HAVE YOUR CAKE AND EAT IT TOO! APPROPRIATELY HARNESSING THE ADVANTAGES OF NONLAWYER OWNERSHIP

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In the United States, Model Rule 5.4 prohibits law firms from sharing fees with nonlawyers, concomitantly denying firms the benefits of outside investment enjoyed by other types of businesses. This rule serves several of the legal profession's core values, primarily ensuring that lawyers are able to exercise their independent professional judgment.

But what if firms could have their cake and eat it too? What if there was a way to harness the benefits of nonlawyer ownership without undermining the values that Model Rule 5.4 protects? This Note evaluates a discussion draft released by the ABA Commission on Ethics 20/20 and uses it as a stepping stone toward constructing a more liberal model for nonlawyer ownership. The model proposed in this Note effectively addresses the ethical concerns regarding nonlawyer ownership while maximizing its benefits.

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INTRODUCTION

American Bar Association ("ABA") Model Rule 5.4 ("Model Rule 5.4") currently prohibits nonlawyer ownership of firm ownership interests ("nonlawyer ownership"), fee sharing with nonlawyers, and outside investment in law firms in the United States.[1] Generally, the rule states that "[a] lawyer or law firm shall not share legal fees with a nonlawyer" and lists several exceptions that further delineate the rule.[2] Although the rule serves ethical purposes that are critical to the integrity of our legal system, it deprives law firms of significant benefits offered by nonlawyer ownership and outside investment.

In December of 2011, the ABA Commission on Ethics 20/20 ("ABA 20/20 Commission") released a discussion draft that contained a modified version of Model Rule 5.4 that would allow a limited form of nonlawyer ownership. Although the ABA ultimately decided not to propose the modified rule, this Note suggests that the decision to circulate the draft indicates a willingness to adapt to meet the needs of an evolving legal market. However, the modified rule included in the discussion draft is still too modest to affect meaningful change. This Note proposes a unique version of Model Rule 5.4 that is capable of meaningfully realizing the benefits of nonlawyer investment, while sufficiently addressing opponents' concerns.

Part I begins with a brief background of the rule that has prohibited nonlawyer ownership for nearly 30 years, exploring its history and the debate that led to its adoption by every state except the District of Columbia.

The debate regarding nonlawyer ownership has intensified in recent years as American legal minds have begun to recognize the importance of staying competitive in an increasingly globalized legal market where reform has permitted such ownership abroad. Part II of this Note provides a history of the dialogue between advocates and opponents of reform. In an effort to provide the reader with a basis for the contemporary arguments of both sides, this Note evaluates the

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1. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2011). Rule 5.4 reads, in relevant part:

> (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
>
> . . . .
>
> (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
>
> > (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
> >
> > (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
> >
> > (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Id.

2. *Id.*

justifications presented for the current rule when it was passed, nearly 30 years ago.

Part III of this Note discusses recent legislative initiatives abroad. In an increasingly globalized legal market, it is more important than ever to adapt to changing circumstances so that American firms may remain competitive.

The discussion then shifts to the District of Columbia model—the only one in the United States that allows any form of nonlawyer ownership.[3] The model and its limitations are examined. The next section discusses the ways that another proposal within a new discussion draft released by the ABA 20/20 Commission may obviate these limitations.[4]

Identifying a need for a greater inquiry into the implications and desirability of nonlawyer ownership, the ABA 20/20 Commission released a discussion draft for comment in December 2011 that included a modified version of Model Rule 5.4 allowing for a modest form of nonlawyer ownership.[5] Part IV of this Note discusses the elements of this model, as well as the reasons why this model is unlikely to allow law firms to take meaningful advantage of nonlawyer ownership's benefits.

Part V of this Note will conclude by proposing a model significantly more liberal than both what is currently allowed under the current Model Rules and the modified version included in the ABA 20/20 Commission's discussion draft. The model proposed in this Note goes further in allowing firms to harness the benefits of nonlawyer ownership while addressing the ethical concerns espoused by reform's opponents. Adherence to an outmoded rule impedes innovation. Accordingly, rulemakers must thoughtfully consider progressive ideas with respect to ethical rules if American law firms are to remain competitive in today's rapidly evolving global market. The model proposed in this Note is a positive step toward such necessary reform.

I. BACKGROUND OF MODEL RULE 5.4

A. Brief History

The debate on nonlawyer ownership begins with ABA Model Rule 5.4.[6] The ABA's Model Rules are not binding upon states or lawyers.[7] States are free to

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3. *See* D.C. RULES OF PROF'L CONDUCT R. 5.4 (2007).

4. *See* ABA Comm'n on Ethics 20-20, Initial Draft Proposal for Comment, Choice of Law-Alternative Law Practice Structures 4–5 (2011) [hereinafter ABA Initial Draft Proposal for Comment], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-alps_choice_of_law_r_and_r_final.authcheckdam.pdf.

5. *See* ABA Comm'n on Ethics 20/20, Discussion Draft for Comment, Alternative Law Practice Structures 2–13 (2011) [hereinafter ABA Discussion Draft for Comment], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf.

6. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2011).

7. *See* STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (2012); Edward S. Adams & John H. Matheson, *Law Firms on the Big*

adopt their own unique rules of ethics, but most states use the ABA's Model Rules as a foundation. Every state has adopted a rule ostensibly mirroring Model Rule 5.4, with the exception of the District of Columbia.[8]

The rules pertaining to fee sharing amongst lawyers and nonlawyers grew out of the *Canons for Professional Ethics*, promulgated in 1908.[9] These original canons, however, did not include any provisions prohibiting partnerships between lawyers and nonlawyers.[10] In 1928, the ABA revised the original *Canons* and adopted *Canons* 33, 34, and 35, which discouraged nonlawyer investment in law firms by effectively prohibiting lawyers from entering into any type of partnership with nonlawyers.[11] However, some members of the Bar were dubious that lawyer-nonlawyer partnerships actually posed serious ethical threats. A report by a member of the *Canons* drafting committee shared these views, writing that "aside from professional policy, I think that there is nothing inherently 'unethical' in the formation of partnerships between lawyers largely engaged in certain kinds of work and an expert engineer, student of finance, or some other form of expert."[12]

In 1969, the ABA promulgated the *Model Code of Professional Responsibility* to replace the *Canons*.[13] The principles of *Canons* 33, 34, and 35 were adopted through several Disciplinary Rules prohibiting lawyer and nonlawyer partnerships[14] and guided by Ethical Consideration 3-3, which emphasized that the Disciplinary Rules protect the public by prohibiting a lawyer "from submitting to the control of others in the exercise of his judgment."[15]

Eight years later, the ABA created the Commission on the Evaluation of Professional Standards, commonly referred to as the "Kutak Commission."[16] The Kutak Commission was established to recommend revisions to the *Model Code of Professional Responsibility* and circulated four drafts of its proposed *Model Rules of Professional Conduct* before the ABA formally adopted the current version of the Model Rules in 1983.[17]

During the drafting of the Model Rules, the Kutak Commission recommended that the ABA change the Model Rules to allow fee sharing with

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Board?: A Proposal for Nonlawyer Investment in Law Firms, 86 CALIF. L. REV. 1, 11 (1998).

8. GILLERS ET AL., *supra* note 7, at 346; *see also* Adams & Matheson, *supra* note 7, at 11.

9. *See* GILLERS ET AL., *supra* note 7, at 4.

10. *See* Adams & Matheson, *supra* note 7, at 4.

11. *See generally* ABA, *Report of the Fifty-first Annual Meeting of American Bar Association*, 51 REPORTS OF A.B.A. 119–31 (1928).

12. ABA, *Report of the Fiftieth Annual Meeting of the American Bar Association*, 50 REP. A.B.A. 388 (1927) (minority view of F.W. Grinnell).

13. GILLERS ET AL., *supra* note 7, at 4.

14. MODEL CODE OF PROF'L RESPONSIBILITY DRs 3-102(A), 3-103(A), 5-107(B), 5-107(C)(3) (1981).

15. MODEL CODE OF PROF'L RESPONSIBILITY EC 3-3 (1981).

16. GILLERS ET AL., *supra* note 7, at 4.

17. *Id.*

nonlawyers.[18] Proposed Model Rule 5.4, circulated in 1981, sought to allow nonlawyer investment as long as firms adopted several safeguards to ensure that their lawyers' professional independent judgment would remain intact and that attorney–client relationships would not be undermined.[19] The proposal represented a radical departure from the previous rules on nonlawyer ownership, because it not only allowed for passive nonlawyer investment and nonlawyer management, but also allowed firms to trade shares of their equity in the public markets.[20] In the face of strong opposition, the Kutak Commission included a critical explanation for why the traditional approach was undesirable, suggesting that "[a]pplications of unauthorized practice principles, only tenuously related to substantial ethical concerns raised by intermediary relationships, may be viewed as economic protectionism for traditional legal service organizations."[21]

The Kutak Commission's arguments failed to convince the ABA House of Delegates, who provided several justifications for their vehement opposition.[22] They contended that nonlawyer ownership would unquestionably interfere with lawyers' professional independence by asserting economic pressures that would inevitably undermine the professionalism and decision-making processes of formally trained lawyers.[23] These opponents also opined that nonlawyers could not

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18. *See id.* at 345; ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005, at 580 (2006) [hereinafter A LEGISLATIVE HISTORY]. The Kutak Commission's recommended revision of Rule 5.4 reads as follows:

> Rule 5.4: Professional Independence of a Lawyer
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> A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if:
>
> (a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;
>
> (b) information relating to representation of a client is protected as required by Rule 1.6;
>
> (c) the organization does not engage in advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so by Rule 7.2 or Rule 7.3; and
>
> (d) the arrangement does not result in charging a fee that violates Rule 1.5.

A LEGISLATIVE HISTORY, *supra*, at 580.

19. *See* A LEGISLATIVE HISTORY, *supra* note 18, at 580.

20. *See id.* at 580–81; *see also* Adams & Matheson, *supra* note 7, at 9.

21. *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, 594 (1989) (quoting Comm'n on Evaluation of Prof'l Standards, Proposed Final Draft: ABA Model Rules of Prof'l Conduct 176–78 (1981)).

22. *See* Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 386–92 (1988).

