

A CALL TO PARTNER WITH OUTSIDE CAPITAL: The Non-Lawyer Investment Approach Must Be Updated

Thomas Markle*

The market . . . will determine that the legal world is inefficiently resourced . . . ; it will increasingly drive out excesses and unnecessary friction and, in turn, we will indeed witness the end of outdated legal practice and the end of outdated lawyers.¹

Richard Susskind

I. INTRODUCTION

A local attorney stands at an intersection in his career. He has always wanted to blaze his own trail, but how can he fulfill his dreams when he has to make ends meet? After paying off his loans and saving enough money from the firm job he landed after law school, his vision of opening up his own solo practice became a reality a few years after passing the bar. His clients soon witnessed his entrepreneurial spirit in full bloom, and realized benefits to their bottom lines that came from the young attorney's abandonment of conventional wisdom. His commitment to cutting costs while constantly improving the delivery of his legal services in a rapidly evolving marketplace quickly built his reputation, and his practice's growing profits were being steadily siphoned off to save up for expansion. The sky was the limit, until it began to fall. Now, an economic slowdown stunted his ability to expand, and his day-to-day operations rapidly depleted his ever-shrinking store of funds marked for future growth and investment. The young attorney's ambitions would have to be put on hold, despite his newly developed market-leading strategies and his innate managerial ability to implement them. How else could he weather the storm?

*. J.D. Candidate, 2014, Sandra Day O'Connor College of Law at Arizona State University; B.A., History and Economics, 2011, Vanderbilt University. The author wishes to thank Professor Zachary Gubler for his open door and helpful criticisms, Mary Markle for her inspiration, and Amelia Valenzuela and Daniel Crane for their feedback, unending flexibility, and much-needed encouragement.

1. RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* 3 (2008).

Unfortunately for this enterprising attorney, under the current state of affairs, there is little else that can be done besides waiting out the economic downturn with self-generated equity or bank lending.² If this attorney, or others similarly situated, could access outside equity, however, efficient and innovative firms would not have to struggle to make ends meet during these periods. Non-lawyer financing of law firms could inject new life into delayed goals, giving pioneering lawyers access to capital that could allow them to develop and implement more efficient solutions to legal problems. In the wake of the 2008 global economic collapse, the visions of aspiring attorneys have come into conflict with outdated norms, and in the midst of this reality, some scholars are advocating for non-lawyer investment in law firms.³

The new post-recession reality in the legal profession is one characterized by foreign competition and technological advances. However, the American Bar Association's ("ABA") Model Rule 5.4 bans non-lawyer investment in law firms, which limits the ability of American lawyers (both solo practitioners and big firm attorneys) to adapt to these changes.⁴ Scholars and proponents of non-lawyer investment have discussed and reiterated the many benefits of non-lawyer equity in law firms, and were encouraged when the ABA indicated that it was willing to consider a more modern stance on the issue by establishing its "Commission on Ethics 20/20."⁵ Its goal was straightforward—"to consider the impact of technology and globalization on the legal profession and determine whether or not such influences warrant changes" to the Model Rules.⁶ Unfortunately, the Ethics 20/20 opinion perpetuates the ABA's traditional and debilitating

2. Edward S. Adams & John H. Matheson, *Law Firms on the Big Board: A Proposal for Nonlawyer Investment in Law Firms*, 86 CALIF. L. REV. 1, 25 (1998) ("Personal investment by the attorney-owner is the sole form of equity capitalization available to a sole proprietorship law firm."). See generally Jennifer Smith, *Law Firms Split Over Nonlawyer Investors*, WALL ST. J., (Apr. 1, 2012), <http://online.wsj.com/article/SB10001424052702304750404577317761468323458.html> ("[L]arger firms that dominate the \$100 billion global corporate legal market . . . can get the capital they need from their partners or banks.").

3. See, e.g., Matthew W. Bish, *Revising Model Rule 5.4: Adopting a Regulatory Scheme that Permits Nonlawyer Ownership and Management of Law Firms*, 48 WASHBURN L.J. 669, 670–71 (2009).

4. MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983).

5. News Release, American Bar Association, ABA President Carolyn B. Lamm Creates Ethics Commission to Address Technology and Global Practice Challenges Facing U.S. Lawyers (Aug. 4, 2009), [available at http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=730](http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=730).

6. ABA H.D., Res. 10A, at 3 (2012), [available at http://iln.isba.org/sites/default/files/blog/2012/08/isba-raises-issue-nonlawyer-ownership-law-firms-aba-house-delegates/joint_isba_sr_lawyers_div_resolution%20authcheckdam.pdf](http://iln.isba.org/sites/default/files/blog/2012/08/isba-raises-issue-nonlawyer-ownership-law-firms-aba-house-delegates/joint_isba_sr_lawyers_div_resolution%20authcheckdam.pdf).

denial of non-lawyer investment in law firms, despite Australia and the United Kingdom successfully liberalizing their non-lawyer investment laws in recent years.⁷

The ABA's updated stance typifies and exemplifies the Association's historic position on non-lawyer involvement in law firms, and clearly demonstrates that the American legal community is more concerned with economic protectionism than keeping pace with global innovation.⁸ In an increasingly interconnected world, the old model of law firm partnerships is breaking down, but by holding strong to the monopoly that lawyers have on legal work and recommending that the United States export these "values" instead, the ABA has thus abdicated its leadership role on the global legal stage.⁹ Therefore, as the ultimate enforcer and creator of ethical guidelines, American states must take their self-directed control over their legal markets and open them to non-lawyer investment, as the District of Columbia has already done.¹⁰ Until that time, many Americans will remain underserved by the non-competitive U.S. legal market, while American firms will continue to sit on the sidelines and witness foreign competitors take more of the global market share through innovation.¹¹

The time has come for new approaches to global legal challenges. In this regard, this comment recommends that individual states pick up the torch and liberalize their ethical rules to allow non-lawyer investment in law firms.¹² This comment proceeds in five parts. Part II sets forth the changes to the legal marketplace and the new economic reality law firms face. Part

7. Sean T. Carnathan, *Is Prohibition of Non-Lawyer Ownership of Firms Antiquated?: New York Rejects British Model of Expanded Law Firm Ownership*, LITIG. NEWS, Summer 2012, at 8, 9–10. See also Heather A. Miller, Note, *Don't Just Check "Yes" or "No": The Need For Broader Consideration of Outside Investment in the Law*, 2010 U. ILL. L. REV. 311, 326–35 (2010).

8. Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 383–84 (1988).

9. *Speakers Debate Nonlawyers' Role in Firms at First Ethics 20/20 Commission Hearing*, Law. Man. on Prof. Conduct (ABA/BNA) 26:110, 110–11 (Feb. 17, 2010).

10. Adams & Matheson, *supra* note 2, at 11–13.

11. See Ethan Bronner, *To Place Graduates, Law Schools Are Opening Firms*, N.Y. TIMES (Mar. 7, 2013), http://www.nytimes.com/2013/03/08/education/law-schools-look-to-medical-education-model.html?ref=education&_r=4&.

12. Although advocating for the liberalization of non-lawyer investment in law firms is closely associated with non-lawyer involvement to allow for multi-disciplinary firms, this comment will not focus on this area of innovation. Multi-disciplinary firms are a natural offshoot and complement to any Model Rule 5.4 opposition and garner a great deal of attention in the academic literature, but due to their separate and independent justifications, this comment, instead, centers on the expansion of non-lawyer investment in law firms. See, e.g., Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 FORDHAM L. REV. 2791, 2797 (2012).

III then outlines the ABA's traditional prohibition on non-lawyer investment in law firms and the updated debate surrounding non-lawyer investment. Part IV continues by comparing the foreign innovations in Australia and the United Kingdom with the American response to the new reality. Part V concludes by analyzing the Ethics 20/20 Commission's opinion and recommending the course of action states must take to correct the ABA's historic prevention of outside equity investment in law firms.

II. THE NEW REALITY IN THE LEGAL MARKET NECESSITATES AN UPDATED APPROACH

The recent global economic downturn exposed the weakness of the traditional partnership model in American law firms. The pressures of rapidly-increasing technological advancements and foreign competition have brought unprecedented change to the U.S. legal marketplace.¹³ The new reality U.S. law firms face is one where lawyers' values are no longer aligned with their firms, and professional ideals have been given over to business concerns.¹⁴ American firms must account for these changes to the traditional partnership model.

