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Alter[ing] People’s Perceptions: The Challenge Facing Advocates of Ancillary Business Practices

MARJORIE MEeks*

There is . . . a world of objects which have a certain form . . . But politics, justice . . . [t]here’s nothing real there, separate from our perception of them. So if you try to change them, as though there was something there to change, you’ll get frustrated if you don’t know this, you’re acting on mistake. Prejudice is the expression of this mistake.

If you know this and proceed with humility, you may perhaps alter people’s perceptions so that they behave a little differently at that axis of behaviour where we locate politics or justice . . .

THE DEBATE

* Philadelphia labor law firm Pechner, Dorfman, Wolffe, Rounck & Cabot was losing so much business to labor-relations consulting firms that it recently acquired a Dallas management consulting company A partner asks: “[I]f I’m hiring a consultant and charging the client for it, why not acquire a consultant firm that does it?”

* “I for one do not feel that it is in the interest of preserving a learned and caring profession to directly associate the practice of law whatever the structure with other services.”

* A law firm in Pittsburgh has turned an operating cost into profit by offering a duplicating, mailroom and messenger service to tenants in its building, including other law firms who, according to H. Edward Wesemann of Thorp, Reed & Armstrong, “use us because we’re aware of the problem of confidentiality.”

* “[T]he greater the participation by lawyers in activities other than the practice of law, the less likely it is that the lawyer can capably discharge the obligations which our profession demands.”

* J.D. Candidate, 1991, Indiana University School of Law at Bloomington; B.A., 1988, DePauw University.


• Borod & Higgins, a thirty-member Memphis firm is now profiting from charging clients and nonclients to subscribe to their previously complimentary investment banking newsletter and conducting seminars at a cost. “What we do is closely tied to what we do as lawyers,” says Ronald Borod. “It’s not like we went out and opened a haberdashery.”

• “It may be that those who speak in favor of professionalism in the law reflect a pathetic nostalgia. But I am unreconstructed. I persist in perceiving a difference between the lawyer and all tradesmen.”

• Van O’Steen & Partners, the Phoenix personal injury firm that took the battle over lawyers’ advertising to the Supreme Court, has established the Van O’Steen Lawyer Marketing Group, which now sells to other law firms an advertising and marketing program similar to its own. “The strongest selling feature we have is a track record as a law firm,” says O’Steen.

• “I know of no lawyer who, on reflection, wishes to equate his professional obligations to those of the marketplace[,] no lawyer who wishes to sell her professional skills as so many potatoes or onions.”

Introduction

The recent boom in ancillary business activities, through which large law firms are forming profitable, controversial—and some would say, unholy—alliances with nonlawyer professionals, has led to an almost bipolar split among those who favor and those who oppose the trend. Few are lukewarm on the subject, especially because ancillary business supporters and critics are usually neatly aligned along correspondingly opposing sides of today’s debate over the “is” and “ought” of legal professionalism. As the eight examples above indicate, most ancillary business proponents argue that the movement will inevitably allow lawyers to improve the services they provide their clients, while opponents view the trend either as a cause or a symptom of lawyers’ ever-declining ethical standards. Thus, any analysis of the merits of ancillary business practices forces an examination of fundamental theories about what a lawyer is or should be.

The trend toward ancillary business practices is still relatively new, which is perhaps the reason that tolerance of the “other side” is in such short supply. Or maybe a mutual understanding between the two camps, some common ground of tolerance, will take more than time. Given the intensity,
the personal nature and, so far, the tenacity of most opinions regarding ancillary business, the only road to accommodating the two disparate views would seem to entail a careful, honest and objective assessment of the origins, effects, advantages and dangers of the current trend. This Note analyzes the two most prevalent and conflicting of the various deeply held beliefs regarding the proper role of the lawyer. It then attempts to resolve the conflict between those two beliefs that surrounds the issue of ancillary business activities.

Part I acknowledges the elusive nature of legal professionalism, which seems to defy any definition more concrete than each speaker’s own perception of it. But, by generalizing to some degree, two widely held views can be used as a starting point of inquiry. Part I begins by looking at the traditional, aspirational view of the profession that has been fostered and, with mixed success, maintained by the legal ethics codes, particularly Model Rule 5.4 which prohibits a lay person’s partnership in a law firm. That history stands threatened today, because replacing the traditional perception in the minds of many lawyers and nonlawyers alike is a second image, perpetuated recently by the spread of law firm diversification. Ancillary business activities have fostered the image of the lawyer as a merchant, selling his problem-solving skills which he tailors to specific clients’ needs. Since so many critics of today’s legal profession cite diversification as either a cause or a symptom of the changes in the profession, Part I finally looks at both the current extent of this trend and the impetus behind it.

The facts, figures and catalysts behind the movement, as examined in Part I, would indicate that ancillary business is changing the face of the practice of law. In light of this evidence, Part II points out the mistake of envisioning a perception—here, legal professionalism—as an object to be forcibly maintained at some artificial status quo. In fact, if legal ethics codes are to be honored and enforced, the inevitably changing nature of the profession would necessitate an adaptation of standards in the area of ancillary business. Such action would be warranted, however, only if the benefit of revising the codes would outweigh the damage to the traditions of the profession.

On this point, the two “sides” necessarily diverge. Ancillary proponents herald the advantages of the movement, or at least recognize that they overshadow the drawbacks. They usually favor encouragement, or at least minimal regulation of the trend. Opponents, on the other hand, see overwhelming disadvantages from the relaxation of strict professional standards and advocate either stiff regulation or complete prohibition of ancillary business.

In an attempt to understand and possibly resolve this fundamental disagreement, Part II outlines and evaluates the most common arguments in favor of amending the codes to accommodate ancillary activities, as well as the perceived threats that the trend poses for the traditional delivery of
legal services. It concludes that most of the traditionalists’ fears are unwarranted and are based on a prejudiced perception of the profession as a static concept. The ethical transgressions they wish to avoid by eliminating ancillary business—or at least maintaining Rule 5.4 in its current form—are either already widespread or are controllable through increased reliance on other rules and continued commitment to self-government from attorneys.

In order for opponents and proponents of ancillary business to work together to modify Rule 5.4, compromise from both sides is crucial. Traditionalists would need to yield to some nonlawyer participation or control in law firms. Diversified firms would need to compromise as well. To prove their claims that ancillary business need not spell the end of professionalism, they must adhere to other ethical standards in conducting their ancillary business if current restrictions are loosened.

This compromise could be reached in countless forms. Part III looks specifically at two recent proposals for revision of Rule 5.4—the Washington, D.C. effort, which has recently received official sanction, and the rejected North Dakota revision. If other states entertain revision of Rule 5.4, they should realize that the Washington, D.C. rule and the North Dakota proposal represent only two points along a continuum of greater or lesser nonlawyer influence in diversified law firms.

