COMMENT

NONLAWYER EQUITY OWNERSHIP OF LAW PRACTICES: A FREE MARKET APPROACH TO INCREASING ACCESS TO COURTS*

TABLE OF CONTENTS

I. INTRODUCTION 226

II. RULE 5.4 AND WHY IT SHOULD BE AMENDED 229
  A. *Rule 5.4 and its History* 229
  B. *Economic Protectionism, Legal Conservativism, and the Long Tradition in the United States of Disallowing Nonlawyer Ownership of Law Practices* 232
    1. *The ABA's Traditional Reason Behind Their Stance Against Nonlawyer Ownership, and Why It Is Unpersuasive—Independence and Professionalism* 232
    2. *The Apparent Alternative Motivations Behind the ABA's Historic Stance* 236
  C. *The Changing Times and Growing Demand for Capital* 242
    1. *Capital is Currently in High Demand and Will Promote Equal Access to Courts* 242
    2. *Other Problems With the ABA's Stance* 245
    3. *Allowing the Free Market to Do What*

* Emil Sadykhov is a third-year law student at the University of Houston Law Center with a Bachelor's of Business Administration in Finance from Southern Methodist University's Cox School of Business.

He would like to thank Alicja Dwornik, his parents, siblings, and the rest of his family for their everlasting love and patient support; Professor James Nelson for his advice and suggestions on the Article; Professor Theodore Rave for his advice on the constitutional issues; the entire UH Law Center and the amazing faculty and staff that work there; and finally, the Houston Law Review and its members, for providing the medium and hard work necessary to publish this Comment.

It Does Best 247
D. The Potential Drawbacks of, and Counter-Arguments to, Allowing Nonlawyer Ownership of Law Practices 249

III. THE *JACOBY & MEYERS, LLP* CASE AND AMENDING RULE 5.4 251
A. The Jacoby & Meyers, LLP *Case* 252
B. Why the Jacoby & Meyers, LLP *Opinion is Flawed, and a Better Way to Argue the Case* 254
1. Why the Jacoby & Meyers, LLP *Court's Reasoning is Flawed* 254
2. A Better Way to Argue the Case 256
C. Regardless of their Merit, Most Constitutional Arguments Are Unlikely to Prevail 258
D. How Rule 5.4 Should Be Amended 261

IV. CONCLUSION 262

I. INTRODUCTION

> [A] major source of objection to a free economy is precisely that . . . [i]t gives people what they want instead of what a particular group thinks they ought to want. Underlying most arguments against the free market is a lack of belief in freedom itself.[1]

Although the unhampered right to contract and unbridled economic liberty are not in themselves liberties guaranteed by the United States Constitution,[2] Milton Friedman was nonetheless perceptive in writing that "there is an intimate connection between economics and politics . . . . [E]conomic freedom, in and of

1. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 15 (40th Anniversary ed. 2002).

2. Although the Court in *Lochner v. New York* found the "liberty of contract" to be a constitutional right within the Fourteenth Amendment, the subsequent *West Coast Hotel Co. v. Parrish* decision implicitly overruled the *Lochner* opinion and its idea that freedom of contract, and indeed all economic activity, should be unrestricted and unregulated by the government. Lochner v. New York, 198 U.S. 45, 56 (1905); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 393–94, 397–98 (1937). Subsequently, the Court in *Williamson v. Lee Optical of Oklahoma, Inc.* put the final nail in the coffin of uninhibited economic activity by imposing the rational basis test and stating that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be . . . out of harmony with a particular school of thought." Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488, 491 (1955); *see also* Joshua Waimberg, *Lochner v. New York: Fundamental Rights and Economic Liberty*, CONSTITUTION DAILY (Oct. 26, 2015), http://blog.constitutioncenter.org/2015/10/lochner-v-new-york-fundamental-rights-and-economic-liberty/ [https://perma.cc/J95F-2LV5].

itself, is an extremely important part of total freedom."[3] The very success of capitalism depends on the free flow of capital in an open market[4]—what *laissez-faire* economists dub a market guided by an "invisible hand," as opposed to the "visible hand" of governmental economic regulation.[5] Whenever an industry is regulated by this "visible hand," economists such as Friedman suggest that these measures inherently impede economic growth.[6] Although modern-day economists have generally shifted away from Friedman's absolute disdain for government intervention in the economy, the Nobel Prize winner's notions about the free market remain influential to this day.[7]

Currently, the American Bar Association's (ABA) Model Rules of Professional Conduct Rule 5.4 (Rule 5.4)[8] prohibits lawyers from "form[ing] a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law"[9] or for a nonlawyer to own any equity in a law firm.[10] According to free-market

---

3. FRIEDMAN, *supra* note 1, at 8–9; *see also* JOHN TOMASI, FREE MARKET FAIRNESS, at xv (2012) ("[M]arket democracy sees the affirmation of private economic liberty as a requirement of democratic legitimacy itself."). Friedman also notes that history has proven the same to be true time and time again, and that there are no examples of politically free societies which "ha[ve] not also used something comparable to a free market to organize the bulk of economic activity." FRIEDMAN, *supra* note 1, at 9. "History," he writes, "suggests . . . that capitalism is a necessary condition for political freedom." *Id*. at 10. That being said, even Friedman understood that, although capitalism is the best economic system known to man, it still requires government regulation by which to ensure that businesses do not run wild—what he calls the "rules of the game." *Id*. at 132–33.

4. *See* Benjamin A. Templin, *The Government Shareholder: Regulating Public Ownership of Private Enterprise*, 62 ADMIN. L. REV. 1127, 1200, 1200 n.446 (2010) (explaining that "the free flow of capital" is "a key ingredient for private entrepreneurs to flourish," and that "[e]ntrepreneurs rely on active credit markets to fund their enterprises."); *see also* S. Neal McKnight, *Stepping Stones to Reform: The Use of Capital Controls in Economic Liberalization*, 82 VA. L. REV. 859, 870 (1996) ("For a number of countries, greater openness to capital flows . . . has been associated with greater investment and economic growth.").

5. *See* FRIEDMAN, *supra* note 1, at 200, writing that "[g]overnment measures have hampered, not helped [economic] development. We have been able to afford and surmount these measures only because of the extraordinary fecundity of the market. The invisible hand has been more potent for progress than the visible hand for retrogression."

6. FRIEDMAN, *supra* note 1, at 38; *see also* McKnight, *supra* note 4, at 869 (explaining in the international context that "[r]estrictions on capital flows make international transactions more costly for companies; efforts to circumvent the controls result in inefficient allocation of resources to avoidance activities. Thus, removing capital controls allows companies to enter into international transactions at lower cost.").

7. *See* Noah Smith, *America Needs a New Milton Friedman*, BLOOMBERG (Feb. 23, 2017, 5:00 PM), http://bv.ms/2maKpRX; *see, e.g.*, TOMASI, *supra* note 3, at xv (explaining that his personal form of liberalism, "market democracy," also values "capitalistic economic freedoms as vital aspects of liberty").

8. MODEL RULES OF PROF'L CONDUCT r. 5.4 (AM. BAR ASS'N, Discussion Draft 1983) [hereinafter Rule 5.4].

9. Rule 5.4(b), *supra* note 8.

10. Rule 5.4(d)(1), *supra* note 8 ("A lawyer shall not practice with or in the form of a

capitalists such as Friedman, Rule 5.4 can be seen as stifling economic freedom.[11] Although *Williamson v. Lee Optical of Oklahoma, Inc.* has made such regulation commonplace (by setting a deferential standard of review for economic legislation),[12] there is nevertheless cause for concern when changes in society render a regulation obsolete[13] whilst authorities in charge of amending those regulations refuse to conform them to the changing legal climate.[14]

Although Rule 5.4 disallows the formation of partnerships with nonlawyers, due to their similar nature,[15] this Comment will focus on nonlawyer equity ownership of law firms. This Comment will explain why nonlawyer equity ownership is disallowed in the United States by Rule 5.4 in the first place, why the practice should be allowed in the United States, and it will present a novel solution on how to amend Rule 5.4 to allow nonlawyer ownership following the example of a recent case brought by the firm Jacoby & Meyers LLC.

Part II will focus on Rule 5.4 itself, including its history and the reasons behind its enactment,[16] why it should be amended,[17] and traditional challenges and counterarguments to permitting nonlawyer equity ownership of law firms.[18] Part III will then

---

professional corporation or association authorized to practice law for a profit, if: (1) a nonlawyer owns any interest therein . . . .").

11. Friedman notes that a citizen subject to laws requiring licensing in order for him or her to practice a particular profession "is likewise being deprived of an essential part of his freedom." FRIEDMAN, *supra* note 1, at 9.

12. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955). The Court here promulgated the deferential rational basis standard of review for economic legislation, which basically states that all such laws will be upheld if they are a "rational way" to cure a particular problem at hand, and that "[a] law need not be in every respect logically consistent with its aims to be constitutional." *Id.* at 487–88; *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (economic legislation is presumed to be valid and is sustained "if the classification drawn by the statute is rationally related to a legitimate state interest.").

13. *See infra* Part II.C.3.

14. *See infra* Part II.B.1–2.

15. Namely that partners are, in a sense, the owners of a partnership, and share in the profits of a business venture similar to how a corporation's owners (the shareholders) profit from the business activity of the firm. *See Partnership*, INVESTOPEDIA, http://www.investopedia.com/terms/p/partnership.asp [https://perma.cc/9U3E-5BYK]; Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423 (1993) ("A business corporation is organized and carried on primarily for the profit of the stockholders.").

16. *See infra* Part II.A–B; *see also infra* Part II.B.1 (explaining the traditional reasons given against permitting nonlawyer partnership with and ownership of law practices, and why those reasons are unpersuasive).

17. *See infra* Part II.C.

18. *See infra* Part II.D.

explore the *Jacoby & Meyers, LLP*[19] decision, reviewing the case itself,[20] more persuasive arguments that could have been asserted,[21] and why most constitutional arguments for allowing nonlawyer equity ownership are nonetheless bound to come up short.[22] Part IV concludes that even though attempts at reform through political avenues have failed, judicial resorts at abolishing or reforming Rule 5.4 will also likely fail.[23] Therefore, judicial correction of the current regulatory fallbacks may be the only option. Hopefully, as more cases are brought, more voice will be given to what is otherwise a topic that is rarely brought up within the legal profession. Because of the low chances of success in court,[24] however, this Comment differentiates itself from other writings in favor of amending Rule 5.4 in that it is not so much solely a legal argument or a specific proposal on how to amend the rule:[25] it argues that proponents of reform should focus on the practical effects of Rule 5.4 rather than its constitutional validity.[26]

II. RULE 5.4 AND WHY IT SHOULD BE AMENDED

A. Rule 5.4 and its History

Although the ABA House of Delegates adopted the ABA Model Rules of Professional Conduct in 1983,[27] states have been

---

19. Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Dep'ts, Appellate Div. of the Supreme Court of the State of N.Y., 118 F. Supp. 3d 554 (S.D.N.Y. 2015).

20. *See infra* Part III.A.

21. *See infra* Part III.B.2.

22. *See infra* Part III.C.

23. *See infra* Part IV; *see also infra* Part III.C.

24. *See infra* Part III.A–B.

25. Although this Comment does make such a proposal similar to other authors such as Matthew Bish or Thomas Andrews. *See infra* Part III.D; Bish, *infra* note 56, at 669; Andrews, *infra* note 30, at 641–52. Although it offers a novel argument to bring in court that is not its main purpose. *See* Part III.B.2.

26. For instance, Ronald Coase writes the following:

> [T]here is some danger for economists . . . that our discussion [of the First Amendment] will tend to concentrate on American court opinions . . . and that, as a result, we will be led to adopt the approach to the regulation of markets found congenial by the courts rather than one developed by economists . . . . [B]y concentrating on issues within the context of the American Constitution, it is made more difficult to draw on the experience and thought of the rest of the world.

