REFORMING THE RULES: A PROPOSAL FOR MODIFYING THE MODEL RULES OF PROFESSIONAL CONDUCT TO PERMIT PARTNERSHIPS BETWEEN LAWYERS AND NONLAWYERS IN THE PRACTICE OF LAW

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The Model Rules of Professional Conduct prohibit partnerships between lawyers and nonlawyers in the practice of law, a ban that purportedly exists to protect lawyers' professional independence of judgment. Despite this noble sentiment, the prohibition ultimately hurts the legal market, to the expense of potential clients, by limiting the professional options available at the lawyer's disposal. The existence of lawyer-nonlawyer partnerships, recently espoused by two states, both decreases the costs and barriers involved in obtaining justice and encourages much-needed legal innovation. While other scholars have proposed schemes that would permit such partnerships without compromising the lawyer's professional responsibility, their methods arguably fail to align the incentives of lawyers with those of their nonlawyer partners. This Note attempts to address this issue by drawing from traditional principles of partnership law and vicarious liability. Holding lawyers, individually, to a strict liability standard concerning the legal misconduct of their nonlawyer partners while designating their partnerships as independently disciplined entities safeguards the professional responsibility of lawyers and nonlawyers alike, paving the way for reform of Model Rule 5.4(b).

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INTRODUCTION

One of the most controversial[1] and least understood rules of the American legal ethics system is the prohibition against partnerships between lawyers and nonlawyers in the practice of law.[2] The prohibition

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1 *See* Robert Saavedra Teuton, Note, *One Small Step and a Giant Leap: Comparing Washington, D.C.'s Rule 5.4 with Arizona's Rule 5.4 Abolition*, 65 ARIZ. L. REV. 223, 223, 229 (2023).

2 *See* Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 408–09 (2013) ("For the bans on fee-splitting with non-lawyers and non-lawyers as law firm partners, there is no equivalent background law to allocate burden of proof . . . . Yet these two bans impinge absolutely on what many may consider to be rational economic behavior . . . . [T]he bar should not have to wait for outside pressure to confront

against lawyer-nonlawyer partnerships[3] has been in place for nearly a century,[4] and many have questioned whether the ban remains necessary.[5] In today's interconnected world, the prohibition stands out as a self-serving[6] method for lawyers to maintain their monopoly over our country's legal system.[7] Nevertheless, the American Bar Association (ABA) Model Rules of Professional Conduct,[8] through their various revisions over the years, continue to enshrine the ban.[9]

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these issues with analytic rigor. It should not need an external threat to teach it to be wary of unsubstantiated predictions of harm. 'How do we know that?' is a question that should always be asked."); Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 410 (1988) ("In truth, lawyer-nonlawyer ventures present no dangers that justify an absolute ban.").

3 A note on terminology: scholars and regulators use several different terms to refer to partnerships in the practice of law between lawyers and nonlawyers, including "multidisciplinary practices," "multidiscipline practices," "dual practice[s]," "alternative business structures," and "nonlawyer ownership of law firms." *See, e.g.*, N.Y. STATE BAR ASS'N, REPORT OF THE TASK FORCE ON NONLAWYER OWNERSHIP 3, 7, 22 (2012); GEOFFREY C. HAZARD, JR., SUSAN P. KONIAK & ROGER C. CRAMTON, THE LAW AND ETHICS OF LAWYERING 988 (2d ed. 1994); Gianluca Morello, Note, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should Be Permitted in the United States*, 21 FORDHAM INT'L L.J. 190, 191 (1997). To avoid confusion, this Note will use the phrase "lawyer-nonlawyer partnerships" throughout.

4 *See* CANONS OF PRO. ETHICS Canon 33 (AM. BAR ASS'N 1928).

5 *See, e.g.*, Teuton, *supra* note 1, at 232–39.

6 As stated explicitly in the Preamble to the Model Rules, the (American) legal system is unique in that it is almost entirely self-regulated. MODEL RULES OF PRO. CONDUCT pmbl. ¶¶ 9–12 (AM. BAR ASS'N 2023). While the debate about the virtues of this system is beyond the scope of this Note, suffice it to say that the fact that lawyers, rather than some independent regulatory body, are the ones who decided that clients need Rule 5.4 for their own protection merits some introspection. *See generally* Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1147–56, 1175–79, 1184–86 (2009) (explaining that courts, commentators, and regulators regard the legal profession as self-regulating and describing the adverse consequences of doing so, including allowing the bar to promulgate self-serving provisions, which encourages courts to avoid adequately exercising their authority; causing trial courts to treat the adoption of professional codes as less relevant than other legal decisions; leading to inconsistent standards for lawyer behavior; allowing the bar to establish visions of law that are at odds with those of courts and states; and undermining the value of professional codes in the eyes of practicing lawyers and laypersons, which leads to distrust in the legal system as a whole).

7 Teuton, *supra* note 1, at 236.

8 The Model Rules of Professional Conduct are a set of ethical rules and responsibilities for lawyers established by the ABA. The Model Rules have no legal force but instead serve (as the name implies) as a model upon which individual states may build their rules of legal ethics. As of 2018, all fifty states and the District of Columbia have adopted legal ethics rules based, at least in part, on the Model Rules. MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2023); *see* Ctr. for Pro. Resp., *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules [https://perma.cc/DJ4V-GZHH]; *Proposed Rules of Professional Conduct*, STATE BAR OF CAL., https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Proposed-Rules-of-Professional-Conduct [https://perma.cc/48N9-7EMX].

9 MODEL RULES OF PRO. CONDUCT r. 5.4(b) (AM. BAR ASS'N 2023).

The fifth section of the Model Rules of Professional Conduct addresses "Law Firms and Associations."[10] Model Rule 5.4(b) states that "[a] lawyer [may] not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."[11] The purpose of this prohibition is to maintain lawyers' professional independence of judgment.[12] While states are not required to adhere to the Model Rules,[13] the vast majority of states have incorporated Model Rule 5.4(b) into their versions of the Rules of Professional Conduct.[14]

As the costs of legal services continue to grow, Model Rule 5.4(b) hurts the legal market by diminishing the organizational options lawyers can use to offer help to potential clients.[15] Permitting lawyer-nonlawyer partnerships would decrease the costs and barriers involved in obtaining justice.[16] The Model Rule also hampers legal innovation by discouraging nonlawyer professionals from lending their expertise to law firms.[17] Despite the many arguments for abandoning the prohibition, however, state bar associations[18] feel that the risks that implicate lawyers' professional independence of judgment are too great to overcome.[19]

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10 *Id.* rr. 5.1–5.7.

11 *Id.* r. 5.4(b).

12 *Id.* cmt. 2.

13 Ctr. for Pro. Resp., *Model Rules of Professional Conduct*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct [https://perma.cc/V77J-ZJ5C].

14 *See* CPR POL'Y IMPLEMENTATION COMM., AM. BAR ASS'N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER (Mar. 15, 2024), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-5-4.pdf [https://perma.cc/5WGT-XZ57].

15 *See* Emil Sadykhov, Comment, *Nonlawyer Equity Ownership of Law Practices: A Free Market Approach to Increasing Access to Courts*, 55 HOUS. L. REV. 225, 242, 245–46 (2017).

16 *See infra* notes 71–73 and accompanying text.

17 Gillian K. Hadfield, *Legal Infrastructure and the New Economy*, 8 I/S: J.L. POL'Y INFO. SOC'Y 1, 56 (2012). Hadfield lists engineers, software architects, systems analysts, management consultants, accountants, and psychologists as examples of nonlawyer professionals who could aid innovative lawyers in "incorporat[ing] methods that fall outside of the traditional model of law . . . ." *Id.*

18 Generally, a state's Rules of Professional Conduct are codified by its bar association, although they have no force of law until they are adopted by the relevant government authority (either the state's highest court or, in some states, the legislature). Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 461–63 (1996); *see also* LISA G. LERMAN, PHILIP G. SCHRAG & ROBERT RUBINSON, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 67–69 (6th ed. 2023) (describing how states regulate lawyers and how "lawyer law" is adopted).

19 *See* Candace M. Groth, Comment, *Protecting the Profession Through the Pen: A Proposal for Liberalizing ABA Model Rule of Professional Conduct 5.4 to Allow Multidisciplinary Firms*, 37 HAMLINE L. REV. 565, 566–67 (2014); Stephen P. Younger, *The Pitfalls and False Promises of Nonlawyer Ownership of Law Firms*, 132 YALE L.J.F. 259, 273 (2022); *see also* Edward S. Adams &

This issue exists because there is currently no way for lawyers to regulate the conduct of nonlawyer partners, who are not bound by the same ethical standards as lawyers.[20] The Rules of Professional Conduct address situations in which the interests of lawyers come into conflict with the interests of their clients,[21] but no mechanism exists for dealing with the conflicts that can occur when nonlawyers have interests that are at odds with their clients.[22] Merely requiring nonlawyers, like their lawyer partners, to abide by the relevant Rules of Professional Conduct would not solve this problem. Even if nonlawyer partners could be taught the Rules, there is no way to enforce the Rules: the consequences for ethical violations that lawyers face (e.g., censure, suspension, disbarment)[23] simply do not apply to nonlawyer professionals.[24] Thus, successful state-level reform of Rule 5.4(b) cannot occur without an alignment of the incentives of lawyer and nonlawyer law firm partners.

Partnership law may provide a solution to this problem. Historically, members of partnerships remained incentivized to supervise their partnerships' behavior—and, therefore, their fellow partners' behavior—by virtue of the accepted principle that, in a general partnership, partners were jointly and severally liable[25] for each other's decisions.[26] However, the "nearly universal move to limited liability entities for law practice" put an end to this system.[27] Limited liability entities typically rely on the

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John H. Matheson, *Law Firms on the Big Board? A Proposal for Nonlawyer Investment in Law Firms*, 86 CALIF. L. REV. 1, 9 (1998) ("The exceptions to per se prohibitions on legal service arrangements involving nonlawyers have substantially eroded the general rule, leading to inconsistent treatment of various methods of organization on the basis of form or sponsorship. Adherence to the traditional prohibitions has impeded development of new methods of providing legal services.").

20 *See* CTR. FOR PRO. RESP., AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005, at 580–81 (2006).

21 *See* MODEL RULES OF PRO. CONDUCT pmbl. ¶¶ 9, 12–13 (AM. BAR ASS'N 2023).

22 Younger, *supra* note 19, at 268.

23 MODEL RULES FOR LAW. DISCIPLINARY ENF'T r. 10 (AM. BAR ASS'N 2020).

24 Younger, *supra* note 19, at 268.

25 Under a regime of joint and several liability, a claimant may choose to apportion liability either among the various parties involved or to any given party or parties involved; thus, any given party can be held individually responsible for the entire cost of an obligation incurred by any other party. *See Joint and Several Liability*, BLACK'S LAW DICTIONARY (12th ed. 2024).

26 Maya Steinitz, *The Partnership Mystique: Law Firm Finance and Governance for the 21st Century American Law Firm*, 63 WM. & MARY L. REV. 939, 998 (2022).