A. *The Traditional Partnership Model*

Law firms have historically been organized in the traditional partnership model, and found success because the legal profession was once based solely upon an attorney's expertise and the fostering of client relationships.¹⁵ The classic law partnership was "a voluntary association of partners who share[d] equally in the outcomes of a common venture, who participate[d] as equals in self-governance through consensus, and who owe[d] distinctive responsibilities to one another."¹⁶ Based largely on a seniority system, each partner was an owner of the firm who shared in its

13. See Milton C. Regan, Jr., *Lawyers, Symbols, and Money: Outside Investment in Law Firms*, 27 PENN. ST. INT'L L. REV. 407, 420–23 (2008).

14. See Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 751–52.

15. Miller, *supra* note 7, at 320; see also Noam Scheiber, *The Last Days of Big Law: You Can't Imagine the Terror When the Money Dries Up*, NEW REPUBLIC (July 21, 2013), <http://www.newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries#> (“[Firms traditionally offered] generous salary, the esteem of one’s neighbors, [and] work that was more intellectual than purely commercial. . . . [T]he partner rarely had to hustle for business” because “[h]e could focus his energy on the legal pursuits that excited his analytical mind.”).

16. Regan, *supra* note 13, at 417.

profits.¹⁷ The partnership's lawyers were the only ones with rights to the ownership shares, limiting the traditional partnership model's capital to the wealth of its partners.¹⁸ Combined with the joint and several liability of the partnership, which provided incentives to monitor the firm's other lawyers, the traditional partnership was a communal environment that aligned the values of individual partners to the firm.¹⁹

The traditional partnership was a highly-effective corporate form in the latter part of the twentieth century. Lawyers during this time were able to convincingly argue that self-regulation of the legal industry was justified because attorneys were professionals dedicated to meeting the needs of society and had pure motives that went beyond mere self-interest and a strong profit motive.²⁰ The practice of law was seen as a revered profession, and the "self-regulation" of the legal profession, combined with the "self-ownership" of law firms, insulated attorneys and gave rise to large, oligopolistic partnerships that had marked influence over prices and encountered only moderate pressures to maximize efficiency.²¹

B. Recent Changes in the Legal Marketplace

The legal services industry has evolved over the last decade and the traditional partnership model has shown signs that it cannot keep pace.²² First, the dedication of a law firm's partners is steadily moving away from the firm.²³ Law firms are "labor-intensive" rather than capital-intensive businesses, making a law firm's most valuable asset its attorneys.²⁴ However, because of the failure of noncompetition agreements, today's associates and "rainmakers" have the freedom to leave their firms whenever they desire, leaving little loyalty to the entity itself.²⁵ Lawyers understand that it is the clients that pay the bills, leaving law partners with increasingly

17. *Id.* at 416–17.

18. Jacqueline Palank, *Law-Firm Loans Show Cracks*, WALL ST. J. (Apr. 29, 2012), <http://online.wsj.com/article/SB10001424052702304811304577369980297246756.html>.

19. Regan, *supra* note 13, at 417 (explaining that joint and several liability means that a "creditor of [a] firm can seek recovery from a partner's personal assets if the firm's assets are insufficient to satisfy the creditor's claim").

20. *Id.* at 420.

21. *Id.*

22. See Miller, *supra* note 7, at 320–26; Regan, *supra* note 13, at 420–23.

23. Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century*, 96 IOWA L. REV. 1649, 1658 (2011).

24. *Id.* at 1661.

25. See *id.* at 1658 ("Firms cannot legally bind lawyers to the firm because noncompetition agreements violate professional ethics rules.").

less time to devote to building firm value.²⁶ Accordingly, modern attorneys must concentrate on what is best for their books of business, not the firm.²⁷ The antiquated idea of lifetime employment at a traditional partnership is gone.²⁸

This tension in a lawyer's allegiance means that the practice of law can no longer be thought of as only a profession. It is undeniable that law firms are business enterprises, because today's law firms are motivated by more than the professional duty to provide quality legal services to their clients.²⁹ Client demands for cost-consciousness and the threat of competitor firms are forcing law firms to provide legal services more efficiently and for less cost.³⁰ Clients are focusing more on price rather than relationships, and there is a premium put on a modern firm's capital in the form of its operations, monitoring, and information technology systems.³¹ This demand for lower costs rather than strong relationships is pushing legal profit margins lower, while at the same time, clients are increasingly unwilling to foot the cost for training younger lawyers.³² In light of this, some firms are looking to rein in costs by moving to productivity-based compensation structures for its attorneys.³³ After all, under the traditional billable hour model, "efficiency destroys revenue."³⁴

In addition, new market competition (in the form of outsourcing or non-lawyer consultants) and public access to legal information are rapidly

26. *Id.*

27. *Id.*; see also Scheiber, *supra* note 15 (bleakly describing some modern firm practices where "[p]artners routinely make pitches behind the backs of colleagues with ties to a client," "[t]hey hoard work for themselves even when it requires the expertise of a fellow partner," and "[t]hey seize credit for business that younger colleagues bring in").

28. Ribstein, *supra* note 23, at 1659.

29. Regan, *supra* note 13, at 430–31 ("Law firm practice by any measure is big business.").

30. *Id.* at 421–22; Miller, *supra* note 7, at 321–22; see also Adam Cohen, *Just How Bad Off Are Law School Graduates?*, TIME (Mar. 11, 2013), <http://ideas.time.com/2013/03/11/just-how-bad-off-are-law-school-graduates/> ("[A]s in many industries, corporations and other legal clients are increasingly intent [sic] with doing more with less. They are insisting on fewer billable hours, and smaller bills, and that translates into fewer, and lower-paid, lawyers.").

31. See Regan, *supra* note 13, at 421–22; SUSSKIND, *supra* note 1, at 36.

32. Regan, *supra* note 13, at 421–22; Ribstein, *supra* note 23, at 1659.

33. See Regan, *supra* note 13, at 422; see also Miller, *supra* note 7, at 322–24; see also Scheiber, *supra* note 15 ("[M]ost large law firms . . . [have] a well-established system for tracking the hours a partner bills and the amount of business he or she generates for the firm. This—especially the second—is the ostensible basis of his or her pay. As a result, the process of determining compensation would seem to be largely mechanical: The data come in, the numbers get tallied, and a final sums pop out.").

34. *The Case Against Clones: A Lawsuit Could Lead to More Competition and More Choice*, ECONOMIST (Feb. 2, 2013), <http://www.economist.com/news/business/21571132-lawsuit-could-lead-more-competition-and-more-choice-case-against-clones>.

decreasing the profits in the delivery of innovative legal services.³⁵ As a result, flat fee billing, virtual offices, and the disaggregation of legal work into distinct tasks have emerged to commoditize legal work.³⁶ This progression has removed the veil of pure professionalism, and exposed the underlying self-interest and profit motive of today's law firms.³⁷

Additionally, the rise of prominent global firms stretches the ability of the traditional partnership to house these complex firm models. Despite evidence that large law firms are structurally vulnerable,³⁸ the pervasive focus on the bottom line has led modern American law firms to mimic their corporate counterparts by expanding in size and global presence.³⁹ A trend of firm mergers and consolidation has resulted, and through domestic and international expansion, global firms are now offering a greater portfolio of client services.⁴⁰ Often, expanding firms must employ non-lawyer experts to manage the associated growth, business development, and marketing.⁴¹ To a limited degree, smaller firms are similarly expanding.⁴²

Just like in any other industry, the recent global economic downturn has shown that lawyers are much more than uninterested professionals.⁴³ They are business-minded specialists that must adapt to the new economy.⁴⁴

35. See Miller, *supra* note 7, at 321–22; Ribstein, *supra* note 23, at 1658–59; see also Cohen, *supra* note 30 (“The more pessimistic view is that the market will never recover: that as a result of globalization, it has become easier for law firms and companies to outsource legal assignments to places like India, where foreign lawyers will work for a fraction of what an American lawyer would earn. There are also new technologies that are putting lawyers out of work—including software that can do tedious document-review projects that used to require an actual human.”).