R. H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 384 (1974).

27. *ABA Model Rules of Professional Conduct: About the Model Rules*, ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html [https://perma.cc/VJ7G-FEQF].

regulating the legal profession in the name of "public interest" since its inception.[28] Some state statutes restricting the unauthorized practice of law date back to the mid-19th century and earlier.[29] For instance, "at least as early as 1899, the New York Penal Code prohibited" the unlicensed practice of law by anyone, and in 1909 the Code was amended to prohibit "corporations and voluntary associations" from doing the same.[30]

Along with unauthorized practice legislation came rules prohibiting nonlawyers from partnering with attorneys or owning equity in a law practice, spurred on by a 1910 case *In re Co-Operative Law Co.*[31] That case influenced the development of, and reasoning behind, rules such as Rule 5.4 "in practically every American jurisdiction."[32] Ever since *Co-Operative Law Co.*, many businesses that provided legal services incidental to some other business (and even some that were established for the sole purpose of practicing law), and which were owned at least in part by nonlawyers, have been enjoined from carrying on their legal practice. These businesses include banks, collection agencies, and even other "nonlaw businesses" who had once provided lawyers to handle simple issues.[33]

Furthermore, since the early 1900s, bar associations throughout the United States have been the most active participant in policing the unauthorized practice of law.[34] The ABA, which is only a professional association and has no actual authority over the practice of law in the United States,[35] has nonetheless been pivotal in attempts to "outlaw and police the unauthorized practice of law."[36] The ABA did so through the Standing Committee on Unauthorized Practice of Law, which aided in actively "prevent[ing] nonlawyers from participating in the business of law, even when the practice of law itself is to be done only by lawyers" by issuing opinions which are

---

28. Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. BAR. FOUND. RESEARCH J. 159, 161 (1980).

29. *Id*. at 180.

30. 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, 579–80 (1989).

31. In re Co-Operative Law Co., 198 N.Y. 479 (1910). This case stood for the proposition that a corporation cannot "be lawfully organized to practice law." *Id.* at 483. It reasoned that because attorneys and their clients should essentially have a master-servant relationship under the law, a corporation cannot indirectly practice law through its employee attorneys "for [they] would be subject to the directions of the corporation and not to the directions of the client." *Id.* at 483–84.

32. Andrews, *supra* note 30, at 580–81.

33. *Id*. at 581–82. For example, workers' compensation claims. *Id.*

34. *Id*. at 583.

35. *Id*. at 596.

36. *Id*. at 583.

then promulgated by the ABA and adopted by most states.[37] Finally, the traditional prohibition on nonlawyer ownership or investment in law firms seen today was promulgated in the ABA's Canons of Professional Ethics in 1928,[38] the precursor to today's Model Rules.

Jumping forward about seventy years from the time of the first rules prohibiting nonlawyer ownership of law practices, the ABA finally promulgated the current Model Rules of Professional Conduct in 1983, which were subsequently adopted by a majority of states in the United States.[39] Before doing so, however, the ABA House of Delegates appointed the ABA Commission on Evaluation of Professional Standards (known as the Kutak Commission).[40] Interestingly enough, the Kutak Commission proposed to relax the historic restriction on nonlawyer ownership by allowing lawyers to work for an entity "in which a financial interest is held or managerial authority is exercised by a nonlawyer," as long as it did not interfere with the lawyer's independent professional judgment and adhered to some other minor restrictions.[41] The Kutak Commission cited "the complex variety of modern legal services" as a reason behind its proposition, as well as the fact that it would be assuming too much in thinking that an attorney's independent professional judgment will be hampered simply because he is employed by a "lay organization."[42]

Nevertheless, the ABA House of Delegates rejected the Kutak Commission's proposed Rule 5.4 due to adamant objections on the grounds that:

> (1) the Commission proposal would permit Sears, Montgomery Ward, H & R Block, or the Big Eight accounting firms, to open law offices in competition with traditional law firms; (2)

---

37. *Id*. at 583–84. Keep in mind that when the author writes "the business of law," he is referring to what many other scholars have noticed as well: that even though the practice of law is viewed as a profession and service, and not as a commodity, it nonetheless must also function as a business in that it must generate revenue over its expenses to stay afloat. *See* Alan L. Zimmerman et al., *Economics and the Evolution of Non-Party Litigation Funding in America: How Court Decisions, the Civil Justice Process, and Law Firm Structures Drive the Increasing Need and Demand for Capital*, 12 N.Y.U. J.L. & BUS. 635, 648–51 (2016); *see also* Peggy Kubicz Hall, *Legal Costs in Minnesota: I've Looked at Fees From Both Sides Now: A Perspective on Market-Valued Pricing for Legal Services*, 39 WM. MITCHELL L. REV. 154, 164 (2012) ("The notion that somehow 'law is different' is dead. . . . [T]he legal industry is subject to the same economic forces as any other industry.").

38. Andrews, *supra* note 30, at 584; Edward S. Adams & John H. Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CALIF. L. REV. 1, 3–4 (1998).

39. Andrews, *supra* note 30, at 593.

40. *Id*.

41. *Id*. at 594 (quoting the proposed Rule 5.4 from A.B.A., 107 ANNUAL REPORT OF THE A.B.A. 886–87 (1982) (Report of the Commission on Evaluation of Professional Standards)).

42. *Id*.

> nonlawyer ownership of law firms would interfere with the lawyer's professional independence; (3) nonlawyer ownership would destroy the lawyer's ability to be a "professional" regardless of the economic cost; and (4) the proposed change would have a fundamental but unknown effect on the legal profession.[43]

As discussed below,[44] these are (for the most part) the same objections that have traditionally been made in opposition to nonlawyer equity ownership of law firms, containing the same rhetorical tools that even led one author—and former member of the 2009 ABA Commission on Ethics 20/20 (the most recent ABA commission to review the issue)—to dub the phenomenon the "idiom of professionalism."[45]

B. Economic Protectionism, Legal Conservativism, and the Long Tradition in the United States of Disallowing Nonlawyer Ownership of Law Practices

1. The ABA's Traditional Reason Behind Their Stance Against Nonlawyer Ownership, and Why It Is Unpersuasive—Independence and Professionalism. Historically, the ABA has held a strict stance against all nonlawyer equity ownership of legal practices and therefore against any investment in law firms by nonlawyers.[46] This stance has persisted since at least 1928 and was incorporated into the ABA's Model Rules of Professional Conduct as today's Rule 5.4.[47] Therefore, apart from investing their own assets (or those of their clients) into the firm, there are currently few alternative options available for an attorney or a law

---

43. *Id.* at 595. Interestingly enough, reasons (1) and (4) are no longer offered in response to nonlawyer ownership proposals despite the fact most of those same objections are applicable today, but a closer inspection of the reasons reveals why. Reason (1) demonstrates a desire for inherent protectionism of the legal profession which is, of course, "incompatible with our national policy against anticompetitive economic behavior." *Id.* at 622. Therefore, it becomes clear why over time, as antitrust laws became more heavily litigated, this objection would have to be left out. *See id.* at 617–22 (explaining how, if not for the state action mandating the formation of bar associations, a common defense in antitrust, the case law demonstrates how these particular rules would otherwise violate federal antitrust laws). Reason (4) demonstrates a common critique of lawyers and their profession by business and other professionals: that "lawyers generally tend to be resistant to change" and are in that sense conservative. Zimmerman, *supra* note 37, at 650.

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

45. Ted Schneyer, *"Professionalism" as Pathology: The ABA's Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities*, 40 FORDHAM URB. L.J. 75, 84 (2012).

46. Adams & Matheson, *supra* note 38, at 3–4.

47. *Id.*; *see also* Rule 5.4(d)(1), *supra* note 8; Andrews, *supra* note 30 at 593.

firm in dire need of capital to either start a law practice or fund new litigation.[48]

The ABA's official motivation behind their persistence in preventing nonlawyer ownership, and in fact against most forms of Alternative Litigation Financing (ALF), is that it "has the potential to interfere with the lawyer's exercise of candid, objective, independent judgment on behalf of the client."[49] The court in *Jacoby & Meyers, LLP*,[50] for example, cites the same purpose behind New York laws barring nonlawyer ownership, stating that "the New York laws 'promote[ ] the independence of lawyers by preventing nonlawyers from controlling how lawyers practice law' and by, among other things, 'attempt[ing] to minimize the number of situations in which lawyers will be motivated by economic incentives rather than by their client's best interests.'"[51] These same reasons have been progressed by other legal scholars and commentators.[52]

It is the very fact that the same prototypical reasons are given in opposition to nonlawyer equity ownership that frustrates many other legal scholars and raises

---

48. *See Panel 1: Litigation Funding Basics* 12 N.Y.U. J.L. & BUS. 511, 513–15 (2015) [hereinafter Panel 1] for Alan Zimmerman's discussion on the various types of nonparty litigation funding. He explains that apart from party funding (i.e. traditional hourly billing), there have emerged "non-party" alternatives such as: (1) the contingent fee; (2) liability insurance; (3) third party funding such as specialty finance companies who "underwrite and evaluate the cases of a law firm in order to qualify them for funding" (seeing as banks typically are wary of funding law firms); (4) post-judgment funding, essentially "purchasing" settlements or judgments that have gone on appeal; and (5) funders who pay a party's hourly attorneys' fees where there is a "deep pocket defendant, or an insurance company that's paying the defense fees and costs." *Id*. Later, Zimmerman explains how banks generally stay out of the legal industry, including when it comes to providing law firms with start-up capital, due to the fact that law firms are incredibly hard to value—firms' assets consist of the attorneys themselves, who tend to change firms in the course of their careers. *Id*. at 526–27. Assets that are so unstable are hard to value, thereby making law firm loans unattractive investments for traditional banks. *Id*.

49. A.B.A., AMERICAN BAR ASSOCIATION COMMISSION ON ETHICS 20/20: INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 22 (Feb. 2012).

50. Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Dep'ts, Appellate Div. of the Supreme Court of the State of N.Y., 118 F. Supp. 3d 554 (S.D.N.Y. 2015). *See* Part III.A–B.1 for a discussion of the case, including its reasoning and holding.

51. *Id*. at 574 (quoting Lawline v. Am. Bar Ass'n, 956 F.2d 1378, 1385 (7th Cir. 1992)).

52. *See, e.g.*, L. Harold Levinson, *Independent Law Firms that Practice Law Only: Society's Need, the Legal Profession's Responsibility*, 51 OHIO ST. L.J. 229, 247 (1990) (arguing the necessity for independence of law firms from nonlawyers in order for them to exercise independent professional judgment); *see also* Schneyer, *supra* note 45, at 84–85 (specifically noting that there has been a "constant reliance over time on virtually the same rhetorical tools" by most legal commentators in opposition to nonlawyer ownership proposals).

suspicions[53]—those reasons being that nonlawyer ownership will somehow interfere with attorneys' independent judgment and prevent them from acting in their client's best interests.[54] Regardless of the sincerity behind these objections,[55] they are flawed for numerous reasons.

First, rules similar to Rule 5.4 existed in other countries, including Australia and the United Kingdom, and these rules have subsequently been amended to allow nonlawyer equity ownership of law firms.[56] For instance, the so-called "Tesco Law," which currently permits companies to provide legal services and law firms to seek external capital in the United Kingdom, was nicknamed as such "because it is meant to make buying legal services as easy as buying a tin of beans."[57] Thus far, these changes have not notably resulted in any of the perceived impacts to lawyers' independent judgment in their respective countries. Meanwhile, some of these reforms have been around since before 2010.[58]

---

53. Schneyer, *supra* note 45, at 84; s*ee also* Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1690–91 (2008) (listing various commentators who agree that the ABA's regulations do not accomplish their intended purpose, and instead only "promote the interests of lawyers.").

54. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 5.4 cmt. (AM. BAR ASS'N 1983) (explaining that the limitations of Rule 5.4 are intended to protect "the lawyer's professional independence of judgment . . . [and] obligation to the client.").

55. *See supra* Part II.B.2.

56. Matthew W. Bish, *Revising Model Rule 5.4: Adopting a Regulatory Scheme That Permits Nonlawyer Ownership and Management of Law Firms*, 48 WASHBURN L.J. 669, 680 (2009).

57. Caroline Binham & Jane Croft, *Law Society present 'Tesco Law'*, FINANCIAL TIMES (Aug. 4, 2011), https://www.ft.com/content/8b9f0932-bebc-11e0-a36b-00144feabdc0); The same author notes that outside investment in law firms would be even more attractive if other "key countries" take up similar regulatory changes, and ironically points to the (at the time) still pending *Jacoby & Meyers, LLP* case as hope that U.S. attitude is also shifting. *Id*.