27 *Id.*; *see also* Dennis Rendleman, *Meditation on Model Rule 5.4*, BUS. L. TODAY (Jan. 14, 2019), https://businesslawtoday.org/2019/01/meditation-model-rule-5-4 [https://perma.cc/Q6SB-T3Y6] ("[W]hat about Rule 5.4(b)? The terminology section [of the Model Rules of Professional Conduct] defines 'partner' as a 'member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.' Although the drafting is inartful, it is reasonable to rely on that definition for interpreting the prohibition on

entity theory of partnership,[28] which holds that a partnership is "an entity with a legal existence apart from the partners who make it up"[29] that can be held liable for actions independently of its individual partners.[30] Under this theory, the partnership, as an independent entity, bears all of the liability risk—while its members remain shielded from personal liability—regarding obligations incurred by the partnership.[31] Therefore, any attempt to align the incentives of lawyer and nonlawyer partners must demand that lawyers be liable for the legal misconduct of their nonlawyer partners.

Applying this concept to the realm of legal ethics could solve the issues associated with Model Rule 5.4(b) reform. First, lawyer-nonlawyer partnerships (even limited ones) should be designated as entities that could be held liable for legal misconduct independently of their individual partners. Additionally, in considering partners as individuals, lawyers should be held to a strict liability standard,[32] as in general partnerships, vis-à-vis the conduct of their nonlawyer partners. Such a regime of entity-wide strict liability would ensure both that nonlawyer partners would be vigilant, since the partnership itself could suffer the consequences of their mishaps (despite the fact that they personally could not be disciplined), and that lawyer partners would be careful to police the conduct of their nonlawyer partners (as the lawyers could be held liable for the nonlawyers' misconduct). This Note proposes that a combination of these standards would effectively align lawyer and nonlawyer incentives, dispelling the issues underlying Rule 5.4(b).

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forming a 'partnership with a nonlawyer.' Historically, however, and particularly in the practice of law, 'partnership' was a term of art. Other than solo practice, the only 'organization' in which more than one lawyer could practice law was a partnership, and at law, partners were/are jointly and severally liable for all acts of the partnership. This was heightened by the responsibility of a lawyer to a client. Although that law is still extant, few lawyers now practice in a pure partnership. The evolution of the law and legal practice since the 1980s has revolutionized law firm organization. To paraphrase, 'Where have all the partnerships gone?' They are PC, LLC, LLP, etc., and are generally no longer jointly and severally liable for the lawyer in the next office. In effect, has Rule 5.4(b) become moot?").

28 *See* Rachel Maizes, Note, *Limited Liability Companies: A Critique*, 70 ST. JOHN'S L. REV. 575, 592 n.97 (1996) ("The notion of the corporation as a separate entity from its members is . . . very much part of the law of limited liability . . . .").

29 *Entity Theory of Partnership*, BLACK'S LAW DICTIONARY (12th ed. 2024).

30 UNIF. P'SHIP ACT § 13 (UNIF. L. COMM'N 1914). In contrast to the entity theory, the aggregate theory of partnership holds that a partnership is nothing more than the sum of the partners who make it up. *Aggregate Theory of Partnership*, BLACK'S LAW DICTIONARY (12th ed. 2024).

31 *See* REV. UNIF. P'SHIP ACT §§ 201 cmt., 306(c) (UNIF. L. COMM'N 1997).

32 *Strict Liability*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("Liability that does not depend on proof of negligence or intent to do harm but that is based instead on a duty to compensate the harms proximately caused by the activity or behavior subject to the liability rule.").

Part I of this Note provides background on the prohibition against lawyer-nonlawyer partnerships by exploring the history that led to the enactment of Model Rule 5.4(b).[33] It then describes recent reforms of the Rule in the District of Columbia, Utah, and Arizona.[34] Part I concludes by discussing historical and current opposition to reformation of Model Rule 5.4(b).[35] Part II discusses the issues associated with lawyer-nonlawyer partnerships and examines whether they are still relevant enough to justify a blanket prohibition.[36] It then explains why the three extant jurisdictional reforms fail to adequately address the issue of protecting lawyers' professional independence of judgment.[37] Part II concludes by analyzing ten other proposed models for reform and discussing the shortcomings of those solutions.[38] Part III proposes a solution to the issue that provides a springboard for reformulating Model Rule 5.4(b) to permit lawyer-nonlawyer partnerships while properly incentivizing lawyers to ensure that their nonlawyer partners adhere to the same ethical standards.[39] Finally, Part III addresses potential concerns and counterarguments and explains why the benefits of the proposed solution outweigh its drawbacks.[40]

I. BACKGROUND

A. *History of Model Rule 5.4(b)*

Model Rule 5.4 addresses the professional independence of lawyers.[41] Model Rule 5.4(b), which has, until recently, been embraced essentially verbatim by every state,[42] prohibits lawyers from partnering with nonlawyers in the practice of law.[43] As explained in a Comment to that Rule, the purpose of the Rule is to protect the lawyer's professional independence of judgment.[44] The concern lies in the conflicted priorities

33 *See* discussion *infra* Section I.A.
34 *See* discussion *infra* Section I.B.
35 *See* discussion *infra* Section I.C.
36 *See* discussion *infra* Section II.A.
37 *See* discussion *infra* Section II.A.
38 *See* discussion *infra* Section II.B.
39 *See* discussion *infra* Section III.A.
40 *See* discussion *infra* Section III.B.
41 MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS'N 2023).
42 *See* CPR POL'Y IMPLEMENTATION COMM., *supra* note 14.
43 MODEL RULES OF PRO. CONDUCT r. 5.4(b) (AM. BAR ASS'N 2023).
44 *Id.* cmt. 2.

between lawyers and nonlawyers.[45] Lawyers are bound to pursue their clients' interests by strict ethical principles.[46] While nonlawyer professionals may have their own standards of conduct, they do not necessarily owe the same duties to legal clients.[47] Nonlawyers do not have the same responsibilities regarding client confidentiality, conflicts of interest, and fee-charging as lawyers;[48] in fact, the professional standards of nonlawyers sometimes explicitly conflict with the Model Rules of Professional Conduct.[49] Thus, allowing lawyer-nonlawyer partnerships would invite nonlawyers to influence the judgment of their lawyer partners.[50] Lawyer-nonlawyer partnerships can also lead to tension between lawyers' duties to zealously advocate for their clients[51] and nonlawyers' interests in pursuing profits.[52]

The prohibition against lawyer-nonlawyer partnerships developed at the beginning of the previous century[53] in response to the burgeoning corporate era in the United States.[54] As large corporations began dominating the market,[55] regulators wanted to make clear that the legal profession was more than just another profit-driven business.[56] The ABA

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45 *See* Younger, *supra* note 19, at 267–68 ("[L]awyers' opposition to [nonlawyer partners] stems principally from a steadfast commitment to professionalism and the ethical practice of law that leads many lawyers to draw the line at forbidding nonlawyers, who may have interests that are at odds with their clients, from owning or running legal practices.").

46 MODEL RULES OF PRO. CONDUCT pmbl. ¶¶ 1–2, 4, 9 (AM. BAR ASS'N 2023).

47 *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-392 (1995).

48 *Id.*

49 COMM'N ON MULTIDISCIPLINARY PRAC., AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES (1999).

50 Bradley G. Johnson, *Ready or Not, Here They Come: Why the ABA Should Amend the Model Rules to Accommodate Multidisciplinary Practices*, 57 WASH. & LEE L. REV. 951, 965–66, 970 (2000).

51 MODEL RULES OF PRO. CONDUCT pmbl. ¶¶ 2, 8–9 (AM. BAR ASS'N 2023).

52 *See, e.g.*, Gassman v. State Bar, 553 P.2d 1147, 1149, 1151 (Cal. 1976) (suspending lawyer from the practice of law for, among other ethical violations, partnering in the division of fees with a nonlawyer assistant, and noting that such partnerships raise the possibility of control by a nonlawyer who is more interested in gaining profits than in protecting the client's fate).

53 CANONS OF PRO. ETHICS Canon 33 (AM. BAR ASS'N 1928).

54 *See* Jayne R. Reardon, *Alternative Business Structures: Good for the Public, Good for the Lawyers*, 7 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 304, 309–10 (2017).

55 Roy D. Simon, Jr., *Fee Sharing Between Lawyers and Public Interest Groups*, 98 YALE L.J. 1069, 1078 (1989).

56 *See, e.g.*, *In re* Co-operative Law Co., 92 N.E. 15, 16 (N.Y. 1910) ("The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose. The right to practice law . . . must be earned by hard study and good conduct. It is attested by a certificate of the Supreme Court, and is protected by registration. No one can practice law unless he has taken an oath of office and has become an officer of the court, subject to its discipline, liable to punishment

published its first list of ethical guidelines for lawyers, the Canons of Professional Ethics, in 1908.[57] The Canons were a compilation of general principles rather than rules, and in the years immediately following their promulgation, the ABA established a committee to more clearly define them.[58] In 1928, on the recommendation of the Special Committee on Supplements to Canons of Professional Ethics, the ABA updated the Canons to include a prohibition against "[p]artnerships between lawyers and members of other professions or non-professional persons . . . [in] the practice of law."[59] The Special Committee proposed the prohibition due to concerns that lawyer-nonlawyer partnerships would lead to interference with lawyers' professional independence of judgment.[60] The first Model Code of Professional Responsibility, adopted by the ABA in 1969, codified the prohibition as a "disciplinary rule."[61] Before the Model Code of Professional Responsibility was recodified as the Model Rules of Professional Conduct in 1983, the ABA formed the Commission on Evaluation of Professional Standards ("Kutak Commission") to explore potential changes to the Model Rules.[62]

The Kutak Commission proposed a modified version of Model Rule 5.4 that would permit lawyer-nonlawyer partnerships provided that the lawyer partners would maintain their independence of professional judgment; the nonlawyer partners would not interfere with the client-

for contempt in violating his duties as such, and to suspension or removal. It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts.").

57 Ctr. for Pro. Resp., *supra* note 13.

58 AM. BAR ASSOC., REPORT OF THE FIFTY-FIRST ANNUAL MEETING OF AMERICAN BAR ASSOCIATION 119 (1928).

59 *Id.* at 496.

60 *See* SPECIAL COMM. ON SUPPLEMENTING CANONS OF PRO. ETHICS, AM. BAR ASS'N, ANNOTATED CANONS COMPILED BY THE CHAIRMAN FOR THE USE OF THE COMMITTEE 10–11 (1926) ("It is . . . fundamental . . . that a partnership or association of individuals, some of whom are not licensed to practice law and some of whom are so licensed, may not as such association or partnership lawfully and properly practice law or do law business. Since the practice of the law is a right or franchise permitted or created by society for its protection and benefit rather than the protection and benefit of the practitioner, it is clear that the practice of the law and the doing of law business by . . . persons who have not complied with the requirements prescribed by society therefor, is a positive injury and menace to society, that society in its own interest, and for its own protection and preservation should and must prevent. . . . The layman . . . may only compete with the lawyer in the practice of the law and the doing of law business by orally soliciting or advertising to do it more expeditiously, faithfully, intelligently, and at less expense than the lawyer, thereby imputing to the lawyer slothfulness, infidelity, and extortion. A loss of confidence in the courts and lawyers is a sign of governmental decline, and a forerunner of disintegration and anarchy."). The Committee also alluded to the issue that lawyers have no mechanism through which to subject nonlawyer partners to legal discipline. Charles A. Boston & Frank W. Grinnell, *Proposed Supplements to Canons of Professional Ethics*, 13 A.B.A. J. 268, 270 (1927).