36. Regan, *supra* note 13, at 421–22; Miller, *supra* note 7, at 324–25.

37. Gary A. Munneke, *Dances With Nonlawyers: A New Perspective on Law Firm Diversification*, 61 *FORDHAM L. REV.* 559, 575 (1992).

38. See Ribstein, *supra* note 14, at 777. Professor Ribstein believes that large firms are starting to shrink, but there is contrary evidence that firms continue to expand. This makes sense. Professor Ribstein merely suggests that larger firms without the proper support structures are bound to fail leading to the downfall of the large, traditional partnership model. However, he admits that the traditional firm model may be sustainable in the largest of firms, especially if they were able to access outside capital markets. *Id.*

39. See Miller, *supra* note 7, at 323–324; Debra Cassens Weiss, *K&L Gates to Merge with Australian Law Firm Middletons*, A.B.A. J. *DAILY NEWS*, (Dec. 4, 2012), http://www.abajournal.com/news/article/kl_gates_to_merge_with_australian_law_firm_middletons/.

40. See Miller, *supra* note 7, at 324.

41. See *id.*

42. See Ribstein, *supra* note 14, at 777.

43. Regan, *supra* note 13, at 437–38.

44. See e.g., Peter Lattman, *Mass Layoffs at a Top-Flight Law Firm*, *N.Y. TIMES* (Jun. 24, 2013), http://dealbook.nytimes.com/2013/06/24/big-law-firm-to-cut-lawyers-and-some-partner-pay/?_r=1 (noting that some law firms must have layoffs to react to current market dynamics

Competitive market forces are moving firms toward a corporate model with greater standardization, limited individual liability, and productivity-based compensation.⁴⁵ Despite the pressures that the legal profession is currently facing, traditional partnerships have little room to adapt because the specter of the ABA's ban on non-lawyer investment in firms still remains.⁴⁶

III. MODERN SCHOLARS ARGUE FOR NON-LAWYER INVESTMENT IN LAW FIRMS

The ABA currently does not approve of any models of law firm ownership by non-lawyers, and maintains its traditional ban even in the face of criticism.⁴⁷ As noted, the traditional law firm was a partnership owned entirely by lawyers.⁴⁸ However, many argue that non-lawyer investment in law firms could alleviate many of the pressures currently felt in the legal marketplace.⁴⁹

A. *The Evolution of America's Ban on Non-Lawyer Investment*

The Model Rules of Professional Conduct (the "Model Rules") are a set of ethical rules for lawyers that outline the limits of lawyer behavior in an effort to self-regulate the legal profession.⁵⁰ The Model Rules are produced by the ABA, and although the ABA has no direct authority over lawyers, its Model Rules are very influential in state courts and legislatures, which are the bodies actually responsible for the legal profession in each state.⁵¹ Each state is free to enact and enforce its own set of ethical rules, but the Model Rules are often adopted by states with minimal changes.⁵² The current set of

because "demand has been flat to down for the last five years . . . and shows little sign of picking up").

45. Regan, *supra* note 13, at 423.

46. *See id.* at 416.

47. *See generally* ABA H.D., Res. 10A, *supra* note 6.

48. *See supra* Part II.A.

49. *See, e.g.*, Bish, *supra* note 3; Erin J. Cox, Comment, *An Economic Crisis is a Terrible Thing to Waste: Reforming the Business of Law for a Sustainable and Competitive Future*, 57 UCLA L. REV. 511 (2009).

50. *See* MODEL RULES OF PROF'L CONDUCT pmbl. (1983).

51. John H. Matheson, *Governance Issues in the Multidisciplinary Corporate Practice Firm*, 69 U. CIN. L. REV. 1107, 1113 (2001).

52. Adams & Matheson, *supra* note 2, at 11; Tyler Cobb, Note, *Have Your Cake and Eat It Too! Appropriately Harnessing the Advantages of Nonlawyer Ownership*, 54 ARIZ. L. REV. 765, 768-69 (2012).

Model Rules was adopted in 1983 and in the U.S. today, “[e]very state has a rule proscribing nonlawyer investment in law firms.”⁵³

Besides recommending and informing positions to the American legal profession, the ABA and its Model Rules also act as the main deterrent to the liberalization of the legal market.⁵⁴ The ABA’s original Canons of Professional Ethics in 1908 (the “Canons”) made no mention of the association of lawyers with non-lawyers, but in an effort to prohibit lawyers from entering any business associations with non-lawyers, in 1928, Canon 34 was adopted by the ABA.⁵⁵ It stated that “[n]o division of fees for legal services is proper, except with another lawyer.”⁵⁶ In 1969, the ABA replaced the Canons with the Model Code of Professional Responsibility (the “Model Code”), and though the Model Code differed from the Canons, the Model Code merely updated the language of the non-lawyer ban in the Model Code’s Disciplinary Rule 3-102(A), which stated: “[a] lawyer or law firm shall not share legal fees with a non-lawyer.”⁵⁷

In 1977, nearly fifty years after Canon 34 was first adopted, the ABA created the Commission on the Evaluation of Professional Standards (the “Kutak Commission”) to recommend revisions to the Model Code.⁵⁸ The Kutak Commission rejected the traditional stance developed in the Canons and the Model Code that prevented the sharing of legal fees with non-lawyers, and in its 1981 draft, the Kutak Commission recommended that the ABA adopt Proposed Rule 5.4.⁵⁹ This rule would have allowed non-lawyers to have a financial interest in a law firm as long as there was “no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship.”⁶⁰ In 1983, the ABA’s policy-making body, the House of Delegates, ultimately rejected Proposed Rule 5.4 and adopted the current Model Rule 5.4, which states that “[a] lawyer or law firm shall not share legal fees with a nonlawyer,” with very limited exceptions.⁶¹ However, the ethical ruling body in the District of Columbia, did, in fact, use its discretion to reject the ABA’s Model Rule 5.4,

53. Adams & Matheson, *supra* note 2, at 3.

54. Bernard Sharfman, Note, *Modifying Model Rule 5.4 to Allow for Minority Ownership of Law Firms by Nonlawyers*, 13 GEO. J. LEGAL ETHICS 477, 477 (2000).

55. Cobb, *supra* note 52, at 769.

56. Adams & Matheson, *supra* note 2, at 4 (quoting *Annual Report of the American Bar Association*, 53 A.B.A. 119–31, 778 (1928)).

57. *Id.* at 6–7 (quoting MODEL CODE OF PROF’L RESPONSIBILITY DR 3-102(A) (1980)).

58. Cobb, *supra* note 52, at 769.

59. *Id.* at 769–70.

60. Adams & Matheson, *supra* note 2, at 8 (quoting LAW. MAN. ON PROF. CONDUCT (ABA/BNA) 01:3, 292–93 (August 20, 1997)).

61. MODEL RULES OF PROF’L CONDUCT R. 5.4 (1983); Adams & Matheson, *supra* note 2, at 10; Matheson, *supra* note 51, at 1116–19; Gilbert & Lempert, *supra* note 8, at 388–92.

eventually passing a rule similar to the one proposed by the Kutak Commission that took effect in 1991.⁶²

In 1998, the ABA established its Commission on Multidisciplinary Practice to consider possible modifications to the Model Rules in regard to the possibility, viability, and ethical ramifications of associations between lawyers and non-lawyers.⁶³ In its recommendations, the Commission flatly rejected passive investments by non-lawyers, but did recommend that “[l]awyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services, . . . provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services.”⁶⁴ Despite the specific and circumscribed recommendation, in 2000, the ABA House of Delegates steadfastly supported the same misgivings it had in the 1980s and denied any reformation of Model Rule 5.4.⁶⁵ In its rejection, the House of Delegates cited the preservation of “core principles and values of the legal profession.”⁶⁶ The traditional ban on non-lawyer investment was left firmly in place.

B. Recent Calls For Non-Lawyer Equity

Since the Kutak Commission’s proposal in 1981, the debate over non-lawyer investment has been contested.⁶⁷ Traditionally, the opponents to non-lawyer investment in law firms centered their arguments around legal ethics—whether non-lawyer economic pressures could undermine the professional independence of lawyers and the attorney-client privilege.⁶⁸ Despite the recent changes felt in the legal services industry, the opponents to a Model Rule 5.4 change continue to hold the same views.⁶⁹

62. Adams & Matheson, *supra* note 2, at 11–13; D.C. RULES OF PROF’L CONDUCT R. 5.4 (2007). See Cobb, *supra* note 52, at 782–86, for a full discussion of the application of the District of Columbia’s Model Rule 5.4.