58. Second Amended Complaint for Declaratory and Injunctive Relief at 5, Jacoby & Meyers, LLP v. Schneiderman, 2013 WL 9580965 (S.D.N.Y. 2013) (No. 11-3387) [hereinafter SAC]; *see also* Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism*, 29 GEO. J. LEGAL ETHICS 1, 15–16 (2016) (concluding, after surveying countries that allow nonlawyer ownership, that arguments against nonlawyer ownership "on the grounds that it will undercut professionalism" tend to miss the mark, and that while some concerns exist, they are not as serious as those touted by the opposition). In fact, reforms aimed at permitting multidisciplinary practices, another type of entity barred by Rule 5.4, began in Australia as early as 1994. Memorandum from the ABA Commission on Ethics 20/20 Working Group on Alternative Business Structures to the ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, and Individuals 8 (Apr. 5, 2011) http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf [https://perma.cc/6LGL-5BUQ] (concerning alternative business structures).

Furthermore, the U.S. jurisdictions of Washington, D.C. and Washington State also currently allow nonlawyer ownership of law firms.[59] Washington, D.C. has allowed nonlawyers to hold "financial or managerial interests" in partnerships formed for the main purpose of practicing the law since 1990—twenty-five years before the *Jacoby & Meyers, LLP* decision.[60]

Therefore, some legal scholars and professionals have stated that the current Rule 5.4 is severely outdated, leaving the legal market in America lacking resources that non-American law firms continue to enjoy and prosper from.[61] Other countries are able to modify their rules of conduct with little objection. As a result, the ABA fears relating to modification are hard to understand and should not prevent attempts to amend Rule 5.4.

Finally, these objections are flawed because that same rhetoric of professionalism and independence can be applied to ABA Model Rule 1.8(f) (Rule 1.8(f)), which currently allows a practice that is in many ways strikingly similar to nonlawyer investment in law practices: the ability for an unrelated third party to simply pick up the check on any litigation, as long as "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship."[62] Therefore, anyone can directly finance any lawsuit entirely, and for any reason at all, as long as they promise not to interfere with the suit.[63] Although Rule 1.8(f) has been promulgated by the ABA and is a part of their Model Rules of Professional Conduct;

---

59. Alison Frankel, *Lawyers Remain Deeply Skeptical of Non-Lawyers Investing in Law Firms*, REUTERS (May 9, 2016), http://blogs.reuters.com/alison-frankel/2016/05/09/lawyers-remain-deeply-skeptical-of-non-lawyers-investing-in-law-firms/. Washington state allows such ownership to a lesser extent therefore the focus will be on Washington, D.C. going forward. *Id.*

60. NEW YORK STATE BAR ASSOCIATION, NYSBA REPORT OF THE TASK FORCE ON NONLAWYER OWNERSHIP 37 (2012) [hereinafter NYSBA Report].

61. *See* Thomas Markle, *A Call to Partner with Outside Capital: The Non-Lawyer Investment Approach Must Be Updated*, 45 ARIZ. ST. L.J. 1251, 1253–54 (2013); Bish, *supra* note 56, at 670–71.

62. MODEL RULES OF PROF'L CONDUCT r. 1.8 (AM. BAR ASS'N, Discussion Draft 1983) [hereinafter Rule 1.8(f)]. Rule 1.8(f) reads:

> A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.

63. For example, Facebook investor and billionaire Peter Thiel is currently funding numerous lawsuits (which are all unrelated to him) targeting Gawker Media, an online media and journalism company, in order to financially destroy it due to a personal vendetta. *See* Ryan Mac, *Behind Peter Thiel's Plan to Destroy Gawker* (Jun. 7, 2016), https://www.forbes.com/sites/ryanmac/2016/06/07/behind-peter-thiel-plan-to-destroy-gawker/#7949746330f4.

however, having a third party fund a particular case would, in reality, present the same hypothetical professionalism and independence challenges as nonlawyer equity ownership. The two alternatives represent essentially the same transaction: one way or another an unrelated third party—neither the client nor the attorney—is paying the costs of the litigation or law practice regardless of what that third party's underlying goals are.

In fact, what is most interesting about Rule 1.8(f) is that it uses language that is strikingly similar to that used by the Kutak Commission in proposing their alternate Rule 5.4.[64] Most notably, the alternative Rule 5.4 proposed by the Kutak Commission would also contain a clause similar to that in Rule 1.8(f)(2), stating that a lawyer may be employed by a nonlawyer-owned firm "but only if: (a) There is no interference with the lawyer's independence of professional judgment or with the attorney-client relationship."[65]

Therefore, if Rule 1.8(f) can exist in harmony with the current precepts of professionalism and independence—with the simple caveat that "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship"[66]—there is little justification for why nonlawyer ownership may not also be permitted with a similar carve out about maintaining professional judgment and the client-lawyer relationship.

2. The Apparent Alternative Motivations Behind the ABA's Historic Stance. The truth of the matter on the ABA's historic stance against nonlawyer equity ownership, however, is not as straightforward as its opponents (or even proponents) might make it seem. Even though the constitutional law implications of this "majoritarian political process failure" will be discussed in more detail below,[67] it is important to first recognize that there is an impediment within the legal profession that prevents meaningful change from occurring through traditional means. Whenever such an issue is discovered, the only available recourse is generally judicial.[68] Here, the political process failure is that large law firms

---

64. *See supra* Part II.A.

65. Andrews, *supra* note 30, at 594 (quoting A.B.A., 107 ANNUAL REPORT OF THE A.B.A 886–87 (1982) (Report of the Commission on Evaluation of Professional Standards)).

66. Rule 1.8(f), *supra* note 62.

67. *See supra* Part III.B.2; *see also* Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 174 (2004), (stating that "judicial review is justified when necessary to correct failings of the majoritarian political process.").

68. In these situations, where recourse would normally be legislative, there is a chance of larger political players preventing smaller ones from enjoying their constitutional rights due to superior political power, "which tends seriously to curtail the operation of

have every incentive, as well as the ability to, prevent nonlawyer equity ownership. Their incentive would be that outside equity investment will theoretically open the door for small firms to obtain serious capital and take on complex (and therefore higher-paying) cases[69] that would previously have been reserved to larger, well-established firms.[70]

Because there is no "smoking-gun" evidence of direct political and economic interference by large law firms, the evidence that does exist is largely circumstantial. Take for instance the New York State Bar Association (NYSBA) which in 2000, consistent with its historic stance, approved a resolution from the Special Committee on the Law Governing Firm Structure and Operation that provided that "no change should be made to the law that now prohibits lawyers and law firms directly or indirectly from transferring ownership or control to nonlawyers over entities practicing law."[71] Then, in 2012 following the introduction of the Tesco Law in the United Kingdom,[72] the NYSBA announced that it would be creating a committee to study the issue of whether or not nonlawyers should be permitted to hold equity investment in law firms.[73] However, then NYSBA President Vincent Doyle said as he seated the committee, "the Association 'remains opposed to nonlawyer ownership of law firms.'"[74] Therefore it seems that there is potentially an inherent bias built into the NYSBA and, by extension, the ABA with regard to this issue.[75] As would be

---

those political processes ordinarily to be relied upon to protect minorities." *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Therefore, the only alternative would be to solve the issue judicially. *See infra* Parts III.C, IV.

69. *See, e.g.*, Markle, *supra* note 61, at 1251–52.

70. *See, e.g.*, Zimmerman, *supra* note 37, at 663 (noting that "[w]hat is interesting is that many [major economic players controlling large concentrations of wealth and power], having achieved great wealth as a financial reward for success in our capitalist economy, are very unhappy when that same economy offers equal access to those wishing to compete with them in resolving an economic dispute.").

71. NYSBA Report, *supra* note 60, at 8, 13–15.

72. Formally known as the Alternative Business Structure, they were the laws that allowed nonlawyers to own parts of and invest in law firms for the first time in the United Kingdom. *See* Marion Dakers, *'Tesco Law' Rules Relaxed to Encourage More One-Stop Law Shops*, THE TELEGRAPH, Oct. 26, 2014, 6:11 PM GMT, http://www.telegraph.co.uk/finance/newsbysector/supportservices/11187121/Tesco-Law-rules-relaxed-to-encourage-more-one-stop-law-shops.html.

73. Jerome Kowalski, *Private Equity Investments in Law Firms Have Arrived in the UK and Have Largely Ignored BigLaw; What Will Happen as This Phenomenon Arrives in the United States?*, KOWALSKI & ASSOCIATES BLOG (Feb. 7, 2012), https://kowalskiandassociates.wordpress.com/2012/02/07/private-equity-investments-in-law-firms-have-arrived-in-the-uk-and-have-largely-ignored-biglaw-what-will-happen-as-this-phenomenon-arrives-in-the-united-states/ [https://perma.cc/4QTS-9HUC].

74. *Id*.

75. *See, e.g.*, *id.* (commenting before the release of the committee's report that "a fair unbiased hearing on the subject won't be very likely here"); *see also* Andrews, *supra* note

expected, the NYSBA's Task Force eventually concluded that they should not allow "any form of nonlawyer ownership."[76]

Next, as one delves deeper into the potential cause behind such bias, something else becomes clear: that large and already-established firms, which might be inclined against giving smaller or fledgling firms easier access to the legal market and thus the ability to compete, have entrenched themselves in various bar associations and committees.[77] The NYSBA's recent Task Force presents a useful example, as it ties in with the upcoming discussion of J&M's challenge to New York's nonlawyer ownership regulations.[78]

First, by reading the 2012 NYSBA Task Force Report, a logical progression in the NYSBA's thinking is demonstrated from the outset on the first page, where a list of issues and their resolutions are presented.[79] Specifically, the first paragraph mentions that the NYSBA approved a resolution in 2000 from a Special Committee that recommended continuing to prohibit any form of nonlawyer equity ownership, reaffirmed further down by the 2012 Task Force and thereby cementing the NYSBA's stance on the issue once more.[80] Therefore, by following the NYSBA's own chronological chain of events, one might conclude that the NYSBA's Special Committee in 2000[81] is to be credited with influencing much of the NYSBA's current stance against nonlawyer equity ownership of law firms. If that is indeed the case, one might hope that the Special Committee in 2000 would have been impartial and unbiased, and would have evaluated the issue keeping in mind the best interests of the legal community as well

---

30, at 579 (explaining that New York's original provisions against nonlawyers practicing law "are representative of those adopted around the turn of the century").

76. NYSBA Report, *supra* note 60, at 6.

77. *See id.*, *supra* note 60, at 53. Both large and small firms were surveyed and it was found that both small and large firms oppose a change in the rule, and that the largest portion of survey respondents that opposed allowing nonlawyer ownership were the respondents from small firms. *Id.* at 41. However, that might be because the Task Force also received far more completed surveys from small firms (821) than it did from large firms (298). *Id.* It is also important to note, however, that the issue lies not only in the size of the firms, but in the fact that some are already long established and sufficiently capitalized based on existing business models available to law firms and attorneys. Those who need capital are generally plaintiff's firms and attorneys, or attorneys who are just starting out on their own. The same survey found that 85.5% of the respondents had been licensed for at least ten years, and 70% of respondents at least twenty years. *Id*.

78. *See supra* Part III.A–B.

79. *See* NYSBA Report, *supra* note 60, at Resolution Adopted by House of Delegates Nov. 17, 2012.

80. *Id*.

81. *See generally* NEW YORK STATE BAR ASSOCIATION, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS (2000) [hereinafter MacCrate Report].

as the clients they owe a duty to. That is where one encounters several questionable facts that would arouse suspicion in even the most casual conspiracy theorist.

