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For generations, the legal profession has assumed that only individual lawyers practice law. Ethical standards have been largely, if not exclusively, directed at individuals, and practice organizations have been regulated to prevent limiting individual lawyer professional judgment. The world in which lawyers now practice makes the individualized model obsolete. The complexity of modern law narrows the breadth of any individual lawyer's practice and makes law firms and other practice organizations inevitable. Firms, in turn, must maintain both ethical compliance and a high level of service quality that is inconsistent with lawyers behaving idiosyncratically. This Article explores these developments and suggests changes in the rules governing lawyer conduct needed to respond to the possibilities and problems the developments create.

I. THE VIEW THAT LAW IS PRACTICED ONLY BY INDIVIDUALS

For over eight hundred years,[1] the term "lawyer" was a description of a person's status in the world. Initially, lawyers were literally "officers of the court" who accompanied the king and later the royal

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1. The usual date for the origin of the legal profession is the late twelfth century, during the reign in England of Henry II. *See* THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER 29 (2010). For an introduction to the development of the modern profession over the centuries, see generally PAUL BRAND, THE ORIGINS OF THE ENGLISH LEGAL PROFESSION (1992) (discussing the early history of the English legal profession); Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385 (2004) (discussing the history and evolution of legal ethical standards); Judith L. Maute, *Alice's Adventures in Wonderland: Preliminary Reflections on the History of the Split English Legal Profession and the Fusion Debate (1000–1900 A.D.)*, 71 FORDHAM L. REV. 1357 (2003) (discussing the development of the bifurcated English legal profession); Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1 (1998) (discussing the history of the legal profession in medieval England).

judges from town to town to resolve disputes.[2] Ultimately, lawyer roles became more diverse and more focused on representation of private interests,[3] but in all cases, a person was trained and admitted to lawyer status by more senior members of the legal profession.[4] A set of activities were then defined as the "practice of law" and reserved to those who had a license to practice.[5] In effect, the legal profession became a secular, self-perpetuating priesthood to which people had to turn at important times in their lives.[6]

Traditionally, lawyer-client relationships were seen as personal—between one lawyer and his or her client. Until the middle of the twentieth century, a majority of American lawyers were solo practitioners, and some remain so today.[7] And while American lawyers have never been prohibited from forming firms, throughout most of the country's history, firms tended to be small.[8] As recently as 1960, fewer than forty U.S. law firms had more than fifty lawyers each,[9] and even in 1968, only twenty firms had more than one-hundred lawyers.[10]

But then too, even "large" firms were understood to be aggregations of individual lawyers, not free-standing organizational entities.[11] Indeed, lawyers have strenuously resisted the idea that institutions—for example, corporations, banks, or insurance companies—may provide legal services.[12] In-house legal departments may handle a company's own legal matters, but those in-house lawyers have not been permitted to

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2. *See* BRAND, *supra* note 1, at 14-16; MORGAN, *supra* note 1, at 185.

3. BRAND, *supra* note 1, at 43, 45.

4. *See id.* at 106-19 (discussing training and entry into the early English legal profession through apprenticeships).

5. *See* Andrews, *supra* note 1, at 1407; Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 160, 165-67 (2000).

6. BRAND, *supra* note 1, at 32 (discussing how the changes to the legal environment resulted in a demand for legal services).

7. *See, e.g.*, RICHARD L. ABEL, AMERICAN LAWYERS 298 tbl.37a, 300 tbl.37c (1989). The U.S. Bureau of Labor Statistics reports that twenty-two percent of American lawyers are "self-employed," a figure that includes partners in law firms as well as solo practitioners. U.S. Bureau of Labor Statistics, *Lawyers*, OCCUPATIONAL OUTLOOK HANDBOOK, 2012–13 EDITION (Mar. 29, 2010), http://www.bls.gov/ooh/legal/lawyers.htm (follow "Work Environment" hyperlink).

8. *See* Marc Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747, 749 (1990).

9. MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 22 (1991); Galanter & Palay, *supra* note 8, at 749.

10. ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 2 (1988) (citing ERWIN O. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? 359 (2d prtg. 1973)).

11. GALANTER & PALAY, *supra* note 9, at 13.

12. *See* Giesel, *supra* note 5, at 172.

represent a business's customers or other third parties.[13] As the Supreme Court of Errors of Connecticut explained: "The practice of law is open only to individuals proved to the satisfaction of the court to possess sufficient general knowledge and adequate special qualifications as to learning in the law and to be of good moral character. . . . Only a human being can conform to these exacting requirements."[14]

That view of law practice as an activity exclusively of individual lawyers largely explains why the American Bar Association ("ABA") Model Rules of Professional Conduct (the "Model Rules")[15] continue to regulate the individual lawyers in law firms but not firms themselves.[16] An American law firm may enter into contracts as an entity and be civilly liable as an entity for torts committed by firm members in the course of their practice,[17] but ordinarily, such a law firm will not itself be subject to professional discipline.[18] Instead, the Model Rules impose personal duties on law firm managers to establish rules designed to help assure that individual firm lawyers and non-lawyers adhere to the standards of lawyer conduct.[19]

When asked to let insurance companies use their employed attorneys to represent policyholders contractually entitled to defense services, the Supreme Court of Kentucky refused to change the state rule against such corporate provision of legal services by resorting to the "age-old adage of 'if it ain't broke, don't fix it.'"[20] What I am in effect saying in this Article is that the system is indeed broken—or at least obsolete—and it is time to fix it.

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13. *See id.* at 175. Issues relating to the corporate practice of law come up most frequently these days in the context of insurance companies trying to assign their employed lawyers to represent the company's policyholders instead of retaining lawyers from local law firms. *See* Charles Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle over the Law Governing Insurance Defense Lawyers*, 4 CONN. INS. L.J. 205, 243-44 (1997).

14. State Bar Ass'n of Conn. v. Conn. Bank & Trust Co., 140 A.2d 863, 870 (Conn. 1958).

15. MODEL RULES OF PROF'L CONDUCT (2011).

16. *See id.* R. 5.1, 5.3.

17. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 (2000).

18. *See id.* § 5. Two important exceptions are New Jersey and New York, which have accepted the idea of imposing discipline on law firms. N.J. RULES OF PROF'L CONDUCT R. 5.1 (1984); N.Y. RULES OF PROF'L CONDUCT R. 5.1, 5.3 (2009).

19. MODEL RULES OF PROF'L CONDUCT R. 5.1, 5.3.

20. Am. Ins. Ass'n v. Ky. Bar Ass'n, 917 S.W.2d 568, 569, 571 (Ky. 1996); *see also* Gardner v. N.C. State Bar, 341 S.E.2d 517, 518 (N.C. 1986). *But see* Gafcon, Inc. v. Ponsor & Assocs., 120 Ca. Rptr. 2d 392, 397 (Cal. Ct. App. 2002) (holding that an insurance company does not engage in the practice of law when an insurer's attorney defends its insured against a third party claim); *In re* Allstate Ins. Co., 722 S.W.2d 947, 948, 950-53 (Mo. 1987) (en banc) (rejecting *Gardner* and holding that an insurance company's attorney can defend its insured in civil litigation).

