

NEW YORK STATE BAR ASSOCIATION



NYSBA

Report of the Task Force on Nonlawyer Ownership

November 17, 2012

Approved by the NYSBA House of Delegates
pursuant to a resolution adopted November 17, 2012.



**NEW YORK STATE BAR ASSOCIATION
RESOLUTION ADOPTED BY HOUSE OF DELEGATES
NOVEMBER 17, 2012**

WHEREAS, in 2000 the New York State Bar Association approved a resolution from the Special Committee on the Law Governing Firm Structure and Operation that provided, *inter alia*, that “[n]o change should be made to the law that now prohibits lawyers and law firms directly or indirectly from transferring ownership or control to nonlawyers over entities practicing law”; and

WHEREAS, in December 2011 the ABA Commission on Ethics 20/20 released for comment a discussion draft proposing a limited form of nonlawyer ownership of law firms and a paper addressing the sharing of fees between or among firms with offices in jurisdictions where nonlawyer ownership is permitted; and

WHEREAS, in view of the fact that more than ten years had passed since this issue was examined by NYSBA, the Task Force on Nonlawyer Ownership was appointed to consider the nonlawyer ownership proposals, evaluate whether the proposals would advance the profession’s core values of loyalty, independence and confidentiality; and

WHEREAS, in April 2012, the ABA Commission on Ethics 20/20 issued a press release indicating that it will not propose changes to ABA policy prohibiting nonlawyer ownership of law firms at this time, and thus withdrawing its December 2011 discussion draft proposing a limited form of nonlawyer ownership of law firms; and

WHEREAS, the Task Force has completed a report concluding that New York should not adopt any form of nonlawyer ownership in the absence of compelling need, empirical data or pressure for change; and

WHEREAS, in September 2012 the ABA Commission on Ethics 20/20 issued a revised paper withdrawing its December 2011 proposal concerning the division of fees within a law firm, and addressing the division of fees between lawyers in different firms where one lawyer practices in a firm in a jurisdiction that prohibits nonlawyer ownership and the other practices in a firm with nonlawyer owners in a jurisdiction that permits it (the Inter Firm Fee Sharing Proposal); and

WHEREAS, in October 2012, the ABA Commission on Ethics 20/20 issued a press release indicating that it will not propose changes to ABA policy with regard to sharing of fees with law firms in jurisdictions that permit nonlawyer ownership, withdrawing its September 2012 discussion draft proposing an Inter Firm Fee Sharing Proposal and referring the issue to the ABA’s Standing Committee on Ethics and Professional Responsibility;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association approves the report and recommendations of the Task Force on Nonlawyer Ownership; and it is further

RESOLVED, that the Association reaffirms its opposition at this time to any form of nonlawyer ownership of law firms in the absence of a sufficient demonstration that change is in the best interest of clients and society, and does not undermine or dilute the integrity of the legal profession; and it is further

RESOLVED, that the Association refers the issue of how to implement the policy behind the Inter Firm Fee Sharing Proposal to the Association's Committee on Standards of Attorney Conduct with the request that the Committee report back to the House of Delegates; and it is further

RESOLVED, that the issue of nonlawyer ownership be the subject of further study and analysis by appropriate entities of the Association; and it is further

RESOLVED, that the officers of the Association are hereby empowered to take such other and further steps as they may deem warranted to implement this resolution.

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I. Introduction

New York State, one of the world's most significant legal centers, has traditionally played a prominent role in the evolution of the law governing lawyers. In particular, New York has been influential in developing the law applicable to the structure and operation of law firms. Law firms are the vehicles through which essential legal services are provided to the public, and the integrity of their ownership and organization is indispensable to maintaining the effective delivery of those services.

At the turn of the twenty-first century, the New York State Bar Association ("NYSBA") established the MacCrate Committee and charged it with studying the existing law governing law firm structure and considering whether there was a need for any changes in the law. In 2000, that Committee issued the MacCrate Report, a seminal and expansive document that contained an appraisal of the American legal profession as of 2000 and discussed in detail nonlawyer involvement in the practice of law. The MacCrate Report opposed the adoption of a 1999 American Bar Association ("ABA") proposal that would have permitted nonlawyer ownership of law firms. NYSBA subsequently adopted a resolution that nonlawyer investment in law firms should continue to be prohibited and joined several other state bar associations in a successful effort to oppose nonlawyer ownership proposals that came before the ABA's House of Delegates.

On December 2, 2011, the ABA's Commission on Ethics 20/20 ("Ethics 20/20 Commission") released for comment a discussion draft proposing a limited form of nonlawyer ownership of law firms (the "ABA NLO Proposal"). The draft proposed to allow certain nonlawyers employed by a law firm to have a minority financial interest in the firm and share in its profits. At the same time, the Ethics 20/20 Commission issued, as an initial proposal for comment, a "conflicts of law" paper to address how to deal with sharing of fees between separate

firms (*inter firm*) or among offices of the same firm (*intra firm*) where one of the firms or offices is located in a jurisdiction where nonlawyer ownership is permissible (both *inter firm* and *intra firm* proposals are together referred to as the “ABA Conflicts of Law Proposal”).¹

In February 2012, Vincent E. Doyle III, then President of NYSBA, gave testimony at a hearing conducted by the Ethics 20/20 Commission. He tracked the history of proposals that would have allowed nonlawyer ownership in New York in particular and the U.S. generally. He observed that after extensive study and debate, our State has consistently refused to allow nonlawyer ownership in law firms. Nonetheless, in recognition of the considerable thought that the Ethics 20/20 Commission had given to the issue of nonlawyer ownership, the fact that the current proposal was more limited than the ABA’s prior proposal, and that more than ten years had passed since the last ABA proposals, President Doyle announced the creation of a new Task Force on Nonlawyer Ownership (“Task Force”) chaired by NYSBA Past President Stephen P. Younger.

The Task Force is comprised of leading practitioners, academics, legal ethicists, retired jurists and other attorneys representing a broad spectrum of the legal profession. It was charged with thoroughly and objectively considering the nonlawyer ownership proposals made by the Ethics 20/20 Commission, evaluating whether the proposed changes will advance the core values of the profession – loyalty, independence and confidentiality – and reporting back to NYSBA.²

The Task Force conducted several meetings between February and November 2012, at which it debated the merits of the Ethics 20/20 Commission’s discussion draft and subsequent proposals solicited the input, views, and experiences of a variety of individuals from various

¹ Subsequent to the initial drafting of this report, the Ethics 20/20 Commission issued a revised conflicts of law proposal which withdrew its initial proposal on *intra firm* sharing of fees, but maintained its proposal on *inter firm* sharing of fees. In response, the Task Force considered this latest proposal as discussed *infra* at 28-31. Ultimately, the Ethics 20/20 Commission also withdrew its proposal on *inter firm* sharing of fees, as discussed *infra* at 31.

² The Report of the Task Force on Nonlawyer Ownership will be hereinafter referred to as “Task Force Report.”

jurisdictions whose professional work has involved, either directly or indirectly, nonlawyer ownership issues. The list of speakers, and a summary of their presentations, is contained in Appendix A of this Task Force Report. The Task Force also reviewed an extensive collection of scholarship on the subject of nonlawyer ownership and discussed these writings at Task Force meetings. A bibliography of these writings is set out in Appendix B to this Task Force Report. To solicit the views of a broad section of attorneys licensed in New York, the Task Force also disseminated surveys to lawyers broken into three groups: Small Firm Practitioners; Large Firm Practitioners; and Corporate Counsel. The results of those surveys are summarized in this Task Force Report.

In April 2012, while the Task Force was in the middle of its work, the Ethics 20/20 Commission announced that it had decided not to continue to pursue the ABA NLO Proposal, which would have changed ABA policy prohibiting nonlawyer ownership of law firms. The Commission noted that it would, however, continue to consider how to provide practical guidance about choice of law problems that arise because some jurisdictions, including the District of Columbia and a growing number of foreign jurisdictions, permit nonlawyer ownership of law firms.

Despite the withdrawal of the ABA NLO Proposal, the Task Force decided to continue with its study and complete the charge assigned to it by President Doyle. This Task Force Report documents the Task Force's findings and recommendations.

The Task Force Report begins with a history of the debate regarding nonlawyer ownership in New York from the 1999 ABA proposals recommending such ownership up through the present. It then describes the Ethics 20/20 Commission's proposals on nonlawyer

ownership and the Task Force's mission. The Task Force Report continues with an examination of the nonlawyer ownership experience in other jurisdictions.

Next, the Task Force Report summarizes the opinions and reports of various bar associations from other jurisdictions and sections of NYSBA prepared in response to the ABA's proposals concerning nonlawyer ownership and choice of law.

Finally, this Task Force Report concludes with the Task Force's observations and recommendations on nonlawyer ownership and choice of law concerns. The Task Force observed that the absence of compelling need, empirical data, or pressure for change, combined with professionalism concerns, all militated against changing New York's position on nonlawyer ownership and against adopting either of the ABA's nonlawyer ownership proposals. As a result, the Task Force voted to oppose adopting any form of nonlawyer ownership in New York, noting that further studies were necessary before any such change should be advocated. The Task Force also voted in opposition to adopting the ABA's proposals on choice of law, except to endorse a proposal on inter firm fee sharing.

The Committee wishes to recognize Bob Emery, Research Librarian at Albany Law School, for his invaluable research assistance throughout this project. In addition, Albany Law School students Mackenzie Keane and Jessica Clemente reviewed drafts of the Task Force Report and provided several helpful suggestions.

The opinions expressed herein are those of the Task Force preparing this Task Force Report and do not represent those of NYSBA unless and until this Task Force Report has been adopted by the Association's House of Delegates or Executive Committee.³

³ The views expressed herein do not necessarily reflect the opinions of every Task Force member.

II. History of the Debate on Nonlawyer Ownership in New York

A. *The MacCrate Report Addresses Nonlawyer Investment in Law Firms*

In 1999, the ABA Commission on Multidisciplinary Practice issued a report proposing, among other things, that lawyers be permitted to form business relations with nonlawyers and to allow entities owned or controlled by nonlawyers to engage in multidisciplinary practice (“MDP”) with lawyers.⁴ That report was rejected by the ABA House of Delegates at the ABA’s Annual Meeting on August 9-10, 1999.⁵

On June 26, 1999, NYSBA’s House of Delegates adopted a resolution:

- (1) opposing any changes in existing regulations prohibiting attorneys from practicing law in MDPs in the absence of a sufficient demonstration that such changes are in the best interest of clients and society and do not undermine or dilute the integrity of the delivery of legal services by the legal profession; and
- (2) urging further studies of the matter.

Pursuant to this resolution, on July 28, 1999, NYSBA established a Special Committee on the Law Governing Firm Structure and Operation chaired by Past President Robert MacCrate (the “MacCrate Committee”) “charging it to consider the present law and its effectiveness,

⁴ ABA Comm’n on Multidisciplinary Practice, Report to the House of Delegates, Resolution (as of June 8, 1999), available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecommendation.html. Much of the focus of the MacCrate Report was on MDP, which is not the subject of this Report as the Ethics 20/20 Commission did not propose to revisit that issue.

⁵ See ABA House of Delegates Resolution (1999), Reports of ABA, Volume 124, No.2, p. 14; available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/flbarrec.html.

whether there is a need for any changes in the law, the evidence in support of such changes, and whether potential advantages from such changes outweigh potential detrimental effects.”⁶

Ultimately, in April 2000, the MacCrate Committee issued a seminal and expansive document entitled “Report of the NYSBA Special Committee on the Law Governing Firm Structure and Operation, *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers*” (the “MacCrate Report”), in which it opposed the ABA’s MDP proposal.⁷ After extensive discussion of its broad study of the principal issues raised regarding the law governing lawyers and law firms in the debate over MDP, the MacCrate Report set forth recommendations as to: “(1) what should be changed in the law to clarify the place of multidisciplinary practice while preserving the core values of the American legal profession; and (2) what in the public interest should remain unchanged in the law.”⁸

With regard to nonlawyer ownership of law firms, the MacCrate Report divided its recommendations into two distinct sections: 1) nonlawyer investment in law firms, and 2) nonlawyer ownership of or control over law firms.⁹

As to nonlawyer financial investment in law firms, the MacCrate Report concluded that the arguments in favor of such investment were not convincing.¹⁰ The type of law firm most likely to benefit from outside investment—*i.e.*, smaller firms and firms facing shortfalls in revenues—“are not likely candidates for outside equity investment.”¹¹ On the other hand, larger,

⁶ NYSBA Special Comm. on the Law Governing Firm Structure Operation, *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers*, at 1 (2000) (hereinafter referred to as “MacCrate Report”).

⁷ *Id.* at 380, 388.

⁸ *Id.* at 3.

⁹ *Id.* at 377-88.

¹⁰ *Id.*

¹¹ *Id.*

more prosperous law firms would likely attract outside investment but, conversely, would not need or desire this investment.¹²

The MacCrate Report's second objection was that any nonlegal entity likely to be attracted to making such an investment would be financially dominant with respect to the law firm. The Report concluded that it was reasonable "to assume that financial dominance confers control, either through outright ownership, or through the functional equivalent of outright ownership."¹³ The Report noted that regulatory authorities in various jurisdictions have called for rules that would govern this type of affiliation "with a view to preserving the professional integrity" of this type of "'captive' legal practice."¹⁴

As a third objection to a nonlawyer's financial investment in a law firm, the MacCrate Report indicated that such investment would impose a duty on the principals of the firm to operate it for the "financial benefit of the investors."¹⁵ Even without the added pressure of an outside investor, the Report noted that lawyers have, at times, unfortunately put the financial needs of their firms before a client's interest.¹⁶ With outside investment, there would be an even greater potential for tensions to arise between legal ethics and the independence of the lawyer on the one hand, and the business plan promoted by nonlawyer investors on the others.¹⁷ The MacCrate Report concluded that "this financial aspect of nonlawyer control of legal practice presents considerable risks to the legal system and the justice system...and should not be permitted in New York."¹⁸

¹² *Id.* at 378.

¹³ *Id.*

¹⁴ *Id.* at 379.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 380.

¹⁸ *Id.*

As to nonlawyer ownership or control over law firms, the MacCrate Report reiterated that lawyers may work with nonlawyer professionals, as long as lawyers retain ultimate control over the services provided to clients.¹⁹ According to the Report, the “nonlawyer participants in such ventures . . . do not play a role in the management of the legal practice, and only have a managerial say with respect to the nonlegal services being provided to the public.”²⁰ The lawyers participating in such a venture, explained the Report, remain responsible for their professional and ethical conduct.²¹ The Report also expressed concern that a partnership between a law firm and nonlawyer entity may be outside the scope of existing professional and ethical rules.²² While acknowledging that effective rules could ultimately develop to govern such partnerships, the MacCrate Report urged “the greatest caution” toward any relationship structured in a manner permitting a “dominant nonlegal participant to influence the professional judgment of lawyers and to pass on matters of legal professional ethics.”²³

The MacCrate Report cited several arguments for allowing lawyers to form general partnerships with nonlawyers. Chief among these was that “consumers should have the right to choose the form of the entity that provides legal services to them.”²⁴ The Report explained that some who favored permitting lawyers to form general partnerships with nonlawyers contended that consumers should have the ability to waive the traditional protections of confidentiality and ethical rules in favor of the efficiencies of a “one-stop shopping” option.²⁵

¹⁹ *Id.*

²⁰ *Id.* at 380-81.

²¹ *Id.* at 381.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 382.

²⁵ *Id.*

The MacCrate Report concluded that the “free marketplace” is not the solution to all of society’s problems.²⁶ “To the contrary, society has historically needed frequent governmental intervention and protection *against* the free marketplace.”²⁷ The Report noted that the government has imposed a broad range of regulations on matters concerning public health and safety and on various professions.²⁸ Although a consumer may desire a free marketplace, the Report explained that “[i]t is in the public interest to ensure that the people who hold themselves out as having special skills, whether they be medical, legal, accounting or other skills, in fact possess those skills and that they comport themselves in a manner commensurate with the high degree of trust the public tends to repose in its professionals.”²⁹

In the legal profession, the Report explained, the judicial branch of government has been responsible for: 1) screening those who seek admission to the profession, 2) supervising continuing legal education, 3) exercising continuing disciplinary authority over those who engage in the practice of law, and 4) terminating the licenses of lawyers who fail to comply with minimum professional standards.³⁰ Furthermore, “states continue to enforce unauthorized practice of law restrictions to be sure that nonlawyers do not injure the public by purporting to provide clients with legal services.”³¹ The Report concluded on this point, noting that, prohibiting “nonlawyers from having any significant influence in the manner in which lawyers deliver legal services to clients (including through passive investment in entities providing legal services to the public) is a crucial attribute of the independent bar, which has traditionally played an important role in our culture.”³²

²⁶ *Id.*

²⁷ *Id.* at 382-83.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 383.

³¹ *Id.*

³² *Id.* at 384.

Moreover, even if there were public demand to combine legal and nonlegal services—and the Report pointed out that the evidence of such demand was equivocal at best—such demand could be and is satisfied by strategic alliances, other contractual relationships with nonlegal professional service providers and lawyers owning and operating nonlegal businesses.³³ These arrangements are different from the proposals of those advocating for nonlawyer ownership, maintained the MacCrate Report, in that the lawyers and nonlawyers in such relationships do not refer to each other as a “partner.”³⁴ The Report underscored the importance of a lawyer’s duties of loyalty, confidentiality and independent professional judgment to a client and indicated that vesting any measure of control over the exercise of these duties in the hands of nonlawyers may put those critical values at risk, especially without any effective oversight.³⁵

The MacCrate Report listed a series of specific dangers that it anticipated if nonlawyers were permitted to be significantly involved in the management of a law firm.³⁶ For example, nonlawyer owners “might well view the practice of law less in professional terms than in terms of being but one of several profit centers” and would be less likely to encourage pro bono or public interest work.³⁷ “In sum,” the Report noted, “placing any measure of control over the practice of law in the hands of nonlawyers would form a constant backdrop for the lawyers attempting to practice in the organization, as the financial objectives of nonlawyer management perpetually compete with considerations of professional ethics and the formulation of independent judgments in the best interests of legal clients and the legal system.”³⁸

³³ *Id.*

³⁴ *Id.* at 385.

³⁵ *Id.*

³⁶ *Id.* at 386.

³⁷ *Id.*

³⁸ *Id.* at 386-87.

In situations where a nonlawyer may have an ownership interest in a law firm, the MacCrate Report pointed to the difficulty of ensuring that lawyers maintain control over their practices because “[i]ndicia of nonlawyer influence will often be elusive.”³⁹ The Report noted that it would be extremely difficult to define “the point at which a nonlawyer’s role within an organization rises to the level of inappropriate interference with practice governance.”⁴⁰ Given that alternative means exist to accomplish the goals sought to be achieved through transfers of control of law firms to nonlawyers, the MacCrate Report declined to take on the risks associated with such a proposal and ultimately rejected the notion that the rules against nonlawyer participation in the practice of law should be relaxed.⁴¹ Although the Report recognized that “we [are] mindful . . . that denying nonlawyers the ability to have a financial interest or otherwise participate in law firm governance deprives lawyers of significant opportunities for financial gain,” the MacCrate Committee “believe[d] that it is in the public interest that lawyers forego this opportunity.”⁴²

B. NYSBA’s House of Delegates Votes Against Nonlawyer Ownership

At its annual meeting held in June of 2000, the MacCrate Report came before NYSBA’s House of Delegates and was resoundingly approved by a voice vote after spirited debate.⁴³ The resolution adopted by the House of Delegates provides, in pertinent part, that:

- (1) Lawyers and law firms should be permitted to provide nonlegal services to clients or other persons, directly or through affiliated entities, provided that no nonlawyer or nonlegal entity involved in the provision of such

³⁹ *Id.* at 387.