23. Andrews, *supra* note 21, at 595.

fully appreciate the ethical considerations inherent in client representation.[24] The opposition's most polarizing argument, which struck a chord with the more traditional members of the Bar, was that the Kutak Commission's proposal to allow nonlawyer investment would permit Sears, or other large retail establishments, to compete with law firms for legal business.[25] This "Fear of Sears" reflected the concern that large corporations, such as Sears, would overwhelm "the legal marketplace, putting many small firms and sole practitioners out of business."[26] Once the threat of law firms owned by corporations like Sears became apparent, the Kutak Commission's Proposed Rule 5.4 was quickly rejected.[27]

II. THE ADVANTAGES AND DISADVANTAGES OF NONLAWYER OWNERSHIP

In evaluating the contemporary debate on fee sharing and nonlawyer investment, it is helpful to remember the arguments that opposed the Kutak Commission's Proposed Rule 5.4 and the manner in which these concerns were addressed by the Kutak Commission. Opponents of the Kutak Commission's Proposed Rule 5.4 identified several key concerns that led to the proposal's ultimate demise: confidentiality concerns, conflict of interest concerns, and finally, the Fear of Sears.[28]

A. Nonlawyer Influence on Professional Independence

The prohibition on nonlawyer ownership indisputably serves ethical purposes that are deeply embedded in modern legal practice.[29] Proponents of the rule's current application point out that allowing outside ownership in law firms would inject undesirable outside forces into the legal profession that would undermine the lawyer's traditional role as a zealous advocate for his client and his client only.[30]

Adding the shaky third wheel of financially driven shareholders onto the tried-and-true attorney–client relationship creates potential for conflicts of

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24. *See* A LEGISLATIVE HISTORY, *supra* note 18, at 580–81.

25. Adams & Matheson, *supra* note 7, at 10–11; Andrews, *supra* note 21, at 595; Bernard Sharfman, *Modifying Model Rule 5.4 to Allow for Minority Ownership of Law Firms by Nonlawyers*, 13 GEO. J. LEGAL ETHICS 477, 481–82 (2000).

26. Adams & Matheson, *supra* note 7, at 14; *see also* Sharfman, *supra* note 25, at 481–82; Laurel S. Terry, *A Primer on MDPS: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 876–77 (1999).

27. Gilbert & Lempert, *supra* note 22, at 392; Terry, *supra* note 26, at 876–77.

28. *See* Adams & Matheson, *supra* note 7, at 10–11, 19; *see also* A LEGISLATIVE HISTORY, *supra* note 18, at 580–81; Andrews, *supra* note 21, at 595; 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, 675 (2009).

29. *See* ABA, *Annual Report of the American Bar Association*, 107 REP. A.B.A. 886–87 (1982) (Report of the Commission on Evaluation of Professional Standards).

30. *See* Adams & Matheson, *supra* note 7, at 15–16.

interest.[31] If lawyers are to be held accountable to the firm's equity holders, in addition to the firm's clients, they are saddled with the precarious task of maximizing profits while attempting to advance the best interests of their clients.[32] For example, nonlawyer managers may have the propensity to encourage decisions that benefit the firm, but might not be best for the client.[33] This might occur in a contingency fee arrangement, where the firm must decide whether to advise a client to settle or proceed to trial with hopes of a greater award. If the contingency rate is 30%, the settlement offer is $100,000, and the most that a court might award is $120,000, a nonlawyer—motivated by the bottom line—might be persuaded to settle, rather than advise the client to pursue the larger award at trial. From a business perspective, this is understandable: at 30%, the firm stands to gain only $6,000. This comparably small benefit is unlikely to outweigh its cost, vis-à-vis the hours spent in preparation of trial. However, for the injured plaintiff who stands to gain an additional $17,000, the decision to go to trial may very well be within his best interests. Thus, the prudent business decision conflicts with the prudent client decision. The point at which lawyers become accountable to those other than their clients is the point at which professional independence ceases to exist.[34]

Proponents of the current Model Rule 5.4 also point out that nonlawyers are not held to the same level of professional responsibility as are lawyers.[35] This creates the potential for ethical conflicts when individuals who are not exercising the same level of professional responsibility as lawyers have an influence upon the decision-making process of a law firm.[36]

B. Threats to Professional Independence Overstated?

Conversely, those advocating reform opine that the concerns regarding nonlawyer ownership's threats to professional independence are overstated and already present to some degree, as firms are already under tremendous pressure from their creditors to meet financial obligations.[37] Furthermore, a firm's success is often judged by its relative position in law firm rankings.[38] These rankings are predicated upon a firm's profits per partner.[39] If attorneys within a firm believe

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31. *Id.*
32. *Id.*
33 *Id.*
34. *See* James R. DeBuse, *Opening at $25 1/2 is Big Firm U.S.A.: Why America May Eventually Have a Publicly Traded Law Firm, and Why Law Firms Can Succeed Without Going Public*, 34 J. CORP. L. 317, 336 (2008).
35. *Id.*
36. Adams & Matheson, *supra* note 7, at 16.
37. *See* Andrews, *supra* note 21, at 607–08; *see also* Adams & Matheson, *supra* note 7, at 19–20; Christine Parker, *Law Firms Incorporated: How Incorporation Could and Should Make Law Firms More Ethically Responsible*, 23 U. QUEENSLAND L.J. 347, 362–63 (2004).
38. *See The Am Law 100 2012*, AM. LAYWER (May 1, 2012), http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202489912232&slreturn=1.
39. *See id.*

that their ability to attract clients depends on their ranking, then they are likely to "tailor their professional judgment" to maximize profits per partner.[40] Although the same dynamic would inevitably be present if success were measured by share price rather than profits per partner, a publicly traded firm's share price would at least be influenced by factors other than revenue alone: quality of service, ethics, and client loyalty to name a few.[41] Knowing that a reputation for poor service or unethical behavior can negatively influence share prices creates a financial incentive for firms to closely regulate the ethics of their lawyers. Concerns that lawyers might make decisions that benefit their firm's share price at the expense of their clients' best interests are thereby transformed into advantages of nonlawyer equity.[42]

Moreover, there currently exist many contexts in which a lawyer must satisfy ethical obligations while answering to individuals or entities that may very well influence the lawyer's professional judgment. For example, the in-house counsel of public companies practice under the supervision of management while ultimately serving the company and its shareholders as the client.[43] Despite the fact that counsel's success is roughly linked to the success of the company, counsel is still expected to exercise independent judgment.[44] That there would be a meaningful difference between the type or degree of influence exerted upon in-house counsel and that exerted upon lawyers practicing as part of a nonlawyer-owned firm is a specious argument.

Proponents of reform suggest that the need for liberalization in an evolving profession with an increasingly globalized marketplace outweighs whatever protections the current rule provides.[45] In response to professional independence concerns, proponents of reform suggest that shareholders' interests and clients' interests would usually align anyway because of fiduciary duty protections[46] or other protections implemented to alleviate the chances of shareholder-client conflicts.[47] Moreover, the impact of nonlawyer influence on

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40. *See* Erin J. Cox, *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, 531 (2009).

41. *Id.* at 531–32.

42. *Id.*

43. *Id.* at 532.

44. *Id.*

45. *See* Justin D. Petzold, *Firms Offers: Are Publicly Traded Law Firms Abroad Indicative of the Future of the United States Legal Sector?*, 2009 WIS. L. REV. 67, 101–02; *see also* Lindsay Fortado, *Pressure on Law Firms to Sell Stakes to Public; British May Soon Follow Australian Lead*, INT'L HERALD TRIB., June 14, 2007, at 16.

46. Adams & Matheson, *supra* note 7, at 16.

47. *See* Steven Brill, *Psst—Wanna Buy a Hot Stock?*, AM. LAW., Nov. 1987, at 3, 102 (suggesting voting-dominant stocks for senior lawyers and firm contributions to pro bono work).

decision-making can be ameliorated by setting a cap on nonlawyer ownership, which could preclude nonlawyers from ever becoming majority owners.[48]

C. Confidentiality Concerns

Opponents of reform argue that nonlawyer ownership would present a serious threat to attorney–client confidentiality: The understanding that information given to the lawyer from the client during the course of representation is confidential and will not be shared with any other party.[49] This understanding is central to the attorney–client relationship because it facilitates the full disclosure necessary for effective representation.[50] Opponents of reform believe that nonlawyer ownership would force lawyers to answer to nonlawyers regarding the course of client representation, creating a threat to confidentiality. Additionally, a myriad of confidentiality concerns would arise if law firms were subject to the disclosure requirements imposed by the regulations that govern all publicly traded securities.[51]

When it proposed a modified version of Model Rule 5.4, the Kutak Commission insisted that the opposition's confidentiality concerns could be adequately addressed by implementing safeguards that require conditions be placed on lawyer-nonlawyer partnerships.[52] The Kutak Commission's proposed rule required a lawyer partnering with a nonlawyer to keep client information ascertained in the course of representation confidential, in accordance with Model Rule 1.6.[53] The proposed rule would have also prohibited the lawyer-nonlawyer partnership from communicating any client information to other members of the firm, effectively sequestering that client's work from the rest of the firm.

Confidentiality concerns could also be addressed by requiring nonlawyer owners to sign confidentiality agreements or by carving out law firm exceptions to the usual corporate disclosure requirements.[54] Confidentiality agreements would impose upon nonlawyers a contractual duty of confidentiality and provide for certain consequences if the duty is breached, similar to the manner by which a lawyer's professional responsibility imposes upon him a duty of confidentiality and consequences for a breach of that duty. With respect to corporate disclosure carve-outs, it may be necessary for regulatory bodies to exempt law firms from

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48. *See* Stephen Gillers, *A Profession, If You Can Keep It: How Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953, 1008 (2012); Sharfman, *supra* note 25, at 495–96.

49. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2011).

50. *Id.*

51. *See* Larry E. Ribstein, *Want to Own a Law Firm?*, AMERICAN (May 30, 2007), http://www.american.com/archive/2007/may-0507/want-to-own-a-law-firm.

52. *See* Paul R. Koppel, *Under Siege from Within and Without: Why Model Rule 5.4 is Vital to the Continued Existence of the American Legal Profession,* 14 GEO. J. LEGAL ETHICS 687, 698 (2001).

53. *See id.*; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client.").

54. *See* Ribstein, *supra* note 51.

certain disclosure requirements so that publicly-traded-company regulations do not compel the firm to breach client confidentiality.

