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Thomas D. Morgan
George Washington University Law School, tmorgan@law.gwu.edu

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The Rise of Institutional Law Practice

Thomas D. Morgan[1]

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

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[1]Oppenheim Professor of Antitrust & Trade Regulation Law, The George Washington University Law School. This article, to be published in the Hofstra Law Review in 2012, is based on the Lichtenstein Lecture presented at the Maurice A. Deane School of Law of Hofstra University on February 1, 2012.

[2]The usual date for the origin of the legal profession is the late 12th century, during the reign in England of Henry II. For an introduction to the development of the modern profession over the centuries, see, e.g., PAUL BRAND, THE ORIGINS OF THE ENGLISH LEGAL PROFESSION (1992); 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); Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385 (2004); Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1 (1998).

people had to turn at important times in their lives.

Traditionally, lawyer-client relationships were seen as personal – between one lawyer and his or her client. Until the middle of the 20th century, a majority of American lawyers were solo practitioners and some remain so today.[3] And while American lawyers have never been prohibited from forming firms, throughout most of the country's history, firms tended to be small. As recently as 1960, fewer than 40 U.S. law firms had more than 50 lawyers each,[4] and even in 1968, only 20 firms had more than 100 lawyers.[5]

But then too, even "large" firms were understood to be aggregations of individual lawyers, not free-standing organizational entities. Indeed, lawyers have strenuously resisted the idea that institutions – for example, corporations, banks or insurance companies may provide legal services. In-house legal departments may handle a company's own legal matters, but those in-house lawyers have not been permitted to represent a business' customers or other third parties.[6] As the Connecticut Supreme Court explained: "The practice of law is open only to individuals proved to the satisfaction of the court to possess sufficient general knowledge and

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[3]See, e.g., RICHARD L. ABEL, AMERICAN LAWYERS 298-300 (1989). The Bureau of Labor Statistics reports that 26% 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, Occupational Outlook Handbook, 2010-11 Edition, found at http://data.bls.gov/cgi-bin/print.pl/oco/ocos053.htm.

[4]MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 22 (1991). See also, Marc Galanter & Thomas 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).

[5]ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 2 (1988), citing ERWIN SMIGEL, THE WALL STREET LAWYER 358-59 (1969).

[6]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. The issues are collected and addressed in Grace M. Geisel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 175 (2000). See also, 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 (1997).

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."[7]

That view of law practice as an activity exclusively of individual lawyers largely explains why the ABA Model Rules continue to regulate the individual lawyers in law firms but not firms themselves. 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,[8] but ordinarily such a law firm will not itself be subject to professional discipline.[9] 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.[10]

When asked to let insurance companies use their employed attorneys to represent policyholders contractually entitled to defense services, the Kentucky Supreme Court refused to change its 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.'"[11] What I am in effect saying in this lecture is that the system is indeed broken – or at least obsolete – and it is time to fix it.

II. What Has Changed About the Nature of Lawyer Practice?

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[7] *State Bar Ass'n v. Connecticut Bank & Trust Co.*, 140 A.2d 863, 870 (Conn. 1958).

[8] RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS § 9.

[9] Two important exceptions are New York and New Jersey, which have accepted the idea of imposing discipline on law firms. N.J. RULES OF PROF'L CONDUCT R. 5.1; N.Y. JUDICIARY LAW, RULES OF PROF'L CONDUCT R. 5.1, 5.3.

[10] MODEL RULES OF PROF'L CONDUCT R. 5.1 & 5.3.

[11] *American Insurance Ass'n v. Kentucky Bar Ass'n*, 917 S.W.2d 568, 571 (1996). See also, *Gardner v. North Carolina State Bar*, 341 S.E.2d 517 (N.C.1986). But see, *In re Allstate Insurance Co.*, 722 S.W.2d 947 (Mo.1987); *Gafcon, Inc. v. Ponsor & Associates*, 120 Cal.Rptr.2d 392 (Cal.Ct.App.2002).

Over the last 40 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. Today, few lawyers any longer act alone. They act primarily as members of teams, often only some of whose members are lawyers.

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, to legal aid offices, to prosecutorial and other government agencies, and even to entities that develop technology designed to simplify client self-representation. In my book, *The Vanishing American Lawyer*,[12] I explain some of the reasons for this transformation in the way legal services are delivered and I will summarize the most important here.