61 MODEL CODE OF PRO. RESP. Canon 3 (AM. BAR ASS'N 1980).

62 *See* CTR. FOR PRO. RESP., *supra* note 20, at v.

lawyer relationship; and the partnership would abide by the relevant client confidentiality, advertising and solicitation, and fee-charging rules.[63] The ABA's House of Delegates unexpectedly opposed this change and wasted no time in rejecting it, keeping the version of Model Rule 5.4 that remains in effect today.[64]

In 1999, the ABA's Commission on Multidisciplinary Practice again proposed that the Rules be modified to allow for the formation of lawyer-nonlawyer partnerships; once again, the House of Delegates rejected such a change.[65] In 2001, the ABA's Commission on Evaluation of the Rules of Professional Conduct recommended that "no significant change" be made to Model Rule 5.4.[66] In 2011, the ABA's Commission on Ethics 20/20 recommended a modified version of Model Rule 5.4 that would permit lawyer-nonlawyer partnerships in certain circumstances; yet again, this proposal was rejected.[67] More recently, in 2020, the ABA's House of Delegates approved Resolution 115, which, in passing, explicitly reaffirmed opposition to reform of Model Rule 5.4;[68] and, in 2022, the House of Delegates approved Resolution 402, which reiterated its prior opposition by stating that "the ownership or control of the practice of law by non-lawyers [is] inconsistent with the core values of the legal profession" and that rules prohibiting lawyer-nonlawyer partnerships "should not be revised."[69]

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63 MODEL RULES OF PRO. CONDUCT r. 7.5 (AM. BAR ASS'N, Discussion Draft 1980).

64 *See* CTR. FOR PRO. RESP., *supra* note 20, at 580–81. Interestingly, Recommended Rule 5.4 was the only proposed rule that the House of Delegates "rejected in its entirety." Adams & Matheson, *supra* note 19, at 9.

65 COMM'N ON MULTIDISCIPLINARY PRAC., AM. BAR ASS'N, REPORT OF THE COMMISSION ON MULTIDISCIPLINARY PRACTICE TO THE ABA HOUSE OF DELEGATES 6–8 (1999); Laurel S. Terry, *MDPs: Reflections from the US Perspective*, 8 INT'L J. LEGAL PRO. 151, 153–54 (2001).

66 COMM'N ON EVAL. OF THE RULES OF PRO. CONDUCT, AM. BAR ASS'N, REPORT (2001).

67 Richard L. Thies, *Sharing Fees, Ownership of Law Firms with Non-lawyers*, SENIOR LAW. (Ill. State Bar Ass'n, Springfield, IL), Feb. 2013, at 8, 8; Press Release, Am. Bar Ass'n, ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms (Apr. 16, 2012), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120416_news_release_re_nonlawyer_ownership_law_firms.pdf [https://web.archive.org/web/20220819135414/https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120416_news_release_re_nonlawyer_ownership_law_firms.pdf].

68 CTR. FOR INNOVATION, AM. BAR ASS'N, RESOLUTION 115: ENCOURAGING REGULATORY INNOVATION (2020) ("[N]othing in this Resolution should be construed as recommending any changes to any of the ABA Model Rules of Professional Conduct, including Rule 5.4, as they relate to nonlawyer ownership of law firms, the unauthorized practice of law, or any other subject.").

69 AM. BAR ASS'N, RESOLUTION 402 (2022).

B. *Jurisdictional Reforms*

As the practice of law has undergone dramatic changes over the past century, lawyers have issued regular calls for reform of Model Rule 5.4(b), including the aforementioned formal recommendations in the 1980s, 1990s, and 2000s.[70] Scholars and practitioners continue to argue that Model Rule 5.4(b) is archaic in our increasingly interconnected world,[71] that it hampers legal innovation,[72] and that it increases the costs and barriers involved in obtaining justice.[73]

In response to these calls, three jurisdictions have modified their versions of the Rules of Professional Conduct[74]: In 1991, the District of Columbia adopted a modified form of Rule 5.4(b) that permits lawyer-nonlawyer partnerships under certain circumstances;[75] in 2020, Utah approved an experimental regulatory sandbox under which the Rule was modified to authorize lawyer-nonlawyer partnerships;[76] and, effective in 2021, Arizona became the first state to eliminate Rule 5.4 entirely from its Rules of Professional Conduct.[77]

1. Washington, D.C.

The District of Columbia's Rule 5.4(b) permits lawyers to partner[78] with nonlawyers who assist the partnership in providing legal services to

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70 *See supra* Section I.A.

71 *See, e.g.*, Teuton, *supra* note 1, at 235–36.

72 *See, e.g.*, *id.* at 223–24, 235–36.

73 *See, e.g.*, *id.* at 232–36.

74 *Id.* at 226. While Teuton also lists Washington State as having "modified Rule 5.4," *id.*, that state merely allowed legal partnerships with "limited license legal technicians," which are not considered nonlawyers; its version of Model Rule 5.4(b) continues to prohibit lawyer-nonlawyer partnerships. WASH. RULES PRO. CONDUCT 5.4(b), 5.7 cmt. 12 (WASH. BAR ASS'N 2021). Incidentally, the Washington Supreme Court voted to sunset its limited license legal technician program in 2020. *Sunset of LLLT Program*, WASH. STATE BAR ASS'N (Mar. 31, 2023), https://wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians/decision-to-sunset-lllt-program [https://perma.cc/33F5-H998].

75 D.C. RULES PRO. CONDUCT 5.4(b) (D.C. BAR ASS'N 2018).

76 UTAH RULES PRO. CONDUCT 5.4(d) (UTAH STATE CTS. 2021).

77 *See In re* Ariz. Code of Jud. Admin. § 7-209: Alt. Bus. Structures, Admin. Ord. No. 2020-173, at 1–2 (Ariz. 2020); *In re* Restyle and Amend Rule 31; Adopt New Rule 33.1; Amend Rules 32, 41, 42 (Various ERs from 1.0 to 5.7), 46–51, 54–58, 60 and 75–76, Ariz. Sup. Ct. No. R-20-0034, Order Amending the Ariz. Rules of the Sup. Ct. and the Ariz. Rules of Evidence (Ariz. 2020).

78 In this context, "partnership" and "partner" are used in the colloquial, rather than legal, sense; the full text of the Rule allows a lawyer to practice "in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer . . . ." D.C. RULES PRO. CONDUCT 5.4(b) (D.C. BAR ASS'N 2018).

clients provided that: (1) the partnership's sole purpose is providing legal services to clients;[79] (2) all partners agree to abide by the Rules of Professional Conduct;[80] (3) the lawyer partners agree to be responsible for the nonlawyer partners as if they were lawyers under Rule 5.1;[81] and (4) the above three conditions are expressed in writing.[82]

The District of Columbia's Rule 5.1 requires lawyers with "direct supervisory authority" over other lawyers to make "reasonable efforts" to ensure that the supervised lawyers abide by the Rules of Professional Conduct[83] and holds the supervising lawyers and partners responsible for violations of the Rules by supervised lawyers that the supervisors or partners knew (or should have known) of when the violations' consequences could have been mitigated if the supervisors or partners failed to take remedial action.[84]

2. Utah

Utah's Rule 5.4(d) permits lawyers to practice law in partnership with nonlawyers, as authorized by Utah Supreme Court Standing Order No. 15,[85] provided that: (1) before agreeing to representation, the lawyers provide prospective clients with written notice that they work in partnership with nonlawyers;[86] and (2) the lawyers provide clients with written notice of the "financial and managerial structure" of the partnership.[87]

Utah Supreme Court Standing Order No. 15 established a "pilot legal regulatory sandbox" to assist with overseeing and regulating nontraditional practice of law,[88] including lawyer-nonlawyer

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79 *Id.* 5.4(b)(1).

80 *Id.* 5.4(b)(2).

81 *Id.* 5.4(b)(3).

82 *Id.* 5.4(b)(4).

83 *Id.* 5.1(b)

84 *Id.* 5.1(c).

85 In this context, too, "partnership" and "partner" are used in the colloquial sense; the Rule's text allows a lawyer to practice "with nonlawyers, or in an organization, including a partnership, in which a financial interest is held, or managerial authority is exercised by one or more persons who are nonlawyers . . . ." UTAH RULES PRO. CONDUCT 5.4(d) (UTAH STATE CTS. 2021).

86 *Id.* 5.4(d)(1).

87 *Id.* 5.4(d)(2).

88 Utah Supreme Court Standing Order No. 15, at 1 (2020), https://legacy.utcourts.gov/utc/rules-approved/wp-content/uploads/sites/4/2020/08/FINAL-Utah-Supreme-Court-Standing-Order-No.-15.pdf [https://perma.cc/XBE9-TWWG]. A regulatory sandbox is a policy tool that a government body may use to experiment with "innovative business models" that allow for the loosening of otherwise restrictive rules. *Id.* at 3 n.9.

partnerships.[89] In reaching this decision, the Utah Supreme Court recognized that the traditional regulatory framework espoused by the ABA no longer reflects the needs of the legal services market.[90] The prohibition against lawyer-nonlawyer partnerships impedes innovation and artificially inflates the costs of legal service.[91] Utah's sandbox aims to address this systemic problem and increase access to justice.[92] Since 2020, via its sandbox, Utah has authorized some sixty law firms to operate as lawyer-nonlawyer partnerships.[93]

3. Arizona

In 2020, Arizona became the first state[94] to eliminate Rule 5.4 entirely from its Rules of Professional Conduct[95] after finding that the Rule "no longer serve[d] any purpose."[96] Instead, the Arizona Supreme Court replaced Rule 5.4 with a new section of the state's Code of Judicial Administration that regulates "Alternative Business Structures."[97] This change is analogous to Utah's in that it effectively established a new

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89 *Id.* paras. 3.3.2(b)(i), 4.9.

90 Lucy Ricca, *The Reregulation of Utah: Managing Risk with Better Protections*, GPSOLO, July/Aug. 2021, at 31, 32–33.

91 *See id.* at 32.

92 *Id.* at 32–33.