⁴⁰ *Id.*

⁴¹ *Id.* at 387-88.

⁴² *Id.* at 388. The MacCrate Report also recommended that New York adopt a rule addressing ancillary nonlegal services offered by lawyers and strategic allies.

⁴³ *See, e.g.,* John Caher, *Multidisciplinary Practice Rules Adopted by State*, N.Y.L.J., July 25, 2001, at 1.

services owns or controls the practice of law by a lawyer or law firm or otherwise is permitted to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person.

- (2) Lawyers and law firms should be permitted to enter into interprofessional contractual arrangements with nonlegal professionals and nonlegal professional service firms for the purpose of offering legal and other professional services to the public, on a systematic and continuing basis, provided no nonlawyer or nonlegal entity has any ownership or investment interest in, or managerial or supervisory right, power or position in connection with, the practice of law by any lawyer or law firm.

- (5) Nonlawyer investment in entities practicing law should continue to be prohibited.
- (6) No change should be made to the law that now prohibits lawyers and law firms directly or indirectly from transferring ownership or control to nonlawyers over entities practicing law, since any demand that exists for greater integration of legal services with those of other professions may be satisfied by permitting lawyers to enter into strategic alliances and other contractual relationships with nonlegal professional service providers, as well as by permitting lawyers to own and operate nonlegal businesses.

NYSBA then directed the bench and bar to consider adding the MacCrate Report's proposed amendments to the Code of Professional Responsibility. In August 2000, proposed amendments to the Code were distributed statewide for comment. The proposals were then

debated at the November 2000 NYSBA House of Delegates meeting and, after some modifications to reflect public comments, were approved and forwarded to the courts for consideration.⁴⁴

C. The ABA Rejects a Proposal to Allow “Lawyer Controlled” Multidisciplinary Practice.

In 2000, the ABA Commission on Multidisciplinary Practice issued a more modest proposal for nonlawyer ownership which recommended that only “lawyer controlled” multidisciplinary practices be permitted.⁴⁵ At the ABA Summer Meeting in 2000, by a vote of 314 to 106, the ABA House of Delegates rejected this proposal in favor of the approach taken in the MacCrate Report.⁴⁶ The resolution of the ABA House of Delegates was similar to the resolution passed by NYSBA’s House of Delegates in June 2000 and provided:

that the Standing Committee on Ethics and Professional Responsibility of the American Bar Association shall, in consultation with state, local and territorial bar associations and interested ABA sections, divisions and committees undertake a review of the Model Rules of Professional Conduct (“MRPC”) and shall recommend to the House of Delegates such amendments to the MRPC as are necessary to assure that there are safeguards in the MRPC relating to strategic alliances and other contractual relationships with non-legal professional service providers consistent with the statement of principles in this Recommendation.⁴⁷

⁴⁴ See John Caher, *MDP Remains a Hot Topic of Debate*, N.Y.L.J., Nov. 7, 2000, at 1; see also Wechsler, 2000-2001 *Survey of New York Law: Prof’l Responsibility*, 52 SYR. L. REV. 563, 574-5 (2002) (discussing events leading up to adoption of new Disciplinary Rules).

⁴⁵ Steven C. Krane, *The Heat Subsides: The Future of MDPs in New York*, The New York Prof’l Responsibility Report, Sept. 2000.

⁴⁶ *Id.*

⁴⁷ *Id.*

To the best of the Task Force’s knowledge, the ABA did not undertake further actions concerning multidisciplinary practice or nonlawyer ownership from 2000 up to the time when the Ethics 20/20 Commission conducted its work, although the developments in the United Kingdom, Australia and other jurisdictions may have been discussed at ABA meetings or conferences during that period.

D. The Appellate Divisions of the New York State Supreme Court Adopt Rules Addressing a Lawyer’s Provision of Nonlegal Services and Contractual Relations Between Lawyers and Nonlegal Professionals

On July 23, 2001, the Appellate Divisions adopted new rules on multidisciplinary practice, effective November 1, 2001, specifically DR 1-106 of the Code of Professional Responsibility, entitled “Responsibilities Regarding Non-legal Services.” DR 1-106 addressed “the responsibilities of lawyers or law firms providing nonlegal services to clients or other persons, including lawyers or law firms that own or control an entity providing nonlegal services to clients of the lawyer or law firm, or themselves operate a business providing nonlegal services that are distinct from the legal services they provide.”⁴⁸ For purposes of DR 1-106, “non-legal services” included “those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a non-lawyer.”⁴⁹ The MacCrate Committee, in proposing DR 1-106, noted that a broad array of nonlegal businesses were being conducted by law firms or by entities owned by law firms, such as lobbying, economic or scientific expertise, appraisal services, accounting, financial planning, real estate and insurance brokerage, title insurance and private investigations.⁵⁰

DR 1-106 created a strong presumption that the Code applies to lawyers who perform law-related services and to lawyers who own or control an entity providing nonlegal services.

⁴⁸ NYSBA Comm. on Prof’l Ethics, Op. 752 (2002).

⁴⁹ DR 1-106(C).

⁵⁰ MacCrate Report at 98-103.

DR 1-106 (A)(1) provided that “[a] lawyer or law firm that provides non-legal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Disciplinary Rules with respect to the provision of both legal and non-legal services.”⁵¹ In addition, if a lawyer or law firm provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or lawyer’s firm, the lawyer or law firm must adhere to the Code “with respect to the nonlegal services if the person receiving the services could reasonably believe that the non-legal services are the subject of an attorney-client relationship.”⁵² Furthermore, “[a] lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing non-legal services to a person” was subject to the Code with respect to the nonlegal services “if the person receiving the services could reasonably believe that the non-legal services are the subject of an attorney-client relationship.”⁵³

DR 1-106(B) contained an important caveat for lawyers who coordinate with nonlawyers to provide nonlegal services. That provision cautioned that “a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing non-legal services to a person shall not permit any non-lawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty [of confidentiality] with respect to the confidences and secrets of a client receiving legal services.”⁵⁴

⁵¹ DR 1-106(A)(1).

⁵² DR 1-106(A)(2).

⁵³ DR 1-106(A)(3).

⁵⁴ DR 1-106(A)(4).

The second rule adopted by the Appellate Divisions concerning multidisciplinary practice, also effective November 1, 2001, was DR 1-107, entitled “Contractual Relationships Between Lawyers and Nonlegal Professionals.” DR 1-107(A) noted that “a lawyer or law firm may enter into and maintain a contractual relationship with a non-legal professional or non-legal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other non-legal professional services” provided certain conditions are met.⁵⁵

While generally permitted, contractual relationships between lawyers and nonlegal professionals were closely regulated by the courts. Lawyers or law firms entering into and maintaining such contractual relationships had to ensure that the profession of the nonlegal professional or nonlegal professional service firm was included in a list established by the Appellate Divisions.⁵⁶ Those professions seeking to be included on the list had to meet certain criteria outlined in DR 1-107(B)(1). The profession had to be composed of individuals who: 1) possessed a bachelor’s degree or its equivalent from an accredited college or university, or have attained an equivalent combination of educational credit from such a college or university or work experience, 2) were licensed to practice their profession by an agency of the State of New York or the United States Government, and 3) were “required under penalty of suspension or revocation of license to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession.”⁵⁷ To date, members of only five nonlegal professions have been deemed eligible to form contractual business relationships with lawyers: 1) architecture,

⁵⁵ DR 1-107(A).

⁵⁶ DR 1-107(A)(1).

⁵⁷ DR 1-107(B)(1)(c).

2) certified public accountancy, 3) professional engineering, 4) land surveying, and 5) certified social work.⁵⁸

Significantly, DR 1-107(A)(2) prohibited a lawyer who enters into a contractual relationship with one of the approved groups from permitting the nonlegal professional or nonlegal professional service firm “to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with the practice of law by the lawyer or law firm.”⁵⁹ In addition, a lawyer entering into a contractual relationship with a nonlegal professional under DR 1-107(A) was, nonetheless, still subject to the traditional prohibitions against sharing legal fees with a nonlawyer or receiving or giving any monetary or other tangible benefit for forwarding or receiving a referral.⁶⁰

E. The COSAC Report and the Appellate Divisions’ Enactment of the New York Rules of Professional Conduct, effective April 1, 2009

In 2007, NYSBA’s Committee on Standards of Attorney Conduct (“COSAC”) issued an extensive report and proposed that New York replace the Code of Professional Responsibility with a set of ethical rules following the format of the ABA Model Rules of Professional Conduct but as revised for application in New York.⁶¹ NYSBA’s House of Delegates approved the COSAC Report proposing the Model Rules, with modifications, at a meeting held on November 3, 2007.

⁵⁸ 22 N.Y.C.R.R. 1205.5 (“Nonlegal professions eligible to form cooperative business arrangements with lawyers”).

⁵⁹ DR 1-107(A)(2).

⁶⁰ *Id.*; see also DR 2-103(D), DR 3-102(A). A complete set of the disciplinary rules may be found at <http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/LawyersCodeDec2807.pdf>. The New York Rules of Professional Conduct, including rules 1.5, 5.4 and 8.5, may be found at <http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/RulesofProfessionalConductasamended070112.pdf>.

⁶¹ NYSBA Comm. on Standards of Attorney Conduct “PROPOSED NEW YORK RULES OF PROFESSIONAL CONDUCT,” p.p. ii-vii (2008) (“COSAC Report”).

On February 1, 2008, NYSBA forwarded COSAC’s proposed set of rules and comments to the Presiding Justices of the Appellate Divisions. On December 16, 2008, the Appellate Divisions announced that, effective April 1, 2009, New York attorneys would be governed by the New York Rules of Professional Conduct (“New York Rules”). While the courts adopted the proposed numbering system, based on the ABA Model Rules, the New York Rules maintain most of the substance of the former Code.

The Appellate Divisions did not add any provisions to the New York Rules allowing nonlawyer ownership of law firms and maintained the contents of DR 1-106 and DR 1-107 and carried them forward in Rule 5.7 (“Responsibilities Regarding Nonlegal Services”) and Rule 5.8 (“Contractual Relationship Between Lawyers and Nonlegal Professionals”), respectively.⁶²

F. New York State Bar Opinions 889 and 911

How to reconcile New York’s Rules of Professional Conduct prohibiting nonlawyer ownership with the rules of other jurisdictions permitting such ownership has recently been considered by NYSBA’s Committee on Professional Ethics in two different contexts. It should be noted that the Committee’s opinions interpreted the current Rules, but did not address the question of what policies best accommodate firms active in jurisdictions with conflicting rules or whether New York’s Rules ought to be modified to adapt to developments around the world.

In Opinion 889, dated November 15, 2011, the Committee was asked by an attorney admitted and practicing in a firm in the District of Columbia whether he could share fees with a nonlawyer who would assist the firm in a class action brought in New York. The lawyer was also admitted in New York.

⁶² The contents of DR 1-107(D), which provided that “a lawyer or law firm could allocate costs and expenses with a non-legal professional or non-legal professional service firm pursuant to a contractual relationship permitted by DR 1-107 (A), provided the allocation reasonably reflects the costs and expenses incurred or expected to be incurred by each,” were not included in Rule 5.8. Nonetheless, such permission is implied in the Rules. *See* Rule 5.8, Comment 2.

Noting the conflicting rules in the District and in New York, the Committee examined the provisions of Rule 8.5, the choice of law provision. The Committee explained that “[f]orming a District of Columbia partnership with a non-lawyer in the District of Columbia does not become subject to New York Rule 5.4 (prohibiting fee sharing or a partnership with a nonlawyer) just because the partnership may undertake some New York litigation work.” The Committee opined that the provision of New York Rule 8.5 applying the Rules of the jurisdiction having the “predominant effect” led to the conclusion that the Rules of the District were applicable. It reasoned: “Forming the District of Columbia partnership does not clearly have its predominant effect in New York just because the partnership may undertake some New York litigation work. Under the circumstances presented, neither does it clearly have a predominant effect in New York for the partnership to distribute its fees according to the general terms of the partnership agreement, even though this may include occasional fees from New York litigation.”

Several months after issuing this opinion, the Committee answered a request from a lawyer who wished to become associated with a UK firm that had nonlawyers in supervisory and ownership positions, as permitted in that country. The New York lawyers, as part of the firm, intended to establish a New York office to represent New York clients, but they would not share confidences with the UK nonlawyer owners.

The Committee, in Opinion 911, dated March 14, 2012, concluded that, under these facts, the New York Rule applied and the arrangement was prohibited. It contrasted Opinion 889, and explained that “Rule 5.4 would govern the propriety of the arrangement with the UK entity. Even if the lawyers in question are also licensed in the UK, the predominant effect of their conduct, in practicing law from a New York office on behalf of New York clients, would be in New York.”

III. The ABA's Ethics 20/20 Commission Proposals and the NLO Task Force's Mission

The ABA established the Ethics 20/20 Commission in 2009 to conduct a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments. The Ethics 20/20 Commission's November 2009 Preliminary Issues Outline identified several issues for consideration and study.⁶³ Among other things, the outline identified issues concerning alternative business structures, such as law practices with nonlawyer managers/owners, multidisciplinary practices, or incorporated or publicly traded law firms in other countries that raise ethical and regulatory questions for U.S. lawyers and law firms.⁶⁴ The Commission then conducted a three-year study of the preliminary issues that it had identified, examining how globalization and technology are transforming the practice of law and how the regulation of lawyers should be updated in light of those developments. The Commission emphasized that its "work in this area has been guided by three principles: protecting the public; preserving core professional values; and maintaining a strong, independent, and self-regulated profession."⁶⁵

In June 2011, the Ethics 20/20 Commission publicly rejected certain forms of nonlawyer ownership that certain other jurisdictions currently permit, including multidisciplinary practices, publicly traded law firms, and passive, outside nonlawyer investment or ownership in law firms.⁶⁶ After further consideration and study, on December 2, 2011, the Commission released for comment a Discussion Draft describing a limited form of court-regulated, nonlawyer

⁶³ ABA Comm'n on Ethics 20/20 Preliminary Issues Outline (Nov. 19, 2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/preliminary_issues_outline.authcheckdam.pdf.

⁶⁴ *Id.* at 6.

⁶⁵ ABA Comm'n on Ethics 20/20, *For Comment: Discussion Paper on Alternative Law Practice Structures*, at 1 (Dec. 2, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf ("Ethics 20/20 Discussion Draft on NLO").

⁶⁶ See Press Release, ABA Comm'n on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Firms (April 16, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120416_news_release_re_nonlawyer_ownership_law_firms.authcheckdam.pdf.

ownership of law firms (the “ABA NLO Proposal”).⁶⁷ The ABA NLO Proposal would have allowed nonlawyers, who are employed by a law firm and assist the firm’s lawyers in the provision of legal services, to hold a minority financial interest in the firm and share in its profits.⁶⁸ The draft resembled the approach permitted by the District of Columbia in its Rule 5.4 (“Professional Independence of a Lawyer”)⁶⁹ for more than twenty years, but included additional requirements that lawyers in a firm retain controlling voting rights and financial interests in the firm.⁷⁰ Specifically, the ABA NLO Proposal recommended consideration of amendments to the Model Rules to allow nonlawyer ownership of firms under the following restrictions:

- such law firms would be restricted to providing legal services;
- nonlawyer owners would have to be active in the firm, providing services that support the delivery of legal services by the lawyers (i.e., the firm could not be a multidisciplinary practice);
- nonlawyer ownership and voting interests would be restricted by a 25% cap intended to ensure that lawyers retain control of the firm;
- nonlawyer owners would be required to agree in writing to conduct themselves in a manner consistent with the Rules of Professional Conduct for lawyers; and
- lawyer owners would be responsible for both ensuring that the nonlawyer owners in their firm were of good character and supervising the

⁶⁷ Ethics 20/20 Discussion Draft on NLO.

⁶⁸ *Id.* at 2.

⁶⁹ D.C. Bar, D.C. Rules of Prof'l Conduct, Rule 5.4.

⁷⁰ Ethics 20/20 Discussion Draft on NLO at 2.

nonlawyers in regard to compliance with the Rules of Professional Conduct.⁷¹

On April 16, 2012, however, the Ethics 20/20 Commission announced that it had “decided not to propose changes to ABA policy prohibiting nonlawyer ownership of law firms.”⁷² The Commission indicated that it had considered the pros and cons of the proposal in the Ethics 20/20 Discussion Draft on NLO, “including thoughtful comments that the changes recommended in the Discussion Draft were both too modest and too expansive.”⁷³ The Co-Chairs of the Commission stated that “[b]ased on the Commission’s extensive outreach, research, consultation, and the response of the profession, there does not appear to be a sufficient basis for recommending a change to ABA policy on nonlawyer ownership of law firms.”⁷⁴ In sum, the Commission “concluded that the case had not been made for proceeding even with a form of nonlawyer ownership that is more limited than the D.C. model.”⁷⁵

The Ethics 20/20 Commission noted that it would, however, “continue to consider how to provide practical guidance about choice of law problems that are arising because some jurisdictions, including the District of Columbia and a growing number of foreign jurisdictions, permit nonlawyer ownership of law firms.”⁷⁶ The Commission explained that it believes that these issues “need pragmatic attention” and cited its previously released draft proposals addressing them.⁷⁷ The Commission announced that it would decide at its October 2012 meeting

⁷¹ *Id.*

⁷² *See supra* note 66, at 1.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

whether to submit formal proposals on these subjects to the ABA House of Delegates for consideration in February 2013 and that it welcomed comments on its draft proposals.⁷⁸

These choice of law proposals, also released on December 2, 2011, were contained in a document entitled “Initial Draft Proposal for Comment Choice of Law-Alternative Law Practice Structures.”⁷⁹ The draft contained proposals (the “ABA Conflicts of Law Proposal”) to address “problems that arise as a result of jurisdictional inconsistencies, both domestically and abroad, concerning nonlawyer ownership interests in law firms.”⁸⁰ The Ethics 20/20 Commission stated that it had learned that lawyers licensed in the United States “want more guidance as to their ethical obligations when they are asked to work with or within firms that have nonlawyer owners or partners.”⁸¹ The ABA Conflicts of Law Proposal was much narrower than the ABA NLO Proposal and recommended amendments to Model Rule 1.5 (“Fees”) and Model Rule 5.4 (“Professional Independence of a Lawyer”) “to address inconsistencies among jurisdictions, both domestically and abroad, with regard to the sharing of fees with nonlawyers.”⁸²

The ABA Conflicts of Law Proposal would have amended Model Rule 1.5, and Comment 8 thereto, to address the problem that arises when one firm that is governed by a version of Model Rule 5.4 that does not permit nonlawyer partners or owners enters into a fee-sharing agreement⁸³ with another firm that is permitted to have nonlawyer partners or owners

⁷⁸ *Id.*

⁷⁹ ABA Comm’n on Ethics 20/20: Initial Draft Proposal for Comment Choice of Law - Alt. Law Practice Structures (Dec. 2, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-alps_choice_of_law_r_and_r_final.authcheckdam.pdf (“Ethics 20/20 Initial Draft Proposal on Choice of Law Issues”).