First, law has become far more complex over the last 40 years. Even neighborhood lawyers face issues with multistate and even international dimensions. Clients involved in global commerce hire or send employees all over the country and the world. Those employees create family, tax, and other financial issues that were largely unknown to previous lawyer generations. Even the ablest lawyers cannot be expert in all law everywhere, so the scope of individual lawyer practice fields has inevitably narrowed. 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.

Second, the number of people with legal training has exploded over the last 40 years. In

[12]THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER (2010).

1970, America had about 300,000 licensed lawyers. 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 groups – did not slow until very recently. Today we have about 1.2 million licensed lawyers, of whom about 1 million are in practice.[13] Given those kinds of numbers, no individual lawyer can rely simply on having a law license to assure a successful practice. The gap between the number of lawyers trying to practice available and the number of clients with the means to pay for legal help has widened sharply in recent years. Basically, the growth in the demand for lawyers tends to track growth in the nation's Gross Domestic Product (GDP).[14] American law schools increase the number of available lawyers at a rate exceeding 4% each year, while since 2008 the GDP has increased at an annual rate of 2% or less.[15] 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.

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. If client needs change, able lawyers in declining fields will face problems. Over 20 years ago, Professors Gilson and Mnookin suggested that private law firms are organized in significant part

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[13]THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER 81 (2010).

[14]B. Peter Pashigian, *The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers*, 20 J. L. & ECON. 53 (1977); Thomas D. Morgan, *Economic Reality Facing 21st Century Lawyers*, 69 WASH. L. REV. 625 (1994).

[15]Put another way, the Bureau of Labor Statistics predicts a 13% increase in the demand for lawyers over the next decade while the nation's law schools will increase the supply of lawyers by over 40%. U.S. Bureau of Labor Statistics, Occupational Outlook Handbook, 2010-11 Edition, found at http://data.bls.gov/cgi-bin/print.pl/oco/ocos053.htm.

to diversify the economic risk lawyers face at different stages of a business cycle.[16] A booming economy may keep experienced transactional lawyers busy, for example, as clients seek to expand or go public. Bankruptcy lawyers, on the other hand, get busier when the economy turns down.[17] Forming law firms allows lawyers with varying specialties to support each other through good times and bad. In good times, transactional lawyers keep the revenue flowing and to some extent pay the bankruptcy lawyers more than they deserve. Bankruptcy lawyers return the favor later.[18]

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[16]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 317.

One of the principal competing theories about the growth of law firms was MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRMS (1991). 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 "tournament." The theory was later modified in Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867 (2008).

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

[17]Robert Nelson suggests an alternative way to state the point, i.e., that firms can provide a base of general service to some clients that helps pay the bills during the times between successful periods for the specialty practices of the firm. ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 50-56 (1988).

[18]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. 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"). The ethical status of these practices is explored in, e.g., Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving,* 67 TEXAS L. REV. 1 (1988); Robert W. Hillman, *The Law Firm as Jurassic Park: Comments on Howard v. Babcock*, 27 U.C. DAVIS L. REV. 533 (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 (2003). See also, Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of*

Fourth, being in a firm – or a corporate or government legal department or a legal aid office – allows lawyers to expand and diversify the services they can provide for clients. This is another side of the risk sharing advantage. Individual lawyers must limit their practice to sufficiently few substantive areas that they can stay fully informed in each. 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.

Fifth, multi-lawyer organizations can also provide the sheer number of people that some clients require for the kind of work a client cannot do for itself. A firm can provide the bodies needed to close a business deal, for example, or try a major lawsuit that would overwhelm a solo practitioner or even an in-house legal department.[19] 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.

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. Technology, for example, will allow many documents to be sold as forms or tailored to individual needs using

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Professionalism, 13 GEO. J. LEGAL ETHICS 1 (1999).