II. WHAT HAS CHANGED ABOUT THE NATURE OF LAWYER PRACTICE?

Over the last forty years, protecting a lawyer's status as an individual professional seemed important to lawyers, but I would suggest that to the rest of the American public, the practical definition of a lawyer's professional success has become what the lawyer can help a client accomplish and what trouble the lawyer can help a client avoid.[21] Today, few lawyers act alone.[22] They act primarily as members of teams, often only some of whose members are lawyers.[23]

What I am calling the "rise of institutional law practice" is the multi-person provision of legal services through organizations, ranging from traditional law firms to corporate legal departments, legal aid offices, prosecutorial and other government agencies, and even entities that develop technology designed to simplify client self-representation. In my book, *The Vanishing American Lawyer*, I explain some of the reasons for this transformation in the way legal services are delivered, and I will summarize the most important here.[24]

First, the law has become far more complex over the last forty years.[25] Even neighborhood lawyers face issues of multistate, as well as international, dimensions.[26] Clients involved in global commerce hire or send employees all over the country and the world.[27] Those employees create various financial issues that did not exist for previous generations of lawyers.[28] Even the ablest of lawyers cannot be experts in all law everywhere, so the scope of individual lawyer practice fields has inevitably narrowed.[29] A lawyer who continues to try to be a general practitioner focusing on local subjects that she studied for the bar exam will neither serve her clients well nor retain most of her clients long.[30]

Second, the number of people with legal training has exploded over the last forty years.[31] In 1970, America had about 300,000 licensed lawyers.[32] Interest in going to law school—fueled both by a sense that being a lawyer was a way to make a difference in the world and an increased interest in lawyering among women and members of minority

21. *See* MORGAN, *supra* note 1, at 7-8.
22. *Id.* at 101, 149.
23. *Id.* at 125, 149.
24. *See id.* at ch. 3.
25. *See id.* at ch. 3.C.
26. *See id.* at 89-90.
27. *Id.* at 89.
28. *Id.*
29. *See id.* at 89, 147.
30. *See id.* at 129-31.
31. *See id.* at 80-81.
32. *Id.* at 81 & n.32.

groups—did not slow until very recently.[33] Today we have about 1.2 million licensed lawyers, of whom about one million are in practice.[34] Given those kinds of numbers, no individual lawyer can rely on simply having a law license to assure a successful practice. The gap between the number of available lawyers trying to practice and the number of clients with the means to pay for legal help has widened sharply in recent years.[35] Basically, the growth in the demand for lawyers tends to track growth in the nation's gross domestic product ("GDP").[36] American law schools increase the number of available lawyers at a rate exceeding four percent each year, while since 2008, the GDP has increased at an annual rate less than four percent.[37] It should be no surprise that graduates find it hard to get jobs and that experienced lawyers must find a field of law in which they stand out as significantly better than their clients' other choices.[38]

Third, in a world where lawyers must develop a field of expertise in which they can stand out as unique, a lawyer will do well only so long as his or her expertise is widely needed.[39] If client needs change, able lawyers in declining fields will face problems. Professors Ronald Gilson and Robert Mnookin have argued that lawyers form private law firms in part to diversify the economic risk lawyers face at different stages of a business cycle.[40] Bankruptcy lawyers are busy today, for example, and

33. *Id.* at 80.

34. *Id.* at 81 & n.32.

35. *See id.* at 63-64; Thomas D. Morgan, *Economic Reality Facing 21st Century Lawyers*, 69 WASH. L. REV. 625, 631 (1994) [hereinafter Morgan, *Economic Reality*].

36. MORGAN, *supra* note 1, at 81; Morgan, *Economic Reality*, *supra* note 35, at 627; B. Peter Pashigian, *The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers*, 20 J.L. & ECON. 53, 73 (1977).

37. *Gross Domestic Product (GDP) Graph*, U.S. BUREAU OF ECON. ANALYSIS, http://www.bea.gov/newsreleases/national/gdp/gdp_glance.htm (last modified Mar. 29, 2012). Put another way, the U.S. Bureau of Labor Statistics predicts a ten percent increase in the demand for lawyers over the next decade, while the nation's law schools will increase the supply of lawyers by over forty percent. *See* U.S. Bureau of Labor Statistics, *supra* note 7.

38. *See* MORGAN, *supra* note 1, at 15, 81, 129-30.

39. *Id.* at 140.

40. Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 322-29 (1985). The authors concluded that objectives such as economies of scale, the ability to support specialists, and the ability to offer a range of services could be achieved by firms significantly smaller than the firms then seen, much less the large firms found today. *Id.* at 316-18. Professors Marc Galanter and Thomas Palay have proposed one of the principal competing theories about the growth of law firms. GALANTER & PALAY, *supra* note 9, at 99-108. The authors argued that to attract able young lawyers, firms had to offer a credible hope of partnership and that firms grew as they created new partner positions for the most successful in the "promotion-to partner tournament." *Id.* Professors Galanter and William Henderson later modified the "promotion-to-partnership tournament" theory. *See generally* Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867 (2008).

their transaction-oriented partners profit from their success. A booming economy will let the transaction lawyers return the favor later.[41]

Fourth, being in a firm allows lawyers to expand the client services they are able to provide.[42] Individual lawyers must limit their practice to few substantive areas in which they can stay fully informed.[43] Groups of professionals with multiple areas of interest can provide clients with a greater range of legal services, sometimes called "one-stop-shopping," quite apart from the other advantages that a diverse range of practices permits a firm to achieve.[44]

Fifth, multi-lawyer organizations can also provide the great number of employees that large clients require.[45] A firm can provide the bodies needed to close a business deal or try a major lawsuit "that would

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Galanter and Henderson explained:

> [T]he large law firm sector has gradually moved from the classic promotion-to-partner tournament, which was characterized by a fairly constant and reliable set of rules that limited the options of associates and partners, to the elastic model, which promotes, laterally hires, or de-equitizes partners in order to maximize profits for a proportionally smaller equity class.

Id. More recently, scholars have recognized that the unbridled growth of large law firms is facing serious problems. *See, e.g.*, Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 64-76 (discussing how reputations of individual firm members are more important than that of the firm as a whole); Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 775, 760-61, 765-68 (discussing how alternative providers of legal services undercut the pyramid model on which many firms have been based).