⁸⁰ *Id.* at 1.

⁸¹ *Id.*

⁸² Summary of Actions by the ABA Comm’n on Ethics 20/20, at 5 (Dec. 28, 2011), *available at* <http://www.legalethicsforum.com/files/20111228-summary-of-ethics-20-20-commission-actions-december-2011-final.pdf>.

⁸³ Fee splitting agreements between lawyers not in the same firm are governed by ABA Model Rule 1.5(e) and New York Rule 1.5(g).

under its applicable professional conduct rules.⁸⁴ The proposed amendments to ABA Model Rule 1.5, contained in a proposed resolution accompanying the ABA Conflicts of Law Proposal, would have allowed a lawyer to divide a legal fee with another firm that has nonlawyer partners and owners in a jurisdiction that allows such ownership.⁸⁵ The proposed amendment to ABA Model Rule 1.5(e) read as follows, with insertions underlined:

- (e) A division of a fee between lawyers who are not in the same firm or
between law firms may be made only if:
- (1) the division is in proportion to the services performed by each lawyer or
law firm or each lawyer or firm assumes joint responsibility for the representation;
 - (2) the client agrees to the arrangement, including the share each lawyer or
law firm will receive, and the agreement is confirmed in writing; and
 - (3) the total fee is reasonable.⁸⁶

A proposed amendment to Comment 8 to ABA Model Rule 1.5 would have clarified the intended scope of the above proposal. It stated as follows:

[8] Paragraph (e) permits the division of a fee with a law firm in which a nonlawyer is a partner or has an ownership interest. But see Rule 8.4(a) (prohibiting a lawyer from “knowingly assist[ing]” another to violate the Rule of Professional Conduct). The Rule does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.⁸⁷

⁸⁴ Ethics 20/20 Initial Draft Proposal on Choice of Law Issues, at 1-2.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 3.

The proposed amendments to ABA Model Rule 5.4, also contained in a proposed resolution that accompanied the ABA Conflicts of Law Proposal, attempted to resolve a somewhat similar problem that arises when a lawyer practicing in the office of a law firm where nonlawyer fee sharing is impermissible attempts to share fees with nonlawyers in the same firm who are located in another office where such fee sharing is permissible.⁸⁸ The Ethics 20/20 Commission concluded that a lawyer should be permitted to share fees with nonlawyers under these circumstances, “but only if the nonlawyer performs professional services that assist the firm in providing legal services to its clients and that form of fee sharing is permitted by the jurisdiction whose rules apply to the permissibility of fee sharing with the nonlawyer.”⁸⁹ This approach was contrary to NYSBA Opinion 911 discussed above, although it was endorsed by the Philadelphia Bar Association in an ethics opinion issued in September 2010.⁹⁰

The proposed amendment to ABA Model Rule 5.4 added a new subsection (a)(5), which read as follows:

(5) a lawyer may share legal fees with a nonlawyer in the lawyer’s firm in a manner that is not otherwise permissible under this Rule, but only if the nonlawyer performs professional services that assist the firm in providing legal services to its clients and that form of fee sharing is permitted by the jurisdiction whose rules apply to the permissibility of fee sharing with the nonlawyer. See Rule 8.5(b).⁹¹

⁸⁸ *Id.* at 2.

⁸⁹ *Id.*

⁹⁰ The Philadelphia Bar Ass’n Prof’l Guidance Comm. Op. 2010-7 (Sept. 2010); *see supra* Section II.F.

⁹¹ Ethics 20/20 Initial Draft Proposal on Choice of Law Issues, at 4-5.

The proposed amendment was accompanied by the addition of a new Comment 3 to ABA Model Rule 5.4, which would have clarified the intended scope of the above proposal. It stated as follows:

[3] Paragraph (a)(5) recognizes that the Rule regarding fee sharing with nonlawyers varies among jurisdictions, both within and outside the United States. As a result, a lawyer may be asked to share fees with nonlawyers in the same firm when that form of fee sharing is not permitted under the rules of the jurisdiction that apply to that lawyer, but permitted under the rules of the jurisdiction that apply to the permissibility of fee sharing with the nonlawyer. Under these circumstances, Rule 8.5(b)(2) (Choice of Law) states that the Rule to be applied is the Rule of the jurisdiction where “the lawyer’s conduct occurred” or had its “predominant effect,” even if the lawyer is not admitted in that jurisdiction. Under this test, if a nonlawyer works exclusively with lawyers and serves clients in an office located in a jurisdiction that permits nonlawyer partnership or ownership interests, Rule 8.5(b)(2) ordinarily permits the firm’s lawyers, including those lawyers located in jurisdictions that do not permit such partnerships or ownership interests, to share fees with the nonlawyer because the predominant effect of the fee sharing will be in the jurisdiction that allows it. To determine whether a lawyer can divide fees with a different firm in which a nonlawyer is a partner or has an ownership interest, see Rule 1.5, Comment [8].⁹²

⁹² *Id.* at 5-6.

After the Task Force issued the initial draft of its Task Force Report on September 14, 2012, the Ethics 20/20 Commission issued two revised drafts for comment on September 18, 2012.⁹³ The first draft addressed choice of rule agreements for conflicts of interest, and is not the subject of this Task Force Report. The second draft (the “Inter Firm Fee Sharing Proposal”), pertinent to the work of the Task Force, concerns choice of law issues associated with the division of fees between lawyers in different firms where one lawyer practices in a firm in a jurisdiction that prohibits nonlawyer ownership of law firms, and the other practices at a firm that has nonlawyer owners in a jurisdiction that permits it.⁹⁴ The Ethics 20/20 Commission observed that “it is important to note that nothing in the draft would alter the existing prohibition on nonlawyer ownership or fee sharing with nonlawyers set forth in Rule 5.4 of the ABA Model Rules of Professional Conduct.”⁹⁵

The Ethics 20/20 Commission considered and rejected a proposal to permit fee sharing among members of a single firm that has offices in both jurisdictions that allow nonlawyer ownership and those that do not (intra firm fee sharing).⁹⁶ The Commission noted that such a rule would allow for the possibility that a nonlawyer in a jurisdiction that allows nonlawyer ownership of firms could influence lawyers’ decisions in those jurisdictions that do not allow nonlawyer ownership.⁹⁷

⁹³ ABA Comm’n on Ethics 20/20, *For Comment: New Drafts Regarding Choice of Rule Agreements for Conflicts of Interest and Choice of Law Issues Associated with Fee Division Between Lawyers in Different Firms* (Sept. 18, 2012) available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120918_ethics_20_20_co_chair_cover_memo_comment_drafts_on_fee_division_model_rule_1_7_final_posting.authcheckdam.pdf. (“Fee Division Memorandum”).

⁹⁴ See ABA Comm’n on Ethics 20/20: Draft for Comment, *Fee Division Between Lawyers in Different Firms* (Sept. 18, 2012) available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120918_ethics_20_20_fee_division_and_choice_of_law_comment_draft_final_posting.authcheckdam.pdf.

⁹⁵ Fee Division Memorandum, at 1. Rule 5.4 of the New York Rules of Professional Conduct contains similar prohibitions to those contained in Rule 5.4 of the ABA Model Rules of Professional Conduct.

⁹⁶ *Id.* See ABA Formal Op. 91-360 (1991) (considering issues arising from fee sharing among members of a single firm that has offices in both the District of Columbia, which allows nonlawyer ownership, and in a jurisdiction that does not).

⁹⁷ Fee Division Memorandum, at 2.

As to issues arising when there is a division of fees between lawyers in separate firms located in two jurisdictions, the Ethics 20/20 Commission decided to propose “modest changes...to clarify that lawyers in jurisdictions that prohibit nonlawyer ownership of law firms and the sharing of legal fees with nonlawyers may divide a fee with lawyers in different firms in which such ownership or fee sharing occurs and is permitted by the Rules applicable to those firms.”⁹⁸ The Commission noted that this “practical problem...is arising with greater frequency as lawyers from firms in jurisdictions prohibiting nonlawyer ownership and fee sharing work on client matters with lawyers in firms in other jurisdictions – e.g., the District of Columbia, England, Australia and Canada – that permit various nonlawyer ownership options.”⁹⁹

The Ethics 20/20 Commission concluded that lawyers in jurisdictions that prohibit nonlawyer ownership of law firms and the sharing of legal fees with nonlawyers should be permitted to divide fees with lawyers in different firms in jurisdictions in which such ownership or fee sharing is permitted “because the concerns underlying the prohibition in Rule 5.4 are not implicated.”¹⁰⁰ The Commission observed that “Model Rule 5.4 is designed to insulate lawyers from the influence of nonlawyers,” but there is no reason to believe that the nonlawyers in one firm are in a position to influence the lawyers who practice “in a different jurisdiction and in an entirely different firm.”¹⁰¹ Therefore, the Ethics 20/20 Commission proposed the addition of a new Comment to Rule 1.5 to permit, subject to certain limitations, a lawyer to divide a fee with a lawyer in a different law firm, even if that other firm is permitted to have nonlawyer partners or owners. The proposed Comment (“Comment [9]”) read as follows:

⁹⁸ See *supra* note 94, at 2.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 3.

¹⁰¹ *Id.*

A lawyer who is governed by the Rules of Professional Conduct in this jurisdiction is prohibited from allowing a nonlawyer to direct or regulate the lawyer's independent professional judgment. See Rule 5.4 (Professional Independence of a Lawyer). Subject to this prohibition, a lawyer in this jurisdiction may divide a fee with a lawyer from another firm in a jurisdiction that permits a firm to share legal fees with nonlawyers or to have nonlawyer owners, unless the lawyer who is governed by the Rules of Professional Conduct in this jurisdiction knows that the other firm's relationship with nonlawyers violates the rules of the jurisdiction that apply to that relationship. See Rule 8.4(a) (prohibiting a lawyer from "knowingly assist[ing]" another to violate the Rules of Professional Conduct); Rule 8.5(b) (Choice of Law).¹⁰²

On October 29, 2012, the Ethics 20/20 Commission withdrew its Inter Firm Fee Sharing Proposal, choosing not to present the proposed rule change to the ABA House of Delegates, but rather referring the "narrow and technical issue" to the Standing Committee on Ethics and Professional Responsibility.¹⁰³ The Ethics 20/20 Commission noted that it discussed the issue at its October 25 and 26 meetings, and concluded that "subject to the prohibition of Rule 5.4 (Professional Independence of a Lawyer), the authority to divide fees between lawyers in two independent firms currently exists in Model Rule 1.5."¹⁰⁴ According to Co-Chair Jamie Gorelick, "[i]n deciding which proposals to bring to the House of Delegates, we have considered the importance of the issue to the profession, whether there is confusion as to the application of

¹⁰² *Id.*

¹⁰³ See Press Release, ABA Commission on Ethics 20/20 Will Refer Fee Division Issues to the Standing Committee on Ethics and Professional Responsibility Rather Than Propose Changes to ABA Model Rule 1.5 (Oct. 29, 2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121029_fee_division_release_ethics_20_20_commission_co_chair_cover_memo.authcheckdam.pdf.

¹⁰⁴ *Id.*

the rules that we can helpfully address, and whether a change in the rules is necessary and helpful to address changes in the legal environment.”¹⁰⁵ Nonetheless, the Task Force decided that, having already given considerable thought to the issues, it should continue to provide its analysis of and comments on the Inter Firm Fee Sharing Proposal in this Report for the benefit of future debate by NYSBA, and potentially the ABA.

IV. Nonlawyer Ownership in Other Jurisdictions

A. Australia

Australia is a Federation comprised of six states and each state has the power through its own constitution to regulate and oversee the legal profession.¹⁰⁶ Australia allows both multidisciplinary practices (“MDPs”) and incorporated legal practices (“ILPs”).¹⁰⁷ Australia’s legal profession is primarily comprised of sole practitioners and small law firms, which constitute approximately 80 percent of the total numbers of lawyers in the country.¹⁰⁸

The alternative business model reform, which included allowing nonlawyer ownership of law firms, began in Australia in 1994 when New South Wales became the first state in Australia to allow MDP.¹⁰⁹ This groundbreaking legislation permitting MDP, the first such rule in any common law jurisdiction, also required that lawyers retain at least 51% of the net partnership income.¹¹⁰ Interestingly, there was little interest in establishing MDP when the legislation

¹⁰⁵ *Id.*

¹⁰⁶ Ethics 20/20 Initial Draft Proposal on Choice of Law Issues, at 7.

¹⁰⁷ ABA Comm’n on Ethics 20/20 Working Group on Alt. Bus. Structures, *For Comment: Issues Paper Concerning Alternative Business Structures*, at 8 (Apr. 5, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf.

¹⁰⁸ *Id.* at 7 (citing Murray Hawkins, Dir., Nat’l Legal Profession Project, “Australian Models of Regulating the Legal Profession,” Presentation to the Fed’n of Law Societies of Can. Semi-Annual Conference, 17-19 (Mar. 2011)).

¹⁰⁹ See *supra* note 107, at 8.

¹¹⁰ *Id.*

passed, apparently because most lawyers and law firms felt “that law should remain a profession and not be treated as a business.”¹¹¹

In Australia, MDP is defined as “a partnership between one or more Australian legal practitioners and one or more other persons who are not Australian legal practitioners, where the business of the partnership includes the provision of legal services in this jurisdiction as well as other services.”¹¹² Each legal practitioner who is a partner in such a practice is responsible for the management of the practice’s legal services and they must ensure that the rules and regulations governing the practice of law are followed.¹¹³ The Supreme Court of Australia can prohibit a practitioner from being a partner in an MDP if it finds that the practitioner is unfit to occupy such a position.¹¹⁴

Eventually, “pressure from national competition authorities to reform regulatory structures to create greater accountability and enhance consumer interest and protection, and increased interest in innovation” led to proposals in Australia to allow ILPs, including MDPs and publicly traded law firms, and to eliminate the 50% rule.¹¹⁵ Despite some hesitance based on “concerns within the profession about conflicting duties and increased risks of unethical behavior,” regulators and the organized bar in Australia were able to establish this form of an alternative business structure.¹¹⁶ As of December 2010, there are approximately 2,000 ILPs in Australia, and that number is reportedly growing.¹¹⁷

¹¹¹ *Id.* (citing Steve Mark, Tahlia Gordon, Marlene Le Brun, and Gary Tamsitt, *Preserving the Ethics and Integrity of the Legal Profession in an Evolving Market: A Comparative Regulatory Response* (2010)).

¹¹² Legal Profession Act § 153 (2004) (N.S. Wales).

¹¹³ *See supra* note 107, at 10.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 8.

¹¹⁶ *Id.*

¹¹⁷ *Id.* (citing Murray Hawkins, Dir., Nat’l Legal Profession Project, “Australian. Models of Regulating the Legal Profession,” Presentation to the Fed’n of Law Societies of Can. Semi-Annual Conference, 17–19 (Mar. 2011)).

Each Australian state has the authority to set the primary rules governing ILPs.¹¹⁸ An ILP may provide legal and any other services except that it may not operate a “managed investment scheme” or any other service that is not allowed by the applicable regulations.¹¹⁹ Laws relating to attorney-client privilege and other applicable legal professional privileges apply to ILPs and the lawyers who are officers or employees of an ILP.¹²⁰ ILPs are listed on the Australian Stock Exchange and may have external investors. They must operate in compliance with the Australian Federal Corporations Act and must register with the Australian Securities & Investment Commission.¹²¹

An ILP must appoint a Legal Practitioner Director upon incorporation.¹²² The Legal Practitioner Director is responsible for the management of the legal services provided by the ILP.¹²³ It is also responsible for reporting any misconduct by the ILP or any of its employees or directors.¹²⁴ Sanctions for misconduct may be taken against the entire ILP, any director or any practitioner within the ILP.¹²⁵

B. *United Kingdom*

The UK allows nonlawyer ownership of law firms and passive outside investment in law firms by nonlawyers. The movement in the UK toward nonlawyer ownership began about ten years ago when a 2001 Report of the Office of Fair Trading, entitled *Competition in Professions*, concluded that certain rules governing the legal profession were unduly restrictive.¹²⁶ Several

¹¹⁸ See *supra* note 107, at 8.

¹¹⁹ *Id.* at 9 (citing Legal Profession Act 2005, available at http://www.austlii.edu.au/au/legis/nsw/consol_reg/lpr2005270/).

¹²⁰ See *supra* note 107, at 9.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 10.

¹²⁶ See John Vickers, Director General of Fair Trading, Report on Competition in Professions (Mar. 2011), available at http://www.ofc.gov.uk/shared_ofc/reports/professional_bodies/ofc328.pdf.

groups outside the legal profession raised concerns that the disciplinary system operated by the Law Society of England and Wales was confusing, inconsistent, protective of lawyers, and unresponsive to client needs.¹²⁷ As a result, the government solicited a study led by Sir David Clementi to address these issues.¹²⁸

In 2004, Sir David Clementi's group issued a report entitled *Report of the Review of the Regulatory Framework for Legal Services in England and Wales*.¹²⁹ Many of the recommendations made in that Report were incorporated into the Legal Services Act of 2007 ("LSA"), including recommendations pertaining to alternative business structures for providing legal services ("ABS").¹³⁰ Under the LSA, ABS are defined as entities that have lawyer and nonlawyer management and/or ownership and that provide only legal services or legal services in combination with nonlegal services.¹³¹ The LSA is comprehensive in its scope and provides for regulation of the ABS entity as well as the individual.¹³²

The Legal Services Board ("LSB"), established by the LSA, is a national, non-governmental regulator of all groups that regulate the legal profession and it determines which alternative business structures are allowable.¹³³ The LSB has designated the Solicitors Regulation Authority ("SRA") as an approved regulator for these entities, but there may also be other approved regulators.¹³⁴ All entities with a nonlawyer manager and/or owner must be

¹²⁷ *Id.* at 50–52 (explaining the current regulatory structure in place and the problems within that structure).

¹²⁸ David Clementi, Report of the Review of the Regulatory Framework for Legal Services in England and Wales, 1 (Dec. 2004), available at <http://www.legal-services-review.org.uk/content/report/index.htm> (hereinafter referred to as "Clementi Report").

¹²⁹ *See id.*

¹³⁰ Legal Services Act 2007, Part 5, Alternative Business Structures, available at <http://www.sra.org.uk/lisa>.

¹³¹ *See* <http://www.sra.org.uk/sra/legal-services-act/faqs/ABS-faqs.page>.

¹³² *See infra* Appendix A, at A-7.

¹³³ *See infra* Appendix A, at A-5.

¹³⁴ *See* <http://www.sra.org.uk/sra/how-we-work.page>.

licensed, and all individual participants also must be authorized.¹³⁵ Unlike Australia, the LSA requires nonlawyer owners and managers to pass a “fit to own” test.¹³⁶

Chris Kenny, the Chief Executive of the UK Legal Services Board, explained to the Task Force that three different factors forced these changes in the UK: 1) pressure coming from UK competition authorities; 2) complaints from consumers of legal services and the legal profession’s inability to deal with them; and 3) a “confidence collapse” caused by the push toward a more consumer-oriented legal culture in the UK.¹³⁷ Kenny explained that nonlawyer ownership of law firms makes legal services “more accessible, cheap and cheerful.”¹³⁸ Kenny believes that the Act will lead to better services and more consumer satisfaction.