[19]George P. Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. REV. 1635, 1656-59 (2006); Randall S. Thomas, Stewart J. Schwab & Robert G. Hansen, *Megafirms*, 80 N.C. L. REV. 115 (2001). Providers such as Axiom provide an alternative way to staff large matters; they provide corporate legal offices with individual lawyers who work on matters, sometimes from home. See www.axiomlaw.com. 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. See Rachel M. Zahorsky, *Vendor or Competitor?: Pangea3 Purchase Pleases Some, Worries Others*, ABA J., Feb. 2011, p. 27.

a few clicks of a computer mouse. 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,[20] 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.

Professor Jerry Van Hoy, who has studied the rise of so-called "franchise law firms," describes lawyers' work there as different than most law schools teach – "more clerical and sales-oriented" than "researching and solving legal problems."[21] 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.[22]

Increasingly, such work is being performed in a for-profit context as groups like LegalZoom.com sell millions of dollars worth of clients documents personalized and prepared based on information entered into the clients' home computers.[23] Law schools and other voluntary organizations might produce checklists, packaged forms, and other guidance that

[20]The leading case on writing books is New York County Lawyers' Ass'n v. Dacey, 283 N.Y.S.2d 984 (N.Y.App.Div.), rev'd 234 N.E.2d 459 (N.Y. 1967). But see, Matter of Estate of Margow, 390 A.2d 591 (N.J. 1978) (unlawful for legal secretary to help elderly friend rewrite her will using the old will as a form).

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

[22]Development of efficient techniques for delivering services will be of particular importance in offices trying to deliver legal services to the poor. The profitability of efficiency may be an attraction. Managing attorneys in franchised law practices often share in the fees generated by the office. JERRY VAN HOY, FRANCHISE LAW FIRMS AND THE TRANSFORMATION OF PERSONAL LEGAL SERVICES 29-33 (1997).

[23]This work was recently challenged as the unauthorized practice of law, and in *Janson v. LegalZoom.com, Inc.*, 2011 WL 3320500 (W.D.Mo. 2011), the challenge was upheld based on the fact that nonlawyers were used to verify a document's completeness, grammar, and consistency of the personalized information throughout the document. News reports indicate that the company intends to continue operating in Missouri, albeit with procedures tailored to meet the court's objections.

would allow at least some clients to do their own work.[24]

III. How Should the Law Respond to these Developments?

The changes lawyers have faced over the last 40 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 nonlawyers 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.

1. Sanctioning Practice Organizations, Not Just Individual Lawyers

First, while we should continue to require lawyers individually to 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 20 years ago,[25] and New York and New Jersey have adopted forms of the Schneyer proposal.[26] But a large majority of jurisdictions have yet to move in that direction and the ABA has not seriously advanced the idea.

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

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[24]See, e.g., Julee C. Fischer, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel*, 34 IND. L. REV. 121 (2000). Translation of the documents into languages spoken by the clients will also facilitate these developments.

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

example, lawyers are sometimes paid on a basis that they "eat what they kill," i.e., they are paid based on client matters they attract to the firm. A world of decreased demand for lawyer services promised to be one in which there will be competition within law firms, not just among them. 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.[27]

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.[28] 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.

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 Robert Shapiro or other individual lawyers and non-lawyers who work there.[29] 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

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[26]N.J. RULES OF PROF'L CONDUCT R. 5.1; N.Y. JUDICIARY LAW, RULES OF PROF'L CONDUCT R. 5.1, 5.3.

[27]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, 602-06 (2002).

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

[29]*Janson v. LegalZoom.com, Inc.*, 2011 WL 3320500 (W.D.Mo. 2011).

entities in the same way.

Take another example: In *Maples v. Thomas*, recently decided by the U.S. Supreme Court,[30] two Sullivan & Cromwell associates worked pro bono on a petition for a writ of habeas corpus on behalf of an Alabama prisoner sentenced to death. While the matter was awaiting decision in the district court, each of the lawyers left the firm for other jobs. Neither withdrew as counsel for the prisoner. The district court denied the habeas petition and the court clerk sent notice of the denial to the lawyers at Sullivan & Cromwell, their old address. 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.

The time for appeal expired, and the question before the Supreme Court was whether the 11th Circuit could hear the appeal anyway. The Court held that it could, because the lawyers had in effect abandoned their client without his knowledge. 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 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?"[31]

It is possible, of course, that the lawyers would be subject to discipline under Rules 1.1 (competence), 1.3 (diligence), and 1.4 (communication), for abandoning their client in this way,[32] but my argument is that Sullivan & Cromwell also should be held responsible. The delivery of legal services includes the work of people in the mailroom, not just the firm's

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[30]Maples v. Thomas, 2012 WL 125438 (Jan. 18, 2012).