D. Addressing the Fear of Sears

Opponents of the Kutak Commission's Proposed Rule 5.4 feared that nonlawyer ownership would increase the number of large corporations holding substantial financial interests in the legal industry, which would consequently drive small firms out of business.[55] Often referred to as the "Fear of Sears," supporters of the Kutak Commission's proposed rule insisted that the fear was unjustified because the built-in restraints provided by the other Model Rules would naturally preclude large corporations from expanding their legal practices to the point of industry domination.[56] Model Rule 1.7 limits the number of clients a lawyer or firm may take on by prohibiting representation of a client with interests adverse to an existing client. Model Rule 1.9 provides for similar restraints by prohibiting a lawyer from representing a person in a matter if the lawyer previously represented a client in the same or substantially related matter if that person's interests are adverse to the former client's interests.[57]

Westinghouse Elec. Corp. v. Kerr-McGee Corp. represents an example of how large firms can potentially limit their own growth once they grow to a size where conflict between clients becomes an issue.[58] In this case, the court disqualified Kirkland & Ellis because of former client conflicts between clients of the firm's Chicago and Washington, D.C., offices.[59] The Chicago office represented a client in a suit against oil companies who happened to be part of the American Petroleum Institute, an industry group represented by the firm's Washington, D.C., office.[60] Here, ABA Model Rules governing conflicts of interest and representation of clients with adverse interests precluded the firm from representing both clients.[61] Large corporations seeking to open law practices would face the same problems, as the potential for client conflicts would increase at a rate commensurate with their growth, thereby rendering the prospect of unchecked growth and domination of the legal marketplace highly unlikely.[62]

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55. Adams & Matheson, *supra* note 7, at 14.

56. *Id.* at 14–15; MODEL RULES OF PROF'L CONDUCT Rs. 1.7, 1.8, 1.9 (2011).

57. MODEL RULES OF PROF'L CONDUCT Rs. 1.7, 1.9 (2011). Rule 1.7(a) reads, in relevant part, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." *Id.* Rule 1.9(a) reads, in relevant part, "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client . . . ." *Id.*

58. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1321–22 (7th Cir. 1978); *see also* Adams & Matheson, *supra* note 7, at 15.

59. *Westinghouse Elec. Corp.*, 580 F.2d at 1322.

60. *Id.* at 1313.

61. *See id.*; MODEL RULES OF PROF'L CONDUCT Rs. 1.7, 1.8, 1.9 (2011).

62. *See* GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 640 (2d ed. 1994).

E. The Advantages of Nonlawyer Equity

Those in favor of amending the current version of Model Rule 5.4 posit that the existing restrictions on law firm business structures stifle firm growth and can potentially endanger financial stability, whereas nonlawyer ownership could provide substantial benefits that cannot currently be realized.[63] While law firm growth has traditionally been constrained by debt financing, nonlawyer ownership brings with it the capital benefits and growth potential of equity financing.[64] Equity financing for law firms offers several advantages that the traditional debt financing structure is unable to provide. An infusion of capital without the corresponding increase in balance sheet liabilities would allow firms to expand their offices and hire more attorneys in a manner that cannot be achieved using solely debt financing.[65] Expansion is costly and risky when financed by debt. It often requires substantial upfront capital contributions that partners may not be able to provide. Interest on loans makes the cost of borrowing more expensive. Additionally, slow revenue growth and rising operating expenses, both consequences of a struggling economy, increase the likelihood of default and make banks less eager to offer loans to firms.[66] However, an equity financing structure would help alleviate loan default concerns and facilitate the geographic expansion necessary to compete more effectively in the global market.[67] Advocates of reform urge that these benefits are not purely capitalistic; more offices means greater access to legal services for potential clients, as well as increased consumer choice.[68]

In addition to its role as an expansionary tool, nonlawyer ownership could mean continued prosperity for firms in dire financial straits that still maintain an otherwise successful practice with a strong client base.[69] Instead of closing shop,

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63. *See* Adams & Matheson, *supra* note 7, at 30–37; Heather A. Miller, *Don't Just Check "Yes" or "No": The Need for Broader Consideration of Outside Investment in the Law*, 2010 U. ILL. L. REV. 311, 321–26 (2010); Sharfman, *supra* note 25, at 483–86.

64. *See* Adams & Matheson, *supra* note 7, at 30–37; Miller, *supra* note 63, at 341–42; Bruce MacEwen, *A Conversation with Andrew Grech, Managing Partner of the World's First Publicly Traded Law Firm*, ADAM SMITH, ESQ. (Aug. 17, 2007), http://www.adamsmithesq.com/2007/08/a_conversation_with_andre/.

65. Adams & Matheson, *supra* note 7, at 32–34.

66. *See* Jacqueline Palank, *Law-Firm Loans Show Cracks*, WALL ST. J. (Apr. 29, 2012 , 7:18 PM), http://online.wsj.com/article/SB10001424052702304811304577369980297246756.html.

67. *See id.* at 31–32; *see also* Andrews, *supra* note 21, at 629–30; Sharfman, *supra* note 25, at 483; Mike France, *Law Firms Cut Down on Debt: Fiscal Conservatism is the Watchword at Firms Whose Debt Almost Sank Them*, NAT'L L.J., Sept. 4, 1995, at A1; Nathan Koppel, *Recession Batters Law Firms, Triggering Layoffs, Closings*, WALL ST. J., Jan. 26, 2009, at A1.

68. *See* Complaint for Declaratory and Injunctive Relief at 2, 10, Jacoby & Meyers Law Offices, LLP v. Presiding Justices of the First, Second, Third, & Fourth Dep'ts, Appellate Div. of the Supreme Court of N.Y., 847 F.Supp.2d 590 (S.D.N.Y. 2011), 2011 WL 1884469.

69. *See* Adams & Matheson, *supra* note 7, at 36; Sharfman, *supra* note 25, at 486.

these firms could be thrown a lifesaver of capital in exchange for equity, allowing them to weather the storm, satisfy their financial obligations, and continue serving their clients.[70] The capital infusion received from an equity offering provides the significant advantage of being secure—the capital is "locked-in" and does not need to be paid back, unlike money from debt financing.[71] The security of locked-in capital from equity offers a sustainable longevity not available with debt financing. Equity financing fosters financial stability by allowing "[i]nvestments [to] be made in long-lived and specialized physical assets, in information and control systems, in specialized knowledge and routines, and in reputation and relationships, all of which [can] be sustained even as individual participants in the enterprise" come and go.[72]

The "come and go" nature of human capital creates a fragile and unsustainable business model for law firms financed by debt—a fragility magnified by exposure to the harsh economic environment of the past several years. In more prosperous times, debt financing was sufficient for law firm operation and growth. Credit was cheap and easily accessible, lulling firms into dependency on their creditors for working capital.[73] Firms became exposed to significant risk by leveraging themselves with debt in order to pay salaries, satisfy bills, or expand.[74] When the credit markets collapsed in 2008, many large clients were unable to pay legal fees or deferred fees to a later date.[75] With cash flows slowing down to a trickle and additional credit no longer accessible, many firms were unable to meet their own debt obligations and defaulted on their loans.[76] Others became unable to compensate their partners and associates, precipitating an exodus to firms with sufficient liquid capital to pay salaries.[77] Partners took their capital contributions with them as they departed, along with their books of business. If the firm's plunging partner-contributed capital base did not trigger default, then the decreased revenue resulting from the partner exodus often did. Sustainability with debt financing is predicated largely upon dependable cash flows and partner loyalty. The lessons of the past five years demonstrate that these assets may not always be present.

A firm's financial stability depends on its ability to survive independent of reliable cash flows or an individual partner's book of business, given that these assets can quickly disappear. The locked-in capital provided by outside equity

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70. *See* Sharfman, *supra* note 25, at 486.

71. *See* Cox, *supra* note 40, at 541.

72. Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 387 (2003).

73. *See* Cox, *supra* note 40, at 518.

74. *Id.* at 522.

75. *Id.* at 520.

76. *See* Hildebrandt Inst., *The Anatomy of Law Firm Failures*, J. LAW SOC'Y SCOT. (Dec. 15, 2008), http://www.journalonline.co.uk/Magazine/53-12/1005996.aspx.

77. *See* Cox, *supra* note 40, at 513.

financing provides such stability and continuity, regardless of weather rainmaker partners depart or cash flows slow.[78]

F. Do Law Firms Even Need Equity Financing?

Opponents of nonlawyer ownership argue that the legal industry is patently different from other industries in that it is far less capital intensive; therefore, equity financing is unneeded and undesirable.[79] While companies in other industries have significant capital needs for costly infrastructure or research and development, the legal industry's service-oriented nature deemphasizes these needs.[80] Opponents argue that debt financing is most conducive for controlled and sustainable law firm growth.[81]

G. Nonlawyer Management

Proponents of reform also insist that there are substantial benefits to be realized from allowing nonlawyer, centralized management to make business decisions.[82] This argument suggests that a firm will be able to achieve greater financial success while simultaneously better serving their clients by allowing the lawyers to dedicate their time and energy to practicing their profession and leaving the business decisions to those who are trained to make them.[83]

Opponents of reform doubt the credibility of this perceived benefit of nonlawyer ownership. Those touting the benefits of nonlawyer, centralized management seem to believe that centralized management can only be achieved with nonlawyers. But does a law degree automatically prevent its holder from making sound business decisions or organizing into an efficient management structure? An affirmative answer seems doubtful given the number of law school graduates occupying executive positions in Fortune 500 companies and the number of law school graduates who hold MBAs or other postgraduate business degrees.[84] Additionally, the Model Rules do not prohibit nonlawyers from assuming

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78. *See id*. at 514–15.

79. *See* Adams & Matheson, *supra* note 7, at 30; DeBuse, *supra* note 34, at 337; Susan Beck, *The Case for Going Public*, AM. LAW., July 1999, at 64 (discussing capital requirements of law firms).

80. *See* Adams & Matheson, *supra* note 7, at 30; DeBuse, *supra* note 34, at 337; Beck, *supra* note 79, at 64 (discussing capital requirements of law firms).

81. *See* Neal Solomon, *In Focus: Business of Law, Economic Principles Drive Mergers Among U.S. Firms—Most Recent Law Firm Growth Has Occurred Due to Branching via M & A*, NAT'L L.J., Sept. 26, 2005, at S2; *see also* L. Harold Levinson, *Independent Law Firms That Practice Law Only: Society's Need, the Legal Profession's Responsibility*, 51 OHIO ST. L.J. 229, 248 (1990); Miller, *supra* note 63, at 319–20.

82. Sharfman, *supra* note 25, at 497.

83. *See* Steven Mark & Georgina Cowdroy, *Incorporated Legal Practices—A New Era in the Provision of Legal Service in the State of New South Wales*, 22 PENN ST. INT'L L. REV. 671, 680 (2004).

84. *See* Spencer Stuart, *Leading CEOs: A Statistical Snapshot of S&P 500 Leaders*, SPENCER STUART (Feb. 2006), http://content.spencerstuart.com/sswebsite/pdf/lib/2005_CEO_Study_JS.pdf.

management roles in law firms and collecting a competitive salary: The rules merely prohibit the sharing of firm profits with the nonlawyer manager.