There are currently 150 applications before the LSB that are being considered for approval as nonlawyer ownership structures. These business structures include: legal disciplinary partnerships (“LDPs”) consisting of IT directors and specialist lawyers, office staff receiving internal ownership rights in the firm, personal injury firms of all sizes making public offerings, private equity firms owning law practices, and family law firms.

LDPs are a form of MDP that permits up to 25% of a law firm’s partnership interests to be owned by nonlawyers.¹³⁹ An LDP can only provide legal services, but may have managers who are different types of lawyers, such as barristers and solicitors.¹⁴⁰ An LDP can include up to 25% nonlawyer managers, but external owners are not permitted.¹⁴¹ Nonlawyer managers are subject to a fitness review and approval by the SRA; LDPs must pay the cost of a criminal

¹³⁵ See *supra* note 107, at 13.

¹³⁶ See, e.g., SRA Suitability Test 2011 (Version 4, June 21, 2012), available at <http://www.sra.org.uk/solicitors/handbook/suitabilitytest/content.page> (hereinafter referred to as “Suitability Test”).

¹³⁷ See *infra* Appendix A, at A-5-6.

¹³⁸ See *id.* at A-6.

¹³⁹ See <http://www.sra.org.uk/sra/legal-services-act/faqs/01-legal-services-act-basics/What-is-an-LDP.page>. Since March 31, 2009, firms in the UK have been able to become licensed as LDPs.

¹⁴⁰ *Id.*; see Ethics 20/20 Discussion Draft on NLO, at 8.

¹⁴¹ *Id.*

background check for each nonlawyer principal.¹⁴² The SRA can withdraw approval of a nonlawyer manager and may also direct an LDP to appoint a lawyer to ensure compliance with the LDP's obligations and duties under applicable law.¹⁴³ LDPs are required to maintain professional liability insurance.¹⁴⁴

At an August 2010 meeting of the Ethics 20/20 Commission, the Chief Executive of the Law Society of England and Wales reported that, as of June 2010, there were 254 registered LDPs.¹⁴⁵ Over 70% of these LDPs had 10 or fewer partners.¹⁴⁶ The nonlawyer partners in these LDPs included teachers, financial planners, and accountants.¹⁴⁷ By October 2011, the SRA had approved registration of 490 LDPs, nearly double the number from April 2010.¹⁴⁸ The average size of all LDPs with nonlawyers was seven partners.¹⁴⁹ The largest LDPs with nonlawyers had more than 300 partners.

C. District of Columbia

In 1990, the District of Columbia adopted a unique version of Rule 5.4, which permits a lawyer to form a partnership with a nonlawyer if the main purpose of the partnership is to practice law.¹⁵⁰ The District of Columbia's version of Rule 5.4 – unlike any other version of Rule 5.4 in the U.S. – permits a nonlawyer to hold a financial or managerial interest in such a partnership so long as the nonlawyer “performs professional services which assist the organization in providing legal services to clients” and abides by the Rules of Professional

¹⁴² See Suitability Test, *supra* note 136.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Ethics 20/20 Discussion Draft on NLO, at 8.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 9.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ D.C. Rule of Prof'l Conduct 5.4(a)(4); 5.4(b).

Conduct.¹⁵¹ The District of Columbia’s Rule 5.4(b) also dictates that “[t]he 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.”¹⁵² All the conditions of Rule 5.4(b) must be set out in a written instrument.¹⁵³

The District of Columbia’s version of Rule 5.4 does not allow for passive nonlawyer investment.¹⁵⁴ In addition, the Rule does not contain any cap on the nonlawyer ownership percentage and does not require nonlawyers to pass a fitness test prior to obtaining ownership in a law firm.

Hope Todd, the D.C. Bar’s Legal Ethics Coordinator, who spoke at a meeting of the Task Force on April 24, 2012, explained that the Rule allowing nonlawyer ownership has not seen much use in the District of Columbia because a lawyer, if practicing anywhere outside of the District, would most certainly be in violation of another state’s laws that prohibit nonlawyer ownership of law firms. According to Todd, most lawyers who are interested in setting up an alternative practice allowed by the District’s Rule 5.4(b) abandon their plans once they learn about licensure problems in other states.

V. Speakers and Presentations at Task Force Meetings

Perhaps one of the most informative activities of the Task Force was its solicitation of the input, views, and experiences of a variety of individuals whose professional work has touched on, either directly or indirectly, nonlawyer ownership issues. The Task Force sought information from speakers representing the following viewpoints: the Ethics 20/20 Commission; the

¹⁵¹ D.C. Rule of Prof’l Conduct 5.4(b).

¹⁵² D.C. Rule of Prof’l Conduct 5.4(b)(3); *see* D.C. Rule of Prof’l Conduct 5.1 (“Responsibilities of a Partner or Supervisory Lawyer”).

¹⁵³ D.C. Rule of Prof’l Conduct 5.4(b)(4) and Comment 4 thereto, which notes that “[t]he requirement of a writing helps ensure that these important conditions are not overlooked in establishing the organizational structure of entities in which nonlawyers enjoy an ownership or managerial role equivalent to that of a partner in a traditional law firm.”

¹⁵⁴ D.C. Rule of Prof’l Conduct 5.4, Comment 8.

experience of jurisdictions that currently allow a form of nonlawyer ownership (*i.e.*, Washington, D.C., the UK, and Australia); and leading attorneys and/or professors in the areas of access to justice, law firm practice management, and legal ethics professionalism. The primary means by which the Task Force obtained such information was by inviting speakers to each of the Task Force's meetings.

The Task Force heard from the speakers listed below, whose presentations are summarized in Appendix A to this Task Force Report:

- Jamie Gorelick, Chair, Ethics 20/20 Commission
- Frederic Ury, Ethics 20/20 Commission
- Phil Schaeffer, ABA Standing Committee on Ethics and Professionalism and Liaison to the Ethics 20/20 Commission
- Chris Kenny, Chief Executive, UK Legal Services Board
- Anthony Davis, Hinshaw & Culbertson LLP
- Steve Mark, New South Wales Legal Services Commissioner
- Tahlia Gordon, Research and Project Manager, New South Wales Office of the Legal Services Commissioner
- Carla Freudenburg, Regulation Counsel, District of Columbia Bar
- Hope Todd, Legal Ethics Coordinator, District of Columbia Bar
- Gene Shipp, Bar Counsel, District of Columbia Bar
- Lawrence Bloom, Senior Staff Attorney, District of Columbia Bar
- David Udell, Executive Director, National Center for Access to Justice at Cardozo Law School; Chair, Subcommittee on Access to Justice of the Committee on Professional Responsibility of the Association of the Bar of the City of New York
- Gary Munneke, Pace Law School; Chair, NYSBA Committee on Law Practice Management; Chair, ABA Law Practice Management Section Task Force on the Evolving Business Model for Law Firms
- Paul Saunders, Chair, N.Y.S. Judicial Institute on Professionalism

VI. Task Force Survey Results

To solicit views on nonlawyer ownership from a broad section of New York attorneys, the Task Force circulated surveys to lawyers divided into three populations: Small Firm Practitioners; Large Firm Practitioners; and Corporate Counsel. Surveys were distributed to NYSBA members through NYSBA's email directory. Across all three populations, the majority

of the over 1,200 survey participants opposed the ABA NLO Proposal.¹⁵⁵ This section summarizes the results of the Task Force's survey.

A. Demographics

Both the small and large firm surveys posed the same questions to capture the demographics of survey respondents and to ensure that the respondents fit the criteria for either small or large firm practitioners. The survey asked the following demographic questions:

- (1) Are you in private practice?
- (2) Number of attorneys in your office/organization?
- (3) Please indicate your position.
- (4) Number of years admitted to the bar.
- (5) Age.

Which New York State area do you practice in (primarily)?

The corporate counsel survey posed a slightly different set of demographic questions, as follows:

- (1) Do you consider yourself to be in a Corporate Counsel position?
- (2) Please indicate your title.
- (3) As corporate counsel, do you use outside counsel?
- (4) Number of attorneys in your office/organization?
- (5) Number of years admitted to the bar.
- (6) Age.
- (7) Which New York State area do you practice in (primarily)?

¹⁵⁵ The surveys did not pose questions concerning the ABA's Choice of Law Proposal. At the time of the survey's development and distribution, the ABA's Ethics 20/20 Commission had not yet withdrawn its discussion paper on nonlawyer ownership.

Small Firm Survey Demographics. The Task Force received 821 completed surveys in response to the small firm survey. Reflecting the expected population, 86.9% of respondents worked in firms comprised of less than 10 attorneys. 69.2% of respondents reported working at the partner or of-counsel level, with another 22% of respondents reporting “other” as their title, the majority of whom described themselves as sole owner. 85.5% of respondents had been admitted to the bar at least 10 years, with almost 70% of the respondents having been admitted at least 20 years. Almost 80% of respondents reported being over the age of 45, with over half of respondents over the age of 55 (54%). Respondents as a whole were spread fairly evenly across different regions of the State of New York, with 35.5% practicing in the New York City boroughs, 28.4% in the New York City suburbs (Nassau, Orange, Rockland, Suffolk, and Westchester counties), and 35.2% in upstate counties (north of Orange and Westchester). Less than 1% of respondents reported practicing out of state or out of country.

Large Firm Survey Demographics. The Task Force received 298 completed surveys in response to the large firm survey. As would be expected, 87.8% of respondents reported working at a firm with at least 20 attorneys, and 48.4% reported working in offices with 100 or more attorneys. 72.5% of respondents indicated that they were in the position of partner, managing partner, or of counsel, while 14.8% indicated they were associates or senior associates, and 12.7% indicated “other” positions, including staff attorney, senior counsel, and retired. 83.2% of respondents had been admitted to the bar for at least 10 years, with 72.4% of respondents having been admitted for at least 20 years. 77% of respondents were over the age of 45, with over half of respondents being over the age of 55 (55.6%). Geographically, the majority of respondents reported primarily practicing law in the New York City boroughs (58.5%), followed by 27.6% of respondents practicing upstate (north of Orange and Westchester

counties), 11.2% in New York City suburbs (Nassau, Orange, Rockland, Suffolk and Westchester counties), and 2.7% practicing out of state or out of country.

Corporate Counsel Survey. The Task Force received 92 completed surveys in response to the corporate counsel survey. In line with expectations, 85.9% of respondents identified themselves as corporate counsel, whose titles included “General Counsel,” “Associate General Counsel,” “Senior Counsel,” and “Associate Counsel.” 87.8 % of respondents indicated that they used outside counsel. The reported size of the legal departments varied widely and stretched from one end of the spectrum (one attorney) to the other (over 100 attorneys). 27.5% of respondents said their organization had just one attorney, while 21.3% said there were at least 100 attorneys in the organization. These were the largest two categories, with the numbers of respondents ranging from 3.8% in 50-99 attorney law departments to 18.8% in 2-5 attorney law departments. 80% of respondents reported being admitted to the bar for over 10 years, with 60% of respondents reporting admission for at least 20 years. In comparison to the small and large firm surveys, the largest age range of corporate counsel respondents was between the ages of 36 and 65 (80.2%), followed by 67.9% who were over the age of 45. Geographically, the survey showed a much larger percentage of respondents practicing either out of state or out of country (40.8%) than the small and large firm surveys. The next largest geographic area represented was the New York City boroughs with 28.4% of the respondents, followed by upstate (north of Orange and Westchester counties) with 17.3%, and New York City suburbs (Nassau, Orange, Rockland, Suffolk and Westchester counties) comprising 13.6% of respondents.

B. Questions Presented

For both small and large firms, the survey asked the following six questions designed to elicit respondents’ substantive views on nonlawyer ownership:

- (1) Please indicate your position with respect to the ABA proposal for non-lawyer ownership of firms.
- (2) Please explain why.
- (3) If the ABA proposal were adopted, would you consider giving non-lawyers an ownership interest in your law firm under the terms proposed?
- (4) If so, how would it benefit your firm?
- (5) If no, please explain why.
- (6) Please include any additional comments you may have about this issue.

The corporate counsel survey posed a slightly different set of substantive questions, again designed to elicit respondents' views on nonlawyer ownership of firms.

- (1) Please indicate your position with respect to the ABA proposal for non-lawyer ownership of firms.
- (2) Please explain why.
- (3) If the ABA proposal were adopted, would you consider it beneficial for your outside counsel to grant non-lawyers an ownership interest in your law firm under the terms proposed?
- (4) Please explain why.
- (5) If yes, how would this benefit your organization?
- (6) If no, please explain what detriments you perceive to your organization.
- (7) Please include any additional comments you may have about this issue.

C. Survey Results

Of the 1,211 total survey responses received across small firm, large firm, and corporate counsel respondents, 78.4% of all respondents opposed the ABA NLO Proposal. The largest percentage of opponents was seen in the small firm survey, where 81.7% of respondents opposed

nonlawyer ownership. While still representing a majority, corporate counsel respondents were less strongly opposed to nonlawyer ownership, with 67.9% in opposition. Large firm respondents fell in the middle with 75.2% in opposition. Only 4.8% of all respondents reported that they were “not sure” whether they supported the ABA NLO Proposal. A larger percentage of respondents in the corporate counsel survey reported they were “not sure” of their position (11.1%) than did respondents in the small and large firm survey (5.0% and 2.7%, respectively).

In response to the survey about why the respondent was or was not opposed to the ABA NLO Proposal, comments revealed similar trends across all three populations. Comments in opposition to the ABA NLO Proposal generally referred to concerns regarding lawyer independence, client confidentiality, inability to enforce ethical duties of nonlawyers, improper focus on profit over client needs, inability of nonlawyers to fully comprehend the ethics rules, and tarnishing the image of the profession.

Some of the most illustrative comments in the small firm survey from respondents who opposed the proposal were the following:

- “I believe it would lessen the freedom of the attorney to make professional decisions on behalf of the client since investment considerations might prevail over what is best for the client.”
- “A disbarred lawyer could easily get right back into the game by being a non-lawyer owner of a subsidiary firm.”
- “The non-lawyer expert can be well compensated for his expertise on an employee or consultant basis.”
- “Lawyers go through rigorous and expensive schooling and testing to have the privilege of calling themselves lawyers”

- “This will be the end of pro bono work.”
- “Many businesses today operate on a cost-benefit analysis, where they weigh the cost of disciplinary/criminal consequences against the benefits of rule-breaking. However in law, that is an unacceptable philosophy. Our professional standards are clear: the consequences of an ethical transgression are not a cost of doing business. Ethical transgressions are themselves inherently unacceptable.”

Comments from large firm survey respondents included similarly illustrative remarks in opposition to nonlawyer ownership, such as the following:

- “I feel this will be detrimental to firms providing pro bono legal services as nonlawyers will possibly not understand that ethical obligation.”
- “[It] would demean lawyers in the eyes of the public, who would regard it as further evidence that lawyers are in it solely for the money.”
- “If a non-lawyer fails to comply with rules of ethics, they do not have a license that can be revoked/suspended, etc. This equates to a lack of accountability.”
- “This proposal does not allow for the fundraising that those who seek nonlawyer equity investments have requested, and actually provides for a system more dangerous to the public in which the nonlawyer equity investors actively interfere with the lawyers’ performance of their duties.”
- “[P]lacing profitability ahead of a client’s interest.”

Many of the corporate counsel comments raised the same concerns voiced by small and large firm survey respondents in opposition, and included the following:

- “Independent judgment is one of the most critical facet[s] of being a counsel. This could be seriously impacted if we have non-lawyers owning law firms.”

- “There are other ways of getting non-lawyer capital that do not involve granting ownership rights.”
- “[P]ressure to pursue business at expense of integrity and following the ethics rules.”

On the other side of the coin were comments submitted in favor of the ABA NLO Proposal. These comments generally touched on similar rationales across all respondent populations – *i.e.*, improving access to legal services, increasing innovation and competition, increasing access to capital, a desire to keep pace with international markets, and beliefs that the ABA NLO Proposal had sufficient safeguards.

Small firm respondents offered comments in favor of the ABA NLO Proposal such as the following:

- “It’s extremely limiting to restrict the profession to only partnering with lawyers.”
- “As a small law firm, it may provide opportunity to gain increased business which is not extremely competitive.”
- “In my business I am often paired with advisors whose services coincide with my services. An ability to market joint services would not only be beneficial to my business, but also clients would be better served.”
- “The modernization of the legal profession requires access to capital which is not available under the current model.”
- “[O]ther common law countries allow public listings of law firms . . . firms in the U.S. are at an extreme disadvantage.”
- “[It] aids in succession issues so that an older partner may leave his interest to a family member who is not an attorney.”

- “As a society, we are better off with less restricted, less expensive legal services . . . reduces restrictions and costs through a freer flow of capital and talent.”

Large firm respondents made comments in favor of the ABA NLO Proposal such as the following:

- “Law firms are a business. So long as the rules of professional conduct are complied with, there is no reason other than history to restrict the ownership of this business.”
- “Law firms will be more efficient if they can offer services by non-lawyers.”
- “[Am a] member of the DC bar and worked in a firm with non-lawyer owners in the past...when well done, can be a very good partnership with benefits to clients and the justice system.”
- “[W]e as lawyers are so protective of our own profession that we overlook that the world is ‘bundled’ now and clients want one-stop integrated services. . . . The current approach looks back instead of forward in a global economy and is not in line with EU models.”

Corporate counsel comments included the following (interestingly, a number of comments referred to perceived benefits for small firms):

- “[B]etter competitive environment.”
- “I think this will help smaller firms offer cost-effective services.”
- “[W]ould broaden the pool of capital available to lawyers looking to start law firms and would allow for a larger pool of talent when searching for business

partners with proven skills in the areas of business administration, management and entrepreneurship.”

It should be noted that a handful of respondents indicated that it was too soon for them to form an opinion, providing comments like “too early to tell” and “would want more info on what services the non-lawyer owners would be able to [do].”

In response to whether, if adopted, respondents would consider granting ownership interests to nonlawyers (in the case of law firms) or would consider it beneficial (in the case of corporate counsel), 77.1% of the total 1,211 respondents answered “no.” Once again, small firm respondents had the largest majority in opposition among the three populations (82.5%), corporate counsel respondents had the smallest majority (66.3%), and large firm respondents fell in the middle (71.2%). Only 9.4% of all respondents reported that they were “not sure” whether they would grant nonlawyers ownership interests in their firm or would view it as beneficial. A larger percentage of corporate counsel respondents said they were “not sure” (20%), as opposed to large firm respondents (10.6%), and small firm respondents (8.2%).

Comments given in response to this question were similar to those expressed about the ABA NLO Proposal generally. The comments also provided insight into the practical applications and effect of adopting the ABA NLO Proposal.