[31]Official transcript of oral argument in *Maples v. Thomas*, U.S. Supreme Court, Oct. 4, 2011, at 55.

[32]See, e.g., *In re Wolfram*, 847 P.2d 94 (Ariz. 1993).

lawyers. Lawyers at law firms come and 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.[33]

Interestingly, part of the difficulty this proposal has had 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.[34] 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.[35]

Examples of corporate and law firm excess are unanswerable,[36] 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

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[33]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. A majority of jurisdictions require a criminal defendant pursuing a malpractice remedy to prove affirmatively that he is innocent of the charges against him. RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS § 53.

[34]Milton C. Regan, Jr., *Corporate Norms and Contemporary Law Firm Practice*, 70 GEO. WASH. L. REV. 931 (2002); William H. Simon, *Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct*, 22 YALE J. ON REG. 1 (2005).

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

[36]See, e.g, Milton C. Regan, Jr., *Taxes and Death: The Rise and Demise of an American Law Firm*, 52 STUDIES IN LAW, POLITICS & SOCIETY: LAW FIRMS, LEGAL CULTURE, AND LAW PRACTICE 107 (Austin Sarat, ed.,

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. 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 fully to acknowledge the institutional practice of law, not because of it.

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."[37] As a result of organizations such as the Attorneys Liability Assurance Society (ALAS), 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. 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.[38]

Thus I remain convinced that legal services today and tomorrow will tend to be delivered

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2010).

[37]Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95, 99 (2008) (quoting ANTHONY E. DAVIS & PETER R. JARVIS, RISK MANAGEMENT: SURVIVAL TOOLS FOR LAW FIRMS 4 (2d ed. 2007)). See also, Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209 (1996).

[38]I think the examples in Anthony V. Alfieri, *Big Law and Risk Management: Case Studies of Litigation, Deals, and Diversity,* 24 GEO. J. LEGAL ETHICS 991 (2011), provide some support for this thesis.

by institutions, not primarily individual lawyers. I think we need to embrace the move toward institutional practice, not decry it.[39] We should retain Model Rule 5.2(a) that makes clear that, whatever the ethical responsibility of the firm, each lawyer retains a personal responsibility to conform to the rules of professional conduct,[40] but firms themselves should be subject to professional sanction as well.

2. 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.[41] It is hard to deny that non-lawyers already do many kinds of work traditionally and simultaneously done by lawyers.[42] Non-lawyers prepare tax

[39]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 Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689 (2008). This concern is also implicit in 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 (2011). 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.

[40]MODEL RULES OF PROF'L CONDUCT R. 5.2(a).

[41]We tend to think of unauthorized practice rules as applying only to imposters who pretend to do something beyond their expertise. 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. MODEL RULES OF PROF'L CONDUCT R. 5.4 & 5.5.

[42]Professor Kritzer has done outstanding work on this topic for many years. 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, *The Future Role of "Law Workers": Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 ARIZ. L. REV. 917 (2002); HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK (1998).

Nonlawyers have rarely done their assigned work in a way that has damaged an organization's clients. Indeed, "it is not self-evident that professional certification or supervision insures special competence." Deborah Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 87 (1981). See also, Thomas D. Morgan, *Professional Malpractice in a World of Amateurs*, 40 ST. MARY'S L. J. 891 (2009).

returns, for example.[43] They also legally give tax advice, or negotiate and argue cases before the Internal Revenue Service and the Tax Court. Similarly, non-lawyer patent agents prepare patent applications and otherwise advocate on behalf of inventors before the U.S. Patent & Trademark Office. In each case, the non-lawyers are subject to federal regulation of that practice that applies to lawyers and non-lawyers alike.[44]

Further, the ABA Model Rules already acknowledge that law firms may provide services not traditionally considered legal services. The critical distinction made in current regulations, however, is that it is lawful for lawyers to *employ* nonlawyers but not to become their partner if any of the services would traditionally be viewed as practicing law. That issue of what work may be delegated to nonlawyers also raises all sorts of practical problems,[45] but it is surely a distinction without a difference 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, 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.[46] My point is that the

[43]Indeed, the practice is so well recognized that Congress has recognized an accountant-client evidentiary privilege. 26 U.S.C. § 7525(a).

