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## Dances with Nonlawyers: A New Perspective on Law Firm Diversification

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# DANCES WITH NONLAWYERS: A NEW PERSPECTIVE ON LAW FIRM DIVERSIFICATION

GARY A. MUNNEKE \*

*In this Article, Professor Munneke continues the debate over ethical rules governing lawyers' professional affiliations with nonlawyers, arguing in favor of the adoption of uniform rules that regulate lawyers' conduct in the context of specific ethical issues, such as confidentiality and conflicts of interest. In Professor Munneke's view, the retention of ethical rules that prohibit law firm diversification impedes the ability of lawyers to compete effectively in today's rapidly changing marketplace of professional services.*

*Professor Munneke moreover questions whether state bar association rules that prohibit law firm diversification are capable of withstanding judicial scrutiny under the federal antitrust laws and the First Amendment. According to Professor Munneke, a substantial question exists as to whether the state action exemption should apply to shield these rules from antitrust attack. Professor Munneke further asserts that First Amendment theories of freedom of association and commercial speech may impel less restrictive alternatives to the current regulatory scheme.*

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## INTRODUCTION

AS the practice of law in the United States becomes increasingly complex, new systems for delivering legal services have proliferated. From legal services programs for the poor to in-house corporate law departments, lawyers have struggled to develop effective mechanisms to make legal services available to clients. Of the many new approaches to providing legal services, however, none has generated as much contro-

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versy as the movement launched by a significant number of law firms to provide ancillary business services in conjunction with traditional legal services. The outcome of this battle over law firm diversification will shape the face of the practice of law in this country for the next century. This Article analyzes the current debate and proposes a resolution to this controversy that both ensures the long-term growth of the legal services industry and fosters professionalism.

## I. BACKGROUND

### A. *Change in the Profession*

The practice of law has changed dramatically in recent decades. Research on the legal profession indicates significant shifts in the profession's demographics<sup>1</sup> which have served as an item of discussion in scholarly journals.<sup>2</sup> The problem of change and how to cope with it has also been addressed introspectively by bar associations which have held numerous conferences dealing with these issues.<sup>3</sup> Moreover, this modern-day evolution has been shaped and reflected by the decisions of the courts.<sup>4</sup>

Fundamental questions are being asked today about the practice of law. As the profession has grown larger in number<sup>5</sup> and court decisions

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1. The American Bar Foundation Lawyer Statistical Report documents the growth of the profession from 221,605 in 1951 to 542,205 in 1980, and projections indicate that the United States will have over 1,000,000 lawyers by the year 2000. See Barbara A. Curran, American Bar Foundation, *The Lawyer Statistical Report: A Statistical Profile of the U.S. Legal Profession in the 1980s*, at 3-4 (1985). The profession is increasingly female; the female lawyer population has grown from about 5,500 in 1951 to approximately 83,000 in 1984. See *id.* at 9. The percentage of sole practitioners has declined from about 46% in 1960 to about 33% in 1980. See *id.* at 14. The number of large firms has increased dramatically; an ABA survey shows that the number of firms with more than 100 lawyers has increased from four in 1960, to more than 200 in 1988. See William H. Rehnquist, *The State of the Legal Profession*, 14 *Legal Econ.*, Mar. 1988, at 44, 44.

2. See, e.g., Susan Raridon, *The Practice of Law—The Next 50 Years*, *Legal Econ.*, Apr. 1989, at 31, 33 (predicting that the past "hot areas" of practice of the 1970s and 1980s, including energy law, health care, bankruptcy, computer law, international trade, pensions, and tax, will give way to communications, intellectual property, employment, environmental, government relations, and lobbying in the 1990s, and forecasting that in the next 50 years the areas of practice will include space law, ocean law, and other areas not prominent today).

3. Indeed, a central theme of many conferences on the legal profession is that the practice of law is changing rapidly, and that lawyers must understand the causes of such change in order to respond. See American Bar Ass'n, *Report of the Task Force on the Role of the Lawyer in the 1980's*, at 2 (1981); *Law and the American Future* (Murray L. Schwartz ed., 1976); William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in The Twenty-First Century*, 76 *F.R.D.* 277, 278 (1978).

4. See e.g., *Bates v. State Bar of Arizona*, 433 U.S. 350, 353 (1977) (considering disciplinary rule that prohibited attorneys from advertising); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 752 (2d Cir. 1975) (considering whether attorney should be disqualified from court proceeding because of conflict based on former representation of client's adversary).

5. The question of whether there are "too many lawyers" is not a new one. Those

have opened the door for lawyers to use new techniques in marketing their services,<sup>6</sup> law firms have significantly expanded the scope of the services they provide.<sup>7</sup> Concurrently, an increasing number of law school graduates have pursued careers outside the private practice of law,<sup>8</sup> frequently in fields where they utilize their legal training but are not required to maintain bar membership.<sup>9</sup> Lawyers who have practiced in these fields have often tended to "legalize" their work by using a legal approach to analysis and problem solving. In some areas of practice, lawyers may eventually push nonlawyers out of the field.

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who claim that the practice of law is overcrowded always seem to represent a view that the late Professor Robert McKay described as "the last lawyer into the room, shut the door." Remarks at the National Conference on the Role of the Lawyer in the 1980s (Jan. 1980). See *supra* note 1 and accompanying text.

6. See *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990) (letterhead designation of specialty); *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626 (1985) (advertising); *In re R.M.J.*, 455 U.S. 191 (1982) (same); *Bates*, 433 U.S. at 350 (same).

7. The fact that legal advice incorporates extralegal elements is acknowledged in the Model Rules of Professional Conduct Rule 2.1 (1984) [hereinafter Model Rules]. "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." *Id.* Comments to this rule state as follows:

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation.

Model Rules, *supra*, Rule 2.1 cmt. This admonition implicitly recognizes the notion that legal problems are seldom purely legal problems, and that the resolution of complex issues usually requires more than purely legal advice. See *Raridon*, *supra* note 2, at 33.

8. The 1988 Employment Report and Salary Survey produced by the National Association for Law Placement indicates that 4.8% of law school graduates responding to the survey were employed in full-time nonlegal positions. See National Ass'n for Law Placement, *Class of 1988 Employment Report and Salary Survey 1* (1990). Although the term "nonlegal" is imprecise, it is clear that many law graduates do not practice law. There are no competent sources of information on how many practicing lawyers leave the active practice of law, but extrapolation from the 1980 Statistical Report and legal education statistics suggests that the actual number is substantial. Another survey in 1985 found that 13% of all law school graduates held nonlegal positions. See Leona M. Vogt, *From Law School to Career: Where Do Graduates Go And What Do They Do? A Career Paths Study of Seven Northeastern Area Law Schools 9* (1986). Furthermore, an ABA Young Lawyers Division survey found that 7.8% of the respondents intended to change jobs outside of law within the next two years. See Ronald L. Hirsch, *Are You on Target?*, 12 *Barrister*, Winter 1985, at 17, 18. Whether these lawyers actually left the profession is unknown.

9. These "law-related" careers include a number of fields utilizing legal training but not requiring bar membership such as accounting/tax law and real estate. See generally Frances Utley with Gary A. Munneke, *Nonlegal Careers for Lawyers: In the Private Sector* (2d ed. 1984) (discussing alternative career paths); Deborah L. Arron, *Running From the Law: Why Good Lawyers Are Getting Out of the Legal Profession* (1989) (nonlegal career alternatives); Ellen Wayne, *National Ass'n for Law Placement, Legal Careers: Choices and Options* (1982) (alternative career paths).

Just as lawyers have entered many nonlegal professions, a substantial number of nonlegal enterprises now offer law-related services.<sup>10</sup> Frequently, these service providers compete with law firms for the same clients and work. In some areas they have squeezed out the legal practitioners.<sup>11</sup>

The result of these developments has been a blurring of the line between that which is the practice of law and that which is not. Although lawyers retain a monopoly on the representation of clients in court, many other services are up for grabs.<sup>12</sup> Ironically, lawyers in private practice often find themselves competing with other lawyers who are employed by nonlegal organizations. The response of some firms has been to hire nonlawyers with expertise in law-related areas to help them compete effectively against nonlegal business entities.

Historically, the organized bar has challenged competing nonlegal ventures by attacking them as having engaged in the unauthorized practice of law.<sup>13</sup> The bar associations in many jurisdictions created unauthorized practice committees to monitor the activities of nonlegal organizations that have encroached upon the domain of practicing lawyers.<sup>14</sup>

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10. Many certified public accounting firms provide a tax section comprised of legally trained individuals who support the delivery of accounting services to clients. Although the tax section is not considered to be engaged in the practice of law, there is nevertheless an overlap between the tax planning work of C.P.A.'s and the legal tax work of lawyers. See Utey with Munneke, *supra* note 9, at 18-19, 44. As another example, banks operate trust departments in which the trust management functions frequently have legal overtones. If the bankers, who are often lawyers, also assist clients with financial planning, they are likely to engage in work similar to that of a single practitioner. See *id.* at 22. Likewise, insurance companies that provide estate planning services may do almost everything that lawyers do, short of drafting wills and trusts. See *id.*

11. The most obvious example is in the real property field. In many jurisdictions, title companies have absorbed the bulk of residential real estate transfers by providing a less expensive service than lawyers. Practicing lawyers have lost the real estate market for all but the most complicated, adversarial, or large closings. See Gary Taylor, *Practicing Law on the Borderline*, Nat'l L.J., May 28, 1990, at 3, 3.

12. See generally *Virginia State Bar v. Surety Title Ins. Agency*, 571 F.2d 205 (4th Cir.) (dispute regarding state bar association's proper role in adopting and enforcing disciplinary rules concerning the unauthorized practice of law), *cert. denied*, 436 U.S. 941 (1978); *In re Co-operative Law Co.*, 92 N.E. 15, 16 (1910) ("corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it").

13. See Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 Am. B. Found. Res. J. 159, 160 (1980); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1, 3 (1981). Although Christensen and Rhode differ somewhat in their views as to when the organized bar became aggressively involved in the enforcement of unauthorized practice regulations, both agree that the protection of lawyers' economic interests has been a major tenet of the bar's agenda for approximately 50 years. The ABA was one of the first organizations to outlaw, and then police, the unauthorized practice of law. It formed a Standing Committee on the Unauthorized Practice of Law to perform these functions. 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, 583 (1989).

14. From 1937 through 1978, the ABA Standing Committee on the Unauthorized Practice of Law formulated "Statements of Principles" concerning accountants, archi-

These committees have fallen into disfavor, however, for a number of reasons including a series of legal setbacks,<sup>15</sup> the threat of antitrust challenge posed by the Federal Trade Commission,<sup>16</sup> and the increasingly unclear distinction between the practice of law and the pursuit of related fields.<sup>17</sup> In the wake of these committees, a more laissez-faire, free market environment has evolved.<sup>18</sup> In this new environment, both lawyers and nonlawyers have experimented extensively with new delivery systems.<sup>19</sup>

In order to appreciate this movement by law firms towards ancillary business ventures, it is important to understand the changes in the legal profession that have occurred in recent years. For much of the nineteenth and twentieth centuries, the vast majority of lawyers practiced alone or in very small firms.<sup>20</sup> These lawyers offered services that were personal to their clients.<sup>21</sup> Clients tended to hire lawyers on the basis of personal loyalties. Increasingly, however, the attorney-client relationship has become more institutional than personal.<sup>22</sup> Along with the de-

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fects, banks, claims adjusters, collection agencies, insurers, engineers, publishers, title companies, realtors, and social workers that charted the appropriate sphere of activities for each profession in relation to the legal profession. These efforts were designed to ensure that nonlawyers did not practice law. See Andrews, *supra* note 13, at 584.

15. See Rhode, *supra* note 13, at 55-62.

16. Many statements of principles formulated by the ABA were rescinded because of successful antitrust challenges. See James Podgers, *Statements of Principles: Are They on the Way Out?*, 66 A.B.A. J. 129, 129 (1980). "[Ninety-six percent] of state bar associations had unauthorized practice committees in 1976." Rhode, *supra* note 13, at 15. According to the chairman of the ABA's unauthorized practice committee, this percentage has decreased primarily because of antitrust concerns. See *id.*

17. See David Lauter, 'Outsiders' Who Work for Firms, Nat'l L.J., Feb. 6, 1984, at 1, 32 (discussion with consultant Robert Weil) ("In the past . . . 'the psychology of the profession' has been to 'step back from the line' separating law from other fields. More recently, that reticence has been diminishing.").

18. See *id.* (discussion with regulatory economist Jim J. Tozzi) ("[L]aw is increasingly multi-disciplinary, . . . requiring 'a range of services' to represent a client. 'Economists and any of these others,' [accountants, lobbyists, engineers, etc.] . . . 'were always brought in on an ad hoc basis, but if you're an integral part of the firm, it adds another dimension.'"); Rosalind Resnick, *Looking at Alternative Services—The Lawyer/Non-lawyer Wall Continues to Erode*, Nat'l L.J., June 10, 1991, at 1; Taylor, *supra* note 11, at 3.

19. See *infra* note 41 and accompanying text.

20. See Curran, *supra* note 1, at 13.

21. During the first two-thirds of this century, the legal profession was a "close-knit fraternity of like-minded practitioners who shared a strong sense of common values and a general disdain for any efforts to commercialize the profession." James W. Jones, *The Challenge of Change: The Practice of Law in the Year 2000*, 41 Vand. L. Rev. 683, 683 (1988). Lawyers believed that law, as a profession, was "a branch of the administration of justice and not a mere money-getting trade." *Id.* at 683-84. "The loyalty lawyers felt toward their firms was mirrored by the fidelity of their clients, who valued stability over cost effectiveness." S.S. Samuelson & L.J. Jaffe, *A Statistical Analysis of Law Firm Profitability*, 70 B.U. L. Rev. 185, 189 (1990).

22. See Murray L. Schwartz, *The Reorganization of the Legal Profession*, 58 Tex. L. Rev. 1269, 1274-79 (1980). Professor Schwartz discusses a number of negative effects produced by this "bureaucratization of the legal profession," including the change in lawyer loyalty from clients to employers, see *id.* at 1278-79, the "attenuation of the local general professional community as the lawyer's reference group for norms of practice and

personalization of client services, a more permissive marketing environment<sup>23</sup> has encouraged law firms to expand their services in search of new clients.<sup>24</sup>

Competition and shrinking profits have further applied pressure on law firms to find new sources of revenue.<sup>25</sup> Clients have reinforced this businesslike environment by demonstrating less loyalty to preexisting professional relationships, and changing firms when the price is right.<sup>26</sup>

Many law firms have responded to the competitive atmosphere of the 1980s by broadening the scope of the services they offer. Often this has resulted in an expansion of services beyond the practice of law. One example of this is the creation of estate planning departments that service the needs of general business or litigation clients. Frequently, this has also produced a broadening of the scope of services offered to clients in general. The law firm, for example, to further service a client engaged in lobbying activities, might make available the skills of research analysts, economists and other consultants in conjunction with the services offered by the legal team. Moreover, in a commercial land acquisition, the law firm might supply a variety of professionals including engineers and environmental consultants to expedite the deal.

It is a commonly accepted practice for a law firm to go into the marketplace and purchase nonlegal expertise to provide competent services for individual clients.<sup>27</sup> Little controversy is generated when a law firm retains a salaried professional to provide a specific nonlegal service to a

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professionalism . . . [and the] decline in self regulation of the bar." *Id.* at 1269. Compare Professor Schwartz' assessment of the demise of professionalism to that of former ABA President Justin Stanley, who chaired the ABA Commission on Professionalism. *See* Justin A. Stanley, *Lawyers In Business*, 8 N. Ill. U. L. Rev. 17, 22 (1987) ("[L]awyers and law firms seem to be drifting from an attitude of professionalism toward one of commercialism."); *id.* at 26.

23. Although Supreme Court cases such as *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), speak of advertising, a concept that many practitioners resisted, the buzzword "marketing" did not bring with it the same connotations of sleazy ambulance chasing. Advertising is one approach to marketing legal services, but every lawyer or law firm that seeks to find new clients or retain old ones engages in marketing, regardless of whether advertising is used or not. This shift in thinking and the implications generated by it were first observed by Lori Andrews in her groundbreaking work. *See* Lori B. Andrews, *Birth of a Salesman: Lawyer Advertising and Solicitation* 85 (1980) [hereinafter *Birth of a Salesman*].

24. *See* Kathy Brock, *Competition is the Catchword for Professional Services*, *The Business Journal-Portland*, January 7, 1991, at 11; W. Ward Reynoldson, *The Case Against Lawyer Advertising*, 75 A.B.A. J. 60 (1989).

25. *See* Donna K.H. Walters, *Partners Under Pressure*, *L.A. Times*, July 7, 1991, at D1. A new source of income for many firms has been the providing of ancillary services, such as economists and lobbyists, to clients. Law firms face a growing demand from increasingly sophisticated clients who are shopping harder for law firms to provide broader services. *See* Thomas F. Gibbons, *Law Practice in 2001*, 76 A.B.A. J. 68 (1990).

26. "More sophisticated clients are divvying up their business to several service providers based on specialties . . . rather than using one firm for all of their services—a trend observers expect will continue." Brock, *supra* note 24, at 13.

27. *See supra* note 7 and accompanying text.

class of clients with similar needs.<sup>28</sup> When the nonlegal services, however, extend beyond mere contract work or employment arrangements, the role of nonlawyers expands and many lawyers become very nervous.<sup>29</sup> The current debate on ancillary business activities arises in today's competitive environment. Each side in this debate has its own view of the proper nature of the lawyer-client relationship. Before further examining this debate in Section III, it may be helpful to review the regulatory framework governing the lawyer-client relationship and examine some of the experimental arrangements that have been employed by lawyers to expand the scope of their services within a confining regulatory scheme.

### B. Regulation of the Marketplace

Law firms that wish to provide legal *and* nonlegal services to clients do not enter a regulatory vacuum. Ethical rules restrict the ability of law firms to provide services ancillary to the practice of law. This regulatory net defines the types of arrangements that law firms may establish.

Lawyers are hampered in their efforts to diversify by traditional notions of law practice and by longstanding ethical prohibitions against business entanglements with nonlawyers.<sup>30</sup> Ethical rules provide that a lawyer may not "form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."<sup>31</sup> In addition, the lawyer may not "share legal fees with a nonlawyer,"<sup>32</sup> give anything of value to a nonlawyer for recommending the lawyer's services,<sup>33</sup> or permit

28. See Andrews, *supra* note 13; Lauter, *supra* note 17.

29. An example of this fear may be found in a message from ABA President Stanley L. Chauvin to members of the association:

[T]he mixing of law practice with non-law business could open the flood gates for outside regulation of the profession. . . . I truly doubt that lawyers who create ancillary businesses are motivated by a desire to serve clients or the public more effectively. . . . The risk of putting the lawyer-client relationship in jeopardy appears to be motivated by profit.