41. MORGAN, *supra* note 1, at 140-41. "Anyone who has followed the decline in loyalty to firms and the seemingly endless moves some lawyers make from firm to firm" can see both the reality of the risk-sharing explanation of law firms and the challenges it presents. *See id.* at 141. This risk-sharing model, of course, carries with it certain implications, including that the lawyers may try to: (1) "avoid working as hard as their partners [do] but [hope] to receive a full share of profits anyway, a phenomenon called 'shirking'"; (2) accept "support from their partners in their own low-demand times but [sell themselves] to a different firm just as their skill becomes more valuable ('leaving')"; and (3) take good clients with them as they leave ("grabbing"). *Id.* The ethical status of these practices is explored in, for example, Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1, 8-20 (1988); Robert W. Hillman, *The Law Firm as Jurassic Park: Comments on* Howard v. Babcock, 27 U.C. DAVIS L. REV. 533, 543 (1994); Robert W. Hillman, *The Property Wars of Law Firms: Of Client Lists, Trade Secrets and the Fiduciary Duties of Law Partners*, 30 FLA. ST. U. L. REV. 767, 769, 776-77 (2003); *see also* Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1, 55-56 (1999) [hereinafter Regan, Jr., *Law Firms*] (discussing how "immediate concerns about compensation and revenues" promote a culture of "grabbing," rather than cooperation, within firms, and develop "control firm[s]" in which "relationships are held together by fear and self-interest" and which "can undermine team production and" firm health (internal quotation marks omitted)).

42. MORGAN, *supra* note 1, at 143.

43. *Id.* at 140, 143.

44. *Id.* at 143.

45. *Id.* at 142.

overwhelm a solo practitioner or even an in-house legal department."[46] And when you think about it, this so-called "project work" can often profitably involve non-lawyers as well as lawyers, a reality that pervades much of modern law practice.[47]

These realities are as true for organizations serving individual clients as they are for business lawyers. Many traditional legal services for individuals will tend to be delivered as commodities, that is, as standardized products sold primarily on the basis of price. [48] Technology, for example, will allow many documents to be sold as forms or tailored to individual needs using a few clicks of a computer mouse.[49] If a client needs face-to-face advice for reassurance or needs to take a matter to court, someone with legal training will become involved, but for the kinds of work that many people with modest training can do quite well, competition will tend to drive fees to levels far lower than those we see today.[50]

Professor Jerry Van Hoy, who has studied the rise of the so-called "franchise law firm," describes lawyers' work there as different than most law schools teach—"more clerical and sales-oriented" than "researching and solving legal problems."[51] On the other hand, even commodity work is work some clients need done, and people who enjoy developing ways to perform the work more efficiently for a high volume of clients may thrive in the new environment.[52] Increasingly, such work

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46. *Id.*; George P. Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. REV. 1635, 1656 (2006); Randall S. Thomas, Stewart J. Schwab & Robert G. Hansen, *Megafirms*, 80 N.C. L. REV. 115, 127 (2001). Providers such as Axiom Legal present an alternative way to staff large matters: they offer corporate legal offices with individual lawyers who work on matters, sometimes from home. *See* John Turrettini, *De-Layering: Axiom Legal Eliminates an Expensive Middleman in Corporate Legal Work*, FORBES, July 26, 2004, at 136. In another development, Thomson Reuters has acquired Pangea3, one of the largest outsourcing firms in India, and has hired U.S. lawyers to do outsourcing work for corporations and law firms. Rachel M. Zahorsky, *Vendor or Competitor?: Pangea3 Purchase Pleases Some, Worries Others*, A.B.A. J., Feb. 2011, at 27; *About Us*, PANGEA3, http://www.pangea3.com/company-overview.html (last visited Nov. 5, 2012).

47. MORGAN, *supra* note 1, at 96-98, 142 (internal quotation marks omitted).

48. *Id.* at 95.

49. *Id.* at 95-96; *see also* Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1054 (W.D. Mo. 2011).

50. The leading case on writing books is N.Y. County Lawyers' Associationn v. Dacey, 283 N.Y.S.2d 984, 988-89, 1001 (App. Div.), *rev'd*, 21 N.Y.2d 694 (1967) (holding that the publication of a book containing forms drafted and instructions on how to fill out the forms written by a layman constituted the unlawful practice of law). *But see In re* Estate of Margow, 390 A.2d 591, 593, 597 (N.J. 1978) (holding that it was unlawful for a legal secretary to help an elderly friend rewrite her will using the old will as a form).

51. *See* JERRY VAN HOY, FRANCHISE LAW FIRMS AND THE TRANSFORMATION OF PERSONAL LEGAL SERVICES 2 (1997).

52. *See id.* at 18-19. Development of efficient techniques for delivering services will be of

is being performed in a for-profit context as groups like LegalZoom.com ("LegalZoom") sell millions of dollars worth of documents, personalized and prepared based on information entered into the clients' home computers.[53] Law schools and other voluntary organizations might produce checklists, packaged forms, and other guidance that would allow at least some clients to do their own work.[54]

III. HOW SHOULD THE LAW RESPOND TO THESE DEVELOPMENTS?

The changes lawyers have faced over the last forty years are real, and the question becomes: what changes in our thinking about lawyers and lawyer regulation are necessary to deal with the new reality? We are no longer a self-referential priesthood, and others can provide some or all of the services that our clients need. What rules should apply to lawyers and even non-lawyers now performing functions that lawyers have traditionally performed and assumed? I believe at least four changes in lawyer regulation are required to allow lawyers to deliver services effectively now and in the future.

A. Sanctioning Practice Organizations, Not Just Individual Lawyers

First, while we should continue to require lawyers to individually adhere to standards of integrity and confidentiality, conduct standards also should be imposed on practice organizations themselves. This is not a new proposal. Professor Ted Schneyer urged it over twenty years ago,[55] and New York and New Jersey have adopted forms of the

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particular importance in offices trying to deliver legal services to the poor. *See id.* at 19. The profitability of efficiency may be an attraction. *Id.* at 20. Managing attorneys in franchised law practices often share in the fees generated by the office. *Id.* at 31.

53. *See* Julee C. Fischer, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 125 (2000); Andrea Chang, *LegalZoom.com Files to Raise up to $120 Million in IPO*, L.A. TIMES (May 12, 2012), http://articles.latimes.com/2012/may/12/business/la-fi-legalzoom-20120512. This work was recently challenged as the unauthorized practice of law. *Janson*, 802 F. Supp. 2d at 1057-58. The challenge was upheld based on the fact that non-lawyers were used to verify a document's completeness, grammar, and consistency of the personalized information throughout the document. *Id.* at 1063-64. News reports indicate that the company intends to continue operating in Missouri, albeit with procedures tailored to meet the court's objections. Debra Cassens Weiss, *LegalZoom Can Continue to Offer Documents in Missouri Under Proposed Settlement*, A.B.A. J. (Aug. 23, 2011, 7:32 AM), http://www.abajournal.com/news/article/legalzoom_can_continue_to_offer_documents_in_missouri_under_proposed_settle/.