The first questionable fact arises in looking at who the three chairmen of the NYSBA's Special Committee on the Law Governing Firm Structure and Operation are, and what their regular jobs are (or were) apart from chairing the Committee. The report that this committee released was nicknamed the "MacCrate Report," after the very first chairman of the Committee listed in the report: Robert MacCrate.[82] In the late 1980's, apart from being a practicing attorney, MacCrate was the president of both the NYSBA and the ABA.[83] More importantly, however, is that MacCrate was also a partner at Sullivan & Cromwell LLP,[84] an international law firm which as of 2017 has 875 attorneys, and thirteen offices internationally, and generated a revenue of $1.36 billion in 2016.[85]

Next, the second chairman listed in the report is Sydney M. Cone, III.[86] Cone was a partner and is now senior counsel at Cleary Gottlieb Steen & Hamilton LLP, an international law firm with over 1,200 attorneys, sixteen offices world-wide, and having collected $1.272 billion in revenue in 2016.[87] The third and final chairman listed, Steven C. Krane,[88] was a partner at Proskauer Rose LLP, which is also an international law firm consisting of

---

82. *Id*. at Special Committee on the Law Governing Firm Structure and Operation; Russell G. Pearce, *MacCrate's Missed Opportunity: The MacCrate Report's Failure to Advance Professional Values*, 23 PACE L.R. 575, 575 (2003).

83. William Grimes, *Robert MacCrate, Lawyer in My Lai Inquiry, Dies at 94*, NEW YORK TIMES, Apr. 8, 2016, https://www.nytimes.com/2016/04/10/us/robert-maccrate-lawyer-in-my-lai-inquiry-dies-at-94.html.

84. *Id*.

85. *About S&C*, SULLIVAN & CROMWELL, LLP, https://www.sullcrom.com/overview [https://perma.cc/FN3Z-FLXT]; *Sullivan & Cromwell Law Firm Profile*, THE AMERICAN LAWYER, http://www.americanlawyer.com/law-firm-profiles-result?firmname=Sullivan+%26+Cromwell [https://perma.cc/J6FG-28BK].

86. MacCrate Report, *supra* note 81, at Special Committee on the Law Governing Firm Structure and Operation.

87. THE INTERNATIONALIZATION OF THE PRACTICE OF LAW 1 (Jens Drolshammer & Michael Pfeifer eds.) (2001) (Sydney M. Cone III was a "former Partner" at Cleary, Gottlieb, Steen & Hamilton); *About Us: Who We Are*, CLEARY GOTTLIEB, https://www.clearygottlieb.com/about-us/who-we-are [https://perma.cc/8BTG-WHEY] ("Cleary Gottlieb employs approximately 1,200 lawyers" and has "16 offices."); Christine Simmons & Lucy Mclellan, *New York's High-Flying Firms Hit New Heights in Profits, Revenue*, LAW.COM (Apr. 10, 2017) http://www.law.com/sites/almstaff/2017/04/10/new-yorks-high-flying-firms-hit-new-heights-in-profits-revenue/ [https://perma.cc/6NSC-D4Z6](stating that Cleary Gottlieb received $1.272B in revenue in 2016).

88. MacCrate Report, *supra* note 81, at Special Committee on the Law Governing Firm Structure and Operation.

over 700 attorneys, thirteen offices world-wide, and having collected $736.5 million in revenue in 2013.[89]

Furthermore, going beyond the chairmen of the 2000 Special Committee of the NYSBA, one might even look to current ABA leadership to see if there is any large firm influence on a national level. For example, the current president of the ABA, Linda Klein,[90] is also a "shareholder" (partner) in a large U.S. law firm and lobbying group, Baker, Donelson, Bearman, Caldwell & Berkowitz P.C.[91] The current president-elect of the ABA is Hilarie Bass, Co-President of the international law firm Greenberg Traurig,[92] which boasts a staff of approximately 2,000 attorneys.[93]

One of the main issues regarding the influence of large law firms in bar associations is the fact that most of the larger, well-established firms are defense firms that bill hourly; however, most plaintiff's firms must work on a contingent fee basis and therefore, require much more up-front capital.[94] Therefore, this not only incentivizes most large firms to prevent smaller, start-up firms from accessing capital and thereby becoming competitors in the market for legal services, it also gives an incentive to prominent defense firms of all sizes to prevent plaintiff's firms (those that typically require the most up-front capital) from attaining the capital necessary to survive the beginning stages of litigation.[95]

Other legal scholars have also commented on the self-serving nature of the ABA and each state's respective bar associations.[96] Furthermore, those same scholars have pointed out the presence of economic protectionism within the ranks of various bar associations going back as far as 1920, and also that even if protectionism is the true motivation behind the disallowance of nonlawyer ownership, it is not "a legitimate justification for the

---

89. Bruce Weber, *Steven Krane, Ex-Leader of New York State Bar, Dies at 53*, N.Y. TIMES (June 24, 2010), http://www.nytimes.com/2010/06/25/nyregion/25krane.html.

90. *Linda A. Klein*, A.B.A., http://www.americanbar.org/groups/leadership/aba_officers/klein.html [https://perma.cc/Y3HX-KWXL].

91. *Our Firm: Firm Profile*, BAKER DONELSON, https://www.bakerdonelson.com/Our-Firm [https://perma.cc/YCD8-R5XN].

92. *Hilarie Bass*, A.B.A., http://www.americanbar.org/groups/leadership/aba_officers/Bass.html [https://perma.cc/A396-737B]

93. *Our Firm: Firm History*, GREENBERGTRAURIG, https://www.gtlaw.com/en/general/our-firm/firm-history [https://perma.cc/T9C3-DN8V].

94. *See, e.g.*, Zimmerman, *supra* note 37, at 640–43 (explaining that due to increased pleading standards, plaintiffs face more and more challenges against defendants, who have time on their side and therefore, are economically better situated to continue litigation).

95. *Id*.

96. *See id.* at 663; Hadfield, *supra* note 53, at 1690–92; Andrews, *supra* note 30, at 622 ("One justification—economic protectionism—is rarely heard in public, but undoubtedly has played an important role in practice in preserving the business restrictions on lay involvement.").

current prohibitions in light of the antitrust laws."[97] Even Ted Schneyer, a member of the 2009 ABA Commission on Ethics 20/20 and co-chair of the Alternative Law Practice Structures sub-group (aimed at developing recommendations regarding law practices owned in part by nonlawyers), expressed his dissatisfaction at the ABA's blunt opposition "even to [the] experimentation with a highly restricted form of nonlawyer ownership of law firms."[98]

Whether the ABA's seemingly protectionist agenda is ultimately good for attorneys and their clients alike is another question,[99] but it is at least clear that it appears to be a significant driving force behind the refusal to amend Rule 5.4 and permit nonlawyer equity ownership. However, it is likely not the *only* driving force. Authors who point solely to economic protectionism as the main driving force behind disallowing nonlawyer equity ownership might be misled in characterizing various bar committees' intentions so plainly. In reality, there are most likely a number of other significant factors which lead to the current Rule 5.4 and its persistence.[100] For example, one author notes that "Enron's bankruptcy and other corporate scandals . . . have been a critical factor in states abandoning efforts to pursue [multidisciplinary practices]," creating an environment where it would be "politically incorrect to advocate for lawyer/nonlawyer partnerships."[101] Or, perhaps the attorneys placed in charge of making these decisions are simply in a position where they can only see the downsides of allowing nonlawyer equity ownership of law practices, and cannot see the upsides of allowing it (as some other commentators have also noted).[102] For instance, a "big shot" defense attorney, who has always worked in large defense firms

---

97. Andrews, *supra* note 30, at 616–17.

98. Schneyer, *supra* note 45, at 76 n.*; Memorandum from Jamie S. Corelick and Michael Traynor, Co-Chairs ABA Commission on Ethics 20/20 to ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, and Individuals (Dec. 12, 2011) https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf [https://perma.cc/CU8E-96DU] (concerning alternative law practice structures).

99. *See infra* Part II.C.1–2 (discussing the consequences of ABA rules limiting capital availability when there is growing demand for capital).

100. *See* Schneyer, *supra* note 45, at 82–83 (noting that the ABA Commission decided against recommending a Draft Resolution because the response from other bar associations and members of the legal profession to a Draft Resolution for amending ABA Model Rule 5.4 was extremely negative); *see also id.* at 132 (explaining that a lawyer who views "core values" as sacrosanct and absolute may oppose nonlawyer ownership because nonlawyer ownership would be compromising or putting the core value at risk); Robinson, *supra* note 58, at 33–34 (explaining that the ABA's suspicions of multi-disciplinary practice and nonlawyer ownership were heightened after the Enron scandal).

101. Mona Hymel, *Multidisciplinary Practices: Where Are They? What Happened?*, 103 TAX NOTES 689, 697 (2004).

102. *See infra* note 140.

defending corporate clients, simply might not be able to relate to the typical personal injury attorney whose clients are only able to litigate their claims on contingency fee bases. As a last resort, one might even make the argument that, technically, it is an attorney's job to represent his or her clients as best as possible, which theoretically includes preventing plaintiffs from gaining access to courts and suing their clients. However, whether their motives are proper or not, there undeniably remains a current impediment to enabling nonlawyer equity ownership of law practices deriving from within various states' bar associations.[103]

C. The Changing Times and Growing Demand for Capital

The reason why nonlawyer equity ownership is important at all—and the reason why this isn't an "if it ain't broke don't fix it" situation—is because there is a growing demand for capital in the legal market as the costs of litigation soar ever higher.[104] Furthermore, as mentioned previously,[105] those who currently need capital the most are start-up firms[106] and, predominantly, plaintiff's firms such as Jacoby & Meyers (and even individual plaintiffs themselves).[107] As more plaintiffs and firms are able to bring cases to court, more meritorious claims would presumably be adjudicated—at best creating more equity—and more claims in general would be brought needing to be defended against—at worst creating more jobs for the legal profession. Therefore, there is good cause for amending Rule 5.4 to allow nonlawyer equity ownership of law practices.

1. Capital is Currently in High Demand and Will Promote Equal Access to Courts. It is well known within the legal community that litigation costs have soared over the past few decades,[108] and even courts themselves have started to take

103. Zimmerman, *supra* note 37, at 653.

104. *See infra* Part II.C.1.

105. *See supra* Part II.B.2.

106. Zimmerman, *supra* note 37, at 650.

107. *See, e.g.*, Panel 1, *supra* note 48, at 521–22 (Mr. Desmarias, a practicing attorney, explains that plaintiffs often need funding especially in litigating patent cases, for example, which are highly expensive); Zimmerman, *supra* note 37, at 636, 639–48 (explaining how procedural obstacles have made modern day litigation into a "'pay to play' process," where plaintiff firms struggle to obtain justice for their clients if they lack serious funding while defendant firms reap the benefits of billing more hours).

108. Zimmerman, *supra* note 37, at 638.

notice[109] of what some might call a "pay to play" system.[110] Furthermore, the rise in litigation costs has not been met by a proportionate rise in the amount of capital available in the legal market.[111] Therefore, the most common argument as to why more capital is needed in the new age of six-figure litigation[112] is that capital will provide greater access to courts for plaintiffs who would otherwise not have enough money to fund the litigation themselves.[113]

However, access arguments, although meritorious,[114] are often difficult to bring to court considering that one must first have access to bring them, after which the argument obviously becomes moot. For instance, when Jacoby & Meyers brought their case in New York,[115] they too made the argument that, if allowed to accept nonlawyer equity investment, they would thereby be able to lower the costs of their legal services and thereby provide access to

---

109. Lawsuit Funding LLC v. Lessoff, No. 33066(U), slip op. at 12 (N.Y. Gen. Term Dec. 4, 2013) ("There is a proliferation of alternative litigation financing in the United States, partly due to the recognition that litigation funding allows lawsuits to be decided on their merits, and not based on which party has deeper pockets or stronger appetite for protracted litigation"). This case was based on a loan agreement for a law firm, where the lender had a security interest in the attorney's contract rights (the contingent fee not yet earned). *Id*. at 2. The court upheld the agreement, reasoning that it was not a loan, but rather that it was no different than any other investment in any ordinary business, because the payment to the "lender" was contingent on recovery from the underlying action. *Id*. at 11–12. Similarly to how an equity owner-investor earns a return on the business' profit (rather than charging interest on his investment), the "loan" here would only be paid back if the plaintiffs succeeded. *Id*. at 10. Furthermore, the court specifically ruled that such an agreement does not violate the rule against fee sharing, New York Rule of Professional Conduct 5.4(a). *Id*. at 11–13. This is yet another example of a permitted practice which is very similar to that prohibited by Rule 5.4(d).

110. Zimmerman, *supra* note 37, at 636.

111. *Id*. at 654–55 (finding that the amount of capital "flowing through private law practices" falls short of the amount of capital required by the market).

112. *See, e.g.*, Panel 1, *supra* note 48, at 522 (describing that "it's not uncommon for the monthly fees to be $500,000").

