. No U.S. jurisdiction has ever adopted the 1991 version, but the Litigation Section was satisfied that the short-lived 1991 version had symbolic value. Soon after that version was adopted, a Litigation Section spokesman “conceded privately that the rule was ‘not likely to be adopted anywhere,’ but asserted that the Section had nonetheless ‘made its point.’” Schneyer, *supra* note 28, at 388 (citing Letter from Mark Harrison, Chairman, ABA Special Coordinating Comm. on Professionalism, to Lee Cooper, Chairman, ABA House of Delegates 2 (Aug. 27, 1991)). On the other hand, the ABA Standing Committee on Professional Discipline quickly called for reconsideration on the ground that the rule was unenforceably vague. See *id.* at 388 n.162.

141. See GILLERS, *supra* note 8, at 387–92 (summarizing the legislative history of Rule 5.7, including further amendments in 2002). The 1994 version was proposed by the Special House of Delegates Committee on Ancillary Business in Support of the 1994 Version of Rule 5.7. See Schneyer, *supra* note 28, at 391. In its report to the House, the Special Committee concluded that the provision of law-related services should not be prohibited, but should be regulated. The Special Committee also found that “law-related services are being provided wherever lawyers practice, that [those services] are often provided by separate entities, and that there has been no reported disciplinary infraction or malpractice claim resulting from the provision of

delivery of law-related services in ancillary business has continued to grow with no significant evidence of ethical problems.¹⁴² Although the Litigation Section ultimately lost this battle, the question is how it won the day in the first place. I believe the Section leaders could not have prevailed, even temporarily, without mesmerizing themselves and the House by invoking “professionalism concerns.”¹⁴³ Here are three examples.

law-related services.” *Id.* at 393–94 (quoting from the Special Committee’s report). The current version of Rule 5.7 simply makes a lawyer “subject to the Rules of Professional Conduct with respect to the provision of law-related services” if the services are provided by the lawyer “in circumstances that are not distinct from the lawyer’s provision of legal services to clients” or are provided

in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

MODEL RULES OF PROF’L CONDUCT R. 5.7(a) (2012). “The term ‘law-related services’ denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.” *Id.* R. 5.7(b).

142. See Lowell J. Noteboom, *Professions in Convergence: Taking the Next Step*, 84 MINN. L. REV. 1359, 1365, 1398 n.15 (2000) (reporting that as of 1999, more than ten percent of the 200 largest law firms in the United States were already operating ancillary businesses and the number was increasing). For many examples, see *id.* at 1365–73. A somewhat related phenomenon has also grown apace—lawyers who work with other professionals in consulting or professional-service firms, where they render services such as lobbying or tax advice without holding themselves out as engaging in the practice of law and, as a practical matter, need not comply with many rules of legal ethics. See Hazard, *supra* note 69, at 1092 (estimating that as many as one third of U.S. lawyers now work in such settings). See generally Tanina Rostain, *The Emergence of “Law Consultants,”* 75 FORDHAM L. REV. 1397 (2006). Whether changes in the rules of legal ethics to permit lawyers to practice in MDPs and law firms with nonlawyer owners would encourage some of these “émigrés” to return the profession’s regulatory fold is unclear, but that was one of the MDP Commission’s objectives. See ABA COMM’N ON MULTIDISCIPLINARY PRACTICE, *supra* note 108, at app. pt. B.4 & nn.31–33.

143. See Schneyer, *supra* note 28, at 366. One eloquent lament about the time and energy that went into the ancillary business debate came from Ralph Elliott, a member of the ABA ethics committee.

The [Litigation] Section talks about a loss of something vaguely called “professionalism” and a fear that lawyers could face regulation by nonlawyers if they were to engage in [ancillary business] activities. Its report evokes remembrance of a pristine professional past that never was and fears of a subjugated future that never will be. Indeed, many purport to see in the Section’s report simply a “save-our-turf” concern, with a subtext of anti-competitive restraints upon trade.

i. The Precautionary Principle

Larry Fox, a Litigation Section leader, argued that ancillary businesses should be banned because they could ultimately destroy the legal profession’s privilege of self-regulation. His argument put the dangers of ancillary businesses on the same footing as those of global warming:

[W]hile the writer would concede [that] the likelihood that the ancillary business movement will lead to the loss of self-regulation is no more determinable [than] the likelihood that Merrill Lynch will end up owning Shearman & Sterling,¹⁴⁴ the only relevant question is whether the profession is willing to take that indeterminable risk, when what we are talking about is the likelihood that what will be lost are aspects of the profession that are so fundamental no amount of financial benefit could justify the loss. Quite simply, it is too much to ask the profession to wait to see if the worst fears are realized. By the time they occur, the damage will be irreparable.¹⁴⁵

Mr. Fox made no effort to identify a plausible mechanism by which law firm ownership and operation of ancillary businesses could destroy professional self-regulation. Although many law firms have been operating ancillary business for years, there is no evidence

See id. at 366–67 n.20 (quoting ABA COMM. ON ETHICS & PROF’L RESPONSIBILITY, RECOMMENDATION AND REPORT TO THE HOUSE OF DELEGATES (1991) (Minority Report of Ralph G. Elliot)).

144. Mr. Fox’s reference to nonlawyer ownership of law firms in an argument against *law-firm* ownership and operation of ancillary businesses suggests that he saw the two as equally undesirable lawyer entanglements with business.

145. Schneyer, *supra* note 28, at 372–73 (quoting Lawrence J. Fox, Address at the ABA 17th National Conference on Professional Responsibility: Is Half a Loaf Better than None? 7–8 (May 21–24, 1991)). The precautionary principle, which is implicit in this argument, can operate as anything from a mere adage (“better safe than sorry”) to a rule shifting the burden of proof in environmental policy debates. *See* Christopher D. Stone, *Is There a Precautionary Principle?*, 31 ENVTL. L. REP. 10790–10, 10799 (2001) (discussing various ways of understanding the principle).

Dennis Block suggested one mechanism by which self-regulation would be eroded unless the ABA banned ancillaries. Block argued that the Federal Trade Commission would get its nose under the regulatory tent by interceding to ban law firms’ ancillary businesses on the ground that they would lead to abusive self-referrals and constitute an unfair trade practice. *See* Block et al., *supra* note 131, at 799–800. The astonishing thing about this theory is that months before the House adopted its ban, the FTC *welcomed law firms’* ancillary business for their “potential to provide significant benefits to consumers,” and stated that it had “no wish to impede their development.” *See FTC Unit Lauds Law-Firm Diversification*, LEGAL TIMES (D.C.), Apr. 8, 1991 (quoting Letter from Kevin Arquit, Dir., FTC Bureau of Competition, to George Kuhlman, Counsel, to the ABA Comm. on Ethics & Prof’l Responsibility (Mar. 27, 1991)).

whatsoever that this has generated significant ethical problems or undermined professional self-regulation. Fox's jeremiad has proven to be anything but prophetic.

ii. A Preoccupation with Motive

Since Cohen's day, one of the bar's most cherished conceits is that lawyers, as professionals, must be motivated by a desire to serve, not to reap profits. This conceit played a role in the ancillary business debate. When the Washington, D.C. law firm of Arnold & Porter opened several ancillary businesses in the 1980s, it did so, according to Jim Jones, its managing partner at the time, to accommodate clients whose transactions demanded a "team effort" in which "lawyers work closely with other professionals . . . to achieve the clients' goals in the most direct and cost effective way."¹⁴⁶ But ABA President Stanley Chauvin Jr. saw only greed behind such ventures. "I truly doubt," he wrote,

that the lawyers who create ancillary business are motivated by a desire to serve clients or the public more effectively and at lower cost. The risk of putting the lawyer-client relationship in jeopardy appears more likely to be motivated by profit. The client's best interest is sacrificed in favor of the law firm's quest to make money. . . . [W]hen we consider our clients' rights—when we consider any risks to them against any prospective gains to the law firm—there is only one conscientious conclusion: The risks far outweigh the gains.¹⁴⁷

One reason Chauvin's risks outweigh his gains may be a belief that lawyers' profits, seen through the lens of "professionalism," cannot even be viewed as evidence that clients benefit from the ancillary services they buy. On this point, however, that lens distorts reality. Of course Arnold & Porter would not have opened its ancillaries without hoping to profit. But so what? What lawyers do in practice to earn money is usually meant to serve client interests; the law firm that opens a new branch office or adds a new practice group will hope to benefit clients and *thereby* profit. The real policy question regarding whether to permit ancillary businesses, or MDPs, or law firms with nonlawyer owners is one of foreseeable societal costs and benefits, not lawyers' motives.