Stanley L. Chauvin, Jr., *A Conscientious Conclusion: Ancillary Business too Risky for Clients and Lawyers (Message from the President)*, 76 A.B.A. J. 8, 8-9 (1990).

30. Although the Model Rules and the predecessor Model Code of Professional Responsibility (1969) [hereinafter Model Code] do not prohibit all business combinations involving lawyers and nonlawyers, one treatise notes:

While the Comment to Model Rule 5.4 asserts that the Rule expresses traditional limitations on sharing fees, to protect the lawyers' professional judgment, substantial portions of Rule 5.4 are best read as a continuation of an attempt to restrict lawyers and nonlawyers from working together if legal services will be rendered in the joint venture.

1 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* 256 n.7 (3d ed. 1989).

31. Model Rules, *supra* note 7, Rule 5.4(b); Model Code, *supra* note 30, DR 3-103(A).

32. Model Rules, *supra* note 7, Rule 5.4(a); Model Code, *supra* note 30, DR 3-102(A).

33. See Model Rules, *supra* note 7, Rule 7.2(c); Model Code, *supra* note 30, DR 2-103(B).



a nonlawyer to direct the lawyer's independent professional judgment.<sup>34</sup> Moreover, the lawyer may not practice in an association authorized to practice law for a profit, if: "(1) a nonlawyer owns any interest therein, . . . ; (2) a nonlawyer is a corporate director or officer thereof; or (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer."<sup>35</sup> Furthermore, the lawyer shall not assist a non-lawyer to engage in the unauthorized practice of law.<sup>36</sup> In addition, rules that restrict in-person solicitation of business<sup>37</sup> and protect client confidences<sup>38</sup> necessarily place limitations on lawyers' dealings with nonlawyers. Collectively, these rules have kept lawyers out of nonlegal activities, and have likewise kept nonlawyers from providing legal services.<sup>39</sup>

These regulations are now giving way to more permissive rules governing joint lawyer-nonlawyer ventures, and such activities appear to be evolving with or without the imprimatur of the organized bar.<sup>40</sup> Part II of this Article reviews the current debate over lawyers' ancillary business

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34. See Model Rules, *supra* note 7, Rule 5.4(c); Model Code, *supra* note 30, DR 5-107(B).

35. Model Rules, *supra* note 7, Rule 5.4(d); Model Code, *supra* note 30, DR 5-107(C).

36. See Model Rules, *supra* note 7, Rule 5.5(b); Model Code, *supra* note 30, DR 3-101(A).

37. See Model Rules, *supra* note 7, Rule 7.3; Model Code, *supra* note 30, DR 2-103(A).

38. See Model Rules, *supra* note 7, Rule 1.6; Model Code, *supra* note 30, DR 4-101.

39. See Harry J. Haynsworth, *Marketing and Legal Ethics: The Rules and Risks* 120 (rev. ed. 1990); Andrews, *supra* note 13, at 600. Both Dean Haynsworth and Professor Andrews conclude that this regulatory net has been effective in preventing joint business ventures between lawyers and nonlawyers for the providing of legal services.

40. Both the District of Columbia and North Dakota have considered a plan to allow nonlawyer participation in law firms. The North Dakota Supreme Court rejected the following bar recommendation that was designed to liberalize Model Rule 5.4 so as to allow the sharing of fees, and the formation of partnerships with nonlawyers, provided that certain ethical safeguards were maintained:

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

(1) An agreement by a lawyer with the lawyer's firm, partners, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on the profit-sharing arrangement.

(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.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(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 representa-

activities. It remains to be seen whether the organized bar can formulate workable solutions to this intractable problem, given the divergence of opinion that prevails. Regardless of what the formal bar ultimately decides, new delivery systems will continue to be forged by entrepreneurial lawyers.<sup>41</sup> To the extent that these innovative practices infringe upon traditional concepts of the nature of lawyering, new rules may be hammered out by court decisions when these practices are challenged.

Frequently, careful planning allows lawyers who engage in joint ventures with nonlawyers to traverse the ethical obstacle course unscathed. In practice, the ethical rules have proved to be mere snares for the unwary, not barriers to all ancillary business activity, and, as a result, innovative practice arrangements have continued to develop.<sup>42</sup>

There are strong arguments for the repeal of some, if not all, of the

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tive 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

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

North Dakota Rules of Professional Conduct Rule 5.4 (Proposed Draft 1986).

The District of Columbia Court of Appeals has adopted a rule permitting nonlawyers to become partners in law firms:

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

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

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

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

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

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

District of Columbia Rules of Professional Conduct Rule 5.4(a)(4), (b) (1990).

41. See *Lawline v. American Bar Ass'n*, 738 F. Supp. 288, 290 (N.D. Ill. 1990) (unincorporated association of lawyers, paralegals and lay persons that answered legal questions of the general public), *aff'd*, 956 F.2d 1378 (7th Cir. 1992); *Florida Bar v. Consolidated Business and Legal Forms, Inc.*, 386 So. 2d 797, 798-99 (Fla. 1980) (company owned entirely by nonlawyers that employed both lawyers and lay persons to deliver legal services to the general public); *Cuyahoga County Bar Ass'n v. Gold Shield, Inc.*, 369 N.E.2d 1232, 1233-34 (Ct. C.P. Ohio 1975) (group legal services plan whereby member lawyers were made available to provide legal services to subscribers of the plan).

42. See Stephanie B. Goldberg, *More than the Law: Ancillary Business Growth Continues*, 78 A.B.A. J. 54, 56 (1992) (discussing the steps law firms have taken to avoid problems including conflict checks, disclosure statements, and special retention agreements). Despite the obstacles, firms with ancillary businesses represent "a growing movement. A 1991 survey by Phyllis Weiss Haserot, president of New York's Practice Development Counsel, identified 80-85 ancillary businesses operated by law firms—up from about 65 in 1989." *Id.* at 55.

rules that govern lawyers' business relationships with nonlawyers.<sup>43</sup> Most notably, a removal of the economic restrictions resulting from the current rules could allow lawyers to compete more effectively in the free market environment of today's business world. Such changes might actually help law firms survive in the coming decades.

### C. *Experimentation in the Marketplace*

It has long been commonplace for small town lawyers to engage in ancillary business activities. These businesses have often been operated out of the same office as the law practice.<sup>44</sup> Office sharing arrangements with nonlegal businesses, where a lawyer and a nonlawyer share clients, if not fees, have also been commonplace.<sup>45</sup> In the past, professional discipline was periodically meted out against lawyers who used these arrangements to solicit clients indirectly by feeding the law practice with clients from the ancillary business.<sup>46</sup> For the most part, such practices were ignored by disciplinary officials provided that the lawyer's conduct was not egregious.<sup>47</sup>

In a small town, where there might not be enough legal work to keep lawyers busy full-time,<sup>48</sup> some relaxation of the rules against affiliations with nonlawyers has served a practical purpose. By permitting lawyers to engage in ancillary business activities and thereby supplement the income they received from their law practice, legal services have been made available to people who would otherwise not have access to a lawyer.<sup>49</sup>

In larger communities, where the competition has been greater and there has been enough legal work to sustain full-time law practices, many of the reasons that make ancillary businesses attractive in small towns do

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43. See *infra* part II.

44. See Haynsworth, *supra* note 39, at 80.

45. It would be impossible to catalogue all the different business arrangements involving small-town lawyers and providers of nonlaw services. A lawyer might own a real estate or insurance agency. A real estate law firm might own a title company or maintain an interest in a local bank. A lawyer who was also a certified public accountant might operate a joint law/accounting practice. A real estate or insurance agency, instead of being operated by the lawyer, could simply occupy a suite in the same office building, and perhaps share support staff and overhead expenses. A car ride through almost any rural county evinces the prevalence of these practices. An interesting description of the phenomenon appears in the *Litigation Section Recommendation and Report to the House of Delegates on Ancillary Business Activities of Lawyers* (1990). Although the Litigation Section opposed the idea of ancillary business generally, the Report carved out a small town exception because the practice was so entrenched. See *id.* at 3, A-7.

46. See *In re Cornelius*, 520 P.2d 76, 78-81, 86, *aff'd*, 521 P.2d 497 (Alaska 1974); *Florida Bar v. Curry*, 211 So. 2d 169, 171 (Fla.), *cert. denied*, 393 U.S. 981 (1968); *In re Depew*, 524 P.2d 163, 164-66 (Idaho 1974); *In re Miller*, 131 N.E.2d 91, 93-95, 97 (Ill. 1955).

47. See John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* 345-46, 350 (1982). The close-knit legal community in a small town could enforce informally what the formal disciplinary process ignored. Such cohesiveness is absent in more urban settings. See *id.* at 346-47, 350.

48. See Haynsworth, *supra* note 39, at 80.

49. See *id.*

not exist. Urban lawyers have tended to view attempts by their counterparts to diversify into nonlegal or law-related businesses as being a form of unfair competition. Before the ban on legal advertising was declared unconstitutional, any foray by law firms into business ventures that could generate new clients for the firm was considered unethical.<sup>50</sup> Even after the *Bates* decision,<sup>51</sup> there remained an undercurrent of feeling among lawyers that extra-legal services were unprofessional. As a result of this dichotomy between large and small communities, a regulatory scheme has been maintained despite the fact that its provisions seldom have been enforced in smaller communities.<sup>52</sup> Thus, there has been a double standard of enforcement.

Ironically, the same ethical considerations confront both the sole practitioner and the large law firm partner. Problems involving loyalty, confidentiality, and solicitation apply with equal force to the small and large firm. The only distinctions between the two lie in the economic stakes. If small firms and sole practitioners are able to engage in ancillary business activities without violating the Rules of Professional Conduct, then large firms should be able to do the same. But ethical pitfalls do exist, and arguably these are more pronounced in larger organizations. The better solution may be to regulate lawyers' conduct in the context of specific ethical issues, such as confidentiality, rather than prohibiting prophylactically an entire genre of associations.

Separate standards should not be employed for ancillary businesses operated by large and small law firms. If there are no valid reasons for prohibiting small firms from engaging in ancillary business ventures, it follows that no absolute bar should be imposed upon large firms either.

More importantly, the distinctions between sole practitioners and large firms, or between small towns and big cities, are analytically meaningless. The fact that an issue is more pressing in one setting than another does not lead to the conclusion that different rules are necessary. Although conflicts of interest may be more difficult to identify in a firm of five hundred attorneys than in a firm of five, the standard for determining when a firm should withdraw or be disqualified should not differ.<sup>53</sup>

Similarly, the distinction between law-related and nonlegal business activities should be discarded. Although the dividing line between "non-

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50. See *Birth of a Salesman*, *supra* note 23, at 1.

51. The Court in *Bates v. State Bar of Arizona*, 433 U.S. 350, 368-72 (1977), discussed "The Adverse Effect on Professionalism" as one of the arguments offered by the Bar Association in support of retaining the ban on advertising. The Court's response clearly articulates its antipathy towards the Bar's position. *Bates*, however, did not put to rest the sentiment that professionalism was under attack.

52. See *supra* note 47 and accompanying text.

53. *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975), dealt with the conflict of interest problems inherent in large law firms. Neither the Code nor the Rules mentions any special provisions applicable to lawyers practicing in large or small firms. The court in *Silver Chrysler Plymouth* does, however, acknowledge that associates in large firms may not have access to confidential information in such a manner that would later require their personal disqualification. See *id.* at 756-57.

legal" and "law-related" is obscure at best, some of the enterprises commonly referred to as law-related include real estate agencies, insurance agencies, investigation agencies, and accounting firms.<sup>54</sup>

A practicing lawyer engaged in a business venture extrinsic to the practice of law should be careful not to allow that venture or its clients to interfere with his professional responsibilities to the law practice or its clients. The lawyer must conduct her law practice according to the standards of the applicable Rules or Code, and conform her conduct outside the practice to standards of integrity and honesty.<sup>55</sup> The lawyer's business activities, as well as personal conduct, may be subject to constraints imposed by the ethical standards. This is true regardless of whether the activity is characterized as legal or law-related.

It is virtually impossible to draw a meaningful line between nonlegal and law-related activities. Although some activities could be characterized as law-related more easily than others, it is difficult to imagine any activity that could not be considered law-related under any circumstance because almost every field of human endeavor has some legal ramification. In the absence of a meaningful distinction between lawyers' responsibilities vis-à-vis nonlegal and law-related work, line drawing becomes a true exercise in futility. The rest of this Article, therefore, will not dwell on this distinction, but rather will refer to all business activities by lawyers outside of the practice of law as "nonlegal."

The most common form of ancillary business activity occurs when the lawyer or law firm owns a nonlegal business. The lawyer may or may not have partners or joint venturers for the nonlegal enterprise. The nonlegal business, moreover, may or may not operate in conjunction with the law business. In addition, advice that the lawyer gives to clients or customers of the nonlegal business will contain varying degrees of legal content and thereby subject the nonlegal business to prosecution for the unauthorized practice of law. The critical element in each situation is that the lawyer is in a position to exercise control over the policy or management of the nonlegal business.<sup>56</sup> The lawyer need not be involved in the actual management of the business, but, in any event, the lawyer's financial investment would place him in a position to exercise control.<sup>57</sup>

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54. Arguably, in the law-related scenarios the nexus between the two fields of work is close enough that clients of the law-related activity might become clients of the legal practice. In a nonlegal business, on the other hand, there is no connection with the legal business (e.g., a practicing lawyer may own a restaurant). This distinction unfortunately confuses rather than clarifies the situation.

55. See *In re Cornelius*, 520 P.2d 76, 85 (Alaska), *aff'd on reh'g*, 521 P.2d 497 (Alaska 1974).

56. Thus, mere financial investment in a company, such as the purchase of non-controlling shares of stock, would not fall within the scope of this definition.

57. The Model Rules do not prohibit lawyer investment in outside business. A law firm may own its building and rent out space in it, operate a restaurant or travel agency, or invest in all manner of unrelated businesses. Model Rule 1.8 provides:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest ad-

When a lawyer engages in a nonlegal business, various ethical issues arise in addition to the general duties of honesty and integrity. Included among these are such ethical issues as unauthorized practice, conflicts of interest, confidentiality, and solicitation. The nonlegal business presents a potential threat to the integrity of the legal profession because it exposes lawyers to an opportunity to violate their professional ethics. But, as is the case with conflicts of interest in general, a potential conflict does not necessarily require withdrawal or disqualification.<sup>58</sup>

A subset of the lawyer-owned, nonlegal business is the joint practice, where the lawyer herself is certified in another field such as accounting, real estate or medicine.<sup>59</sup> In the course of an interview with one client, the lawyer may simply change hats, or vice versa. While dual training permits a lawyer to provide a broader range of services, traditionally it was feared that a dual practice would allow lawyers to improperly funnel nonlegal clients to the law practice. As Dean Haynsworth has noted, however, many earlier restrictions against dual practice have given way

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verse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) the client consents in writing thereto.

Model Rules, *supra* note 7, Rule 1.8(a). Thus, business dealings with *clients* may be subject to discipline. The conflict involves the clients' interests, not the joint venture *per se*. The joint venture, however, is explicitly prohibited to the extent that a lawyer may not make a nonlawyer a partner in a law practice. See Model Rules, *supra* note 7, Rule 5.4(b),(d). These same rules apply when the law firm enters into a business relationship with a nonlegal business such as a title company or investigator. Other concerns, however, including conflicts, confidentiality, and improper solicitation, render the lawyer's business dealings with his clients susceptible to criticism in additional ways.

58. Perhaps the best approach is to view ancillary businesses as conflicts. The Model Code contains the clearest statement of this concept in DR 5-101(A) which states:

Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgement on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

Model Code, *supra* note 30, DR 5-101(A). The Model Rules also address outside business activities in Rule 1.7:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.

Model Rules, *supra* note 7, Rule 1.7(b). Under a conflict of interest analysis, a lawyer would be required to both ascertain whether the activity in question compromised any ethical duties to present or former clients, and obtain the affected clients' consent. See Model Rules, *supra* note 7, Rules 1.7, 1.9.

59. One of the first medical-legal law firms in the country was formed in the early 1980s, in which all the partners had both J.D. and M.D. degrees, and continued to practice their medical specialties as well as the law. See Gail Appleton, *Combining Law and Medicine*, Nat'l L.J., May 16, 1983, at 10.

to a more permissive rule.<sup>60</sup>

A variation on the joint practice theme is the office sharing arrangement, where the legal and nonlegal activities are independently owned and operated. Suppose ABC law firm shares office space with XYZ consulting group. XYZ employs a number of consultants and ABC engages primarily in business planning work. Although each entity operates under its own lease, an overlapping management team provides common support services such as word processing, reception and billing. Is it a problem if ABC and XYZ informally refer clients to each other, or if ABC utilizes consultants employed by XYZ as experts in its cases? Probably not.

In this example of an informal arrangement, the law firm may be able to avoid transgressing any of the rules that pertain to its business dealings with nonlawyers.<sup>61</sup> If, however, the law firm and consulting practice were to share fees formally, or form a partnership, the arrangement would be ethically impermissible for the lawyers.<sup>62</sup> Such a venture would subject the lawyers to disciplinary action even if the arrangement were more economically viable than the informal arrangement described above.

Suppose instead that ABC law firm holds an economic or controlling interest in the consulting group.<sup>63</sup> As long as the law firm does not violate any ethical rules, particularly those covering dealings with nonlawyers, such an arrangement would be permissible.<sup>64</sup>

Similarly, the law firm could hire the consultants as employees of the firm to do work in conjunction with the firm's cases, and could even share profits through a qualified pension or profit sharing plan.<sup>65</sup> Yet, the law firm could not give the consultants a share of its legal fees,<sup>66</sup> and arguably could not take a share of any consulting fees for services provided independently by the consultants.<sup>67</sup>

These scenarios illustrate the unusual constraints dictated by the present rules. Lawyers walk an ethical tightrope whenever they contemplate

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60. See Haynsworth, *supra* note 39, at 121.

61. See Model Rules, *supra* note 7, Rules 5.4, 5.5; Model Code, *supra* note 30, canon 3.

62. See Model Rules, *supra* note 7, Rule 5.4(a), (b); Model Code, *supra* note 30, DR 3-102(A), DR 3-103(A).

63. This example is, in fact, an ancillary business.

64. The converse, of course, would not be true because nonlawyers are prohibited from holding an economic interest in a law firm. See Model Rules, *supra* note 7, Rule 5.4(d)(1); Model Code, *supra* note 30, DR 5-107(C)(1).

65. See Model Rules, *supra* note 7, Rule 5.4(a)(3); Model Code, *supra* note 30, DR 3-102(A)(3).

66. See Model Rules, *supra* note 7, Rule 5.4(a); Model Code, *supra* note 30, DR 3-102(A).

67. See Model Rules, *supra* note 7, Rule 5.4(a); Model Code, *supra* note 30, DR 3-102(A). This particular proposition may be the subject of some debate, the counterargument being that the firm is not improperly sharing fees with the ancillary business since none of the activities of the nonlegal business involve the practice of law.

any form of multiprofessional practice, and the plight becomes more precarious when they cede power and income to nonlawyers. At the same time, sophisticated practitioners can devise ways to avoid taking an ethical fall while deriving substantially all of the benefits of a joint venture.