H. The Costs of Reform

Can the ethical hurdles even be cleared in the first place, and if so, at what cost? Proponents of reform insist that confidentiality concerns can be addressed simply by carving out exceptions for corporate disclosure requirements or employing the use of confidentiality agreements.[85] However, when a regulatory structure is narrowly tailored to avoid specific problems, its complexity tends to make compliance costly, and such costs could quickly swallow up any potential benefits of reform.[86] Perhaps, the benefits of nonlawyer ownership could be achieved without amending Model Rule 5.4, which would require creation of a regulatory structure that could eventually prove to be cost prohibitive for firms wishing to utilize nonlawyer equity.[87]

Although proponents of reform suggest a hard cap on nonlawyer ownership will limit the disparate expectations of professional responsibility between lawyers and nonlawyers,[88] it is difficult to predict the efficacy of this solution.[89] While preventing nonlawyers from becoming majority owners may help alleviate this concern,[90] it would also limit the amount of available equity financing.[91] Limiting nonlawyer ownership to minority, non-controlling interests may ensure that all of a firm's decisions are made under the traditional level of ethical scrutiny[92] but may also undermine the advantages gained from having experienced business professionals in law firm management positions. Even if there is a cap set on nonlawyer ownership that would prevent nonlawyers from becoming majority owners, powerful nonlawyers owning minority interests could easily possess the capability of pulling in big clients.[93] If these powerful nonlawyers attract lucrative clients, it is difficult to imagine a situation where they

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85. Exxon Corp. v. Burglin, 4 F.3d 1294, 1298–99 (5th Cir. 1993) (demonstrating an occasion when the court upheld the use of confidentiality agreements restricting the rights of investors to confidential information); Miller, *supra* note 63, at 355–56.

86. *See* DeBuse, *supra* note 34, at 337.

87. *See id.*

88. *See* Miller, *supra* note 63, at 352–53; Sharfman, *supra* note 25, at 495–96.

89. *See* Miller, *supra* note 63, at 354–55; *see also* DeBuse, *supra* note 34, at 336 (opining that the inherent interest in maximizing value would make it unlikely that nonlawyer owners would refrain from any influence upon the firm).

90. *See* Sharfman, *supra* note 25, at 494–96; Brill, *supra* note 47, at 3.

91. *See* Miller, *supra* note 63, at 354 ("[S]caling down the outside ownership also scales down the benefits achieved with the outside capital.").

92. Sharfman, *supra* note 25, at 494–96.

93. *See* Koppel, *supra* note 52, at 701 ("Once fees are shared, a non-lawyer can recommend a lawyer to a potential client . . . because there is a financial incentive for the non-lawyer to make the recommendation."); *see also* Emmons, Williams, Mires & Leech v. State Bar, 6 Cal. App. 3d 565, 573–74 (1970) (suggesting that fee sharing allows for competitive solicitation which could mean that profit-motivated nonlawyers control the legal work).

would not possess great influence, regardless of their total percentage of equity ownership.

I. The Real Reason for Resistance?

Those in favor of reform take a different stance. If the nonlawyer ownership concept can clear the ethical hurdles, does it even matter that the benefits may be overstated or inapplicable? What harm is done by allowing the market to figure it out? Some advocates of reform ask these questions in an effort to smoke out what they believe to be the true reason behind their opponent's resistance: Reform by way of nonlawyer ownership is a harbinger of major change and a threat to the status quo with which they are comfortable. The rule as currently applied is archaic and functions as an undesirable prophylactic to preserve the elite cadre of white-shoe lawyers. The parochial old-law establishment risks being left behind if it does not adapt to the twenty-first century, globalized and evolving legal industry where an eye towards progress is needed to remain competitive.

III. PUSHES FOR REFORM

A. Reform Abroad

If the American legal system is not willing to adapt to meet the needs of its legal services consumers, another country's will. In fact, several other countries have already passed legislation that provides firms in those countries with access to nonlawyer capital. Firms in these countries that avail themselves of nonlawyer capital's benefits may potentially enjoy a competitive advantage over firms that lack access to nonlawyer capital. Australia's Legal Profession Act of 2004 made it possible for Slater & Gordon to become the world's first publicly traded law firm.[94] Throughout the debate that began decades prior to the Act's passage, Australian legal scholars and decision-makers recognized a need for greater competition and a law firm structure that would provide limited liability for partners.[95] Faced with the same ethical concerns that currently exist in the United States, Australian scholars concluded that conflict of interest and confidentiality issues were already ubiquitous throughout the profession and that nonlawyer ownership would do little to magnify these issues' prevalence.[96]

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94. *Legal Profession Act 2004* (Vic) s 2.7 (Austl.), *available at* http://www.legislation.vic.gov.au/domino/Web_notes/LDMS/LTObject_Store/LTObjSt2.nsf/d1a8d8a9bed958efca25761600042ef5/8e2f606b8f6fab8cca2577610024a34b/$FILE/04-99a033.pdf; Lindsay Fortado, *Slater & Gordon Lifts Curtain on Global Law Firms Going Public*, BLOOMBERG (June 12, 2007), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aa5QVuS4ICbk&refer=news.

95. *See* Petzold, *supra* note 45, at 74–78; *see also* Steven Mark, *Harmonization or Homogenization? The Globalization of Law and Legal Ethics—An Australian Viewpoint*, 34 VAND. J. TRANSNAT'L L. 1173, 1194 (2001); Mark & Cowdroy, *supra* note 83, at 675–81; Parker, *supra* note 37, at 347.

96. *See* Parker, *supra* note 37, at 358 ("[T]he ethical dangers identified with incorporated legal practice are already rife in legal practice."); *see also* MARK HERRON ET

In 2000, New South Wales passed the Legal Profession Act, allowing unrestricted incorporation for legal services firms.[97] The Act also permits a lawyer to share legal fees with an incorporated legal practice or with a nonlawyer in a multidisciplinary partnership.[98] Slater & Gordon went public in 2007 and exceeded its first-year-profits projection by over 10%.[99] The firm has enjoyed subsequent financial success, posting revenue of $111 million in fiscal year 2010, a 21% increase over 2009.[100] On the heels of Slater & Gordon's success, Integrated Legal Holdings, an "aggregator of legal services firms," went public in 2007.[101] Only a year after the Act was passed, 27% of law firms in Western Australia were incorporated and receiving outside capital. The success of firms like Slater & Gordon proves that nonlawyer ownership can have real-world applicability. However, skeptics argue that success in Australia cannot be used as an indicator that similarly situated firms in the United States would fare as well under this model because there are distinct differences between the American and Australian legal markets.[102]

Australian reform proved to be more than a legislative aberration with the passage of the United Kingdom Legal Services Act, which was fully enacted on October 6, 2011.[103] The Legal Services Act provides for Alternative Business Structures that allow outside businesses to invest in law firms.[104] The Alternative Business Structures also allow lawyers to work in mixed practices and law firms to operate under external ownership.[105] However, in the case of external investment in law firms, the firm must be licensed by the appropriate regulatory body before a

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AL., FACING THE FUTURE: GENDER, EMPLOYMENT AND BEST PRACTICES ISSUES FOR LAW FIRMS 60 (1996).

97. Bish, *supra* note 28, at 683.

98. *See id.* at 683–84.

99. *See* Malar Velaigam, *Slater Beats Profit Target After £14m Flotation*, LAWYER, Sept. 10, 2007, at 11.

100. *See* Anthony Lin, *Australia's Slater & Gordon Sees 21 Percent Revenue Increase Over 2009*, AM. LAW. (Aug. 20, 2010) http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202470861324&slreturn=20120630063454.

101. Company Profile, INTEGRATED LEGAL HOLDINGS LTD., http://www.ilh.com.au/CompanyProfile.aspx (last visited Aug. 10, 2012).

102. *See* Petzold, *supra* note 45, at 96–99 (pointing out that, as compared to firms in Australia and the UK, American firms already enjoy the availability of limited liability and do not have the same pressing concerns with competitive pressure and stagnation in international markets); *see also* Adams & Matheson, *supra* note 7, at 26–29; Jonathan Goldsmith, *The Core Values of the Legal Profession for Lawyers Today and Tomorrow*, 28 NW. J. INT'L L. & BUS. 441, 451 (2008).

103. *Supermarket 'Law Shops' to Sell Legal Services*, BBC NEWS (Oct. 6, 2011), http://www.bbc.co.uk/news/uk-15187154.

104. Sofia Lind, *Alternative Business Structure Launched Under U.K. Legal Services Act*, LEGAL WEEK (Oct. 7, 2011), http://www.law.com/jsp/article.jsp?id=1202518170381&slreturn=1; *see also The Legal Services Act 2007—briefing*, LAW SOC'Y 3–6 (Nov. 29, 2007), http://www.lawsociety.org.uk/documents/downloads/dynamic/lsa_briefing.pdf.

105. *The Legal Services Act 2007—briefing*, *supra* note 104, at 3.

nonlawyer may own an interest.[106] The Act sought to increase competitive pressure through the premise that market forces should dictate the optimal firm structure.[107] British companies anxious to test the waters have quickly taken advantage of the opportunity to invest in law firms. For example, Palamon Capital, a British private equity firm, invested $16-million in Quality Solicitors, a network of small British law firms, barely two weeks after the Act took full effect.[108]

Several other European countries have followed suit, reconsidering their own restrictions on law firm business structures. In response to the United Kingdom Legal Services Act, the Scottish Parliament passed the Legal Services (Scotland) Act 2010, which permitted outside investment in Scottish law firms.[109] Spain also allows external investment in law firms.[110]

As reform precipitates the growth of transnational practices for law firms abroad by providing these firms with a very useful expansionary tool—nonlawyer capital—critics remain unpersuaded, insisting that the costs and benefits are different abroad than they are in the United States.[111]

B. The District of Columbia Rule 5.4

Every jurisdiction besides the District of Colubmia has adopted a version of Model Rule 5.4 that is very similar to the one that appears in the ABA Model Rules. The District of Columbia has instead adopted its own provision.[112]

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106. *See id.* at 5.

107. *See* Petzold, *supra* note 45, at 82–86; *see also* Richard A. Brealey & Julian R. Franks, *The Organizational Structure of Law Firms: A Discussion of the Recommendations of the 2004 Review of the Regulatory Framework for Legal Services in England and Wales*, JUSTICE 3–5 (July 13, 2005), *available at* http://www.dca.gov.uk/legalsys/brealey-franks.pdf.

108. Jane Croft, *Palamon Capital Invests in Quality Solicitors*, FIN. TIMES (Oct. 21, 2011, 4:44 p.m.), http://www.ft.com/intl/cms/s/0/0ec0c6f4-fbce-11e0-9283-00144feab49a.html#axzz1blkL6vfb.

109. Legal Services (Scotland) Act 2010 (A.S.P. 16), *available at* http://www.legislation.gov.uk/asp/2010/16/pdfs/asp_20100016_en.pdf.