The nationwide effects of ancillary business are not yet apparent, but for any states that decide to revise their ethics codes, the challenge will be to maintain the traditional standards of professionalism while branching out into ancillary areas. The balancing act is not an impossible one, and the legal profession need not allow critics’ predictions of the end of attorney self-regulation to become a self-fulfilling prophecy. If the legal profession takes care to ensure that ancillary business and dedicated service to the client are not mutually exclusive, ancillary participants can simultaneously address the traditionalists’ reservations and preserve the bar’s cherished prerogative of self-government.

I. BASES OF THE ANCILLARY BUSINESS CONTROVERSY

A. The Elastic Concept of Professionalism

In August 1986, Justin A. Stanley, then-President of the American Bar Association and one of the country’s most distinguished attorneys, declared that “[p]rofessionalism” is an elastic concept and any single definition runs the risk of being too confining.”11 As Chairman of the ABA Commission on Professionalism (the “Stanley Commission”), Stanley was

ANCILLARY BUSINESS PRACTICES

presenting to the ABA House of Delegates and Board of Governors the most comprehensive evaluation of the legal profession to date. The sixty-three page report was drafted in response to then-Chief Justice Warren E. Burger's fear that "the Bar might be moving away from the principles of professionalism." At the outset, the Commission admitted its investigation would be limited to "perceptions" of American lawyers. They found this topic "appealing because the word 'perception' recognizes that this study, with a distinguished panel and thorough as it may be, [was] not conducive of scientific proof."1

This dearth of definition, however, does not stem from any lack of thought devoted to the subject. The identifying characteristics of a profession, and the legal profession in particular, have been examined by law professors, bar association leaders, social scientists and partners in the nation's leading law firms. Despite the validity of these concerted efforts

12. Id. at 248.
13. Id.
15. See Stanley Report, supra note 5, at 261-62 (quoting R. Pound, The Lawyer from Antiquity to Modern Times 5 (1953)) ("The term [profession] refers to a group pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood.").

In addition, New York University Professor Eliot Freidson prepared a definition of the legal profession for the Stanley Report:

An occupation whose members have special privileges, such as exclusive licensing, that are justified by the following assumptions:
1. That its practice requires substantial intellectual training and the use of complex judgments.
2. That since clients cannot adequately evaluate the quality of the service, they must trust those they consult.
3. That the client's trust presupposes that the practitioner's self-interest is overbalanced by devotion to serving both the client's interest and the public good, and
4. That the occupation is self-regulating—that is, organized in such a way as to assure the public and the courts that its members are competent, do not violate their client's trust, and transcend their own self-interest.

Id., see also Schneyer, Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct, 14 LAW & Soc. INQUIRY 677, 731 (1989) (Schneyer has pointed out that the legal profession, when developing the Model Rules, defined itself by an attitude of "overly deterministic 'role morality'" with different sets of guidelines for each role today's lawyers must play instead of "ordinary morality," as some of the critics had prescribed.").


What makes a profession distinct is not the vague list of attributes that any occupation can claim, nor need it be some monopolistic grasp over a particular segment of the market, but rather the way in which it organizes its work and how it defines that work as different from other groups'

to encapsulate the concept on paper, perhaps the most widely shared view
is that of Thomas S. Johnson, Illinois State Bar Association representative
to the ABA House of Delegates. He finds "[p]rofessionalism . . . is difficult
to define, but most lawyers think they know it when they see it." 19

B. Incongruous Images of the Legal Profession

If legal professionalism, then, is such an ephemeral concept, defined only
by extrinsic evaluation, what do lawyers—and others—see when they "see
it"? Two divergent views seem to be among the most frequent today. One
holds that lawyers are uniquely obligated citizens with duties not only to
their clients, but to society as a whole and to the administration of justice. 20
The other is a growing—and possibly conflicting—perception that lawyers
are becoming pragmatic problem-solvers, working alongside other profes-
sionals and treating the client's interests as paramount. 21

1. The Traditional 22 Perception of the Legal Profession

a. Roots in the Ethics Codes

After adopting the Canons of Professional Ethics in 1908, 23 the ABA
added provisions in 1928 prohibiting nonlawyers' financial or managerial
involvement in law 24 Canons 33 through 35, relating to lawyer/nonlawyer
partnerships, were straightforward prohibitions with few available explana-
tions for their adoption. They were strictly construed in the following years
by the ABA Committee on Professional Ethics and the ABA Committee
on Professional Ethics and Grievances to prohibit nearly all forms of
business association between lawyers and nonlawyers that offered legal

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19. Johnson, Enhancing Professionalism and Preserving the Independence of the Bar, 75
20. See infra notes 22-45 and accompanying text.
21. See infra notes 46-69 and accompanying text.
22. Use of the term "traditional" to describe opinions of the legal profession is not meant
to imply that a certain image is no longer valid or popularly held. To the contrary, many
observers of the profession today subscribe to what this Note refers to as the "traditional"
perception. The terminology is merely used to indicate the contrast between the perception
supported by values stressed in the ethics codes and the perception of those who feel that the
growth of ancillary business activities is detrimentally and irreparably changing the practice of
law.
23. T. MORGAN & R. ROTUNDA, SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY
412 (1989). All officially adopted ethics codes mentioned in this Note can be found in this
source.
24. See Andrews, Nonlawyers in the Business of Law: Does the One Who Has the Gold
involvement).
services to the public. As a whole, the Canons spoke in what the Stanley Commission correctly deemed "aspirational" terms. For example, the Canons' preamble stated that although a particularized list of obligations was impossible to compile, lawyers should strive far beyond a mere list of enumerated duties. For all their lofty talk of preserving the "integrity and impartiality" of "the system for establishing and dispensing Justice," however, the Canons were somewhat vague and standardless.

With the 1969 passage of the Model Code of Professional Responsibility ("Model Code"), the ABA attempted to improve on the Canons by providing more concrete ethical standards. The Model Code was adopted by almost every state bar association within five years and consists of nine general Canons of behavior, Disciplinary Rules and Ethical Considerations that elaborate on the Rules in a similar aspirational tone as the earlier Canons. Unlike the earlier Canons, the Model Code finally offers justifi-

25. Id. at 587-88 & nn.64-69.
26. Stanley Report, supra note 5, at 257; see also ABA CANONS OF PROFESSIONAL ETHICS Canon 32 (1908), in T. MORGAN & R. ROTUNDA, supra note 23, at 421 ("[H]e advances the honor of his profession and the best interests of his client when he renders service tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law.").
28. Id.
31. Stanley Report, supra note 5, at 258. When the Ethical Canons stood for 62 years without revision, why was the Model Code only seven years old at the time work began on the Model Rules? One commentator suggests "a felt need to shore up the profession's public image in the wake of the Watergate scandal, in which many lawyers were implicated." Schneyer, supra note 15, at 688.
32. The Special Committee on Evaluation of Professional Standards was informally referred to as the Kutak Commission after its chairman, Robert J. Kutak. See Gilbert & Lempert, supra note 3, at 384.
to the Model Code. The issue of nonlawyer participation, however, was
tabled until the February 1983 meeting, but in the interim, the ABA solicited
and reviewed proposed amendments from interested parties. In February
1983, the ABA continued the debate and this time the ban on nonlawyer
participation in a law firm was directly addressed during discussion of the
Kutak Commission's Proposed Rule 5.4.