63. Matheson, *supra* note 51, at 1119.

64. *Id.* at 1123 (quoting ABA Comm’n on Multidisciplinary Practice, Revised Recommendation 10F (visited Apr. 17, 2001) <<http://www.abanet.org/cpr/mdprecom10F.html>>.).

65. *Id.*

66. ABA H.D., Res. 10A, *supra* note 6, at 2.

67. See James Podgers, *Closing Act: Ethics 20/20 Proposals Crack Open the Door for Foreign Lawyers to Practice in the U.S.*, A.B.A. J., Jan. 2013, at 20–21.

68. See generally Cindy Alberts Carson, *Under New Mismanagement: The Problem of Non-Lawyer Equity Partnership in Law Firms*, 7 GEO. J. LEGAL ETHICS 593 (1994). See also Gilbert & Lempert, *supra* note 8, at 390, 403.

69. See *supra* Part II.B; see also *Speakers Debate Nonlawyers’ Role in Firms at First Ethics 20/20 Commission Hearing*, *supra* note 9 (“[An opponent of non-lawyer investment said]

Proponents of a change to Model Rule 5.4, on the other hand, argue that the traditional ban on non-lawyer investment is “economic protectionism at its finest” and “[b]y choosing to cling to traditional rules banning lawyers and nonlawyers from joining forces, the ABA and jurisdictions following its lead have ignored important changes in the legal profession and in the needs of those who use legal services.”⁷⁰ Although the ABA’s ban is firmly in place, it is instructive to observe some of the arguments that have developed in favor of non-lawyer investment in order to better assess the propriety of any change.

1. Non-Lawyer Equity Addresses Firms’ Needs

It is argued that “[p]rophylactic rules create an irrebuttable presumption of harm,” but Model Rule 5.4’s blanket ban on non-lawyer investment remains unchanged.⁷¹ That is why many lawyers and scholars have decided that the time has come for firm investment liberalization to bring much needed equity capital to law firms.⁷² Access to the equity markets would provide the capital to address many of a firm’s long-term needs, to include the expansion of the firm, investment in new technologies, and funding of contingency-fee cases.⁷³

Law firms have a growing need to expand internally and globally in a similar fashion as their corporate counterparts.⁷⁴ As law firms typically generate steady income streams in good times and in bad, investors would have a new and reliable investment vehicle, while law firms could rely on investors’ equity to see a firm through its expansionary phases.⁷⁵ As a labor-

that it would be a ‘terrible mistake’ to water down Model Rule 5.4’s standards on the independence of lawyers. The ABA should not endorse different forms or organizations that compromise the legal profession’s values and ethics.”).

70. Gilbert & Lempert, *supra* note 8, at 383–84; *see also* Adams & Matheson, *supra* note 2, at 24 (“While [opponents to non-lawyer investment] claim [Model Rule 5.4] is necessary to protect the integrity of the ‘profession,’ real economic pressures threaten to undermine the integrity of the profession in law offices across the country on a daily basis, as lawyers frequently struggle to make ends meet to stay in business rather than to serve deserving, destitute potential clients or the legal system as a whole. Access to the public equity markets could ease these pressures.”).

71. Munneke, *supra* note 37, at 607.

72. *See, e.g., id.*

73. Adams & Matheson, *supra* note 2, at 30–35.

74. *See supra* Part II.B.

75. Ribstein, *supra* note 14, at 789; Daniel Fisher, *North Carolina Bill Would Let Non-Lawyers Invest in Law Firms*, FORBES (Mar. 11, 2011), <http://www.forbes.com/sites/danielfisher/2011/03/11/north-carolina-bill-would-let-non-lawyers-invest-in-law-firms/> (“Right now lawyers borrow money at high interest rates from outside investors who hide behind the fig leaf of providing debt financing instead of equity. But as

intensive business, new associates are the lifeblood of a law firm, and clients have historically absorbed the training costs of new lawyers through the traditional billable hour.⁷⁶ With the current environment of stiff price competition amongst firms, law firms are having to internalize an associate's training costs.⁷⁷ A law firm that can access outside capital can rely on their investors to see the firm through its attempt to expand before a solid return is posted.⁷⁸ Additionally, firms with limited budgets would be free to innovate in regards to the composition and compensation of its attorneys to attract and keep top talent by allowing for stock payments as opposed to partnership opportunities.⁷⁹

Today, law firm partners provide all of the equity financing for law firms, but current equity partners have little interest in subsidizing the future goals of the firm because of the delayed profitability.⁸⁰ Partners have an incentive to mind their books of business and have little interest in the long-term training of younger lawyers, leaving the firm susceptible to a lack of properly trained lawyers.⁸¹ The capital needed to invest in hiring and training new lawyers, however, could alleviate this pressure, and ensure the long-term viability of a firm as it expands to meet its clients' needs.⁸² This equity cushion would also double as a fund to be tapped to pay off exiting partners, which, under the current ethical rules, normally imposes a strain on already leveraged firms by forcing a payout to the retiring partner.⁸³ A store of equity could buffer the firm from these major fluctuations in funding to continue a regime of expansion.⁸⁴

anyone with a grasp of finance can understand, debt starts to look a lot like equity as the risk levels escalate. And lawyers facing interest rates of 20% or more face enormous pressure to agree to settlements that may shortchange their clients but leave them financially whole. Perhaps it would be better for all concerned if those investors represented more patient, and explicit, equity money.”).

76. Adams & Matheson, *supra* note 2, at 33–34.

77. *Id.*

78. Cobb, *supra* note 52, at 776–77.

79. Ribstein, *supra* note 14, at 789.

80. See Adams & Matheson, *supra* note 2, at 32; Regan, *supra* note 13, at 422. See also Palank, *supra* note 18, and Cobb, *supra* note 52 at 776–78, for discussions of the risks of relying on debt financing of law firms.

81. Ribstein, *supra* note 23, at 1658 (“[L]awyers have little incentive to commit time to building the firm rather than books of business they can take with them when they leave.”); see also Bruce MacEwen et al., *Law Firms, Ethics, and Equity Capital*, 21 GEO. J. LEGAL ETHICS 61, 84 (2008).

82. Adams & Matheson, *supra* note 2, at 31–34.

83. Ribstein, *supra* note 14, at 788–89; Palank, *supra* note 18.

84. Cobb, *supra* note 52, at 776–77.

Another benefit that non-lawyer equity can provide is capital for investments in new technologies.⁸⁵ As Professor Richard Susskind, an expert on the use of information technology (“IT”) in the legal profession, predicts, the consumer commoditization of legal work will ensure that IT and the capacity to manipulate information will become part and parcel of any 21st Century law firm.⁸⁶ The client push for more efficient solutions includes the “standardization, systematization, packaging, and commoditization” of legal services that incorporate the rapidly-evolving pace of technological change and the intellectual property concerns that go with it.⁸⁷ The old partnership model that revolves around client-specific work does not provide enough incentive for firms to maximize their research and development expenditures or create firm-wide integrated solutions, but non-lawyer equity would then broaden the firm’s focus to provide more innovative and cost-effective IT solutions with the long-term health of the firm in mind.⁸⁸

A third benefit that non-lawyer investment would provide is the ability to finance contingency-fee cases.⁸⁹ Law firms have working capital requirements, and though most can be covered by a bank’s line of credit, contingency-fee cases have significant up-front costs that include attorney salary, firm overhead, and court costs.⁹⁰ These cash flow needs could be covered by outside equity.⁹¹ This has the benefit of allowing firms to take on cases that may be riskier at the outset by passing some of that risk to the firm’s investors.⁹² Funding more contingency-fee cases would have the

85. Adams & Matheson, *supra* note 2, at 32–33.

86. See SUSSKIND, *supra* note 1, at 253–54 (stating that the liberalization of non-lawyer investment in law firms will provide “new and improved ways of delivering conventional services and will create novel markets and opportunities where none had been recognized before.”).