On the one hand, small and large firm respondents who indicated that they would not consider retaining nonlawyer owners submitted comments such as the following:

- “My firm does not have enough specialized business which would support the need for these services. It makes more sense for us to contract for outside services as we need them.” (Small firm)
- “I am in solo practice to be independent.” (Small firm)

- “As solo practitioners, we already have to be extraordinarily diligent to avoid conflicts and maintain a practice within the guidelines of the Code of Professional Responsibility. I do not want to have to spend time monitoring the actions of a non-lawyer who may not care if I lose my license.” (Small firm)
- “[T]he proposal sounds a lot like ‘champerty,’ pure and simple. The non-lawyer ‘owner’ in this proposed scenario exists only to profit from his supposed ‘participation’ in the legal endeavor.” (Small firm)
- “I do not want my practice to be subject to the financial demands of investors who have no interest in representing clients on an independent and ethical basis, rather than as objects to be milked to reach a bottom line.” (Large firm)
- “I am ‘old’ fashioned.” (Large firm)
- “I would consider myself at risk in being partners with a non-lawyer. How can I ensure that he complies with the rules, when he does not have the same training as an attorney and he has no license at risk for his misdeeds.” (Large firm)
- “Adding a non-lawyer looking for profit to our firm would definitely intensify the debate we already have – should we take on a case that we believe will benefit our community as well as our client even though it may involve considerable financial risk and years of legal services to prevail. That case will probably never be profitable.” (Large firm)

On the other hand, small and large firm respondents who would consider granting ownership interests to nonlawyers made comments that included:

- “It would enable us to ‘insure’ that the employee would be less likely to seek employment elsewhere.” (Small firm)

- “I could focus more on practicing law, and less on day to day running of a business.” (Small firm)
- “For my firm, I am interested in offering discovery services. It would be a lot easier to get into that business with an equity partner in information technology.” (Small firm)
- “[T]here are other skills that would benefit the firm, skills that might not have been acquired by a traditional lawyer. A non-lawyer might bring diverse information to a practice.” (Large firm)
- “[It] will enable greater flexibility for interdisciplinary problem solving and facilitate the financial health of private practice.” (Large firm)
- “Increased access to expansion capital.” (Large firm)

Corporate counsel respondents who did not view nonlawyer ownership as beneficial offered comments that included the following:

- “I would probably cease using any law firm owned by non-lawyers.”
- “I use outside counsel for legal work only, not in seeking business advice.”
- “I will be very suspicious about that advice knowing there are investors/shareholders who are more profit driven.”
- “I want the attorneys I use to be concerned only with me as a client. I do not want to have to wonder if the attorney is basing his decisions for me on the basis of earning a good return for his non-lawyer investors.”
- “[It] would place a burden on in-house counsel who would need to research non-lawyer owners in the firms under consideration to avoid potential conflicts of interest which would otherwise exist.”

- “[P]oor legal advice.”
- “[T]he shareholder of my lawyers may be the competitor of my company.”

On the other hand, corporate counsel also expressed views that extending nonlawyer ownership rights would be beneficial, including:

- “Should also reduce costs of cases involving experts.”
- “Would allow my outside attorney advisors to use, e.g., CPA to provide numerical calculations to support the attorney’s advice.”
- “Reduce costs.”
- “Shorten time to trial or arbitration; ensure experienced testimony or advice on nonlegal aspects of case.”

The surveys’ request for “any additional comments” provided further insight on respondents’ views, revealing some of the most candid reactions, and making it clear that the issue evoked strong feelings across all populations.

On the one hand, survey respondents’ comments in opposition included:

- “I feel very strongly that the NYSBA should not support this move. It will further dilute the public’s image of the legal profession – which should be about helping non-lawyers navigate our civil and criminal justice system, but is more and more perceived by the public as simply a way to exploit the struggles of individuals for the benefit of the elite. Focus more on how we can regain our stature in the community, please?” (Small firm)
- “It is difficult enough to police the practice of law when it is limited to admitted attorneys.” (Small firm)
- “This is a slippery slope.” (Small firm)

- “I am surprised at the ABA and very disappointed in them. . . to promote what will be the ultimate demise of the profession is astonishing and a testament to the fact that they have lost their way.” (Large firm)
- “[T]he question should be not how would the proposal benefit the firm, but how does the proposal benefit the client.” (Large firm)
- “This is all about greed for the few and not about delivering more efficient, effective, counseling to the majority of citizens at a reasonable fee.” (Large firm)
- “[T]he burden should be on those proposing this change to show why the legal profession needs nonlawyer owners.” (Corporate counsel)
- “[W]ill discontinue my membership should the ABA adopt this rule.” (Corporate counsel)

On the other hand, additional comments in support included:

- “Please make this proposal happen. I think it’s a shame that we’re needlessly limiting business when our economy is struggling so immensely.” (Small firm)
- “Much has happened since 2000, including the report in the UK from Sir David Clementi that formed the basis for the UK Legal Services Act. We need to be alert to these changes and be prepared to respond to them in appropriate ways, o[r] we are going to be left behind.” (Small firm)
- “Although some might argue it is a first step down a slippery slope, the District of Columbia has not slid further down that slope in 20 years.” (Large firm)
- “Legal Services has a lot of people on our Board of Directors who are not lawyers, and I think it works out ok.” (Large firm)

- “The UK recently allowed ABS and my organization is one that is looking to take advantage of that. The bar should be open to innovative structures and focus on ensuring the ethical practice of law within those new structures.” (Corporate counsel)
- “We have professional standards to be upheld AND ENFORCED, and a non-lawyer ownership interest could encourage morality at a higher standard outside the law.” (corporate counsel) (emphasis in original)

In sum, the survey revealed that most respondents, whether from small firms, large firms or corporate counsel, did not support adopting the ABA NLO Proposal in New York. While this survey does not purport to represent a statistically representative sample, it is reasonable to infer that the reasons and comments expressed by the respondents are reflective of both the positive and negative opinions of the larger population of New York-licensed attorneys.

VII. Positions of Other States and Committees

In addition to our NLO Task Force, several committees and bar associations from other jurisdictions or from NYSBA sections have issued formal opinions or reports in response to the ABA’s nonlawyer ownership proposals. The Task Force has considered each of the positions from these associations, sections and committees of which we are aware, each of which is summarized in this section. In addition, substantial comments were posted on the Ethics 20/20 Commission’s website.¹⁵⁶

¹⁵⁶ Comments *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/alps_working_group_comments_chart.authcheckdam.pdf.

A. *Opinions in Opposition*

1. New Jersey

In a January 2012 Report, the New Jersey State Bar Association's Professional Responsibility and Unlawful Practice Committee recommended that the Association's Board of Trustees oppose the ABA's then-existing proposal on nonlawyer ownership of law firms.¹⁵⁷ The Committee consists of lawyers from various fields of the profession.

The New Jersey Report concisely stated several bases for opposing the ABA NLO Proposal. The Report noted that the existing system serves the public well and requires personal accountability of lawyers to the judiciary.¹⁵⁸ It emphasized that no Committee member knew of an interest by the local bar, the business community, or general public in allowing nonlawyer ownership.¹⁵⁹ It also noted that the existing rules governing law firm ownership already permit firms to employ nonlawyers and compensate them as they see fit.¹⁶⁰ The New Jersey Report emphasized a general concern about "encroachment on attorneys' accountability and independent professional judgment," and a concern that the proposal "may be tantamount to MDP in sheep's clothing," which New Jersey has long opposed.¹⁶¹ Overall, the New Jersey Report position can be summarized in its statement that the Committee was "wary of changing the status quo without good reason to do so."¹⁶²

The New Jersey Report was adopted by the New Jersey State Bar's Board of Trustees in January 2012.

¹⁵⁷ NJSBA Report of the Prof'l Responsibility and Unlawful Practice Comm. on Ethics 20/20 Proposal to Permit Non-Attorney Ownership of Law Firms (January 25, 2012). One committee member, Steven M. Richman, lodged a minority position in favor of the proposal, in which he criticized the Report's "categorical rejection" of the proposal's effort to "address the reality of the global practice of law while insisting on adherence to local ethical standards." He viewed the proposal as "appropriate, necessary and sufficiently protective of the issues raised in the [Report]."

¹⁵⁸ *Id.* at 1.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 2.

¹⁶² *Id.* at 1.

2. *Illinois State Bar Association*

In March 2012, the Illinois State Bar Association (“ISBA”) adopted a resolution opposing the ABA’s proposals to change Model Rule 1.5 and Model Rule 5.4(b).¹⁶³ The Resolution set forth two ISBA policies: “permitting the sharing of legal fees with non-lawyers or permitting ownership and control of the practice of law by non-lawyers threatens the core values of the legal profession”; and it is ISBA “policy to oppose any effort by the American Bar Association to change the Model Rules of Professional Conduct to permit lawyers to share legal fees with non-lawyers or permit law firms directly or indirectly to transfer ownership or control to non-lawyers over entities practicing law.”¹⁶⁴

The Illinois Resolution recited that the changes proposed by the Ethics 20/20 Commission would be inconsistent with both prior ABA policy established in July 2000, as well as Illinois Rule of Professional Conduct 5.4.¹⁶⁵ Further, the Resolution noted that “there has been no demonstrated need or demand from the public or profession for such changes in the Model Rules” and that the sharing of legal fees with nonlawyers adversely impacts core values of the profession such as the exercise of independent judgment and regulation by the judiciary.¹⁶⁶ The Illinois Resolution affirmed and proposed that the ABA affirm and re-adopt “the policy adopted by the American Bar Association in July, 2000, to wit:

The sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession. The law governing lawyers that prohibits lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring

¹⁶³ ISBA Resolution Opposing Certain ABA Ethics 20/20 Proposals And/Or Working Drafts of Proposals and Affirming and Re-Adopting Policy on Fee Sharing and Non-Lawyer Ownership and Control of Law Practices (March 2012).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

to non-lawyers ownership or control over entities practicing law should not be revised.”¹⁶⁷

ISBA further resolved that the ABA should reject all proposals to amend Model Rules 1.5 and 5.4 and to permit publicly traded law firms, nonlawyer ownership of or investment in law firms, and multidisciplinary practice.¹⁶⁸

In June 2012, together with the ABA’s Senior Lawyers Division, ISBA filed a Report and Resolution (denominated ABA Resolution 10A) with the ABA’s House of Delegates urging the ABA to re-adopt its 2000 House of Delegates Resolution “particularly at a time when technological advances and globalization are pressuring the profession to lessen its commitment to the public and to professional independence.”¹⁶⁹ The Report reminded the ABA of the core principles and values set forth in the 2000 Resolution.¹⁷⁰ With regard to the Ethics 20/20 Commission’s proposed changes to Rules 1.5 and 5.4(a) on choice of law, the Report emphasized that “[i]f adopted by the House, this would amount to an approval of nonlawyer fee splitting and ownership” which is inconsistent with the policies of all 50 states.¹⁷¹ The Report urged that because the 20/20 Commission had expressed its intention to continue considering the ABA Choice of Law Proposal (after removing from consideration the ABA NLO Proposal), it was imperative that the House of Delegates give guidance as to how the Commission should proceed. The Report also stressed the importance of reaffirming the ABA policy because wide public distribution of the Commission’s nonlawyer ownership proposals had fostered public perception that the profession desires to adopt nonlawyer ownership.¹⁷² The Report urged the

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ ABA, ISBA and the Senior Lawyers Div. of the ABA Report to the House of Delegates, Resolution (Aug. 2012) (hereinafter referred to as “Resolution 10A”).

¹⁷⁰ *Id.* at 2.

¹⁷¹ *Id.* at 5 (emphasis in original).

¹⁷² *Id.*

ABA to avoid the “evils of fee sharing with nonlawyers” and emphasized that lawyer independence is as important to proclaim and advocate throughout the world as is due process and the rule of law.¹⁷³

Resolution 10A was supported by the ABA’s Young Lawyers Division, the Maryland, Indiana, Mississippi, North Carolina, New Jersey, Oregon, Nevada, Iowa and South Dakota bar associations and the National Conference of Women’s Bar Association.

Prior to its August 2012 meeting, the ABA House of Delegates distributed a “point/counterpoint” discussion regarding Resolution 10A, with contributions from proponents and opponents. John Thies (ISBA) and Richard Thies (ABA Senior Lawyers Division) authored the proponent opinion. Michael Traynor and Jamie Gorelick (on behalf of the Ethics 20/20 Commission) authored the opposition opinion.

The proponent opinion urged that the Resolution be debated and voted on at the ABA’s Annual Meeting in Chicago, citing the same reasons set forth in the Resolution itself. The opposition opinion cited three reasons to oppose Resolution 10A. First, in contrast to the position of the proponents, the Commission is unambiguously not recommending “a change in ABA policy on nonlawyer ownership in law firms.” Second, there is “no need for a ‘public clarification’ regarding ABA policy.” Third, “Resolution 10A would foreclose the House of Delegates from even considering related proposals on conflict of rules that the Commission has not yet decided to make and that would not come before the House until February 2013.” The opposition position emphasized that it would be “bad practice” to take preemptive action to foreclose consideration of the issue before all views were fully presented. Further, all members of the Ethics 20/20 Commission, even those who voted against altering the prohibition on

¹⁷³ *Id.*

nonlawyer ownership, felt that consideration of the choice of law issue should proceed for consideration.

At the ABA House of Delegates meeting in August 2012, the House passed a motion to postpone indefinitely consideration of Resolution 10A.

3. *NYSBA Trusts and Estates Law Section*

In response to a request by the Section's Executive Committee and the Task Force's solicitation of comments, in March 2012, the Practice and Ethics Committee of the Trusts and Estates Section issued a report on the ABA's NLO Proposal.¹⁷⁴ The report summarized a survey of members of the Section's Executive Committee, members of the Practice and Ethics Committee and NYSBA's Trusts and Estates listserv. It concluded that this practice area does not favor the ABA's proposal.¹⁷⁵

The Committee's main inquiry was to measure the extent of demand for the proposed change among law firms and their clients. To that end, the Committee issued a survey posing four questions:

- (1) In your T&E practice, do you employ non-owner professionals in the delivery of legal services?
- (2) In your T&E practice, would you offer ownership interests to recruit and retain non-lawyer expertise?
- (3) In your T&E practice, would you expect that non-lawyer ownership would increase the accessibility of your legal services to the public?

¹⁷⁴ Memorandum to Exec. Comm. from Practice and Ethics Comm. re: Report on the Dec. 2, 2011 ABA Discussion Paper on Alt. Law Practice Structures Re Proposal to Amend Rules of Prof'l Conduct to Permit Non-Attorney Partners (March 2, 2012).

¹⁷⁵ *Id.* at 1.

(4) Do you support the proposed ABA amendment to Rule 5.4 of the Rules of Professional Conduct?¹⁷⁶

The Committee reported receiving 27 survey responses, which revealed the following: 59.3% of respondents did not employ non-owner professionals; 88.9% of respondents would not offer ownership interests to recruit nonlawyer expertise; 81.5% of respondents would not expect nonlawyer ownership to increase accessibility to legal services; and 74.1% of respondents did not support the ABA NLO Proposal.¹⁷⁷

Comments from survey participants included the following: “attracting talent can be achieved through contractual means”; “the ABA [NLO] proposal does not go far enough”; “[t]here is no effective mechanism to enforce non-attorney partner compliance with the Rules of Professional Conduct”; “this change would be contrary to our core values and ethical obligations as attorneys”; and “the ABA should explore options that would allow U.S. firms to compete internationally in a way that does not permit U.S. firms, or the U.S.-based component of a multi-jurisdictional firm, to offer partnerships to non-lawyers or be influence[d] by non-lawyer interests.”¹⁷⁸

The Committee’s report concluded that based on the survey results, NYSBA’s existing reservations about commingling business and legal interests, the inability to redress violations of ethical rules by nonlawyers, and the existing ability to contract with nonlegal professionals, the Trusts and Estates Section should oppose the ABA’s proposal.¹⁷⁹

In March 2012, the Section’s Executive Committee adopted the Committee’s Report.

¹⁷⁶ *Id.* at 3.

¹⁷⁷ *Id.* at 3-4.

¹⁷⁸ *Id.* at 4-5.

¹⁷⁹ *Id.* at 5.

B. *Opinions in Favor*

1. NYSBA International Section

In March 2012, the Executive Committee of NYSBA’s International Section adopted a Report supporting the ABA NLO Proposal, while also recommending that the proposal be more expansive.¹⁸⁰ The International Section reported that its members consist of lawyers licensed in New York, as well as other states, and internationally. To prepare its Report, the Section formed a Subcommittee of four members to gather input from Section members.¹⁸¹

As background, the Report recognized that nonlawyer ownership was preferable to existing threats to the current legal system. These threats include improper influence exerted from banks through direct financing of litigation, document production websites like Legal Zoom and Rocket Lawyer, and non-conventional legal service providers or “alternative” models like Axiom.¹⁸²

The Subcommittee considered the experience of Slater & Gordon, a law firm with offices in Australia and the UK that went “public” in 2007. The Report noted that the Subcommittee had not heard any evidence of shareholder pressure that caused the firm to dilute its professional commitments.¹⁸³ The Subcommittee also considered the experience in the UK, which allows both multidisciplinary practice and alternative business structures pursuant to the Legal Services Act of 2007.¹⁸⁴ The Report indicated that over the course of several years, Section members have engaged in discussions with members of the UK bar.¹⁸⁵ The Subcommittee also stated that it was influenced by a desire to reduce “perceived restricted trade practices of lawyers.”¹⁸⁶

¹⁸⁰ NYSBA Int’l Section Task Force on Non-Lawyer Ownership Interim Report (Feb. 24, 2012).

¹⁸¹ *Id.* at 1.

¹⁸² *Id.* at 2-3.

¹⁸³ *Id.* at 3.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 4.

The Report identified certain issues that the Section remained concerned about. First, having heard of an instance where a U.S. firm was denied protection of Swiss professional secrecy laws due to its LLP status, the Section expressed concern about “moves to erode the attorney/client privilege, particularly in Europe.”¹⁸⁷ The Report also recommended a “fit and proper test” which all law firm owners (both lawyers and nonlawyers) would be required to meet.¹⁸⁸

After setting forth the Section’s considerations and concerns, the Report made seven “findings.”¹⁸⁹

First, given the International Section’s unique composition, the Report recommended that NYSBA regularly consult with the International Section as thoughts develop on issues relating to nonlawyer ownership.¹⁹⁰ *Second*, the ABA’s previous rejection of publicly traded law firms, passive nonlawyer investment, and multidisciplinary practice should be revisited. According to the Report, the ABA NLO Proposal was too conservative, and external investment is not likely to be any more harmful than sharing fees with a nonlawyer professional.¹⁹¹ *Third*, the Report found that the “imposition of ethical duties on nonlawyers needs clarity,” and that nonlawyer compliance with ethical rules needs certainty.¹⁹² *Fourth*, the Report sought clarity on the possibility of foreign lawyers as nonlawyer owners in a firm.¹⁹³ *Fifth*, the Report recommended that the ABA issue a one-page executive summary to engage busy lawyers and members of the

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* There is no specific definition of “fit and proper” in the Report, but the reference is likely to the LSB’s “Fit and proper person policy.” Legal Services Board, L&P 017 Fit and proper person policy – v2.0 (2012), available at <http://www.lsb.vic.gov.au/documents/L-P017FitandProperPersonPolicy-V2.pdf>; see also *supra* note 136 and accompanying text (discussing “fit to own” test).

¹⁸⁹ The Report pointed out some minor errors in the ABA report. For example, the Solicitors Regulatory Authority regulates the solicitors’ profession in both England and Wales, and not just England, as the ABA paper mistakenly indicated.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 4-5.

¹⁹² *Id.* at 5.