146. Jones, *supra* note 126, at 690.

147. L. Stanley Chauvin, Jr., *A Conscientious Conclusion*, A.B.A. J., Mar. 1990, at 8.

*iii. No Sense of Duty to Support Their Opposition to Lawyer or
Law Firm Ownership of Ancillary Businesses with Available
Evidence*

When attempting to influence ABA policymaking for the practice of law, bar entities and lawyers should support their positions with evidence, if reasonably available, that bears on the issues at hand.¹⁴⁸ For purposes of gauging the risks and utility of ancillary businesses in the ABA’s 1991 debate, evidence could have been gathered because a substantial number of ancillaries were already in operation.¹⁴⁹ Yet only the ABA entities that supported a continuation of the ancillary business experiment—SCCOP and the ABA ethics committee—submitted useful evidence. SCCOP obtained a report from twenty-five law firms summarizing their experience with ancillaries,¹⁵⁰ and the ethics committee obtained comments from the Federal Trade Commission, which reflected a consumer perspective.¹⁵¹ But the Litigation Section, which proposed the ban on law firms owning and operating ancillary businesses, did nothing to further the fact-finding effort.¹⁵² If professionalism is the issue, why bother?

148. *See supra* note 29. This aspirational duty is arguably implicit in the proposition that “[a]s a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.” MODEL RULES OF PROF’L CONDUCT, Preamble and Scope ¶ [6] (2000).

149. *See supra* notes 126, 142.

150. *See* Schneyer, *supra* note 28, at 368 n.29, 387 n.153.

151. The FTC’s comments were positive and stressed the pro-competitive effects of permitting law firms to have ancillary businesses. The Director of the FTC Bureau of Competition stated that “law firm diversification has the potential to provide significant benefits to consumers,” but “[t]he Litigation Section’s approach would reduce these benefits substantially.” *FTC Unit Lauds Law-Firm Diversification*, LEGAL TIMES (D.C.), Apr. 8, 1991, at 14 (quoting Letter from Kevin Arquit, Dir., FTC Bureau of Competition, to George Kuhlman, Counsel, ABA Comm. on Ethics & Prof’l Responsibility (Mar. 27, 1991)).

152. On the contrary, the Litigation Section muddied the debate by citing spurious “evidence” to support a ban on the ground that allowing law firms to own and operate ancillary businesses would lead to scandals and lawsuits that would damage the reputation of the legal profession. In a report to the ABA House of Delegates, the Section cited a memo from a malpractice insurer’s loss prevention counsel to its insureds warning that too many of the firms were engaging in “entrepreneurial activities” that were likely to generate lawsuits. *See* Schneyer, *supra* note 28, at 378 n.101 (citing ABA LITIG. SECTION, REPORT TO THE HOUSE OF DELEGATES 21 n.17 (1990)). The authors of the memo quickly made it clear, however, that they had not been concerned about ancillary businesses but, rather, about lawyers investing in their *clients’* businesses. *Id.* at 378 & n.102 (citing Letter from Robert O’Malley to Mark Harrison, Chairman, Special Coordinating Comm. on Professionalism Working Grp. 2 (Oct. 18 1990) (on file with author) (stating that the Litigation Section

By tracing the evolution of the idiom of professionalism from Julius Henry Cohen's day to the year 2000, and the use of the idiom over that period in bar policymaking on issues involving lawyers' business entanglements as well as in the bar's unsuccessful legal defense of rules banning those entanglements, Part I has set the stage for my critique of the idiom-based arguments the opponents of nonlawyer ownership made to the 20/20 Commission.

II. A CRITIQUE OF THE IDIOM-BASED ARGUMENTS THE OPPONENTS OF NONLAWYER OWNERSHIP MADE TO THE 20/20 COMMISSION

I turn now to the written submissions the 20/20 Commission received on the subject of nonlawyer ownership of law practice entities during the ALPS debate. Most were submitted in response to the Commission's calls for comment on the ALPS Working Group's Draft Resolution and Report¹⁵³ and its earlier Issues Paper on Alternative Business Practice.¹⁵⁴ Part II analyzes a representative sample of these submissions with three aims in mind: to show that opponents of nonlawyer ownership repeatedly relied on a handful of arguments, to link those arguments to rhetorical tools and concepts associated with the idiom of professionalism, and to criticize the arguments themselves.

Altogether, the 20/20 Commission received more than thirty written submissions that address the Working Group's proposal and nonlawyer ownership of law-practice entities, generally. Most of the submissions were from lawyers or bar entities¹⁵⁵ and the great

"appears to have misinterpreted [Attorneys' Liability Assurance Society's] ALAS' position and has used ALAS' memorandum to support a position that the memorandum does not in fact support"). ALAS also reported that *none* of the 2,000 claims filed against their insured firms as of the late 1980s involved the "activities challenged by the Litigation Section." *Id.* at 378 & n.103 (quoting Letter from William Freivogel to Mark Harrison, Chairman, Special Coordinating Comm. on Professionalism Working Grp. 2 (Oct. 3, 1990)). Moreover, in the same report to the House, the Litigation Section suggested that two recent law firm "scandals" would have been avoided if proposed Rule 5.7 had been in effect. But the rule almost certainly would not have been relevant in either case. *See id.* at 379 & nn.105-09 (explaining why the rule would have been irrelevant and citing sources).

153. *See* ALPS Draft Resolution, *supra* note 17.

154. *See* ALPS Issues Paper, *supra* note 10.

155. *See* ALPS Comments Chart, *supra* note 18.

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majority of these were strongly negative.¹⁵⁶ Because many of the negative responses were duplicative or insubstantial,¹⁵⁷ I focus on a representative subset¹⁵⁸ consisting of those I found most substantive.¹⁵⁹

156. For the few comments the Commission received in favor of amending Model Rule 5.4 to permit nonlawyer ownership, see sources cited *supra* notes 20–21. The comments discussed here are cited in note 158 and analyzed in Part II.B.