[44]See 37 CFR Part 10.

[45]Practical issues of delegation to non-lawyers are helpfully addressed in Paul R. Tremblay, *Shadow Lawyering: Nonlawyer Practice Within Law Firms*, 85 IND. L.J. 653 (2010).

[46]The best known recent example of this was Bierbrower, Montalbano, Condon & Frank, P.C. v. Superior

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. Sometimes the services have been provided from within the firm; at other times, separate stand-alone or side-by-side entities have been created.[47] 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 as well as lawyers 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 they should not be permitted to partner with investment advisers and securities dealers rather than getting those licenses themselves.

A decade ago, the report of the A.B.A.'s Multidisciplinary Practice Commission called for revisions in Rule 5.4, but they were defeated.[48] The time has come to revisit the rejection of

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Court (ESQ Business Services, Inc.), 949 P.2d 1 (Cal. 1998), in which the California Supreme Court held that a New York law firm could not collect a fee for representing its client in an arbitration that took place in California.

RESTATEMENT (THIRD): THE LAW GOVERNING LAWYERS § 3 concluded that a lawyer may represent in any jurisdiction any client that has matters on which the lawyer works in at least one jurisdiction in which the lawyer is licensed to practice. That idea has now found its way into MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(4) (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").

[47]Once again, Professor Schneyer has written ably about such developments. Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363 (1993).

[48]The proposal was in COMMISSION ON MULTIDISCIPLINARY PRACTICE, AMERICAN BAR ASS'N, REPORT (1999). There have been several fine analyses of the issues presented, *e.g.*, Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the*

multidisciplinary 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 Great Britain, such smaller entities focused on individual needs have been among the primary applicants for multi-disciplinary practice status.[49]

The Ethics 20/20 Commission has released for comment a possible tentative step toward recognizing the role of nonlawyers in many kinds of representation. The District of Columbia has allowed non-lawyer partners in DC firms for many years,[50] and under the tentative Ethics 20/20 proposal, lawyers would be permitted to create similar firms called "ALPS" (Alternative Legal Practice Structures).[51] Nonlawyers could be members of such a firm but only if they provide "services that assist the firm in providing legal services to clients." The nonlawyer percentage of ownership would be limited,[52] however, and the nonlawyers would be required to pass a "fit to own" test.[53]

While I realize that the 20/20 Commission faces a challenge in getting the ABA House of Delegates to modify the existing prohibition in any way, limiting such organizations is ultimately self-defeating. Although U.S. lawyers are now barred from participating in multi-disciplinary

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Core Values Debate, 84 MINN. L. REV. 1115 (2000).

[49]ABA COMMISSION ON ETHICS 20/20, DISCUSSION DRAFT FOR COMMENT (ALTERNATIVE LAW PRACTICE STRUCTURES), DECEMBER 2, 2011, pp. 8-9.

[50]D.C. RULES OF PROFESSIONAL CONDUCT R. 5.4(b).

[51]ABA Commission on Ethics 20/20, *Discussion Draft for Comment*, Dec. 2, 2011, at 5-6.

[52]The proposal would limit the percentage of nonlawyer ownership. The suggested figure of 25% is bracketed to indicate that states should choose the figure that seems right to them.

[53]A similar requirement is found in the new Australian regulations. See Steve Mark, *Views From an Australian Regulator*, 2009 J. PROF'L LAWYER 45, 58-63.

firms that deliver legal services in the United States, American clients can often get the services from firms operating out of Great Britain 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."[54] Up to now, the American Bar Association 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 avoiding conflicts of interest. Blanket prohibition of multi-disciplinary firms, however, should no longer be the rule.

3. Permitting Restrictive Covenants

Third, Model Rule 5.6(a) 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, Rule 5.6 now prohibits many kinds of financial penalties that firms seek to use to discourage moving to another practice setting.

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.[55] That probably made sense in a world in which most lawyers practiced alone anyway. 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.