93 *Authorized Entities*, UTAH OFF. OF LEGAL SERVS. INNOVATION, https://utahinnovationoffice.org/authorized-entities [https://perma.cc/S5T5-4A3L]. These partnerships run the gamut of legal services, including personal injury law, healthcare law, employment law, tax law, immigration law, family law, financial services law, real estate law, public benefits law, and even criminal defense law. In each case, one or more lawyers has agreed to partner with one or more nonlawyers to more efficiently deliver legal services to the public. *Id.* As of January 2025, thirty-seven entities are authorized to operate in the sandbox. *Id.*

94 Younger, *supra* note 19, at 264.

95 *See In re* Ariz. Code of Jud. Admin. § 7-209: Alt. Bus. Structures, Admin. Ord. No. 2020-173, at 1–2 (Ariz. 2020); *see also In re* Restyle and Amend Rule 31; Adopt New Rule 33.1; Amend Rules 32, 41, 42 (Various ERs from 1.0 to 5.7), 46–51, 54–58, 60 and 75–76, Ariz. Sup. Ct. No. R-20-0034, Order Amending the Ariz. Rules of the Sup. Ct. and the Ariz. Rules of Evidence at 9 (Ariz. 2020).

96 ARIZ. SUP. CT. TASK FORCE ON THE DELIVERY OF LEGAL SERVS., REPORT AND RECOMMENDATIONS 14 (2019); *see id.* at 6–9. In a particularly rousing call to action, the Arizona Task Force asserted:

> The legal profession cannot continue to pretend that lawyers operate in a vacuum, surrounded and aided only by other lawyers or that lawyers practice law in a hierarchy in which only lawyers should be owners. Nonlawyers are instrumental in helping lawyers deliver legal services, and they bring valuable skills to the table.

Id. at 15.

97 An Alternative Business Structure is "a business entity that includes nonlawyers who have an economic interest or decision-making authority in the firm and provides legal services . . . ." *In re* Ariz. Code of Jud. Admin. § 7-209: Alt. Bus. Structures, Admin. Ord. No. 2020-173, at 1 (Ariz. 2020).

regulatory scheme under which lawyer-nonlawyer partnerships could exist.[98] As in Utah, regulators in Arizona recognized that the prohibition against lawyer-nonlawyer partnerships no longer reflects the needs of the legal services market, especially in light of the justice gap caused by the increasing legal costs that many low-income clients are unable to meet.[99] Since 2021, Arizona has authorized some one hundred law firms to operate as lawyer-nonlawyer partnerships.[100]

C. *Opposition to Reform*

Formal recommendations for reform of Model Rule 5.4(b) have been overwhelmingly rejected.[101] Because the stated purpose of the prohibition against lawyer-nonlawyer partnerships is to maintain lawyers' professional independence of judgment,[102] state regulators have not felt comfortable reforming the Rule in the absence of solutions to such concerns.[103] The Kutak Commission sought to permit lawyer-nonlawyer partnerships in light of the "complex variety of modern legal services" that necessitated moving beyond the traditional law firm makeup.[104] Contemporary opposition to the Commission's proposed modification took four forms: (1) concerns of interference with the lawyer's professional independence of judgment;[105] (2) fears that allowing lawyer-nonlawyer partnerships would permit large corporations to turn to the lucrative practice of law, unfairly competing with traditional law firms;[106] (3) concerns that allowing nonlawyers to work together and on

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98 *In re* Restyle and Amend Rule 31; Adopt New Rule 33.1; Amend Rules 32, 41, 42 (Various ERs from 1.0 to 5.7), 46–51, 54–58, 60, and 75–76, Ariz. Sup. Ct. No. R-20-0034, Order Amending the Ariz. Rules of the Sup. Ct. and the Ariz. Rules of Evidence (Ariz. 2020).

99 *See* Ann A. Scott Timmer, *Regulatory Reform: What's in It for Me?*, GPSOLO, July/Aug. 2021, at 24, 25.

100 *Alternative Business Structures Program*, ARIZ. CTS. (May 10, 2024), https://www.azcourts.gov/cld/Alternative-Business-Structure/Directory [https://perma.cc/F6SK-46T4].

101 *See supra* Section I.A.

102 MODEL RULES OF PRO. CONDUCT r. 5.4(b) cmts. 1–2 (AM. BAR ASS'N 2023).

103 *See* Groth, *supra* note 19, at 570–72; Younger, *supra* note 19, at 273; *see also* Adams & Matheson, *supra* note 19, at 9 ("The exceptions to per se prohibitions on legal service arrangements involving nonlawyers have substantially eroded the general rule, leading to inconsistent treatment of various methods of organization on the basis of form or sponsorship. Adherence to the traditional prohibitions has impeded development of new methods of providing legal services.").

104 MODEL RULES OF PRO. CONDUCT r. 7.5 cmt. (AM. BAR ASS'N, Discussion Draft 1980).

105 Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 595 (1989).

106 *Id.*

equal footing with lawyers would demean the legal profession;[107] and (4) general fears of possible negative effects of the proposal on the legal profession.[108]

In the many decades since the Kutak Commission's proposal, only the first concern—that of interference with the lawyer's professional independence of judgment—remains relevant.[109] The concern that allowing lawyer-nonlawyer partnerships would permit large corporations to turn to the profitable practice of law and unfairly compete with traditional law firms (the so-called "fear of Sears"[110]) has thus far proven groundless.[111] Additionally, there is no evidence that reforms in the

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107 *Id.*

108 *Id.*

109 For example, most recently, in explaining "why non-lawyer involvement in the practice of law is such a threat to clients and our system of justice," Resolution 402 lists six reasons (regulation, training, ethics and accountability, impact on the justice system, conflicts of interest, and independence and control) that all amount to concerns of interference with the lawyer's professional independence of judgment. *See* AM. BAR ASS'N, RESOLUTION 402, at 4–5 (Aug. 2022).

110 This concern owes its name to an apparently decisive conversation that occurred, as recalled at the time by Professor Hazard (the Kutak Commission's official reporter), during the debate over the Kutak Commission's proposal before the ABA's House of Delegates: "[S]omeone asked if . . . [the Kutak] proposal would allow Sears Roebuck to open a law office. When they found out it would, that was the end of the debate." Morello, *supra* note 3, at 212 n.151 (quoting David A. Kaplan, *Ethics Change in Works: Want to Invest in a Law Firm?*, NAT'L L.J., Jan. 19, 1987, at 28). To put the "fear of Sears" in modern (and nonlegal) terms, some have analogized the concern to the contemporary rideshare market, in which large corporations such as Uber and Lyft essentially put the traditional taxicab market out of business. Quentin Brogdon, *Non-Lawyer Ownership of Law Firms—Coming Soon?*, TEX. LAW. (June 2, 2023, 3:14 PM), https://www.law.com/texaslawyer/2023/06/02/non-lawyer-ownership-of-law-firms-coming-soon [https://perma.cc/4JMP-S3NS].

111 Matthew W. Bish, Note, *Revising Model Rule 5.4: Adopting a Regulatory Scheme That Permits Nonlawyer Ownership and Management of Law Firms*, 48 WASHBURN L.J. 669, 690–93 (2009) (explaining why the "fear of Sears" was never grounded in reality); Bernard Sharfman, Note, *Modifying Model Rule 5.4 to Allow for Minority Ownership of Law Firms by Nonlawyers*, 13 GEO. J. LEGAL ETHICS 477, 481–83 (2000) (explaining how other provisions of the Model Rules, such as the conflict of interest provisions of Model Rules 1.9 to 1.11, suffice to counter the "fear of Sears"). Admittedly, many nonlawyer entities have attempted to enter the legal market in recent years. This is especially true with regard to accounting firms that stand to benefit by cornering the tax law market. Elijah D. Farrell, Note, *Accounting Firms and the Unauthorized Practice of Law: Who Is the Bar Really Trying to Protect?*, 33 IND. L. REV. 599, 599–602 (2000); Morello, *supra* note 3, *passim*. Thus, some commentators have suggested that the contemporary equivalent of the "fear of Sears" would be a fear of the Big Four accounting firms. Teuton, *supra* note 1, at 229–30. On the other hand, others have argued that the market globalization and technological expansion that occurred at the turn of the century created a demand for lawyer-accountant partnerships that superseded any previous concerns about competition with traditional law firms. Bish, *supra*, at 678–79. Notably, before the ABA's Commission on Multidisciplinary Practice proposed that Model Rule 5.4(b) be modified in 1999, the Commission determined that "the expansion of professional service entities, principally accounting firms, into the practice of law" was "the most important issue to face the legal profession this century." Am. Bar. Ass'n Comm'n on Multidisciplinary Prac., *Background Paper on Multidisciplinary Practice: Issues and Developments*, 10 PRO. LAW. 1, 3

District of Columbia, Utah, and Arizona permitting lawyer-nonlawyer partnerships have led to a demeaning of the legal profession; at least in Utah and Arizona, the new regulatory schemes have appeared to be quite successful.[112] Therefore, all that remains is to address concerns regarding maintaining the lawyer's professional independence of judgment.[113] Developing a method to protect the professional independence of judgment of lawyer members of a lawyer-nonlawyer partnership would clear the path for long-overdue reform of Model Rule 5.4(b).[114]

II. ANALYSIS

A. *The Problem*

The primary reason for the prohibition against lawyer-nonlawyer partnerships is the protection of lawyers' professional independence of judgment.[115] There is a real concern that nonlawyers cannot properly appreciate the myriad ethical considerations involved in the practice of

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(1998). In addition, in jurisdictions (such as the District of Columbia, England, and Wales) in which large accounting firms have permissibly entered the legal market, there have been no indications that the accounting firms have "dominated the market," that the market share for traditional law firms had decreased, or that the general quality of legal services has not improved. Zachariah James DeMeola & Michael Houlberg, *Model Rule 5.4: How It Protects Little, Harms a Lot, and Why Its Removal Can Greatly Benefit Lawyers*, GPSOLO, July/Aug. 2021, at 27, 29.

112 As of January 2025, Utah and Arizona respectively report thirty-seven and 104 authorized entities that are licensed to operate as lawyer-nonlawyer partnerships in the practice of law. *Authorized Entities*, OFF. OF LEGAL SERVS. INNOVATION, https://utahinnovationoffice.org/authorized-entities [https://perma.cc/7S9D-MVHA]; *Alternative Business Structures Directory*, ARIZ. CTS. (May 10, 2024), https://www.azcourts.gov/cld/Alternative-Business-Structure/Directory [https://perma.cc/7FUA-WXEJ]. Lawyer-nonlawyer partnerships have apparently been utilized very infrequently in Washington, D.C., but there is similarly nothing to suggest that a demeaning of the legal profession has occurred there since 1990. *See infra* note 129.

113 Some scholars, noting that authorized lawyer-nonlawyer partnerships in Utah and Arizona do not appear to have drawn higher numbers of complaints than traditional law firms (for example, as of June 2022, Utah has reported only eleven complaints made through its regulatory sandbox—approximately one complaint per every 2,123 services delivered (on par with the rate of complaints lodged against traditional law firms)—while Arizona has reported no complaints made against Alternative Business Structures), have argued that harm to consumers of the type caused by interference with the lawyer's professional independence of judgment is no longer a concern. DAVID FREEMAN ENGSTROM, LUCY RICCA, GRAHAM AMBROSE & MADDIE WALSH, LEGAL INNOVATION AFTER REFORM: EVIDENCE FROM REGULATORY CHANGE 45–46 (2022). However, Stephen P. Younger has observed that the vast majority of consumer complaints about legal services never get reported. Younger, *supra* note 19, at 287. Therefore, the lack of reported consumer complaints made against lawyer-nonlawyer partnerships does not suggest that concerns regarding maintaining the lawyer's professional independence of judgment are unfounded. *Id.*

114 *See* Teuton, *supra* note 1, at 254.