In its proposed version, the Kutak Commission had refused to automat-
ically perpetuate the old Model Code's assumption that lay involvement
would hamper independent legal judgment. The members of the Commission
felt the Model Rules should address perceived changes in the practice of
law. The Commission noted that innovations such as paralegals, private
corporate hiring of attorneys and group legal services were all once consid-
ered violations of ethics codes, but have since become widely accepted.
Nonetheless, the "fear of Sears" ruled the day

One lawyer's famous query whether "this rule mean[s] Sears & Roebuck
will be able to open a law office" and an answer in the affirmative sparked
fear among the delegates. In addition, the Proposed Rule invited delegates
to explore "new methods of providing legal services." This open-ended
suggestion seemed a far cry from the perception of the legal profession
embodied in the 1908 Canons, and the Kutak innovation was short-lived.
The assembly voted to adopt Model Rule 5.4 in a final form almost
identical to the old Model Code's provision on independent professional
judgment. Thus, the new Model Rules of Professional Conduct maintained
the ban on partnerships with nonlawyers.

33. See Andrews, supra note 24, at 573.
34. Gilbert & Lempert, supra note 3, at 390.
35. Andrews, supra note 24, at 593-95. The Proposed Rule stated:
A lawyer may be employed by an organization in which a financial interest is
held or managerial authority is exercised by a nonlawyer, or by a lawyer acting
in a capacity other than that of representing clients, such as a business corpo-
ration, insurance company, legal services organization or government agency, but
only if:
(a) There is no interference with the lawyer's independence of professional
judgment or with the client-lawyer relationship;
(b) Information relating to representation of a client is protected as required
by Rule 1.6;
(c) The organization does not engage in advertising or personal contact with
prospective clients if a lawyer employed by the organization would be prohibited
from doing so by Rule 7.2 or Rule 7.3; and
(d) The arrangement does not result in charging a fee that violates Rule 1.5.
36. Gilbert & Lempert, supra note 3, at 386-87 & nn.7-11.
38. Gilbert & Lempert, supra note 3, at 388.
b. Threats to Tradition

The legal profession today is often accused of a general decline in that mysterious quality of "professionalism."40 One typical commentator finds "[t]he changes wrought have been virtually 180 degrees from the early canons of lawyer behavior and outlook. . . . The decline [in American lawyers' professionalism] . . . is the result of . . . lawyers that practice law as a business rather than as a profession."41 Many of those who would preserve the profession as envisioned by the framers of the ethics codes see law firm diversification as the primary threat.42 They fear law firms' widely offered rationale for ancillary activities—greater service to clients—entails a dangerous redefining of lawyers' duties.43 They would agree with the recommendation of the Stanley Report for the "rekindling of lawyer professionalism"44 when it advises lawyers to emphasize "the role of the lawyer as both an officer of the court and . . . of the system of justice" and to avoid "identifying too closely with their clients."45

2. The Emerging Perception

Concern is mounting that lawyers are evolving into hired problem-solvers. Whether or not that role is necessarily inconsistent with the "traditional" lawyer described above, it does warrant an overview of the proliferation of ancillary business activities today and an inquiry into the impetus behind their popularity.

a. The Realities of the Profession

Since the 1983 passage of the Model Rules' restriction on lawyer/nonlawyer partnerships, countless law firms46 have begun offering nonlaw services


42. See Stanley Report, supra note 5, at 280-81. "The Commission has been disturbed by increasing participation by lawyers in business activities. [S]ome firms now operate businesses which may provide services that those firms believe are ancillary to the practice of law" Id. at 280.

43. D. Block, supra note 10, at 19; see also Johnson, supra note 19, at 521 ("[L]awyers do more than meet the routine legal needs of their clients. [I]t is still lawyers who give meaning and vitality to the Constitution and the Bill of Rights.").

44. Stanley Report, supra note 5, at 243.

45. Id. at 278.

46. As of late 1989, an estimated 44 to 62 firms were engaged in nonlaw activities, with nearly 75 percent initiated between 1987 and 1989, and at least 32 other firms were considering such ventures. Gibbons, supra note 37, at 70, 73. The current number of diversified firms is increasingly difficult to tabulate, however, as greater numbers of smaller, less conspicuous law firms branch out into ancillary business.
through subsidiaries, affiliates or in-house consulting groups. Susan E. Saltonstall of the Washington, D.C. management consulting firm of Saltonstall and Associates now estimates that the trend may have leveled off, though only temporarily. The highest concentration of such ventures is among the largest firms in Washington, D.C., where lobbying the federal government is big business, but firms in Boston, New York City, Chicago, Los Angeles and across the nation have made the move as well. The services offered by these nonlaw professionals are as diverse as the needs of the firms' clients, though most firms are involved in no more than two or three nonlegal areas.

Some firms have elected to keep their nonlawyer professionals in-house, sometimes designating them as specialists of various kinds, in other cases setting up internal divisions. Model Rule 5.4(b), however, prohibits nonlawyers from becoming equity partners in law firms. Thus, these nonlawyers, who are often among the most talented men and women in their respective fields, were being denied the security, prestige and voice in running the firm that partnership brings. In most firms engaged in ancillary business activities, therefore, the difficulty of integrating large numbers of nonlawyers into the firm and designing lucrative compensation packages for them has led to a different, and even more problematic, arrangement—ancillary affiliates.

47. Saltonstall feels some firms which in the recent past might have diversified without hesitation are now postponing such moves in the face of the current controversy until the ABA establishes some guidelines for law firms in this area or takes other definitive action on the issue; Telephone interview with Susan E. Saltonstall of Saltonstall and Associates (Feb. 28, 1991); see infra notes 112-14 and accompanying text (containing further discussion of probable ABA courses of action).


49. See Gibbons, supra note 37, at 73 (chart indicating number of firms involved in 26 different areas of ancillary business, including financial consulting, international trade consulting, lobbying services and health care consulting).

50. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(b) (1987) ("A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.").

51. J. Jones, L. Sotsky & A. Friedrich, supra note 18, at 3. The two-hundred plus member firm of Arnold & Porter of Washington, D.C., one of the leaders in diversification, has formed APCO, MPC and Associates and the Secura Group.

APCO designs revenue-raising mechanisms for nonprofit organizations

The company, which has 15 employees, also offers lobbying, as well as finding venture capital investments for corporate clients. On its staff are public relations specialists, researchers and business school graduates.

The other entity, MPC and Associates functions more like a real estate development company. MPC, which has a four-person staff of engineers and real estate professionals, implements some of the projects that APCO dreams up.

Stille, supra note 2, at 20, col. 1. The Secura Group, an outgrowth of the firm's banking practice provides strategic planning and management advice to banks, thrifts and credit unions. Lawrence, Law for the Future, Wash. Post, Dec. 19, 1988, at 1, 32, col. 1. "'[T]hese
Rather than be treated as second-class citizens within the firm, these professionals have settled into separate organizations of various forms: partnerships, limited partnerships, corporations or passive investments. Still other firms have simply acquired an existing entity that offers services helpful to the largest number of the firm’s clients. Some firms have even merged with one of their large, well-established clients.