157. The comments I put aside tend to be very short, often no longer than a paragraph.

158. Letter from John H. Beisner, Partner, Skadden, Arps, Slate, Meagher & Flom LLP, to ABA Comm’n on Ethics 20/20 (June 1, 2011) [hereinafter Comments of U.S. Chamber Inst. for Legal Reform], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/uschamberinstituteforlegalreform_issuespaperconcerningalternativebusinessstructures.authcheckdam.pdf (regarding comments of the U.S. Chamber Institute for Legal Reform on the issues paper concerning alternative business structures); Joseph E. Neuhaus, Comments of the New York State Bar Association Committee on Standards of Attorney Conduct on Ethics 20/20’s Issue Paper Concerning Alternative Business Structures (June 9, 2011) [hereinafter Comments of NYSBA], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/newyorkstatebarassociationcommitteeonstandardsofattorneyconduct_issuespaperconcerningalternativebusinessstructures.authcheckdam.pdf; Letter from Mark Chandler et al. to ABA Comm’n on Ethics 20/20 (Feb. 29, 2012) [hereinafter Comments of Nine General Counsel], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/ninegeneralcounselcomments_alpschoiceofflawinitialdraftproposal.authcheckdam.pdf; Letter from Susan A. Feeney, President, N.J. State Bar Ass’n, to ABA Comm’n on Ethics 20/20 (Jan. 31, 2012) [hereinafter Comments of NJSBA], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/njstatebarassociation_alpsdiscussiondraft.authcheckdam.pdf; Lawrence J. Fox, MDP Redux—Slay the Dragon Again . . . Now! (Jan. 30, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/fox_alpsdiscussiondraft.authcheckdam.pdf; Letter from Douglas R. Richmond to ABA Comm’n on Ethics 20/20 (Jan. 6, 2012) [hereinafter Richmond Letter], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/richmond_alpsdiscussiondraft.authcheckdam.pdf; Letter from Richard L. Thies to ABA Comm’n on Ethics 20/20 (Feb. 23, 2012) [hereinafter Thies Letter], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/thies_alpsdiscussiondraft.authcheckdam.pdf. These responses are listed on the ALPS Comments Chart, *supra* note 18. *See also* Joan C. Rogers, *Speakers Debate Nonlawyers’ Role in Firms at First Ethics 20/20 Commission Hearing*, 26 *Laws. Man. on Prof. Conduct* (ABA/BNA) 110 (Feb. 17, 2010) (reporting on testimony given at the Commission’s public hearing on Feb. 5, 2010).

159. Readers can judge the representativeness of the written comments and testimony I discuss by consulting all of the comments the 20/20 Commission received by April 2, 2012 at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/la_county_bar_association_finalreviseddraftproposals_tech_and_confidentiality_client_dev_and_outsourcing.authcheckdam.pdf.

These responses were often preoccupied with MDPs and law firms with outside investors rather than the Draft Resolution itself.¹⁶⁰

Drawing on the history of the idiom of professionalism in Part I, Part II.A identifies six concepts or rhetorical tools that are associated with the idiom of professionalism and salient in the opponents' arguments against the Working Group's proposal and nonlawyer ownership generally. Part II.B then examines a number of those arguments, links each argument to one of the elements of the idiom, and criticizes the argument itself. Because the six elements overlap to some degree, some of the arguments could be linked with more than one element.

A. Six Elements of the Idiom of Professionalism That Are Salient in the Opponents' Arguments Against Nonlawyer Ownership

Two of the six elements of the idiom to be discussed are "procedural"; they tended to skew the ALPS debate in the opponents' favor. The other four elements were used to establish a plausible downside for the Working Group's proposal.

The first procedural element posits that the proponents of the Working Group's proposal had the *burden of proof* in the debate and would have to overcome a strong *presumption* in favor of the status quo (the existing ban). The opponents justified these ground rules by characterizing the very limited form of nonlawyer ownership the Draft Resolution would allow as a profound departure from longstanding professional rules and traditions.¹⁶¹

The second procedural element is a *biasing and selective approach to the role of empirical evidence* in the debate. This element privileges the opponents to present their arguments without supporting evidence while criticizing the Working Group for providing nothing more than "anecdotal evidence" to support *theirs*. For example, just as opponents of the MDP Commission's 1999 recommendation to allow lawyers to practice in MDPs succeeded in tabling the recommendation "unless and until" studies demonstrate that MDPs (none of which existed in the United States at the time) would further the public interest without compromising core values,¹⁶²

160. See generally ALPS Draft Resolution, *supra* note 17.

161. See *infra* notes 176–84 and accompanying text.

162. See AM. BAR ASS'N, THE FLORIDA BAR REPORT WITH RECOMMENDATION TO THE HOUSE OF DELEGATES 2 (2000), available at <http://www.floridabar.org/>

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so opponents of nonlawyer ownership in the ALPS debate found the Working Group’s proposal unacceptable because the accompanying Draft Report failed to provide rigorous evidence that allowing lawyers to practice in law firms with a very limited form of nonlawyer ownership would benefit lawyers and clients.¹⁶³ At the same time, the opponents felt no need to provide *any plausible* evidence to support *their* claims that allowing even a highly restricted form of nonlawyer ownership would “compromise core values.”¹⁶⁴ Although the core values are embedded in enforceable rules of legal ethics,¹⁶⁵ the opponents failed to produce any evidence of “compromise” that countered the Working Group’s finding that two decades of experience with a *less* restrictive form of nonlawyer ownership in Washington, D.C. had produced no pertinent disciplinary complaints.¹⁶⁶ This mirrored the failure of the Litigation Section to provide any plausible evidence that permitting lawyers and law firms to own and operate ancillary businesses would embroil them in business scandals and bring an end to professional self-regulation.¹⁶⁷

Opponents of the Working Group’s ALPS proposal relied on four more elements of the idiom to justify their claim that even the highly restrictive form of nonlawyer ownership the Draft Resolution would permit had a substantial downside. The first, consistent with Cohen’s dichotomy,¹⁶⁸ posits that nonlawyer ownership in any form is an inherently corrupting business entanglement and must therefore be *banned categorically*.¹⁶⁹ On this view, the alternative of permitting

TFB/TFBResources.nsf/BC390EF1565832AE85256A4F006AEEA8/2F91DA541FD B7A2885256B29004BECBC/\$FILE/mdpaba.pdf (“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 extensive and well-reasoned analysis 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.” (internal quotation marks omitted)).

163. See Richmond Letter, *supra* note 158, at 2.

164. See *infra* Part II.B.2.

165. See MODEL RULES OF PROF’L CONDUCT R. 1.1 (2012) (duty of competence); *id.* R. 1.6 (duty of confidentiality); *id.* R. 1.7 (duty of loyalty); *id.* R. 5.4(c) (duty to maintain independent professional judgment in rendering legal services).

166. See Joan C. Rogers, *Trio of Federal Suits Challenge Ethics Rule That Stops Private Equity Investment in Firms*, 27 *Laws. Man. on Prof. Conduct (ABA/BNA)* 382, 383 (June 8, 2011) (reporting information the Commission received from the D.C. Bar Counsel’s Office).

167. See *supra* notes 145, 152 and accompanying text.

168. See *supra* notes 37–44 and accompanying text.

169. See *supra* note 44 and accompanying text.

but regulating some form(s) of nonlawyer ownership is no more acceptable than permitting but regulating lawyer advertising or participation in GLS plans had been—before the Supreme Court said otherwise.¹⁷⁰

A closely related element is the *slippery slope theory*, which in this context means that even if adopting the Working Group’s proposal would not itself be objectionable, it would inexorably lead to the legalization of more radical forms of nonlawyer ownership, which would be objectionable.¹⁷¹

Another element of the idiom that the opponents used in an effort to establish a plausible downside for the Working Group’s proposal was the familiar voicing of unsubstantiated concerns that nonlawyer ownership, if permitted, would *compromise the core values* of the profession and *therefore* be unacceptable—however modest the compromise or risk thereof might be.¹⁷²

Finally, a sixth element of the idiom was used not to establish a plausible downside for the Working Group’s proposal, but rather to negate a possible benefit. The ALPS Draft Report suggested that, in the absence of demonstrated harm, allowing lawyers to practice in firms that have nonlawyer owners might be desirable as a way to promote competition in the legal services market.¹⁷³ One opponent relied on the proposition that even if doing so would promote competition, that point deserved no weight because, from the standpoint of professionalism, *promoting lawyer competition is an irrelevant, if not a negative, value*,¹⁷⁴ as Cohen believed.¹⁷⁵

170. See *supra* notes 74–75, 91–96 and accompanying text.

171. See *infra* Part II.B.4.

172. Indeed, some opponents went so far as to insist that nonlawyer ownership can only be defended if it can be shown to *advance* the core values. See *infra* note 184 and accompanying text accompanying.