87. SUSSKIND, *supra* note 1, at 270; see also George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn From the Medical Profession’s Shift to a Corporate Paradigm*, 70 *FORDHAM L. REV.* 775, 835 (2001) (“Current advances in Internet and computer software technology would seem to provide unprecedented opportunities for efficient and affordable delivery of needed services and effective collaboration among professionals serving clients’ related needs. Without lifting the current prohibitions on capital investment from outside the profession and resulting structural innovations, those opportunities will likely remain unfulfilled—at least as they might benefit middle- and lower-income consumers.”).

88. Ribstein, *supra* note 14, at 782–87.

89. A contingency fee is the fee charged for a lawyer’s services, usually calculated as a percentage as a percentage of the client’s net recovery, but is payable only if the lawsuit is successful or settled favorably. See *BLACK’S LAW DICTIONARY* 362 (9th ed. 2009).

90. Adams & Matheson, *supra* note 2, at 34.

91. *Id.*; see also Ribstein, *supra* note 14, at 788.

92. Adams & Matheson, *supra* note 2, at 34–35.

added benefit of providing more access to justice for the public because risk-averse firms, who would normally reject possibly meritorious claims and leave these potential clients without representation, could offer representation knowing that non-lawyer equity would act as a buffer if the case was unsuccessful.⁹³

2. Non-Lawyer Ownership Will Not Lead to an Increase in Ethical Violations

When lawyers act as agents to profit-maximizing shareholders, proponents of the traditional ban on non-lawyer investment claim that there could be possible breaches of a lawyer's independent professional judgment by way of the temptation to "practice to the share price."⁹⁴ However, beyond Model Rule 5.4, the other Model Rules would continue to protect clients through the enforcement of professional ideals if non-lawyer investment in law firms were allowed.⁹⁵ For example, Model Rule 1.8(f)(2) provides that "[a] lawyer shall not accept compensation [from a third person for representation of the client] unless there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship."⁹⁶

Additionally, by the nature of the labor-intensive element of the legal industry, "the value of a firm's stock would directly reflect the market's perception of the ability of the firm to render quality, professional legal services."⁹⁷ Non-lawyer shareholders then "would be acting to their detriment by interfering with the professional independence and judgment of a firm's lawyer-employees, thereby diminishing the quality of the legal services offered."⁹⁸ The long-term viability of any law firm depends upon a maintenance of the firm's reputation, meaning firms that allow non-lawyer investment could not sacrifice professional independence in the hopes of short-term gains.⁹⁹

93. *Id.*

94. Munneke, *supra* note 37, at 606–07.

95. *Id.*

96. MODEL RULES OF PROF'L CONDUCT R. 1.8(f)(2) (1983). See also Harris & Foran, *supra* note 87, at 837–40, for a longer discussion of the ethical safeguards of the Model Rules in regards to non-lawyer investment.

97. Adams & Matheson, *supra* note 2, at 16.

98. *Id.*

99. Ribstein, *supra* note 14, at 791 ("Firms cannot survive in the long run unless they cater to their customers, including by building their reputations for long-term fair dealing."); see also *id.* at 804 ("[The ethical rule banning non-lawyer investment] is unnecessary, since profit-maximizing owners who are subject to competition from a variety of mechanisms for delivering legal services have a long-term incentive to maintain their firm's reputation."); Munneke, *supra*

3. Other Arguments for Non-Lawyer Ownership

As Professor George Harris and Professor Derek Foran demonstrate, the medical profession went through a similar marketplace liberalization and has not faced the ethical issues feared by many.¹⁰⁰ Instead, it has found stability and innovation through corporate structures.¹⁰¹ Harris and Foran argue that when physicians had exclusive ownership rights to their practices, the costs of medical services were inflated because the lack of price competition among providers “prevented the creation of potentially more economical business structures.”¹⁰² In 1979, the Federal Trade Commission held that provisions against non-physicians having ownership rights in medical practices violated antitrust laws, and the profession’s ethical concerns were not sufficient justification to insulate the medical services industry.¹⁰³

Harris and Foran assert that a physician’s primary duty is still to patients, and suggest that the Model Rules could allow non-lawyer investment by directly addressing the paramount protection of a client’s interests and the importance of exercising independent judgment, even in the face of non-lawyer temptations to the contrary.¹⁰⁴ They conclude that the self-regulation of the legal market in America is non-competitive, resulting in legal services being so “extraordinarily expensive” that many Americans must forgo assistance when they have real needs.¹⁰⁵ A more efficient legal system would accommodate the ethical tension that the non-lawyer ownership of law firms entails.¹⁰⁶

note 37, at 569 (“The better solution may be to regulate lawyers’ conduct in the context of specific ethical issues, such as confidentiality, rather than prohibiting prophylactically an entire genre of associations.”).

100. Harris & Foran, *supra* note 87.

101. *Id.*

102. *Id.* at 812.

103. *Id.* at 815; *see also id.* at 816 (In its opinion, the Federal Trade Commission stated: “To say that physicians are above ‘trade,’ and to assert that they are entitled to preserve their basic ethical values despite deleterious effects on competition, would be to completely remove physicians from a marketplace setting, rather than admit that the services they offer, the delivery of which are both highly necessary and equally highly respected, might better comport with the public’s needs were they subject to appropriate competitive factors”) (quoting *In re Am. Med. Ass’n*, 94 F.T.C. 701 (1979)).

104. *Id.* at 837–38 (“There is no reason why the profession could not demand compliance with those rules and thereby protect its ‘core values’ in the corporate provider context.”).

105. *Id.* at 796.

106. *Id.* at 799–800 (“The legal system qua system is largely immune to pressures to reduce costs: those with disputes have no coercive alternative to the costly system if they are plaintiffs and no choice, period, if they are defendants.”) (quoting Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 Mich. L. Rev. 953, 993 (2000)).

Beyond antitrust considerations, non-lawyer ownership also implicates the First Amendment.¹⁰⁷ In its holding in *Citizens United v. Federal Election Commission*,¹⁰⁸ the majority of the Supreme Court reaffirmed the First Amendment rights of corporations to unsuppressed political speech, and in so doing, opened the door to considerations of corporate freedom of speech to promote competition.¹⁰⁹ In the wake of that case, Professor Knake posits that the ABA's restrictions outlined in Model Rule 5.4 might be unconstitutional because it limits the freedom and degree of association of corporate organizations.¹¹⁰ Knake predicts that state professional conduct rules barring non-lawyer investment could not withstand the scrutiny of a corporate free speech challenge, because "[t]he fact is that law practice is a business."¹¹¹ She concludes that corporations have a First Amendment right to deliver legal services, and Model Rule 5.4 must be adapted to allow for non-lawyer investment in order to account for these increased political rights.¹¹²

IV. DIFFERING APPROACHES TO THE NEW REALITY IN THE LEGAL MARKET

The new economic reality, marked by technological change and foreign competition, presents lawyers with opportunities to either innovate or maintain the status quo. As demonstrated in Australia and the United Kingdom, there are other approaches to the non-lawyer investment issue beyond America's traditional prohibition.¹¹³ From publicly-traded firms in Australia to legal services offered at one-stop shops at local grocers in the United Kingdom, the liberalization of the legal marketplace has allowed experimentation to flourish in foreign markets in recent years.¹¹⁴ America, on the other hand, continues its ban on non-lawyer investment in law firms, even after the ABA petitioned the Ethics 20/20 Commission to provide updated approaches to the new reality in the legal market.

107. See Munneke, *supra* note 37, at 585–614, for an in-depth discussion of the antitrust issues associated with the ban on non-lawyer involvement in law firms, as well as the First Amendment issues of freedom of association and commercial speech surrounding non-lawyer bans.

108. 558 U.S. 310 (2010).

109. *Id.* at 342–43.

110. Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 36 (2012).

111. *Id.* at 42.

112. *Id.* at 45–46.

113. See Smith, *supra* note 2.

114. See *id.*

A. *Foreign Jurisdictions Allow Non-Lawyer Ownership*

To bring perspective to the non-lawyer investment debate in America, one should first highlight and evaluate real-world alternatives American firms would be able to take in a more liberalized legal market.