Whenever the ancillary group is a separate entity, however, its management will usually be a source of ethical inquiry, centered around Rule 5.4’s prohibitions. Typically, the ancillary group is headed by a governing board or committee, which is dominated by members of the law firm. This board also may include key officers or employees of the consulting firm itself and, occasionally, outside directors. Day-to-day management of the consulting firm is usually vested in nonlawyers, although the key officers may be lawyers.

These affiliated groups usually work on legal and nonlegal issues for the firm’s established clients. The affiliated nonlawyers can also significantly contribute to the parent firm through extra business generated by their own pre-established clients, by attracting their own clients to the firm or simply from the marketing advantage the firm reaps by its association with a well-known nonlawyer.

b. The Forces Behind Ancillary Business

The fact that a large number of law firms are using ancillary businesses to service their clients does not by itself suggest that lawyers are abandoning their “traditional” role and “identifying too closely with their clients” as the Stanley Commission suggested. However, inquiry into the motivating forces behind the ancillary business trend supports the argument that many lawyers today are, if not disregarding the profession’s responsibilities to the

innovations were driven by the needs of our clients . We saw opportunities to better serve clients by bringing nonlawyers into our family. We weren’t out trying to top anyone else.”

Id. at 32, col. 2 (quoting John Hawke, Jr., partner at Arnold & Porter); see also Fitzpatrick, Legal Future Shock: The Role of Large Law Firms by the End of the Century, 64 IND. L.J. 461, 467-71 (1989) (a thorough description of the interworkings of Arnold & Porter’s ancillary business groups from an insider, partner James F. Fitzpatrick).

52. J. Jones, L. Sotsky & A. Friedrich, supra note 18, at 3-4.


55. Id.


57. Stanley Report, supra note 5, at 278; cf. Rooney, Report on Professionalism; the ABA Attempts Suicide, 75 Ini. B.J. 480, 526 (1987) (“[T]he commission concludes that the duty of lawyers to the system transcends their duty to their clients when there is a conflict between the two. . . [T]here is no authority for such a proposition. The suggestion would probably come as a major shock to most practicing attorneys.”).
justice system, at least shifting their focus of concern from their profession’s image to their client’s needs.

Law firms began hiring nonlegal personnel twenty years ago, and now paralegals, investigators and other paraprofessionals have become standard fixtures in both large and smaller firms. In addition, over the last ten years, the more lucrative practice areas of large firms, such as regulated industries and antitrust law, were effectively outmoded by deregulation and increased acceptance of business combinations. Firms initially, therefore, turned to outside business activities to compensate for the lost revenue and then maintained those practices even after recovering from the immediate financial crunch.

Today, as the practice of law has become even more complex, both attorneys and their clients are realizing that many specific jobs within larger projects must be handled by other professionals if the firm is to achieve the most effective and cost-efficient results for its clients. For example, a comprehensive report on ancillary business, submitted to the ABA by several large firms involved in the trend, points to today’s real estate transactions. What once would have required only a working knowledge of contract and property law now entails “environmental science or engineering, tax and zoning issues, intricate financing arrangements, questions of insurance and professional liability, and so on.”

In addition to using nonlegal professionals to help them resolve complex legal issues, lawyers often need extra-legal advice as well. Seven years ago, for example, Houston’s Fisher, Gallagher, Perrin & Lewis hired an engineer to advise the firm’s attorneys on where to focus their legal analysis of technically intricate complaints. Thus, their attorneys are freed from assessing the inscrutable technicalities and can sell the client a more time-efficient result. Similarly, Harvard Professor of Law David Wilkins notes that, in increasing numbers today, “[c]lients want more than just legal advice—they want business advice.” Responding to such needs, several firms have formed affiliates with financial planning or investment consultants to provide clients with such advice.

Besides their clients’ needs, however, many firms also may have their own survival increasingly in mind. With the financial squeeze facing most

58. J. Jones, L. Sotsky & A. Friedrich, supra note 18, at 1.
60. Is Ancillary Business the Future?, 1 PROF. LAW 1 (Summer 1989).
61. Id. The ABA Special Coordinating Committee on Professionalism, while studying ancillary business in 1988, solicited opinions on the subject from ABA entities and large law firms. The article is the response by a group of large firms involved in ancillary business.
62. Id.
firms today, past ABA President Justin A. Stanley finds “it is perhaps not surprising to see the entry of law firms into businesses.” Houston law firm consultant William Cobb concurs, listing the rising price of legal services and competition for clients as the primary forces behind ancillary business. The traditional ethics codes, however, and Model Rule 5.4 in particular, present barriers to firms working with nonlawyers and billing those services to clients. Although these restrictions may make firms hesitant to diversify, observers like Cobb see no other lucrative solution to financial difficulties as partners’ hourly rates increase and other consulting companies draw business away from the legal profession.

Quite apart from the aspirational argument that allowing ancillary activities will benefit the client—or the more straightforward motivation of financial survival—there is also an issue of fairness, or symmetry, involved. Accounting firms have long been hiring attorneys to work in what is usually called the firm’s “tax department.” If these lawyers merely advised the firm on its own legal problems, no one could argue. But they often perform legal services such as interpreting tax statutes for the firm’s clients, and some eventually become principals of the accounting firm. This practice would seem to be in direct conflict with the Model Rules’ prohibitions on lawyer/nonlawyer partnerships, yet efforts to enforce the rules have been few. One possible reason for this oversight in enforcement seems to be the realization that this type of comfortable, efficient multi-disciplinary relationship is just the type that should be allowed.

II. ACCEPTANCE OF ANCILLARY BUSINESS REALITIES

A. Reactions to the Inevitable

Whatever the catalysts behind ancillary business—services, finances or fairness—more and more firms may be feeling the push to diversify. District of Columbia management consultant Susan E. Saltonstall finds that the financial, legal, and even social climate inducing the nation’s largest firms to diversify is inevitably affecting smaller firms as well because their market

65. Stanley Report, supra note 5, at 259.
66. Stanley, supra note 40, at 27.
67. Lauter, supra note 63, at 32, col. 1.
68. Id., see also Rothfeld, supra note 64, at B5, col. 5 (quoting David Wilkins, professor at Harvard Law School) (“It’s increasing competition for legal business and increasing competition between lawyers”); Stille, supra note 2, at 22, col. 1 (H. Edward Wesemann of Pittsburgh’s Thorp, Reed & Armstrong says, “Clients look at the total bill, not just the legal bill. We think [our ancillary business] gives us an edge.”).
69. Andrews, supra note 24, at 635; see also Andrews, supra note 24, at 632-37 (a thorough discussion of possible justifications for the nonenforcement of the Rules’ prohibitions in this context).
share is being taken up by other professions.\textsuperscript{70} She tells her clients who are law firms, "Whether you have a subsidiary or not, the profession has changed. You have to think like a businessman even though you still have to be a very good lawyer."\textsuperscript{71} In fact, \textit{The National Law Journal} recently ran an article sounding more like an overzealous recruiting officer than an advice column on firm management. The writer declared that "[a]ny law firm with more than 40 lawyers, and certainly with more than 150 lawyers, should analyze the potential of [diversifying itself in a nonlaw subsidiary]," and he promised benefits such as strategic market positioning, new client contacts, cross-selling potential and higher partner profits.\textsuperscript{72}