54. *See, e.g.*, Fischer, *supra* note 53, at 124-25 (describing the burgeoning self-help market for legal instruments). Translation of the documents into languages spoken by the clients will also facilitate these developments. *Id.* at 143-44.

55. *See* Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 11 (1991) [hereinafter Schneyer, *Professional Discipline*].

Schneyer proposal.[56] But a large majority of jurisdictions have yet to move in that direction, and the ABA has not seriously advanced the idea.[57]

Regulating the conduct of practice organizations—not just individual lawyers—continues to be an idea whose time should come. Firm managers need an incentive to create a world in which lawyers share responsibility, as well as benefits of each other's conduct. Today, for example, lawyers are sometimes paid on an "eat-what-you-kill" basis, that is, they are paid based on client matters they attract to the firm.[58] A world of decreased demand for lawyer services promises to be one in which there will be competition within law firms, not just among them.[59] In an "eat-what-you-kill" system, a lawyer knows he will be paid for fee-generating work he brings in, but others will share the liability if the client turns out to be dishonest.[60]

The risk to firms who see themselves as only aggregations of their members thus can be enormous. Clients, as well as lawyers, have a stake in having professional standards that reinforce efforts of law firms to establish a culture of ethical conduct by each of its lawyers and non-lawyers. Young lawyers learn quickly that their future in the firm depends on how well they please their elders.[61] Everyone has a stake in having firms preserve the value of the reputation that is a firm-wide asset, and the challenge for managers will be to preserve that asset as firms develop a less cohesive feel.[62]

Two examples may help provide some reality to the idea of sanctioning organizations, not simply individuals. First, when LegalZoom was charged with unauthorized practice, it was the corporation that was charged, not the individual lawyers and non-

56. *See* N.J. RULES OF PROF'L CONDUCT R. 5.1 (1984); N.Y. RULES OF PROF'L CONDUCT R. 5.1, 5.3 (2009).

57. Ted Schneyer, *On Further Reflection: How "Professional Self-Regulation" Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 611 (2011) [hereinafter Schneyer, *On Further Reflection*].

58. Milton C. Regan, Jr., *Corporate Norms and Contemporary Law Firm Practice*, 70 GEO. WASH. L. REV. 931, 937 (2002) [hereinafter Regan, Jr., *Corporate Norms*] (internal quotation marks omitted).

59. *See id.*

60. MORGAN, *supra* note 1, at 141-42 (internal quotation marks omited). A similar problem arises when one lawyer wants the firm to undertake a representation that would create a conflict of interest with another client attracted to the firm by a different lawyer. *See* Geoffrey C. Hazard, Jr. & Ted Schneyer, *Regulatory Controls on Large Law Firms: A Comparative Perspective*, 44 ARIZ. L. REV. 593, 602-03 (2002).

61. For a rich account of this phenomenon, see generally Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631 (2005).

62. *See* MORGAN, *supra* note 1, at 145-46; Hazard, Jr. & Schneyer, *supra* note 60, at 605.

lawyers who work there.[63] Because it is a corporation, we have no trouble seeing LegalZoom as an entity subject to such a charge, and what I am advocating here is that we see law firms as entities in the same way.

Take another example: In *Maples v. Thomas*,[64] recently decided by the U.S. Supreme Court, two Sullivan & Cromwell associates worked pro bono on a petition for post-conviction relief on behalf of an Alabama prisoner sentenced to death.[65] While the matter was awaiting decision in the district court, each of the lawyers left the firm for other jobs.[66] Neither withdrew as counsel for the prisoner.[67] The District Court denied the petition, and the court clerk sent notice of the denial to the lawyers at Sullivan & Cromwell—their old address.[68] Someone in the firm's mailroom noted on the envelope that the lawyers no longer worked there and returned the notice to the court unopened.[69]

The time for appeal expired, and the question before the Supreme Court was whether the Eleventh Circuit could hear the appeal anyway.[70] The Court held that it could because the lawyers had in effect abandoned their client without his knowledge.[71] But for our purposes, what is important is that during oral argument, Justice Scalia asked:

> If we find that these lawyers did abandon their client, will there be some sanction imposed on them by the bar? I often wonder, . . . does anything happen to the counsel who have been inadequate in a capital case? . . . Have you ever heard of anything happening to them? Other than they're getting another capital case?[72]

It is possible, of course, that the lawyers would be subject to discipline under Model Rules 1.1[73] (competence), 1.3[74] (diligence), and 1.4[75] (communication) for abandoning their client in this way,[76] but my argument is that Sullivan & Cromwell should also be held responsible. The delivery of legal services includes the work of people in the mailroom, not just the firm's lawyers. Lawyers at law firms come and

63. Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1057 (W.D. Mo. 2011).
64. 132 S. Ct. 912 (2012).
65. *Id.* at 918-19.
66. *Id.* at 919.
67. *Id.*
68. *Id.* at 919-20.
69. *Id.* at 920.
70. *Id.* at 917.
71. *Id.*
72. Transcript of Oral Argument at 55, Maples v. Thomas, 132 S. Ct. 912 (2012) (No. 10-63).
73. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2011).
74. *Id.* R. 1.3.
75. *Id.* R. 1.4.
76. *See, e.g.*, *In re* Wolfram, 847 P.2d 94, 96, 103 (Ariz. 1993).

go, and firm clients should not be the victims of those departures. The firm itself should bear responsibility for seeing that its obligations to firm clients are met.[77]

Interestingly, part of the difficulty this proposal has had in getting traction may be that not everyone applauds the rise of the institutional practice of law. During the same period that law firms have grown larger, corporate clients have grown as well, and some have come crashing down after instances of outright fraud. Some critics seem to have been tempted to conflate the growth of corporate law firms with these financial irregularities.[78] In part, they suggest that lawyers in large organizations might be tempted to let a corporate model of "managing" risk replace the sense of individual responsibility and character that lawyers have been required to cultivate in the past.[79]

Examples of corporate and law firm excess are unanswerable,[80] but the general case for linking corporate fraud to institutional law practice seems weak. Every time there is a financial scandal or a financial crisis, one can make the argument that lawyers should have been able to prevent it. Lawyers must have gotten too close to their clients, we hear; lawyers have higher moral standards than people in finance or other business fields and should be expected to prevent misconduct.[81] I expect most of us doubt that lawyers are morally superior, however, and in my view, the financial scandals that occurred happened *in spite* of the failure to fully acknowledge the institutional practice of law, not because of it.

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77. A natural question that follows, of course, is what the sanction could or should be. It is easy to disbar or suspend the license of a natural person; it is harder to imagine suspending a law firm. It is not hard to think about censuring a firm, however, and in today's competitive environment, even making a firm ineligible to take more pro bono cases could be a sanction firms would seek to avoid. In any event, because *Maples* was a criminal case, the usual malpractice remedy against a firm would be hard to pursue. *Compare* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. b (2000), *with id.* § 53 cmt. d (commenting on the requisite showings of proof for a civil litigant and criminal defendant in a malpractice claim). A majority of jurisdictions require a criminal defendant pursuing a malpractice remedy to prove affirmatively that he is innocent of the charges against him. *Id.* § 53 cmt. d.