1. Australia

In an effort to promote increased competition and limit the liability of equity partners, Australia enacted the Legal Profession Act of 2004 (“LPA”), bringing unprecedented liberalization to the country’s legal market.¹¹⁵ Enacted in some form in all of the Australian states besides South Australia, the LPA allows legal service providers to register with the Australian Securities and Investments Commission as Incorporated Legal Practices (“ILPs”).¹¹⁶ The designation of an ILP provides access to Australia’s financial markets and the myriad of fundraising options that are available to other corporate forms.¹¹⁷ However, unlike their corporate counterparts, ILP lawyers have duties of confidentiality and are exempted from securities disclosure obligations.¹¹⁸ As an ethical safeguard, ILP lawyers are not only responsible for their personal breaches of ethical and professional obligations, ILP lawyers are also subject to discipline for the conduct of any non-lawyer director who may negatively impact the furnishing of legal services.¹¹⁹

In May of 2007, Slater & Gordon became the first Australian law firm to take advantage of the new-found access to non-lawyer investment when it became the first law firm in the world to go public.¹²⁰ Slater & Gordon, founded in 1935, focuses on litigating class-action personal injury lawsuits, and had 140 lawyers on staff at the time of its public offering.¹²¹ In order to strike a balance between its business interests and the LPA’s concern with a lawyer’s ethical duties as a member of an ILP, Slater & Gordon’s prospectus for the offering subordinated the firm’s duties to its shareholders

115. Justin D. Petzold, Comment, *Firm Offers: Are Publicly Traded Law Firms Abroad Indicative of the Future of the United States Legal Sector?*, 2009 WIS. L. REV. 67, 73–74 (2009).

116. Regan, *supra* note 13, at 409.

117. *Id.*

118. *Id.* at 410.

119. *Id.* at 410; *see also* Miller, *supra* note 7, at 327–28 (“At least one director must be a lawyer who is responsible for the management of legal services and ensures that appropriate management systems are implemented and maintained to enable the provision of legal service in accordance with the standard of professional obligations of legal practitioners.”).

120. Regan, *supra* note 13, at 411; Petzold, *supra* note 115, at 68.

121. Regan, *supra* note 13, at 411.

in favor of its “primary duty to the courts and a secondary duty to [its] clients.”¹²² Slater & Gordon’s initial public offering was met with success as the firm sold over 17 million new shares to investors, raising over AU\$49 million¹²³ in proceeds.¹²⁴

Since its initial public offering, Slater & Gordon has used equity capital to acquire small and medium-sized practices from different regions of the country, and during the global financial crisis of 2008, Slater & Gordon reported increases in revenue and net profit after taxes.¹²⁵ In February 2012, Slater & Gordon even expanded internationally when it acquired Russell Jones & Walker (“RJW”), a firm with twelve offices in the United Kingdom, and the re-branding has already taken effect.¹²⁶ In the six months following the takeover of RJW, Slater & Gordon announced a nearly fifty percent increase in its revenue.¹²⁷

However, not all attempts to go public in Australia have been met with success. Also in 2007, Integrated Legal Holdings Limited (“Integrated”), a holding company that does not provide legal services but acquires firms under one brand name, became the second Australian law firm to go public.¹²⁸ Integrated’s issue price of AU\$0.50 fell to AU\$0.14 in 2009, and sits at a mere AU\$0.09 in early 2013.¹²⁹ Although Integrated’s story may suggest that a law firm’s public equity financing may not always be met with success, Slater & Gordon’s path demonstrates that non-lawyer investment provides new life and liquidity to Australia’s legal market that helps law firms adapt to the new global economic reality.¹³⁰

122. *Prospectus*, SLATER & GORDON LTD., at 1, 12 (2007), <http://www.slatergordon.com.au/docs/prospectus/Prospectus.pdf>, (last visited May. 4, 2013) (“Lawyers have a primary duty to the courts and a secondary duty to their clients. These duties are paramount given the nature of the Company’s business as an Incorporated Legal Practice. There could be circumstances in which the lawyers of Slater & Gordon are required to act in accordance with these duties and contrary to other corporate responsibilities and against the interests of Shareholders or the short-term profitability of the Company.”).

123. This was roughly \$40 million USD at the time of the offering. *Australian Dollar (AU\$)/ US Dollar (\$)*, GOOGLE: FINANCE, <https://www.google.com/finance?q=AUDUSD> (last visited Sept. 6, 2013).

124. Regan, *supra* note 13, at 412.

125. Miller, *supra* note 7, at 329–30.

126. *About Us*, SLATER & GORDON, <http://www.slatergordon.co.uk/about-us/> (last visited Sept. 6, 2013).

127. Joshua Freedman, *Slater & Gordon Claims First-Half Revenue Rise of 46.5 per cent*, THE LAWYER (Feb. 27, 2013), <http://www.thelawyer.com/slater-and-gordon-claims-first-half-revenue-rise-of-465-per-cent/3001804.article>.

128. See Miller, *supra* note 7, at 330, 345–47.

129. *Id.* at 330; *ILH Group Ltd*, GOOGLE: FINANCE, <https://www.google.com/finance?cid=710460> (last visited Mar. 11, 2013).

130. See Regan, *supra* note 13, at 412; Petzold, *supra* note 115, at 68.

2. The United Kingdom

With the Legal Services Act of 2007 (“LSA”), the United Kingdom joined Australia and enacted legislation to allow non-lawyer investment in law firms.¹³¹ The LSA found its origins in a 2004 review of the United Kingdom’s regulatory framework for legal services.¹³² In an effort to determine “what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector,” the report recommended that the law allow for non-lawyer investment in law firms.¹³³ This move would provide investment as well as “fresh ideas about how legal services might be provided in consumer friendly ways.”¹³⁴

The LSA authorized Alternative Business Structures (“ABSs”), which are regulated organizations that provide legal services marked by varying degrees of non-lawyer involvement (to include ownership).¹³⁵ In early 2012, the regulatory body for lawyers in England and Wales, the Solicitors Regulation Authority, began licensing ABSs.¹³⁶ Non-lawyer investors seeking a ten percent interest or more in an ABS are required to pass a suitability test, which mirrors many of the same requirements for a British lawyer entering the profession.¹³⁷ Lawyers are tasked with upholding the ethical and professional principles of independence, client confidentiality, and acting in the client’s best interest, while non-lawyer owners in ABSs are prohibited from causing a breach of any of the duties imposed by the licensing authority.¹³⁸

Although the ABS application process became official in 2012, the true impact of the availability of ABS status is unknown yet because the approval process is lengthy.¹³⁹ However, what is known is that nearly 400

131. Petzold, *supra* note 115, at 81–82.

132. Regan, *supra* note 13, at 413.

133. SIR DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES: FINAL REPORT 1, 115 (2004), available at <http://www.legal-services-review.org.uk/content/report/report-chap.pdf>.

134. *Id.*

135. Regan, *supra* note 13, at 413–14; Miller *supra* note 7, at 331–32; *Setting Up an ABS*, THE LAW SOCIETY, <http://www.sra.org.uk/solicitors/firm-based-authorisation/abs/need-to-be-authorised.page> (last updated Oct. 31, 2012).

136. *Setting Up an ABS*, *supra* note 135; *Does Your Firm Need to be Authorized as an ABS?*, SOLICITORS REGULATION AUTHORITY, <http://www.sra.org.uk/solicitors/freedom-in-practice/alt-bs/need-to-be-authorised.page> (last updated July 12, 2013).

137. THE LAW SOCIETY, *supra* note 135.

138. Regan, *supra* note 13, at 414; see also Legal Services Act, 2007, c. 29, sch. 13 (U.K.), available at http://www.opsi.gov.uk/acts/acts2007/pdf/ukpga_20070029_en.pdf.

139. Andrew Hopper QC, *Alternative Business Structures: An Uncertain Future?*, HALSBURY’S L. EXCHANGE (Jan. 21, 2013), <http://www.halsburyslawexchange.co.uk/legal->

firms have since started the ABS application process, and out of these initial applicants, seventy-four licenses were granted.¹⁴⁰ The new ABSs range from a small law firm looking to bring in the equity of a non-lawyer family member to the Co-operative Group of grocery stores looking to become the United Kingdom's largest provider of legal services by 2022.¹⁴¹ The ABS law also allowed Australia's Slater & Gordon to acquire RJW.¹⁴² Time will tell how successful the market liberalization strategy is and the ethical issues that ABSs will present, but with the ABS process firmly in place, non-lawyers are able to now invest in British law firms.