173. See ALPS Draft Resolution, *supra* note 17, at 3.

174. See Richmond Letter, *supra* note 158, at 3; see also *infra* text accompanying note 218. In defending its ban on lawyer advertising in *Bates*, the Arizona State Bar unsuccessfully made the analogous argument that the “hustle of [an ad-infused] marketplace” would undermine the legal profession’s service orientation. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368 (1977). The “hustle of the marketplace” is, of course, a pejorative term for competition.

175. See *supra* notes 62–63 and accompanying text.

B. A Critique of the Opponents’ Idiom-Based Arguments Against the Working Group’s Proposal

1. *Proponents of Nonlawyer Ownership Must Bear the “Burden of Proof”*

In their comment on the ALPS Discussion Paper, general counsel at nine U.S.-based companies asserted that in the debate on nonlawyer ownership, the burden of proof should fall on those who proposed such a “fundamental change” to Rule 5.4, and that the proponents had failed to meet that burden.¹⁷⁶ This raises a question of characterization. Assuming that the general counsels’ argument here is not based on the slippery slope theory, what makes amending Model Rule 5.4 to permit such a limited form of nonlawyer ownership a “fundamental” change? Is it more fundamental than, say, the much earlier decision to permit lawyers to be employed by corporations to serve as in-house counsel?¹⁷⁷

Putting aside the question-begging characterization of the Working Group’s proposed changes as “fundamental,” and bracketing out slippery slope arguments for the moment, why *should* the proponents of such a limited form of nonlawyer ownership have the burden of proof?¹⁷⁸ In his comment on the Draft Resolution, Richard Thies, a bar leader in Illinois, purported to find the answer in ABA precedent,¹⁷⁹ namely, the extremely broad House of Delegates resolution that ended the MDP debate in 2000.¹⁸⁰ As noted earlier, that resolution declared, without elaboration, that “[t]he sharing of legal fees with non-lawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of

176. Comments of Nine General Counsel, *supra* note 158, at 8.

177. *See supra* notes 69 and accompanying text. Explicit ABA approval of working in-house as an employee of a corporate client came in 1928, with the addition of a new canon of ethics. *See* ABA CANONS OF PROF’L ETHICS, Canon 35 (1969) (“A lawyer may accept employment from any organization . . . to render legal services in any matter in which the organization, as an entity, is interested . . .”).

178. Recall Bruce Green’s point that one might just as well argue that “the opponents of change should have the burden of proving that the [existing bans] are essential At the very least, the question ought to be debated . . . without any presumption one way or the other.” Green, *supra* note 33, at 1157–58. Perhaps the “imposition” of the burden on proponents of measures that would narrow the ban on nonlawyer ownership is an inevitable consequence of relying on our system of professional self-regulation. If so, that inevitability does not, in my view, commend the system.

179. *See* Comments of Nine General Counsel, *supra* note 158, at 63.

180. *See id.* at 64.

the legal profession.”¹⁸¹ Mr. Thies argued that this pronouncement should be dispositive because “[n]othing that has happened since 2000 would warrant a reversal” and “[t]he facts have not changed.”¹⁸² But he did not say what “facts” supported the 1999 resolution in the first place, or why the recent reforms that broadly authorize nonlawyer ownership in the U.K. and Australia¹⁸³ is not a changed fact. Nor did he consider whether the 1999 resolution might have been adopted with nothing quite as narrow as the Working Group’s resolution in mind.

Finally, in what may have been an effort to raise to unscalable heights the burden of proof that proponents of allowing nonlawyer ownership must meet in order to justify any liberalization of the ban, the president of the New York State Bar Association, when appointing a task force to reconsider nonlawyer ownership in light of the 20/20 Commission’s work, told the task force to consider “whether a change would *further advance the core values*,” and explained that nonlawyer ownership should not be considered “unless it is going to *advance*” those values.¹⁸⁴ Does this mean, for example, that nonlawyer ownership in any form is worth considering only if it would make lawyers *more* competent, independent, loyal to clients, and/or protective of client confidences? If not, what does it mean?

2. *A Biasing and Selective Approach to the Use of Empirical Evidence*

Opponents of nonlawyer ownership took a biasing and selective approach to the role of empirical evidence. They felt no need to support their arguments against the Working Group’s proposal with *any* evidence but, at the same time, dismissed the Draft Report’s arguments in favor of the proposal on the ground that they were supported by no more than “anecdotal” evidence.

181. *MDP Recommendation—Center for Professional Responsibility*, *supra* note 9.

182. Comments of Nine General Counsel, *supra* note 158, at 63.

183. See ALPS Issues Paper, *supra* note 10, at 7–10, 13–15 (identifying the relevant reforms).

184. John Caher, *Ethics Panel Addresses Issue of Non-Lawyer Owned Firms*, N.Y. L.J., Mar. 22, 2012, at 1, available at <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202546510694&slreturn=1> (quoting Vincent Doyle III) (emphasis added).

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For example, the U.S. Chamber Institute for Law Reform¹⁸⁵ made assertions about the downside of nonlawyer ownership that were not only unsubstantiated, but so dubious on their face that they could only have been makeweights. The Institute divined that firms with outside investors “would likely hurt client interests . . . because lawyers would be focused on attracting . . . nonlawyer investors rather than providing top-notch legal services,”¹⁸⁶ and that such firms would be “likely to *increase* the cost of legal services and *diminish* access to justice because investors will expect substantial profits without adding much, if any, value to the quality (or efficiency) of the legal services being provided.”¹⁸⁷ I would have thought, however, that firms that do not provide top-notch services would be at a disadvantage in finding outside investors,¹⁸⁸ and that law firms would rarely seek outside equity investors unless they thought an infusion of equity capital would enable them to upgrade the quality and efficiency of their services or maintain financial stability.¹⁸⁹

On the other hand, Doug Richmond criticized the Working Group for failing to prove that “a material percentage of U.S. lawyers” would be interested in practicing with nonlawyer partners in firms meeting the requirements of the Draft Resolution.¹⁹⁰ Referring to what the Working Group conceded was anecdotal evidence that small law firms in D.C. are “increasingly interested” in having nonlawyer partners,¹⁹¹ Richmond asserted that “[t]here is, of course, no such

185. See Comments of U.S. Chamber Inst. for Legal Reform, *supra* note 158. The Institute is an arm of the U.S. Chamber of Commerce. It works to limit “litigation abuse.” *Id.* at 1.

186. *Id.* at 3.

187. *Id.*

188. Cf. THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 170 (2010) (suggesting that if law firms were permitted to attract and retain outside investors, their interest in doing so might “impose financial and behavioral discipline on law firms whose members have not experienced serious pressure to exercise it” in the past).

189. A potential new benefit for law firms that obtain equity capital from outside investors rather than relying solely on debt financing came to light recently when the law firm Dewey & LeBoeuf was forced into bankruptcy by its lenders. See James R. Denlea, *Rule Barring Nonlawyers from Investing Was Key*, NAT’L L.J., June 18, 2012, at 49, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202559704812>; Lawrence W. Newman & David Zaslowsky, *In Wake of Dewey, Considering Alternative Business Structures*, N.Y. L.J., June 1, 2012, at 4, available at <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202556659208>.

190. Richmond Letter, *supra* note 158, at 1. Mr. Richmond is a Managing Director with Aon Professional Services and a well-known consultant to law firms on issues of professional responsibility and malpractice liability.