113. Robinson, *supra* note 58, at 10–12; *see also* SAC, *supra* note 58, at 3. *But see* Andrews, *supra* note 30, at 623 (stressing the need for development of multidisciplinary firms as "the most serious impediment imposed" by Rule 5.4 rather than access to courts and capital).

114. *See, e.g.*, Robinson, *supra* note 58, at 10 (citing studies taken in Australia, the UK, and the US which "indicate that there are likely a significant number of people who could benefit from the help of a lawyer, but do not hire one because they either cannot afford a lawyer or are unaware of how one could assist them."). Furthermore, one of the only alternatives for plaintiffs in need of capital are loans from litigation financiers, who can charge exorbitant interest rates because they are not regulated as are banks. *See* Courtney R. Barksdale, *All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707, 708–09 (2007); *see also supra* note 49, at 5 (explaining that litigants involved in large, complex matters, or those with living or medical expenses may not have access to traditional sources of capital and may need to obtain alternative litigation financing).

115. *See infra* Part III.A.

"economically challenged individuals who would otherwise have no access to the legal system."[116] However, the court seemingly laughs off this argument by simply countering that the Constitution protects *individuals'* right to appeal to courts—not the rights of law firms to form certain types of associations.[117] Furthermore, seeing as Jacoby & Meyers were already making this argument in court, they had not necessarily suffered the injury of being shut out of court.[118] What the court completely overlooks, however, is the fact that individuals' very ability to access the courts depends on them being able to pay for the legal services necessary to bring a claim, which in turn depends on how little an attorney or firm can accept for those services; this ultimately turns on how capitalized that attorney or firm is.[119]

Another example of how the current costs of litigation have literally reduced access to justice is the recent phenomenon of so-called "patent trolls."[120] Patent trolls are companies that exist for the sole purpose of owning a large portfolio of patents, which they then utilize to essentially extort settlements from unsuspecting companies that have technically infringed upon their patents. Sometimes, infringement simply occurs when a technology or process similar to that owned by the patent troll is used.[121] The reason that this strategy works, even when the victim of the patent troll is not truly infringing upon the troll's patent, is because the cost of waging litigation to prove as much would be incredibly expensive[122] while a settlement would be quicker and much more painless.[123] This is especially true for "mom and pop" businesses who might unwittingly use a process that a patent troll owns a patent on, and who would have the least amount of money to actually defend themselves in court.[124] Therefore, if law firms

---

116. SAC, *supra* note 58, at 3.

117. Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Dep'ts, Appellate Div. of the Supreme Court of the State of N.Y., 118 F. Supp. 3d 554, 575–76 (S.D.N.Y. 2015).

118. *Id*. at 579–80.

119. *See, e.g.*, Zimmerman, *supra* note 37, at 638 (explaining that costs of litigation have risen thereby reducing "access to justice for those who are not the very wealthy in our society, unless they can find a source of capital").

120. *See generally Patent Trolls*, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/issues/resources-patent-troll-victims [https://perma.cc/NXB8-9Z9E].

121. *Id*.

122. Panel 1, *supra* note 48, at 521–22.

123. ELECTRONIC FRONTIER FOUNDATION, *supra* note 120.

124. Mike Masnick, *FTC Releases Big Report On Patent Trolls, Says The Patent System Needs To Change*, TECHDIRT (Oct. 6, 2016), https://www.techdirt.com/articles/20161006/11043435728/ftc-releases-big-report-patent-trolls-says-patent-system-needs-to-change.shtml [https://perma.cc/A2SV-9DXM]; *see, e.g.*, ELECTRONIC FRONTIER FOUNDATION, *supra* note 120 (giving an example of a particular

could attain the necessary capital to take on these cases, individuals and businesses would be able to actually fight against more and more of these patent troll suits. This would completely undermine their strategy, and could potentially solve the problem that patent trolls currently present.[125]

2. Other Problems With the ABA's Stance. The other problem with the ABA's stance, regardless of its motivations,[126] is not just that it is hurting under-capitalized law firms and plaintiffs,[127] but also that it is leaving the U.S. legal market stagnant behind that of other countries[128] and hurting all types of clients by keeping the domestic costs of legal services artificially high.[129] In fact, some legal scholars have noted that the ABA's economic protectionism is hurting corporate and individual clients in the long run.[130] Clients with otherwise meritorious claims are sometimes not able to pay for litigation,[131] and those that can simply chose not to as a matter of business strategy[132] (for example, companies faced with extortion by patent trolls).[133]

Furthermore, the ABA's stance leaves the U.S. legal market lagging while that of the European Union, which is more liberal in regulating the practice of law (especially regarding nonlawyer ownership and partnerships), benefits from the innovative legal services that emerged after de-regulation[134] and which might

---

company, Lodsys, that neither produces nor sells any products and yet profits by targeting "small app developers, claiming the use of in-app purchasing technology . . . infringes Lodsys' patents.").

125. While the FTC suggests that the Patent Office should solve the problem by "getting rid of vague patents with 'indefinite' claims," allowing nonlawyer equity investment could potentially see the rise of firms specifically geared towards fighting these claims, thereby either counter-balancing the patent troll industry or shutting it down completely. Masnick, *supra* note 124.

126. *See supra* Part II.B.1–2.

127. *See supra* Part II.C.1.

128. SAC, *supra* note 58, at 4–5.

129. Hadfield, *supra* note 53, at 1694 n.20 and accompanying text (finding that law firm rates have increased from between 25-40% from 2000–2008).

130. *See, e.g.*, Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers, and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 236, 282 (2002) (writing that because of lawyers' monopoly on "the law business," the end result is that "the public, especially unrepresented parties, lose out.").

131. Zimmerman, *supra* note 37, at 643 n.26 (citing an ABA survey which found that 90% of plaintiffs' attorneys "are likely to turn away cases that are not cost-effective.").

132. *See* Panel 1, *supra* note 48, at 515–16 (Mr. Drucker explains that CFO's faced with investing large sums into their own business, providing a range of expected returns, versus litigation, providing an all-or-nothing result, would most likely chose the investment).

133. *See supra* notes 122–27 and accompanying text.

134. Melissa Pender, *Multijurisdictional Practice and Alternative Legal Practice Structures: Learning From EU Liberalization to Implement Appropriate Legal Regulatory*

locally be in-demand.[135] Other scholars point to the fact that the ABA's outdated stance places U.S. firms at a disadvantage following the most recent economic recession, as "[t]he pressures of rapidly-increasing technological advancements and foreign competition have brought unprecedented change to the U.S. legal marketplace."[136]

This in turn reflects upon the very assets that make up the legal market: the attorneys themselves.[137] For instance, one author notes that "[t]he high cost of forming and operating a law practice, together with the burden of large education loans, limits the opportunities for newly-minted lawyers to employ their legal skills."[138] That same author points to the rising rate of law school loan defaults as evidence of the financial pressure currently exerted on young attorneys, while other attorneys lacking capital to fund litigation are forced into other careers.[139]

In addition to the effects on attorneys themselves, the status quo of the ABA's current regulations also prevents companies from taking advantage of efficient legal services.[140] For example, lawyers typically lack management, technology, accounting, or other general business knowledge;[141] therefore, nonlawyer equity ownership is seen as a way for lawyers and nonlawyers to collaborate in a way that creates efficiencies that inevitably lower costs for clients.[142] The biggest industry hoping to benefit (and already benefitting abroad) from such multidisciplinary practices (MDPs) is the accounting industry—one prominent accounting firm in particular even became one of the largest legal services providers in the world.[143] Other industries, such as the insurance industry, could also benefit from these types of arrangements (and, again, are currently already doing so abroad).[144]

Reforms in the United States, 37 FORDHAM INT'L L.J. 1575, 1577–79, 1612–17 (2014).

135. *See, e.g.*, Andrews, *supra* note 30, at 623.

136. Markle, *supra* note 61, at 1252–54.

137. *See* Zimmerman, *supra* note 37, at 653.

138. *Id*. at 650.

139. *Id*. at 652.

140. Robinson, *supra* note 58, at 11–12; *see* Schneyer, *supra* note 45, at 86 (stating that "[t]he internal problem is that the constant resort to idiom-based arguments in bar debates on the rules that should govern lawyers' business entanglements tends to forestall serious efforts to assess the specific risks and benefits of the entanglements at issue.")

141. Zimmerman, *supra* note 37, at 654; *see also* Robinson, *supra* note 58, at 11–12.

142. Robinson, *supra* note 58, at 11–12.

143. John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 84–85 (2000); *see also* Elijah D. Farrell, *Accounting Firms and the Unauthorized Practice of Law: Who Is The Bar Really Trying to Protect?*, 33 Ind. L. Rev. 599, 599–605 (2000).

144. Robinson, *supra* note 58, at 22.

3. Allowing the Free Market to Do What It Does Best. Although some modern economists' views differ from Friedman's regarding government intervention in the economy, it is nonetheless undisputed that economic growth as we know it today could only exist with, and "began only with the development of market society."[145] Socialism, defined by government ownership of property and control of the economy,[146] is essentially the opposite of a true market society (more commonly "market economy"), where private property ownership and voluntary exchanges between individuals in the market rule the day.[147] Beginning in 1979, China underwent significant economic reform of its socialist planned economy, enabling it to become one of the global economic leaders that it is today.[148] Just as China did in the late 1970s, the legal profession should do its best to place itself within the rubric of the free market and thereby allow innovation and evolution to flow with the economic tides, rather than against them. Only then will the legal profession begin to see a "massive, protracted, and unexpected economic upsurge" such as that observed in China.[149] However, the economic liberalization of a country is a far different matter than the deregulation of a profession.

As already noted,[150] Australia and the United Kingdom have long allowed for nonlawyer ownership of law practices, with Australia allowing it as far back as 2000.[151] Since then one Australian firm, Slater & Gordon, even went public by listing themselves on the Australian Stock Exchange. In their first fiscal half-year following the initial public offering, profits increased 56% "compared to its profits over the same period in the previous year."[152] At the same time, one scholar who empirically studied the

---

145. TOMASI, *supra* note 3, at 58–60.

146. *Socialism*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/socialism [https://perma.cc/VXP3-8H79].

147. *Market Economy*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/market%20economy [https://perma.cc/V5HM-R4Q7].

148. Barry Naughton, *Growing Out of the Plan: Chinese Economic Reform 1978-1993*, 39 THE CHINA J. 124, 124–25 (1998); Loren Brandt & Thomas G. Rawski, *China's Great Economic Transformation*, CHINA BUS. REV., Nov.–Dec. 2008 at 31, http://homes.chass.utoronto.ca/~floyd/newsletter/bransky.pdf [https://perma.cc/Q3CQ-92WK] ("In economic terms, Chinese socialism held the economy far below its production frontier while severely restraining the frontier's outward movement.").

149. *See generally* Brandt, *supra* note 148. Indeed, since the early 1980's, China has been the fastest growing large economy in the world, and by a large margin. Naughton, *supra* note 148, at 5.

150. *See supra* Part II.B.1.

151. Bish, *supra* note 56, at 683.

152. *Id*. at 700; *see also* McKnight, *supra* note 4, at 871 (explaining that free flows of capital abroad have produced a wide variety of economic benefits and are associated with economic growth, especially in "[t]he high-growth economies of East Asia, in particular Singapore and Hong Kong," which "are frequently cited as examples of the benefits of

effects of deregulation in the United Kingdom and Australia noted that "the evidence [from these countries] does not indicate that the professionalism concerns raised by nonlawyer ownership justify a blanket ban."[153]

Furthermore, some might overlook the fact that at least one U.S. jurisdiction, Washington D.C.,[154] does currently allow nonlawyer equity ownership with the caveat that their Rule 5.4 does not allow for passive investment by nonlawyers in the practice: the investor must "perform[] professional services which assist the organization in providing legal services."[155] Even though this rule has been in effect in D.C. since the early 1990s,[156] there has not been much criticism of its impact on professionalism, and the rule still stands to this day.[157]

With the changing times came a globalized economy,[158] innovations in technology,[159] and soaring litigation costs[160]—all of which have not been met with proportional changes to the regulation of the legal market in the United States.[161] Therefore,

---

economic liberalization.").