¹⁹³ *Id.*

public.¹⁹⁴ *Sixth*, the Subcommittee found evidence that the U.S. system needs to be modernized, as reflected by the fact that three U.S. law firms have registered with the UK as Legal Disciplinary Practices (“LDPs”).¹⁹⁵ *Seventh*, no disciplinary problems with LDPs have been reported in the UK, which suggested no evidence of diminished professional responsibility from their nonlawyer ownership scheme.¹⁹⁶

In sum, the Report advocated modernization of the legal profession, which would include models of law firm ownership previously prohibited in New York. Otherwise, the Report expressed concern that the U.S. may lose ground and law firms may relocate overseas.¹⁹⁷

The Report was adopted by the International Section in March 2012.

One month later, in April 2012, the Executive Committee adopted a second report (“Supplemental Report”) concerning NYSBA Ethics Opinion 911 and choice of law issues.¹⁹⁸ In sum, the Committee expressed its belief that “New York lawyers must be able to affiliate, as employees or partners, with US and non-US law firms that comply with the ownership rules of their home jurisdiction, regardless of whether those ownership rules permit non-lawyer ownership or not.”¹⁹⁹ The Supplemental Report raised concern that the impact of Opinion 911 will affect New York as a major international legal center, insofar as it places a disincentive on foreign firms from continuing to engage New York lawyers or maintain branch offices in New York. The Section feared that, as a result, New York may lose its preferred status as a legal center to more favorable jurisdictions, such as D.C.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 6.

¹⁹⁸ NYSBA Int’l Section Report on Non-Lawyer Ownership (April 12, 2012).

¹⁹⁹ *Id.*

As it concerned the ABA Choice of Law Proposal, the Section supported adoption of the proposal, urging that, at a “bare minimum,” the proposal is “*essential*” if New York does not change its position on nonlawyer ownership.²⁰⁰ Further, it noted that “such affiliation should be permitted regardless of the predominant jurisdiction in which, or with respect to which, the lawyer or foreign legal consultant performs services.”²⁰¹

On October 26, 2012, the Section issued a comment paper to the Task Force Report in which it supported the adoption of the Task Force Report but urged NYSBA’s House of Delegates to appoint a new task force to reconsider the issues.²⁰² According to the Section’s comments, such task force should be charged with adopting recommendations that will:

- (a) Preserve and enhance New York as a center for the practice of international law;
- (b) Provide for the independence of New York lawyers from nonlawyer controls that could compromise professional ethical standards and integrity, including those that can now exist as a result of debt financing; and
- (c) Develop rules and ethical standards applicable to law firms with nonlawyer ownership to ensure the continued maintenance of professional and ethical standards.²⁰³

The Section further advised that it resolved to appoint a Task Force within the Section to “continue to study the potentially conflicting obligations of lawyers exposed to inconsistent

²⁰⁰ *Id.* (emphasis in original).

²⁰¹ *Id.*

²⁰² Comment of the International Section, NYSBA to the Proposed Report and Recommendation of the Task Force on Nonlawyer Ownership (Oct. 26, 2012).

²⁰³ *Id.* at 3.

jurisdictional rules governing affiliation with non-NY firms with permitted nonlawyer ownership and consider means of effectively and fairly addressing these potential conflicts.”²⁰⁴

2. *NYSBA Commercial and Federal Litigation Section*

In July 2012, the Committee on Ethics and Professionalism of NYSBA’s Commercial and Federal Litigation Section issued a Report to the Section’s Executive Committee in which it recommended endorsing the Ethics 20/20 Commission’s proposed amendments to Rule 1.5(e), while recommending revisions to the proposal to amend Rule 5.4(a).²⁰⁵ This Report superseded prior draft reports in which the Committee had recommended endorsing all changes to Rule 1.5 and 5.4(a).²⁰⁶

The Committee endorsed the ABA’s proposed changes concerning inter firm fee sharing, as expressed in the amendment to Rule 1.5(e), because “it helps clients get multijurisdictional advice, it frees attorneys from the difficult task of policing the compensation policies and ownership structure of independent firms in foreign jurisdictions, and it does not interfere with the ability of New York lawyers to make judgments for the benefit of their clients free from the influence of non-lawyer members of the foreign firms.”²⁰⁷

The Committee recommended restricting the ABA’s proposed amendment to Rule 5.4(a) on intra firm fee sharing, such that nonlawyers in the same firm would be permitted to share fees only if the following criteria are met:

²⁰⁴ *Id.* at 6.

²⁰⁵ Report of the Ethics and Professionalism Comm. of the Commercial and Fed. Litig. Section of NYSBA on the ABA Proposal for Comment on Choice of Law – Alt. Law Practice Structures (July 26, 2012).

²⁰⁶ *See, e.g.*, Report of the Ethics and Professionalism Comm. of the Commercial and Fed. Litig. Section of NYSBA, (June 8, 2012). The draft report viewed the changes as “advisable and necessary” to provide guidance to practitioners and address the “practical reality that some jurisdictions allow non-lawyer members.” That report also noted a lack of empirical evidence of instances where nonlawyers in a firm influenced legal advice given to a client, and that “lawyer independence does not seem to be compromised.”

²⁰⁷ *See supra* note 205, at 2.

- (1) the non-lawyer owners are in a foreign jurisdiction that permits non-lawyer ownership;
- (2) non-lawyer owners do not have the ability to control the management of the firm as a whole;
- (3) non-lawyer owners do not sit on the compensation committee or play any role, directly or indirectly, in decisions relating to the compensation of attorneys admitted to practice or working in jurisdictions that prohibit non-lawyer ownership; and
- (4) the non-lawyer performs professional services that assist the firm in providing legal services to its clients.²⁰⁸

In suggesting these limitations, the Committee expressed its concern that the modified Rule 5.4, as originally proposed by the Ethics 20/20 Commission, would lead to effective ownership and control by foreign nonlawyers over New York law firm offices.²⁰⁹

The Committee's report was adopted by the Section's Executive Committee in August 2012.

3. *New York City Bar Association Committee on Professional Responsibility*

In July 2012, the New York City Bar Association's Professional Responsibility Committee sent the Task Force a comment letter on the Ethics 20/20 Commission's proposed amendments to Rules 1.5 and 5.4, in which the Committee expressed support for the ABA's proposal.²¹⁰

²⁰⁸ *Id.* at 3.

²⁰⁹ *Id.* at 2.

²¹⁰ Letter from David Lewis, Chair of the City Bar Comm. on Prof'l Responsibility, to Stephen P. Younger, Chair, NYSBA Task Force on Nonlawyer Ownership (July 23, 2012) (quoting NYSBA Comm. on Prof'l Ethics Opinion 911 (Mar. 14, 2012)).

The Committee made several observations about the Ethics 20/20 Commission’s proposal. These observations included: Model Rule 8.5(b)(2) currently focuses on the rules of the jurisdiction in which either the conduct occurred or the predominant effect of the conduct is felt; the Ethics 20/20 Commission found no evidence of undue influence by nonlawyers upon lawyers in separate firms or firms in other jurisdictions where nonlawyer ownership is prohibited; and, since fee sharing is already occurring within firms through “accounting gymnastics,” the practical realities of legal practice necessitate a rule that explicitly allows for sharing of fees.²¹¹

The Committee then provided its own analysis by comparing New York’s Rules of Professional Conduct with the ABA Model Rules relevant to the issues. Specifically, the Committee noted that Rules 1.5(g) and 5.4 are both similar to the ABA’s version of the rules, that NYSBA Ethics Opinion 911 concludes that “a New York lawyer may not practice law principally in New York as an employee of an out-of-state entity that has non-lawyer owners or managers,” and that N.Y. Rule 8.5(b)(2)(ii), like ABA Model Rule 8.5(b)(2), effectively permits fee sharing with lawyers or firms in other jurisdictions where nonlawyer ownership is permitted only if the “predominant effect” of the conduct takes place in that other jurisdiction.²¹² The Committee noted that no empirical or other evidence demonstrated improper influence of nonlawyers where the nonlawyers are exclusively associated with firms, or firm offices, located outside New York.²¹³ Further, practical considerations suggest that New York firms currently have sister offices in nonlawyer ownership jurisdictions and that such firms would be required to maintain fiscal and managerial separation from a sister office. Finally, the Committee was

²¹¹ *Id.* at 2-3.

²¹² *Id.* at 4-5.

²¹³ *Id.* at 5.

unaware of any New York firm being “publicly disciplined for maintaining a separate office with nonlawyer owners in a jurisdiction that permits nonlawyer ownership.”²¹⁴

In sum, the Committee opined that “it is appropriate and desirable for the legal profession to proactively address and resolve issues raised by the disparate professional rules concerning fee-sharing with nonlawyers.” The Committee noted that “[l]eft unresolved, these issues may present an opportunity for a regulator outside the profession to seek to fill a perceived regulatory void.”²¹⁵ According to the Committee, New York lawyers currently face the choice of law issues implicated by the rules that inform the ABA Choice of Law Proposal and would benefit from guidance.²¹⁶

4. *NYSBA Committee on Standards of Attorney Conduct*

On October 3, 2012, the New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”), chaired by Joseph E. Neuhaus, submitted a memo to the Task Force in support of the Inter Firm Fee Sharing Proposal. By a vote of 14-6, COSAC adopted a position in support of the proposal.

Specifically, COSAC observed that the proposed Comment [9]

addresses in a practical way the problem presented by the fact that some jurisdictions now permit limited nonlawyer ownership of law firms while others do not. The instances in which such fee sharing will arise are relatively limited – principally, where a lawyer in one jurisdiction retains local counsel in another or refers the work on a matter to another lawyer in the relevant jurisdiction more qualified to handle the matter while retaining joint responsibility for the matter. Rule 1.5(e). [internal citation omitted]. The

²¹⁴ *Id.*

²¹⁵ *Id.* at 6.

²¹⁶ *Id.*

Comment clarifies that in such situations the fact that a non-lawyer owner of the other firm might receive a portion of the profits of that firm that stem indirectly from the fees shared by the in-state lawyer is too attenuated a path to qualify as sharing a fee with the non-lawyer owner – just as the receipt by a law firm’s employees or contractors of income that can be traced to legal fees does not amount to prohibited sharing of fees with a non-lawyer.

COSAC’s comments continued:

The proposed Comment properly emphasizes that a lawyer must at all times retain the ability to exercise independent professional judgment and may not allow a nonlawyer to direct or regulate the lawyer’s independent judgment. Thus, a New York firm would be permitted to share fees with a District of Columbia firm that has a nonlawyer partner, provided the lawyers in the New York firm maintain their independent professional judgment on behalf of the mutual client being served by both law firms and provided both firms were otherwise permitted to share fees in the matter.

According to COSAC, Comment [9] does not diverge from what historically has been understood as acceptable fee sharing arrangements – the agreement is consensual and confirmed in writing by the client, both firms serve a mutual client and both firms have to comply with their jurisdiction’s applicable ethics rules. Further, COSAC observed that making accommodation for cross-border co-counsel (which it contended already exists to some extent) “will not present undue risks of nonlawyer influence on the practice of law by lawyers in such firms” and that the risk of “improper influence” is “significantly reduce[d] since a nonlawyer owner would have to extend his or her influence to a separate firm.”

VIII. Task Force Observations and Recommendations

A. Task Force Observations

In this section of the Task Force Report, the Task Force has attempted to compile its observations about the various strengths and weaknesses of the proposals issued by the Ethics 20/20 Commission concerning nonlawyer ownership structures and choice of law issues. As noted above, the Task Force heard from many extremely knowledgeable and thoughtful speakers. Those speakers were diverse with respect to legal practice background, geography and viewpoints on the issues. Following research conducted by the Task Force, the Task Force members discussed their views on these issues. While each member may have had a specific reason or reasons in voting on the issues, the below observations were discussed by the group as a whole.

1. *Nonlawyer Ownership as an Alternative Structure for Legal Practice*

Some proponents of nonlawyer ownership contend that a nonlawyer ownership model could provide easier access to legal services for those otherwise unable to afford them, and provide several new opportunities for lawyers and law firms to better serve the public.²¹⁷ The Working Group for the Ethics 20/20 Commission reported that it had “heard anecdotal evidence from lawyers who advise District of Columbia law firms on arrangements for admitting nonlawyers to their partnerships that law firms, and small law firms in particular, are increasingly interested in having nonlawyer partners.”²¹⁸ Ethics 20/20 Commission stated that, “[t]hese firms believe that there is or will be client demand for the legal services that firms with

²¹⁷ Ethics 20/20 Discussion Draft on NLO, at 9; *see also* George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession’s Shift to a Corporate Paradigm*, 70 *FORDHAM L. REV.* 775, 845 (2001); Matthew W. Bish, *Revising Model Rule 5.4: Adopting a Regulatory Scheme That Permits Nonlawyer Ownership and Management of Law Firms*, 48 *WASHBURN L. J.* 669, 689–90 (2009).

²¹⁸ *Id.* at 2.

nonlawyer partners are well-positioned to provide.”²¹⁹ Examples cited by the Ethics 20/20 Commission “include law firms that focus their practice on land use planning with engineers and architects; law firms with intellectual property practices with scientists and engineers; family law firms with social workers and financial planners on the client service team; and personal injury law firms with nurses and investigators participating in the evaluation of cases and assisting in the evaluation of evidence and development of strategy.”²²⁰ In contrast, the D.C. Bar officials who presented to the Task Force revealed that there was minimal real world usage of this model in D.C.²²¹ The Task Force survey did not provide support for the notion that there is a strong need for alternative structuring in New York law firms.

Proponents of nonlawyer ownership have also argued that such a regime “permit[s] nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee.”²²² Comment 7 to District of Columbia’s Rule 5.4 provides the following examples: “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 who use accountants’ services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions.”²²³ The Working Group for the Ethics 20/20 Commission reported that it had heard anecdotal evidence from small firms that they could better recruit technology experts if they could offer them a partnership interest in a law firm. According to the Working Group, this, in turn, would allegedly “help them innovate

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *See infra* Appendix A, at A-13-14.

²²² D.C. Rule of Prof’l Conduct 5.4, Comment 7.

²²³ *Id.*

by harnessing new technologies, thus responding to accelerating demand.”²²⁴ However, N.Y. Rule 5.4(a)(3) already permits a lawyer or law firm to “compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit-sharing arrangement.” In this manner, profit sharing with such nonlawyer experts is currently permitted.

Thus, it cannot be that nonlawyer ownership is just about money and financial structuring of law firms.²²⁵ Rather, it is the concept of allowing nonlawyers to exercise “ownership” over a legal practice that lies at the heart of this debate. Thus, there is not strong support for allowing such ownership at this time.

2. *No Compelling Need*

Despite efforts to seek out voices who would speak for and articulate the “need” for nonlawyer ownership, the Task Force was unable to establish that there is any compelling “need” for alternative practice structures in New York such as nonlawyer ownership at this time. As noted in the survey results discussed in Section VI above, the Task Force did not observe any

²²⁴ Ethics 20/20 Discussion Draft on NLO, at 2.

²²⁵ The financial aspect of the prohibition on nonlawyer ownership has been raised in litigation brought by the law firm of Jacoby & Meyers. In *Jacoby & Meyers, LLP v. Presiding Justices of First, Second, Third and Fourth Dep’ts, Appellate Div. of Supreme Court of New York*, 847 F. Supp. 2d 590 (S.D.N.Y. 2012), Jacoby & Meyers LLP sought a declaration that New York’s Rule 5.4 is unconstitutional. The firm argued, among other things, that the prohibition on non-lawyer equity investment imposes higher capital costs and, therefore, impairs the firm’s ability to expand “their mission to provide lower cost legal services to those who cannot afford more traditional lawyers.” *Id.* at 591. The court granted the defendants’ motion to dismiss the complaint because the firm lacked standing to challenge the constitutionality of the Rule. *Id.* at 598. According to court records, the plaintiff filed a notice of appeal on April 5, 2012. The parties have exchanged appellate briefs and oral argument is scheduled before the Second Circuit on October 5, 2012. *Jacoby & Meyers, LLP v. Presiding Justices of First, Second, Third and Fourth Dep’ts*, App. Div. of Sup. Ct. of N.Y. (S.D.N.Y. 2012), *appeal docketed*, No. 12-1377 (2d Cir. Apr. 9, 2012). Jacoby & Meyers commenced similar actions in New Jersey and Connecticut. See *Jacoby & Meyers Law Offices, LLP v. Justices of the Sup. Ct. of N.J.*, No. 11-2866 (D. N.J., filed May 18, 2011); *Jacoby & Meyers Law Offices, LLP v. Judges of the Conn. Super. Ct.*, No. 11-817 (D. Conn., filed May 18, 2011). On March 7, 2012, the United States District Court in New Jersey denied defendant’s motion to dismiss, remitting the issue of whether an alternative business structure may exist under Rule 5.4(d) of the New Jersey Rules of Professional Conduct to the New Jersey Supreme Court for their review and analysis. The District Court retained jurisdiction over the federal constitutional issues and stayed the case until such time as a party seeks to reopen the matter. *Jacoby & Meyers Law Offices, LLP v. Justices of the Sup. Ct. of N.J.*, No. 11-2866 (D. N.J. March 7, 2012) (order denying motion to dismiss). Oral argument was held in the Connecticut action on March 23, 2012, but there is no subsequent history in the matter as of this writing. See *Jacoby & Meyers Law Offices, LLP v. Judges of the Conn. Super. Ct.*, No. 11-817 (D. Conn., filed May 18, 2011).

groundswell of support to adopt nonlawyer ownership in New York. While the Task Force did hear from bar leaders who believed that nonlawyer ownership could serve the profession well, the arguments put forth by most of these leaders spoke about the potential policy-level benefits of nonlawyer ownership as an alternative practice structure – such as improving access to justice or keeping pace with other countries. It is possible that the absence of any expression of a compelling need for nonlawyer ownership of law firms in New York was due to the lack of any meaningful empirical New York data on this issue and the extremely limited experience most practitioners have with these structures. But it is also consistent with the fact that the ABA decided to drop its original NLO Proposal.

3. *No Empirical Data*

It is critical to note that there simply is a lack of meaningful empirical data about nonlawyer ownership of law firms and what its potential implications are for the future of the legal profession in New York. No form of nonlawyer ownership has been allowed in New York and we are not aware of any empirical studies of any established forms of nonlawyer ownership in other jurisdictions. This created a material limitation on the Task Force’s ability to study the issue as it was difficult to assess past experience.

The only, albeit limited, experience that U.S. lawyers have with nonlawyer ownership of law firms is in Washington, D.C. The District of Columbia has permitted nonlawyer ownership since 1990 without any corresponding increase in disciplinary complaints.²²⁶ However, the Task Force also learned that nonlawyer ownership is used relatively little in D.C. Similarly, while LDPs have been permitted in England and Wales since March 29, 2009, apparently no

²²⁶ Ethics 20/20 Discussion Draft on NLO, at 9.

disciplinary problems with LDPs have been reported through November 2011.²²⁷ Nonetheless, it is simply too early to measure the success of these structures at this time.

Most Task Force members recognized that having more empirical data on nonlawyer ownership would be useful in assessing the issues. This is one of the most compelling reasons for future study as additional jurisdictions adopt forms of nonlawyer ownership.