115 MODEL RULES OF PRO. CONDUCT r. 5.4(b) cmt. 2 (AM. BAR ASS'N 2023).

law.[116] Lawyers spend years learning and being tested on ethical and professional rules.[117] Without this process of training, how can nonlawyers understand the responsibilities involved in the legal profession?[118]

More importantly, even if nonlawyer partners could be taught the appropriate legal rules, there is no way to enforce them.[119] Lawyers are incentivized to balance the fine line between their own interests and their clients' needs by the knowledge that mistakes will lead to disciplinary consequences.[120] But the consequences for ethical violations that lawyers face simply do not apply to nonlawyer professionals.[121] An accountant or a physician, say, who commits legal misconduct while working in partnership with a lawyer in the practice of tax law or healthcare law, faces no threat of censure or disbarment.[122] The lack of a coherent solution for this issue is, in major part, what has led to continuing support for Model Rule 5.4(b) in its current version.[123] In short, what is needed is a regulatory method of aligning the incentives of lawyer and nonlawyer partners.

The District of Columbia's Rule 5.4(b) takes a step in the right direction by requiring all partners in lawyer-nonlawyer partnerships to agree to abide by the Rules of Professional Conduct and holding the lawyer partners responsible for the actions of the nonlawyer partners as if they were lawyers under the District of Columbia's Rule 5.1.[124] But these restrictions do not solve the problem.[125] The District of Columbia's Rule 5.1 only holds partners responsible for other lawyers' violations of the Rules when the partner "knows or reasonably should know of the conduct

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116 Younger, *supra* note 19, at 268.

117 *Id.*

118 *See* Anthony J. Sebok, *Selling Attorneys' Fees*, 2018 U. ILL. L. REV. 1207, 1221 (2018) ("[S]ince nonlawyers lack the ethical muscles developed by lawyers, they are more likely to pursue their own self-interest, all things being equal, than lawyers.").

119 *See* Younger, *supra* note 19, at 268.

120 *See* MODEL RULES FOR LAW. DISCIPLINARY ENF'T r. 10 (AM. BAR ASS'N 2020).

121 Younger, *supra* note 19, at 268; *see also* Cindy Alberts Carson, *Under New Mismanagement: The Problem of Non-lawyer Equity Partnership in Law Firms*, 7 GEO. J. LEGAL ETHICS 593, 613 (1994) ("A non-lawyer partner is in an enviable position with regard to the discipline authority of his jurisdiction. He enjoys the many benefits of working with a profession that is well-policed. Since he does not pay bar dues, however, he need not contribute to the cost of this policing. The increased investigation, discipline, and insurance costs that are a direct result of the acts of non-lawyer partners will be borne by the lawyers in the jurisdiction, most of whom will probably not be contributors to the problem. The non-lawyer partner need never fear that the bar will use its police authority against him, since he is beyond its jurisdiction.").

122 Younger, *supra* note 19, at 268; Carson, *supra* note 121, at 613.

123 Younger, *supra* note 19, at 268; Carson, *supra* note 121, at 613.

124 D.C. RULES PRO. CONDUCT 5.4(b) (D.C. BAR ASS'N 2018).

125 *See* Teuton, *supra* note 1, at 252.

at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."[126] Since, presumably, the point of a lawyer-nonlawyer partnership is that the nonlawyer will bring valuable nonlegal efforts to the table, a nonlawyer partner's conduct will almost necessarily involve activities of which the lawyer partner is unaware and unable to know.[127] Thus, application of the District of Columbia's Rule 5.1 seems worthless in addressing the very issue it was designed to prevent here.[128] Indeed, it seems that very few lawyers in Washington, D.C., have availed themselves of Rule 5.4(b) to form a lawyer-nonlawyer partnership,[129] and the District of Columbia Bar itself has wondered whether its version of the Rule is too nebulous.[130]

The Utah and Arizona revisions of the Model Rule do not fare much better. Utah's Rule 5.4(d) contains none of the restrictions mentioned above.[131] The only constraint it places on lawyer-nonlawyer partnerships is a requirement that lawyers provide clients with written notice of the nature of the partnership.[132] Therefore, it, too, fails to solve the issues behind the prohibition against lawyer-nonlawyer partnerships. Arizona's regulatory scheme directly addresses the issue by holding all members of an Alternative Business Structure responsible for abiding by the relevant

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126 D.C. RULES PRO. CONDUCT 5.1(c)(2) (D.C. BAR ASS'N 2018).

127 *See* Teuton, *supra* note 1, at 249; Carson, *supra* note 121, at 613–14, 613 n.130.

128 *See, e.g.*, Teuton, *supra* note 1, at 252 ("Further, the D.C. Rule does not clarify how firms should proceed when a disclosure conflict arises between nonlawyer professionals' ethical rules and ethical rules governing attorneys. For example, a law firm in D.C. could have a social worker partner subject to mandatory reporting requirements, but the D.C. Rule flatly imposes other rules of professional conduct on all persons with 'managerial authority or holding a financial interest' in the firm; such rules may require nondisclosure of certain information in conflict with the social worker's reporting requirement. Accordingly, different professional and legal disclosure and nondisclosure requirements may conflict and may produce legal ambiguities or frequent rule violations by D.C. law firms." (footnotes omitted)).

129 *New York State Bar Association: Report of the Task Force on Nonlawyer Ownership*, 76 ALB. L. REV. 865, 928 (2013). *But see* Sam Skolnik, *D.C. Nonlawyer Partner Rule Spurs Interest as States Mull Change*, BLOOMBERG L. (Oct. 30, 2019, 4:55 AM), https://news.bloomberglaw.com/us-law-week/d-c-nonlawyer-partner-rule-spurs-interest-as-states-mull-change [https://perma.cc/ SX3X-6BWA] ("D.C. Bar spokeswoman Andrea Williams said that the group doesn't keep statistics on Rule 5.4 implementation, including how many firms have used it to employ nonlawyer partners."). In contrast, both Utah and Arizona maintain comprehensive lists of authorized lawyer-nonlawyer partnerships. *Authorized Entities*, *supra* note 112; *Alternative Business Structures Directory*, *supra* note 112.

130 *See D.C. Bar Global Legal Practice Committee Seeks Public Comment on Rule of Professional Conduct 5.4*, D.C. BAR (Jan. 23, 2020), https://www.dcbar.org/newsevents/news/d-c-bar-global-legal-practice-committee-seeks-publ [https://perma.cc/N7NX-L3B6] ("Are the circumstances under which a D.C. Bar member may practice with a nonlawyer partner under Rule 5.4(b) too restrictive? Have these restrictions prevented you from establishing a practice with a nonlawyer that you otherwise would have done?").

131 UTAH RULES PRO. CONDUCT 5.4(d) (UTAH STATE CTS. 2021).

132 *Id.*

ethical rules and subjecting them to discipline for failing to do so.[133] Again, however, it is unclear how, practically, the regulatory authority could sanction a nonlawyer.[134]

B. *Addressing Extant Proposals*

Over the years, legal scholars have proposed various methods of updating Model Rule 5.4(b) to permit partnerships between lawyers and nonlawyers in the practice of law. Repealing the prohibition against lawyer-nonlawyer partnerships would lower the costs of legal services and encourage innovation in the modern legal market.[135] As this Note argues, an effective revision of the Model Rule must provide a method to regulate the legal conduct of nonlawyer partners by aligning the interests of lawyer and nonlawyer partners. This Section briefly summarizes the various proposals that have been offered and explains why they are inadequate in addressing protection of the lawyer's professional independence of judgment.

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133 *In re* Ariz. Code of Jud. Admin. § 7-209: Alt. Bus. Structures, Admin. Ord. No. 2020-173, at 23–25 (Ariz. 2020).

134 The regulatory scheme does provide that an Alternative Business Structure itself could be subject to disciplinary action, such as suspension or revocation of its license, for breaching regulatory requirements. *Id.* at 16–18. But it fails to explain how nonlawyers could be subjected to reprimand, admonition, or probation. *Id.* at 16–18, 23–24. Proponents of Arizona's regulatory scheme might argue that the threat of an Alternative Business Structure losing its license would suffice to keep its members, lawyer and nonlawyer alike, on the right side of the law. Such an argument would, it must be noted, assume that the regulatory scheme relied upon circular reasoning to permit lawyer-nonlawyer partnerships: lawyers and nonlawyers could partner in the practice of law through an Alternative Business Structure, without worries of interference with the lawyers' professional independence of judgment, as partners would know that any such interference could lead to dissolution of the Alternative Business Structure—that is, the Alternative Business Structure would be permitted to operate only because there would be no concern of interference with the lawyers' professional independence of judgment, while there would be no concern of interference with the lawyers' professional independence of judgment only because the Alternative Business Structure had been permitted to operate. The problem with this reasoning is that a negative incentive is arguably only effective to the extent that it threatens to leave a wrongdoer in a worse position than the wrongdoer was prior to the offense. The termination of an Alternative Business Structure in response to its members' legal misconduct would not be punishing its members—they would be forced to dissolve their partnership but would face no actual penalties. Presumably, the types of lawyers and nonlawyers who would not care to be zealous in adhering to the Rules of Professional Conduct are the same types of people who would be willing to take risks to advance their goals, unfazed by the remote prospect of such lukewarm disciplinary action.

135 *See supra* Section I.B.

1. The Arizona Model

One simple suggestion is for the ABA to do away with Model Rule 5.4 entirely and adopt an Alternative Business Structure scheme, similar to the current Arizona model, in which lawyer-nonlawyer partnerships would be permitted.[136] However, simply adopting an Alternative Business Structure scheme would not solve the issues associated with opposition to reform of Model Rule 5.4 in the absence of additional regulatory reform.[137] As the Arizona model does not provide a mechanism for the regulatory authority to discipline nonlawyer partners, they have no incentive to abide by the Rules of Professional Conduct.[138] Therefore, when nonlawyer partners have interests (such as maximizing profits) that conflict with those of their clients, their priorities would hamper their partnerships' professional duties to the clients.[139]

2. The "Commitment and Disclosure" Model

Thomas R. Andrews has proposed that the ABA replace Model Rule 5.4 with the Kutak Commission's proposed revision and supplement the Model Rule with explicit requirements for lawyer partners to contractually require nonlawyer partners to comply with the Rules of Professional Conduct and for lawyer-nonlawyer partnerships to disclose to potential clients the nature of their partnerships.[140] As a baseline, these requirements are surely a good starting point in terms of transparency, but Andrews's proposal does nothing to align the incentives of lawyer and nonlawyer law firm partners.[141] First, a demand that nonlawyer partners abide by the Rules of Professional Conduct is meaningless if the nonlawyers do not properly understand the Rules. Second, even if nonlawyers could be taught the relevant Rules and appreciate their importance, nonlawyers would still not face the applicable consequences for legal misconduct. Thus, the "commitment and disclosure" model fails to align the interests of lawyer and nonlawyer partners. In fact, Andrews

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136 See Reardon, *supra* note 54, at 351 for a detailed template for state adoption of Alternative Business Structure systems.