Looking at the situation in reverse, it is well settled that a lawyer who is employed by a nonlegal entity cannot provide any legal services to clients of that nonlegal organization.<sup>68</sup> For instance, a J.D./C.P.A. in partnership with another C.P.A. could not offer legal services to the C.P.A. firm's clients, although he could give legal advice to the accounting partnership itself. Moreover, the nonlegal organization could not own or invest in the law practice.<sup>69</sup> Furthermore, ethical rules prohibit partners in a law firm from selling their practice to a C.P.A. firm.<sup>70</sup>

In summary, under the present regulatory scheme law firms can operate subsidiaries that provide nonlegal services. Law firms, however, cannot operate in such a way that they themselves offer both legal *and* nonlegal services, except where those nonlegal services are ancillary to the practice of law. Nonlawyer ownership of or control over the delivery of legal services is generally prohibited. Thus, true multiprofessional offices remain beyond the range of feasibility, despite the fundamental appeal of the concept of holistic problem solving centers.<sup>71</sup>

A separate question related to nonlawyer participation in law firms has arisen in a sphere separate from the delivery of legal services, namely, the area of law firm management. As law firms have grown larger and more complex, lawyers have learned (sometimes the hard way) that administering the law firm interferes with practicing law. Increasingly, lawyers have employed professional managers to handle administrative responsibilities previously directed by attorneys.<sup>72</sup> Hiring nonlawyer professionals to manage the firm presents some of the same problems as hiring staff professionals to support the delivery of legal services. Law firm managers inevitably gain control over important policy decisions of the firm,<sup>73</sup> and this may constitute control over the lawyers' independent professional judgment. Professional level administrators are likely to expect financial incentives beyond straight salary, and this may be viewed as fee-

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68. See *In re Co-operative Law Co.*, 92 N.E. 15 (N.Y. 1910); Haynsworth, *supra* note 39, at 97-98.

69. See Model Rules, *supra* note 7, Rule 5.4(b), (d); Model Code, *supra* note 30, DR 3-103(A), DR 5-107(C).

70. See Model Rules, *supra* note 7, Rule 5.4(b), (d); Model Code, *supra* note 30, DR 3-103(A), DR 5-107(C).

71. If institutions could develop, bringing many professions under one roof, they could draw on the talents of individuals of varied backgrounds and "have as their mission the broader goal of problem solving." James F. Fitzpatrick, *Legal Future Shock: The Role of Large Law Firms by the End of the Century*, 64 Ind. L.J. 461, 465 (1989). Despite the fact that multiprofessional offices have been discussed for several years, the chilling effect of the ethical rules has prevented widespread experimentation with the concept.

72. See Andrews, *supra* note 13, at 628.

73. See *id.* at 629.



splitting with a nonlawyer.<sup>74</sup> Thus, the internal pressure from professional level administrative staff for more flexible compensation arrangements and greater control over decisionmaking evokes many of the same issues as the ancillary services problem.<sup>75</sup>

## II. THE CURRENT DEBATE

### A. *Business or Profession*

Despite strong arguments that professionalism and business are not contradictory concepts, many practicing lawyers have become increasingly troubled by the changes they are witnessing and experiencing in the legal marketplace.<sup>76</sup> Their disaffection has not been limited to the specific issue of lawyers in business with nonlawyers, although law practice diversification has been one of the many "evils" contributing to the perceived demise of professional standards.

Recent debates on the question of ancillary business activities have focused on whether law is a business or a profession.<sup>77</sup> Adherents to the "law is a profession" position have lamented the demise of traditional standards of ethics, civility, and public service.<sup>78</sup> They view creeping commercialism as the root of the problem.<sup>79</sup> "Law as a business"—that is, a money-making trade—is seen as the antithesis of the public service ideal upon which the legal profession was founded.<sup>80</sup>

The idea that professionalism is grounded in public service has its roots deep in the history of Anglo-American law. In the distant past when the French speaking Norman kings dispensed justice to an Anglo-

74. See *id.* at 628.

75. See *id.* at 629.

76. See Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to our System of Justice?*, 42 Fordham L. Rev. 227, 239 (1973) (if lawyers fail to maintain standards of professionalism themselves, they may lose traditional prerogatives such as self regulation); *supra* note 120 and accompanying text.

77. See Geoffrey C. Hazard, *Law's Both a Business and a Profession*, Nat'l L.J., Oct. 24, 1988, at 13.

78. See, e.g., Peter Megargee Brown, *The Quiet Revolution in the American Law Profession: Remarks Before the Commission on Professionalism of the American Bar Association*, 14 Fordham Urb. L.J. 855, 868 (1986):

The atmosphere has become that of a Baghdad flea market: the blatant touting and puffing of wares; legal gossip publications stoking the flames of the business mentality within the profession while selling law office computer equipment and marketing client-building seminars. The current barbarians may well be the newly anointed "Manager-Accountants" who run the machine. They talk earnestly about the "real world"—their world. Their creed is the printout, the computer, and the bottom line. Their caterwaul is, "nothing is forever, not clients, not partners, not anything. . . ." All this despite centuries of history.

79. See, e.g., Stanley, *supra* note 22, at 22 ("[L]awyers and law firms seem to be drifting from an attitude of professionalism toward one of commercialism.").

80. See Brown, *supra* note 78, at 867. Brown and Stanley both view the profession's trend toward a more businesslike orientation as a threat to such fundamental values as public service, loyalty to clients, and ultimately the bar's power of self regulation.

Saxon populace, it was necessary for parties to be represented by someone who could speak the language of the court.<sup>81</sup> These representatives were inevitably nobles who served out of fealty to their king. For such early advocates, service rather than profit was the reason to assume this role. English barristers today do not accept a fee, but rather receive an "honorarium" in acknowledgement of this tradition of public service.<sup>82</sup>

While public service should be considered one of the main pillars of professionalism, it is not the only one. Education, status, and power are others.<sup>83</sup> And so is money.<sup>84</sup> In the American legal profession today, there are very few individuals who come to the bar with sufficient personal resources that they do not need to receive remuneration for their work.<sup>85</sup> Furthermore, for at least the last century, legal education has been viewed as a pathway to upward mobility for generations of immigrants' children.<sup>86</sup>

It is simply a myth to say that lawyers do not work for money, or that money making is not an inherent component of professionalism. The belief that practicing law can provide a lifestyle better than that of an assembly line worker or migrant farm laborer is fundamental to many practicing lawyers.<sup>87</sup>

If part of being a professional involves making money, then the business aspects of practice are not inimical to professionalism; rather, they are inherent in it. This does not mean that making money should become the sole motivator for attorneys, or that unfettered greed should have any place in the concept of professionalism. In fact, the concept of professionalism implies a fair monetary return, as well as other privileges, in exchange for special responsibilities including public service.

It is certainly appropriate to speak of a "duty of public service" for lawyers, based upon longstanding traditions in the legal profession.<sup>88</sup> It is equally appropriate to discuss the professionalism of the business side of law, integrating the professional responsibilities of lawyers with the

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81. See 1 Frederick Pollock & Frederic W. Maitland, *The History of English Law* 85 (2d ed. 1898).

82. See Henry S. Drinker, *Legal Ethics* 169 (1953).

83. See Charles W. Wolfram, *Modern Legal Ethics* § 1.5, at 14-15 (1986).

84. See *id.* at 15.

85. In 1990, most law school graduates accepted positions with salaries ranging from \$22,800 to \$81,000. See National Ass'n for Law Placement, *Class of 1990 Employment Report and Salary Survey* 12 (1991). Although some individual graduates may possess substantial resources, and may not need to work for a living, it is improbable that this number is large.

86. See Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s*, at 74-75 (1983).

87. See Wolfram, *supra* note 83, § 1.5, at 14-15.

88. See Model Rules, *supra* note 7, Rule 6.1, urging lawyers to perform public interest legal service. The background to this section states: "Lawyers have traditionally assumed an individual obligation to provide legal services to those unable to afford them." *Id.* Rule 6.1 cmt. (citations omitted). Despite the admonition in the Rules and the tendency of many lawyers to engage in pro bono activities, an obligatory duty to provide public service has never existed in the legal profession.

right to compensation. To consider law to be either a business *or* a profession, that is, as mutually exclusive alternatives, makes no sense historically, theoretically or practically. It is time to put this red herring to rest.

The proper inquiry ought to be: When lawyers earn money from the practice of law, what limitations does professionalism place on their money-making activities? Some of the restrictions are fairly obvious—a lawyer must charge a reasonable fee;<sup>89</sup> a lawyer must segregate and account for clients' funds separate from her own;<sup>90</sup> a lawyer should engage in pro bono public service;<sup>91</sup> a lawyer may not solicit business from strangers face-to-face in an intrusive way;<sup>92</sup> a lawyer should withdraw from representing a client if his personal business interests interfere with his independent professional judgment.<sup>93</sup>

The subject of ancillary businesses operated by law firms has generated a hue and cry among many practicing lawyers who are calling for a prohibition of these new forms of association with nonlawyers. In the name of professionalism, the opponents of law firm diversification have denounced these innovative business arrangements as a threat to the traditional values of the legal profession.<sup>94</sup> This outcry is not likely to end soon. Contemporaneously, other lawyers have supported the development of such new forms of practice.<sup>95</sup> This debate will continue to pit powerful segments within both the organized and practicing bar against each other.<sup>96</sup>

Unfortunately, the rhetoric of advocacy has obscured the real issues highlighted by these new forms of practice. The opponents of diversification present a litany of horrors that *might* come to pass if law firms are allowed to go into business with nonlawyers.<sup>97</sup> Their logic seems to be that if enough bad things could occur from business entanglements with

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89. See Model Rules, *supra* note 7, Rule 1.5; Model Code, *supra* note 30, DR 2-106.

90. See Model Rules, *supra* note 7, Rule 1.5; Model Code, *supra* note 30, DR 9-102.

91. See Model Rules, *supra* note 7, Rule 6.1. There is no comparable section of the Model Code.

92. See Model Rules, *supra* note 7, Rule 7.3; Model Code, *supra* note 30, DR 2-104.

93. See Model Rules, *supra* note 7, Rule 1.7(b); Model Code, *supra* note 30, DR 5-101(A).

94. See L. Harold Levinson, *Making Society's Legal System Accessible to Society: The Lawyer's Role and Its Implications*, 41 Vand. L. Rev. 789, 791 (1988). The ABA has weathered such divisive issues as abortion and the Vietnam War, but these were external political questions. The ancillary business debate goes to the heart of lawyers' concept of themselves as professionals. The adversaries in this battle are unlikely to change their minds or their practices because of a vote of the ABA House of Delegates.

95. See Jones, *supra* note 21, at 688-92.

96. See Andrews, *supra* note 13, at 622. For example, James W. Jones, a leading advocate for more relaxed rules governing law firm affiliations, is a partner at Washington's powerful Arnold & Porter, while Dennis Block, who has lead the opposition, is a partner in New York's Weil Gotshal & Manges. This dichotomy is typical of the division within the ABA on this issue. See Randall Samborn and Marianne Lavalle, *ABA in Atlanta: Subsidiaries, Dan Quayle Dominate*, Nat'l L.J., Aug. 26, 1991, at 3, 31.

97. See *infra* note 120 and accompanying text.

nonlawyers, then all such dealings are inappropriate. By banning such business arrangements, the multitude of horrors could not take place and professionalism could be maintained.<sup>98</sup>

On the other side, proponents of diversification seem to gloss over the very real dangers that exist when law firms expand their services beyond traditional legal assistance to clients.<sup>99</sup> The reality is that potential problems involving lawyers' responsibilities to clients may present significant difficulties, but a prophylactic rule to solve the problem is overkill.

Perhaps more importantly, the real issues in this dispute are, as Professor Andrews has concluded, economic ones.<sup>100</sup> Those law firms that have resisted expanding the scope of their services are in direct competition with firms that have pursued more aggressive policies of attracting and servicing clients.

### B. *The Evolving Marketplace*

To understand this competition among firms, it is necessary to examine the evolution of large firm practice in the United States. Prior to 1970, the legal marketplace was dominated by a handful of large firms in each major city, with the largest concentration in New York City.<sup>101</sup>

During the 1970s and 1980s, these firms expanded rapidly to keep pace with the growing appetite of large corporate clients for legal services.<sup>102</sup> Between 1982 and 1987, fees for legal services increased from \$34,325,371,000 to \$66,997,543,000 (an increase of 95.2%).<sup>103</sup> Firms grew to meet the needs of their clients, and an increasing number of medium-sized firms grew into large firms operating competitively in the same market. During the 1980s, as businesses expanded, practice areas such as corporate mergers and acquisitions, and commercial real estate boomed.<sup>104</sup>

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98. See Levinson, *supra* note 94, at 805, 807.

99. "The primary objective of any lawyer should be to deliver quality work and service. The ownership of the organization where that lawyer works has nothing to do with quality or service." Thomas S. Clay, *Yes: Excellence Must Be Rewarded*, 76 A.B.A. J., May 1990, at 38, 38.

100. Professor Andrews recounts the history of the "business canons," the term that he uses to describe the ethical rules governing business associations with nonlawyers. See Andrews, *supra* note 13, at 579-600. He concludes that an important basis for these rules is economic protectionism. See *id.* at 622. Nevertheless, he argues that the rules are not subject to either constitutional or antitrust attack. See *id.* at 617-21. According to Andrews, the best prospects for changing the rules come from the states themselves, Congress, or the Federal Trade Commission. See *id.* at 656. The question of a legal challenge to these rules is addressed further in Part III of this Article.

101. See Daniel J. Cantor, *Law Firms Are Getting Bigger . . . and More Complex*, 64 A.B.A. J. 215, 215 (1978).

102. See Steven Brill, *A Boom in Premium Deal Work*, Am. Law., Jul.-Aug. 1989 (Supplement), at 6; Jones, *supra* note 21, at 687.

103. See Bureau of the Census, U.S. Dep't of Commerce, Pub. No. SC87-A-52, 1987 Census of Service Industries, table 3a at US-20 (1990).

104. See Emily Couric, *Specialties: What's Hot, What's Not*, Nat'l L.J., Feb. 3, 1986, at 1, 26-28 (hot areas identified in early 1986 include general corporate/securities, bank-

The Supreme Court's 1977 decision in *Bates v. State Bar of Arizona*<sup>105</sup> translated into more than a go-ahead for legal advertising. It meant that firms could actively market their services to prospective clients.<sup>106</sup> Long-standing professional relationships were no longer sacred. Clients had more firms from which to choose, and, thus, attorneys who actively sought clients, and who offered an array of services to attract them, had a distinct advantage in the marketplace. Conversely, firms that could not compete in this new, diversified environment fell upon hard times, and lawyers who were not "rainmakers" lost influence in their organizations.<sup>107</sup>

One approach to change that many firms found attractive was expansion into new geographical markets. One of the first mergers on a national level was between Kutak, Rock of Omaha, and Huie, Brown & Ide of Atlanta.<sup>108</sup> These two firms recognized the value of a national practice. In the ensuing years, many firms opted to establish branch offices in Washington, D.C., various state capitals, and cities where their clients had offices.<sup>109</sup> This geographical expansion placed new pressures on local firms, since clients of the out-of-town firm could utilize a branch office of their retained firm as opposed to traditional local counsel.<sup>110</sup> It is likely that the expansion of out-of-state firms into the Washington, D.C., market had a direct bearing on the decision of many D.C. firms to enter into ancillary business ventures. In addition to producing additional income for the law firms, the operation of nonlaw businesses enabled the firms to offer a wider range of services than their competitors.<sup>111</sup>

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ing and real estate); Craig Endicott, *100 Markets Diversity for Growth*, Advertising Age, Dec. 8, 1986 at S-2, S-3 ("The biggest growth area in Atlanta is commercial real estate [in 1986]."); Ellen L. Rosen, *The Large-Firm Boom Continues: A 10-year Look*, Nat'l L.J., Sept. 28, 1987, at S-2, S-26, ("Skadden's expertise in mergers and acquisitions was the 'engine driving the firm' to quadruple in size.").

105. 433 U.S. 350 (1977).

106. See Birth of a Salesman, *supra* note 23, at 12-13.

107. As competition increases and other firms develop new areas of specialization, internal tensions increase, more lawyers have less to do, and non-performers and former rainmakers get defensive. See Chris Bridge, *Proposal from Chris Bridge: Firm Leadership Must Be Confident and Committed*, Am. Law., Dec. 1990, (Pullout Management Report), at 25. When law firms merge, only those considered rainmakers—"those with a well-established client list and ability to bring in new business"—are absorbed by the new firm. Joan Vennochi, *Two Boston Law Firms Talking of a Merger*, The Boston Globe, Aug. 23, 1990, at 57.

108. See Mitchell Pacelle, *Kutak after Kutak*, Am. Law., Jan.-Feb. 1985, at 33, 103.

109. See Angel Castillo, *New York Lawyers Branching Out To Florida*, N.Y. Times, Nov. 23, 1980, § 1, at 1; Andrew W. Lehren, *Outside Firms Making Mark in Philadelphia*, Phila. Bus. J., Nov. 5, 1990, at 3B; see also Paul F. Bellows, *Branches: Key to Growth*, Nat'l L.J., Dec. 26, 1988, at S-13 (discussing growth of branch offices).

110. Law firms are becoming nationwide to better serve their clients in other parts of the country. See Fitzpatrick, *supra* note 71, at 463.

111. See *supra* note 24 and accompanying text. This was particularly significant in the legal market of Washington, D.C., where clients frequently required services that transcended the bounds of traditional law practice. It also remained true in rural areas, and became relevant in a widening circle of jurisdictions. Had ancillary business simply been

As the 1980s drew to a close, the frenzy of legal activity that characterized the decade diminished. Changes in the stock market, investment banking, and corporate takeovers chilled the corporate legal market.<sup>112</sup> This slowdown produced a ripple effect in many other areas of practice. As a result, competition among law firms intensified even more. Headlines in the legal press told the story of numerous old-line, silk-stocking firms closing, splitting up, or merging into other entities.<sup>113</sup> It would be unusual today for any large firm to escape a close introspective examination of its institutional identity, client base, and future.

Not surprisingly, in an effort to compete in this new environment, some firms chose a more conservative direction than others, and resisted expansion into nonlaw businesses. These firms have become staunch opponents of diversification, and vice versa.<sup>114</sup> If the debate were simply which approach is most economically efficient, we could leave it to free market forces. The debate, however, now implicates the propriety of lawyers' conduct and calls into question the fundamental requirements of professionalism. Hence, it becomes necessary to explore the two positions.