110. COUNCIL OF BARS & LAW SOC'YS OF EUROPE, CCBE RESPONSE TO THE LEGAL SERVICES BOARD'S CONSULTATION ON A REGULATORY REGIME FOR ALTERNATIVE BUSINESS STRUCTURES 4 (Sept. 4, 2009), *available at* http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/ab_structure/ccbe.pdf (noting that Spain allows firms to accept external capital to a "certain extent").

111. *See* Petzold, *supra* note 45, at 96–99.

112. The District of Columbia rule provides:

> A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlaywer 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;

Although the District of Columbia's Rule 5.4 allows for a limited form of nonlawyer ownership, the benefits of its Rule 5.4 are severely restrained by an uncertainty surrounding which jurisdiction's ethical rules apply when a multi-jurisdictional firm implements permitted nonlawyer ownership in its District of Columbia office. However, a provision within the ABA 20/20 Commission's discussion draft seeks to eliminate this choice-of-law uncertainty. The District of Columbia's Model Rule 5.4 is a helpful starting point in any discussion of how the benefits of nonlawyer ownership can be harnessed in a manner that does not threaten professional independence. This section explores the contours of this rule before moving on to discuss how the ABA 20/20 Commission's Choice-of-Law Proposal can eliminate the presently existing constraints and allow multi-jurisdictional firms with offices in District of Columbia to experiment with nonlawyer ownership.

1. The District of Columbia's Rule 5.4 Explained

The District of Columbia's Rule 5.4 attempts to harness the advantages of collaboration between lawyers and nonlawyers by allowing a limited form of nonlawyer fee sharing.[113] Under the rule, a lawyer and a nonlawyer may only form a partnership if the purpose of the partnership is to practice law.[114] The nonlawyer may hold a managerial interest in the firm only if he or she "performs professional services which assist the organization in providing legal services to clients."[115] The rule's drafters emphasized that it would not allow passive investment by nonlawyers or firm acquisitions by investors. The intent to limit the role of nonlawyers was crystallized in the comments section by explicitly stating that the rule was not intended to allow "an individual or entity to acquire all or any part of the ownership of a law partnership or other form of law practice organization for investment or other purposes."[116]

Unfortunately, relatively few District of Columbia firms have chosen to experiment with nonlawyer owners[117] because ambiguities in the rule made it unclear whether firms with offices outside the District of Columbia could ethically share fees with nonlawyers affiliated with the firm's District of Columbia office. As a result, the subsequent advantages gained by the rule's application were

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> (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;
>
> (4) The foregoing conditions are set forth in writing.

D.C. RULES OF PROF'L CONDUCT R. 5.4(b) (2007).

113. *See id.*; *see also* GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 45.7 (3d ed. 2009); DeBuse, *supra* note 34, at 326–27.

114. D.C. RULES OF PROF'L CONDUCT R. 5.4(b) (2012).

115. *Id.*

116. *Id.* R. 5.4 cmt. 8.

117. *See* John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 159 (2000).

limited to those law firms wholly operated within the District of Columbia, with no outside offices.[118] Additionally, the District of Columbia Rule 5.4's narrow parameters serve to limit the benefits of nonlawyer ownership to those that are a product of business-decision-making expertise from nonlawyers acting in a managerial capacity[119]—a benefit that could likely be achieved under the rule as it currently stands elsewhere in the United States by paying those nonlawyer experts a competitive salary.

2. Improving the District of Columbia Rule 5.4's Application Through the ABA 20/20 Commission's Choice-of-Law Proposal

Along with a modified version of the ABA's Model Rule 5.4 (discussed later in this Note) aimed at permitting some form of nonlawyer ownership, the ABA 20/20 Commission's December 2011 discussion draft also included modifications that seek to address choice-of-law problems.[120] These modifications are aimed at ameliorating the fee-sharing difficulties faced by firms with offices in different jurisdictions with conflicting rules on nonlaywer ownership.[121] Under the current Model Rules, multi-jurisdictional firms with an office in the District of Columbia face uncertainty with respect to which jurisdiction's ethics rules apply. This choice-of-law uncertainty deters these firms from implementing otherwise permitted nonlawyer ownership. Amendments in the ABA 20/20 Commission's discussion draft seek to resolve this uncertainty. Because the District of Columbia is the only jurisdiction that currently permits any form of nonlawyer ownership, only firms with offices in the District would be affected if the modifications were adopted.[122] The ABA 20/20 Commission's draft discusses potential amendments to Model Rule 1.5(e) regarding fee divisions between separate law firms and to Model Rule 5.4 concerning situations where a law firm has offices in several jurisdictions, not all of which allow fee sharing with nonlawyers within the same firm.[123]

The draft's proposed modification to Model Rule 1.5(e) concerns inter-firm divisions. These modifications would allow a law firm that is not otherwise

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118. *See id.*

119. D.C. RULES OF PROF'L CONDUCT R. 5.4 cmt. 7 (2012).

120. ABA Initial Draft Proposal for Comment, *supra* note 4, at 1.

121. Joan C. Rogers, *Ethics 20/20 Stands by Plans to Propose Latitude for Firms to Have Nonlawyer Owners*, BNA.COM (Oct. 26, 2011), http://www.bna.com/ethics-2020-stands-n12884904021/); *see also* ABA Comm'n on Ethics 20/20, Issues Paper Concerning Alternative Business Structures (2011) [hereinafter ABA Issues Paper], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf.

122. This is not to say that only multi-jurisdictional firms with offices in the District of Columbia would *ever* be affected. If jurisdictions adopted rules that permitted nonlawyer ownership in the future, firms with offices in these jurisdictions would obviously benefit from resolution of choice-of-law uncertainty as well. However, because the District of Columbia is the only jurisdiction that currently permits any form of nonlawyer ownership, only multi-jurisdictional firms with offices in the District of Columbia would currently benefit.

123. *See* ABA Initial Draft Proposal for Comment, *supra* note 4, at 1–2.

permitted to share fees with nonlawyers to divide a legal fee with a different firm that has nonlawyer owners in accordance with that jurisdiction's rules regarding nonlawyer ownership.[124] The amendment would allow a firm in Arizona that receives a referral from a different firm with nonlawyer partners in the District of Columbia to ethically divide the legal fee from that particular representation with the District of Columbia firm.[125]

The other choice-of-law issue addressed by the ABA 20/20 Commission concerns Model Rule 5.4 and intra-firm fee sharing.[126] Although the District of Columbia's rule has allowed nonlawyer ownership for more than 20 years, many firms with offices in additional jurisdictions are reticent to experiment with nonlawyer ownership due to uncertainty about whether the firm's non–District of Columbia offices are permitted to share fees with the firm's District of Columbia office.

Such choice-of-law ambiguity is as old as the District of Columbia Rule 5.4 itself. ABA Formal Opinion 91-360, published just after the District of Columbia adopted its current model 20 years ago, concluded that a lawyer practicing in a jurisdiction where nonlawyer fee sharing is prohibited may not share fees with nonlawyers of the same firm, even if the nonlawyers are in a jurisdiction where such ownership is permitted.[127] However, the Opinion suggests that the restrictions on fee sharing could effectively be circumvented as long as the District of Columbia office is separately operated, both fiscally and managerially.[128] Thus, although the nonlawyer in the D.C. office may not participate in profits earned outside of D.C., nothing prohibits the nonlawyer's share of the D.C. office's profits from being upwardly adjusted.[129] Such creative accounting ostensibly allows circumvention of the rules on intra-firm fee sharing.

The potential intra-firm fee sharing amendment included in the ABA 20/20 Commission's discussion-draft obviates the need for such circumvention and allows firm-wide sharing of fees.[130] As long as the nonlawyer performs a service that assists the firm in providing legal counsel to clients and such an arrangement is permitted in the jurisdiction in which the nonlawyer's "conduct occurred," the entire firm's fees may be shared with that nonlawyer.[131]

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124. *See id.*

125. *See id.*

126. *Id.*

127. ABA Comm'n. on Ethics & Prof'l Responsibility, Formal Op. 91-360 (1991).

128. *Id.* at 12.

129. *Id.*

130. *See* ABA Initial Draft Proposal for Comment, *supra* note 4, at 3.

131. *See* MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(2) (2011) ("[T]he rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.").

Although the discussion draft's modified Model Rule 5.4, discussed later in this Note,[132] was not ultimately recommended by the ABA 20/20 Commission, the amendments regarding choice-of-law issues could be potentially meaningful steps towards reform. If adopted, the choice-of-law uncertainty that currently discourages multi-jurisdictional firms from implementing otherwise-permitted nonlawyer ownership would be eliminated. Proliferation of lawyer–nonlawyer partnerships in the District of Columbia could follow closely behind. Prospectively, the advantages of the District of Columbia's Rule 5.4 could be realized by firms other than those solely operating within that jurisdiction. If firms with other offices outside of the District of Columbia are allowed to use their District of Columbia office as a laboratory for experimentation with nonlawyer ownership, the idea's efficacy could be examined on a broader scale. If these firms experience success with nonlawyer ownership in their District of Columbia offices, the idea of widespread nonlawyer ownership would undoubtedly gain broader support. The ABA 20/20 Commission will decide whether to formally submit these proposals in its October 2012 meeting.[133]

IV. ABA 20/20 COMMISSION DISCUSSION DRAFT AND A MODIFIED MODEL RULE 5.4

A. Background of Discussion Draft

Several years ago, the ABA identified a need to further examine the desirability of its rules against nonlawyer ownership in the face of an increasingly global law practice. Guided by the principles of protecting the public, preserving professional values, and maintaining an independent and self-regulated profession, the ABA 20/20 Commission met in November of 2009 and published a Preliminary Issues Outline to seek feedback on the viability of different nonlawyer ownership options.[134] The ABA 20/20 Commission rejected options to permit publicly traded law firms and passive equity investment after determining that these forms of nonlawyer ownership represent too great of a threat to its guiding principles.[135] The ABA 20/20 Commission also initially considered establishing multidisciplinary practices ("MDPs"). Under the ABA's proposal, MDPs would allow firms to offer both legal and non-legal services. Under this framework, firms organized as MDPs could serve as a one-stop shop where professionals—lawyers, and nonlawyers alike—would work side by side to provide clients with legal and

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132. ABA Discussion Draft for Comment, *supra* note 5, at 2.

133. James Podgers, *Ethics 20/20 Commission Suspends Campaign to Draft a Proposal on Nonlawyer Ownership of Law Firms*, ABA J. (Apr. 16, 2012, 1:06 PM), http://www.abajournal.com/news/article/ethics_20_20_commission_suspends_campaign_to_draft_a_proposal_on_nonlawyer/ [hereinafter *Commission Suspends Campaign*].