191. ALPS Draft Resolution, *supra* note 17, at 2.

thing as ‘anecdotal evidence’ for purposes of any standard relevant to lawyers.”¹⁹²

Yet the Working Group also cited other evidence suggesting that a non-trivial number of U.S. lawyers might have such an interest in fairly short order if the Draft Resolution was widely adopted. Between 2009 and 2013, lawyers in England and Wales were allowed to practice in Lawyer Disciplinary Practices (LDPs), i.e., law firms that have nonlawyer owners but must operate under virtually the same regulatory constraints the Working Group’s Draft Resolution would impose.¹⁹³ The Draft Report cited data showing that, within two years, 218 law firms in England and Wales had taken on nonlawyer owners and registered as LDPs.¹⁹⁴

Calling the Working Group’s evidence of demand anecdotal is certainly fair. But under the circumstances, insisting on more probative evidence is unrealistic. The Working Group found it impossible to get more rigorous data on lawyer demand (i.e., lawyer interest in practicing law in firms with the form of nonlawyer ownership the Draft Resolution would permit), or virtually any useful information about potential client demand for the services such firms would offer.¹⁹⁵

192. Richmond Letter, *supra* note 158, at 1. Richmond fails to mention that the Working Group also learned that a number of law firms with offices in Washington, D.C. and other jurisdictions as well have expressed interest in having nonlawyer partners in their D.C. offices but felt that they could not take that step as long as those other jurisdictions continued to bar their lawyers from practicing in firms with nonlawyer owners. See ALPS Draft Resolution, *supra* note 17, at 10.

193. See ALPS Draft Resolution, *supra* note 17, at 8 & nn.18–22 (describing the regulatory restrictions on LDPs in England and Wales).

194. *Id.* at 9 & n.24 (citing data provided by the Solicitors Regulatory Authority, the regulatory arm of the Law Society of England and Wales). The weight of this evidence is clouded, however, by the fact that LDPs will have to decide by 2013 whether to revert to being traditional law firms without nonlawyer owners or, instead, become licensed “alternative business structures,” a much broader category that includes MDPs and law firms with outside investors. See *id.* at 9 n.25. Richmond seems to think that the Draft Report mentioned LDPs solely to note that so far no problems with LDPs have been reported. Richmond Letter, *supra* note 158, at 4 (suggesting that LDPs have been in operation so briefly that the lack of problems as of April 2011 is not meaningful). In fact, however, the Draft Resolution cited the rapidly growing numbers of LDPs chiefly as evidence of lawyer interest. See ALPS Draft Resolution, *supra* note 17, at 9.

195. When released for comment, the ALPS Discussion Paper was accompanied by a cover memorandum from the Co-Chairs of the 20/20 Commission, which solicited comments on whether “there is demand [among lawyers or clients outside of Washington, D.C.] for firms with limited nonlawyer ownership of the sort the Working Group proposes.” Memorandum from Jamie S. Gorelick & Michael Traynor, Co-Chairs, ABA Comm’n on Ethics 20/20, to ABA Entities, Courts, Bar

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In any event, requiring rigorous evidence of lawyer and client interest in a practice structure that now exists only in small numbers in one jurisdiction strikes me as inappropriate. After all, economists advised the MDP Commission that the only reliable way to gauge demand for MDPs was to permit them, at least provisionally, and see whether there “turns out to be a market.”¹⁹⁶ Outside of Washington, D.C., this approach would presumably be necessary as well to gauge demand for D.C.-like law firms with nonlawyer owners.

Besides, if such firms are permitted and lawyers prove to be uninterested, or if they are created and fail for lack of clients, there will be little opportunity for the profession’s core values to be compromised. In any event, I doubt that those who opposed the Working Group’s proposal would think better of it if they were presented with reams of rigorous evidence of demand.¹⁹⁷

*3. The Imperative to Ban Nonlawyer Ownership Categorically
Rather than Permitting but Regulating a Modest Form of Nonlawyer
Ownership*

As Part II noted since the Supreme Court struck down the ban on lawyer advertising¹⁹⁸ and narrowed the ban on practicing law through intermediaries to permit lawyers to participate in GLS programs,¹⁹⁹ the dire consequences bar leaders had predicted if those categorical bans were relaxed have not materialized. While some lawyers still

Associations, Law Schools, and Individuals 3 (Dec. 2, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf. The Commission received virtually no responses about client demand for firms with such a limited form of nonlawyer ownership, which is hardly surprising because potential clients and consumer groups must have had little or no idea about the range, cost, and quality of the services such unfamiliar firms would offer. Given the reasons why the Commission could not obtain more probative evidence of demand, it is hardly damning to learn that the New Jersey State Bar Association was “unaware of any *outcry* within the New Jersey bar, business community, or general public in [sic] allowing non-attorneys to acquire equity ownership in law firms, regardless of how limited.” Comments of NJSBA, *supra* note 158, at 1 (emphasis added).

196. ABA COMM’N ON MULTIDISCIPLINARY PRACTICE, *supra* note 108; *see also supra* notes 116–17 and accompanying text.

197. *Cf.* Rogers, *supra* note 158, at 2 (reporting on an exchange at a 20/20 Commission meeting between Commissioner Stephen Gillers and attorney Larry Fox, who opposes nonlawyer ownership). In response to a question from Professor Gillers, Mr. Fox acknowledged that, at least in his case, such evidence would fall on deaf ears. *Id.*

198. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

199. *See sources cited supra* note 76.

find lawyer advertising undignified, the bar obviously has come to accept truthful lawyer advertising and participation in GLS programs. But in the case of nonlawyer ownership, courts have not (yet) struck down or significantly narrowed the ban. And judging by the comments the Commission received on the issue, the impulse to maintain that ban remains strong. The comments of nine general counsel at major corporations are a case in point:

[T]he experience of countries such as Australia illustrates that the impulse to start relaxing the longstanding rules upon which the legal profession has been built can quickly lead to a radical transformation of the practice of law. The experience suggests that allowing non-lawyers control over law firms—even if only in small measure—will pave the way for a fundamental reworking of the profession. The far better course is to refuse to open the door to non-lawyer ownership even a crack. The argument for a clean rule against non-lawyer ownership rests on . . . principle. Permitting even a limited form of non-lawyer ownership transforms the debate from a matter of principle to a matter of degree and creates a built-in constituency in favor of further change. The ABA should resist this pernicious trend at the outset. After all, the role of the ABA is to *strengthen* the practice of law as a profession, not to erode its foundations by weakening its very commitment to professionalism.²⁰⁰

In fact, however, knowledgeable observers have suggested that MDPs and outside investment in law firms do pose greater risks than the limited form of nonlawyer ownership that is permitted in Washington D.C.,²⁰¹ let alone the more limited form the Working Group's proposal would permit. And the nine general counsel seem to agree, for they acknowledge that that proposal "may pose *less risk* of outside [i.e., nonlawyer] influence" than the MDP Commission's proposals.²⁰² But permitting one arrangement while prohibiting another that carries more risk need not be unprincipled. The 20/20 Commission found "fundamental principles" including the profession's core values relevant when it made early decisions not to consider lifting the ban on MDPs and outside investment, but continued to consider a more modest proposal.²⁰³ And, if adopting

200. Comments of Nine General Counsel, *supra* note 158, at 10 (emphasis added).

201. See, e.g., Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 392–400 (1988).

202. Comments of Nine General Counsel, *supra* note 158, at 7 (emphasis added).

203. See ALPS Draft Resolution, *supra* note 17, at 2 (stating that the Commission was guided by "fundamental principles" (including the profession's core values) in

the Working Group’s Draft Resolution would have meant that there would no longer be any principled basis for opposing MDPs or passive investment in law firms, one might suppose that two decades of trouble-free (albeit limited) experience with a similarly circumscribed form of nonlawyer ownership in Washington, D.C. would by now have led to further liberalization there.

4. *The Slippery Slope Theory*

The opponents’ comments invoke the slippery slope theory to argue that, even if adopting the Working Group’s proposal would not be objectionable in itself, it would allow the proverbial camel to get its nose under the professional tent. Arguments premised on the slippery slope theory are a subset of arguments for maintaining a categorical ban on nonlawyer ownership, and need little separate discussion. But it is worth mentioning Doug Richmond’s curious variation on the theme.