### C. *The Law Firm Diversification Battle*

The advent of the diversification movement was heralded as early as 1980, with a report of the American Bar Association Commission on Professional Standards, also known as the Kutak Commission.<sup>115</sup> The discussion draft of the proposed Model Rules of Professional Conduct recommended the adoption of Rule 7.5.<sup>116</sup> The Kutak Commission's

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a D.C. concern, it is unlikely the issue would have engendered the national acrimony that it has. See *supra* text accompanying notes 26-27.

112. See Michael Bradley, *The Party's Over*, Phila. Bus. J., Jan. 7, 1991, § 1, at 1 ("Those in the mergers and acquisitions business are working harder on fewer transactions."); Jones, *supra* note 21, at 684-86; Michael Quint, *The Dicey Future at Chase Manhattan*, N.Y. Times, July 1, 1990, § 3, at 1, 6 ("More recently, the big banks have been set back by the drop in the commercial real estate market and a sharp slowdown in the very profitable, albeit risky, business of financing mergers and acquisitions.").

113. See Stephen Labaton, *Old-Line Law Firm Agrees to Biggest New York Merger*, N.Y. Times, Feb. 19, 1988, at A1; Dana Leonard, *Howdy, Partner: Arizona Law Firms Join National Trend, Catch Case of Mergermania*, Ariz. Bus. Gazette, Jan. 2, 1989, § 2, at 1; David Margolick, *Prestigious Law Firm on Wall Street to Split*, N.Y. Times, Mar. 6, 1982, § 2, at 27.

114. It may sound cynical to assert that the philosophical positions of the adherents followed the economic ones, but a review of the support for the opposing positions in the ancillary business debate suggests that this is the case. It would be naive to suggest that Dennis Block and Justin Stanley, leading opponents of diversification, are not as economically vested in the outcome of the issue as James Jones, the leading proponent. Their firms have cast their lot with a narrow definition of law practice that precludes diversification into nonlegal areas. If they lose the political battle, the economic war may be decided as well.

115. The "Kutak Commission" was the nickname for the ABA Comm'n on Evaluation of Professional Standards, named for its chairman, Robert J. Kutak. See Andrews, *supra* note 13, at 593.

116. The proposed rule permitted nonlawyers to maintain an interest in a law firm

proposal represented a much more liberal view of business affiliations between lawyers and nonlawyers than was contemplated under the existing Code of Professional Responsibility.<sup>117</sup> In the initial skirmish, supporters of the traditional rules prohibiting lawyers from becoming entangled with nonlegal entities successfully prevented the adoption of proposed Rule 7.5.<sup>118</sup> The ABA Model Rules as finally adopted continued the Code's blanket prohibitions against business arrangements with nonlawyers.

The first real salvo of the present battle was sounded in 1986 by another ABA commission, the Commission on Professionalism (or the Stanley Commission, as it was called, in recognition of its chair, former ABA President Justin Stanley).<sup>119</sup> The report of the Stanley Commission addressed a number of issues suggesting that there had been a decline in professionalism among lawyers. On the issue of ancillary businesses, the Commission wrote:

The Commission has been disturbed by what it perceives to be an increasing participation by lawyers in business activities. The activities take several forms. . . .

It seems clear to the Commission that the greater the participation by lawyers in activities other than the practice of law, the less likely it is that the lawyer can capably discharge the obligations which our profession demands. The Commission views the trend as disturbing and urges the American Bar Association to initiate a study to see what, if any, controls or prohibitions should be imposed.<sup>120</sup>

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provided that the firm upheld specific ethical requirements. The proposed rule read as follows:

A lawyer shall not practice with a firm in which an interest is owned or managerial authority is exercised by a nonlawyer, unless services can be rendered in conformity with the Rules of Professional Conduct. The terms of the relationship shall expressly provide that:

- (a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (b) the confidences of clients are protected as required by Rule 1.7; and
- (c) the arrangement does not involve advertising or solicitation prohibited by Rules 9.2 and 9.3 [presently Rules 7.2 and 7.3 respectively]; and
- (d) the arrangement does not result in charging a client a fee which violates Rule 1.6 [presently Rule 1.5].

Model Rules of Professional Conduct Rule 7.5 (Discussion Draft 1980). This formula is very similar to the one rejected in North Dakota. *See supra* note 40.

117. The "Kutak Commission" spent five years reformulating the prior Model Code. Its proposed Rule 7.5 held a very different view on associations between lawyers and nonlawyers than the Code.

118. This proposed rule was successfully opposed based on several objections: the proposal would permit Sears, Montgomery Ward, H&R Block, or the big eight accounting firms to open offices in competition with traditional law firms; nonlawyer ownership would interfere with a lawyer's professional independence; nonlawyer ownership would destroy a lawyer's ability to be a professional; and it would have a fundamental but unknown effect on the legal profession. *See Andrews, supra* note 13, at 595.

119. *See American Bar Ass'n Comm'n on Professionalism, " . . . In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism (1986).*

120. *Id.* at 30-31.

Since a number of major law firms were already experimenting with ancillary businesses, being told that they were not professional did not sit well at all. In fact, the District of Columbia Bar Association disregarded the Stanley Commission's report and adopted amendments to its Rules of Professional Conduct that allowed nonlawyers to become partners with lawyers in law firms.<sup>121</sup>

Meanwhile, the Stanley Commission Report led to the creation of a Special Coordinating Committee on Professionalism whose mission was to consider, among other things, business affiliations between lawyers and nonlawyers. The Professionalism Committee conducted hearings, published a newsletter,<sup>122</sup> and discussed the issue. The general consensus of this bipartisan group was that law firm diversification should be regulated but not prohibited outright.<sup>123</sup> A minority report by Dennis Block of the Litigation Section took the opposite position that ancillary business should be prohibited as contrary to the tenets of professionalism.<sup>124</sup> The minority view was presented to the ABA House of Delegates in a separate report from the Litigation Section Committee on Ancillary Business.<sup>125</sup>

The House of Delegates declined to adopt the Litigation Section's recommendations.<sup>126</sup> Instead, in August 1990, it referred the question to the Standing Committee on Ethics and Professional Responsibility.<sup>127</sup> The Ethics Committee, after holding hearings and receiving written comments, issued a draft proposal for a new Model Rule 5.7 that recognized ancillary business activities, and attempted to clarify the ethical obligations of lawyers who engage in such ventures.<sup>128</sup> Failing to address the issues of fee splitting or nonlawyer partnerships, the proposal simply pro-

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121. *See supra* note 40 and accompanying text.

122. *See, e.g.*, The Professional Lawyer (Special Coordinating Committee on Professionalism, American Bar Ass'n Center for Professional Responsibility) Summer 1989 (newsletter).

123. *See* Working Group On Ancillary Business Activities Interim Report to the ABA Special Coordinating Committee On Professionalism 1 (1990).

124. *See* American Bar Association Litigation Section Recommendation And Report To The House Of Delegates On Ancillary Business Activities Of Lawyers 1, appendix (1989) (minority report by Dennis J. Block).

125. *See id.* This effort was also lead by Dennis Block, who perhaps concluded that it would be a better strategy to take the offensive through a section resolution, rather than wait for his adversaries to act.

126. *See* Summary Of Action Taken By The House Of Delegates Of The American Bar Association: 1990 Midyear Meeting 7-8 (1990).

127. *See* American Bar Association Standing Committee On Ethics And Professional Responsibility: Special Coordinating Committee On Professionalism Report To The House of Delegates 11 (1990).

128. The final text of the proposal after much tinkering was as follows:

(a) A lawyer who provides, or whose law firm provides, representation to clients, and who is also associated, or whose law firm is also associated, with an ancillary business entity:

(1) shall initially disclose in writing to all customers of the ancillary business entity the nature of the relationship between the lawyer or law firm and the ancillary business entity; and



vided that lawyers could operate ancillary businesses (which most observers conceded could be done already), but fell short of permitting nonlawyer investment in legal services. Under the proposal, a firm could operate an ancillary consulting firm or hire consultants to serve as salaried employees of the firm, but it could not name the consultants as partners in the firm or share fees with them other than indirectly through a qualified compensation plan.<sup>129</sup> The proposal thus accomplished an anomalous result. While the economic interests of lawyers were protected, no protection was afforded to the economic interests of nonlawyer consultants, who were prevented from maximizing the value of their

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(2) shall treat a customer of the ancillary business entity in all respects as a client under the Rules of Professional Conduct, unless:

(i) the ancillary service is unrelated to any matter in which representation is provided by the lawyer or the law firm to the customer as a client of the lawyer or law firm; and

(ii) the lawyer or law firm directly or through the ancillary business entity, has first clearly communicated to that customer by means including written disclosure, that the relationship between the ancillary business entity and the customer is that of non-legal business and customer, not that of lawyer and client.

(b) In the circumstances in which a customer of an ancillary business entity is required to be treated as a client pursuant to paragraph (a) (2):

(1) a lawyer who is a partner in the law firm associated with the ancillary business entity shall make reasonable efforts to ensure that the entity has in effect measures giving reasonable assurance that the conduct with respect to that customer of all those employed or retained by or associated with the entity conforms to the Rules of Professional Conduct;

(2) a practicing lawyer associated with the ancillary business entity who has direct supervisory authority over persons employed or retained by or associated with the entity shall make reasonable efforts to assure that their conduct with respect to that customer is compatible with the professional obligations of the lawyer;

(3) a practicing lawyer associated with the ancillary business entity shall be responsible for conduct with respect to that customer of a person employed or retained by or associated with the entity that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer and if:

(i) the lawyer orders or, with knowledge of the relevant facts and the specific conduct, ratifies the conduct involved; or

(ii) the lawyer is a partner in a law firm associated with that entity 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 remedial action; and

(4) if the lawyer reasonably should know that the ancillary business entity is not complying with any obligation imposed by the Rules of Professional Conduct with respect to the provision of ancillary services to such customers, the lawyer shall dissociate from the entity unless the entity immediately rectifies the situation.

American Bar Association Standing Committee On Ethics And Professional Responsibility: Recommendation And Report To The House Of Delegates 3-4 (1991) (Proposed Model Rule 5.7).

129. See *supra* note 128 and accompanying text. The limits of this provision in regard to the inclusion of nonlawyers in pension or compensation plans has not been fully explored. See Model Rules, *supra* note 7, Rule 5.4(a)(3); Model Code, *supra* note 30, DR 3-102(A)(3). A firm arguably could avoid the restriction on fee splitting imposed by Rule 5.4, by making profit based payments through the compensation or retirement plan.

services in the marketplace if they wished to engage in joint ventures with lawyers.

The Ethics Committee Report argued that three basic ethical issues are involved: confidentiality, conflicts of interest, and interference with the lawyer's independent professional judgment.<sup>130</sup> The Committee did not suggest that one of the problems was improper solicitation. To have done so might have subjected the proposal to the criticism that it was merely concerned with economics. Alternatively, the Committee may have concluded that Rules 7.1, 7.2, and 7.3 were sufficient to protect against improper solicitation through a nonlawyer affiliate.<sup>131</sup> The Committee failed to explain why other ethical rules were insufficient to cover the remaining ethical issues.

Not surprisingly, this report did not satisfy either side in the debate.<sup>132</sup> Some of those who supported the ancillary business concept may have felt that the proposal created an abstruse web of restrictions that simply rephrased the existing rules without broadening the range of permissible ancillary business activities, thereby obfuscating the issue. Opponents may have objected to the proposal's tacit acceptance of the concept of ancillary businesses and its failure to address problems involving conflicts, confidentiality and confusion.

The Litigation Section offered an alternative proposal prohibiting law firms from offering ancillary services, in whatever form, to anyone not already a client of the firm.<sup>133</sup> That rule would effectively close the door to most external ancillary businesses, and severely restrict in-house provision of ancillary services.

Both sides characterized their dispute as a choice between regulation and prohibition.<sup>134</sup> In one of the closest and most controversial votes in the ABA in recent years, the House of Delegates, after rejecting the Ethics Committee proposal, adopted the Litigation Section rule by a vote of 197 to 186.<sup>135</sup> After the vote, the winners hailed the victory as a significant one, while advocates of diversification minimized the potential im-

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130. See American Bar Association Standing Committee On Ethics And Professional Responsibility: Report To The House Of Delegates 14 (1991) (summarizing the Ethics Committee's study of lawyers' ancillary business activities).

131. See *id.*

132. See *id.* (Minority Report Of Ralph G. Elliot, Minority Report Of William C. McClearn).

133. See American Bar Association Litigation Section Recommendation And Report To The House Of Delegates 1-2 (1991). Most significantly, the 1991 version differed from the earlier Litigation Section proposal by dropping the so-called solo-practitioner exception which had allowed individual practitioners to operate ancillary businesses. See American Bar Association Litigation Section Recommendation And Report To The House Of Delegates 2 (1990). The exception had been criticized as an inconsistency that illustrated the inappropriateness of a prophylactic rule. See *supra* note 44 and accompanying text.

134. See Bureau of Nat'l Affairs, *ABA Rejects Ancillary Business, Inroads on Client Confidences*, 60 U.S.L.W. 2121, 2122 (Aug. 20, 1991).

135. See *id.*

pact of the decision.<sup>136</sup>

In August 1992, the ABA House of Delegates, by a seven vote margin, repealed Model Rule 5.7<sup>137</sup> before any jurisdiction had adopted it. It remains to be seen what effect this vacillation will have. Some states may yet adopt some variation of Rule 5.7 while others may fashion more liberal rules along the lines of Washington D.C. Still others may retain the status quo. Such a scenario would only further confuse the issue because the standards adopted by the states would not be uniform.<sup>138</sup>

In an era of increasing multijurisdictional practice, a proliferation of standards would produce serious problems. A law firm with offices in several different states might face conflicting ethical obligations imposed by different jurisdictions.<sup>139</sup> Clients may be confused as to how they should obtain ancillary services. If this long battle over diversification continues, as it probably will, the ABA's legitimacy as a voice for the legal profession on ethical issues may be seriously eroded.<sup>140</sup>

### III. THE LEGAL ISSUES

Beyond the question of whether the rules should be changed is the more fundamental issue of whether they must be changed. An examination of case law involving the bar's regulatory powers demonstrates that these rules cannot pass judicial muster. To understand this failure, it is necessary to consider the interrelationship of a number of court decisions involving lawyers in the areas of federal antitrust law and the First Amendment.

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136. These lawyers seem just as committed to continuing the fight as their opponents. The losers in the August shootout, lead by the Real Property Section, introduced a resolution to rescind the House action on ancillary business activities at the Association's 1992 midyear meeting in Dallas. In Dallas, the resolution was withdrawn with a promise that it would be presented at the next annual meeting in San Francisco, in August, 1992.

137. See Randall Samborn & Victoria Slind-Flor, *ABA '92: Feminism is Theme*, Nat'l L.J., Aug. 24, 1992, at 1, 34.

138. In 1990, the ABA General Practice Section pushed through a rule that permits the sale of a law practice. See Model Rules, *supra* note 7, Rule 1.17. Because this rule has not been added to state Rules of Professional Conduct, it has no authority and little persuasive power. If anything, it adds confusion in regard to the application of the Model Rules to actual practice.

139. In the case of the District of Columbia, passage of D.C. Rule 5.4(b), which permits nonlawyer partners, raises interesting conflict of laws questions. Will a lawyer, who is licensed in a state that does not allow nonlawyer partners, and practices as a partner in a District of Columbia firm with a nonlawyer partner, be disciplined for violating state Rule 5.4? Such a possibility is very real.

140. Although most jurisdictions have adopted the Model Rules, often subject to their own variations, no mechanism exists for grafting amendments to the Model Rules on to the state Rules. Thus, model rules such as Rule 1.17 may remain mere models unless they are adopted by the individual states. This departure from a uniform standard undermines the overall persuasiveness of the Model Rules and erodes the development of a national standard for ethical practice.

A. *Antitrust Considerations*

The question of whether the rules restricting associations with nonlawyers violate federal antitrust laws is not a simple one. The Sherman Anti-Trust Act prohibits business combinations that restrict free trade, fix prices, or conspire to limit control of a business or industry to certain members of society.<sup>141</sup> The Act was originally intended to break up monopolistic business organizations that had evolved during the latter half of the nineteenth century.<sup>142</sup> Over the years, the Act has been utilized as a weapon to prevent big business from squeezing out smaller competitors.<sup>143</sup> Activities by any organization, group of organizations, or individuals that promote monopolistic practices are subject to regulation under the Act.<sup>144</sup>

Conversely, the state has the power to restrict trade, grant monopolies and authorize business combinations that would otherwise be illegal. In *Parker v. Brown*,<sup>145</sup> the Supreme Court recognized a state action exemption to the coverage of the Sherman Act.<sup>146</sup> In *Parker*, farmers challenged a state regulatory program governing the production and marketing of farm crops.<sup>147</sup> The Court held that the Sherman Act was not intended to restrict state action in areas of legitimate state interest.<sup>148</sup> It should be noted that the Court has not refused the states the right to grant certain monopolies, including the exclusive right to practice law,<sup>149</sup> teach,<sup>150</sup> or grant degrees.<sup>151</sup> While there may be limits on a state's regulatory power, it is essential for an ordered society that the state have power to make such regulatory decisions.<sup>152</sup>

This principle was tested in a case involving the legal profession, *Gold-*

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141. Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1988).

142. See Thomas V. Vakerics, *Antitrust Basics* § 1.01 (Rel. 8 1992) ("The basic premise of the Sherman Act is that unrestrained competition will result in the most favorable allocation of economic resources and the lowest prices possible for a variety of goods and services."); see also *United States v. Aluminum Co. of America*, 148 F.2d 416, 428 (2d Cir. 1945) ("[A]mong the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them.").

143. See *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

144. See *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946); *Aluminum Co.*, 148 F.2d at 428-29.

145. 317 U.S. 341 (1943).

146. See *id.* at 361.

147. See *id.* at 348-49.

148. See *id.* at 350-51.

149. See *In re Pitchford*, 581 S.W.2d 321, 323 (Ark.), *cert. denied*, 444 U.S. 863 (1979); *Brown v. Wood*, 516 S.W.2d 98, 99-100 (Ark. 1974), *cert. denied*, 421 U.S. 963 (1975).

150. See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Ex rel. Charles*, 504 N.E.2d 592, 600 (Mass. 1987); *Minnesota v. Newstrom*, 371 N.W.2d 525, 527-28 (Minn. 1985) (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925)).

151. See *Nova University v. Board of Governors*, 287 S.E.2d 872, 882 (N.C. 1982).

152. The question of when the government should regulate or deregulate an industry, although interesting and timely, is beyond the scope of this Article. It will be assumed for purposes of this discussion that some intrusion into the affairs of the legal profession implicates legitimate state interests.