78. Regan, Jr., *Corporate Norms*, *supra* note 58, at 938-39; William H. Simon, *Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct*, 22 YALE J. ON REG. 1, 30-31 (2005).

79. Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909, 1939 (2006); Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957, 1962-63 (2006); William H. Simon, *The Ethics Teacher's Bittersweet Revenge: Virtue and Risk Management*, 94 GEO. L.J. 1985, 1990-91 (2006).

80. *See, e.g.*, Milton C. Regan, Jr., *Taxes and Death: The Rise and Demise of an American Law Firm*, 52 STUDIES L. POL. & SOC'Y (SPECIAL ISSUE) 107, 117-20 (2010).

81. Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1146 (2000).

Rather than the rise of risk management representing a decline in lawyer standards, in my view, risk management is one of the accomplishments of the modern legal profession. Far from trying simply to "manage" risk, risk management has been an effort to establish "institutional (i.e., firm or practice-wide) policies, procedures, or systems . . . designed to minimize risk within the firm and its practice."[82] As a result of organizations such as the Attorneys Liability Assurance Society, other legal malpractice insurers, and the personal leadership of people such as Robert O'Malley, Anthony Davis, and Robert Creamer, firms have reexamined leadership structures, initiated new-matter review procedures, and designated "general counsel" to receive confidential reports and questions from lawyers concerned about what they are being asked to do on behalf of a client.[83] In spite of good risk management programs, some lawyers do and will behave badly, but because of risk management efforts, we can expect the number of such incidents to be reduced.[84]

Thus, I remain convinced that legal services today and tomorrow will tend to be delivered by institutions, not primarily individual lawyers. I think we need to embrace the move toward institutional practice, not decry it.[85] We should retain Model Rule 5.2(a),[86] which makes clear that, whatever the ethical responsibility of the firm, each lawyer retains a personal responsibility to conform to the rules of professional conduct,[87] but firms themselves should be subject to professional sanction as well.

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82. Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95, 99 (2008) [hereinafter Davis, *Legal Ethics*]; *see also* Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209, 220-21 (1996).

83. *See* Davis, *Legal Ethics*, *supra* note 82, at 103-04.

84. *See* Anthony V. Alfieri, *Big Law and Risk Management: Case Studies of Litigation, Deals, and Diversity*, 24 GEO. J. LEGAL ETHICS 991, 1021 (2011).

85. Another objection might be that whenever lawyers try to regulate themselves, they will tend to do so in a way that is ineffective and self-serving. *See, e.g.*, Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1719-20 (2008). This concern is also implicit in Schneyer, *On Further Reflection*, *supra* note 57. Professor Schneyer argues that requirements of institutional "ethical infrastructure" imposed in the new British and Australian regulatory systems may do more to promote good firm behavior than will fear of punishment after the fact. *Id.* at 585, 623, 628 (internal quotation marks omitted).

86. MODEL RULES OF PROF'L CONDUCT R. 5.2(a) (2011).

87. *Id.*

B. *Acknowledging the Role of Non-Lawyers in Delivering Legal Services*

A second change in regulation should acknowledge the appropriate role of non-lawyers in delivering many kinds of legal services.[88] It is hard to deny that non-lawyers already do many kinds of work traditionally and simultaneously done by lawyers.[89] Non-lawyers prepare tax returns, for example.[90] They also legally give tax advice or negotiate and argue cases before the Internal Revenue Service and the Tax Court.[91] Similarly, non-lawyer patent agents prepare patent applications and otherwise advocate on behalf of inventors before the U.S. Patent and Trademark Office. In each case, the non-lawyers are subject to federal regulation of that practice that applies to lawyers and non-lawyers alike.[92]

Further, the Model Rules already acknowledge that law firms may provide services not traditionally considered legal services.[93] The critical distinction made in current regulations, however, is that it is lawful for lawyers to *employ* non-lawyers but not to become their partner if any of the services would traditionally be viewed as practicing law.[94] That issue of what work may be delegated to non-lawyers also raises all sorts of practical problems,[95] but it is surely a distinction without a difference

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88. We tend to think of unauthorized practice rules as applying only to imposters who pretend to do something beyond their expertise. *See id.* at R. 5.5 cmt. 2. The rules restrict lawyers, however, insofar as the lawyers: (1) act outside jurisdictions in which they are licensed; (2) help a non-lawyer to do work lawyers have traditionally done; or (3) form a partnership with a non-lawyer, some of whose activities involve what is traditionally considered to be the practice of law. *Id.* at R. 5.4, 5.5.

89. Professor Herbert M. Kritzer has done outstanding work on this topic for many years. *See generally* Herbert M. Kritzer, *The Future Role of "Law Workers": Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 ARIZ. L. REV. 917 (2002). He calls such persons "law workers" and sees them as examples of the kinds of people with whom lawyers are likely to compete in the future. *See* HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 202 (1998); Kritzer, *supra*, at 920-21 (internal quotation marks omitted). Non-lawyers have rarely done their assigned work in a way that has damaged an organization's clients. KRITZER, *supra*, at 195; Kritzer, *supra*, at 921. Indeed, "it is not self-evident that professional certification or supervision insures special competence." Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 86 (1981); *see also* Thomas D. Morgan, *Professional Malpractice in a World of Amateurs*, 40 ST. MARY'S L.J. 891, 898-99 (2009).

90. Indeed, the practice is so well-recognized that Congress has created an accountant-client evidentiary privilege. I.R.C. § 7525(a)(1) (2006).

91. *See* KRITZER, supra note 89, at 11; Kritzer, *supra* note 89, at 920 n.13.

92. *See, e.g.*, 37 C.F.R. pt. 10 (2011).

93. *See* MODEL RULES OF PROF'L CONDUCT R. 5.7 (2011).

94. *See id.* R. 5.4.

95. Professor Paul R. Tremblay helpfully addresses issues of delegation to non-lawyers. *See* Paul R. Tremblay, *Shadow Lawyering: Nonlawyer Practice Within Law Firms*, 85 IND. L.J. 653, 680-86 (2010).

unless one presumes that lawyers are better people and always deserve to be in control. It is not lawyer bashing to say that no such presumption is appropriate.

Traditional limits on the practice of law should be acknowledged as a vestige of a simpler past. Trial lawyers should continue to register with out-of-state courts before whom they practice and be admitted *pro hac vice*,[96] but transactional lawyers should not be expected to do anything comparable. If a lawyer's Dallas client is working on a contract in Phoenix, the lawyer should be able to fly to Arizona. This may seem obvious—it is what lawyers do all the time. However, charges of unauthorized practice are not unprecedented.[97] My point is that the fundamental concept of state- and even nation-based admission to practice needs to be reexamined in light of what present and future client needs are found to be.