134. *See* ABA Comm'n. on Ethics 20/20, *Preliminary Issues Outline* 6 (2009) [hereinafter ABA *Preliminary Issues Outline*], *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/preliminary_issues_outline.authcheckdam.pdf.

135. *See* ABA Discussion Draft for Comment, *supra* note 5, at 4.

nonlegal assistance.[136] This option was also quickly rejected, just as the ABA had done when faced with a similar proposal in 1999.[137]

In April 2011, the ABA 20/20 Commission sought comment on an Issues Paper discussing two remaining options involving nonlawyers in an ownership capacity.[138] The first form, "Limited Lawyer/Nonlawyer Partnerships with a Cap on Nonlawyer Ownership," permitted fee sharing with nonlawyers but with strict requirements.[139] Under this approach, the firm must engage only in the practice of law; there would be a cap on nonlawyer ownership; and each nonlawyer would have to pass a fit-to-own test, similar to the character and fitness test required for bar passage.[140]

The second option on which the ABA 20/20 Commission sought feedback was called "Lawyer/Nonlawyer Partnerships with No Cap on Nonlawyers' Ownership."[141] Virtually identical to the District of Columbia Rule 5.4, this form would function similarly to the "Limited Lawyer/Nonlawyer Partnerships with a Cap on Nonlawyer Ownership" form.[142] However, it did not place a cap on nonlawyer ownership, nor did it require nonlawyers to pass a fit-to-own test.[143] As with the first option's model, the firm's sole purpose must be to provide legal services to clients.[144]

On December 2, 2011, the ABA 20/20 Commission published for comment a Discussion Paper on Alternative Law Practice Structures.[145] The Working Group conducting research on this issue recommended that the ABA 20/20 Commission include the first option, the more moderate of the two forms previously discussed.[146] Similar to the District of Columbia Model, this version of Model Rule 5.4 would require a firm's sole purpose to be the provision of legal services.[147] Additionally, nonlawyer participation must be limited to assisting in the provision of those services, and nonlawyers in the firm must provide direct

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136. *See id.* at 5.

137. *Id.*

138. ABA Comm'n on Ethics 20/20 Working Group on Alternative Business Structures, *For Comment: Issues Paper Concerning Alternative Business Structures* 17 (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf.

139. *Id.*

140. *Id.*

141. *Id.* at 17–18.

142. *Id.*

143. *Id.*

144. *Id.*

145. Letter from ABA Commission on Ethics 20/20 Preceding Discussion Draft for Comment, Alternative Law Practice Structures 1 (2011) [hereinafter Letter Preceding ABA Discussion Draft for Comment], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf.

146. *Id.* at 2.

147. *Id.*

support to the firm's sole purpose of delivering legal services to clients.[148] Furthermore, lawyers must ensure that nonlawyer conduct complies with the Model Rules.[149] The proposal is more restrictive than the District of Columbia Model in that it caps nonlawyer ownership by requiring that lawyers maintain a controlling financial interest and controlling voting power.[150] These requirements ensure that lawyers maintain actual control of the firm.[151] The proposal also requires nonlawyers to pass a fit-to-own test demonstrating each nonlawyer's professional reputation for integrity.[152]

In its research, the ABA 20/20 Commission's Working Group analyzed how the District of Columbia Model has functioned since it was introduced.[153] Importantly, the ABA 20/20 Commission examined the effects of the District of Columbia's Rule 5.4 and found no evidence of ethical violations, complaints, or any other adverse consequences after it was enacted.[154] The ABA 20/20 Commission's research also revealed that many of the District of Columbia firms with nonlawyer partners were small firms and that the ability to offer a financial stake in the firm was helpful in recruiting talented nonlawyers.[155]

Although the ABA 20/20 Commission decided not to propose the modified rule to the ABA's House of Delegates, deeming it both too expansive and too restrictive, the elements of the rule still provide valuable insight into the legal community's current attitude toward reform in the United States.[156] Furthermore, the elements of the ABA 20/20 Commission's modified rule should be carefully examined when constructing a more appropriate and beneficial model.

B. How Elements of the Modified Rule Protect Professional Independence

The modified version of Model Rule 5.4 included in the ABA 20/20 Commission's discussion featured several provisions designed to address the primary concern of nonlawyer ownership's opponents: the threat to professional independence. This section explores these provisions in greater detail.

1. Passive Investment Prohibited

The model included in the discussion draft requires that nonlawyer owners be actively involved in the provision of legal services, identical in this aspect to District of Columbia Rule 5.4. The memo that accompanied the discussion draft recommends a requirement that all "non-lawyers *actively* and *materially* assist the lawyers in providing legal services to the clients *by bringing some valuable non-legal professional service to the table*, not merely by raising

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148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. ABA Discussion Draft for Comment, *supra* note 5, at 3–4.
154. *Id*.
155. Letter Preceding ABA Discussion Draft for Comment, *supra* note 145, at 2.
156. *See* Podgers, *supra* note 133.

capital."[157] This emphasis clearly reflects the ABA 20/20 Commission's aversion to the idea of passive equity investment. Whether this aversion is well-founded is less clear. The inclusion of the U.S. Chamber Institute for Legal Reform's written submission as the Discussion Paper's sole justification for the prohibition of passive investment might suggest that the ABA 20/20 Commission is more wary of the legal community's reaction to reform than they are of the actual implications of passive equity investment.[158] If the true reason for passive equity aversion is a fear of the legal community's knee-jerk reaction, then opponent's arguments regarding the ethical threats of passive equity should be examined with an even more discerning eye.

2. A Cap on Nonlawyer Ownership

Unlike the District of Columbia's Model, the modified rule requires a cap on nonlawyer ownership.[159] This requirement was included to protect against potential undue influence on lawyers' independent professional judgment from nonlawyer partners.[160] If lawyers retain a controlling interest in the firm, their ability to make independent decisions regarding matters of legal representation is less likely to be affected by nonlawyers. Under the modified rule, nonlawyers may not have a financial or voting interest in an amount exceeding 25% of the firm total; however, states may tailor this amount to their individual preferences as long as it does not exceed 25%.[161] The discussion draft includes additional requirements seeking to ensure that nonlawyers are precluded from significantly affecting decision-making and that lawyers retain control of the firm.[162] Considering both the Working Group's failure to find any disciplinary complaints involving nonlawyers in the District of Columbia and the already limited application of the rule, the justification for the nonlawyer equity cap is unclear.[163]

Perhaps the proliferation of such arrangements outside of Washington, D.C., would present greater opportunity for threats to the independent professional

157. *Id.*; *see also* Letter from John H. Beisner, U.S. Chamber Institute for Legal Reform, to Natalia Vera, Senior Research Paralegal, Commission on Ethics 20/20 (June 1, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110627_abs_issues_paper_comments_for_posting.authcheckdam.pdf.

158. *See generally* ABA Discussion Draft for Comment, *supra* note 5, at 10.

159. *Id.* at 10–11.

160. *Id.* at 10; *see also* Letter from John H. Beisner, U.S. Chamber Institute for Legal Reform, to Natalia Vera, Senior Research Paralegal, Commission on Ethics 20/20, *supra* note 157.

161. *See* ABA Discussion Draft for Comment, *supra* note 5, at 11; *cf*. MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2011) (providing another example of where the Model Rules allow jurisdictions to tailor the details of the rules to their individual preference).

162. *See* ABA Discussion Draft for Comment, *supra* note 5, at 11 (emphasizing that the Commission aims to prevent nonlawyers from affecting firm decisions, except "in matters where supermajorities prevailed.").

163. *See id.* at 9. A nonlawyer equity cap is not necessarily undesirable. Rather, I suggest that the cap may be unnecessary considering that the discussion draft's Rule 5.4 is no more expansive than the District of Columbia's Rule 5.4, which has no cap and has not garnered any disciplinary complaints.

judgment of lawyers, but it is still unclear why the seemingly arbitrary cap of 25% was chosen. A cap of 49% would allow lawyers to maintain a majority ownership while nearly doubling the capital infusion from nonlawyer ownership.[164] Alternatively, firms could protect against undue influence from nonlawyers, and maintain this protection, by adopting what would essentially amount to a dual-share structure.[165] Under this framework, firms could issue different classes of stock to nonlawyers and lawyers.[166] Lawyer partners would receive shares with special rights, granting them special voting privileges or multiple votes per share.[167] Conversely, nonlawyer shares would represent an equivalent financial interest but different voting rights.[168] While this might make the offer of potential partnership less appealing to nonlawyers, it would allow them to receive an identical financial benefit while assuaging concerns of nonlawyer influence on independent legal judgment.

3. Fit-to-Own Requirement

The fit-to-own requirement is also unique to the discussion draft's modified rule, with the District of Columbia Rule 5.4 containing no such provision.[169] The fit-to-own requirement seeks to maintain the integrity of the legal profession by mandating that nonlawyer owners satisfy a character and fitness assessment.[170] Explained in the discussion draft's modified Rules 5.4(b)(4) and 5.4(b)(6), lawyer partners are required to make reasonable efforts to ensure the good character of their nonlawyer counterparts and to document incidents sufficient to support a judgment of good character.[171] Additionally, lawyer partners

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164. *See, e.g.*, S.B. 254, Gen. Assemb., Reg. Sess. (N.C. 2011). Although ultimately unsuccessful, the North Carolina Senate considered a bill that sought to allow up to 49% nonlawyer ownership.

165. *See* Miller, *supra* note 63, at 353–54.

166. *Id.*

167. *See id.*

168. *See id.*

169. *See* ABA Discussion Draft for Comment, *supra* note 5, at 12.

170. *Id.*

171. The Resolution recommends the following two provisions be read in conjunction with each other to ensure nonlawyer owners are of sound character and integrity:

> 5.4(b)(4): the lawyers who have a financial interest in the firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under Rule 5.1; and
>
> . . . .
>
> 5.4(b)(6): lawyers with a financial interest 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.

Id.

must take whatever steps are necessary to ensure the continued good character of the nonlawyers on an ongoing basis; an initial inquiry alone is insufficient.[172]

Rather than establishing a regulatory body to directly monitor nonlawyers, the modified rule relies solely on lawyer partners' supervision of nonlawyers.[173] Although subjecting nonlawyers to the authority of the court for misconduct may serve as additional protection, the same effect may be realized more cheaply by vicariously subjecting lawyers to the court's authority for the misconduct of their nonlawyer counterparts. As with the cap on nonlawyer ownership, it is unclear why the ABA 20/20 Commission chose to include provisions regarding the character of nonlawyers, when the District of Columbia Rule 5.4 has functioned effectively without such provisions.