The ancillary business trend has been described as "synergistic" and a logical evolution of practice.\textsuperscript{73} Law firms' operating costs—such as advertisement, rent and competitive salaries to attract new hires—are increasing faster than attorneys' hourly rates.\textsuperscript{74} Thus, firms struggle to attract more clients and then attempt to diversify to serve them more efficiently. But this expansion increases costs still further while at the same time the swelling number of lawyers lowers hourly rates.\textsuperscript{75} "The bar might stop it for a while," says University of Illinois Professor of Law Ronald Rotunda regarding diversification, "[b]ut the economic pressures are [all] in favor of allowing this sort of arrangement."\textsuperscript{76}

As this Note has detailed, lawyers currently work side-by-side with non-lawyers in arrangements that differ from equity partnerships in name only,\textsuperscript{77} and this state of affairs seems in little danger. Still, Model Rule 5.4 has been "stubbornly resistant to change,"\textsuperscript{78} as have the perceptions of the legal profession held by many of those most able to influence the course of the profession. Even when presented with such a carefully tailored and thoughtful alternative as the Kutak version of Model Rule 5.4, the ABA declined the opportunity to relax its prohibitions against nonlawyer participation. This attitude seems even less practical now than it did at the 1983 convention; now that so many law firms have already diversified, ignoring or repressing ancillary business practices would seem an imprudent course.

\textsuperscript{70} For example, Saltonstall reports that "accounting firms do state sales and use tax business now. And a small telecommunications boutique firm I counsel has lost business to engineers and others because of the perception that consultants in [the telecommunications] area can do just what attorneys do." Telephone interview with Susan E. Saltonstall of Saltonstall and Associates (Feb. 28, 1991).

\textsuperscript{71} \textit{Id.}


\textsuperscript{75} \textit{Id.}

\textsuperscript{76} Rothfeld, \textit{supra} note 64, at B5, col. 6.

\textsuperscript{77} \textit{See supra} notes 46-56 and accompanying text.

\textsuperscript{78} Andrews, \textit{supra} note 24, at 600.
Currently, the Model Rules are attempting to perpetuate one version of legal professionalism. However, they mistakenly treat that concept as one particular, static object rather than as the collection of divergent, evolving perceptions which this Note suggests. A partner in one of the largest diversified firms suggests, "I think the opponents have taken this position more as a matter of theology than rationality. They have a narrow and rigid view of what it is to be a lawyer." Those who attempt to perpetuate such an inviolate perception of the profession are bound to be frustrated, and their rules are bound to be ignored in both spirit and practice.

The ultimate aim of any professional code should not be to blindly advocate one permanent set of values and force the actions of the professionals into those boundaries. A changing professional climate would dictate that the standards of the profession adapt. On the other hand, rules must not be carelessly discarded simply because of increasing infractions of their spirit. In some instances, instead of revising rules, those in charge of enforcing them should simply exert stronger efforts. Thus, before the current codes are discounted as remnants of an outdated perception of the profession, either their rationales must be rejected, or substantial advantages must arise from their revision. The next section of this Note, therefore, assesses the benefits and disadvantages to the profession of ancillary business practices.

B. Reassessing the Impact of Ancillary Business on the Profession

When evaluating any revision of current ethics codes, both the traditional and emerging perceptions of the profession should be considered. Presumably, the adherents to the traditional viewpoint will generally favor some restriction on diversification, and those who follow the emerging perception will prefer expansion of the codes to accommodate ancillary business. But in order to accurately and honestly measure the gain or loss to the profession from revision of the codes, even the most closely held viewpoints must be left open to the possibility of reassessment.

79. Telephone interview with James F Fitzpatrick, partner at Arnold & Porter (Jan. 25, 1991). District of Columbia management consultant Susan E. Saltonstall suggests that this "rigid view" may be as much a product of self-preservation as self-righteousness. She often encounters resistance from clients whom she counsels to consider diversification. "Many lawyers are simply more comfortable looking for a needle in a haystack rather than exercising their interpersonal skills as much as businessmen have to—and that's definitely not a bad thing. Many lawyers are lawyers because they didn't want to be businessmen. They chose to go to law school and not to business school." Telephone interview with Susan E. Saltonstall of Saltonstall and Associates (Feb. 28, 1991).
Ancillary business activities could be called either a cause or a symptom of other recent developments in the legal profession. But whatever the causal relationship, law firm diversification has been unceremoniously lumped together with several other phenomena which have had unpopular effects on the legal profession: the sharply increasing number of practicing lawyers, stiffer competition, more solicitation and advertising, increasing fees and billable hours and decreasing quality of services. Perhaps because of this unpopular company, outcry concerning the dangers of ancillary business activities has been considerable. Some of the most frequent complaints are these: lawyers will sacrifice their independent judgment, the quality of legal services will decrease as lawyers' time is consumed in other ventures, law will become a business rather than a unique profession, a lawyer's loyalty to his client and the firm's subsidiary will clash, clients will be misled as to the legal expertise of nonlawyers in law firms, financial scandals and disciplinary actions against attorneys will draw negative press leading to loss of the public's trust, and these crises will culminate in the government's justified interference in the profession's right to self-government.

Despite this lengthy list of concerns, however, the opposition to ancillary business was not organized until 1988 when the ABA Special Coordinating Committee on Professionalism requested input and opinions from interested parties. Then, both proponents and opponents were motivated to put their respective arguments in writing. The Chair of the ABA Litigation Section's Ancillary Business Committee, Dennis J. Block of Weil, Gotshal & Manges in New York, seemed to represent well the concerns of those who view the legal profession as uniquely obligated and privileged. He joined two other lawyers in predicting that increased ancillary business would lead to numerous pitfalls, chiefly a redefining of the legal profession, the loss of self-governing ability by the bar and countless conflicts of interest. For example, if a firm's client asked a lawyer about the legal or ethical validity of a recommendation which the consulting affiliate gave the client, would the lawyer be able to respond candidly? And if an affiliated consulting group encountered a legal issue raised by one of its client's problems, would referral of the client to the parent firm be improper solicitation?

81. See supra note 61.
83. Id. at 4-16.
However, the most relevant viewpoint on the subject today is that of the American Bar Association, because it alone is empowered to modify the Model Rules, from which the states principally take their cues in formulating their own ethics codes. The ABA made its position clear when the District of Columbia Bar began seriously considering a revised version of Model Rule 5.4 and North Dakota came close to adopting verbatim the Kutak Commission’s version. The ABA Center for Professional Responsibility responded to those two developments with a memorandum on the policy behind Model Rule 5.4. According to the report, the Rule was intended to control four problem areas: the unauthorized practice of law, confidentiality, independent professional judgment and advertising and solicitation.