153. Robinson, *supra* note 58, at 61–62. The same author also found in his study that the access benefits have *not* been substantial thus far. *Id.* at 53–54. However, he then notes that "[t]his does not mean these deregulatory strategies are not worth pursuing." *Id.* at 54. Also, it is possible that, as with any economic change, the benefits will simply take more time to accrue, one could have only studied nonlawyer ownership's effects for less than two decades. *See* Bish, *supra* note 56, at 683 (discussing Australian law allowing nonlawyer ownership since 2000). In fact, Ted Schneyer even wrote that he thinks that more lawyers will come to see nonlawyer ownership as attractive as time goes by. Schneyer, *supra* note 45, at 136. This points out that even if the rule were changed, there will still be a delay with regards to the practice catching on, and therefore the benefits might take some time to accrue.

154. *See supra* notes 59–60 and accompanying text.

155. D.C. RULES OF PROF'L CONDUCT r. 5.4(b) (D.C. BAR 2007); Bish, *supra* note 56, at 679–80.

156. Sean T. Carnathan, *Is Prohibition of Non-Lawyer Ownership of Firms Antiquated?*, ABA: LITIGATION NEWS, http://apps.americanbar.org/litigation/litigationnews/articles-print/071012-non-lawyer-ownership-summer12.html [https://perma.cc/Z2V7-J6LF].

157. To be fair, this might be because the rule has not seen much use, most likely owing to the fact that lawyers who practice in multiple jurisdictions within the United States would therefore be subject to conflicting rules, putting them at risk of losing their accreditation. Bish, *supra* note 56, at 679 n.92. *See also* SAC, *supra* note 58, at 17 (explaining that while D.C. "stands in the vanguard of domestic and international jurisdictions that have rejected the arbitrary and insubstantial grounds" of the rules against nonlawyer ownership, the fact that many attorneys based in D.C. are also admitted to practice in New York means that the rules nonetheless apply to them as well, and using the nonlawyer equity structure would thus place them at risk).

158. Zimmerman, *supra* note 37, at 650.

159. *See generally* Stephen Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953, 971 (2012).

160. Zimmerman, *supra* note 37, at 640–48.

161. *Id.* at 650.

as one author put it, "[t]he legal profession may be its own worst enemy in terms of achieving success" seeing as "lawyers generally tend to be resistant to change" in the face of shifting global markets.[162] In fact, many scholars have noted that the practice of law has changed from being viewed strictly as an independent profession to more of a business akin to other service-related industries.[163] It seems as though the time has come for the United States to keep up with the rest of the world and the changing global economy.

D. The Potential Drawbacks of, and Counter-Arguments to, Allowing Nonlawyer Ownership of Law Practices

The first and most common argument against allowing nonlawyer equity ownership, discussed above,[164] as well as other types of ALF is that it might undercut professionalism and the independent judgment of lawyers.[165] As was also discussed, the flaws in this argument abound,[166] and many legal commentators view them as outdated[167] and serving little purpose other than mere economic protectionism.[168]

However, some actual problems arise regarding nonlawyer equity ownership which must be addressed. First and foremost is the problem of a nonlawyer owner (or litigation funder) exerting control over ongoing litigation, including having an effect on settlement.[169] Typically, this issue might emerge when there is a conflict of interest between the actual party to the litigation and the third party who provided the capital, whether through litigation financing or through nonlawyer equity ownership,

---

162. *Id*.

163. *See, e.g.*, Hall, *supra* note 37, at 164 (writing that "[t]he notion that somehow 'law is different' is dead."); Peroni, *supra* note 143, at 88 (referring to "the imagined golden years" as a time when law was viewed as a profession rather than a business, "even if this vision of the legal profession probably never reflected economic reality"); Zimmerman, *supra* note 37, at 654 ("Whether large or small, law firms are businesses.").

164. *See supra* Part II.B.1.

165. *See, e.g.*, A.B.A. COMMISSION ON ETHICS, AMERICAN BAR ASSOCIATION COMMISSION ON ETHICS 20/20: INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES at 22 (Feb. 2012); Schneyer, *supra* note 45, at 84.

166. *See supra* Part II.B.1.

167. Hadfield, *supra* note 53, at 1691 (citing Barlow Christensen, who completed a history of regulation of the unauthorized practice of law for the ABA in 1980 and found that the regulations were no longer defensible, in Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors - or Even Good Sense?*, 5 AM. B. FOUND. RES. J. 159, 215 (1980)).

168. Andrews, *supra* note 30, at 616, 622.

169. *See* A.B.A. COMMISSION ON ETHICS, *supra* note 167 at 26; Panel 1, *supra* note 48, at 525, 528.

regarding whether to settle when a settlement offer is made.[170] For example, a funder might urge settlement when the offer is two or three times their investment but is nonetheless too low to truly compensate the actual party to the litigation.[171]

However, liability insurance has been in existence in the United States since 1886,[172] and it is a known and accepted fact that "[i]nsurers typically have complete control through a right and duty to defend," including control over settlement decisions.[173] At the same time, seeing how current litigation funders offer nonrecourse loans,[174] they are able to contract freely unlike banks who are subject to interest rate regulations.[175] Therefore, because funders can contract freely and provide money to fund the litigation, some argue that it is only fair that funders (including insurers) should be given some measure of control over the litigation.[176] Interestingly enough, however, evidence shows this not to be the case in practice: most non-party litigation funders "do not typically contract for such control over the litigation."[177] In fact, most funders do not typically seek such control due to requirements that they not "intermeddle" in litigation.[178] Thus far, ALF has not posed any problems with regard to control over litigation that cannot be handled through regulation or simple freedom of contracting.[179] If it did, these problems would be no different than those posed by the currently acceptable practice of liability insurance.[180]

Next, even if the ABA and company's intent is truly the economic protectionism of large, established law firms, and even if that intent is proper, that argument also fails because the opposite

---

170. *See* Panel 1, *supra* note 48, at 528.

171. *Id*.

172. Zimmerman, *supra* note 37, at 658.

173. *Id*. at 660.

174. For example, the plaintiff has no obligation to repay the "loan" if he does not win his case. Martin J. Estevao, *The Litigation Financing Industry: Regulation to Protect and Inform Consumers*, 84 U. COLO. L. REV. 467, 480 (2013).

175. Barksdale, *supra* note 114, at 734.

176. *See, e.g.*, Panel 1, *supra* note 48, at 531 (Mr. Seidel mentions that he thinks funders should have control over litigation).

177. Zimmerman, *supra* note 37, at 661.

178. *Id*. Furthermore, proponents of litigation funding note that this is an issue that comes up immediately when underwriting a particular case, and that if there is a conflict of interest with regards to settlements that particular case is simply passed up on. Panel 1, *supra* note 48, at 530 (Mr. Zimmerman explaining his litigation funding practices).

179. *See generally* Estevao, *supra* note 174, at 471 (proposing regulation that would prevent predatory behavior amongst litigation financiers while preserving the benefits of litigation financing).

180. Indeed, one group of authors points out the "'double standards' applied to liability insurers and non-party plaintiff-side litigation funders." Zimmerman, *supra* note 37, at 661.

is actually being accomplished.[181] As mentioned above, attorneys are thought to have little actual business or economics expertise.[182] This is most evident in the majority of lawyers' ignorance as to the downsides of disallowing small firms to capitalize more easily: if plaintiffs are able to bring fewer cases due to lack of capital, "the adverse economic impact is equal or greater on those lawyers who earn a living defending against such claims."[183] Plaintiff and defense attorneys are part of a symbiotic relationship in which they depend on the success of one another to thrive themselves.[184] Friedman himself once said that "[t]he most important single central fact about a free market is that no exchange takes place unless both parties benefit."[185] If one party cannot come to the bargaining table due to undercapitalization, the "exchange" (the litigation that generates revenues for both plaintiff and defense attorneys) will simply not occur, leaving *both* parties out of a job and thereby accomplishing the opposite of economic protectionism.

III. THE *JACOBY & MEYERS, LLP* CASE AND AMENDING RULE 5.4

Now that nonlawyer equity ownership has been fully considered,[186] the most recent case on the matter provides an example of how a nationwide change to current ABA regulations could be implemented.[187] *Jacoby & Meyers, LLP* was brought as a putative class action in federal court in New York[188] by the reputable, national, and predominantly plaintiff's firm Jacoby & Meyers LLC (J&M),[189] seeking "a declaration that New York Rule 5.4 violated the First and Fourteenth Amendments and the Dormant Commerce Clause."[190] However, J&M's approach proved an ineffective way to argue the case for nonlawyer equity ownership. Part III.B.2 of this Comment attempts to propose an alternate approach.

---

181. *See* Zimmerman, *supra* note 37, at 656.

182. *See id.* at 654; *see also* Panel 1, *supra* note 48, at 525 (Mr. Seidel notes that lawyers know very little about the funding industry).

183. Zimmerman, *supra* note 37, at 663.

184. *Id*.

185. *Interview with Milton Friedman*, PBS: COMMANDING HEIGHTS (Oct. 1, 2000), https://www-tc.pbs.org/wgbh/commandingheights/shared/pdf/int_miltonfriedman.pdf [https://perma.cc/YF9M-AWPZ].

186. *See supra* Part II.

187. Or rather, an example of how *not* to bring about change. *See infra* Part III.B.

188. Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Dep'ts, Appellate Div. of the Supreme Court of the State of N.Y., 118 F. Supp. 3d 554, 560 (S.D.N.Y. 2015).

189. *See generally* JACOBY & MEYERS LLC, http://www.jacobymeyers.com/ [https://perma.cc/PTJ3-AT9A].

190. *Jacoby*, 118 F. Supp. 3d at 561.

A. The Jacoby & Meyers, LLP Case

On March 13, 2015, J&M filed its third amended complaint[191] seeking declaratory and injunctive relief against the New York Rules of Professional Conduct which "prohibit non-attorneys from owning or investing in law firms," and who are thereby "prohibited from participating in economic associations whose primary purpose is free speech."[192] Specifically, J&M sought "declaratory judgment that Rule 5.4; Judiciary Law Sections §§ 478, 484, 485, 491, 495; N.Y. Part. L. § 121-1500(a)(I); and N.Y. Limited Liability Co. L. §§ 201, 1201, 1203, 1207(a), 1208, 1210, 1211, [(NY Rules)] insofar as they are applied to non-lawyer investments in law firms" violate the U.S. Constitution in a number of ways.[193] J&M also sought an injunction against the defendants—the Presiding Justices of the First, Second, Third, and Fourth Departments of the Appellate Division of the Supreme Court of New York and a litany of other related state actors[194]—from enforcing the NY Rules.[195]

J&M argued that the NY Rules specifically violate: (1) the First Amendment, made applicable to the states by the Due Process Clause of the Fourteenth Amendment; (2) the Dormant Commerce Clause; and (3) the Substantive Due Process and Equal Protection clauses of the Fourteenth Amendment.[196] J&M's primary argument was that the NY Rules restricted the First Amendment's protections of free speech and association; specifically, free speech through corporate spending and the lawyer's right to speak for clients, and the right of individuals and corporations to "form[] associations for the purpose of providing legal representation."[197] In response to J&M's First Amendment arguments, the court said first that J&M's case "ha[d] nothing to do with speech" because it involves conduct instead.[198] Next, the court noted that the First Amendment only protects conduct that is expressive, while the conduct here was purely commercial.[199]

---

191. *Id*. at 563–64.

192. SAC, *supra* note 58, at 3.

193. *Id.* at 5–6; *see also Jacoby*, 118 F. Supp. 3d at 563–64, 563 n.25 and accompanying text (explaining that the SAC is almost exactly the same as the third and final amended complaint and challenged the same NY Rules).

194. SAC, *supra* note 58, at 1–2, 7–9. For instance, defendants included Eric Schneiderman, the Attorney General of the State of New York, who is partially responsible for enforcing the NY Rules in New York. *Id.* at 1, 7.

195. *Id*. at 6.

196. *Id*. at 5–6; *see also Jacoby*, 118 F. Supp. 3d at 566–81 (portion of opinion assessing J&M's constitutional claims).

197. *Jacoby*, 118 F. Supp. 3d at 567.

198. *Id*. at 568–70.

199. *Id*. at 570.