Perhaps the reason why the District of Columbia's Rule 5.4 has been able to function effectively without fit-to-own requirements is because of Model Rule 5.3's applicability.[174] The current Model Rule 5.3 already subjects lawyers to discipline for failing to ensure that nonlawyer employees adhere to the rules of conduct, at least where the lawyer partner is aware of such misconduct and the nonlawyer is "employed or retained" by that lawyer.[175] If the goal of the discussion draft's fit-to-own provision is to ensure the integrity of the legal profession, it is hard to imagine the practical advantage this requirement has over the dictates of Model Rule 5.3, particularly if this rule was amended slightly to encompass all nonlawyers associated with law firms. Considering the success of the District of Columbia's Rule 5.4, which does not contain a fit-to-own requirement, and the already narrow application of the discussion draft's modified rule, this provision does not seem necessary to protect any of the legal profession's core values. Rather, the requirement needlessly narrows the modified rule's already limited application, likely in an effort to avoid a negative knee-jerk reaction by opponents of reform.

C. The Modified Rule's Benefits

If the discussion draft's modified rule had ultimately been adopted, its implications would have been modest. It is clear that the ABA 20/20 Commission

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172. *Id.*

173. *See id.*

174. MODEL RULES OF PROF'L CONDUCT R. 5.3 (2011). Referring to a nonlawyer employed or retained by or associated with a lawyer, the Rule reads, in relevant part:

> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
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> . . . .
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Id.

175. *Id.*

is wary of the potential impact of such reform. However, the extent to which such apprehension stems from legitimate concerns for professional independence, rather than a desire to avoid the opposition's potential negative knee-jerk reaction, remains unclear. Nonetheless, the modified rule is a positive sign for those favoring reform. It seeks to strike a delicate balance between realizing some of the potential advantages of nonlawyer ownership while cautiously protecting against the concerns espoused by opponents.

Allowing nonlawyer ownership would present a real opportunity to remedy what has been identified as a "growing problem of unmet legal needs" among a portion of the population that cannot afford access to justice.[176] Nonlawyer equity is a useful expansionary tool that could allow firms to grow into underserved legal markets. Also, permitting nonlawyer ownership would place nonlawyer experts, such as engineers in patent cases or medical professionals in personal injury cases, side by side with lawyers.[177] This sort of partnership would allow for greater efficiency and innovation through the free exchange of ideas. Additionally, transaction costs to the client are lessened because the firm employing nonlawyer experts may be able to handle services that would otherwise be outsourced and billed separately.[178]

Nonlawyer ownership that would have been permitted by the discussion draft's modified rule also presents advantages to smaller firms who would otherwise be unable to recruit and retain talented nonlawyers because of their inability to guarantee competitive compensation for their services.[179] Allowing these firms to offer the prospect of partnership to nonlawyer experts provides a potentially lucrative incentive to join and stay with the firm.[180] Additionally, permitting such nonlawyer ownership may have a positive effect on agency costs at small and large firms alike. The interests of nonlawyers could be aligned with those of the firm by offering them the financial stake that comes along with partnership rather than a salary that is paid regardless of personal performance or the firm's success.

D. A Good Start, but the Discussion Draft's Modified Rule Falls Short

The discussion draft's modified rule does well to allow firms the opportunity to realize the foregoing advantages while not implementing a move so bold that it substantially threatens the professional independence of lawyers. The lack of disciplinary complaints regarding nonlawyer partners in the District of Columbia suggests that its Rule 5.4 contains adequate safeguards, such as the requirement that nonlawyer partners actively assist the lawyers in providing legal services, to ensure that professional independence and other core professional values are preserved. However, the ABA 20/20 Commission chose to exercise an

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176. ABA Discussion Draft for Comment, *supra* note 5, at 3–4; *see also* William D. Henderson & Rachel M. Zahorsky, *Paradigm Shift*, ABA J., July 2011, at 40.

177. *See* ABA Discussion Draft for Comment, *supra* note 5, at 5–6.

178. *Id.* at 7.

179. *Id.*

180. *Id.*

overabundance of caution by including additional restrictions, such as caps on nonlawyer ownership and a requirement that all nonlawyers pass a character and fitness test.[181] While this additional protection may be needed to allay concerns of opponents to the reform, or to function as an extra safeguard if the rule sought to allow passive equity, the success of the District of Columbia's Rule 5.4, containing no such restrictions, can be referenced in making a strong case that these additional restrictions are unnecessary where the rule's application is already greatly limited.[182]

While the potential threat to professional independence and other cited concerns are mitigated at a rate commensurate with the modest nature of the reform, the benefits are scaled down at an equal rate. If the District of Columbia's Rule 5.4 has been successful without the potentially oppressive restrictions that the ABA 20/20 Commission's modified rule includes, then it seems unnecessary to include them. Nonetheless, the discussion draft and its modified rule are indicative of the ABA's willingness to thoughtfully consider reform, regardless of the decision not to propose the modified rule to the ABA House of Delegates.[183]

This Note recognizes that the ABA 20/20 Commission's discussion paper is a positive indicator of the American legal system's willingness to adapt to changing circumstances. However, the modified rule itself was far too modest to effect a meaningful change and likely insufficient to allow domestic firms to respond to rapidly evolving technology and an increasingly globalized legal industry.

Allowing nonlawyers to partner with lawyers will certainly enhance access to legal services, but the unduly restrictive requirements proposed by the ABA 20/20 Commission make it unlikely that any meaningful effect will be felt by those who stand to benefit the most—those in need of a capital infusion. In fact, most of the modified rule's benefits, such as the positive effects of nonlawyer expertise on efficiency and innovation, can be realized with creative accounting. Paying these experts a competitive salary has always been acceptable; they just may not have an equity stake in the company or an interest in its profits.

1. The Importance of Passive Investment

The most effective way to truly enhance access to legal services is to allow law firms to benefit from the capital infusion that comes along with passive equity investment: allowing nonlawyers to invest in law firms without requiring them to actively participate in the provision of legal services.[184] As previously discussed, passive equity investment would allow law firms to enjoy increased financial stability and to expand at a more rapid rate than can be achieved using traditional debt financing.[185] Capital infusions from passive equity investment

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181. *Id.* at 11–12
182. *See* D.C. RULES OF PROF'L CONDUCT R. 5.4 (2012).
183. *See* Podgers, *supra* note 133.
184. *See generally* Adams & Matheson, *supra* note 7, at 20–30.
185. *Id.* at 31–32; Sharfman, *supra* note 25, at 481–82.

could mean continued prosperity for firms who, despite a strong reputation or solid book of business, are temporarily unable to satisfy their short-term financial obligations because of unforeseen cash flow problems or departure of key partners.[186]

The ABA 20/20 Commission quickly ruled out the possibility of passive equity investment due to concerns regarding what effect it could have on lawyers' professional independence and the potential for conflicts of interest.[187] However, the increasingly globalized nature of the legal industry requires re-examination of the argument in favor of passive equity investment if domestic law firms are to remain competitive. This Note posits that a version of Model Rule 5.4 can be constructed that realizes the more powerful advantages of nonlawyer ownership resulting from passive equity investment, while adequately addressing opponents' concerns regarding threats to the legal profession's core values.

V. PROPOSING AN IMPROVED MODEL

A. Permitting Passive Investment

The first step in leveraging nonlawyer ownership to achieve greater accessibility and quality of legal services is to eliminate the requirement that nonlawyer owners must actively assist their lawyer counterparts in providing legal services to clients. This is the barrier between the model proposed by the ABA 20/20 Commission and passive equity investment.[188]

Opponents of passive equity investment believe that the threats of nonlawyer ownership are magnified when the nonlawyer is not required to be actively involved in the provision of legal services. Independent professional judgment is critical in ensuring that a lawyer's decisions are based on training, professional ethics, and a duty to serve the interests of the client above all else.[189] Passive investment's opponents argue that if nonlawyer owners are not involved whatsoever in the provision of legal services, they will have less of a vested concern in the client's interests and will be concerned more with their own interests in profit.[190] As the percentage of nonlawyer owners increases, and the distance between the nonlawyer owners and the actual business of the firm increases, so too does the threat to professional independence.[191] Opponents also opine that passive equity investment would increase the threat of conflicts of interest.[192] If nonlawyers are required to be actively and materially involved in the firm, their potential to impute independent business conflicts to the firm is constrained by the number of clients with whom the nonlawyers are able to be

186. *See* Mark & Cowdroy, *supra* note 83, at 676.

187. *See* ABA *Preliminary Issues Outline*, *supra* note 134, at 1.

188. *See* ABA Discussion Draft for Comment, *supra* note 5, at 7–13.

189. *See* Cindy Alberts Carson, *Under New Mismanagement: The Problem of Non-Lawyer Equity Partnership in Law Firms*, 7 GEO. J. LEGAL ETHICS 593, 633 (1994).

190. *See* Andrews, *supra* note 21, at 600–01; *see also* DeBuse, *supra* note 34, at 336.

191. *See* Carson, *supra* note 189, at 633–34 (1994).

192. *See id.* at 618–20; *see also* Adams & Matheson, *supra* note 7, at 16.

actively and materially involved.[193] Allowing passive equity investment would remove these built-in constraints and present many more conflicts because the passive investors may be invested in many other businesses with interests adverse to the firm's existing and potential clients. Furthermore, opponents argue that passive equity investment would exacerbate confidentiality concerns because of the added difficulty of educating distant, non-involved owners on the importance of client confidentiality. Additionally, disclosure requirements triggered by the transfer of equity interests may pose a threat to client confidences.[194]

B. Implementing a Less Restrictive Nonlawyer Ownership Cap

Although these concerns are valid, they are not insurmountable. The first step in addressing ethical concerns within a model that allows passive investment is to set a cap that restricts nonlawyer ownership to a minority interest, thereby requiring the firm's lawyers to retain control and management. The cap should be set to 49% to maximize the benefit to be realized from outside equity while concurrently restricting such ownership to a minority interest.[195] Limiting nonlawyer ownership to a minority share would ensure that any firm decision would ultimately be made by those with appropriate formal training and an ethical obligation to the client and the legal profession.

1. A Separate, More Restrictive Cap for Passive Ownership

Another way the model could harness the benefits of outside equity while minimizing passive investors' influence on firm decision-making is to set a separate, more restrictive cap on passive investors. Even though nonlawyers participating actively could hold a full 49% share of the firm, the cap for passive investors should be 25%, but in no case shall the interest held by nonlawyers, active or passive, exceed 49%. This would reduce the threat to professional independence presented by passive nonlawyers and minimize the potential for possibly unwaivable conflicts of interest while allowing firms to reap the fiscal benefits of having a capital structure comprised of 49% nonlawyer equity.