Richmond asserts that “there is a camel, it has a nose, and [the Commission is] leading it to the profession’s tent while disclaiming such intent.”²⁰⁴ The twist lies in how he thinks the slippery slope phenomenon would play out. Richmond fears that if the Working Group’s proposal is adopted, *it might not spawn any problems!*²⁰⁵ In that unfortunate case, “[w]hen the outside investment and MDP proponents resurface those proposals—and they will—they continue to beat those drums now—they will say . . . ‘See, the Ethics 20/20 Commission’s change to Model Rule 5.4 spawned no problems, and our proposals merely build upon that secure foundation.’”²⁰⁶

Now, perhaps this would happen. If states began to adopt the Working Group’s proposal, the Washington, D.C. experience suggests that they would encounter few, if any, ethical problems. Let us assume with Richmond that this would embolden proponents of MDPs and outside investment in law firms to come forward with new proposals. But what if it did? Surely, Richmond and other strong advocates for holding the line would be prepared to challenge those proposals by distinguishing them from the Working Group’s proposal.

deciding not to consider recommending publicly-traded law firms, other forms of passive investment in law firms, or MDPs).

204. Richmond Letter, *supra* note 158, at 5.

205. *See id.* at 4–5

206. *Id.*

For his part, Larry Fox finessed the slippery slope argument altogether, by directly accusing the Commission (not the ALPS Working Group, which would have been more appropriate) of “launching a new MDP assault on Rule 5.4.” “Of course,” Fox added, “they don’t call it that. They have invented a new name [ALPS], but trust me; this is really the same wine in the same bottles, with a new label.”²⁰⁷

5. *Unsubstantiated Concerns that Nonlawyer Ownership Will
“Compromise Core Values”*

For many lawyers, the profession’s core values are the heart of lawyer professionalism. Consequently, many of the comments opposing the Working Group’s proposal expressed concerns that, by allowing even a very limited form of nonlawyer ownership, the proposal would compromise core values.²⁰⁸

207. Fox, *supra* note 158, at 2. Fox “reasoned” to this conclusion by asking what sorts of nonlawyers would become law firm partners under the proposal. Those nonlawyers might commonly include IT professionals; law firm administrators; scientists and engineers in intellectual property firms; social workers and financial planners in family law firms; or nurses and investigators in personal injury firms, Fox seized on a more exotic example—architects. *See id.* Next, though presumably aware that the Draft Resolution limits nonlawyer partners to assisting lawyers in providing legal services, *see* MODEL CODE OF PROF’L CONDUCT R. 5.4(b)(1),(2) (2012); ALPS Draft Resolution, *supra* note 17, Fox asks, “If an architect is involved in the practice of law, is that not UPL?” Fox, *supra* note 158, at 2. (The right answer would ordinarily be, no, it is not UPL for an architect to work under a lawyer’s supervision to help her develop a rationale to support a client’s request for a zoning variance or draft or interpret a client’s construction contract.) Next, Fox asserts that if the architect is not involved in the practice of law, “she must be . . . designing buildings [which is] a multi-disciplinary activity.” *Id.* In my opinion, this argument is absurd and grossly mischaracterizes the Working Group’s Draft Resolution. If Fox’s characterization were apt, then law firms with nonlawyer owners in Washington, D.C. would presumably be operating unethically, as de facto MDPs. And competing law firms without nonlawyer partners would have reason to complain to disciplinary authorities, as they have not. *See* Rogers, *supra* note 166, at 383 (providing information supplied by D.C. bar counsel). In the same submission, Fox disdainfully referred to the nonlawyer professionals who are or might become law firm owners under the proposal as “trades-people infecting law firms.” Fox, *supra* note 158, at 2.

208. Allowing for minor variations in terminology, there is at least a rough consensus that those values include competence, confidentiality, loyalty (avoidance of conflicts), independent professional judgment, and the preservation of professional self-regulation. *See supra* note 9. Many accounts also include promoting access to justice.

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Examples include concerns that nonlawyer ownership will (a) put the attorney-client privilege at risk (confidentiality);²⁰⁹ (b) weaken the profession’s commitment to pro bono work, which increases access to justice;²¹⁰ (c) promote conflicts of interest by *introducing* “mixed motives” into law firm decisions,²¹¹ yet, at the same time, somehow *accelerate* a tendency that *already exists* among lawyers to “chase after higher profits;”²¹² (d) revive the use of “runners” to drum up business;²¹³ (e) increase the likelihood of external regulation and

209. See Fox, *supra* note 158, at 4 (stating that the Working Group’s proposal “will compromise the availability of the privilege for the clients of *the MDP*” (emphasis added). If a firm asserts that its “non-lawyer architects were merely engaged in the . . . practice of law . . . a court is even less likely to buy that proposition . . . than they [sic] buy the proposition that . . . [an] Assistant General Counsel (who is at least a lawyer) is entitled to the privilege when she is wearing a business hat.” *Id.*; see also Comments of Nine General Counsel, *supra* note 158, at 4 (“[T]he addition of nonlawyer partners to law firms creates . . . uncertainty about which aspects of a non-lawyer’s advice to a client are . . . privileged.”). This concern is largely unwarranted. Communications between a lawyer or her clients, on one hand, and, on the other, a nonlawyer whom the lawyer employed or retained to assist her in providing legal services to those clients, are privileged. See, e.g., *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961). There is no reason for nonlawyer *partners* to be treated differently. See also THE ATTORNEY CLIENT PRIVILEGE IN CIVIL LITIGATION 629 (Vincent S. Walkowiak ed., 4th ed. 2008) (“It is generally accepted that a consultant . . . may communicate with the client or with the attorney without destroying the attorney-client privilege, if the communications are made on behalf of the client to obtain legal advice. . . . [T]he general rule that a client’s disclosure of confidential communications . . . destroys the attorney-client privilege does not apply when the disclosure is made to third parties who assist an attorney in rendering legal advice.”).

210. See Comments of NYSBA Comm., *supra* note 158, at 4 (stating that the legal profession is committed to increasing access to legal services through pro bono work, but “[o]ther professions may not necessarily share this commitment”).

211. See Comments of Nine General Counsel, *supra* note 158, at 5 (“[Non-lawyer ownership] changes a firm from a group of like-minded attorneys zealously pursuing their clients’ interests, into a group with inherently mixed motives It is not hard to imagine that non-lawyer partners might place considerations of economic gain ahead of a client’s interests.”).

212. *Id.* at 4. But insofar as business interests are already influencing law firms that have no nonlawyer partners, one could just as well speculate that the marginal contribution to that trend by nonlawyer owners in a law firm operating under the restrictions in the Working Group’s proposal would be a drop in the bucket. Besides, Julius Henry Cohen’s animus against business values in law practice notwithstanding, the business impulse to improve law firm efficiency and management, especially risk management, is not self-evidently bad for clients. See Christine Parker et al., *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, 37 J.L. & Soc’y 466 (2010).

213. See Fox, *supra* note 158, at 4–5 (“One of the darkest chapters in our profession’s history featured the wholesale use of runners—ambulance chasers—who would show up at . . . hospital bedsides to sign up potential plaintiffs for a share of the

jeopardize self-regulation,²¹⁴ and even (f) “facilitate the destruction of the independence and core values of the legal profession and ultimately the judicial branch of government.”²¹⁵

Just how unsubstantiated assertions that nonlawyer ownership will compromise core values have “worked” over time in bar debates about the ethics rules that should govern nonlawyer ownership is a bit of a mystery. My impression is that many lawyers regard the core values as “core” not just in the sense that they are important, but in the further sense that they are sacrosanct. Sacrosanct values are often viewed as absolute values brooking no compromise. Consequently, a lawyer who regards the ability to exercise independent professional judgment on behalf of clients as an absolute value may oppose any proposal to relax the categorical ban on nonlawyer ownership simply because those who advocate maintaining that ban assert that nonlawyer ownership will “compromise” that core value or put it “at risk.” Yet neither the advocates nor the lawyer may have any idea about the *probability* that such an ill-defined risk will materialize or the *gravity* of the harm that will result if it does. In short, whether a highly circumscribed form of nonlawyer ownership of law firms will “compromise” the core value of independent professional judgment *sounds like* an empirical question, but for ardent opponents of

lawyer’s contingent fee. And now, with the ability to share fees with non-lawyer runners, we can expect this practice to thrive once again.”); *see also* J. Leeds Barroll, *in* COMMENTS: UNIFORMITY, CHOICE OF LAW AND CONFLICTS OF INTEREST WORKING GROUP, DISCUSSION DRAFT ON ALTERNATIVE LAW PRACTICE STRUCTURES 4 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111219-alps_comments_all.authcheckdam.pdf (calling the Draft Resolution “nothing but a subterfuge to legalize runners and to institutionalize the paying of referral fees”). The glaring weakness in these assertions is that, although the Draft Resolution would permit lawyers to share legal fees with nonlawyer partners (under restricted conditions), direct contact with prospective clients to solicit their business remains an ethical violation, *see* MODEL RULES OF PROF’L CONDUCT R. 7.3(a) (2012), as does violating or attempting to violate the Rules of Professional Conduct through the acts of another.” *Id.* R. 8.4(a).