137 *See infra* note 163.

138 *See supra* note 134 and accompanying text.

139 *See supra* note 134 and accompanying text.

140 Andrews, *supra* note 105, at 641–42.

141 For example, Andrews has stated that a contractual requirement "would go a long way towards meeting the concern that the nonlawyer is not susceptible to the bar's jurisdiction" but has failed to explain how the bar would practically be able to discipline nonlawyer partners. *Id.*

has conceded that his proposed model may not adequately address the issues associated with opposition to reform of Model Rule 5.4.[142]

3. The "Nonlawyer Professional Liability" Model

Gianluca Morello has proposed that professional nonlawyer partners could be made to face the loss of their professional licenses[143] for violations of legal ethics codes.[144] Such a system would certainly incentivize nonlawyer partners to avoid misconduct. However, Morello has pointed out that enacting such a requirement would require the action of every relevant jurisdiction,[145] and is therefore highly impractical to implement.

4. The "Nonlegal Remedies" Model

Bradley G. Johnson has suggested that extant remedies other than legal discipline, such as fiduciary duties of care and duties imposed by the laws of agency, torts, contracts, and property,[146] suffice to discourage nonlawyer partners from engaging in unethical activities.[147] However, Johnson has assumed that nonlawyer members of a lawyer-nonlawyer partnership are unlikely to interfere with the professional judgment of

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142 Specifically, Andrews has stated that "[t]here may be other amendments that should be made to the Kutak Commission's proposed Rule 5.4, to provide further safeguards against the perceived dangers." *Id.* at 642. Andrews has noted, however, that it is "important . . . that the rule not become so complicated and burdensome in practice as to make nonlawyer involvement with lawyers effectively impossible, while pretending to authorize it in principle," apparently foreseeing some of the extremely complex proposals that would be put forward over the next few decades. *Id.*

143 Morello, *supra* note 3, at 251.

144 *Id.* That is, nonlawyer professionals could be made "answerable to their own professional body" for the professional standards of their lawyer partners, i.e., violations of the Rules of Professional Conduct. *Id.* & n.375. For example, accountants (partnered with lawyers in the practice of law) who committed legal misconduct would face the loss of their CPA licenses, while physicians would face the loss of their medical licenses.

145 *Id.* at 251.

146 John S. Dzienkowski and Robert J. Peroni have also suggested that "the discipline of the marketplace" would incentivize nonlawyer partners to avoid any appearance of wrongdoing, for if their partnership's reputation suffers due to their professional misconduct, their clients will choose to "go to others for their services . . . ." John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 196 (2000); *see id.* at 141, 191.

147 Johnson, *supra* note 50, at 970–71.

lawyer partners.[148] Assuming that such a concern does, in fact, exist, it seems highly questionable whether extant nonlegal remedies are enough to align the incentives of lawyer and nonlawyer law firm partners.

5. The Consumer-Commercial-Contractual Model

Candace M. Groth has proposed that the ABA adopt the "Consumer-Commercial-Contractual Model" as a "liberalized, but professionalism-protective version of Model Rule 5.4."[149] The Consumer-Commercial-Contractual Model involves amending Model Rule 5.4(b) by adding eight requirements for lawyer-nonlawyer partnerships in the practice of law.[150] Specifically, Groth's model requires nonlawyer partners to actively participate in firm management; requires nonlawyer partners to abide by the Rules of Professional Conduct in relation to consumer clients (though not necessarily in relation to commercial clients); and incorporates protections for legal professionalism.[151] Groth has suggested that the risk that nonlawyers will attempt to influence their lawyer partners' professional independence of judgment would be mitigated by the requirement that the nonlawyer partners have an active stake in maintaining client relationships.[152]

Even assuming a willingness to modify the Rules to such an extent,[153] and putting aside the extreme complexity and lengthiness of the

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148 *Id.* at 1001 ("Because nonlawyer partners in an MDP are unlikely to interfere with the professional judgment of a lawyer, it is not necessary for the ABA to make any additional changes to the Model Rules to protect the professional independence of lawyers within MDPs.").

149 Groth, *supra* note 19, at 568.

150 Briefly, the requirements include: (1) the partnership must be designated by the state as a "multidisciplinary firm"; (2) all nonlawyers must be active participants in the firm, meaning that they actively provide services or are engaged in the daily affairs of the firm, to the exclusion of passive investors or organizations; (3) all partners must agree to abide by the Rules of Professional Conduct; (4) nonlawyer partners must agree to also abide by all relevant nonlegal professional codes of conduct, following the more stringent rule when applicable, and agree to seek guidance from the relevant authorities in cases of direct conflict; (5) nonlawyer partners must agree to be subject to the jurisdiction of state legal disciplinary authorities; (6) lawyer partners must undertake to be responsible for nonlawyer partners under Rules 5.1–5.3; (7) commercial clients may, subject to specific restrictions, agree to vary the application of the Rules of Professional Conduct with regard to nonlawyers, while consumer clients must be clearly informed as to the nature of the multidisciplinary firm; and (8) the partnership must file with the state a "Certificate of Multidisciplinary Practice" describing the identity and nature of the firm and these requirements. *Id.* at 592–96.

151 *Id.*

152 *Id.* at 597.

153 As Groth has admitted, it is "an open question whether the organized bar will accept such a liberal form of Model Rule 5.4." *Id.* at 601. Another hurdle to overcome is that Groth's proposal

Consumer-Commercial-Contractual Model, Groth's proposal fails to adequately address the concern of maintaining the professional independence of lawyers. It does not incentivize lawyers to regulate the conduct of their nonlawyer partners or provide an adequate mechanism for enforcing nonlawyer adherence to the Rules of Professional Conduct. Furthermore, Groth has avoided the crux of the issue by proposing that in cases where a "Nonlawyer Ethics Code" conflicts with the Rules of Professional Conduct, nonlawyer partners shall "seek guidance on a proper course of action from the relevant lawyer and nonlawyer[] professional ethics authorities"[154] without deigning to suggest what a "proper course of action" might entail.[155]

6. The "Monetary Penalty" Model

Matthew W. Bish has proposed that the ABA replace Model Rule 5.4 with the Kutak Commission's proposed revision and adopt a regulatory scheme with six requirements to address ethical concerns.[156] Importantly, Bish has suggested that the Rules must impose a monetary penalty[157] on partnerships whose nonlawyer partners commit misconduct[158] (similar to the Arizona regime[159]). This would help to align the incentives of lawyer and nonlawyer law firm partners. However, once again putting aside the complexity and lengthiness of the model, Bish's proposal does not go far enough, as liability does not personally reach the lawyer partners (or, for that matter, the nonlawyer partners). Therefore, without a mechanism to address the conflicts that might occur when nonlawyers have interests that are at odds with their clients, the "monetary penalty" model would not adequately address concerns of interference with the professional judgment of lawyer partners.

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would also require extensive modification of several other Model Rules, such as those governing conflicts of interest. *Id.*

154 *Id.* at 593.

155 *See id.*

156 Briefly, the requirements include: (1) the state bar must establish oversight of nonlawyer investments; (2) each partnership must appoint a legal director to monitor compliance; (3) the Rules must impose a monetary penalty on partnerships whose nonlawyer partners commit misconduct; (4) legislation must create a hierarchy of duties for lawyer partners; (5) Model Rule 1.10 must be updated to account for nonlawyer partners' conflicts of interest; and (6) firms must disclose their nonlawyer interests and obtain informed consent from potential clients. Bish, *supra* note 111, at 697–702.

157 Bish has conceded that, to be effective, "[t]he amount of this penalty would have to be significant in order to provide an ample amount of deterrence . . . ." *Id.* at 699 n.229.

158 *Id.* at 699.

159 *See infra* note 200.

7. The Legal Benefit Entity Model

Maya Steinitz has proposed requiring lawyer-nonlawyer partnerships to organize as legal "benefit entities"[160] that commit to prioritizing the interests of their clients over profits.[161] To a large extent, such a system would solve the issues that arise when the Rules of Professional Conduct come into conflict with nonlawyer partners' nonlegal professional codes of conduct.[162] However, Steinitz's model does not suggest how nonlawyer partners should gain familiarity with, and understand how to comply with, the Rules of Professional Conduct.[163] Therefore, it, too, fails to adequately align the incentives of lawyer and nonlawyer law firm partners.

8. The Minority Ownership Model

Bernard Sharfman has proposed amending Model Rule 5.4(b) to allow minority ownership of law firms by nonlawyers.[164] Under this model, lawyer-nonlawyer partnerships would be permitted as long as the lawyer partners maintained majority ownership, including financial and voting control of the partnership.[165] Sharfman has addressed the concern of maintaining the professional independence of lawyers by further proposing that Model Rule 5.4(b) be amended to mirror the District of Columbia's Rule holding the lawyer partners responsible for the misconduct of their nonlawyer partners.[166]

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160 Steinitz, *supra* note 26, at 1007. A benefit entity is a business that is legally permitted to prioritize interests other than shareholder profit. *Id.* The directors of a benefit entity have a duty to consider the ability of the corporation to accomplish its general benefit purpose; a "general public benefit" is defined as "[a] material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation assessed taking into account the impacts of the benefit corporation as reported against a third-party standard." *Id.* at 1007–08 (quoting BENEFIT CORP., MODEL BENEFIT CORP. LEGIS. § 102 (2017), https://benefitcorp.net/sites/default/files/Model%20benefit%C20corp%C20legislation%20_4_17_17.pdf [https://perma.cc/UB3B-PBDU]).

161 Steinitz, *supra* note 26, at 995.

162 *See id.* at 1008.

163 Steinitz has actually suggested setting up a legal benefit entity system in conjunction with Arizona's Alternative Business Structure system, which would serve to alleviate these concerns. *Id.* at 940. In that case, however, the primary issue would be getting the ABA to adopt the Alternative Business Structure system, which would first entail a complete overhaul or elimination of Model Rule 5.4.

164 Sharfman, *supra* note 111, at 494.

165 *Id.* at 494–95.