The four concerns of the ABA, however, can all be discounted as long as the other Model Rules addressing those four issues continue to be as stringently respected and enforced as they now are through ethics committee opinions and attorney self-government. First, the ABA feared that nonlawyer investors in law firms might require the firm’s nonlawyer personnel—such as senior lay advocates or legal interns—to employ standardized forms for wills or real estate contracts without final attorney supervision. However, the ABA failed to acknowledge that the same risks are posed when paralegals employ standardized forms, and that no demonstrable harm to the public has ever resulted from that practice. In addition, unauthorized practice rules, which in some jurisdictions even carry criminal penalties, are available to sanction nonlawyers who might overstep any boundary—or lawyers who would encourage them to do so.

The ABA’s concern over confidentiality holds even less weight, because nonlawyers in law firms are exposed to client confidences almost every day. The only additional risk that ancillary business would pose is that nonlawyer interest-holders might force attorneys to disclose clients’ secrets. For instance, the ABA feared a nonlawyer board of directors might insist on using confidential client information in devising corporate strategy, but this question has been laid to rest by the ABA Ethics Committee. Although the question addressed by the Committee was not identical to the concern

85. See supra note 35.
86. Gilbert & Lempert, supra note 3, at 403.
87. ABA Memorandum Subject: Model Rule 5.4 (Professional Independence of a Lawyer) 7-8 (Apr. 22, 1987) (unpublished memorandum available from the ABA Center for Professional Responsibility in Chicago) [hereinafter ABA Memorandum Subject: Model Rule 5.4].
88. Id.
89. MODEL RULES OF PROFESSIONAL CONDUCT Rules 5.5, 1.6(a), 2.1, 7.1-7.3 (1989) (The Rules listed, respectively, hold lawyers to standards set by the ABA in the areas of unauthorized practice, confidentiality, independent professional judgment and advertising and solicitation.).
90. Gilbert & Lempert, supra note 3, at 404.
91. Id.
93. ABA Memorandum Subject: Model Rule 5.4, supra note 87, at 7.
raised here, the reasoning can be applied to deny confidential access to nonlawyer boards of directors and in other similar situations. In addition, a rule is already in place to address the issue; attorneys are obligated to insure their nonlawyer assistants' behavior is "compatible" with a lawyer's.

The most obvious response to the ABA's concern over preserving lawyers' independent professional judgment in the face of economic pressure is that the ABA is too late. Lawyers' increasing emphasis on the bottom line has been noted and criticized for several years. But the ABA assumes that the monetary temptation to sacrifice quality work for quantity will automatically increase with the advent of nonlawyer management. This view unreasonably implies that lay managers are unable either to comprehend or to respect the ethical obligations that the codes impose on lawyers. Such a rationale also assumes that nonlawyer control will necessarily be more influential and more inherently unprincipled than, for example, the control a partner could assert over salaried associates in her firm. In short, there are many more ominous threats to a lawyer's ethical and financial independence than a nonlawyer partner.

Finally, the ABA is concerned about advertising, which they imply would be initiated at the behest of pernicious nonlawyer managers. This merely echoes the numerous objections the ABA had toward lawyer advertising before the Supreme Court settled the issue in Bates v. Arizona State Bar, when it upheld the first amendment rights of attorneys to advertise. Any ABA concerns, therefore, seem belated and irrelevant as the standards for attorney advertising are continually loosened. However, any revised ethics code that acknowledges and permits ancillary business would continue to include provisions requiring all legal advertising to conform to the relevant standards of each jurisdiction.

2. Benefits to the Emerging Legal Profession from Relaxing Current Restrictions on Ancillary Business

When partners in diversified law firms list the benefits ancillary business activities bring to the profession and to its customers, they usually speak of better service to those clients who come to them with problems involving several disciplines. Arnold & Porter's managing partner James Jones...
ANCILLARY BUSINESS PRACTICES

explains the ways in which ancillary business practices enable these firms to better serve their clients: "Increasingly, . . . the distinction between what is a 'strictly legal' issue and what is not is often quite blurred . . . . Today's lawyer is almost as likely to be focusing on economic, scientific, financial or political questions as on strictly legal issues." If lawyers cannot identify or cannot adequately analyze the nonlegal issues within a client's problem, then the nonlawyer steps in. Ancillary business organizations are also more convenient, both for lawyers and their clients. When the members of the team engaged on a certain case are all in the same office or under common management, the logistics are easier for everyone involved, and the client need not look to any other organizations for further service.

By prohibiting lawyers from forming partnerships with nonlawyers, however, the current rules hamper this type of productive interaction. They discourage the most talented nonlawyers from joining law firm affiliates by preventing them from attaining equal status with attorneys. In order to acquire the services of nonlawyer professionals, therefore, most diversified firms have constructed affiliates rather than hiring in-house consultants. The affiliate approach, however, entails significant financial risks and start-up costs. Many smaller firms are effectively shut out of the affiliate scene because they lack the resources to absorb such risk. Neither can they afford to construct a facade of "elaborate bookkeeping and separation [of firm from lay affiliate] which, of course, is done for precisely the ethical code reasons . . . ."

Smaller firms, then, would benefit from an amendment to the rules which would permit them to attract nonlawyers as equity partners instead of as in-house hires or affiliates.

Another benefit of relaxed restrictions on partnerships with nonlawyers would be the increased acceptance of "professional" law firm managers. Growing numbers of large and mid-sized firms are already employing these lay people who offer specialized business or organizational training. The efficiency and skill of these lay employees spare firms the loss of a senior partner's billable hours spent on management, and the work can be done more consistently than if it were rotated among several partners.

Finally, allowing nonlawyer professionals to become partners in law firms would alleviate some of the possible negative effects of ancillary business.

101. Gibbons, supra note 37, at 72.
103. Stille, supra note 2, at 1, col. 4 ("Law partnerships, which normally divvy up all the net income at the year's end, can be torn apart when the shares are sapped by start-up costs or losses from an outside venture. The impact is greatest on the younger partners whose shares are smaller.").
104. Andrews, supra note 24, at 627 (quoting remarks by Stephan Brill in Transcript of Proceedings of Conference Sponsored by the American Lawyer, The 80's Shakeout: An Update 381 (June 1, 1987)).
Every dollar saved by streamlining routine jobs and replacing redundant affiliate management with in-house procedures could presumably be channeled back to the firm, thus lifting some of the economic pressures that threaten to compromise the quality of lawyers' independent judgment and service to clients.105

III. THE NECESSITY OF COMPROMISE ON THE QUESTION OF ANCILLARY BUSINESS

The preceding assessment of the overall effects of ancillary business on the profession should make the image of lawyers as hired problem-solvers seem more appealing to traditionalists. They should recognize nonlawyer partnership as a path to more effective and efficient client service and a partial solution to some firms' financial difficulties. Ancillary advocates, however, should be reminded that a modification of Rule 5.4 would not be license to disregard the remaining rules and standards which prohibit those ethical transgressions often associated with ancillary business. They should also recognize the corresponding need for increased diligence in the profession's tradition of self-government, which would in turn reassure those still hesitant to condone diversification.