B. *The American Response to the New Reality*

Foreign innovation in the new international economic reality stretches beyond just Australia and the United Kingdom¹⁴³ However, America has yet to grab hold of the advantages that non-lawyer investment in law firms can bring.

1. The Commission on Ethics 20/20 Perpetuates the Traditional Ban on Non-Lawyer Investment

The global economic collapse in 2008 caused major rifts in many sectors, and in 2009, in an effort to take inventory after the recession, the ABA appointed the Commission on Ethics 20/20 (the "Commission") to study the impact of globalization and technology on the legal profession and propose possible changes to the Model Rules.¹⁴⁴ In June 2011, the

services-act-an-uncertain-future/; Neil Rose, *Future of Law: Big Brands and Alternative Business Structures*, THE GUARDIAN (Oct. 12, 2012), <http://www.guardian.co.uk/law/2012/oct/12/brands-alternative-business-structures>.

140. Neil Rose, *Over 300 ABS Applications Waiting in the Wings, Says SRA*, LEGAL FUTURES (Jan. 14, 2013), <http://www.legalfutures.co.uk/latest-news/over-300-abs-applications-waiting-wings-says-sra>.

141. Rose, *supra* note 139; Caroline Binham, *OFT says 'Tesco Law' Approvals Too Slow*, FIN. TIMES (Jan. 18, 2013), <http://www.ft.com/intl/cms/s/0/67a46fb8-615e-11e2-9545-00144feab49a.html#axzz2NGIQazi6>; *see also* Smith, *supra* note 2.

142. *The Case Against Clones*, *supra* note 34.

143. *See Alternative Business Structures Explored*, THE L. SOC'Y UPPER CAN. GAZETTE (Dec. 27, 2012), <http://www.lawsocietygazette.ca/news/alternative-business-structures-explored/> (noting that Canada was first to use ABSs in 2001).

144. James Podgers, *Ethics 20/20 Recommends Helping Foreign Lawyers to Practice in U.S., Sidesteps Nonlawyer Ownership*, A.B.A. J. (Oct. 30, 2012), http://www.abajournal.com/news/article/ethics_20_20_recommends_making_it_easier_for_foreign_lawyers_to_practice_in/; Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 397–98 (2013).

Commission flatly and publicly rejected law firm models that are permissible in Australia and the United Kingdom, “including multidisciplinary practices, publicly traded law firms, and passive, outside nonlawyer investment or ownership in law firms.”¹⁴⁵ It appeared that the ABA’s rejection of non-lawyer investment in 2000 would simply be upheld, but in December 2011, the Commission released a Discussion Draft for comment that described a limited form of court-regulated, non-lawyer ownership of law firms that would have allowed non-lawyers employed by a law firm to have a minority financial interest in the firm.¹⁴⁶ The draft’s model would have retained all voting power with a firm’s lawyers, but the Commission never advanced these ideas further than the Discussion Draft.¹⁴⁷

As such, in 2012, the Commission paradoxically rejected the non-lawyer proposal as “too modest” and “too expansive,” finding that there was not a “sufficient basis” for recommending a change to Model Rule 5.4 to allow for non-lawyer investment.¹⁴⁸ The Commission’s co-chair, Jamie Gorelick, viewed non-lawyer ownership of firms as a “distraction” because the Commission considered other measures more important, and the Commission ultimately submitted recommendations to the House of Delegates to consider in 2013 that would make it easier for foreign lawyers to practice in the United States for limited periods.¹⁴⁹

145. Press Release, ABA Commission on Ethics 20/20, ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms (Apr. 16, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120416_news_release_re_nonlawyer_ownership_law_firms.authcheckdam.pdf.

146. *Id.*; Gillers, *supra* note 144, at 398.

147. Gillers, *supra* note 144, at 399–401. Condemning the rejection of the Discussion Draft, Professor Gillers writes that “[t]he proposition that certain regulatory ideas are too repugnant even to allow discussion by an ABA body is intellectually unacceptable and harms the good work of the Association.” *Id.*

148. ABA Commission on Ethics 20/20, *supra* note 145. The Commission felt that the case had not been made for “proceeding even with a form of nonlawyer ownership that is more limited than the D.C. model.” *Id.* See also Evan Glassman & Anthony A. Onorato, *Litigation Financing and Non-Lawyer Investment in Law Firms*, 246 N.Y. L.J. 115 (Dec. 15, 2011), *available at* <http://www.stepto.com/assets/htmldocuments/070121126%20stepto.pdf>. The District of Columbia has a 25 percent non-lawyer ownership cap that includes the requiring of: “(1) firms to provide only legal services; (2) non-lawyers be active in supporting the delivery of legal services; (3) a cap on non-lawyer percentage ownership; (4) non-lawyers adhere to the attorney conduct rules; and (5) the attorneys supervise the nonlawyers’ compliance with the rules of conduct and ensure their ‘good character.’” *Id.* See also *The Case Against Clones*, *supra* note 34.

149. Podgers, *supra* note 67, at 20–21.

2. Jacoby & Meyers Attempts to Utilize Non-Lawyer Investment in America

In 2011, Jacoby & Meyers, a personal injury law firm, filed lawsuits in New York, New Jersey and Connecticut challenging those states' ethical rules banning non-lawyer investment in law firms.¹⁵⁰ Jacoby & Meyers believed that non-lawyer equity would allow the firm to upgrade its technology and take advantage of the economy of scale, and argued that the current bans on non-lawyer investment violated the firm's freedom of speech and assembly.¹⁵¹ Jacoby & Meyers' Connecticut and New Jersey suits are still ongoing, but it was their New York lawsuit that made headlines in early 2012.¹⁵²

In the New York litigation, Jacoby & Meyers argued that New York's Rule 5.4 of the Model Code of Professional Conduct, which prevented the firm from providing "lower cost legal services to those who cannot afford more traditional lawyers," was unconstitutional.¹⁵³ The court dismissed Jacoby & Meyers's complaint because the court lacked subject-matter jurisdiction based on the firm's lack of standing to bring any action to change New York's Rule 5.4.¹⁵⁴ "[O]ther provisions of New York law," to include limited liability company law, prevented Jacoby & Meyers from receiving non-lawyer equity, and thus, the firm failed to show that New York's Rule 5.4 caused injury to the firm.¹⁵⁵ However, in its appeal, Jacoby & Meyers successfully got their case remanded so that they could amend their complaint to challenge the "other provisions of New York law."¹⁵⁶ The Jacoby & Meyers cases are still ongoing at this time, but some scholars believe lawsuits like these are the only way that any changes to non-lawyer investment rules can be made.¹⁵⁷

150. Smith, *supra* note 2.

151. *The Case Against Clones*, *supra* note 34.

152. See, e.g., Carnathan, *supra* note 7, at 9–10; *US Judge Tosses Lawsuit on Law Firm Ownership Ban*, REUTERS (Mar. 8, 2012), <http://www.reuters.com/article/2012/03/08/jacobymeyers-idUSL2E8E8EHF20120308>.

153. *Jacoby & Meyers v. Presiding Justices*, 847 F. Supp. 2d 590, 591 (S.D.N.Y. 2012).

154. *Id.* at 598.

155. *Id.* at 591, 598.

156. *Jacoby & Meyers v. Presiding Justices*, 488 F. App'x 526, 527 (2d Cir. 2012); see also Jennifer Smith, *Not Dead Yet: 2nd Circuit Resurrects Jacoby & Meyers Suit*, WALL ST. J. (Nov. 21, 2012), <http://blogs.wsj.com/law/2012/11/21/not-dead-yet-2nd-circuit-resurrects-jacoby-meyers-suit/>.

157. *The Case Against Clones*, *supra* note 34.