166 D.C. RULES PRO. CONDUCT 5.4(b) (D.C. BAR ASS'N 2018); Sharfman, *supra* note 111, at 494–95.

While Sharfman has been forthright about attempting to address the problems underlying Model Rule 5.4(b) reform, his minority ownership model fails on two counts to adequately address the concern of maintaining the professional independence of lawyers. First, the model suffers from the same deficiency as the District of Columbia's regime: the District of Columbia's Rule 5.1 only holds a partner responsible for other lawyers' violations of the Rules when the partner "knows or reasonably should know of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action";[167] it does not address misconduct of which the lawyer was reasonably unaware. Second, while relegating nonlawyer partners to minority status gives lawyer partners more control of the partnership, it does nothing to stop nonlawyer partners from attempting to influence the lawyers' decisions in ways that do not comport with the Rules of Professional Conduct.[168]

9. The "Capped Passive Investment" Model

Tyler Cobb has proposed liberally amending Model Rule 5.4(b) by adding five requirements for lawyer-nonlawyer partnerships in the practice of law.[169] Cobb's model allows passive investment by nonlawyers but places a forty-nine percent cap on nonlawyer ownership, an additional twenty-five percent cap on passive ownership, and transfer restrictions on the partnership's shares; allows passive investors to enjoy only financial rights and gives active nonlawyer partners limited voting rights; requires nonlawyer partners to pass a character test when they comprise more than twenty-five percent of the partnership; requires nonlawyer partners to sign confidentiality agreements; and requires passive investors (but not active nonlawyer partners) to waive duties to shareholders that conflict with duties to clients.[170]

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167 D.C. RULES PRO. CONDUCT 5.1(c)(2) (D.C. BAR ASS'N 2018).

168 Indeed, Sharfman has conceded that his model does not prevent minority investors from "influenc[ing] the behavior of the firm or somehow put[ting] pressure on the professional independent judgment of the firm's lawyers." Sharfman, *supra* note 111, at 495.

169 Tyler Cobb, Note, *Have Your Cake and Eat it Too! Appropriately Harnessing the Advantages of Nonlawyer Ownership*, 54 ARIZ. L. REV. 765, 798–99 (2012).

170 *Id.* at 797–99; *see also* Justin Schiff, Comment, *The Changing Nature of the Law Firm: Amending Model Rule 5.4 to Allow for Alternative Business Structures Resulting in Nonlawyer Ownership of Law Firms*, 42 CAP. U. L. REV. 1009, 1033–43 (2014) (discussing a cap on nonlawyer ownership). These "cap" models resemble Sharfman's minority ownership model. *Supra* Section II.B.8. In fact, when the ABA's Commission on Ethics 20/20 recommended modifying Model Rule 5.4 in 2011 to permit lawyer-nonlawyer partnerships, one of the alternative models it

Like some of the other proposed models, Cobb's model is extraordinarily complex. It also fails to adequately address the concern of maintaining the professional independence of lawyers. It does not incentivize lawyers to regulate the conduct of their nonlawyer partners or provide an adequate mechanism for enforcing nonlawyer adherence to the Rules of Professional Conduct.[171]

10. The "Adequate Policies and Procedures" Model

James W. Jones and Bayless Manning have proposed amending Model Rule 5.4(b) in conjunction with the addition of a new Model Rule 1.18.[172] Under the Jones-Manning model, Model Rule 1.18 would prohibit lawyers from representing clients if the lawyers, for any reason, are prevented from providing the clients with "objective and independent legal advice," unless, with the clients' consent, the lawyers reasonably believe that any such reason will not actually prevent the lawyers from rendering objective and independent advice.[173] Model Rule 5.4(b) would then be reformulated to permit lawyer-nonlawyer partnerships when (and only when) the lawyer partners reasonably believe that there are "adequate policies and procedures in effect" to allow the lawyer partners to appropriately comply with the Rules.[174]

This "adequate policies and procedures" model does not adequately address the concern of maintaining the professional independence of lawyers. Placing the burden of responsibility upon the individual lawyer

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considered was a regime of limited partnerships in which nonlawyer partners would be permitted to own no more than a certain percentage of the firm. ABA COMM'N ON ETHICS 20/20 WORKING GRP. ON ALT. BUS. STRUCTURES, AM. BAR ASS'N, FOR COMMENT: ISSUES PAPER CONCERNING ALTERNATIVE BUSINESS STRUCTURES 17 (2011).

171 Cobb has acceded that it might also be necessary to amend Model Rule 5.3 [and Model Rule 5.1] to "explicitly make lawyers responsible for all actions of the nonlawyers with whom they are in business. If this structure is to be effective, it must be clear that lawyer partners within a firm shall be held accountable for any misconduct of their nonlawyer counterparts, regardless of whether the lawyers knew of such conduct." Cobb, *supra* note 169, at 797 (footnote omitted). Again, however, Cobb has failed to explain how to enforce nonlawyer partner compliance.

172 James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159, 1206–07 (2000). When Jones and Manning published their "radical proposal" in June of 2000, the first section of the Model Rules of Professional Conduct, addressing the client-lawyer relationship, ended with Model Rule 1.17. As that section currently ends with Model Rule 1.18, the modern equivalent of their proposal would entail adding a new Model Rule 1.19. *See* COMM'N ON EVAL. OF THE RULES OF PRO. CONDUCT, AM. BAR ASS'N, MODEL RULES OF PROFESSIONAL CONDUCT AS ADOPTED BY ABA HOUSE OF DELEGATES rr. 1.11–1.17 (2002); MODEL RULES OF PRO. CONDUCT rr. 1.1–1.18 (AM. BAR ASS'N 2023).

173 Jones & Manning, *supra* note 172, at 1206.

174 *Id.* at 1207.

to determine whether there are adequate policies and procedures in force entirely circumvents the objective of the solution: What incentive would lawyer partners have to regulate the conduct of their nonlawyer partners?[175] And, perhaps more importantly, what mechanism would be employed to enforce nonlawyer adherence to the Rules of Professional Conduct?[176]

III. PROPOSAL

Opposition to reform of Model Rule 5.4 grounded in concern for maintenance of the professional independence of lawyers has occurred only because there is currently no way for lawyers to regulate the conduct of nonlawyer partners, who are not bound by the same ethical standards as lawyers.[177] One way to solve this issue is to require lawyer-nonlawyer partnerships to ascribe to a hybrid theory of partnership law under which all members of a partnership, as well as the partnership itself, are liable for any misconduct.[178] Abiding by such a theory would effectively align the incentives of lawyer and nonlawyer law firm partners.[179] The result would be that both lawyer and nonlawyer members of a lawyer-nonlawyer partnership would be careful to abide by the relevant Rules of Professional Conduct, with no uncertainty as to the lawyer partners' professional judgment.[180]

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175 Jones and Manning have attempted to circumvent this issue by pointing out that under their proposed version of Model Rule 5.4(b), "the burden placed on individual lawyers is a serious one. Lawyers would be subject to professional discipline if they failed to take reasonable steps to assure that the organizations in which they practiced enabled them to comply with all of the requirements of the Model Rules, including of course the requirement of the new Rule 1.18 regarding professional independence." *Id.* at 1209 n.176. However, as, under their proposed Model Rule 1.18, it is the individual lawyer who determines the ability to maintain independence of professional judgment, it would be extremely difficult, if not impossible, to prove that the lawyer "failed to take reasonable steps." *Id.*

176 Jones and Manning have similarly obfuscated this issue by asserting, without suggesting any sort of enforcement mechanism, that lawyers practicing in lawyer-nonlawyer partnerships are responsible for the legal conduct of their nonlawyer partners. *Id.*

177 *See* Younger, *supra* note 19, at 268.

178 The idea of a hybrid theory of partnership law is not entirely novel. For example, the Revised Uniform Partnership Act generally defines partnerships using the entity theory but also applies the aggregate theory for some purposes, including joint and several liability. REV. UNIF. P'SHIP ACT §§ 201, 306 (UNIF. L. COMM'N 1997).

179 *See* Carson, *supra* note 121, at 614–15.

180 *Id.*

A. *The Ideal Mechanism for Solidifying the Professional Obligations of Nonlawyer Members of Lawyer-Nonlawyer Partnerships: A System of Entity-Wide Strict Liability*

The ideal mechanism for solidifying the professional obligations of nonlawyer members of lawyer-nonlawyer partnerships is a system of entity-wide strict liability. Model Rule 5.1 (or the District of Columbia version of Rule 5.1[181]) does not go far enough in aligning the incentives of lawyer and nonlawyer partners, since it only holds partners responsible for known violations.[182] Instead, to solve the issue Model Rule 5.4(b) is intended to address, the Rule should hold lawyer partners strictly liable for any ethical violations committed by nonlawyer partners in their partnership. Then, even if a lawyer partner adequately supervised a nonlawyer partner, and the nonlawyer partner violated an ethical rule without the lawyer partner's knowledge, the lawyer partner would be subject to discipline as if the lawyer partner had committed the violation. Such a system would incentivize lawyers to ensure that their nonlawyer partners adhere to the same ethical standards. Specifically, the New York and New Jersey versions of Model Rule 5.1, which require law firms, particularly, to ensure that their members comply with the Rules,[183] could provide a springboard for reformulating Rule 5.4(b) to permit lawyer-nonlawyer partnerships. Model Rule 5.1 requires only partners and managers of a law firm to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."[184] In contrast, New York's Rule 5.1 states, "[a] law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules,"[185] and New Jersey's Rule 5.1 states, "[e]very law firm, government entity, and organization authorized . . . to practice law . . . shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers conform to the Rules . . . ."[186] Thus, these two states place additional responsibilities upon law firms as entities (not just

181 D.C. RULES PRO. CONDUCT 5.1(b) (D.C. BAR ASS'N 2018).

182 MODEL RULES OF PRO. CONDUCT r. 5.1(c)(2) (AM. BAR ASS'N 2023).

183 N.Y. RULES PRO. CONDUCT 5.1(a) (N.Y. BAR ASS'N 2022); N.J. R. PRO. CONDUCT 5.1(a) (N.J. STATE CTS. 2024).

184 MODEL RULES OF PRO. CONDUCT r. 5.1(a) (AM. BAR ASS'N 2023).

185 N.Y. RULES PRO. CONDUCT 5.1(a) (N.Y. BAR ASS'N 2022).

186 N.J. RULES PRO. CONDUCT 5.1(a) (N.J. STATE CTS. 2024).

upon the lawyers who control them) to ensure compliance with the Rules.[187]

Applying such a version of Model Rule 5.1 to Model Rule 5.4 could further bolster the alignment of incentives of lawyer and nonlawyer partners. Lawyer-nonlawyer partnerships should be designated as entities that could be held liable for misconduct independently of their individual partners. Unlike the District of Columbia version of Rule 5.1,[188] the New York and New Jersey versions require the law firm itself to make reasonable efforts to ensure that its lawyers conform to the Rules of Professional Conduct.[189]

Going one step further would incentivize even nonlawyer partners to avoid ethical misconduct. Law firms (partnerships) should be required to make reasonable efforts to ensure that all of their partners, lawyers and nonlawyers alike, conform to the Rules of Professional Conduct. Under this system, even though nonlawyer partners would face no personal threat of censure or disbarment, their firms, as entities, could suffer for their missteps. Therefore, this system would incentivize even nonlawyer partners to avoid ethical misconduct.