Several law firms already have expanded their range of services by adding law related services ranging from economic consulting to private investigation to financial management.[98] Sometimes the services have been provided from within the firm; at other times, separate stand-alone or side-by-side entities have been created.[99] A friend of mine who does estate planning in Virginia has transformed himself and his firm into a wealth planning enterprise, and he gives investment advice in addition to drafting wills and trusts. Lawyers in the firm have become licensed securities dealers and certified financial planners in order to be able to deliver this total package. I would not be surprised to see other lawyers and firms take similar steps in their own areas of expertise, and the question that remains is: why should they not be permitted to partner with investment advisers and securities dealers rather than getting those licenses themselves?

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96. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5.

97. The best known recent example of this was *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, in which the California Supreme Court held that a N.Y. law firm could not collect a fee for representing its client in an arbitration that took place in California. 949 P.2d 1, 3-5, 13 (Cal. 1998). *The Restatement (Third) of the Law Governing Lawyers* concluded that a lawyer may represent, in any jurisdiction, any client who has matters on which the lawyer works in at least one jurisdiction in which the lawyer is licensed to practice. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (2000). That idea has now found its way into the Model Rules. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(4) (stating that a lawyer may temporarily deliver legal services where the lawyer is unlicensed if the services "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice").

98. Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363, 367-68 (1993).

99. Once again, Professor Schneyer has written ably about such developments. *Id.* at 367.

A decade ago, the report of the ABA Commission on Multidisciplinary Practice called for revisions in Model Rule 5.4, but they were defeated.[100] The time has come to revisit the rejection of multi-disciplinary practice. Multi-service practice organizations are not of interest only to corporate clients. Social service agencies that want to provide legal services as part of a package of services to the poor also have a stake in changing the present rules, and in the United Kingdom, such smaller entities focused on individual needs have been among the primary applicants for multi-disciplinary practice status.[101]

In late 2011, the ABA Commission on Ethics 20/20 released for comment a tentative step toward recognizing the role of non-lawyers in some kinds of representation.[102] The District of Columbia has allowed non-lawyer partners in D.C. firms for many years,[103] and under the tentative ABA Commission on Ethics 20/20 proposal, lawyers would have been permitted to create similar firms called Alternative Legal Practice Structures ("ALPS").[104] Non-lawyers could have been members of such a firm but only if they provided "services that assist the firm in providing legal services to clients . . . ."[105] The non-lawyer percentage of ownership would have been limited,[106] and the non-lawyers would have been required to pass a "fit to own" test.[107] But even this proposal was seen as too radical and the Commission has announced it will make no such proposal to the ABA House of Delegates.[108]

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100. AM. BAR ASS'N, COMM'N ON ETHICS 20/20, DISCUSSION DRAFT FOR COMMENT: ALTERNATIVE LAW PRACTICE STRUCTURES REPORT 5 & n.11 (2011) [hereinafter COMM'N ON ETHICS 20/20, REPORT], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf; AM. BAR ASS'N, COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES app. A, at A1, A5-A6 (1999). There have been several fine analyses of the issues presented. *See, e.g.*, Green, *supra* note 81, at 1144-56.

101. COMM'N ON ETHICS 20/20, REPORT, *supra* note 100, at 7-9.

102. *See* Memorandum from Jamie S. Gorelick & Michael Traynor, Co-Chairs, ABA Comm'n on Ethics 20/20, to ABA Entities, Courts, Bar Ass'ns (state, local, specialty, and int'l), Law Schs., and Individuals 1-3 (Dec. 2, 2011) [hereinafter Memorandum, Gorelick], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf.

103. D.C. RULES OF PROF'L CONDUCT R. 5.4(b) (2007); Memorandum, Gorelick, *supra* note 102, at 2.

104. COMM'N ON ETHICS 20/20, REPORT, *supra* note 100, at 5-6.

105. *Id.* at 5.

106. The proposal would limit the percentage of non-lawyer ownership. *Id.* at 5-6, 10-11. The suggested figure of twenty-five percent is bracketed to indicate that states should choose the figure that seems right to them. *Id.* at 11.

107. *Id.* at 5-6, 12 (internal quotation marks omitted). A similar requirement is found in the new Australian regulations. *See* Steve Mark, *Views From an Australian Regulator*, 2009 J. PROF. LAW. 45, 59-60.

108. Memorandum, Gorelick, *supra* note 102, at 2.

In my view, limiting such organizations is ultimately self-defeating. Although U.S. lawyers are now barred from participating in multi-disciplinary firms that deliver legal services in the United States,[109] American clients can often get the services from firms operating out of the United Kingdom or Australia, which have each adopted programs permitting—but registering and regulating—what the British call "alternative business structures" and the Australians call "incorporated legal practices."[110] Up to now, the ABA has acted as though lawyers still operate in a world in which communication and travel are difficult. Clients know better. Regulatory regimes should properly continue to require competent service, protection of privileged information, and avoidance of conflicts of interest. Blanket prohibition of multi-disciplinary firms, however, should no longer be the rule.

C. Permitting Restrictive Covenants

Third, Model Rule 5.6(a)[111] should be amended to permit restrictive covenants designed to impose reasonable restrictions on a lawyer's changing firms. In the name of not restricting lawyer mobility, Model Rule 5.6 now prohibits many kinds of financial penalties that firms seek to use to discourage moving to another practice setting.[112]

The traditional argument against such restrictions has been that they violate a lawyer's professional independence and a client's freedom to choose its own lawyer.[113] That probably "made sense in a world in which most lawyers practiced alone. Today, however, relatively few lawyers are independent; most work within some kind of firm or other organization, and the financial viability of such firms and organizations depends on a reasonably stable number of contributing [partners]."[114]

In the name of not restricting lawyer mobility, Model Rule 5.6 now permits a lawyer to leave her current firm with little or no notice, while

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109. *See* MODEL RULES OF PROF'L CONDUCT R. 5.4 (2011); COMM'N ON ETHICS 20/20, REPORT, *supra* note 100, at 5.

110. *Legal Profession Act 2004* (N.S.W.) pt 2.6 div 2 (Austl.); Legal Services Act, 2007, c. 29, §§ 71–111 (Eng.); *see also* Memorandum from ABA Commission on Ethics 20/20 Working Group on Alt. Bus. Structures, to ABA Entities, Courts, Bar Ass'ns (state, local, specialty, and int'l), Law Schs., and Individuals 7-10, 13-14 (Apr. 5, 2011), *available at* http://www2.americanbar.org/calendar/ll0508-2011-midyear-meeting/Documents/alternate_structures.pdf (discussing developments in England, Australia, Canada, and Scotland).