*farb v. Virginia State Bar*,<sup>153</sup> where two home buyers, who were themselves lawyers, sought to overturn the state bar's minimum fee schedule after they discovered that every lawyer they contacted about settlement on their new home quoted an identical price.<sup>154</sup> At the time, most state bars, including Virginia's, published minimum fee schedules.<sup>155</sup> Any deviation from this schedule could subject a lawyer to discipline. The rationale underlying these minimum fee schedules was the protection of the public. It was argued that by maintaining price stability and preventing cut-rate practices, the bar could better provide professional services to clients.<sup>156</sup> In 1975, when *Goldfarb* was decided, there was a blanket prohibition against advertising by lawyers as well.<sup>157</sup> As a result, the minimum fee schedule was frequently the only information available to clients about the cost of legal services.<sup>158</sup>

In deciding *Goldfarb*, the Court recognized the hybrid nature of a bar association. On the one hand, the bar can stand in the shoes of the sovereign, participating in such activities as licensure, discipline, and regulation of lawyer conduct under grant of authority from the legislature and/or the courts.<sup>159</sup> On the other hand, the bar can act like a trade association, promoting the parochial interests of its members, lobbying for favorable legislation, providing social activities, and affording individual lawyers a representative organization through which they could voice their opinions as a group.<sup>160</sup>

*Goldfarb* suggests that whenever the bar exceeds the scope of its sovereign capacity, it is merely a trade association, and as such, is not exempt from the application of the Sherman Act.<sup>161</sup> It cannot hide behind the

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153. 421 U.S. 773 (1975).

154. See *id.* at 775-78.

155. Before *Goldfarb*, over one-half of the state bar associations had promulgated minimum fee schedules. See John S. Dzienkowski, *The Regulation of the American Legal Profession and Its Reform*, 68 Tex L. Rev. 451, 467 n.123 (1989) (reviewing Richard L. Abel, *American Lawyers* (1989)).

156. See *Goldfarb*, 421 U.S. at 781. Under the prevailing paternalistic view of lawyering, clients were presumed to be so unsophisticated that they could not appreciate the value of legal services, and in the absence of fee schedules could be victimized by unscrupulous lawyers.

157. See Model Code, *supra* note 30, DR 2-101.

158. The author recalls taking a course in Professional Responsibility as a student in 1972, during which the professor brought to class a box of minimum fee schedules and told his students that they should charge exactly what the schedules said in order to stay out of trouble with the grievance committee. This instruction rendered the topic of legal fees rather easy to master.

159. See *Goldfarb*, 421 U.S. at 791. The Virginia State Bar in *Goldfarb* was a voluntary association. Even though its minimum fee schedule could be used as a basis for disciplining lawyers under the state's Code of Professional Responsibility, the promulgation of the fee schedule did not constitute state action under the *Parker* doctrine. See *id.* at 788-92. Apparently the critical distinction is between sovereign acts and non-sovereign policies aimed at influencing lawyers' conduct, rather than the distinction between a voluntary or integrated bar.

160. See *id.* at 791-92.

161. See *id.*

protection of the state action exemption to the Sherman Act merely because of its status as a bar association, nor can it transform an action of the association into state action merely by labeling it as such.<sup>162</sup>

Two years after *Goldfarb*, the Court addressed the question of advertising by lawyers in *Bates v. State Bar of Arizona*.<sup>163</sup> It was argued in *Bates* that the same reasoning governing the *Goldfarb* decision should apply to the ban on advertising, i.e., that the bar association was simply acting as a trade association, and the ban on advertising constituted an illegal restraint of trade under the Sherman Act.<sup>164</sup> The Court, however, concluded that the power to regulate advertising was state action protected under *Parker v. Brown*.<sup>165</sup> Because the Code of Professional Responsibility was promulgated by the Arizona Supreme Court and not the bar association, as had been the case in *Goldfarb*, the ban on advertising constituted an exercise of the state's sovereign power, and therefore was excluded from the scope of the Sherman Act by the *Parker* doctrine.<sup>166</sup> Limitations on the extent of the state's power to regulate advertising derived instead from commercial speech principles under the First Amendment.<sup>167</sup>

Since the *Bates* decision, commentators have uncritically accepted the notion that any challenge to a state's ethical rules based on the Sherman Act must fail.<sup>168</sup> It may be time to review this assumption again.

*Bates* and *Goldfarb* present two different results distinguishable by the fact that in *Bates* the challenged regulation was promulgated by the Arizona Supreme Court, while in *Goldfarb* the minimum fee schedule was established by a bar association. Under the *Bates* reasoning, it would seem to follow that a minimum fee schedule adopted by the Supreme Court would be exempt from the Sherman Act under *Parker v. Brown*. Conversely, an ethical rule that is unilaterally adopted by a state bar association which prohibits the advertising of legal services could be challenged on the grounds that it is anticompetitive.

The latter position is exactly the one in which doctors, dentists, and

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162. *See id.*

163. 433 U.S. 350 (1977).

164. *See id.* at 359.

165. *See id.*

166. *See id.* at 360. Although the Court in *Goldfarb* declined to rely on the constitutional protection of the First Amendment as the basis for its decision, it accomplished the same result under the Sherman Act. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-92 (1975). In *Goldfarb*, the bar association's minimum fee schedule was thrown out in part because it deprived the Goldfarbs of their opportunity to select an attorney of their choice. *See id.* at 785. This is arguably a question of freedom of association implicating First Amendment rights. Thus, both *Goldfarb* and *Bates* contain antitrust and constitutional elements, although the Court decides the two cases under different theories.

167. *See Bates*, 433 U.S. at 365; *infra* part III.B.2.

168. *See Andrews*, *supra* note 13, at 656. The Federal Trade Commission may have reached the same conclusion when it decided not to proceed against lawyers as it has against other professionals.

other professionals find themselves. In a series of cases, the courts have struck down regulations relative to fees and external relationships. The Federal Trade Commission has prosecuted these cases aggressively on the ground that the practices are anticompetitive, and therefore violate the Sherman Act. At the same time, the F.T.C. has declined to pursue similar actions against lawyers primarily because of the limitations imposed by *Parker v. Brown*.

In *American Medical Ass'n v. Federal Trade Commission*,<sup>169</sup> the Second Circuit upheld a Federal Trade Commission order requiring the A.M.A. to cease and desist from promulgating, implementing and enforcing restrictions on advertising and the solicitation of services by physicians. This determination also extended to contractual arrangements between physicians and nonphysicians.<sup>170</sup> The A.M.A. case represented the culmination of a protracted effort by the F.T.C. to change A.M.A. policy.

While *American Medical Ass'n v. F.T.C.* dealt with the question of whether the A.M.A. had acted in concert to effectuate restraints on trade, *Wilk v. American Medical Ass'n*<sup>171</sup> concerned actual victims of anticompetitive policies. *Wilk* involved a suit brought by chiropractors against the American Medical Association charging that the "defendants engaged in a conspiracy to eliminate the chiropractic profession by refusing to deal with the plaintiffs and other chiropractors."<sup>172</sup> Principle 3 of the A.M.A.'s Principles of Medical Ethics provided that "[a] physician should practice a method of healing founded on a scientific basis; and he should not voluntarily professionally associate with anyone who violates this principle."<sup>173</sup> The plaintiffs contended that "the AMA used Principle 3 to achieve a boycott of chiropractors by first calling chiropractors 'unscientific practitioners,' and then advising AMA members and other medical societies that it was unethical . . . to associate with chiropractors."<sup>174</sup> In rejecting the A.M.A. position, the court held "that the AMA and its members engaged in a group boycott or conspiracy against chiropractors"<sup>175</sup> in violation of the Sherman Act.

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169. 638 F.2d 443 (2d Cir. 1980). This case may be contrasted with *United States v. Oregon State Medical Society*, 343 U.S. 326, 339 (1952) (government failed to prove that the defendant physicians concertedly refused to deal with the private health associations).

170. See *American Medical Ass'n v. Federal Trade Comm'n*, 638 F.2d 443, 447 (2d Cir. 1980).

171. 671 F. Supp. 1465 (N.D. Ill. 1987), *aff'd*, 895 F.2d 358 (7th Cir.), *cert. denied*, 496 U.S. 927 (1990). This case was on remand from the Seventh Circuit's decision in *Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983), which had reversed the trial court's original decision in favor of the A.M.A.

172. *Wilk*, 671 F. Supp. at 1470.

173. *Id.*

174. *Id.*

175. *Id.* at 1477. The A.M.A. argued that the considerable body of evidence introduced by the plaintiffs was insufficient to establish that the group boycott was an unreasonable restraint of trade, because the plaintiffs failed to demonstrate an impact on price and output. See *id.* at 1479 (citing *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); Philip Areeda, *The Rule of Reason—A Catechism on Competition*, 55 Antitrust

The court in *Wilk* used a rule of reason analysis in finding that the actions of the A.M.A. were unlawful.<sup>176</sup> Under the rule of reason, the court considers the effect upon competition produced by the restraint of trade. Where the restraint is unreasonable in light of the effects produced, the restraint will be invalidated.<sup>177</sup> An analysis of the market power of the group engaged in the restraint is frequently utilized by the court in determining the reasonableness of the restraint.<sup>178</sup> Thus, in *Wilk*, the court rejected the A.M.A.'s contention that evidence indicating adverse effects, rather than a specific impact on price and output, was insufficient to establish market power.

The treatment of group boycotts involving professional associations was addressed in *Federal Trade Commission v. Indiana Federation of Dentists*,<sup>179</sup> cited in *Wilk*. In *Indiana Federation of Dentists*, dentists and dental societies, objecting to health insurers' requests for x-rays for review purposes, collectively agreed to withhold the x-rays from the insurers. Justice White, writing for a unanimous Supreme Court, stated:

A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services . . . . Absent some countervailing procompetitive virtue . . . such an agreement limiting consumer choice . . . cannot be sustained under the Rule of Reason.<sup>180</sup>

The court explained its application of the rule of reason rather than a *per se* analysis:

Although this Court has in the past stated that group boycotts are unlawful *per se*, we decline to resolve this case by forcing the Federation's policy into the "boycott" pigeonhole and invoking the *per se* rule. . . . [T]he category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor—a situation obviously not present here. Moreover, we have been slow to condemn rules adopted by professional associations as unreasonable *per se*, see *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), and, in general, to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately ob-

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L.J. 571 (1986)). A group boycott is an action by members of one group to refrain from using the products or services of another group. Here, the court found that "[i]f there is actual proof of adverse effects, then the plaintiffs need not prove market definition and market power." *Id.* at 1479.

176. See *id.* at 1477. The other approach is a *per se* analysis, described *infra*, at note 181 and accompanying text.

177. See Lawrence A. Sullivan, Handbook of the Law of Antitrust § 68 (1977).

178. See *id.* § 69.

179. 476 U.S. 447 (1986).

180. *Id.* at 459.



vious. Thus, as did the FTC, we evaluate the restraint at issue in this case under the Rule of Reason rather than a rule of *per se* illegality.<sup>181</sup>

Thus, it appears that the rule of reason approach will generally be followed where a professional association engages in a group boycott.<sup>182</sup> One recent case, *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*,<sup>183</sup> however, provides an exception to this trend. In a decision that has been criticized,<sup>184</sup> the Supreme Court applied a *per se* analysis to find that the association's group boycott constituted an undue restraint of trade.<sup>185</sup> Likewise, in *Arizona v. Maricopa County Medical Society*,<sup>186</sup> the Supreme Court held that the maximum-fee price fixing agreements of a county medical society constituted a *per se* violation of the Sherman Act.

While price fixing and other manifestly anticompetitive conduct may trigger a *per se* analysis, *Kreuzer v. American Academy of Periodontology*<sup>187</sup> illustrates the more typical judicial response to a group boycott by a professional association. In *Kreuzer*, the defendant association promulgated "limited practice requirements" that required members to restrict their practice to periodontics.<sup>188</sup> Because he refused to follow these requirements, Dr. Kreuzer was excluded from membership in the A.A.P. and denied access to patients.<sup>189</sup> The District of Columbia Circuit refused to apply a *per se* rule, and instead relied on the rule of reason. The court noted that:

Group boycotts serve a variety of objectives. The classic group boycott is a concerted attempt by a group of competitors at one level of competition to insulate themselves from competition from nongroup members who seek to compete at that same level. Typically, the boycotting group combines to deprive would-be competitors of a trade relationship which they need in order to enter the level of competition at which the group operates.<sup>190</sup>

Recognizing that noneconomic motives, such as patient care, may contribute to the challenged policy, the court held: "When the economic self-interest of the boycotting group and its proffered justifications merge

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181. *Id.* at 458-59 (citations omitted).

182. *See* *Wilk v. American Medical Ass'n*, 671 F. Supp. 1465, 1479 (N.D. Ill. 1987), *aff'd*, 895 F.2d 358 (7th Cir.), *cert. denied*, 496 U.S. 927 (1990).

183. 493 U.S. 411 (1990). In this case, lawyers who had regularly accepted court appointments in criminal cases refused their appointments until the District of Columbia Council increased their compensation. This case also illustrates how quickly lawyer groups will be charged under the Sherman Act when they are not cloaked in the protective mantle of the holding of *Parker v. Brown*, 317 U.S. 341 (1943).

184. *See* Diane E. Pierson, Casenote, *Antitrust Analysis in Uncertain Times: FTC v. Superior Court Trial Lawyers Association*, 24 Creighton L. Rev. 125, 153 (1990).

185. *See* *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 428-36 (1990).

186. 457 U.S. 332, 354-57 (1982).

187. 735 F.2d 1479 (D.C. Cir. 1984).

188. *See id.* at 1483.

189. *See id.* at 1493.

190. *Id.* (citation omitted).

the rule of reason will seldom be satisfied. When, however, the justification for the boycott is closely related to a lawful purpose the rule of reason will generally be satisfied.”<sup>191</sup> The court went on to say that “even if evidence existed in the record to support the asserted justification . . . it must be shown that the means chosen to achieve that end are the least restrictive available.”<sup>192</sup>

The medical antitrust cases do not stand alone. In cases involving other occupations, the courts have found violations of the Sherman Act in instances where professional rules prohibited business affiliations outside the profession.<sup>193</sup> The policies implicated in these cases are analogous to those applicable when lawyers exclude nonlawyers from certain practice arrangements. The rules prohibiting lawyers from entering into business ventures ancillary to the practice of law operate as a group boycott excluding nonlawyers from competing at the same level of competition as lawyers. There are arguably legitimate motives for the rules—to enhance professionalism, protect clients and ensure ethical practices. The rules are also economically motivated. It suffices to say that the bar has sufficient market power to restrain competition. In the absence of state action immunity, a challenge to these practices would most likely result in a finding of a Sherman Act violation under a rule of reason analysis.

The only case that has tackled this question using an antitrust analysis is *Lawline v. American Bar Ass’n*.<sup>194</sup> In *Lawline*, an organization of lawyers and nonlawyers challenged ABA Model Code provisions enacted by the Illinois Supreme Court that prohibited lawyers from forming partnerships with nonlawyers.<sup>195</sup> The court applied the Noerr-Pennington doctrine,<sup>196</sup> under which private associations will not violate the antitrust laws if they organize to persuade a governmental body to enact legislation that would produce a restraint of trade.<sup>197</sup> In *Lawline*, the ABA argued successfully that its attempts to persuade state supreme courts to adopt its “model” code fell within the Noerr-Pennington doctrine.<sup>198</sup> The defendant state officials, courts and bar associations were held to be

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191. *Id.* at 1494.

192. *Id.* at 1494-95.

193. See *National Soc’y of Professional Engineers v. United States*, 435 U.S. 679, 693-96 (1978); *Mardirosian v. American Inst. of Architects*, 474 F. Supp. 628, 638 (D.C. Cir. 1979); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183-85 (D.C. Cir. 1978).

194. 738 F. Supp. 288 (N.D. Ill. 1990), *aff’d*, 956 F.2d 1378 (7th Cir. 1992).

195. 738 F. Supp. at 291.

196. See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

197. Although a group boycott may be protected under the First Amendment, purely economic activities may result in violation of the Sherman Act. See *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301, 1309 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

198. See *Lawline v. American Bar Ass’n*, 738 F. Supp. 288, 292 (N.D. Ill. 1990), *aff’d*, 956 F.2d 1378 (7th Cir. 1992).

immune from antitrust liability under *Parker v. Brown*.<sup>199</sup>

In *Hoover v. Ronwin*<sup>200</sup> the Supreme Court took a closer look at the immunity of bar officials under the *Parker* state action exemption. *Hoover* was an Arizona case concerning a state bar examiners' decision to deny admission to a prospective attorney who failed the Arizona bar examination.<sup>201</sup> The applicant alleged that the examiners had conspired to restrain trade by artificially limiting the number of lawyers admitted to practice in Arizona.<sup>202</sup> The case reached the United States Supreme Court after the Ninth Circuit reversed a district court order dismissing the complaint.<sup>203</sup> Although the court of appeals ruled against the applicant Ronwin, the Supreme Court said that the decision turned "on a narrow and specific issue: who denied Ronwin admission to the Arizona Bar?"<sup>204</sup> The answer to this question was that the Arizona Supreme Court, not the bar examiners, made the decision not to admit Ronwin.<sup>205</sup>

The Court distinguished *City of Lafayette v. Louisiana Power and Light Co.*,<sup>206</sup> and *Community Communications Co. v. City of Boulder*.<sup>207</sup> Both *Lafayette* and *Boulder* involved actions by municipalities that ostensibly restrained trade. The city of Lafayette owned and operated an electrical utility that competed with a privately owned utility.<sup>208</sup> The City of Boulder enacted an ordinance imposing a three month moratorium on the expansion of an existing cable television franchise where one company was already operating in the area.<sup>209</sup>

In each case, the Supreme Court held that the action of the municipality was subject to the antitrust laws. In *Lafayette*, the Court said that *Parker* will only exempt municipalities' anticompetitive conduct if it constitutes a state-sanctioned act that replaces competition with regulation or monopoly public service.<sup>210</sup> Significantly, the court noted: "Plainly petitioners are in error in arguing that *Parker* held that all government entities, whether state agencies or subdivisions of a State, are, simply by

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199. See *id.* at 293. The court also summarily rejected constitutional claims raised by the plaintiffs. See *id.* at 295-96.

200. 466 U.S. 558 (1984).

201. See *id.* at 560.

202. See *id.* at 565.

203. See *Ronwin v. State Bar of Arizona*, 686 F.2d 692 (9th Cir. 1981), *rev'd sub nom. Hoover v. Ronwin*, 466 U.S. 558 (1984).

204. *Hoover*, 466 U.S. at 581.

205. See *id.* at 578 ("Unlike the actions of the Virginia State Bar in *Goldfarb*, the actions of the [examiners] are governed by the court's Rules. Those Rules carefully reserve to the court the authority to make the decision to admit or deny, and that decision is the critical state action here."). But aren't they really the same? In *Goldfarb*, the rules were promulgated by the bar association, but it was the Virginia Supreme Court that administered discipline.

206. 435 U.S. 389 (1978).

207. 455 U.S. 40 (1982).