2. Maintaining Majority Control

The firm could ensure permanent majority control by placing transfer restrictions on the firm's shares or interests.[196] A "right of refusal" restriction in this context would mandate anyone wishing to liquidate their equity position to first offer it back to the lawyer-partner majority.[197] Slater & Gordon uses similar

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193. *See* Carson, *supra* note 189, at 618–20.

194. *See* Ribstein, *supra* note 51.

195. Similar to the approach advocated by the bill considered by the North Carolina Senate. *See* S.B. 254, Gen. Assemb., Reg. Sess. (N.C. 2011).

196. Miller, *supra* note 63, at 352–54.

197. DEL. CODE ANN. tit. 8, § 202(c)(1) (2012).

transfer restrictions by requiring employees leaving the firm to transfer their shares back to the firm, precluding the shares' sale elsewhere.[198]

C. Restricting Voting Rights

Continuing to address the concerns with passive investment, the model could further restrict voting rights on interests from passive investment. Under the modified rule included in the ABA 20/20 Commission's discussion draft, active nonlawyers would have limited voting rights.[199] A model embracing passive investment could similarly restrict the voting rights of active nonlawyers while completely eliminating voting rights for passive owners. Although this may make law firm investment less attractive to such investors, the threat to professional independence would certainly be mitigated because these owners would not have any managerial or decision-making power—their interest would be solely financial. Such a structure has already been successfully utilized by the Blackstone Group LP, a publicly traded financial advisory firm organized as a limited partnership.[200] The Blackstone Group offers limited partnership interests on the New York Stock Exchange.[201] While these interests offer capital to the partnership, they do not receive voting rights or any sort of management role in return.[202] To achieve these varied sets of rights among owners in the law firm context, the firm would issue interests in a multi-class structure, with different classes being assigned to lawyer-partners, nonlawyer-partners, and passive investors.[203]

To ensure that ownership distribution remained the same among the classes, each interest would carry with it a transfer restriction limiting transferability to members of its own class or back to the lawyer-partner class. Again, this structure would strike a desirable balance by maximizing the potential of nonlawyer ownership while minimizing the threat to professional independence.

D. A Modified Fit-to-Own Test

While the goals of requiring all nonlawyers to pass a fit-to-own test are admirable, its application would be undeniably costly.[204] Additionally, the cost of complying with the requirement may make nonlawyer ownership cost-prohibitive for smaller law firms who wish to employ only a small percentage of nonlawyers. Some of this cost could be avoided by imposing a character and fitness test only

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198. *See Prospectus*, SLATER & GORDON LTD., at 88 (2007), http://www.slatergordon.com.au/files/editor_upload/File/prospectus/Prospectus.pdf.

199. *See* ABA Discussion Draft for Comment, *supra* note 5, at 11 ("[A]s a practical matter, nonlawyers would not be able to affect decisions except in matters where supermajorities prevailed.").

200. Larry E. Ribstein, *Going Privlic*, AMERICAN (Mar. 27, 2007), http://www.american.com/archive/2007/march-0307/going-privlic.

201. *Id.*

202. *Id.*

203. Google's share structure is another example of ways in which a multi-class structure may be used. For a discussion on this framework, see Miller, *supra* note 63, at 353–54.

204. *See* ABA Discussion Draft for Comment, *supra* note 5, at 11–13.

upon nonlawyers in those firms whose nonlawyer ownership exceeded a certain percentage. The United Kingdom Legal Services Act features a similar provision where "low-risk bodies"—firms with less than 10% nonlawyer ownership—may apply to have certain statutory requirements waived or modified.[205]

Setting the threshold at 25%[206] nonlawyer ownership would allow those firms whose ownership fell below that level to avoid costly compliance. In turn, compliance costs would not deter these firms from experimenting with nonlawyer ownership. The less a firm is comprised of nonlawyers, the less critical the added protection of the fit-to-own test becomes. The fewer nonlawyers, the easier it is for the firm's lawyers to monitor their conduct to ensure that it adheres to the rules of professional responsibility. It may be necessary to amend Model Rule 5.3 to explicitly make lawyers responsible for all actions of the nonlawyers with whom they are in business.[207] If this structure is to be effective, it must be clear that lawyer partners within a firm shall be held accountable for any misconduct of their nonlawyer counterparts, regardless of whether the lawyers knew of such conduct. To avoid any ambiguity as to the extent of lawyer accountability for nonlawyers, lawyers should be required to submit a filing with a designated regulatory body acknowledging accountability for their nonlawyer counterparts.[208]

"High-risk" firms, those whose ownership is comprised of more than 25% nonlawyers, present a greater opportunity for nonlawyers to influence the professional judgment of the lawyers. In such firms, additional protection may be necessary to ensure the integrity and good character of nonlawyer partners. Furthermore, the fit-to-own tests may not be as cost-prohibitive for these firms, because a higher percentage of nonlawyer owners from passive investment likely translates to greater expendable capital. Imposing some sort of character test on all nonlawyers in these firms, passive investors included, would help alleviate ethical concerns by ensuring the integrity of all owners.[209]

E. Addressing Confidentiality Concerns

This model would address confidentiality concerns by requiring all nonlawyer partners, passive and active, to sign confidentiality agreements which would keep confidential information out of the hands of nonlawyer partners or investors. Courts have upheld such agreements and Delaware partnership law allows confidential information to be kept from limited partners.[210] Passive investors would be classified as limited partners because they do not participate in

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205. Legal Services Act, 2007, c. 29, §108 (Eng.).

206. This threshold percentage is arbitrary. Ideally, it should be set at a level that would maximize the number of firms subject to a fit-to-own test while minimizing the number of firms for which the requirement is cost-prohibitive.

207. *See* MODEL RULES OF PROF'L CONDUCT R. 5.3 (2011).

208. The required "filing" would essentially amount to a signature on a contract that indicates a lawyer's acknowledgement that he or she will be held accountable for any action of the firm's nonlawyers. For purposes of administrative efficiency, a firm could submit a single filing containing the signatures of all lawyers within the firm.

209. *See* ABA Discussion Draft for Comment, *supra* note 5, at 3.

210. DEL. CODE ANN. tit. 6, §17-305(b) (2012).

the control of the firm; therefore, such agreements would likely be permitted.[211] Restricting passive investment to sophisticated investors could also reduce the need to disclose confidential information.[212]

F. Addressing Conflict of Interest Concerns

Requiring all passive investors to sign waivers as a condition of investment could alleviate conflict of interest concerns. The nonlawyer ownership bill considered by the North Carolina Senate took similar steps, requiring that, in the event of a conflict between the duties to the clients and the shareholders, "the duty to the client shall prevail over the duty to shareholders."[213] As long as the implications of the waiver are fully explained to the investors and their decision is well-informed, such waivers should be upheld. Another protection against conflict-of-interest concerns may be to restrict the actual number of individual passive investors within the 25% cap. For example, if 25% of the firm's total equity value is $1,000,000, this equity could be distributed among any number of passive investors. The potential for conflict varies based on the number of individual passive investors that account for this total equity value. There is ten times as much potential for conflict if 100 investors, rather than 10 investors, account for the $1,000,000 in total passive equity.[214] Accordingly, the fewer individual passive investors involved, the less potential for conflicts of interest with current or prospective clients.[215]

G. Overview of This Note's Proposed Model

The model proposed here would allow firms to reap the benefits of passive investment while addressing concerns regarding professional independence, confidentiality, and conflicts of interest. The model is significantly more liberal than the one included in the ABA 20/20 Commission's discussion draft. Most notably, it would remove the requirement that all nonlawyers be actively involved in the provision of legal services, thus allowing passive investment. The model addresses this additional threat to professional

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211. *Id.*

212. In the context of hedge funds and certain other private offerings, companies issuing equity shares may be exempt from certain disclosure requirements where the buyer is an accredited or sophisticated investor. *See* Hannah M. Terhune, *MoneyScience: How to Start a Hedge Fund*, MONEYSCIENCE FIN. INTELLIGENCE NETWORK (2008), http://www.moneyscience.com/pg/pages/view/1018/how-to-start-a-hedge-fund (discussing the ways by which hedge funds avoid disclosure requirements).

213. S.B. 254, Gen. Assemb., Reg. Sess. (N.C. 2011).

214. Admittedly, this supposition does not account for how the potential to create conflict may vary from passive investor to passive investor, vis-à-vis varying levels of involvement with other businesses. Rather, the foregoing assertion assumes that each investor has a similar conflict-creating potential.

215. The bill considered in North Carolina took additional measures to alleviate the concerns that many individual owners would impute many individual conflicts to the firm by including a provision stating that those equity holders with less than a 5% stake are not relevant in a conflict of interest determination. S.B. 254, Gen. Assemb., Reg. Sess. (N.C. 2011).

independence by placing a 49% cap on nonlawyer ownership and an additional 25% cap on passive ownership. It would allow passive investors to enjoy financial rights only, while active nonlawyers would enjoy the same limited voting rights as they would under the ABA 20/20 Commission's proposal. All interests in the firm would contain transfer restrictions to preserve the appropriate lawyer-nonlawyer distribution of ownership. Where nonlawyers comprised more than 25% of the firm, they would all be required to pass a character test. Where the percentage of nonlawyers did not exceed 25%, the firm could be exempted from costly compliance with character tests, as long as the firm's lawyer-partners explicitly agreed to be held accountable for the conduct of nonlawyer owners. Protecting against confidentiality concerns, the model would require all passive investors to sign confidentiality agreements and potentially waive access to confidential client information. Addressing conflict of interest concerns, the model would require all passive investors to waive potential conflicts. Additionally, the potential for conflict could be mitigated by including a provision that limits the actual number of passive investors within the 25% cap.

CONCLUSION

Although the modified rule contained within the ABA 20/20 Commission's discussion draft is a step in the right direction, it falls woefully short of realizing the full potential of nonlawyer ownership. The model advocated in this Note would, among other advantages, go further in allowing law firms to reap the benefits of outside capital enjoyed by other businesses. An infusion of outside capital could provide financial stability, which would facilitate long-term prosperity and growth. This prosperity and growth would result in increased access to legal assistance and choice among law firms for consumers. The built-in restraints of this proposed model address threats to professional independence, confidentiality, and conflicts of interest.

Although much of the American legal community may be unwilling to entertain the idea of such drastic change, the success and likely future proliferation of nonlawyer ownership in Australia, the United Kingdom, and elsewhere in Europe serve as a reminder that if we do not adapt to meet the needs of our people and businesses, someone else will. Regardless, the importance of adopting a progressive and open-minded view toward change is undeniable if American law firms are to remain competitive in an increasingly globalized marketplace.