111. MODEL RULES OF PROF'L CONDUCT R. 5.6(a).

112. *See id.*

113. *See, e.g.*, Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 148 (N.J. 1992) ("[F]inancial-disincentive provisions may encourage lawyers to give up their clients, thereby interfering with the lawyer-client relationship and, more importantly, with clients' free choice of counsel.").

114. MORGAN, *supra* note 1, at 165.

at the same time trying to persuade clients to follow the lawyer to a new firm.[115] The Model Rule likewise prohibits firms from financially penalizing such departures.[116]

One need not argue that lawyers must stay at a firm forever, but reasonable restrictions on departure could allow firms some financial security and flexibility in establishing their partnership rules and compensation structures.[117] Important as mobility is, firms must contract for space, hire associates, and develop a reputation that only a degree of institutional stability permits.[118] It can cost law firms competing for top talent "anywhere from $200,000 to $500,000 to bring a recent law graduate into the firm as an associate. Nevertheless, at many firms, at least 40 percent of new hires have voluntarily resigned by the end of their third year in practice, hardly having made back" the cost the firm spent to recruit them.[119] Equity will not enforce restrictive covenants that are excessive in breadth or duration, but there seems no good reason to make lawyer covenants subject to greater restriction.[120]

Ultimately, firms are likely to have to convince young lawyers that they have a future at the firm that will be attractive over a multi-year career. Doing so is likely to improve a firm's bottom line. In some cases, the solution may be part-time work. In other cases, associates need to be given a sense they are growing in their practice, but requiring lawyers to spend a given period at a firm after joining it could be an important part of the process. Some courts have implicitly acknowledged this, recognizing that persons who make up a law firm should be capable of reaching arrangements appropriate to their situation.[121] Conforming the Model Rules to the decisions would be a third step in helping firms deal with the oncoming realities they will face. [122]

D. Changes in the Means of Financing Law Practice

Under current rules, lawyers who practice together in a firm may allocate firm revenues among themselves according to a partnership agreement or other contract.[123] In a small firm, the senior partner who

115. *See* MODEL RULES OF PROF'L CONDUCT R. 5.6(a); MORGAN, *supra* note 1, at 164-65.

116. *See* MODEL RULES OF PROF'L CONDUCT R. 5.6(a); MORGAN, *supra* note 1, at 165; *see also, e.g.*, Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 411 (N.Y. 1989).

117. MORGAN, *supra* note 1, at 165.

118. *See generally* Regan, Jr., *Law Firms*, *supra* note 41 (discussing law firm stability).

119. MORGAN, *supra* note 1, at 162.

120. *Id.* at 165-66.

121. *Id.* at 166; *see also, e.g.*, Howard v. Babcock, 863 P.2d 150, 160-61 (Cal. 1993); Shuttleworth, Ruloff & Giordano, P.C. v. Nutter, 493 S.E.2d 364, 367 (Va. 1997).

122. MORGAN, *supra* note 1, at 166.

123. *See* MODEL RULES OF PROF'L CONDUCT R. 5.4 (2011).

founded the firm might get fifty percent of all profits, for example, while in other firms the revenues might be divided according to a formula that acknowledges who attracted each case as well as who worked on them.[124] Firms typically cover their fixed costs by payments from each partner or shareholder at the time they join the firm; those sums are then returned when the partner leaves the firm.[125]

What firms may not do today is allow non-lawyers to invest in the law firm. Every jurisdiction in the United States has some form of Model Rule 5.4(d),[126] which says:

> A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if: (1) a nonlawyer owns any interest therein . . . ; (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility . . . ; or (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.[127]

This prohibition both denies law firms the ability to raise a potentially important form of capital and reduces the incentive a firm can give its members to help build the firm as an effective, ethical institution that would be attractive to outside investors. Further, if one accepts the idea that firms should be able to deliver more than legal services and the idea that restrictive covenants are not anathema, the sale of stock in a law firm is but a short step. Non-lawyer participation in firm operation and management will itself involve recognition of the propriety of non-lawyers investing time and sharing the benefits of a firm's potential success.[128]

It is not self-evident that lawyers will want to take in outside investors. Lawyers who can afford to self-finance will not want to share earnings with outsiders who will demand a premium for uncertainty. But many law firms generate significant streams of income, and allowing lawyers to sell their firms to outside investment would permit existing lawyers to realize something of the economic value they have created. They can now do that only by a sale to their remaining partners or to

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124. Gilson & Mnookin, *supra* note 40, at 341-42, 346.

125. Thomas D. Morgan, *Should the Public Be Able to Buy Stock in Law Firms?*, ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS, Sept. 2010, at 111, 111 [hereinafter Morgan, *Stock in Law Firms*].

126. *Id.*

127. MODEL RULES OF PROF'L CONDUCT R. 5.4(d).

128. Professors Edward S. Adams and John H. Matheson wrote an early article considering these issues. *See generally* 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 (1998) (discussing the issues resulting from prohibitions against non-lawyer investment in law firms). I have addressed these issues previously in Morgan, *Stock in Law Firms*, *supra* note 125.

other lawyers. A desire to attract and retain outside investors may also tend to impose financial discipline on law firms whose members have perhaps heretofore not had a significant incentive or experienced serious pressure to exercise it.

There may be three other reasons why outside financing would be attractive to some law firms.

First, law firms have traditionally not retained much of their income for future needs. That makes law firms cash poor when the time comes to make a "long-term investment in new technology, new offices, or to support an expanded scope of practice."[129] In Australia, Slater & Gordon used a sale of equity shares to consolidate several offices into larger ones. It also established reserves with which to finance litigation expenses between the time a case is filed and the time the fee becomes payable.[130] In the United Kingdom, mid-size firms have expressed a need for capital with which to expand their ability to use technology to deliver commodity services to middle-class clients.

Second, non-lawyer investors can help create a liquid market in firm shares. This can help price goodwill so that departing partners can realize full value for their contributions to the firm. Successful managers in other industries receive stock options. "They profit when the company profits, and they pay taxes at capital gain rates on the increase in their share value. Lawyers and law firm managers, on the other hand, basically receive only a pass-through of fees earned that is taxed at high ordinary-income marginal rates."[131]

Third, non-lawyer investment may build a stronger institutional character to a law firm, encourage the development of the firm's brand identity, and build the value of its reputation for ethics and quality:

> A law firm's principal assets—its partners and associates—walk out the firm's door every day, have no obligation to return, and often get no more or less in return [for] their capital investment if they have helped the firm prosper or simply get by. In such an environment, even equity partners have little personal stake in the firm as an institution, other than not to be left holding the bag if the firm fails. When outside

129. Morgan, *Stock in Law Firms*, *supra* note 125, at 111.

130. *Id.*; *see also Investors*, SLATER & GORDON, http://www.slatergordon.com.au/investors/ (last visited Nov. 5, 2012).