208. See *Lafayette*, 435 U.S. at 391-92.

209. See *Boulder*, 455 U.S. at 45-46.

210. See *Lafayette*, 435 U.S. at 413.

reason of their status as such, exempt from the antitrust laws."<sup>211</sup> Comparing *Goldfarb* and *Bates*, the Court emphasized that in *Bates*

[T]he state policy requiring the anticompetitive restraint as part of a comprehensive regulatory system, was one clearly articulated and affirmatively expressed as state policy, and that the State's policy was actively supervised by the State Supreme Court as the policymaker. . . . [W]hen the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws.<sup>212</sup>

In *Boulder*, the Court declared that the "clear articulation requirement" was not met by the Home Rule Amendment to the Colorado Constitution that granted municipalities general rulemaking powers.<sup>213</sup> Such a provision, therefore, was insufficient to shield the city from antitrust liability.<sup>214</sup>

Thus, the Supreme Court has established that not all actions of state officials and subdivisions should be treated as acts of the sovereign.<sup>215</sup> If the actions in question are shown to be those of the sovereign, the Sherman Act will not apply. If, however, the actions do not represent clearly articulated state policy and are not supervised by the state,<sup>216</sup> then the Sherman Act will apply.

The question remains whether state ethical code prohibitions against business affiliations between lawyers and nonlawyers constitute state action in light of post-*Bates* cases such as *Boulder* and *Lafayette*. Dictum in *Lafayette* suggests that they do.<sup>217</sup> A close examination of *Bates* suggests that the rules against advertising were neither adopted pursuant to a clearly articulated state policy to replace competition with regulation,<sup>218</sup> nor supervised by state supreme

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211. *Id.* at 408.

212. *Id.* at 410, 416. Although *Goldfarb* may not stand for the proposition stated by the Court, and *Bates* may not be a good example of "active supervision," it is noteworthy that the Court used cases involving the legal profession to illustrate its point that not all government acts are sovereign acts.

213. *See* *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 51 n.14 (1982).

214. *See id.* at 55 ("A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought."). *Boulder* also reaffirmed the holding in *Lafayette*, which had been a plurality decision.

215. *See* *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980); *Jefferson Disposal Co. v. Parish of Jefferson*, 603 F. Supp. 1125, 1129-30 (E.D. La. 1985). The principle is analogous to the traditional notion in tort law that not all government officials were protected with the same level of government immunity. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* §§ 131-132 (5th ed. 1984).

216. *See* *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978).

217. *See id.* at 416.

218. Nowhere in the Code or Rules (and comments thereto) is there any mention of a state policy to eliminate competition. At most, such a policy may be inferred, but this is not enough to violate the First Amendment given that a constitutional delegation of

courts.<sup>219</sup> The majority in *Hoover* believed that the Arizona Supreme Court's ratification of the bar examiners' decision concerning admission of candidates was sufficient to meet the *Lafayette* standard.<sup>220</sup>

In a spirited dissent, Justice Stevens (joined by Justices Blackmun and White, in a 4-3 decision in which Justices O'Connor and Rehnquist did not participate) likened present day occupational restrictions to medieval guilds.<sup>221</sup> Justice Stevens recognized the potential conflict produced by government delegation of licensing power to private parties that have an economic interest in limiting admissions. He further pointed out that the state may avoid such a conflict by either formulating standards and administering procedures *or* delegating the job to private parties, in which case the policies displacing competition must be clearly and affirmatively expressed and appropriately supervised.<sup>222</sup> The test in *Goldfarb* and *Bates* was whether the sovereign *requires* the restraint, and that test, according to Justice Stevens, was not met in *Hoover*.<sup>223</sup>

If Justice Stevens' analysis were applied to the ancillary business rules, a question would arise as to whether these rules constitute a clearly articulated and actively supervised delegation of power. Although at first blush, these rules may be viewed as part of the same regulatory scheme (the ethics code) as the regulations in *Bates*, one could argue that ethical rules that impose a group boycott on nonlawyers should be afforded a different treatment than ethical rules that are limited to restricting competition among lawyers. Close scrutiny of post-*Bates* antitrust cases also suggests that the rudimentary treatment of the *Lafayette* standard in *Bates*<sup>224</sup> does not square with the law as it has evolved.

Far from clearly articulating state policy to restrict competition, disciplinary codes neither reflect any intention to exclude nonlawyers from dealing with lawyers in the delivery of client services, nor contain language remotely suggesting authority to supervene the Sherman Act. To the contrary, the Scope section of the Model Rules specifically states that "nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty."<sup>225</sup> Moreover, state supreme courts do not actively administer a

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power was insufficient in *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52-56 (1982).

219. Although procedures vary from state to state, state supreme courts, in practice, are seldom active participants in overseeing anticompetitive policy. Rather, they oversee the disciplinary process as a whole. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (establishing standard through which antitrust policies are "actively supervised by the state itself").

220. *See Hoover v. Ronwin*, 466 U.S. 558, 582 (1984).

221. *See id.* at 582-84 (Stevens, J., dissenting).

222. *See id.* at 584-85 (Stevens, J., dissenting).

223. *See id.* at 590 (Stevens, J., dissenting) ("Here, the sovereign is the State Supreme Court, not petitioners, and the court did not require petitioners to grade the bar examination as they did.").

224. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 359-62 (1977).

225. Model Rules, *supra* note 7, Scope. Comparable language is contained in the

policy of noncompetition. They may promulgate the rules, and they may oversee the disciplinary system generally, but one is hard-pressed to characterize such activity as active supervision of the state's policy of noncompetition in accordance with *Lafayette* and *Boulder*.<sup>226</sup> For these reasons, the state action exemption should not apply to the rules restricting lawyers' ancillary business activities, and the rules should be treated no differently than similar rules in other professions.

### B. First Amendment Considerations

If it is concluded that a state supreme court's promulgation of an ethical code for lawyers falls within the scope of the *Parker v. Brown* exemption,<sup>227</sup> a further question arises as to whether such action conflicts with constitutionally guaranteed liberties. In the case of regulations that restrict innovative business ventures between lawyers and nonlawyers, the First Amendment, as applied to the states through the Fourteenth Amendment of the United States Constitution,<sup>228</sup> presents fundamental problems for any state regulation. Although this constitutional problem has been alluded to in the recent ABA debates,<sup>229</sup> most commentators have not explored the question fully.<sup>230</sup>

In order to understand the conflict between the right of lawyers to engage in various forms of business with nonlawyers and the state's power to regulate lawyers' expressive conduct involving such activities, it is necessary to look at the basic objectives of the First Amendment, and the legal doctrines that apply to lawyers that engage in commercial activity through professional associations. It is further necessary to both evaluate the nature of such activity and apply an appropriate test for determining whether the rules are unnecessarily broad.

Two possible approaches may be used to challenge ethical rules that restrict relationships between lawyers and nonlawyers: freedom of association and commercial speech. While each carries with it specific im-

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Model Code. Although this admonition is cited most often in the context of legal malpractice, it may also be read to repudiate the establishment through the Rules of a state-sanctioned anticompetitive policy.

226. That state supreme court justices are themselves lawyers should render them suspect for purposes of either articulating or administering an anticompetitive policy in the first place. To acknowledge such authority condones the foxes guarding the henhouse.

227. See *supra* notes 145-52 and accompanying text.

228. U.S. Const. amends. I, XIV. See Laurence H. Tribe, *American Constitutional Law* § 11-2, at 772 (2d ed. 1988) ("[M]any of the rights guaranteed by the first eight Amendments' have been selectively absorbed into the fourteenth.") (quoting *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968)).

229. See American Bar Association Standing Committee On Ethics And Professional Responsibility: Report To The House of Delegates 13 (1991) (summarizing Ethics Committee's study of lawyers' ancillary business activities); Stanley, *supra* note 22, at 31-32.

230. See Andrews, *supra* note 13, at 652-55. Although Professor Andrews' analysis represents the most thorough review of the First Amendment attack on the business regulations, his conclusion that such a challenge will fail needs reexamination. See *infra* this Part.

pediments to a successful attack on the rules, both approaches provide viable alternatives to the antitrust theory and should be explored.

The freedom of association approach argues that lawyers have a constitutional right to associate with others for the delivery of legal services, and that restrictions on associations with nonlawyers infringe on that right. Such restrictions may be viewed as falling within either of two paradigms.<sup>231</sup> Under the first line of analysis, the restrictions would be analogized to cases in which the government has either sought to outlaw an association outright or punish an individual's affiliation with it.<sup>232</sup> Established principles of first amendment jurisprudence<sup>233</sup> would warrant that a lawyer's affiliation with a nonlawyer could not be prohibited outright unless it could be shown that the resulting association "actively engaged in lawless conduct"<sup>234</sup> or threatened to incite imminent lawless action.<sup>235</sup> Moreover, a lawyer who affiliated with a nonlawyer could not be punished for such affiliation unless a prohibition of the resulting association were constitutionally permissible,<sup>236</sup> and it were shown that the lawyer engaged in the affiliation "with knowledge of its illegality, and . . . with the specific intent of furthering [the association's] illegal aims by such affiliation."<sup>237</sup>

Under the second line of analysis, restrictions on lawyer affiliations with nonlawyers would be analogized to cases in which the "government makes no attempt to brand an association, or affiliation with it, as unlawful, but nonetheless interferes significantly . . . with an activity integral to the association . . . as in the case of . . . attempts to prevent labor unions from referring their members to union attorneys for assistance in litigation."<sup>238</sup> Under this line of analysis:

Such governmental interference also violates the first and fourteenth amendments even if it is justified by a legitimate objective, such as the avoidance of conflicts of interest in attorney-client relationships, unless [the] government shows that a serious impairment of the objective would clearly occur in the absence of the challenged interference, and that no less intrusive regulation could prevent such impairment.<sup>239</sup>

The other approach to the problem is to re-examine *Bates* and its prog-

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231. See Tribe, *supra* note 228, § 12-26, at 1015-17. The second paradigm, *see infra* notes 238-39 and accompanying text, appears to be more applicable to nonlawyer affiliations than the first. See *infra* notes 232-37 and accompanying text. The second paradigm is discussed in detail, *see infra* Part III.B.1.

232. See *id.* § 12-26, at 1015.

233. See *id.* § 12-9, at 841-49.

234. *Id.* § 12-26, at 1015.

235. See *id.* (citing *Noto v. United States*, 367 U.S. 290, 297-98 (1961)).

236. See *id.*; *supra* notes 234-35 and accompanying text.

237. Tribe, *supra* note 228, § 12-26, at 1015 (citing *Elfbrandt v. Russell*, 384 U.S. 11 (1966)).

238. *Id.* § 12-26, at 1016 (citing *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964)).

239. *Id.* § 12-26, at 1016-17 (citing *United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217, 223-25 (1967)).

eny with respect to the limits of state regulation of protected First Amendment rights. If affiliations between lawyers and nonlawyers can be construed to fit into the same class of protected expression as the commercial speech in *Bates*, then the same test for determining the adequacy of the rules should be applied. Under this test, prophylactic prohibitions would give way to less restrictive measures.

In addition to the freedoms of religion, speech, press, assembly and petition that are enumerated in the First Amendment of the Constitution,<sup>240</sup> the Supreme Court has read the First Amendment to imply the rights of expression,<sup>241</sup> privacy,<sup>242</sup> and association.<sup>243</sup> Together, these rights create a powerful bulwark for the protection of individual liberty.<sup>244</sup> Nevertheless, these rights are not absolute, and the government may abridge them in specific circumstances.<sup>245</sup>

Lawyers confront a unique set of First Amendment problems in their professional capacity. As citizens they retain the same rights as other citizens to speak out on issues of public concern.<sup>246</sup> They are afforded the same constitutional protection as nonlawyers in the conduct of their private lives. At the same time, some aspects of lawyering necessitate restriction of the unfettered freedom of expression. Lawyers, as officers of the court, are subject to greater restrictions in the exercise of First Amendment rights than nonlawyers.<sup>247</sup> On pain of discipline, an attorney may not reveal the confidences of her client,<sup>248</sup> make prejudicial extrajudicial comments about a case in litigation,<sup>249</sup> or disrupt the court.<sup>250</sup> At the same time, a citizen does not sacrifice all her First Amendment rights by becoming a lawyer. Accordingly, rules that prohibit affiliations between lawyers and nonlawyers must be addressed in light of this con-

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240. See U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

241. See Tribe, *supra* note 228, § 12-1, at 785-89.

242. See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

243. See Tribe, *supra* note 228, § 12-26, at 1010-22.

244. See *id.* § 12-1, at 785-89.

245. See, e.g., *Greer v. Spock*, 424 U.S. 828, 838 (1976) (upholding denial of access to military base for use as a public forum); *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939) (privilege of using streets and parks for communication of views may be regulated in the public interest).

246. See U.S. Const. amend. I.

247. Ethical Rules may prevent a lawyer from making statements to the press regarding pending cases. These rules do not violate the lawyer's First Amendment rights because such rules implicate important state interests relating to the control over the professional conduct of its attorneys. See *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434-35 (1982).

248. See Model Rules, *supra* note 7, Rule 1.6(a); Model Code, *supra* note 30, DR 4-101(B).

249. See Model Rules, *supra* note 7, Rule 3.6(a); Model Code, *supra* note 30, DR 7-107.

250. See Model Rules, *supra* note 7, Rule 3.5(c); Model Code, *supra* note 30, DR 7-106(C).



cern over the extent to which the government may properly restrict the First Amendment rights of lawyers in the conduct of their practices.

### 1. Freedom of Association

Among the rights implied in the First Amendment is the freedom of association.<sup>251</sup> Paradoxically, the freedom of association is so basic that the situations in which it has been raised as an independent legal issue have been limited. Some commentators have suggested that associational interests have been raised in other cases under different names.<sup>252</sup> For example, the school desegregation cases may be viewed as freedom of association cases.<sup>253</sup> When lawyers enter into business relationships with nonlawyers, rules that prohibit such arrangements are clearly infringements on the right of association. Yet, if the state has a legitimate interest in prohibiting certain associations, the state interest must be balanced against the associational rights. The issue of a lawyers' freedom of association has been raised in a number of cases. An examination of these cases will help interpret the doctrine of freedom of association as it applies to law firm diversification.

In a 1963 case, *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*,<sup>254</sup> the Supreme Court struck down a prohibition against a group legal services plan created by a union for the benefit of its members.<sup>255</sup> Under the plan, union members could obtain specified legal services from lawyers on a panel selected by the union.<sup>256</sup> The state claimed that the arrangement violated ethical rules that prohibited a lawyer from allowing a nonlawyer to direct the lawyer's independent professional judgment.<sup>257</sup> In invalidating the prohibition, the Court relied upon *NAACP v. Button*.<sup>258</sup> In *Button*, the Court had enjoined the enforcement of ethical rules that prohibited NAACP attorneys from soliciting legal business for the purpose of identifying victims of racial discrimination.<sup>259</sup> The principle that began with *Button*, namely, that lawyers could solicit clients in the exercise of their First Amendment rights, was eventually upheld in *In re Primus*.<sup>260</sup> *Trainmen*, *Button*, and

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251. See Tribe, *supra* note 228, § 12-26, at 1010-22.

252. See Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L.J. 1, 3 (1964).

253. See *Runyon v. McCrary*, 427 U.S. 160 (1976); *Brown v. Board of Educ.*, 349 U.S. 294 (1955); *Ross v. Houston Indep. School Dist.*, 559 F.2d 937 (5th Cir. 1977).

254. 377 U.S. 1 (1964).

255. See *id.* at 8.

256. See *id.* at 4.

257. See *id.* at 6 n.10 (citing the Canons of Professional Ethics of the American Bar Association, canon 35 (1938)).

258. See *id.* at 6, 8 (citing *NAACP v. Button*, 371 U.S. 415, 429, 444 (1963)).

259. See *Button*, 371 U.S. at 419, 444.

260. 436 U.S. 412, 432 (1978).

"Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts. The First and Fourteenth Amendments require a measure of protection for "advocating lawful means of vindicating legal rights,"

*Primus* thus stand for the proposition that the protection of the First Amendment is not limited to the narrow concept of spoken and written words.

In another line of cases, the Court has dealt with the denial of bar applications on the basis of character and fitness. In many of these cases the disqualified candidates were involved in politically unpopular organizations.<sup>261</sup> In *Baird v. State Bar of Arizona*,<sup>262</sup> an applicant was denied admission to the Arizona bar after having passed the written exam because she refused to answer a question on the bar application that asked if she had ever been a member of an organization that advocated the violent overthrow of the government.<sup>263</sup> Baird argued that the question required her to surmise the objectives of every organization to which she had belonged in the past,<sup>264</sup> and would infringe upon her freedom to associate with organizations of her choice.<sup>265</sup> In finding for Baird, the Court held that Baird's First Amendment associational interest was paramount to the bar's power to review the character and fitness of applicants.

In *Hishon v. King & Spalding*,<sup>266</sup> the Court upheld the complaint of a woman who was denied partnership in a prominent Atlanta law firm because of her sex.<sup>267</sup> Despite the fact that Hishon had been given excellent evaluations and reviews while working as an associate at the firm, she was passed over for partnership. The firm argued that the essence of a partnership is that partners are permitted to choose whomever they want as fellow partners, unfettered by Title VII of the Federal Civil Rights Act.<sup>268</sup> Significantly, the Court did not address the right of partners to associate freely through partnership election. Rather, the Court instead held that Hishon would be permitted to establish on remand that when she was recruited and hired by the firm, she was promised an equal opportunity to be considered for partnership, and that such promise was a part of the employment contract protected by Title VII.<sup>269</sup>

In a concurring opinion, Justice Powell pointed out that it would not be a violation of Title VII for any number of lawyers to discriminate in

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including "advis[ing] another that his legal rights have been infringed" and refer[ring] him to a particular attorney or group of attorneys . . . for assistance. *Id.* (citations omitted) (alterations in original).

261. See *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 176 (1971); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 234-35 (1957).

262. 401 U.S. 1 (1971).

263. See *id.* at 4-5.

264. See *id.* at 7.

265. See *id.* at 8. Forcing an individual to make such an inquiry could have a chilling effect on the right of individuals to choose their associations if they ever hoped to practice law. Significantly, the question did not ask whether she personally advocated the violent overthrow of the government. See *id.* at 4-5.

266. 467 U.S. 69 (1984).

267. See *id.* at 74, 78.

268. See *id.* at 78.

269. See *id.* at 76.

the formation of a partnership or in the addition of a lateral partner.<sup>270</sup> On the other hand, he suggested that a law firm's discrimination in the selection of partners from outside the firm may not be constitutionally protected either.<sup>271</sup>

All of these cases suggest that lawyers possess basic First Amendment rights to join and form associations and express their views freely. Freedom of association in many ways depends upon some other right to give it substance. For example, in civil rights cases such as *Button*, the right of association was subordinate to the right of free speech asserted by members of the association.<sup>272</sup> Thus, an association may do the same things as an individual under the rubric of freedom of expression. This ability includes the right to associate with others in the exercise of these expressive rights.<sup>273</sup>

In the landmark case of *Bates v. State Bar of Arizona*,<sup>274</sup> the Supreme Court struck down, on the basis of commercial speech, a state regulation that banned the advertisement of legal services.<sup>275</sup> The defendants in this case, Bates and O'Steen, were individual lawyers who acted through an association, which they called the "Legal Clinic of Bates and O'Steen."<sup>276</sup> Disciplinary action was taken against the defendants because their association advertised legal services in contravention of Arizona DR 2-101.<sup>277</sup>

Ethical rules against advertising and solicitation appear to apply with equal force to both associations of lawyers and individual practitioners.<sup>278</sup> Thus, under the First Amendment, the law firm, as an association of lawyers, appears to have the same rights as an individual lawyer that practices alone.