214. Some opponents of the Draft Resolution base this claim on the fact that nonlawyer owners of law firms would not be subject to professional discipline. *See, e.g.,* Comments of Nine General Counsel, *supra* note 158, at 4. But as agents and fiduciaries of firm clients, nonlawyer owners, like their lawyer counterparts, would owe clients duties of confidentiality, loyalty, and care and be subject to civil liability for breaching those duties. Under the proposal, lawyer partners would also have a duty to ensure that nonlawyer partners behave in a manner that is consistent with lawyers’ ethical duties, just as they have a duty to supervise their nonlawyer employees, who are also outside the jurisdiction of lawyer disciplinary agencies. *See* MODEL RULES OF PROF’L CONDUCT R. 5.3 (2012).

215. Thies Letter, *supra* note 158, at 4.

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nonlawyer ownership in any form, it is not. For them, it is a rhetorical question.

6. *Any Suggestion that Allowing Law Firms to Have Nonlawyer Owners Might Promote Competition in the Legal Services Market Is Out of Bounds*

Since Cohen’s day, promoting competition in legal services, far from being a core value of the American legal profession, has been a negative value.²¹⁶ But one sentence in the Draft Report supporting the ALPS Working Group’s proposal went against the grain by suggesting that promoting competition in legal services might have redeeming social value. “[I]n the absence of empirical evidence from the District of Columbia or elsewhere that lawyers cannot meet their professional obligations in any firm that has even a single nonlawyer owner,” the Report stated, “there is no clear justification for protecting lawyers in traditional law firms from having to compete with lawyers who believe that the kind of alternative law practice structures the Resolution would permit can improve client service.”²¹⁷ This sentence did not go unnoticed by opponents of the proposal. Doug Richmond responded that the sentence “makes no sense at all unless someone is advocating change for the sake of it.”²¹⁸ “Certainly,” he added, “fostering competition between domestic law

216. For the profession’s anti-competitive justifications for minimum fee schedules, see *supra* notes 83–84. For a discussion on the Arizona State Bar’s effort to justify its ban on lawyer advertising by arguing before the Supreme Court that the “hustle” of an ad-infused “marketplace” for legal services would have grave consequences for client confidence and lawyers’ sense of professionalism, see *supra* text accompanying note 92.

217. ALPS Draft Resolution, *supra* note 17, at 3. This sentence also went against the grain in that it was at odds with the opponents’ insistence that the “burden of proof” in the ALPS debate fall on the proponents of the Working Group’s proposal. Mr. Richmond found “most curious . . . the Working Group’s complete bypass of the obvious converse position, i.e., in the absence of empirical evidence that clients require alternatively-structured law firms for their legal needs to be met, there is no reason to alter the widely accepted status quo.” Richmond Letter, *supra* note 158, at 3. It is true that the Working Group was unable to provide substantial evidence of client demand. But although the “status quo”—the categorical ban—may still be widely accepted in the bar, I am far from certain that the American public, fully informed on the issue, would, or should, agree. Although Richmond is right that there are two competing ways of assigning the burden of proof in the ALPS debates, wide acceptance of the status quo within the bar does not strike me as a dispositive reason to accept Richmond’s assignment.

218. *Id.*

firms cannot be part of the Commission's charge."²¹⁹ But why not? Nothing in the Commission's charge ruled out that consideration.²²⁰

III. TWO PROBLEMS WITH CONTINUING TO TREAT THE IDIOM OF PROFESSIONALISM AS THE "OFFICIAL LANGUAGE" FOR THE BAR'S POLICY DEBATES ON THE RULES THAT SHOULD GOVERN LAWYERS' BUSINESS ENTANGLEMENTS

In tracing the development of the idiom of professionalism from Julius Henry Cohen's day up to the 20/20 Commission's ALPS debate, Part I identified the idiom-based arguments that served, within the bar, to justify minimum fee schedules and bans on lawyer

219. *Id.* Richmond also objected to the reference in the same sentence to "improving client service." "[I]mproving client service in this context would be an odd charge for the Commission," he wrote, "because 'client service' . . . (as distinguished from duties of diligence or communication, which have . . . ethical bases) is a pure practice management issue traditionally and rightly left to individual lawyers and law firms." *Id.* But practice management itself has become a matter of ethical concern. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2009) (requiring law firm partners to "make reasonable efforts to ensure that the[ir] firm has in effect measures giving reasonable assurance that [the firm's lawyers] conform to the Rules of Professional Conduct"). See generally Ted Schneyer, *On Further Reflection: How "Professional Self-Regulation Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577 (2011). In recent years, Australia and the United Kingdom have both made the proactive regulation of law firm management a central part of their regulatory program. For a brief discussion of "management-based proactive regulation" in New South Wales, see *id.* at 620–26.

220. See *supra* note 1 and accompanying text. On the contrary, when President Lamm created the Commission in 2009, she expected it to review the Model Rules "as well as other developments in . . . lawyer regulation, including . . . changes in how other countries regulate lawyers." "I don't think," she said, that "the U.S. legal profession is in a position [to] ignore what's going on worldwide." See James Podgers, *Firm Hand for Hard Times*, A.B.A. J., Aug. 2009, at 63, 64. And what is "going on" in the United Kingdom is the recognition that promoting competition in legal services is an appropriate regulatory objective. See Legal Services Act, 2007 c. 29, § 11(e), (U.K.), available at <http://www.legislation.gov.uk/ukpga/2007/29/part/1> (listing the "promoti[on] [of] competition in the provision of [legal] services" as one of eight overarching regulatory objectives). In a recent article, Professor Laurel Terry, Steve Mark (the Legal Services Commissioner for New South Wales), and Tahlia Gordon (the Director of Research in Mr. Mark's office) conclude on the basis of "many antitrust studies of the legal profession" that increased competition in legal services is desirable, not for its own sake, but because it is likely to improve access to justice. They also see great value in official statements of regulatory objectives, though they do not think increasing competition must be on the list, because those words are incendiary and a reference to the ultimate objective of improving access to justice should suffice to make the point. See Laurel S. Terry et al., *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM L. REV. 2685, 2737–38 (2012).

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advertising and participation in GLS plans, but ultimately failed to survive Supreme Court scrutiny. Part II criticized the very similar arguments that showed up repeatedly in submissions to the 20/20 Commission from opponents of a proposal to narrow the ban on nonlawyer ownership of law practices by permitting lawyers to practice in law firms that have an extremely limited form of nonlawyer ownership.

From this analysis, I conclude that heavy and repeated reliance on idiom-based arguments to win the day in bar debates on the business aspects of law practice poses two problems that bar leaders may not fully appreciate.