4. *No External Pressures for Change*

International bar leaders told us that each adoption of nonlawyer ownership in their jurisdiction came about due to outside forces, either economic or governmental, which thrust the change upon the profession. The Task Force did not identify any jurisdiction that had recently adopted a form of nonlawyer ownership where the catalyst for that change came about as a result of a movement from within the profession. For example, the change in the UK came about due to the government's desire to promote competition in the legal market.

In the U.S., regulation of the profession has traditionally been handled at the State level of government. We are not aware of any governmental or other outside forces pressing for change in law firm ownership structures in New York.

5. *Concerns About Professionalism*

One of the most significant concerns for many Task Force members was the impact that nonlawyer ownership of law firms would have on "Professionalism." In one sense, professionalism is an individual responsibility of each and every lawyer. Thus, it is conceivable that an individual lawyer should still be able to uphold the highest standards of professionalism despite participation in a practice structure incorporating nonlawyer ownership. However, the vast majority of Task Force members observed that it was not worth taking the risk of impacting the core values of our profession by allowing nonlawyers to hold equity interests in law firms.

²²⁷ *Id.*

While professionalism is the responsibility of each and every individual lawyer, it goes beyond each lawyer. Professionalism informs how the profession is regulated as a whole and how our profession is viewed by the public. Despite the fact that there may be missed financial opportunities for lawyers and nonlawyers by not taking advantage of nonlawyer ownership, it is more consistent with the core values of our profession to continue to keep the concept that “ownership” of legal practices is an independent right to be exercised only by lawyers.

6. *Choice of Law Problems and Opinions 889 and 911*

While the Task Force did not observe any need to embrace nonlawyer ownership in New York at this time, there was greater recognition of the concerns related to the choice of law issues identified above. Given the continued increase in interstate and international law practice, New York lawyers need guidance on the ethical issues involved in associating with law firms outside New York that have nonlawyer owners and managers. Today, multijurisdictional law firms are governed by different rules regarding the permissibility of nonlawyer ownership based on their geography, which creates thorny problems for New York lawyers and law firms. Different permutations of these problems arise when New York lawyers or law firms associate with lawyers, law firms, or branch offices of such New York law firms located in jurisdictions that do permit nonlawyer ownership.²²⁸

For example, in Opinion 889, discussed in section II.F. above, NYSBA’s Committee on Professional Ethics opined that a New York attorney who was admitted and principally practicing in a firm in the District of Columbia could ethically conduct litigation in New York if he belonged to a District of Columbia partnership that included a nonlawyer who would benefit from the resulting fees. By contrast, in Opinion 911, also discussed in section II.F., above, the Committee opined that the inquirer, who was a New York attorney practicing law from a New

²²⁸ For example, there are issues regarding referral fees that arise with regard to nonlawyer-owned firms.

York office on behalf of New York clients, could not be employed by an out-of-state entity that has non-lawyer owners or managers. Other opinions in New York condone sharing of fees between lawyers licensed in New York with lawyers who are licensed in another state or country, but who are not licensed in New York, under certain conditions.²²⁹

As these Opinions demonstrate, New York lawyers face a multitude of choice of law and other ethical issues implicated by disparate jurisdictional rules on nonlawyer ownership, which led to Ethics 20/20 discussion drafts relating to potential amendments to ABA Model Rules 1.5(e) and 5.4. In addition, New York needs to be cautious about unduly inhibiting foreign law firms from setting up branch offices within the State. Left unresolved, these ethical issues may present an opportunity for an external regulator to seek to fill a perceived regulatory void. As a result, these issues are worthy of further study and analysis by the appropriate NYSBA committees as nonlawyer ownership develops in other jurisdictions.

Nonetheless, the Task Force concluded that there was a need to draw a sharp line against nonlawyer ownership at this time. The Task Force was also concerned that the ABA Choice of Law Proposal lacked protections against potential abuse of the proposed new rule and would undermine the current predominant effects test. The view of a majority of the Task Force was that if New York chooses not to allow nonlawyer ownership, it should not be allowed in through the back door under a choice of law rule and thereby allow professionalism concerns to erode.

The Task Force's initial concerns surrounding choice of law applied to both intra firm and inter firm fee sharing, the former proposal having been subsequently withdrawn by the Ethics

²²⁹ See NYSBA Comm. on Prof'l Ethics, Op. 864 (2011) ("A lawyer is ethically permitted to work on a personal injury case with an out-of-state lawyer and share legal fees with that lawyer if the arrangement complies with Rule 1.5(g)."); NYSBA Comm. on Prof'l Ethics, Op. 806 (2007) ("A New York law firm may participate with a foreign law firm in handling legal matters in New York referred by the foreign firm, and in sharing of legal fees in such matters, where the foreign firm's lawyers have professional education, training and ethical standards comparable to those of American lawyers and the firm otherwise complies with [Rule 1.5(g.)].

20/20 Commission on September 18, 2012, and the latter having been referred to the ABA Standing Committee on Ethics and Professional Responsibility on October 29, 2012.²³⁰

However, the Task Force does believe that *inter firm* fee sharing may raise fewer concerns than its counterpart.

The need to maintain the independence of a lawyer's professional judgment is a concern in both the context of *intra firm* and *inter firm* fee sharing. However, in considering the Inter Firm Fee Sharing Proposal, members of the Task Force observed that *inter firm* fee sharing presents little, if any, risk, provided that certain safeguards are maintained in the rules.

Specifically, in *inter firm* fee sharing, a lawyer is contracting with a completely independent law firm, responsible for complying with the ethics rules of its respective jurisdiction. Further, some members highlighted that the agreement is consensual and confirmed by the client in writing.

Finally, some members observed that these arrangements have, in practice, existed for some time, and represent a practical solution to a practical issue.

Nevertheless, the Task Force considered whether Comment [9] was the appropriate means of condoning *intra firm* fee sharing arrangements. On the one hand, some viewed a Comment as an inappropriate means of overruling the provisions of a Rule, noting that Rule 5.4 explicitly prohibits the sharing of fees with a nonlawyer. It was observed that to the extent any such change to Rule 5.4 is being made, it ought to take the form of a rule, and not a comment. On the other hand, others viewed Comment [9] as a simple measure clarifying an existing Rule. Opinion 889 provides that a lawyer is not sharing fees directly with a nonlawyer when sharing fees with the **firm** itself. Task Force members expressed the view that there is a difference between sharing fees directly with a nonlawyer, and sharing fees with a **law firm** that has nonlawyer owners – the latter being *arguably* permissible under current ethical rules.

²³⁰ See Fee Division Memorandum, *supra* note 93; *supra* note 103.

After deliberation, the Task Force reached a consensus that Comment [9] would best be served by adding an exception clause designed to protect clients and prohibit *inter firm* fee sharing where the lawyer's independent professional judgement is known to be at risk by virtue of a nonlawyer owner's influence. Specifically, with the addition of such language, Comment [9] would state as follows:

A lawyer who is governed by the Rules of Professional Conduct in this jurisdiction is prohibited from allowing a nonlawyer to direct or regulate the lawyer's independent professional judgment. See Rule 5.4 (Professional Independence of a Lawyer). Subject to this prohibition, a lawyer in this jurisdiction may divide a fee with a lawyer from another firm in a jurisdiction that permits that firm to share legal fees with nonlawyers or to have nonlawyer owners, unless the lawyer who is governed by the Rules of Professional Conduct in this jurisdiction knows that the other firm's relationship with nonlawyers violates the rules of the jurisdiction that apply to that relationship, or knows that a nonlawyer owner is directing or controlling the professional judgment of a lawyer working on the matter for which fees are being divided. See Rule 8.4(a) (prohibiting a lawyer from "knowingly assist[ing]" another to violate the Rules of Professional Conduct); Rule 8.5(b) (Choice of Law).²³¹

The Task Force reached a consensus that although the substance of this suggested revision to Comment [9] should be adopted by NYSBA, the appropriate implementation of the policy would best be carried out following further consideration by COSAC. By referring the implementation of the policy to COSAC, the Task Force expects COSAC's consideration to

²³¹ Suggested language has been underlined.

include whether the change is best accomplished through a modification to the Rules or through adoption of a Comment to the Rules. It should be noted that three members of the Task Force abstained from either supporting or opposing the Inter Firm Fee Sharing Proposal as revised or referring the issue to COSAC for further consideration.

B. Recommendations

At its meeting on June 7, 2012, the Task Force voted on: (1) whether New York should adopt any form of nonlawyer ownership (although the ABA NLO Proposal had been withdrawn) and (2) whether to support the ABA's Choice of Law Proposal. This Report was approved at a meeting of the Task Force on September 10, 2012.

On the issue of nonlawyer ownership, by a vote of 16-1, the Task Force opposed New York enacting any form of nonlawyer ownership at this time. When asked what conditions they would like to see before revisiting the issue of nonlawyer ownership, Task Force members primarily identified studies from jurisdictions where nonlawyer ownership is currently authorized. Members noted that they would want to see studies on the impact of nonlawyer ownership on access to justice, professionalism, lawyer independence, the relationship between the lawyer and the client, regulation of lawyers, and feedback from clients and "consumers" (as the UK refers to clients).

On the ABA Choice of Law Proposal, the Task Force unanimously opposed the proposal as written. By a vote of 9-5, the Task Force opposed any concept of *intra firm* sharing of fees with nonlawyer owners, even if subject to further restrictions.²³² By a vote of 9-6, the Task Force opposed any concept of *inter firm* sharing of fees, even if subject to further restrictions.²³³

²³² *Intra firm* sharing of profits with nonlawyer employees of the law firm is already permitted under Rule 5.4(a)(3) of the ABA Model Rules and New York Rule 5.4(a)(3), which provides that "a lawyer or law firm may compensate a nonlawyer employee...based in whole or in part on a profit sharing arrangement." See NYSBA Comm. on Prof'l Ethics, Op. 917 (2012) ("A law firm may ethically pay a bonus to a nonlawyer employee engaged in marketing

Subsequent to the Ethics 20/20 Commission’s withdrawal of the *intra firm* fee sharing proposal and issuance of its revised proposal on *inter firm* fee sharing, the Task Force reconvened in October to discuss and vote on the Inter Firm Fee Sharing Proposal. By a vote of 14-5, the Task Force voted in favor of the Inter Firm Fee Sharing Proposal, provided that the language of Comment [9] is modified to explicitly restrict fee sharing where a lawyer knows that a nonlawyer owner is directing or controlling his or her professional judgment, as set forth in Section VIII.A.6 above. Further, on November 1, 2012, the Task Force reached a consensus in favor of referring to COSAC the implementation of the policy behind the modification to Comment [9], including whether the modification is best accomplished as a Rule or as a Comment to a Rule.

September 10, 2012

Amended October 10, 2012, November 1, 2012

based on the number of clients obtained through advertising provided the amount paid is not calculated with respect to fees paid by the clients.”); NYSBA Comm. on Prof’l Ethics, Op. 887 (2011) (“Rule 5.4(a)(3) clearly allows a lawyer to pay a bonus to a non-lawyer employee, including an employee engaged in marketing, that is not based on referrals of particular clients or matters, but rather is based on the profitability of the entire firm or a department within the firm”); NYSBA Comm. on Prof’l Ethics, Op. 733 (2000) (under former DR 3-102(A)(3), “a lawyer may compensate non-lawyer employees based on profit sharing but may not tie remuneration to the success of specific efforts by employees to solicit business for lawyers or law firms”).

²³³ One Task Force member attending the June 7th meeting did not cast a vote concerning *intra firm* sharing of fees.

APPENDIX A

Speakers and Presentations at Task Force Meetings

A. *The Ethics 20/20 Commission*

The Task Force considered the viewpoints of several representatives from the Ethics 20/20 Commission including the Chair and individual members. Each expressed their support for the 20/20 Commission's proposal and elaborated on the basis for and requirements of the proposal with regard to alternative business structures for law firms.

At the January 25, 2012 NYSBA Annual Meeting, representatives from the Ethics 20/20 Commission led a panel discussion on the Ethics 20/20 Commission's recent ethics proposals, including the proposal on Alternative Law Practice ("ALP"). Chair Jamie S. Gorelick and Commission Member Frederic S. Ury spoke on the Commission's behalf.

Chair Gorelick expressed the view that the majority of the Commission then supported the ALP proposal, describing the proposal as "extremely modest." She explained that 10 years ago it was big firms that were seeking the benefit of MDP, but now she indicated that the push was coming from small firm lawyers.

Chair Gorelick also clarified that the ALP "proposal" was actually a discussion draft. In other words, the Commission was looking to the bar associations to provide data and real input to help answer two questions: (1) Is there a need or appetite for the proposal? (2) Is there a danger in adopting the change? At the time the discussion paper on ALP was issued, the Commission did not have any data or studies in its hands about the need for or impact of ALP structures, although Chair Gorelick indicated that they did look for such studies. She said that there had been no record of disciplinary complaints in D.C. stemming from nonlawyer ownership of law firms. She indicated that the evidence the Commission was able to amass

included testimony from a consultant to D.C. law firms, who gave the Commission anecdotal evidence that was supportive of the proposal. The Commission also went to the solo practice section of the D.C. bar, where half opined that they did not need ALP, and the other half said maybe. Chair Gorelick commented that the Commission saw the nonlawyer ownership movement in England as a success. She also explained that the Commission discussed the slippery slope issue and agreed that the legal profession should never jeopardize regulation by the courts and should not move toward national regulation of the legal profession.

At the Task Force's March 7, 2012 meeting, Phil Schaeffer, Liaison to the Ethics 20/20 Commission from the ABA's Standing Committee on Ethics and Professionalism spoke about the driving forces, benefits, and concerns behind the NLO discussion draft.

Schaeffer explained that in coming up with its proposal, the ABA was aware of a general sentiment against multidisciplinary practice ("MDP") and did not want to revive it. Instead, the ABA's proposal required that any outside investor support the legal practice itself. In crafting its proposal, the ABA looked to the only nonlawyer ownership prototype in the U.S. – the rule in the District of Columbia. For the last 20 years in D.C., lay people have been able to hold interests in law firms. The D.C. rule is broader than the Ethics 20/20 Commission proposal because in D.C. nonlawyers are able to provide services that are not limited to the legal practice. Schaeffer said that the ABA amassed quite a bit of testimony on the D.C. model, and the model has worked marvelously. Small firms as well as big firms have employed the new structure, and there have been no complaints. He also reported that the model has a broad range of applications, including land use and estate planning. The Ethics 20/20 Commission added more requirements than the D.C. model (e.g., requiring written certifications that outside participants are familiar with the Model Rules of Professional Responsibility and agree to abide by them,

making nonlawyers subordinate to lawyers, and requiring lawyers to maintain control over and responsibility for the practice). Schaeffer emphasized that the Ethics 20/20 Commission suggested a modest proposal requiring that nonlawyers work only in support of the legal practice; such as, for example, an investment advisor supporting estate services.

In response to questions from the Task Force, Schaeffer stated that regardless of whether firms can currently pay nonlawyers bonuses or contracts tied to firm profits, current rules do not allow for a long-term profit-sharing relationship. He elaborated that a lawyer just starting out may not be able to pay bonuses to employees, but could tie the firm's future success to compensation.

Concerning regulation and discipline of nonlawyers, Schaeffer expressed that the Ethics 20/20 Commission's proposal provides that if nonlawyers commit misconduct, their lawyer managers would be held responsible under the normal supervision rules and doctrines of respondeat superior. The only direct way to discipline a nonlawyer within the firm would be to sanction the nonlawyers by forcing them out of the firm. According to Schaeffer, the grievance committee is the last to receive news of misconduct. Schaeffer commented that the real regulation comes in the form of rising costs of malpractice insurance and premiums, and increased malpractice litigation. Further, while there would be no CLE requirements for nonlawyers under the 20/20 proposal, lawyers in the firm would be required to certify that the nonlawyer has read and is familiar with the Rules of Professional Responsibility.

Schaeffer explained that the impetus for the proposal was a desire to improve the quality of services provided to clients. He added that the Ethics 20/20 Commission perceived that the proposal would benefit young lawyers or lawyers of modest means who cannot afford to pay for expert services within their operations and cannot afford to pay a full salary; however, through

nonlawyer ownership, they could procure the desired expertise by offering long-term reward. He agreed with Chair Gorelick's earlier statement that the Ethics 20/20 Commission had no empirical evidence to support the proposal.

Schaeffer continued that the public is unaware of the legal profession's inability to finance litigation in general. Alternative litigation financing is another issue related to the proposal. He indicated that although clients pay for an expert, if the client cannot pay, the expert does not get paid. Having worked in land use law for many years, Schaeffer commented that many experts would have been happy if they were guaranteed a piece of the firm enterprise.

Schaeffer presented his own personal view that the Ethics 20/20 Commission's proposal did not go far enough, commenting that the proposal's 25% cap on nonlawyer ownership did not satisfactorily address the needs of solo practitioners just starting out. He believed the proposal should allow for full ownership, not an arbitrary 25% stake.

B. United Kingdom

At the Task Force's March 7, 2012 meeting, two speakers presented views regarding the United Kingdom's approach to ALP: Chris Kenny, Chief Executive of the UK Legal Services Board; and Anthony Davis, a partner at Hinshaw & Culbertson in New York. Each of the speakers described the movement leading up to the changes the UK made in how legal services are provided, allowing for full nonlawyer ownership, including passive outside investment. In addition, Davis and Kenny explained how legal services are regulated in the UK, and the perceived effectiveness of the system. Davis and Kenny expressed favorable views toward ALP and described the benefits it has provided to the UK.

Davis explained the genesis of the current regime in the UK. Ten years ago, during the Blair administration, a movement arose outside the legal profession to address perceived problems in the provision of legal services. The movement looked at the way solicitors were

disciplined and regulated, and concluded that the system was not working. Instead, a number of lawyers were committing fraud, and the system was harming clients and failing to address the needs of the public. Also around this time, the antitrust regulators in the British government began to look at restrictive trade practices within the legal profession, beyond just solicitors.

Out of this movement came a series of committees and reports, most notable being the Clementi Report, which led to the Legal Services Act of 2007. The Act provides for an overarching non-governmental, national regulator of all groups that regulate the legal profession, known as the Legal Services Board. The largest group regulated by the Legal Services Board is solicitors, and the second largest is barristers. Davis explained that one of the “sub-regulators” is the Solicitor Regulatory Authority (“SRA”). The SRA is an independent agency and is not a self-regulating entity.

As Chief Executive of the Legal Services Board, Kenny’s role is to regulate the regulators following eight overarching principles, which are laid out in the Act. Davis pointed out that the Legal Services Act is governed by the same objectives as the U.S. legal profession (e.g., service to clients, to the public, and professional independence). One critical difference is that the Legal Services Board and SRA also promote competition in the provision of legal services.

Kenny further explained that pressure from inside the UK around three issues combined to lead to this change. First, there was pressure from the UK competition authorities. A 2001 report concluded that law is no different from other businesses in that there should not be a barrier to ownership of law firms, because it would be unconscionable to allow such barriers anywhere else in the economy. Second, the profession was struggling to deal in a satisfactory way with complaints from consumers. Third, there was a collapse of confidence in self-

regulation of professions generally, including in other professions such as architects, as the country moved toward a more aggressive consumer culture. Kenny believes that nonlawyer ownership makes legal services much more accessible and less expensive.