Necessarily, any meeting of the minds or a decision to modify Model Rule 5.4 would require some type of compromise between ancillary proponents and opponents. Countless forms of Rule 5.4 would be workable depending on the compromise struck, and the degree of nonlawyer influence in law firms that any revision allowed would dictate the corresponding degree of conciliation necessary from ancillary opponents. The District of Columbia has provided an example of one feasible alternative, while the state of North Dakota provides an example of an unsuccessful experiment in that area.

However, all the necessary compromises on the ancillary business issue need not come from the opponents' side. For example, a proposed revision which allowed nonlawyers carte blanche in their managerial or financial activities within law firms would likely be rejected even by some revisionists. But whatever alternative is finally agreed upon, ancillary proponents must continue to practice law in the spirit of professionalism which the remaining rules require if they want the continued cooperation and support of traditionalists after the pertinent rules are revised.

A. Revisionist Efforts to Date

1. Taking the Lead in Washington, D.C.

For purposes of analysis, this Note has spoken of revision of Model Rule 5.4 only as a contingency, but as of January 1, 1991, change has become

105. Id. at 627-29. If nonlawyer private investments were allowed, firms could avoid extensive borrowing to raise capital. Id. at 629-31.
a reality for the legal profession in Washington, D.C. On March 1, 1990, the District of Columbia Court of Appeals adopted a version of Rule 5.4 allowing nonlawyers to hold a partnership interest in a law firm as long as their activities assist the firm in "providing legal services to clients." 106

106. The text of the new rule is as follows:

Rule 5.4 Professional Independence of a Lawyer.
(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
(1) An agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;
(3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
(4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b).
(b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:
(1) The partnership or organization has as its sole purpose providing legal services to clients;
(2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;
(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;
(4) The foregoing conditions are set forth in writing.
(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.


Relevant comments to Rule 5.4 provide:

[3] As the demand increased for a broad range of professional services from a single source, lawyers employed professionals from other disciplines to work for them. So long as the nonlawyers remained employees of the lawyers, these relationships did not violate the disciplinary rules. However, when lawyers and nonlawyers considered forming partnerships and professional corporations to provide a combination of legal and other services to the public, they faced serious obstacles under the former rules.

[7] As the introductory portion of paragraph (b) makes clear, the purpose of liberalizing the rules regarding the possession of a financial interest or the exercise of management authority by a nonlawyer is to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. For example, the Rule permits economists to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counseling clients, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others
The rule adopted by the court allows law firms in D.C. to hire nonlawyer partners only if the firm’s "sole purpose [is] providing legal services to clients." The rule is similar, but not identical, to a version proposed in 1985 by the District of Columbia Bar Model Rules of Professional Conduct Committee that was closer to the 1983 Kutak proposal. The court’s revisions to the Committee’s proposal were protested in a December 1988 letter to the court signed by several prominent members of the District of Columbia legal community—but to no avail.

The attorneys protested what they called the court-adopted "artificial compliance standard" as too confusing in its use of ambiguous terms such as "sole" and "legal services" and argued that firms wishing to form ethically acceptable ancillary business associations would be left without clear guidance. They also felt the rule mandated inconsistent treatment of different ancillary business ventures based only on the ventures’ structures and not on any inherent ethical difference in their forms. For example, the rule implies that an independent nonlaw subsidiary would be acceptable while an in-house consulting group would not.

Thus, even before the new rule was adopted, its content was a source of controversy, and further conflict may follow. Just as the rule is too restrictive to please some diversified firms, criticism of the rule from traditionalists can also be expected. In addition, the D.C. court’s ruling seems to ignore the ABA’s long-standing policy against lawyer/nonlawyer partnerships. The rule came less than a month after a report issued by the ABA Litigation Section’s Task Force on Ancillary Business which explicitly opposed such partnerships and in fact “urge[d]” adoption of rules forbidding them.

who use accountants’ services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions. In all of these situations, the professionals may be given financial interests or managerial responsibility, so long as all of the requirements of paragraph (c) are met.

Id. comment.

107. See supra note 35.

108. Letter of Arnold & Porter; Brownstein, Zeidman and Schomer; Collier, Shannon, Rill & Scott; Howrey & Simon; Kaplan, Russin & Vecchi; Miller & Chevalier; Nixon, Hargrave, Devans & Doyle; Verner, Lipfert, Bernhard & McPherson; and Wickwire, Gavin & Gibbs to the D.C. Court of Appeals (Dec. 1, 1988) (copy on file with the Indiana Law Journal).

109. Id.

110. Id. at 3. A variation on this basic “fairness” argument is commonly heard from ancillary advocates in other jurisdictions across the country. Currently, many state ethics codes treat various lawyer/nonlawyer practice arrangements with similar functions quite differently, and bar association ethics opinions do not always bear out their strict language with strict enforcement of the business codes. Andrews, supra note 24, at 631-32.

The Litigation Section's position on nonlawyer partnerships, however, does not reflect the views of the entire ABA. According to Bryant Garth, director of the American Bar Foundation, the research arm of the ABA, "the ABA is just crippled because there are such differing opinions among the many sections. The Litigation Section is so opposed, but the solo practitioners and others are in favor. No one wants to touch [the issue] on the floor of the House of Delegates." No substantive action was taken on the issue at the ABA's annual meeting in August 1990, but at the February 1991 mid-year meeting the ABA Standing Committee on Ethics and Professional Responsibility solicited comments on its proposed draft of revised Model Rules, which, if adopted, would represent the ABA's official recommendation on the subject to jurisdictions around the country. The issue was not before the House of Delegates in February, however, and the Committee accepted further input from various interested groups until March 25. The Committee will file their final recommendation with the House of Delegates by June 1 as is required for inclusion on the agenda of the August 1991 annual meeting, the next opportunity for any definitive action on either the new rules or the ancillary business issue in particular.

How recent events, both those in the capital and within the ABA, will effect lawyers and clients in the rest of the country remains to be seen, but any nationwide repercussions of the D.C. move will likely be gradual, on a state-by-state basis. Currently, Washington, D.C. is the undisputed center of ancillary business activity, so official acceptance of the practice there is hardly surprising. But so far, the organized bar of only one jurisdiction besides the District of Columbia has seriously entertained the idea of allowing nonlawyer partnerships—and there unsuccessfully.

2. Experimenting in North Dakota

The 1983 Kutak proposal made quite a favorable impression on the Professional Conduct Study Subcommittee of the Attorney Standards Committee of North Dakota when that state was considering adoption of the


new Model Rules in 1986. A rule very similar to Kutak's was proposed as North Dakota's Rule 5.4 and included in the model rule package which the subcommittee submitted to the rest of the state. A vote of state bar members, the bar's Board of Governors, and the Attorney Standards Committee indicated widespread initial support for the revision.