V. ANALYSIS

A. *The Commission on Ethics 20/20 Got It Wrong*

The ABA took a step toward understanding the challenges and pressures that American lawyers are facing in light of the rapid changes in globalization and technology when it commissioned the Ethics 20/20 Commission. This comment has highlighted the pressures that law firms are currently facing, including client demands and the financial climate, but the ABA's refusal to change its stance on non-lawyer investment indicates that its "core principles and values" are more concerned with protecting the profession's noncompetitive profits than providing the leadership the American legal industry needs to confront the new reality firms are facing.¹⁵⁸ By refusing to allow serious commentary and debate on non-lawyer investment, despite scholarly calls to the contrary, the Commission on Ethics 20/20 provided a disservice to the U.S. legal system and firmly places American firms on the sidelines of innovation.¹⁵⁹

Model Rule 5.4's historic ban on non-lawyer investment is misguided and handcuffs the legal industry to archaic models designed to keep traditional firm structures in place. Opponents of change espouse the dangers to client confidentiality and the lawyer's professional independence if non-lawyers are allowed to invest in law firms, but these "core values" are outdated.¹⁶⁰ As shown in the medical industry, market liberalization does not directly lead to ethical violations; unscrupulous professionals lead to violations.¹⁶¹

The Model Rules already provide the necessary ethical boundaries to prevent industry-wide failures, but to allay these reasonable fears, market liberalization should include a direct call for lawyers to abide by the current ethical rules and to remind them of their professional duties.¹⁶² As exemplified by the Australian firm Slater & Gordon's prospectus, this can

158. See Resolution 10A, *supra* note 6.

159. See Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1732 (2008); Cox, *supra* note 49, at 540 ("A rising concern among U.S. law firms is that they will lose relevance in the global arena when forced to compete with the liberalized business structures available to foreign firms.") (footnote omitted).

160. See Cox, *supra* note 49, at 550–51.

161. See generally Harris & Foran, *supra* note 87.

162. *Id.* at 838 ("Perhaps most importantly, lawyers working for a corporate legal services provider could and should be subject to the same ethical rules that govern the conduct of all lawyers. There is no reason why the profession cannot demand compliance with those rules and thereby protect its 'core values' in the corporate provider context.").

be done fairly easily.¹⁶³ Under a more liberalized regulatory regime, Slater & Gordon subordinated shareholder priorities by declaring a first priority to the courts and a secondary duty to its clients.¹⁶⁴ Although this moved the firm's shareholders to the end of the priority line, Slater & Gordon is very lucrative because the firm is allowed to innovate and take advantage of the myriad advantages that passive equity investments provide.¹⁶⁵

American firms need non-lawyer investment now if they are to fully update the partnership model and keep up with Australian and British firms in the fast-paced global legal market.¹⁶⁶ Not only do benefits include much needed extra capital and access to justice, but with competing countries free to structure their law firms in ways that allow them to offer creative legal solutions on the world stage, America may be destined to stunt its future ability to adapt if states choose to stick to the ABA's recommendations.¹⁶⁷ ABA recommendations take nearly five years to make and it is impossible to know whether the U.S. Supreme Court will hear a case on the freedom of corporate association anytime soon.¹⁶⁸ Moreover, the Jacoby & Meyers suits show that litigating the non-lawyer investment issue is time-consuming and doesn't have much hope of success.¹⁶⁹

America has surrendered its leadership role in favor of economic protectionism, and it is too late for the ABA to right the ship in time.¹⁷⁰ Calls to adapt have been denied, and the Commission on Ethics 20/20 has

163. SLATER & GORDON, *supra* note 122, at 9.

164. *Id.*

165. See Freedman, *supra* note 127. It should also be noted that Slater & Gordon is a publicly-traded class-action personal injury law firm, and despite its expansion, the author has found no significant, demonstrated increase in complaints. Moreover, a rise in non-frivolous complaints could be a good thing, as it would signal that legal services are being provided to more of those in need of them.

166. MacEwen et al., *supra* note 81, at 91.

167. *The Case Against Clones*, *supra* note 34 (“Yet the reality on the ground in America suggests that change is badly needed.”).

168. See Knake, *supra* note 110, at 46 (expressing concern that an argument supporting non-lawyer ownership based upon on the First Amendment “would only perpetuate an already overly complicated and somewhat contrived jurisprudence,” and recommending that other regulatory means be utilized).

169. See Smith, *supra* note 154.

170. DeStefano, *supra* note 12, at 2843 (“[T]he reality is that, if [the U.S. does] not [innovate], non-U.S. players will.”); Cox, *supra* note 49, at 514 (“Without access to modern capital structures, U.S. law firms are handicapped in building transnational legal presences. Firms with access to large pools of capital have a competitive advantage in expanding their practices globally and delivering efficient services to their clients.”); THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 90 (2010) (“If American lawyers ignore the fact that their direct competitors play by different rules, they will have only themselves to blame when clients take advantage of these changes and seek the same or better professional services at lower cost elsewhere.”).

now firmly entrenched America's tradeoff of monopolistic profits for a lack of innovation.¹⁷¹ However, the ABA is not the final authority on adopting new ethical standards, leaving American states an opportunity to become pioneers of change.

B. It is Time For States to Unlock Innovation

The Commission on Ethics 20/20's decision to reject non-lawyer investment in law firms signals that some American practitioners are ready and willing to allow competing foreign markets to become the hotbeds of legal innovation. It further entrenches American legal service providers in outdated systems that fail to recognize that the traditional professional model followed by attorneys has given way to a business-oriented system that has already firmly taken root.¹⁷² The economic protectionism that the ABA continues to support could quickly lead to declining future profits, but with the Commission on Ethics 20/20's rejection of non-lawyer investment, it is now up to individual states to become the laboratories of innovation.¹⁷³

States are free to change their ethical rules, and given the pressing need and the lack of a pioneering spirit from the ABA, this is the time for states to make hard decisions and become workshops of innovation.¹⁷⁴ On top of the District of Columbia's example discussed earlier, this is what has occurred in North Carolina.¹⁷⁵ In 2011, a bill was introduced by the North Carolina state legislature to allow non-lawyers to buy up to 49% of a firm, but would leave the firm's control in the hands of its attorneys.¹⁷⁶ The implementation of these types of changes could pay figurative dividends for adventurous states, who could then offer a different "basket" of goods and services to perhaps better attract businesses, investors and firms to the area.¹⁷⁷

The "core values and principles" expressed in Model Rule 5.4 are already found in other ethical rules, and it is time to let them do their job

171. See ABA Commission on Ethics 20/20, *supra* note 145.

172. Regan, *supra* note 13, at 431.

173. See DeStefano, *supra* note 12, at 2796.

174. MacEwen et al., *supra* note 81, at 91.

175. Fisher, *supra* note 75.

176. *Id.*; Cobb, *supra* note 52, at 788. Since the District of Columbia made its Model Rule 5.4 change to allow non-lawyer investment in law firms, there has been "no evidence of ethical violations, complaints, or any other adverse consequences after it was enacted." *Id.* See also *id.* at 798 (discussing the North Carolina measure that solves the conflict between duties to shareholders and clients by declaring that "the duty to the client shall prevail over the duty to shareholders").

177. MacEwen et al., *supra* note 81, at 91.

and allow firms to tap into the benefits of non-lawyer investment in law firms.¹⁷⁸ American law firms will be better off for the change. With access to non-lawyer equity, legal innovators can innovate, investors can invest, and our legal market can produce best practices that will allow firms to tap into a new found growth potential, without limiting themselves to self-generated capital or bank loans.

VI. CONCLUSION

Legal innovation is occurring internationally, but the United States cannot get on board because of its historic and steadfast denial of non-lawyer investment in law firms. Upon review, the ABA's previous denial of non-lawyer equity merely amounts to economic protectionism, but the unprecedented changes in recent years have exposed the business pressures of the practice of law, and have revived the discussion for the liberalization of the American legal market. However, the ABA continues its debilitating stronghold, exemplified most recently in the Commission on Ethics 20/20's failure to propose any changes to Model Rule 5.4. As a result, the ABA has voluntarily relinquished America's place as the leader on the global legal stage, and puts the U.S. at a disadvantage when it comes to developing strategies in a highly interconnected technological marketplace.

In the face of this reality, states should choose to break away from the ABA's recommendations to allow American firms to remain competitive on the global stage. Now is the time for states to adopt ethical changes to allow for non-lawyer investment in law firms in order to unlock and unleash the overwhelming benefits that outside capital can bring. By being allowed the freedom to develop new models of legal practice, and to include non-lawyer investment in firms, American firms can help define and develop strategies that will come to dominate the 21st Century. Without this measure, American firms may soon be relegated to passive observers watching Australian, British, and other international firms gain global marketshare.

178. Gilbert & Lempert, *supra* note 8, at 410 (“[T]hese positions can be adopted—and no doubt there are other variations, as well—without impairing in the least the ability of lawyers to serve their clients effectively and professionally.”).