Therefore, only minimal constitutional protection was afforded for the type of commercial association in which J&M was attempting to engage[200]—namely, the rational basis test established by the Court in *Williamson*.[201] Needless to say, the Court found that "[t]he First Amendment does not bar these laws" because the laws were intended to protect the public and are thus legitimate.[202]

Next, J&M argued that the NY Rules violate the Dormant Commerce Clause in that they "excessively burden[] interstate commerce relative to any putative local benefit [they] might otherwise advance," as well as the flow of capital across state lines, by prohibiting plaintiffs from accepting nonlawyer investment; and because the NY Rules "apply extraterritorially, a firm with New York lawyers cannot accept nonlawyer investment . . . in the District of Columbia."[203] The court dismissed this argument by applying another admittedly deferential[204] standard of review—the "*Pike* standard"[205]—which states that "the statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce."[206] The court reasoned the NY Rules do not treat out-of-state attorneys differently than in-state attorneys.[207]

Lastly, J&M argued that the NY Rules violate the Fourteenth Amendment by "abridg[ing] a fundamental right under Substantive Due Process"[208] and denying the firm "equal protection of the laws in violation of the Equal Protection Clause"[209] because the same restrictions on nonlawyer ownership of law practices do not apply to "similarly situated professions, including but not limited to investment banking."[210] First, the

---

200. *Id*. at 573.

201. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488, 491 (1955).

202. *Jacoby*, 118 F. Supp. 3d at 575–76.

203. SAC, *supra* note 58, at 27.

204. *Jacoby*, 118 F. Supp. 3d at 577 (explaining that the rule for evaluating Dormant Commerce Clause challenges does not set a high bar, and that state laws often pass its scrutiny).

205. *Id*. (the standard comes from the case Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

206. *Id*. (quoting Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 109 (2d Cir. 2001)).

207. *Id*. The court itself notes that "[a] facially discriminatory law motivated by 'simple economic protectionism' is subject to a 'virtually *per se* rule of invalidity.'" *Id*. at 576–77 (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 624(1978)). Even though the "discrimination" refers to intrastate—versus interstate—commerce, this lenient rule recognizes the problems associated with economic protectionism.

208. *Id*. at 578 (quoting SAC, *supra* note 58, at 30). However, as the court notes, J&M did not allege specifically which "fundamental right" had been violated; therefore, the court assumed it to be free speech and access to courts. *Id*.

209. SAC, *supra* note 58, at 31.

210. *Id*.

court noted that only unenumerated rights, such as the right to marry or to have an abortion, come "within the ambit of substantive due process."[211] Although the court noted that the right of access is in some contexts "a fundamental right for substantive due process purposes,"[212] the court held against J&M simply because J&M itself has not suffered the injury of being denied access to court.[213] Second, the court held against J&M on its Equal Protection Clause argument by stating that lawyers and bankers serve different roles in society, and therefore the NY Rules "are rationally related to New York's legitimate—indeed its 'extremely important'—interest in maintaining and assuring the professional conduct of the attorneys it licenses."[214]

B. Why the Jacoby & Meyers, LLP Opinion is Flawed, and a Better Way to Argue the Case

Jacoby & Meyers, LLP not only suffered from huge obstacles from the start,[215] but also from ineffective arguments brought by the plaintiffs[216] and unsatisfactory reasoning by the presiding court. The next two sections consider why, and provide an alternate approach to arguing the case.

1. Why the Jacoby & Meyers, LLP Court's Reasoning is Flawed. First, the court alluded to its own inherent bias throughout the opinion. For instance, the court inserted dismissive remarks such as "J&M contends, *with debatable justification*, that it 'has become synonymous with legal services for underserved populations.'"[217] Or, the court sarcastically quipped "[b]ut fear not," —after addressing J&M's argument that the NY Rules thwart its goal of providing cheaper legal services—because they have numerous offers from prospective nonlawyer investors.[218] Later, in describing J&M's First Amendment arguments, the court stated their arguments "[a]t worst . . . . make[] a mockery of the First Amendment."[219] The court's inherent bias seems fairly clear and has the obvious

---

211. *Jacoby*, 118 F. Supp. 3d at 579 n.148.

212. *Id*. at 579 (citing United Transp. Union v. St. B. Mich., 401 U.S. 576, 585 (1971).

213. *Id*. at 580.

214. *Id*. at 580–81.

215. *See infra* Part III.C.

216. *See infra* Part III.B.2.

217. *Jacoby*, 118 F. Supp. 3d at 564 (quoting SAC, *supra* note 58, at 12) (emphasis added).

218. *Id*.

219. *Id*. at 568.

potential to cloud the court's reasoning.

Next, the court framed J&M's First Amendment claim inaccurately by focusing on the free speech and association rights of the attorneys themselves.[220] In doing so, the court ignored the fact that the NY Rules realistically impede the free speech rights of the *clients* whom the attorneys would be representing through their "right to speak for [them]."[221] Even though J&M did a lackluster job of explaining this notion to the court, their argument should have focused more on the inability to expand operations "within communities in which working-class, blue-collar and immigrant families reside."[222] Consequently, the rules vicariously deprive the *clients* of their free speech and court access rights as well.[223] Furthermore, the court noted that "[t]o the extent plaintiffs seek to vindicate the rights of their clients,"[224] J&M would have faced third party standing issues if it were not for the fact that vendors have standing "to assert the constitutional rights of customers and prospective customers,"[225] or that those with a commercial interest in speech may challenge statutes that infringe upon the First Amendment rights of others.[226] Therefore, the court's response to J&M's First Amendment and right of access arguments is wrong because it addresses the wrong question; at the very least, the court would not have so easily brushed off the right of access argument if J&M had argued it more effectively.[227] Ironically, the court noted that "[i]t is, in fact, those clients whose access to the legal system the Constitution protects."[228]

Regarding the access argument under Substantive Due Process, the court (also ironically) mentioned that if attorneys were a "suspect classification," they would be subject to a higher level of scrutiny than simply rational basis.[229] However, the court

---

220. *Id*.

221. *Id*. at 567 (quoting SAC, *supra* note 58, at 5, 25).

222. SAC, *supra* note 58, at 13.

223. *See, e.g.*, Zimmerman, *supra* note 37, at 643 n.26 (citing A.B.A., ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT (2009), https://www.americanbar.org/content/dam/aba/migrated/litigation/survey/docs/report_aba_report.authcheckdam.pdf [https://perma.cc/X88A-CC7F] (finding that 90% of plaintiff's attorneys "are likely to turn away cases that are not cost-effective").

224. *Jacoby*, 118 F. Supp. 3d at 567 n.58.

225. *Id*. (quoting 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.9.3 (3d ed. 2008)).

226. *Id*. (citing Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 504 n.11 (1981)).

227. *Id*. at 580 (stating succinctly "J&M has no legally sufficient right of access claim").

228. *Id*. at 575.

229. *Id*. at 580 n.159 and accompanying text.

stated that such a classification would not apply because lawyers are not "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[230] As discussed previously, however, the opposite might in fact be true.[231]

2. A Better Way to Argue the Case. J&M did not argue their point about the NY Rules vicariously abridging the constitutional rights of the clients[232] in their Substantive Due Process argument,[233] but instead alluded to it via the First Amendment and the role of legal representation in speaking on behalf of others.[234] Therefore, the court had little trouble dismissing their claims because the NY Rules are commercial regulations that directly impose restrictions on *attorney* free speech and association rights—not those of their clients—and easily pass the rational basis test.[235]

J&M did, however, argue multiple times under Substantive Due Process grounds that the NY Rules serve no legitimate state interest, are not rational means to serve such interest, and are thus arbitrary and capricious.[236] However, the court flatly rejected these arguments by repeatedly stating that the regulations are rationally related to the legitimate state interest of ensuring the independence and professionalism of licensed attorneys.[237]

The issue with the court's holding is that the state interest at hand does not seem legitimate because there appears to be an ulterior motive behind the regulations.[238] Furthermore, less restrictive means can accomplish the claimed state interests,[239] so they cannot be reasonably related to the given state interest. However, supposing the state interests of professionalism and independence are one of many ends but nonetheless legitimate, the court would simply retort with the fact that "the laws need not be the only—or even the best—means of accomplishing New York's

---

230. *Id*. (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)) (internal quotation marks omitted).

231. *See supra* Part II.B.2.

232. Namely, that clients' rights to freedom of speech and association are abridged by preventing the costs of such speech through attorneys from being lowered (to feasible levels) by the workings of the free market. *See supra* Part III.B.1.

233. *See* SAC, *supra* note 58, at 29–30.

234. *Id*. at 25.

235. *Jacoby*, 118 F. Supp. 3d at 567–76.

236. *See* SAC, *supra* note 58, at 26, 30-31.

237. *See Jacoby*, 118 F. Supp. 3d at 578–81.

238. *See supra* Part II.B.2.

239. *See* SAC, *supra* note 58, at 26.

legitimate regulatory objectives" under the rational basis test.[240] Therefore, they key to success in court is to demonstrate that the standard of review must be raised above the deferential standard of rational basis.

United States v. Carolene Products Co.,[241] and specifically its infamous Footnote 4, is the quintessential case dealing with commercial regulation and the problem of "discrete and insular minorities."[242] In Footnote 4, Justice Stone set out possible exceptions to rational basis review of purely commercial legislation.[243] Most importantly, Justice Stone recognized that "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily relied upon to protect minorities" could be a "special condition" calling for "a correspondingly more searching judicial inquiry."[244]

Footnote 4 today is "identified with a political process theory of judicial review," which justifies judicial review whenever the majoritarian political process fails.[245] In other words, whenever minorities are shut out of the political process, they are not able to protect themselves against regulatory issues through traditional avenues (i.e. by voting on legislation).[246] In these situations, judicial review is used to correct the failings of the political process.[247]

In the case of Rule 5.4 or the NY Rules, this very problem of majoritarian political process failure is evident: established attorneys of larger law firms form the majority of various bar association decision-making committees, leave little room for small-time plaintiff's attorneys and firms, and have every

---

240. *Jacoby*, 118 F. Supp. 3d at 580 n.156 (citing Dandridge v. Williams, 397 U.S. 471, 487 (1970)).

241. United States v. Carolene Products Co., 304 U.S. 144 (1938).

242. *Id*. at 152–53 n.4.

243. *Id*. The exceptions included: 1) whenever legislation targets specific rights from the first ten Amendments directly; 2) whenever the legislature enacts laws restricting "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"; and 3) "discrete and insular minorities," including national or racial minorities. *Id.*

244. *Id*.

245. Gilman, *supra* note 67 at 173–74.

246. See i*d*. at 175, explaining that "[l]egislation emerges from [] wheeling and dealing. No one wins all the time and no one always loses; 'a variety of voices [are] guaranteed their say and no majority coalition [will] dominate.' Some minority groups, however, cannot form coalitions with other groups or deal with them . . . because they are 'discrete and insular.'" (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 80 (1980) and *Carolene Products Co.*, 304 U.S. at 152–53 n.4, respectively).

247. Gilman, *supra* note 67, at 174–75.

incentive to maintain the status quo.[248] Therefore, if a court can be convinced of the existence of "prejudice against discrete and insular minorities"[249] within the ABA and the various state bar associations, it would be more inclined to give the issue "more searching judicial inquiry" than it otherwise would under the rational basis standard.[250]

Stricter judicial scrutiny would not only invalidate a majority of the *Jacoby & Meyers, LLP* court's reasoning behind its holdings, but would also inevitably lead to the conclusion that the ban on nonlawyer equity ownership should be lifted. First, multitudes of legal scholars and even attorneys[251] agree that the rule is outdated and is not necessary to ensure the professionalism and independence of attorneys.[252] Second, a similar rule currently exists within the United States, Rule 1.8(f), demonstrating not only the viability of allowing nonlawyer ownership with caveats to ensure professionalism, but also providing a template upon which Rule 5.4 might be modified.[253] Similarly, rules allowing nonlawyer ownership have existed abroad for some time now and have not caused significant issues with regards to professionalism or independence.[254] Therefore, because there is simply no "evil at hand for correction,"[255] the regulations can be seen as arbitrary, contrary to the holding of *Williamson*.[256] Lastly, seeing as the intent behind the regulation seems to be more economic protectionism[257] than protecting the public, the ends are clearly illegitimate under stricter scrutiny.[258] However, achieving said scrutiny in the first place is an almost impossible task.[259]

C. Regardless of their Merit, Most Constitutional Arguments Are

---

248. *See supra* Part II.B.2.