131. Morgan, *Stock in Law Firms*, *supra* note 125, at 111-12. While partnership agreements vary, U.S. lawyers traditionally have not put a value on the "good will" in their firms, in part because to do so would imply that firms can be sure that clients will continue to retain it. ABA Comm. on Prof'l Ethics, Formal Op. 266 (1945). The Professional Ethics Committee put the matter dramatically: "Clients are not merchandise. Lawyers are not tradesmen. They have nothing to sell but personal service. An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status." *Id.*

> investors are involved, on the other hand, there are parties with a genuine stake in the institution's growth and prosperity. And the incentives flow to the lawyers, as well. The best way to get people to devote full effort to their law practice may be to give them something tangible to show for their efforts when the time comes to leave.[132]

But if all this is true, why have lawyers so long resisted the idea? One concern has been that lawyers are client agents and have a fiduciary duty to focus principal attention on their clients' interests:

> Admitting non-lawyer investors to the mix will create a competing interest in earning a high economic return, the argument goes, thus potentially compromising the interests of clients or even influencing the lawyers' professional judgment of how to represent the clients.
>
> A . . . related concern is that shareholders who are not firm lawyers will inevitably expect information about the firm and its clients, if only to measure management success and to predict future firm performance. Confidential client information is something a lawyer must keep inviolate. Even a client's identity is normally not public information and may not be disclosed other than when doing so would be in the client's interest. Market information, on the other hand, is essential, and the inherent tension over its release may seem to place insurmountable limits on sale of equity securities.[133]
>
> A different concern is that the involvement of non-lawyer investors would reduce lawyers' willingness to tell clients what the clients [do not] want to hear. The last time a serious effort was made to bring law firms into modernity by opening them up to non-lawyer partners, the Enron scandal broke in which lawyers were accused of turning a blind eye to wrongdoing by Enron executives. Critics largely ignored the fact that the Enron events took place under the current regime, not one involving non-lawyers, but the critics suggested the events might have turned out even worse if profit-making rather than client service became a law firm's touchstone.[134]

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132. Morgan, *Stock in Law Firms*, *supra* note 125, at 112; *see, e.g.*, Charlotte Edmond, *Private Equity Firm First to Openly Target Legal Services in U.K.*, LAW.COM (Mar. 6, 2008), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005560588 (reporting on the plans of investment house Lyceum Capital, whose advisory board includes Richard Susskind and Tony Williams). Richard Susskind is the IT advisor to the Lord Chief Justice. *About Richard*, RICHARD SUSSKIND, http://www.susskind.com/about.html (last visited Nov. 5, 2012). Tony Williams is the former director of Andersen Legal, the legal arm of the late Arthur Andersen accounting firm. *People*, JOMATI CONSULTANTS LLP, http://jomati.com/people2.html (last visited Nov. 5, 2012).

133. Morgan, *Stock in Law Firms*, *supra* note 125, at 112; *see also* Mark, *supra* note 107, at 56-58 (describing the challenges of the New South Wales, Australia Legal Services Commissioner in dealing with this issue).

134. Morgan, *Stock in Law Firms*, *supra* note 125, at 112.

There are good answers to these objections:

> First, the idea that only outside investors have a profit motive ignores the history of large law firms over the last forty years. Profits have been widely publicized in *The American Lawyer* and elsewhere.[135] They have been the lure to attract new lawyers, the incentive to work evenings and weekends, and the measure of many lawyers' self-worth. The presence of outside investors may change how profits are shared but not whether profits are sought.
>
> Second, there is nothing about doing well as a lawyer that inhibits doing good work for clients or helping them obey the law. Most clients, most of the time, want help to stay out of trouble, not to figure out how to violate legal standards. Clients sometimes may want to move the law in directions that outside observers would not favor, but that difference in viewpoint neither makes their lawyers less civic-minded nor likely has anything to do with whether a firm has issued equity capital.[136]
>
> Third, most of the talk today is about firms seeking private capital from sophisticated investors rather than selling publicly-traded stock as Slater & Gordon did. While one could imagine law firms doing the kind of financial reporting that the [U.S. Securities and Exchange Commission] requires, it would likely be more trouble than it is worth, and reducing the number of investors actually involved would tend to reduce the amount of even non-sensitive client information that would be made available.[137]

No one knows, of course, whether enough outside investors would choose to buy law firm stock to make offering it worthwhile. But if not an idea whose success is inevitable, it is an idea not to be legislated beyond the realm of possibility.[138]

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135. *Id.*; *see, e.g.*, Aric Press & John O'Connor, *The Law Firm Investor's Guide*, AM. LAW., June 2008, at 121 (publishing growth and blue-chip indexes to law firms during the days of high law firm profitability).

136. Morgan, *Stock in Law Firms*, *supra* note 125, at 112. Bruce MacEwen has offered an imaginative alternative of a derivative security priced to reflect financial performance of the law firm but would give the security holder no management control. *See* Bruce MacEwen, Milton C. Regan, Jr. & Larry Ribstein, *Conversation: Law Firms, Ethics, & Equity Capital*, 21 GEO. J. LEGAL ETHICS 61, 65-67 (2008). Professor Milton C. Regan, Jr., is likely correct that those who oppose outside investment would not be impressed by the distinction, but it is a possible middle ground. *Id.* at 67-70.

137. Morgan, *Stock in Law Firms*, *supra* note 125, at 112.

138. *Id.*

IV. CONCLUSION

The point of this Article has been to call for a response to changes in the delivery of legal services that I have called the rise of institutional law practice. I believe the changes are irreversible and constructive. The logical vehicle for articulating and addressing these changes would be the ABA Commission on Ethics 20/20, but its response has been disappointingly modest.[139]

Inevitably, institutional law practice is here to stay, and the only sensible question is how to embrace it and make it better serve the public interest. That is the insight the United Kingdom and Australia have had in their moves to register and regulate law practice organizations, in addition to registering and regulating individual lawyers.[140] While the new regulatory structure in both countries was initiated by antitrust authorities rather than the legal profession itself,[141] neither the United Kingdom nor Australia lacks a developed sense of lawyer professional duty, and practitioners have largely accepted the new regime.[142] We can learn a lot from their experience, and I believe we should adapt their insights to the American legal profession at our earliest opportunity. Until we do so, the ABA is likely to have to consider these issues again and again until it gets them right.

139. *See supra* text accompanying notes 100-08.

140. *See Legal Professional Act of 2004* (N.S.W.) pt 2.6 div 2 (Austl.); Legal Services Act, 2007, c. 29, §§ 71–111 (Eng.); *see also* Ted Schneyer, *Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice,* 2009 J. PROF. LAW. 13, 25 [hereinafter Schneyer, *Thoughts*].

141. Schneyer, *Thoughts*, *supra* note 140, at 24-25.

142. *See* Mark, *supra* note 107, at 63.