In the state supreme court, however, the proposal was rejected with little comment, and the ABA's version of the Model Rules was adopted in April 1987.\footnote{Gibbons, supra note 37, at 73; see also Gilbert & Lempert, supra note 3, at 400-03 (containing a thorough discussion of the proposal's rejection).} According to the assistant state court administrator for the North Dakota Supreme Court, the ruling may have been in reaction to negative national press suggesting ill effects from adoption of the proposal. Further attempts to reopen the issue are thought to be unlikely in the near future.\footnote{Gilbert & Lempert, supra note 3, at 402.}

\section*{B. Suggestions for the Future}

\subsection*{1. Alternative Ancillary Structures}

If any other jurisdictions do give serious thought to the ancillary business issue, what options—besides the D.C. rule and the ABA's blanket prohibition—are available for their consideration and what would be the ramifications of their choices? Susan Gilbert, ethics counsel to the D.C. bar, and Larry Lempert, executive editor at Prentice Hall Law and Business in D.C., see the possibilities as a "spectrum" of differing degrees of nonlawyer involvement.\footnote{Id. at 409.}

For example, at one end are the ABA's Model Rules which prohibit nonlawyer managerial or financial participation in a law firm. Less strict is the new D.C. rule which allows nonlawyer managerial or financial interest in an entity only if the nonlawyer provides professional services which assist the entity in providing legal services and the entity delivers solely legal services. The next step would be to allow that entity to engage in client services other than the practice of law. Finally, under a rule furthest removed from Model Rule 5.4, the nonlawyers would not be required to even participate actively in the entity but could enter strictly as investors.\footnote{Id. at 402.} This final alternative includes another spectrum of possibilities. The rule could allow nonlawyers free reign, it could limit nonlawyer investment to keep financial control in the hands of the firm's lawyers, or it could set nonlawyer participation at any level in between.\footnote{Id.} Gilbert and Lempert urge jurisdictions to examine some of these midrange options instead of refusing to...
address the issue simply because they fear the prospect of overwhelming nonlawyer control that “sent the ABA House of Delegates running to the far end of the spectrum, an absolute ban.”

Obviously, the widespread results of revision can be only speculative as of now. They will vary with the form of Rule 5.4 chosen, with the area of the country where the change is implemented and according to which body is the source of the revision. But so far, no empirical evidence exists suggesting that permitting lawyer/nonlawyer partnerships will actually result in the harms the ABA has predicted. In fact, case law in the similar area of unauthorized practice indicates no significant harm to the public interest.

2. Vigilant Self-Regulation

There is one result of increased ancillary business, however, that its opponents may have good reason to fear, if care is not taken. Some critics argue that proliferation of ancillary business will eliminate one of “the bar’s most cherished prerogatives”—the right to self-regulation. They maintain that ancillary activities focus lawyers’ attentions too narrowly on their clients at the expense of lawyers’ commitment to public service, and they fear the government will necessarily step in to correct this oversight. Such a state of affairs would spell disaster, they say, because one important role of lawyers is to defend citizens against governmental tyranny.

However, this ominous prediction mistakenly assumes that ancillary business and service to clients are mutually exclusive, when in fact the former facilitates the latter. The legal profession need not fear the specter of governmental regulation—so long as ancillary participants are willing to compromise just as they want the opponents to. Participants must demonstrate by their actions—in fact the former facilitates the latter. The legal profession need not fear the specter of governmental regulation—so long as ancillary participants are willing to compromise just as they want the opponents to. Participants must demonstrate by their actions—instead of merely by words—that their arguments in favor of ancillary activities are well-founded. In short, in pursuing ancillary business they must exercise the restraint that all applicable ethics codes demand of lawyers generally. In any jurisdiction that revises Model Rule 5.4 to allow ancillary activities, diversified law firms must be careful not to read a new rule’s endorsement of their activities as license to forsake their professionalism.

120. Id. at 409-10.
122. D. Block, supra note 10, at 23.
123. Id. at 24 (“When lawyers redefine themselves as merely ‘problem-solvers’ who provide no unique contribution to society; who devote their energies primarily to profits and client development; and who abdicate their traditional roles of improving the accessibility to, and administration of justice, there will be no justification for preserving [the right to self-regulation].”)
124. Id. at 26.
But so far, there is every indication that firms will not overstep these boundaries. Diversified firms in the nation's capital are still participating in bar activities, pursuing law reform, representing indigent clients and supporting excellence in legal education.\textsuperscript{125} In a report on ancillary business, members of one of the largest diversified firms in D.C. astutely point out that the greater threat to self-regulation is "overly zealous defense of the bar's 'monopoly' and the insularity of those who insist that only lawyers are capable of ethical conduct."\textsuperscript{126}

\textbf{CONCLUSION}

For all the questions left unanswered, there are some guarantees to revision of Model Rule 5.4. The letter and spirit of the ethics codes will be more closely obeyed, and all the other ethical rules will still hold lawyers to the same high standards currently in force. And with nonlawyer professionals handling the technical or foreign matters, lawyers will have more time to devote to the questions of law involved in each case, although this also may allow them more time to debate the nature of the legal profession.

The bipolar views of the legal profession today somehow seem more compatible in light of an observation that sounds as applicable today as when written in 1905 by Louis Brandeis:\textsuperscript{127} "'Lawyers are now to a greater extent than formerly business men, a part of the great organized system of industrial and financial enterprise. And they do not seem to be so much of a distinct professional class.'"\textsuperscript{128} Even if the realities of the profession are changing, there can at least be some measure of security in the constancy of the change.

Any specifics regarding the future of the legal profession are impossible to predict. But the new D.C. rule seems to be just one more indication of the general direction that change will inevitably take. A partner at D.C.'s Arnold & Porter, the firm many consider to be the leader in ancillary business ventures, declares that "successful law firms in 1995 will not be practicing law in the same way that successful law firms practiced in 1980\textsuperscript{129}" In fact, he sees diversification as an ideal opportunity for lawyers to rise to the top of the professional heap. In the years to come, different professional groups called in to attack today's complex problems will jockey for the position of control. All lawyers need to do to come out on top, he says, is put to good use their skills for "assembling a large team

\begin{footnotes}
\item 125. J. Jones, L. Sotsky & A. Friedreich, \textit{supra} note 18, at 24.
\item 126. \textit{Id.}
\item 127. \textit{Stanley Report, supra} note 5, at 304.
\item 128. \textit{Id.} (quoting L. Brandeis, \textit{The Opportunity in the Law, in Legal Profession: Responsibility and Regulation} 16 (G. Hazard & D. Rhode eds. 1985)).
\item 129. Fitzpatrick, \textit{supra} note 51, at 461.
\end{footnotes}
of specialists,” “understanding the importance of schedule and priority” and “the ability to think analytically, which is the province of lawyers.”

Perhaps the bar should take one more lesson from the Stanley Report, which reminds lawyers that “the legal profession is in a process of evolution... The challenge for individual lawyers and the organized Bar is to understand these changes and to preserve those principles of professionalism which endure despite the changing legal landscape.” If lawyers begin to understand and accept the changes ancillary business brings, perhaps perceptions will be altered and the bar will behave a little differently, acting both to preserve the profession’s enduring principles and to accommodate its newest ones.

130. Id. at 466.
131. Stanley Report, supra note 5, at 304.