The first problem is that idiom-based arguments, which are value-laden but often devoid of factual support, may well be displacing more difficult, evidence-based assessments of the risks and benefits, or the likely impact, of a proposed rule—assessments that at least sometimes should be considered necessary before deciding whether to adopt or reject the rule.²²¹ For that reason, idiom-based arguments may beget ill-considered rules. Moreover, the fact that idiom-based arguments tend to be unsupported by empirical evidence may undermine the ABA’s status as the primary source of ethics rules for law practice in another way. Legal scholars increasingly regard as fatuous regulatory policies based on factually ungrounded arguments such as an argument that nonlawyer ownership must be categorically banned because of the “concern” that it will or might “compromise core values” or “put them at risk.”²²² Such arguments fuel scholarly

221. It would be naïve, however, to suppose that reliable, evidence-based assessments are always, or even mostly, possible in the domain of lawyer regulation. Laurel Terry and her colleagues recently pointed out that although some governments may insist that legal regulators “must have empirical evidence justifying [a] proposed rule or restriction” before they act, and this “empiricism principle . . . makes sense in some contexts (such as prescription drug approvals), [the principle may not be] appropriate . . . for legal profession regulation where it may be difficult to measure *ex ante* the impact of regulatory changes on objectives such as [furthering] the public interest.” Terry et al., *supra* note 220, at 2740 & n.277. While this point is well taken, it would not follow that a proposal to allow some form of nonlawyer ownership must be rejected unless and until there is substantial evidence that its benefits will exceed its costs. The wiser course may be to adopt the rule, perhaps provisionally, with the understanding that its effects will be monitored. Unfortunately, systematic study of the impact of ethics rules has never been a feature of professional self-regulation in the United States, as it increasingly is elsewhere. See Parker et al., *supra* note 212; Terry et al., *supra* note 220, at 2692 nn.27–52.

222. See, e.g., THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 68–69 (2010) (deriding the “preposterous” claims of professional rhetoric); Edward S. Adams & John H. Matheson, *Law Firms on the Big Board: A Proposal for*

doubts that the bar can make appropriate rules on such subjects.²²³ Even within the bar such arguments against nonlawyer ownership may lose their cachet over time if, as I predict, more lawyers come to see nonlawyer ownership as attractive.²²⁴ Meanwhile, however, we will have missed the opportunity to learn from experience which, if any, forms of nonlawyer ownership cause problems and how best to regulate firms with nonlawyer owners.

The second problem that arises when rules banning lawyer entanglements with business are idiom-based and have no empirical support is that they have proven to be vulnerable to legal challenge on constitutional or antitrust grounds. This problem is certainly not going away. Indeed, it is no longer fanciful to suppose that categorical bans on nonlawyer ownership will be struck down on constitutional grounds in the foreseeable future,²²⁵ or that state legislatures will try to override the bans by statute.²²⁶

Nonlawyer Investment in Law Firms, 86 CAL. L. REV. 1, 40 (1998) (dismissing arguments against corporate ownership of law practices, such as “fear of corporate giants, interference with professional independence . . . unauthorized practice of law, and the danger of the legal profession becoming too businesslike”).

223. Cf. Rob Atkinson, *A Dissenter’s Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 263 (1995) (challenging the bar’s professionalism movement on the ground that it rests on an implicit assumption that there is a single, universal way to be a legal professional, which categorically condemns a broad range of activities even if some of them would be completely benign).

224. This scenario may have been prefigured by the “revolt” that led to ABA repeal of a ban on law firms owning and operating ancillary businesses in favor of a regulatory approach. See *supra* Part I.C.3.

225. In May 2011, Jacoby & Meyers, a plaintiffs’ personal injury firm, filed nearly identical lawsuits challenging on various constitutional grounds the bans on nonlawyer ownership in New York, New Jersey, and Connecticut. See Mark Hamblett, *Suit Challenges N.Y. Prohibition on Non-Lawyer Firm Ownership*, N.Y. L.J., May 20, 2011, at 1, available at <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202494645339> (describing the suits as claiming that the ban on nonlawyer investment “denies law firms the ability to raise outside capital, [thereby] denying most lawyers a critical source of funding [and] dramatically impeded access to legal services for those otherwise unable to afford them”). In November 2012, the U.S. Court of Appeals for the Second Circuit held that Jacoby & Meyers could amend its complaint challenging the New York ethics rule banning nonlawyer ownership in order to challenge New York statutes that also prevent nonlawyer ownership, and could resubmit the claim to the federal district court. See *Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third and Fourth Dep’ts, App. Div. of the Sup. Ct. of the State of N.Y.*, 488 F. App’x 526 (2d Cir. 2012); Scott, *Jacoby & Meyers to Bring Amended Lawsuit Over Non-lawyer Ownership*, JD J. (Nov. 22, 2012), <http://www.jdjournal.com/2012/11/22/jacoby-meyers-to-bring-amended-lawsuit-over-non-lawyer-ownership/>; see also Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 8 (2012) (“In light of precedent extending over half a century, the blanket suppression of corporate law

CONCLUSION

As co-chair of the ALPS Working Group, I was disappointed that the 20/20 Commission decided not to recommend our proposal for adoption by the ABA House of Delegates. Our Draft Resolution and Draft Report remain in the ABA archives, but no relaxation of the ban on nonlawyer ownership of law firms by the ABA or state-supreme courts seems likely in the short term—unless, of course, the ban is struck down in litigation.²²⁷

This Article does not try to make the case for nonlawyer ownership as a matter of public policy. Instead, it criticizes in rhetorical terms the input the 20/20 Commission received from lawyers and bar entities who opposed the Working Group’s narrow proposal and nonlawyer ownership generally. The Article shows that the input relies heavily—often exclusively—on arguments couched in what I call the idiom of professionalism. It shows that the same arguments have been invoked repeatedly since Julius Henry Cohen’s day to support bans on various lawyer “entanglements with business.” And, judging by the frequent failure of those arguments to withstand judicial scrutiny in recent decades when those bans were attacked on constitutional or antitrust grounds, this Article suggests that the arguments have become threadbare and do no honor to the tradition of professional self-regulation.

Stephen Gillers, my colleague on the 20/20 Commission, recently put my concern in useful perspective. After stating that “[t]he traditional model of lawyer regulation cannot expect to police this new world” of law practice, and asking what “enlightened regulators” should do about it, he ventured the following answer:

[O]ne argument must be immediately repudiated: that if we do anything that recognizes these changes, we afford a patina of legitimacy at the expense of the American legal profession’s core values Not only is that claim false, I argue that the opposite is

practice ownership must give way to the First Amendment rights of corporations, lawyers, and individuals associated with the delivery of legal services.”).

226. A bill was introduced in the North Carolina General Assembly during the 2011 session that would have permitted “nonattorney ownership of professional corporation law firms, subject to certain requirements.” S254, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011).

227. An analogy: the House of Delegates resolution shutting down the MDP Commission in 2000 brought a halt to consideration of whether to allow MDPs in the states, some of which had previously shown considerable interest in the idea. See Mona L. Hymel, *Multidisciplinary Practices: Where Are They? What Happened?*, 103 TAX NOTES 689 (2004).

true. Doing nothing threatens these values because by ignoring the accelerating changes at play, we fail to regulate against the abuses these changes may bring To put it another way, the cry we must heed is not for less regulation of the profession, but rather for new regulation of the burgeoning ways that legal services are sold. That these changes bring with them new forms of competition with established distribution channels and the lawyers who populate them, and that they undoubtedly lead to financial disappointment and professional dislocation for many lawyers while empowering others and offering possible benefits to clients in the form of lower costs and greater efficiency, seems indisputable. It is not a trend, I submit, that we can vote down. Indeed, insofar as the changes make legal services more accessible and affordable while protecting core values, our social responsibility requires us to welcome them. But if the illusion that we can stop the changes leads to inaction, we do threaten the very core values we claim to protect.²²⁸

228. Stephen Gillers, *A Profession If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Legal Marketplace, and What We Should Do About It*, 63 HASTINGS L.J. 953, 998–99 (2012).