249. *Carolene Products Co.*, 304 U.S. at 152–53 n.4.

250. *Id*. After all, Footnote 4 "clearly qualified th[e] deference" given to economic legislation and is intended to "correct [the] failings of the majoritarian political process." Gilman, *supra* note 67, at 174, 183.

251. *See, e.g.*, Hall, *supra* note 37, at 164.

252. *See supra* Part II.B.1.

253. *Id*.

254. *See supra* note 58 and accompanying text.

255. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955).

256. *Id.* at 489–90 n.4 (explaining that the regulations may not be arbitrary by quoting the opinion of the lower court, Lee Optical of Okla., Inc. v. Williamson, 120 F. Supp. 128, 140–422 (W.D. Okla. 1954), *aff'd in part*, *rev'd in part*, 348 U.S. 483 (1955)).

257. *See supra* Part II.B.2.

258. *See* Andrews, *supra* note 30, at 621 ("[p]rotection of the economic well-being of the profession is not . . . a valid interest" within the meaning of the rational basis standard of review).

259. *See infra* Part III.C (explaining that it would be almost impossible to assign any class of lawyers, or lawyers as a whole, the title of "discrete and insular" minority).

Unlikely to Prevail

The inherent problems with any constitutional argument regarding the rules prohibiting nonlawyer ownership are threefold: 1) they are considered economic regulation and therefore receive a very deferential standard of review;[260] 2) there are no solid constitutional arguments against these rules; and 3) there is no suitable theory of harm upon which to bring such a claim.[261]

First, the deferential standard of review given to economic regulation necessarily means that any regulations restricting the practice of law, as long as not obviously arbitrary and at least rationally related to some potential state interest,[262] will most likely be upheld.[263] For instance, the court in *Jacoby & Meyers, LLP* invoked the rational basis test a number of times in rejecting J&M's arguments.[264] Alternatively, arguing that Rule 5.4 infringes on the association rights of attorneys—as did J&M, unsuccessfully[265]—leads to the same result as other First Amendment arguments: that "partnership . . . with nonlawyer equity investors would be non-expressive commercial conduct outside the scope of the First Amendment," and therefore would be "undeserving of constitutional protection."[266]

Second, most constitutional arguments, even those based on Footnote 4, hit a road block because state legislators gave the various state bar associations authority to regulate themselves.[267] The ABA and various state bar associations decide on the rules of professional conduct and independence of attorneys, so it is difficult to argue that there may be a problem within the majoritarian political process that needs correction when the rules are not promulgated by traditional legislation. Additionally, to bring the case to court, a plaintiff would have to plead the same way J&M did and simply request declaratory and injunctive relief against those who enforce the regulations rather than bringing a theory of actual harm.[268]

---

260. *See supra* note 12 and accompanying text.

261. *See, e.g.*, *supra* Part III.B.1.

262. *Williamson*, 348 U.S. at 488, 489–90 n.4.

263. *See* Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Dep'ts, Appellate Div. of the Supreme Court of the State of N.Y., 118 F. Supp. 3d 554, 577 (S.D.N.Y. 2015) (stating that this standard of review "is not a high bar" to overcome).

264. *See id.* at 580–81.

265. *Id.* at 572–76.

266. *Id*. at 573.

267. *See* Schneyer, *supra* note 45, at 87.

268. *See, e.g.*, SAC, *supra* note 58, at 5–9.

Furthermore, the Footnote 4 argument that would hypothetically enable stricter scrutiny to be applied to Rule 5.4 requires that those affected by the legislation be deemed "discrete and insular" minorities who cannot form coalitions to oppose the regulation "because of majority prejudice against them."[269] However, the title of "discrete and insular minority" is typically assigned to groups based on immutable characteristics, such as nationality or race,[270] and to those who have "a history of purposeful unequal treatment."[271] Needless to say, it is a stretch to say that lawyers—who voluntarily choose to enter the profession and thereby subject themselves to long-standing regulations—are "discrete and insular" and thereby require more justification behind their regulation. Furthermore, the Supreme Court seems to be unwilling to "expand the list of suspect classes" and instead seems intent on "cut[ting] it back."[272] For example, "the poor" are not considered a "discrete and insular class"; neither are "uniformed state police officers over 50."[273] Therefore, regulations adverse to attorneys, even small firm and plaintiff's attorneys, likely would not qualify for more exacting scrutiny under Footnote 4.

Lastly, there is no solid theory of harm upon which to base such a case. Those who are actually harmed by prohibitions against nonlawyer ownership are unidentifiable, seeing as the harm itself is that attorneys have not yet been able to utilize nonlawyer investments to lower costs for clients.[274] Also, as previously mentioned, any access argument brought to court would be inherently hypocritical, seeing as the party must have had access to court to bring those arguments in the first place.[275]

Predictably, *Jacoby & Meyers, LLP* was affirmed on appeal,[276] and a virtually identical case filed by J&M in Connecticut was easily dismissed on largely the same grounds.[277] Again, the

---

269. Gilman, *supra* note 67, at 174–75.

270. *Id*. at 216–17.

271. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

272. Gilman, *supra* note 67, at 220.

273. *Id*.

274. *See* SAC, *supra* note 58, at 4.

275. *See supra* note 117 and accompanying text. Furthermore, the *Jacoby & Meyers, LLP* court states that "the right of access to the courts inheres in individuals and entities seeking relief or defending themselves as litigants, not in law firms like J&M in their capacities as legal representatives." Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Dep'ts, Appellate Div. of the Supreme Court of the State of N.Y., 118 F. Supp. 3d 554, 578–79 (S.D.N.Y. 2015).

276. Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Dep'ts, 852 F.3d 178, 192 (2d Cir. 2017).

277. Jacoby & Meyers, LLP v. Judges of the Conn. Superior Court, No. 3:11-cv-817 (RNC), 2017 U.S. Dist. LEXIS 49951, at *2–5 (D. Conn. 2017).

common theme in these opinions—and the problem in attempting to make changes to restrictions such as Rule 5.4 judicially—is the applicability of the widely deferential rational basis standard of review.[278] The fact that strict scrutiny will likely never be applied means that there is no realistic judicial solution to the problems caused by Rule 5.4.[279]

D. How Rule 5.4 Should Be Amended

Even though there are numerous obstacles currently facing both attorneys and investors with regard to changing the current laws prohibiting nonlawyer equity ownership of law practices,[280] such laws have existed elsewhere and have been successfully changed.[281] Furthermore, there are two models within the United States upon which to base an amended Rule 5.4: the existing Rule 1.8(f)[282] and the Kutak Commission's proposed Rule 5.4.[283]

In fact, other scholars have also proposed the adoption of the Kutak Commission's model.[284] However, those same scholars propose additional internal oversight and regulatory committees[285] (all of which would undoubtedly be necessary if nonlawyer ownership was allowed), and such proposals exceed the scope of this Comment. This Comment only proposes that Rule 5.4 be amended to allow lawyers to be employed by or to create and own organizations in which a nonlawyer holds a financial interest or management position—but only as long as "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship,"[286] and "information relating to representation of a client is protected as required by Rule 1.6."[287] A key point to re-emphasize regarding the quoted limiting language is that the same exact language is used

---

278. *See Jacoby & Meyers, LLP*, 852 F.3d at 191–92.

279. *See, e.g.*, *id.* (noting that the regulations "easily pass muster under rational basis review."); Jacoby & Meyers, LLP v. Judges of the Conn. Superior Court, No. 3:11-cv-817 (RNC), 2017 U.S. Dist. LEXIS 49951, at *4–5 (D. Conn. 2017) (dismissing not only due to the reasoning behind the affirmance on appeal in the New York case, but also for various procedural reasons and to avoid proceeding with the action in lieu of nonjudicial alternatives).

280. *See supra* Part III.C.

281. *See supra* notes 56–58 and accompanying text.

282. *See supra* note 62 and accompanying text.

283. *See supra* Part II.A.

284. *See, e.g.*, Bish, *supra* note 56, at 697.

285. *Id*. at 697–702.

286. ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005, at 580 (2006); Rule 1.8(f), *supra* note 62.

287. ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005, at 580 (2006); Rule 1.8(f), *supra* note 62.

in both the currently permissible Rule 1.8(f) and in the Kutak Commission's proposed Rule 5.4.[288]

IV. CONCLUSION

The bottom line is that Rule 5.4 constricts the U.S. legal profession's current "economic pie," and possibly even the U.S. economy as a whole. Creating more cases for attorneys (via increased access to courts for themselves and their clients) and creating efficiencies within the law (by allowing various professions to combine with the legal profession) will necessarily create more jobs for attorneys (who are needed to bring cases for and defend against the newly-created litigants)[289] and other related professions as well. Nonlawyer ownership of law practices is not only an issue of free-market economics, but is also inherently an issue of access to courts. Although the benefits of liberalizing regulations dealing with nonlawyer equity ownership in Europe have not exactly materialized in the ways anticipated by its proponents,[290] these benefits, as with all economic liberalization, will take some time to accrue and become evident.[291]

Whichever approach is ultimately taken to resolve the issue—legislative, judicial, or simply internal (assuming the ABA abandons its historically strict stance)—three things are clear: first, there is an urgent need for the re-evaluation of current ABA rules of attorneys' professional responsibility, one that grows more pressing as foreign firms continue to innovate and improve their respective legal industries while that of the United States stagnates; second, there is an urgent need for capital as litigation becomes more expensive, thus depriving more potential plaintiffs of their day in court; and third, there are proven models upon

---

288. *See supra* notes 64–65 and accompanying text.

289. *See* Zimmerman, *supra* note 37, at 663–64, writing:

> To the extent that access to justice is constrained and fewer cases are filed or maintained to their conclusion due to a lack of capital on the plaintiff's side, the adverse economic impact is equal or greater on those lawyers who earn a living defending against such claims. This systemic, symbiotic relationship between the lawyers on each side of a legal dispute seems to be lost on many of the lawyers who are directly affected by it. One wonders why all lawyers, whether traditionally plaintiff-oriented or defendant-oriented, are not loud voices in a choir singing the benefits of assuring necessary capital is available to each side of the dispute to pursue civil justice for choses in action.

290. *See* Kowalski, *supra* note 73, at 663.

291. *See, e.g.*, Zimmerman, *supra* note 37, at 662 (explaining that even though nonparty litigation funding has been in existence and has been growing over the past twenty years, it is only now being identified as a "new phenomenon"; and even "though it still has not achieved maturity and economic efficiency," "[a]s in any emerging market in a capitalist economy" it is most likely to succeed in providing greater access "if allowed to mature without unnecessary outside constraints").

which to smoothly make the transition to nonlawyer ownership.

However, making these changes to the legal profession's regulations will not be as simple as amending the rule itself.[292] While judicial approaches are unlikely to work,[293] traditional regulatory methods have thus far failed[294]—bringing constitutional challenges in court may be the only option. However, if a case brought based on a political process theory of judicial review[295] succeeds, it would open the door not only for other state bar associations to follow, but could also potentially make its way up to the Supreme Court where rules arbitrarily barring nonlawyer ownership might be struck down on a national level. Even though Footnote 4 is unlikely to apply to lawyers (small firm or otherwise), and thus a court is unlikely to lower the standard of review,[296] its political process failure reasoning might nonetheless sway a court to view the matter through the lens of equity rather than the broad deference assigned to economic regulation. Regardless of the method used, it is time attorneys are permitted to obtain reasonable capital allowing underrepresented clients to obtain reasonably priced legal services.

Emil Sadykhov

---

292. *See supra* Part II.B.2.

293. *See supra* Part III.C.

294. *See*, *e.g.*, Hymel *supra* note 101, describing how various state bar committees met and considered proposals to allow MDP's in July of 2000, and explaining that even those state committees that were in favor of allowing MDP's before that time, such as Arizona, failed in persuading their respective bar associations back home to make any changes. Instead, following "the defeat of the ABA's recommendation" that same year, "pressure from some members of the bar to reject the task force proposal mounted", including "[a] prominent group of attorneys, [that included] 17 past bar presidents." *Id*.

295. *See supra* Part III.B.2.

296. *See supra* Part III.C.