Thus, a regime of entity-wide strict liability would solve the issues associated with reform of Model Rule 5.4(b).[190] Designating lawyer-nonlawyer partnerships as entities that are responsible for misconduct independently of their individual partners would incentivize nonlawyer partners to figure out how to comply with the Rules rather than risk impugning the standing of their firm.[191] Additionally, holding lawyer partners (even in limited partnerships) strictly liable for any partner's

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187 N.Y. RULES PRO. CONDUCT 5.1(a) (N.Y. BAR ASS'N 2022); N.J. RULES PRO. CONDUCT 5.1(a) (N.J. STATE CTS. 2024).

188 D.C. RULES PRO. CONDUCT 5.1(b) (D.C. BAR ASS'N 2018).

189 N.Y. RULES PRO. CONDUCT 5.1(a) (N.Y. BAR ASS'N 2022); N.J. RULES PRO. CONDUCT 5.1(a) (N.J. STATE CTS. 2024).

190 *See supra* Section II.A.

191 Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 176 (2008) (discussing the effect that lawyers' desires to maintain specific types of reputations have on the implementation of rules of professional conduct); Milton C. Regan, Jr., *Professional Reputation: Looking for the Good Lawyer*, 39 S. TEX. L. REV. 549, 554–57 (1998) (discussing the importance of reputation for lawyers and law firms and the interplay between reputation and ethical oversight); Ted Schneyer, *Reputational Bonding, Ethics Rules, and Law Firm Structure: The Economist as Storyteller*, 84 VA. L. REV. 1777, 1779–82, 1790–92 (1998) (discussing the importance that law firms ought to place on reputation as one of the few methods that potential clients are able to use in evaluating services; the fact that to preserve reputation, firms need to monitor the conflicting interests and activities of their lawyers; and the structural drawbacks caused by the prohibition against lawyer-nonlawyer partnerships). *See generally* ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM (2d ed. 2022) (discussing the importance that law firm partners place upon firm reputation in the context of law firms' independence and commitment to professional values).

legal misconduct would incentivize lawyer partners to carefully supervise their nonlawyer partners' actions rather than risk facing personal liability.[192] Claiming ignorance would be of no avail; strict liability means that even if the lawyer partners "reasonably" supervised their nonlawyer partners—even if the lawyer partners were entirely unaware of their nonlawyer partners' ethical violations—lawyer partners would be held responsible for any and all misconduct that occurs in the partnership.[193]

Under such a system, lawyer members of lawyer-nonlawyer partnerships would approach their duties with the appropriate extra vigilance, ensuring that their professional independence of judgment is maintained. Therefore, a system of entity-wide strict liability would effectively align lawyer and nonlawyer incentives, dispelling the issues underlying Model Rule 5.4(b). With concerns of interference with lawyers' professional independence of judgment adequately addressed, there would no longer be a valid reason to continue prohibiting lawyers from partnering with nonlawyers in the practice of law.

B. *Entity-Wide Strict Liability: Addressing Concerns and Counterarguments*

The obvious drawback of a system of strict liability is the potential increase in liability for lawyers.[194] This concern would take three forms: First, since lawyers presumably do not like liability,[195] they would likely advocate against any proposal that involved embracing extra liability.[196] Second, even if lawyers would acknowledge the necessity of extra liability, a system of strict liability would almost certainly force them to change the ways in which they practice and the types of clients whose cases they

192 *See* Rachel Reiland, Note, *The Duty to Supervise and Vicarious Liability: Why Law Firms, Supervising Attorneys, and Associates Might Want to Take a Closer Look at Model Rules 5.1, 5.2 and 5.3*, 14 GEO. J. LEGAL ETHICS 1151, 1153 (2001).

193 While holding partners liable for misconduct they knew nothing about may seem strange, it is not an entirely novel concept. For example, the New York Court of Appeals has ruled that under the New York City Human Rights Law, employers can be vicariously strictly liable for unlawful discrimination committed by their employees even when the employers did not participate in the misconduct. Doe v. Bloomberg L.P., 167 N.E.3d 454, 458 (N.Y. 2021) (citing Zakrzewska v. New Sch., 928 N.E.2d 1035, 1040 (N.Y. 2010)).

194 *See* Regan, *supra* note 191, at 549–52.

195 *See* Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1417 (2013) (discussing the effectiveness of the threat of liability to potential tortfeasors from a law and economics perspective).

196 As evidenced by the pushback the ABA has received to its numerous attempts to abolish Model Rule 5.4(b), see *supra* Section I.C, any successful proposal to reform the Model Rule would need overwhelming support from the lawyer community.

agreed to accept.[197] Finally, increases in lawyer liability tend to drive up the costs of legal services[198] to the detriment of potential clients.[199]

This Note offers two responses to this concern. First, such a system would not increase any actual liability risk; at most, it would increase the risk of discipline.[200] Therefore, even to lawyers who wish to practice in lawyer-nonlawyer partnerships, entity-wide strict liability would not be as alarming as it sounds; such a system would not unduly pressure lawyers to change their modes of practice;[201] and there is no reason to assume that increases in the risk of discipline (rather than increases in the risk of liability) would adversely impact the costs of legal services.[202]

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197 *See* Benjamin Zipursky, *Regulation and Responsibility for Lawyers in the Twenty-First Century*, 70 FORDHAM L. REV. 1949, 1953 (2002) ("Greater regulation and liability for lawyers will likely give lawyers a different attitude toward their work. Their professional judgment comes to take a different, and lesser role, as the law and the prospect of liability loom larger . . . . Of at least equal concern, increased regulation is likely to demagnetize the lawyer's internal moral compass, which critics have argued has already been seriously weakened. It is, moreover, likely to intensify already disturbing trends of antagonism between lawyer and client."); *see also* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 813 (1992) ("Those opposed to making it easier for clients or third parties to sue lawyers for professional misconduct frequently assert that whatever compliance gains might result from expanding liability will be more than offset by the harm that will result from 'defensive lawyering.").

198 *See* Zipurksy, *supra* note 197, at 1952–53 ("Prima facie, greater liability will make legal services costlier, and if we are talking about levels of legal service that cannot be done without, then those service costs will, in total, rise. It will bring the insurance industry into play in a bigger way, producing a higher level of tertiary costs for legal services. More defensive law is hardly what we need. More litigation is unlikely to ease the court access problems of the lower and middle classes. Indeed, one of the greatest reasons for difficulty in access to low cost legal services is that being a plaintiff's lawyer is an increasingly costly business because of the crowdedness of courts.").

199 *See id.* As Zipursky implies, the issue is not just that increased costs would be disfavored by bill-paying clients, but that increased costs would compound the difficulties in access to low-cost legal services. *Id.* As one of the primary motivations for Model Rule 5.4 reform is the argument that the Rule artificially keeps the cost of legal services high and thereby hampers public access to legal services—indeed, addressing the "justice gap" between "those who can afford to pay for legal services and those who cannot do so" was the main reason why Arizona's Supreme Court decided to delete its version of Model Rule 5.4, ARIZ. SUP. CT. TASK FORCE ON THE DELIVERY OF LEGAL SERVS., *supra* note 96, at 8–10—any reform that increased the costs of legal services would be particularly ironic.

200 Thus, this proposal stands in contrast with Arizona's broad disciplinary mandate, which might expose members of lawyer-nonlawyer partnerships to financial liability. *In re* Ariz. Code of Jud. Admin. § 7-209: Alt. Bus. Structures, Admin. Ord. No. 2020-173, at 16–18, 23 (2020).

201 That is, beyond incentivizing them to police the conduct of their nonlawyer partners, which is the goal of Model Rule 5.4 reform.

202 In addition, it is important to note that even increases in actual (i.e., monetary) liability risks would generally not have any practical significance, since

> [p]ersonal exposure becomes relevant only under a "doomsday scenario" in which malpractice insurance . . . [has] been exhausted . . . . Thus, the number of instances in which the resources of all partners likely would come into play as a source for satisfying

Additionally, the only way to address protection of lawyers' professional independence of judgment is to utilize some method of incentivizing lawyer partners to police the conduct of their nonlawyer partners.[203]

The benefit of a system of entity-wide strict liability is that it would align the incentives of lawyer and nonlawyer law firm partners.[204] Entity-wide strict liability would solve two problems at once by incentivizing nonlawyer partners to be careful to avoid ethical misconduct and incentivizing lawyer partners to appropriately supervise the conduct of their nonlawyer partners.[205] Ultimately, establishing a regime of entity-wide strict liability could pave the way for much-needed reform of Model Rule 5.4(b), permitting lawyer-nonlawyer partnerships in the practice of law to the benefit of lawyers, nonlawyer professionals, and clients alike.

CONCLUSION

The Model Rule 5.4(b) reforms adopted by the District of Columbia, Utah, and Arizona are "steps in the right direction"[206] but do not go far enough in addressing concerns of interference with lawyers' professional independence of judgment. A national reformulation of Model Rule 5.4(b) that permits lawyer-nonlawyer partnerships is long overdue,[207] but such a modification would require a method of aligning the incentives of lawyer and nonlawyer partners to ensure adherence to the Rules of Professional Conduct. While legal scholars have proposed various methods of permitting lawyer-nonlawyer partnerships, none go far enough in addressing protection of the lawyer's professional independence of judgment.

A regime of entity-wide strict liability for lawyer-nonlawyer partnerships would address this issue by solidifying the professional obligations of nonlawyer partners, which would incentivize lawyer partners to ensure that their nonlawyer partners comply with the relevant ethical rules. By adopting a stricter form of Model Rule 5.1, holding

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a claim may be relatively small. This is particularly the case in those jurisdictions that impose requirements for minimum amounts of malpractice insurance.

Regan, *supra* note 191, at 551.

203 *See, e.g.*, R. Matthew Black, Note, *Extra Law Prices: Why MRPC 5.4 Continues to Needlessly Burden Access to Civil Justice for Low- to Moderate-Income Clients*, 25 WASH. & LEE J. CIV. RTS. & SOC. JUST. 499, 506–07 (2019).

204 *See supra* Section III.A.

205 *See supra* Section III.A.

206 Marc N. Biamonte, Note, *Multidisciplinary Practices: Must a Change to Model Rule 5.4 Apply to All Law Firms Uniformly?*, 42 B.C. L. REV. 1161, 1193 (2001).

207 *See* Bruce A. Green, *Civil Justice at the Crossroads: Should Courts Authorize Nonlawyers to Practice Law?*, 75 STAN. L. REV. ONLINE 104, 115 (2023).

lawyer partners, as well as the partnership itself, strictly liable for any ethical violations committed by nonlawyer partners in their partnership, states could repeal their prohibitions against lawyer-nonlawyer partnerships without running afoul of the issues Model Rule 5.4(b) was intended to prevent.

The success of recent jurisdictional developments and the continued push for national reform should serve as strong signals to the ABA that Model Rule 5.4(b) must be reconsidered. The Model Rule's blanket prohibition has no place in the modern legal landscape. An approach that allows for the existence of lawyer-nonlawyer partnerships but adequately addresses the ethical concerns that come along with them would be a welcome change for both those in need of legal services and those who provide such services. Entity-wide strict liability meets these criteria with minimal complexity and would be a powerful adaptation in our ever-evolving legal system.