The act of associating with a particular group may contain elements of

270. *See id.* at 79.

271. "[I]nvidious private discrimination . . . has never been accorded affirmative constitutional protections." This is not to say, however, that enforcement of laws that ban discrimination will always be without cost to other values, including constitutional rights. Such laws may impede the exercise of personal judgment in choosing one's associates or colleagues. Impediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First and Fourteenth Amendments.

*Id.* at 80 n.4 (Powell, J., concurring) (citations omitted) (alteration in original).

272. *See NAACP v. Button*, 371 U.S. 415, 438 (1963).

273. *See Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-65 (1979); *Keyishian v. Board of Regents*, 385 U.S. 589, 607 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

274. 433 U.S. 350 (1977).

275. *See id.* at 384.

276. *Id.* at 385; *see id.* at 354.

277. *See id.* at 355-56.

278. Although the Supreme Court has protected the freedom of attorneys to associate for purposes of assembly, speech and other forms of free expression, it is not clear that the limits of associational freedom are coextensive with the limits of these other constitutional rights. Are there any activities engaged in by an association that would not merit the constitutional protection that would otherwise be afforded to an individual? Does the right to associate imply the freedom to do anything in the name of the association?

both expression and action.<sup>279</sup> The motivation for the association may be political or religious expression, business or economic enterprise, or something in between. When fundamental First Amendment rights are implicated, a strict scrutiny standard has been applied to state regulatory schemes.<sup>280</sup> On the other hand, when purely commercial activity is involved, a less restrictive rational basis test has been employed.<sup>281</sup> In cases that do not fit neatly into either extreme, an intermediate level of scrutiny is appropriate.<sup>282</sup> In short, the Court employs a calculus under which there is a direct relationship between the First Amendment concerns and the burden the state carries in defending its regulations.

In one sense, the question is simply: what type of scrutiny is required when state regulations prohibit lawyers from associating with nonlawyers for the purpose of providing ancillary business services to clients? Initially, such arrangements appear to be commercial activity, necessitating that the state only have to show a rational basis for the prohibition. Upon reflection, however, it seems that the associational activity involved in these lawyer-nonlawyer enterprises contains a substantial element of expression.<sup>283</sup> Accordingly, a question arises as to whether this expressive element changes the level of scrutiny.

The Rules of Professional Conduct represent more than a state's commercial regulation of an industry. Rather, they have been promulgated by lawyers as an expression of the legal profession's duties in light of professional values. The Rules contain certain self-serving provisions, but on the whole they represent a credo, a philosophy, and, moreover, an expression of what it means to be a lawyer.<sup>284</sup> In most states, this document is given force through its adoption by the state's highest court. In this sense, the Rules of Professional Conduct become a regulatory formulation.<sup>285</sup>

What happens when lawyers hold a different view of the profession

279. See Tribe, *supra* note 228, § 12-26, at 1011-12 (citing *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981)).

280. See *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971) ("[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.").

281. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

282. See *Trimble v. Gordon*, 430 U.S. 762, 767 (1977). An intermediate scrutiny has also been applied in commercial speech cases involving legal advertising. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) ("There is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.'"). The very question that left no doubt in the mind of Justice White, troubles Chief Justice Rehnquist along with Justices O'Connor and Scalia. This raises the specter of abandonment of the commercial speech doctrine, or at least a reduced scrutiny as the makeup of the Supreme Court changes. See *id.* at 676 (O'Connor, J., concurring).

283. See *supra* note 273 and accompanying text.

284. See Model Rules, *supra* note 7, Preamble and Preliminary Statement.

285. See Charles W. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. Rev. 281, 284-85 (1979).

than the one proffered in official dogma? What if a lawyer or group of lawyers disagree with the party line? In *Bates*, the challenged law on advertising was clear and unequivocal.<sup>286</sup> Yet, the Legal Clinic of Bates and O'Steen maintained a different philosophy for the practice of law, which could not be pursued under existing rules.<sup>287</sup> Bates and O'Steen did not set out to break the disciplinary rules of the profession, but merely tried to provide routine legal services to people of moderate means. They also discovered that they could not sustain their practice without advertising.<sup>288</sup> Even though economic considerations were involved in *Bates*, the seminal issue involved the free expression of an idea about the nature of the practice of law that could not be given force without violating the disciplinary rule.<sup>289</sup> The same expressive value appears in the ABA debate, in the statements of the ancillary business proponents.<sup>290</sup>

At least one case has addressed the level of scrutiny applicable to the regulation of professional practice. In *Garcia v. Texas State Board of Medical Examiners*,<sup>291</sup> the court stated the long recognized rule that it is within "[t]he police power of the State . . . to enact comprehensive, detailed, and rigid regulations for the practice of medicine, surgery, and dentistry."<sup>292</sup> It has been unchallenged that it is within the power of the state to regulate both legal and health services. According to *Garcia*, the state must balance the needs of the general public for qualified professionals against the state's police power to regulate. Constitutional rights may be abridged in the process. The need to protect the public from unlicensed doctors is so great, that in order to outweigh this need, it must be clearly demonstrated that the state's exercise of power is unreasonable.<sup>293</sup> Thus, the court found a rational basis for preventing a nonphysician from running a medical corporation: it would prevent abuses resulting from lay-person control and preserve the doctor-patient relationship.<sup>294</sup>

The dangers of lay control of a medical corporation are arguably stronger than the risks inherent when a nonlawyer associates with a lawyer. This is primarily due to fact that lawyers will retain control over

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286. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 355 (1977).

287. See *id.* at 354.

288. See *id.*

289. See *id.* at 383-84.

290. See *Jones*, *supra* note 21, at 684-85, 688. In fact, the political nature of the debate, the forum in which the ideas are being discussed, and the process by which compromise has been achieved lead inexorably to the conclusion that this is the very type of robust debate on issues of public concern that the First Amendment seeks to foster. If, as earlier suggested in this Article, the proponents and opponents represent different visions for the future of the legal profession and the delivery of legal services, the First Amendment component of lawyer-nonlawyer ventures is very high.

291. 384 F. Supp. 434 (W.D. Tex. 1974), *aff'd*, 421 U.S. 995 (1975).

292. See *Garcia*, 384 F. Supp. at 437.

293. See *id.*

294. See *id.* at 440.

legal services.<sup>295</sup> It may also be argued that there is less of an expressive element in the prohibition found in *Garcia* than in lawyer-nonlawyer ventures. Underlying this argument is the fact that the medical services provided through the corporation in *Garcia* did not differ from those provided by a doctor-operated enterprise; the only difference between the two enterprises related to the control of the corporation. It may be further argued that the state's interest in protecting human life is greater than its interest in protecting individuals' economic and legal interests. Consequently, a strong case can be made that the holding in *Garcia* should not be applied to the legal profession.

In *In re 1115 Legal Service Care*,<sup>296</sup> the New Jersey Supreme Court considered whether a non-commercial, internally staffed, prepaid legal service plan violated ethical rules because nonlawyers acted as trustees.<sup>297</sup> Under New Jersey rules, practicing law within this type of organizational structure was not permitted on the theory that when nonlawyers are in control of a legal corporation, they might be in a position to direct the rendition of legal services, and place their own interests ahead of those of the clients. The court found an exception to this rule, which is applicable provided that clients' interests predominate and nonlawyer trustees are kept from exercising professional judgment and involvement in individual cases.

If groups of persons combine for valid economic, social, or other reasons not inconsistent with public policy and seek in conjunction with their mutual interests to provide legal services to their constituency, we see no supervening interest bearing on the regulation of the legal profession that should militate against such efforts.<sup>298</sup>

Thus, the court found that this type of legal service plan served an important and useful function by providing needed services, and held that the rules should be revised to allow such organizations to engage in the practice of law.<sup>299</sup>

Other cases have reached a similar result.<sup>300</sup> In *NAACP v. Button*,<sup>301</sup> the Court considered whether a regulation that restricts lawyer referrals and recommendations unduly limits protected freedom of association.<sup>302</sup>

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295. The facts in *Garcia* indicate that the board of directors of the medical corporation contained no doctors at all. See *id.* at 436.

296. 541 A.2d 673 (N.J. 1988).

297. See *id.*

298. *Id.* at 676.

299. See *id.* at 677.

300. See, e.g., *In re Education Law Ctr., Inc.*, 429 A.2d 1051, 1059 (N.J. 1981) (providing an exception to treatment as the unauthorized practice of law where the corporation operates for charitable and benevolent purposes). But see *Florida Bar v. Consolidated Business & Legal Forms, Inc.*, 386 So.2d 797, 798-99 (Fla. 1980) (denying exception to treatment as the unauthorized practice of law); *Cuyahoga County Bar Ass'n v. Gold Shield, Inc.*, 369 N.E.2d 1232, 1236-37 (Ohio 1975) (no exception to treatment as unauthorized practice of law).

301. 371 U.S. 415 (1963).

302. See *id.*

Although the state claimed that this situation fell within the traditional purview of state regulation of professional conduct, the Court held that only a compelling state interest in regulating particular conduct could justify limiting First Amendment freedoms.<sup>303</sup> The Court further held that in order to justify broad prohibitions, the state must establish a substantial regulatory interest by proving that the feared evils will result if the conduct is allowed.<sup>304</sup> It is not sufficient to infer that there will be injurious intervention in, or control of, litigation without specific allegations and proof on the record.<sup>305</sup> Since the NAACP shared the same aims and interests as its members and clients, there was little risk of harm.<sup>306</sup> The regulation infringed on the right of the NAACP, its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of constitutionally protected rights.<sup>307</sup> Although *Button* involved the exercise of protected First Amendment rights by citizens who were represented by lawyers, at the heart of the case was the mechanism for the delivery of legal services. If NAACP attorneys could not reach out to potential victims of discrimination, the type of class action litigation contemplated by the legal staff would be much more difficult to pursue. It follows that *Button* stands for the proposition that lawyers have a right of association for the purpose of forming and utilizing legal service delivery systems to meet the needs of potential clients.

The same idea resurfaced in *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*,<sup>308</sup> in which the Supreme Court upheld a labor union's right to operate a group legal services plan.<sup>309</sup> *Trainmen* relied on the holding in *Button*, although the union and its members were not seeking redress of constitutional grievances. In both cases, an innovative service delivery system was upheld despite the arrangement's violation of ethical rules. In fact, *Trainmen* deals specifically with a practice delivery system involving both lawyers and nonlawyers.<sup>310</sup>

Although there are associational interests at issue in these cases, their pure First Amendment aspects make it hard to generalize in applying their holdings to the commercial setting. The problem of commercial

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303. See *id.* at 438.

304. See *id.* at 444.

305. See *id.*

306. See *id.* at 443.

307. See *id.* at 433 ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

308. 377 U.S. 1 (1964).

309. See *id.* at 8.

310. The bar's response was to graft a group legal services exception to the ethical rules. See Model Code, *supra* note 30, DR 2-103(D)(4). The rambling regulation was eliminated as unnecessary by the framers of the Model Rules. Ironically, almost all the charges that have been levied at ancillary business activities by law firms can be, and have been, directed at group legal services. Furthermore, after almost three decades of legitimacy, there is no evidence that unprofessional conduct is any more prevalent in group legal services plans than in law firms engaging in private practice.

association is not a new one. In *Roberts v. United States Jaycees*,<sup>311</sup> the Supreme Court held that male members' freedoms of intimate or expressive association were not abridged through the application of a Minnesota human rights act that required the admittance of women members.<sup>312</sup> For purposes of First Amendment analysis, the Court distinguished the idea of freedom of intimate association in one's personal and family relationships, from the idea of expressive association.<sup>313</sup> With respect to expressive association, the Court stated:

[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. . . .

The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.<sup>314</sup>

The Court then held that Minnesota's compelling interest in eliminating discrimination against female citizens justified the infringement of male members' associational freedoms.<sup>315</sup>

In contrast, the Ninth Circuit in *IDK, Inc. v. County of Clark*,<sup>316</sup> held that the operators of an escort service could not claim the protection of expressive association because escort services were primarily commercial rather than communicative.<sup>317</sup> Other cases have recognized that although an activity may be commercial in nature, it is not automatically excluded from First Amendment protection.<sup>318</sup> Thus, both corporate speech and association merit protection if First Amendment values are implicated. Commercial activity, however, would not be protected if First Amendment values are not implicated. In the context of legal services, this means that law firms and other legal services providers deserve the same consideration for their expressive conduct that individuals receive. The issue thus becomes one of delineation between activities that are expressive and those that are commercial.

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311. 468 U.S. 609 (1984).

312. *See id.* at 623.

313. *See id.* at 619-20.

314. *Id.* at 622-23.

315. *See id.* at 623.

316. 836 F.2d 1185 (9th Cir. 1988).

317. *See id.* at 1194-95 (despite the obvious "communication" in dating, an otherwise commercial enterprise cannot secure constitutional protection simply by calling an activity "expressive").

318. *See, e.g., Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 20-21 (1986) (holding that utility was not required to allow consumer group to use space in its newsletter); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978) (criminal statute that prohibited banks and other corporations from making expenditures to influence voting represented an unconstitutional abridgement of corporate free speech).



In *In re National Store Fixture Co.*,<sup>319</sup> the court examined a regulation that prohibited the appointment of persons associated with a relative of a bankruptcy judge to the position of trustee in the same court where that judge sits.<sup>320</sup> The court, employing a rational basis test, balanced the legitimate government interests promoted by the regulation against the personal rights being threatened.<sup>321</sup> Noting that the rule created an irrebuttable presumption that the appointment of trustees associated with a relative of a bankruptcy judge would cause both judges and lawyers to lose their integrity, the court stated that such presumptions are not appropriate when more precise tests are available. The regulation violated the constitutional right of association because it created an irrebuttable presumption although safeguards already existed.<sup>322</sup> Attorneys may move to disqualify a judge if fairness becomes an issue,<sup>323</sup> but there is no need to prohibit the appointment of a trustee simply because of the trustee's associations.

*National Store* demonstrates that regulations infringing on the freedom of association may fail the scrutiny of the rational basis test. *Button* and *Trainmen* recognize that associational interests may reach a higher level implicating the strict scrutiny test. Under either test, the state is not free to impose prohibitions on lawyers' associations without valid reason, and any regulatory scheme is subject to review under the appropriate test.<sup>324</sup>

In the search to identify some guiding principles, it might make sense to allow associations between lawyers and nonlawyers, while enforcing existing disciplinary rules that address specific evils. Additional rules could be promulgated as they become necessary. Courts have generally not upheld regulations that make an irrebuttable presumption that evils may result.<sup>325</sup> Associations between lawyers and nonlawyers have been banned because of fears that the nonlawyer may control litigation,<sup>326</sup> violate the attorney-client privilege,<sup>327</sup> or undermine professional standards.<sup>328</sup> These evils, if they occur, certainly would be injurious to the public. Because the courts, in other contexts, have required proof that evils will inevitably occur,<sup>329</sup> there should be no absolute ban on associa-

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319. 37 B.R. 481 (Bankr. W.D. Mo. 1984).

320. *See id.*

321. *See id.* at 487.

322. *See id.* at 488-89.

323. *See id.* at 487.

324. In other cases, the courts have been unwilling to strike down requirements imposed upon bar applicants. *See, e.g.,* *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988) (upholding mandatory bar membership), *cert. denied*, 493 U.S. 873 (1989), *rev'g* *Levine v. Supreme Court of Wis.*, 679 F. Supp. 1478 (W.D. Wis. 1988); *Nordgren v. Hafter*, 616 F. Supp. 742 (S.D. Miss. 1985) (upholding requirement of graduation from an ABA-approved law school), *aff'd*, 789 F.2d 334 (5th Cir.), *cert. denied*, 479 U.S. 850 (1986).

325. *See, e.g.,* *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) (invalidating disciplinary rule that prohibited advertisements by lawyers).

326. *See* *Andrews*, *supra* note 13, at 605.

327. *See id.* at 614.

328. *See id.* at 628-29; *supra* notes 76-80 and accompanying text.

329. *See In re National Store Fixture Co.*, 37 B.R. 481, 489 (Bankr. W.D. Mo. 1984)

tions with nonlawyers. Prophylactic rules create an irrebuttable presumption of harm. Other ethical rules provide a more precise means of counteracting these evils in the context of lawyers' actions.<sup>330</sup> The ethical rules should be understood to govern lawyers' conduct in their associations with nonlawyers.<sup>331</sup> If a lawyer puts profit ahead of representation, or otherwise fails to represent a client competently, disciplinary actions may be brought against the attorney. Enforcement of existing rules should be adequate to permit associations with nonlawyers while still protecting the client.<sup>332</sup>

Because of its commercial nature, the typical law practice may not deserve the same degree of constitutional protection that the Court afforded the practice arrangements in *Button* and *Trainmen*. Nevertheless, law firm diversification represents more than ordinary business activity. There are political ramifications to the ancillary business debate that go directly to the questions of what it means to be a competent lawyer, how clients should be represented, and what systems can best provide legal services.<sup>333</sup> In a larger sense, all legal representation involves some form of defense or vindication of the rights of clients, a role that has been recognized as a fundamental right in the criminal context.<sup>334</sup> Accordingly, all restrictions on lawyers' ability to form associations to provide legal services have a direct impact on client rights. For these reasons, it is appropriate to hold the state to a higher standard of scrutiny than the rational basis test.<sup>335</sup>

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(voiding Bankruptcy Rule 5002 which absolutely barred appointment of persons associated with the relative of a judge of the bankruptcy court as bankruptcy trustees before that court).

330. The idea that ethical violations are more likely to occur when lawyers are involved in nonlegal businesses or associate in practice with nonlawyers is highly speculative. The record of group legal services programs strongly suggests that there is no basis for an absolute ban on such associations. In-house corporate counsel also work under the direction of nonlawyers, but there is no record of charges that the existence of corporate law departments undermines professionalism. Lawyers can be disciplined for misconduct whether or not they are practicing law, so the ethical rules themselves provide a strong incentive for self regulation by lawyers of their ancillary business activities.

331. See Model Rules, *supra* note 7, Preamble, Rule 5.

332. In fact, lawyers could have access to information in other fields, such as accounting, economics, or science, in the most economically feasible and efficient way. The present system, under which such associations are prohibited, forces lawyers to purchase the expertise of consultants on the open market, at premium rates. This drives up the cost of legal services and reduces the competitiveness of lawyers in the marketplace.