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[54]Legal Services Act 2007, Ch. 29 (Great Britain); Legal Professional Act of 2004 (NSW) (Australia). Developments in England, Australia, Canada and Scotland are discussed in ABA Commission on Ethics 20/20, *Issues Paper Concerning Alternative Business Structures*, Apr. 5, 2011, at 7-17.

[55]See, e.g., *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 148-49 (N.J. 1992) ("financial disincentive provisions may encourage lawyers to give up their clients, thereby interfering with the lawyer-client relationship and, more importantly, with the clients' free choice of counsel").

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 at the same time trying to persuade clients to follow the lawyer to a new firm. The Rule likewise prohibits most kinds of financial penalties that firms might try to use to discourage such departures.[56]

One need not argue that lawyers must be yoked to the same firm forever to recognize that reasonable restrictions on departure can allow firms more financial security and flexibility in establishing their partnership rules and compensation structures. Important as mobility is, firms must contract for space, hire associates, and develop a reputation that only a degree of institutional stability permits.[57] 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.[58] Nevertheless, at many firms, at least 40% of new hires have voluntarily resigned by the end of their 3rd year in practice, hardly having made back the cost the firm spent to recruit them. The law will not enforce restrictive covenants in any field that are excessive in scope or duration, but there seems no good reason to subject lawyer covenants to greater restriction.

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

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[56]See, e.g., *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410 (N.Y. 1989).

[57]See generally Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1 (1999).

[58]THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER 162 (2010).

implicitly acknowledged this, recognizing that persons who make up a law firm should be capable of reaching arrangements appropriate to their situation.[59] Conforming the rules to the decisions would be a third step in helping firms deal with the oncoming realities they will face.

4. 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. In a small firm, the senior partner who founded the firm might get 50% 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. 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.

What firms may not do today is allow non-lawyers to invest in the law firm. All American jurisdictions have some form of ABA Model Rule 5.4(d) that 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.

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

[59]E.g., *Howard v. Babcock*, 863 P.2d 150 (Cal. 1993); *Shuttleworth, Ruloff & Giordano, P.C. v. Nutter*, 493 S.E.2d 364 (Va. 1997).

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.[60]

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 sale to 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.

Any capital required to help a law firm build out office space, buy furniture and new technology, stock the library, guarantee a lease, or otherwise provide working funds traditionally has been borrowed from the partners or from banks. Given a history of law firm finance that has seemed to work for generations, a natural question might be why law firms would want to raise equity capital from third parties at all. Ordinarily, one only seeks outside capital at all when the projected return is likely to exceed the cost, and in a world of low interest rates, borrowed money has long looked like the way to keep law firm profits in the hands of the lawyer-partners.

But there are at least three reasons why law firm interest in selling equity seems to be growing. First, law firms have long paid profits out each year rather than retaining earnings. The result is to make money less available or more costly for long-term investment in new

[60]One of the early articles considering these issues was 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). I have addressed these issues previously in Thomas D. Morgan, *Should the Public Be Able to Buy Stock in Law Firms?*, 11 ENGAGE 111 (Sept. 2010).

technology, new offices, or to support an expanded scope of practice.

The Australian and U.K. experience tends to confirm this explanation. Slater & Gordon, for example, reported a need to consolidate several offices into larger ones and a need to finance high litigation expenses between the time a case is filed and the time the fee becomes payable.[61] In the U.K., it seems to be midsize firms that want to expand their ability to use technology to deliver commodity services to middle class clients that may be especially hungry for capital.

A second reason for a law firm's turning to non-lawyer investors will be to create a liquid market in firm shares so that good will can be priced and departing partners can realize full value for their years of service. Successful managers in other industries receive stock options, the argument goes. 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.

A third incentive for seeking non-lawyer investment may be to create a more lasting institutional character to the modern law firm and to encourage the development of the firm's brand identity and 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 of their capital investment if they have helped the firm prosper or simply get by.[62] 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 investors are

[61]Information about Slater & Gordon can be found at http://www.slatergordon.com.au.