333. See *supra* note 7 and accompanying text.

334. See *Gideon v. Wainwright*, 372 U.S. 335, 342-44 (1963).

335. "The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."

*McGowan v. Maryland*, 366 U.S. 420, 562 (1961) (Douglas, J., dissenting) (quoting *Board of Educ. v. Barnette*, 319 U.S. 624, 639 (1943)).

If expressive associations are to be regulated in the same way as speech, then commercial/expressive associations deserve the same level of scrutiny as commercial speech. Thus, the proper test should be that the right of lawyers to associate with nonlawyers in the delivery of services may only be regulated if: (1) the state can demonstrate that it has a substantial interest to be protected by imposing the regulation; (2) the regulation furthers the substantial state interest; and (3) the regulation is drawn no more broadly than necessary in order to carry out the state interest in question.<sup>336</sup> Such a test would recognize that lawyers do not have unfettered power to do whatever they want in the name of the First Amendment. At the same time, it would acknowledge that the state does not have unfettered authority to regulate associational interests.

In the context of this Article, state regulation appears in the form of a professional disciplinary code.<sup>337</sup> Regulations that govern lawyers' professional associations deserve special scrutiny. These regulations place a number of significant restrictions on the right of lawyers to freely associate with nonlawyers. For example, a lawyer may not enter into a partnership with a nonlawyer if any of the activities constitutes the practice of law.<sup>338</sup> In addition, a lawyer may not split a fee with a nonlawyer,<sup>339</sup> or accept employment in a case if his or her independent professional judgment may be directed by a nonlawyer.<sup>340</sup> Moreover, a lawyer may not assist a nonlawyer to engage in the unauthorized practice of law.<sup>341</sup>

In looking at these rules, it is necessary to identify the substantial state interest involved. If there is a substantial state interest, do the rules further that interest, and are they sufficiently narrow? A rule may in fact prohibit conduct in furtherance of the state interest, but if it also prohibits conduct that does not implicate the state interest, the rule may be held unconstitutional.

The history of the organized bar's involvement in the area of legal advertising suggests the need to look carefully at the regulatory scheme governing business ventures with nonlawyers. The bar's approach to the question of advertising was to adopt a prophylactic rule prohibiting all

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336. This proposed test parallels the *Central Hudson Gas* test. See *infra* note 374 and accompanying text. This test was first articulated in the context of legal services in *In re R.M.J.*, 455 U.S. 191, 203 (1982) (citing *Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980)).

337. Both the Model Code and the Model Rules govern lawyers' conduct in a wide variety of situations: dealings with clients, other lawyers, the courts, each other, and the outside world. See Model Rules, *supra* note 7, Preamble; Model Code, *supra* note 30, Preamble.

338. See Model Rules, *supra* note 7, Rule 5.4(b); Model Code, *supra* note 30, DR 3-103.

339. See Model Rules, *supra* note 7, Rule 5.4(a); Model Code, *supra* note 30, DR 3-102.

340. See Model Rules, *supra* note 7, Rule 5.4(c); Model Code, *supra* note 30, DR 5-107(B).

341. See Model Rules, *supra* note 7, Rule 5.5(b); Model Code, *supra* note 30, DR 3-101(A).

advertising.<sup>342</sup> After *Bates*, many states adopted extensive "laundry list" regulations prohibiting all manner of conduct involving communications with potential clients.<sup>343</sup> In *In re R.M.J.*,<sup>344</sup> the Supreme Court sent a message that such comprehensive regulations were impermissible.<sup>345</sup> Thereafter, the various state codes of professional responsibility and the new Model Rules of Professional Conduct attempted to focus on the fundamental state interest in preventing false, deceptive and misleading communications about legal services.<sup>346</sup> These new rules, nevertheless, continued to prohibit broad classes of communication without considering the effect of these communications on the state interest.<sup>347</sup> Thus, in *Shapiro v. Kentucky Bar Ass'n*,<sup>348</sup> the Supreme Court held unconstitutional that state's rule prohibiting the use of targeted direct mail promotions.<sup>349</sup> Moreover, in *Peel v. Attorney Registration and Disciplinary Committee of Illinois*,<sup>350</sup> the Court overturned a rule that prohibited the advertising of a legal specialization.<sup>351</sup> Throughout the advertising drama, bar associations consistently drafted regulations as broadly as possible, and failed to recognize the Supreme Court's clear message that imposed limits on their own regulatory power.<sup>352</sup>

The present rules establish a blanket prohibition against associations with nonlawyers without examining the state's interest in proscribing the conduct. Moreover, these rules do not consider whether such interest is furthered, and ignore whether they sweep unnecessarily broad. An examination of the rules in question indicates that in this area, as in advertising, the bar has failed to meet the constitutional test.<sup>353</sup> Even if the state can show that it has legitimate interests, it is not at all clear that the

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342. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 365 (1977) ("[T]he disciplinary rule [prohibiting advertising] serves to inhibit the free flow of commercial information and to keep the public in ignorance.").

343. See Model Code, *supra* note 30, DR 2-101(A).

344. 455 U.S. 191 (1982).

345. See *id.* at 207. The Court stated that "although the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests." *Id.*

346. See Model Rules, *supra* note 7, Rules 7.1, 7.2.

347. See Model Rules, *supra* note 7, Rule 7.3. The rule currently prohibits in-person solicitation and all telephonic contact with prospective clients. At one time it also prohibited direct-mail advertising. See *id.* cmt. at 324.

348. 486 U.S. 466 (1988).

349. See *id.* at 476-78.

350. 496 U.S. 91 (1990).

351. See *id.* at 107.

352. This "misunderstanding" of the Court's meaning in the advertising saga is important to this discussion in two ways: first, it shows that the organized bar is not necessarily right when it interprets how lawyers ought to practice law; secondly, it shows that the Supreme Court has been willing to look behind the veneer of professionalism to strike down ethical rules that infringe protected constitutional rights.

353. Professor Andrews persuasively demonstrates that the only meaningful justification for the "business canons" is economic protectionism. See Andrews, *supra* note 13, at 621-22. He sounds uncannily reminiscent of the Supreme Court in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), as well as in *Supreme Court of New Hampshire v. Piper*,

rules against affiliations with nonlawyers further those interests. Certainly, a less restrictive means than a blanket prohibition could be devised to further the state interest. Even if the less stringent rational basis test were used, economic protectionism would not be a sufficient reason to prohibit associations protected under the First Amendment.<sup>354</sup> Thus, despite courts' reticence to strike down regulations in a number of commercial association cases, there are persuasive arguments for doing so in the case of ancillary businesses.

## 2. Commercial Speech

The commercial speech approach to challenging lawyer-nonlawyer affiliations involves a re-examination of Supreme Court cases concerning the advertising of legal services. The Court has consistently permitted regulation of false, deceptive and misleading communications to prospective clients concerning lawyers' availability to provide legal services, while striking down regulations that merely furthered the self interest of the legal profession.<sup>355</sup>

This reasoning could be extended to cover activities that involve expressive associations with nonlawyers. Such an extension of the existing law would recognize that the activities in question involve a broader definition of legal advice than traditionally recognized, including the communication of information to clients in innovative ways.<sup>356</sup> By focusing on the expressive element of law firm diversification, business ventures with nonlawyers may be viewed as alternative systems for making legal services available. The current prophylactic rules, like the rule prohibiting in-person solicitation of legal business, should give way to a more narrow regulatory scheme designed to eliminate specific evils while protecting the expressive values of the conduct.

Since 1977, the Supreme Court has applied the commercial speech doctrine to cases involving communications to prospective clients of lawyers,<sup>357</sup> rewriting the ethical rules on advertising in the process.<sup>358</sup> As previously stated, the commercial speech doctrine applies to lawyer associations as well as to individual lawyers.<sup>359</sup> Underlying this doctrine is the fundamental right of individuals to band together in associations for commercial gain or to enhance their own collective interests. This form of associational conduct differs from advertising and solicitation in that it does not necessarily embody communication to third persons, i.e., prospective clients. Such activities, which include the formation of ancillary

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470 U.S. 274 (1985). Arguably, such parochial trade unionism has no place in the ethical code of the legal profession.

354. See *supra* notes 238-39 and accompanying text.

355. See *supra* this part.

356. See *supra* note 7 and accompanying text.

357. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 357-58 (1977).

358. See *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988).

359. See *supra* notes 274-78 and accompanying text.

businesses to provide nonlegal services to clients of the law firm, may be properly viewed as setting forth a philosophy about the nature of legal services. Under this philosophy, legal services are viewed as an expressive interest that deserves constitutional protection.<sup>360</sup>

Since *Bates* was decided in 1977, there has been a gradual expansion of a lawyer's right to communicate that he or she is available to provide legal services.<sup>361</sup> Today, all but the most offensive communications with prospective clients are permissible.

The two cases that have grappled with the limits of client solicitation are *In re Primus*,<sup>362</sup> and *Ohralik v. Ohio State Bar Ass'n*.<sup>363</sup> These companion cases have been read to say that solicitation for pecuniary gain may be prohibited while solicitation in the exercise of free speech is protected from regulation. This assessment is certainly the interpretation given to these holdings in the Model Rules.<sup>364</sup> An argument can be made, however, that this interpretation is not necessarily warranted.

Justice Powell, writing for the Court in *Ohralik*, recognized that the state has the power to regulate commercial activity even when speech is a component of the activity.<sup>365</sup> "The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs. The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain *under circumstances likely to result in the adverse consequences the State seeks to avert*."<sup>366</sup> And to what consequences does this statement refer? The opinion goes on:

Although . . . personal solicitation . . . may apprise a victim of misfortune of his legal rights, the very plight of that person . . . makes him more vulnerable to influence but also may make advice all the more intrusive. Thus, under these adverse conditions the overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy

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360. The difference between the two theories discussed in this section lies in the fact that under an association approach, the focus is on the right of lawyers to band together to provide legal services. The commercial speech approach, meanwhile, extends the logic of previously decided cases on legal advertising to cover expressive practice arrangements such as ancillary businesses.

361. See *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91, 103-11 (1990); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476-80 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 639-49 (1985); *In re R.M.J.*, 455 U.S. 191, 199-207 (1982); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368-84 (1977).

362. 436 U.S. 412 (1978).

363. 436 U.S. 447 (1978).

364. See Model Rules of Professional Conduct Rule 7.3(a) (1991), reprinted in Thomas D. Morgan & Ronald D. Rotunda, 1992 Selected Standards On Professional Responsibility 97 (1992) ("A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for . . . doing so is the lawyer's pecuniary gain.").

365. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

366. *Id.* at 464 (emphasis added).

...<sup>367</sup>

In a concurring opinion, Justice Marshall raised the question of whether honest, unpressured commercial solicitation might not be permissible.<sup>368</sup> He would allow greater restriction of in-person solicitation than printed advertising, but only to the degree necessary to prevent dangers attendant to the conduct.<sup>369</sup>

The companion case to *Ohralik*, *In re Primus*,<sup>370</sup> involved not only the exercise of protected First Amendment rights, but a pristine course of conduct in stark contrast to the lawyer in *Ohralik*.<sup>371</sup> Although *Primus* may be cited for the proposition that a lawyer may solicit clients pursuant to the lawyer's First Amendment rights, no clue is provided concerning the limits of intrusiveness in this situation. The Court simply stated that political expression or association requires a different standard than commercial conduct.<sup>372</sup> Justice Rehnquist in dissent laments:

If Albert Ohralik, like Edna Primus, viewed litigation "not [as] a technique of resolving private differences," but as "a form of political expression" and "political association," for all that appears he would be restored to his right to practice. And we may be sure that the next lawyer in Ohralik's shoes who is disciplined for similar conduct will come here cloaked in the prescribed mantle of "political association" to assure that insurance companies do not take unfair advantage of policyholders.<sup>373</sup>

Since *Ohralik* and *Primus* were decided before the application of the *Central Hudson Gas* test<sup>374</sup> to legal advertising in *In re*

367. *Id.* at 465.

368. *See id.* at 476 (Marshall, J., concurring) ("I believe it is open to doubt whether the State's interests are sufficiently compelling to warrant the restriction on the free flow of information which results from a sweeping nonsolicitation rule . . .").

369. *See id.* at 477 (Marshall, J., concurring).

370. 436 U.S. 412 (1978).

371. *Compare id.* at 414-17 (lawyer may not be sanctioned for soliciting clients by mail when the solicitation is not for pecuniary gain) with *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449-52 (1978) (lawyer may be sanctioned for soliciting clients in person when the solicitation is for pecuniary gain). What happens if Ohralik adopts Primus's behavior, or vice versa?

372. *See Primus*, 436 U.S. at 434 ("The approach we adopt today in *Ohralik*, that the State may proscribe in-person solicitation for pecuniary gain under circumstances likely to result in adverse consequences, cannot be applied to appellant's activities on behalf of the ACLU.") (citation omitted).

373. *Id.* at 442 (Rehnquist, J., dissenting) (citations omitted) (quoting *NAACP v. Button*, 371 U.S. 415, 429, 431 (1963)). The now Chief Justice has never been happy with the direction of the Court in the legal advertising area, arguing since *Bates* that there is no such thing as commercial speech. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 404-05 (1977) (Rehnquist, J., dissenting in part). He now has sympathizers in Justices O'Connor and Scalia. *See Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 480 (1988) (O'Connor, J., dissenting).

374. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). In *Central Hudson Gas*, the Court articulated a four-step analysis for determining whether commercial speech is protected:

At the outset, we must determine whether the expression is protected by the

*R.M.J.*,<sup>375</sup> it would make sense to reconsider solicitation under current doctrine. In *Shapero v. Kentucky Bar Ass'n*,<sup>376</sup> the Court struck down the portion of Rule 7.3 that prohibited direct mail advertising, a form of client contact only slightly less intrusive than in-person solicitation.<sup>377</sup> Although *Primus* appears to require the same strict scrutiny of regulations involving political expression and association as had existed before, *Ohralik* is a different matter. If the important consideration in *Ohralik* is intrusiveness rather than pecuniary gain (which may be viewed as a distinction between commercial expression and political expression), the *Central Hudson Gas* test would seem to call for a different analysis.<sup>378</sup> Clearly the state has a substantial interest in preventing highly intrusive conduct by lawyers in obtaining clients.<sup>379</sup> The regulatory scheme probably furthers that interest.<sup>380</sup> It is highly probable that the state can fashion a less restrictive formula than an absolute prohibition, for instance, one that focusses on the specific evil to be prevented—intrusive overreaching by the lawyer.<sup>381</sup>

It is only a short step from the expressive considerations involved in the advertising cases to the considerations inherent in law firm diversification. If we accept the notion that there is an expressive element in ancillary business activities, then it is necessary to balance the First Amendment rights of lawyers with the state interests present. The *Cen-*

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First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

*Id.*

375. 455 U.S. 191 (1982).

376. 486 U.S. 466 (1988).

377. See *id.* at 476 ("But merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech."). It should be further noted that direct-mail advertising is grouped conceptually with solicitation in Rule 7.3. See Model Rules, *supra* note 7, Rule 7.3.

378. See *In re R.M.J.*, 455 U.S. 191, 203 (1982) (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980)).

379. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978).

380. A prophylactic rule eliminates the danger of overreaching in solicitation by banning solicitation altogether. It also has the effect of extinguishing the lawyer's expressive rights inherent in that conduct. Although Chief Justice Rehnquist might not like it any more now than he did in his *Primus* dissent, many if not all forms of legal services contain an element of public service that implicates First Amendment rights. See *In re Primus*, 436 U.S. 412, 442 (1978) (Rehnquist, J., dissenting); *Ohralik*, 436 U.S. at 457.

381. Although *Board of Trustees v. Fox*, 492 U.S. 469, 477, 480 (1989), may represent a retreat from the *Central Hudson Gas* least-restrictive-means test, see 447 U.S. at 566, the new test, "a means narrowly tailored to achieve the desired objective," *Board of Trustees*, 492 U.S. at 480, may still disallow a prophylactic rule where less onerous alternatives are available. In the majority opinion, Justice Scalia points out that this standard is different from the rational basis test. See *id.*



*tral Hudson Gas* test<sup>382</sup> provides an established calculus for ascertaining the legitimacy of the regulatory scheme. Utilizing this test, the absolute prohibitions in the rules governing affiliations with nonlawyers must fall to a less restrictive paradigm. Specifically, it may be argued that other provisions of the ethical code provide sufficient protection against the anticipated evils.<sup>383</sup> In any event, absent any strong policy justification for the present rules other than the economic self interest of the legal profession, a commercial speech challenge to the existing nonlawyer affiliation rules is desirable.

### CONCLUSION

This Article has reviewed recent developments concerning the ethical rules governing lawyers' professional affiliations with nonlawyers. The current debate appears intractable, and suggests that it will be difficult to achieve a consensus on any proposal to reformulate the rules. At the same time, market forces are producing with increasing regularity new business ventures between lawyers and nonlawyers.<sup>384</sup> Pressure on the current rules can only be expected to increase in the future.

It is time to revisit the question of whether the rules should be challenged in court. Under an antitrust approach, the state action exemption represents a serious problem because it shields the rules from attack. Under a First Amendment approach, the freedom of association theory is hampered by the possible application of a rational basis test of the legitimacy of the state's regulatory scheme, while the commercial speech theory is generally understood to apply to advertising rather than other forms of conduct. In each case, an extension of the existing law is necessary to successfully attack the rules.

Under the antitrust approach, however, there are substantial questions concerning whether the state action exemption should apply to these rules. If it does not apply, the case law involving other professions will dictate the demise of the rules. Freedom of association and commercial speech theories under the First Amendment, likewise, suggest that a less restrictive alternative to the current prophylactic rules may be constitutionally required.

Although challenges to the rules confront substantial obstacles, now is the time to press the attack. As the marketplace for legal services becomes increasingly complex and competitive, lawyers need the freedom

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382. See *Central Hudson Gas*, 447 U.S. at 566; *supra* note 374 and accompanying text.

383. Many potential problems could be obviated through informed consent of the parties, adequate conflicts checks, screening devices to protect confidences, and other methods presently utilized in the practice of law in a variety of situations. See, e.g., *Nemours Found. v. Gilbane*, 632 F. Supp. 418, 428-29 (D. Del. 1986) (firm will not be disqualified where lawyer with conflict of interest sets up a "cone of silence" and does not participate in the case).

384. The image of the little Dutch boy trying to hold back the sea seems sadly suitable to this situation.

to experiment with new delivery systems in order to survive. Ethical rules governing conflicts of interests, candor, confidentiality and other matters apply to lawyers in whatever they do, and such rules, if vigorously enforced, are sufficient to protect the interests of clients, individual lawyers and the legal profession. We do not need and can ill-afford archaic rules designed merely to maintain the economic hegemony of the legal profession, especially when those rules have become counterproductive to their original purpose.