[62]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 the firms can be sure that clients will continue to retain it. ABA Formal Opinion 266 (1945) 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

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.[63]

But if there are legitimate reasons for seeking outside investors, why have lawyers so long resisted the idea? The first reason is probably historical. As we saw earlier, until the late 1960s, law firms tended to be quite small. In 1968, for example, only twenty U.S. law firms had over 100 lawyers. In a small firm, personal relationships provide bonding and incentives for firm survival that outside investors might do little to augment. Further, few outside investors would likely have wanted to put their money into such small operations. In short, until recent years, there was more disinterest than opposition to the subject of outside investment in law firms.

But for those who did think about the issue, one concern was that lawyers are their clients' agents and have a fiduciary duty to focus principal attention on their clients' interests. Law firms exist to help lawyers provide that kind of fiduciary attention. 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

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inconsistent with the best concepts of our professional practice."

[63]See, e.g., Charlotte Edmond, Private Equity Firm First to Openly Target Legal Services in U.K., 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, IT advisor to the Lord Chief Justice, and Tony Williams, former director of Andersen Legal, the legal arm of the late-Arthur Andersen accounting firm).

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.[64]

A different concern is that the involvement of non-lawyer investors would reduce lawyers' willingness to tell clients what the clients don't 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.

[64]The New South Wales (Australia) Legal Services Commissioner describes the challenges of dealing with this issue in Steve Mark, *Views From an Australian Regulator*, 2009 J. PROF'L LAWYER 45, 56-58.

Finally, many lawyers seem to have a recurring nightmare of waking up working for Walmart. One of the early proposals when the ABA Model Rules were proposed in 1983 was that the barrier against lawyers practicing with non-lawyers be breached. Geoffrey Hazard, reporter to the ABA Commission was asked: "Does this mean Sears & Roebuck will be able to offer a law office?" When Hazard answered "yes," the proposal was defeated. Lawyers working for non-lawyers, it seemed, would be demeaning and thus unprofessional.[65]

The answers to these objections, of course, are not hard to see. 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.[66] 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 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.[67]

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[65]See, e.g., THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS & MATERIALS 635 (10th ed. 2008).

[66]See, e.g., Aric Press & John O'Connor, *The Law Firm Investor's Guide*, AM. LAW., June 2008, at ... (offers growth and blue-chip indexes to law firms during the days of high law firm profitability).

[67]Bruce MacEwen has offered an imaginative alternative of a derivative security priced to reflect financial performance of the law firm but that 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

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 SEC 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.

Finally, lawyers are likely to have to get over the fear of all of their clients turning to Walmart for their legal needs. Most lawyers do not provide services to Walmart customers or other middle class clients today. Those potential clients represent a possible growth market for lawyers, however, and a potential unmet demand. At least the start-up costs to do that kind of work will require the kind of capital that outside investors can provide, and Walmart and other mass merchandisers seem as good a source of capital as any.

The more serious practical question is whether anyone who is well-informed would decide to invest in a law firm. As the economy rebounds, lawyers will do better, but law practice activity tends to lag economic recovery, not lead it. Stock in a law firm, in short, will tend to track most other business investments, not hedge or otherwise complement them. But whether non-lawyer investment in law firms is wise as an investment strategy is largely beside the point. The practice of allowing non-lawyer investment in law firms has the potential of providing a genuine economic benefit and a relatively low risk of public harm. If not an idea whose success is inevitable, it's an idea whose time has come to be taken seriously.

Conclusion

61, 64-67 (2008). Professor Regan is likely correct that those who oppose outside investment would not be impressed by the distinction, id. at 67-70, but it is a possible middle ground.

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 Ethics 20/20 Commission, but its response has been disappointingly modest.

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 Great Britain and Australia have had in their moves to register and regulate law practice organizations, in addition to registering and regulating individual lawyers.[68] While the new regulatory structure in both countries was initiated by antitrust authorities rather than the legal profession itself, neither Great Britain nor Australia lacks a developed sense of lawyer professional duty and practitioners have largely accepted the new regime. 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.

[68]Legal Services Act 2007, Ch. 29 (Great Britain); Legal Professional Act of 2004 (NSW) (Australia). See Ted Schneyer, *Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice,* 2009 J. PROF'L LAWYER 13; John Flood, The Re-Landscaping of the Legal Profession: Large Law Firms and Professional Re-Regulation, available at http://ssrn.com/abstract=1650760.