Kenny also explained the workings of the Legal Services Act of 2007, describing it as complicated but absolute. The only two entities currently approved as legal licensing authorities are the SRA and the Council for Licensing and Conveyances (an authority of 1,000 people overseeing residential property work). The approval process is quite long and drawn out (it took 12 months in each case). The Act contains a specific test that imposes rules on regulators, and requires internal compliance structures and proper compensation arrangements.

Kenny informed the Task Force that there are 150 applications currently in the pipeline for NLO structures for law firms. He provided the following examples of structures: law firm partnerships consisting of IT directors and specialist lawyers, but not necessarily external investment; office staff receiving internal ownership rights in the company, which benefits firms in capturing the commitment of junior staff; small-to-large personal injury firms making initial public offerings (he commented that some people still feel uncomfortable with this example); private equity firms that are prepared to invest in law firms; family law firms; and in the communications business, a discrete personal injury work force of 120,000-130,000. Kenny indicated that he has seen a wide variety of practices within the last 2-3 months. Whether that level will be sustained and whether the front-line regulator approves them all remains to be seen. Kenny said the Board wants to make sure entry is possible, but also increase the professionalization of risk management in law firms at the same time.

In response to inquiries about the nature of investment structures, Kenny confirmed that investment structures have been tested to bring legal services to Main Street in the UK. For

example, there are plans to offer legal work in banking and food retailing. As one example, “Quality Solicitors” began three years ago, which helps brand and promote small firms.

Kenny explained the quality control and risk management measures the UK has put in place. Section 90 of the Act identifies three types of regulation: (1) proactively limiting the scope of the services; (2) regulating supervision of law firms; and (3) imposing penalties. Under the SRA model of quality control, the firm/entity is regulated as well as the individual (which was not the case before 2007). Before, partners were responsible only for those they supervised. Now, regulation is becoming a normal part of the legal market.

Davis described how the regulator regulates the entity as well as the individual in the UK. Each entity is required to have a chief compliance officer who is personally responsible for the provision of legal services by both lawyers and nonlawyers. Davis explained that management is also separately responsible and subject to discipline. The regulator can levy sanctions against the firm, but can also remove an owner from management or take away the owner’s investment, and prevent a nonlawyer from owning a piece of the firm in the future as well. The regulator has the power to place conditions on licenses and ownership interests, and levy fines for noncompliance of up to £50 million.

Davis described three levels of safety that are built into the Act. First, there is a fitness-to-own test, through which criminal records of all potential owners are checked. Second, there is general regulation of the profession. SRA regulation provides a less detailed set of rules but sets forth what the lawyer is to achieve for the client. Third, there are enforcement measures like imposition of fines.

Kenny responded to questions concerning the Act’s actual impact on the legal system in the UK. The Board reports annually on the impact of the Act on access to justice – one of the

specific objectives of the Board and regulators. There is an expectation that the UK will see improvement as to value and range of routine legal services that are provided, but Kenny expects to see a diminution in the number of small firms. Kenny sees consolidation as a sign that the market is serving the public better. Currently, eighty-five percent of firms in the UK have four partners or fewer, such as mom and pop solicitor shops.

Kenny believes that the Act has resulted in “consumer benefit.” Such consumer benefit is seen in mass marketing in the personal injury market, and greater accessibility in language and terms of service, all of which enables legal services to be less daunting to the customer. Kenny gave an example of a one-stop shop that provides both law and accounting services.

When asked how the system affects professionalism, Kenny responded that the profession is self-aware, and that self-training ensures ethical conduct. At the same time, although nonlawyers are bound by the same ethical rules, there are no ethics training requirements for nonlawyers because, as Kenny described it, there is no reason for nonlawyers to make legal judgments, so those activities are only being carried out by people with the legal skills to do them.

C. Australia

On May 14, 2012, the Task Force Co-Chair and Secretary participated in a conference call with Steve Mark, the New South Wales Legal Services Commissioner, and Tahlia Gordon, the Research and Project Manager at the New South Wales Office of the Legal Services Commissioner. The call focused on learning about Australia’s experience with alternative legal structures.

Mark explained that one of the biggest problems for organizations and law firms in America and England is the failure to understand what happened in Australia with regard to ALP. In his view, Australia did not go down the path of nonlawyer ownership at all. Rather, it

went down the path of reforming law firm structure and allowing law firms to incorporate, which incidentally allowed multi-disciplinary law firms. In contrast, the English allowed multi-disciplinary practices first and then followed the path of nonlawyer ownership, which Mark viewed as a fatal mistake.

As in the UK, Mark agreed that the push for change came from outside the profession. In 1999, due to federal government initiatives on competition policy, every jurisdiction in Australia was required to look at their legislation and determine whether there were barriers to competition. It was believed that all barriers should be removed unless the cost of removal was greater than the cost of retention. One of the results of this review was that Australia identified a barrier in the legal profession known as the “51% rule.” Under that rule, if a firm allowed any nonlawyer to participate in the practice, the lawyers in the firm had to control at least 51% of everything because of the ethical duties lawyers owed to the court. That rule, which existed in Australia for 10-15 years, was found to be anti-competitive toward accountants who could not enter law partnerships and have a controlling interest. Mark said that after some debate, but without much feedback from the legal profession, the government simply allowed multi-disciplinary practice to exist unfettered.

Mark explained the shift from multi-disciplinary practice to incorporation of law firms in Australia came by way of new legislation. When multi-disciplinary practice was introduced unfettered, a concern arose that accounting firms would call themselves law firms and “all hell would break loose.” That did not happen. At the time, multi-disciplinary practices were not regulated by corporate or legal regulators; legal regulators only regulated the conduct of individual lawyers, not entities. Mark commented that the existence of unregulated entities was one of the drivers behind the Australian government passing legislation called the Legal

Profession Act (“LPA”). By 2001, the government amended this legislation to allow law firms to incorporate, in order to bring them into a regulatory regime.

The LPA established the position of the solicitor director. The legislation requires any incorporated law practice to have at least one solicitor director, which Mark believes to be a key feature of the regulation. The solicitor director has the same duties as both a lawyer to the court, and as a director to the corporate regulator. Under the LPA, each solicitor director has to ensure that the law practice has appropriate management systems and is compliant with the LPA and the ethical duties of lawyers. As the regulator, Mark had to determine what an “appropriate management system” meant. To do so, he identified 10 points that firms must address (in contrast to what he referred to as a 300-page manual). Mark followed this route because he did not want to micromanage law firms by hiring 300 employees and evaluating the final management systems themselves. Rather, he wanted to force law firms to persuade him that they have a system that works. Mark only has a staff of 30, as compared to a staff of 1,200 for the legal regulator in the UK, whereas the size of the UK’s legal profession is only four times the size of Australia’s. According to Mark, the Australian system is not about heavy regulation. It favors principle regulation, as opposed to prescriptions.

As Mark expressed it, the Australian regulatory regime promotes professional ethics, values of professionalism which promote standards, profitability, standing in the profession, and competing on value (not commoditized services). The new system encourages a return to professionalism and away from commercialism, especially in small-to-medium size firms.

As an example of how this regulatory regime has worked, Mark pointed to Slater & Gordon, the first firm to go public in Australia. Before listing its shares, the firm met with Mark to show him the prospectus for the offering, and discuss promoting professionalism, the rule of

law, and client protection (given that his role is to reduce complaints related to these areas). Mark advised the firm to make serious changes to reflect that the firm would still be a law firm and not purely a corporation. Mark advised that, as a law firm, Slater & Gordon needed to make it clear that its primary duty is to the court, and not the corporate regulator. As a result, the firm revised its constitution and shareholder agreements to list a hierarchy of primary duties owed by its directors, in the following order of importance: (1) duty to the court, (2) duty to the client, and (3) duty to the shareholder. Mark informed us that Slater & Gordon recently acquired a UK firm, and used the same hierarchy of duties even though the UK does not require it. Slater & Gordon also added language informing investors that if there is a conflict between corporate law and the LPA, the LPA will prevail.

Mark noted that Slater & Gordon had a case against the tobacco industry. Shareholders of the firm wanted to drag the case out, so that they could earn more money through fees. However, the firm's clients were dying, so the law firm settled the case. Mark explained that shareholders cannot sue the firm the way they could as shareholders in a conventional corporation. As a result, he believes that the LPA structure helps return law firms to their roots as a profession and not just a business.

Mark emphasized that there is a difference between the UK and Australia regarding incorporation and external ownership. Referring to the pitfalls of the UK system, he noted that Sir David Clementi (who led the Clementi Report) was an accountant, not a lawyer. He missed the fundamental point of ensuring that the ethics of a law firm are maintained. Mark explained that the UK went about creating change in the wrong way, opening firms to external investors but not requiring a fit-and-proper test. Focus was placed more heavily on who the buyers were. Mark pointed out that the UK does not have a mechanism to require that the law firm remain a

law firm. Moreover, in Australia, if a solicitor director fails to ensure that the firm has an appropriate management system, Mark can step in and remove the solicitor director's practicing certificate, after which the firm will have seven days to find a new solicitor director or face involuntary liquidation.

As it concerns the impact of the LPA and law firm incorporation, Mark said complaints have dropped by two-thirds since law firms began incorporating. Mark and Gordon are looking at Slater & Gordon to examine the impact of the public listing on the firm's culture. They have talked to firm staff and administration, and have taken client surveys to get a sense of the internal climate at the firm. Their preliminary findings revealed no impact on the firm's ethical culture after listing publicly. Apparently, the concern is more about growth; the firm has grown so fast that employees do not know everyone in the firm anymore, and the firm is losing some of its collegiality. Mark informed us that, overall, the results have been wonderful because firm lawyers have been prompted to talk among themselves and figure out the best approach the firm should take. The result is a better-managed law firm, reduced complaints, better professionalism and ethics, higher profits, and less staff strain. Mark has received many "thank you" letters.

D. District of Columbia

At its meeting on April 24, 2012, the Task Force heard from representatives of the D.C. Bar; Carla Freudenburg, Regulation Counsel at the D.C. Bar; Hope Todd, the D.C. Bar's Legal Ethics Coordinator; Wallace E. Shipp, Jr., Bar Counsel, D.C. Office of Bar Counsel; and Lawrence Bloom, Senior Staff Attorney.

Todd provided the Task Force with background and the circumstances leading up to D.C.'s adoption of Rule 5.4(b). She explained that contrary to the common perception, D.C.'s NLO rule was not adopted because of pressure to allow nonlawyer lobbyists to join law firms. Rather, in the 1980s, when D.C. was considering adopting the ABA model rules, D.C. picked up

on two recommendations that the ABA rejected which aimed to provide better services to clients by loosening restrictions on sharing legal fees with nonlawyers. One of those proposals subsequently became Rule 5.4(b). Todd said the Rule is limited in scope because it allows individual nonlawyers to provide services only to an entity whose sole purpose is to provide legal services.²³⁴ The Rule does not allow passive nonlawyer investment in firms, nor is D.C. interested in pursuing that concept. She expressed the view that the practice of law is enhanced by offering other services, while remaining subject to the Rules of Professional Conduct.

Todd explained that D.C. lawyers are made vicariously liable for breaches of ethics rules by nonlawyer members of their firms, an obligation which must be recognized in writing. There are no CLE requirements for nonlawyers, and D.C. does not even have CLE requirements for its lawyers. Shipp confirmed that in the 20 years of Rule 5.4(b)'s existence, there have been no disciplinary complaints related to nonlawyer owners. Since D.C. does not regulate firms in the same way as the UK, when asked how D.C. would respond to a complaint concerning a nonlawyer, Shipp conceded that this is a legitimate concern but he has not had to confront it.

Todd and others described D.C.'s practical use and experience with the Rule, noting that it has been hard to track. They informed the Ethics 20/20 Commission that D.C. has no empirical evidence on how the Rule is working. Todd explained that the Rule itself has not attracted wide usage because outside of D.C., a lawyer would risk violating another state's rules prohibiting nonlawyer ownership. Thus, unless a firm is solely based in D.C., lawyers have been, and will be, fearful to take advantage of D.C.'s Rule 5.4(b) until other jurisdictions change their rules. This limits the practical ability of sizeable D.C. firms having nonlawyer partners, and the result is that only small-size firms can take advantage of this structure (e.g., nurses in

²³⁴ Shipp gave the following example of acceptable use of the Rule: a two-person law firm wants to bring in a social worker partner, both attorneys are licensed in D.C., and the social worker's function is related to the practice of law.

personal injury firms, and marketing directors). Although Todd was unable to give names because their ethics help line is confidential, she did disclose that the help line has received calls from firms purporting to have nonlawyer partners, asking how their role should be communicated to the public.

Shipp confirmed that use of the Rule is very limited. He indicated that the Rule's use may be limited because D.C. has a liberal admissions policy for out-of-state lawyers: 3,600 lawyers are admitted in D.C. each year, though only 125 sit for the D.C. bar. Thus, most lawyers will immediately have an ethics issue if they waive in from another jurisdiction and want to have a nonlawyer partner. The Ethics 20/20 Commission spoke with a D.C. lawyer who advises attorneys on setting up ALP structures. The lawyer said that although there is a lot of interest in the issue, most lawyers do not pursue it due to the licensing issues in other states. Instead, most firms set up ancillary services, pay good salaries to their nonlegal employees, or implement profit-sharing structures.

Todd and Shipp agreed that there is more interest from out-of-state firms wanting to take advantage of the D.C. model, as opposed to D.C. stand-alone firms. However, the D.C. bar's response has been to advise attorneys to be concerned about ethics issues in their primary jurisdiction of practice. At that point, most lawyers walk away. Shipp reported that of the roughly 1,000 phone inquiries he receives per year, only 10-20 are inquiries from lawyers who actually have nonlawyer partners in D.C. Shipp also indicated a willingness to allow a nonlawyer partner to be physically located outside the state, as long as the firm agreed to abide by D.C.'s ethics rules.

E. David Udell

The Task Force invited David Udell to speak at its meeting on April 25, 2012 about NLO's impact on access to justice issues. Udell is the Executive Director of the National Center

for Access to Justice at Cardozo Law School, and Chair of the Subcommittee on Access to Justice of the Committee on Professional Responsibility of the Association of the Bar of the City of New York. While Udell emphasized the need for improved access to justice, he noted that it is undetermined how NLO would enhance that goal.

At the outset, Udell noted that access to justice has become an increasingly serious problem. Because of the economy, many more people are unrepresented. Court budgets have been slashed, the legal services groups' budgets have been slashed, less interest is available to fund IOLTA accounts, and legal fees are rising in the private market, which is pricing the middle class out of the legal system. Legal education is also being attacked as irrelevant, failing to teach practical skills, and leaving high numbers of graduates underemployed.

Udell noted that Chief Judge Lippman has been holding a third year of hearings on the state of access to justice in New York as part of a Task Force headed by Helaine Barnett.²³⁵ He explained that the Task Force has collected data on the numbers of unrepresented New Yorkers, finding that only 10% of tenants have legal representation in Housing Court matters, and close to 0% are represented in debt collection and foreclosure proceedings.²³⁶ There have been concerted efforts to use the court's budget to obtain more funding for legal services.

Udell pointed out that the New York City Bar Committee on Professional Responsibility is taking a fresh look at nonlawyer ownership models of practice and unauthorized practice laws. Udell noted that alternative business structures have always been an issue when considering improvements to access to justice. Although Udell indicated that the Committee on Professional Responsibility has not yet completed its work, he thinks the profession is subject to sharp

²³⁵ See, e.g., The Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York (Nov. 2011), available at https://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-2011TaskForceREPORT_web.pdf.

²³⁶ See, e.g., *id.* at 16.

criticism because it has prevented other models of representation, while in several areas of law lawyers have not been available to provide any representation to the poor and middle class. Nonetheless, Udell believes it is comparing apples to oranges to say that lawyering is advanced by allowing nonlawyer ownership. Udell stated that there is a market opportunity for nonlawyers to provide services at lower costs than what lawyers charge, but that issue is beyond the scope of his Committee. Alternative business structures are not his Committee's main focus, but rather they are looking at the need for greater access to justice and how to meet that need.

Udell and Task Force members discussed instances where nonlawyers currently provide services that are akin to legal services. For example, in social security disability litigation, nonlawyers provide assistance to clients in disability appeals. Securities arbitration is not considered the practice of law either. In foreclosure proceedings, parties are often pushed into debt modification and use the services of financial advisors. Nonlawyers also participate in providing services in unemployment insurance, workers compensation, NLRB cases, and tax assessments. Udell pointed out the "friend" model, where an unrepresented person can bring a nonlawyer to court to provide moral support and speak to the judge on their behalf, but there is less regulation of what the nonlawyer can do in that situation. The concept was controversial when it was being considered in the UK, but reports indicate that judges appreciate this role.

Udell closed by stating that there is a population for whom a small payment is hard to make in order to pay for legal services so there is a powerful argument that companies like Walmart, if they could own legal service providers, could do so at lower costs than are currently charged. He noted that this model is currently being played out in the UK.

F. *Gary Munneke*

On April 25, 2012, the Task Force heard from Gary Munneke, a Professor at Pace Law School, who is Chair of the ABA's Law Practice Management Section Task Force on the

Evolving Business Model for Law Firms and Chair of the New York State Bar Association's Committee on Law Practice Management.

Since the time when Rule 5.4 was first introduced during the 1990s, Munneke has studied the subject of alternative business structures. He expressed the view that the Ethics 20/20 Commission's discussion paper was correctly withdrawn, as the issue is multi-faceted and complex, and it was not adequately addressed in the paper. He indicated that the issue has deep roots in the American system of law, noting that the first draft of the Model Rules would have provided that a lawyer cannot allow a nonlawyer to influence the lawyer's perspective. Munneke recalled that in debating the Model Rules, delegates to the ABA House from Oklahoma asked whether Sears would be able to own a law firm. They amended the rules to add a prohibition on fee sharing with nonlawyers and passive investment in law firms.

Munneke explained that the discussion on alternative law structures raises several issues that deserve different attention: (1) nonlawyer investment in firms; (2) nonlawyer ownership of firms; (3) influence on a lawyer's independent professional judgment; (4) fee sharing with nonlawyers; and (5) multidisciplinary practice (which he referred to as combined services).

Addressing the issue of nonlawyer investment, Munneke expressed there is a need to capitalize law firms so they can compete on a global stage. This is seen in the efforts of UK firms to be dominant world players in the legal services sector. We need to consider the financing of law firms if New York firms are to compete globally. Access to capital helps firms compete in the world market. The Report of the New York State Bar's Task Force on the Future of the Legal Profession notes that large firm economics will continue to change.²³⁷

²³⁷ See NYSBA Report of the Task Force on the Future of the Legal Profession (Apr. 2, 2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Task_Force_on_the_Future_of_the_Legal_Profession_Home&Template=/CM/ContentDisplay.cfm&ContentID=48108.

Turning to the issue of nonlawyer ownership, Munneke indicated that he is less troubled by passive investment in law firms than direct ownership. There are a number of situations where we already have forms of nonlawyer “control” over firms: corporate counsel’s office, general counsel who work for the CEO of a company, group legal services, groups like the NAACP Legal Defense Fund (which are dominated by boards of directors which include nonlawyers), law firms that are dominated by a single client, large firms that delegate major decisions to nonlawyer administrators, lawyers employed by nonlegal organizations (e.g., Big Four accounting firms), and fee sharing by the beneficiary of a law firm retirement plan. Passive investment is more dangerous. Lawyers can capitalize their firms through loans, but lending terms are so strict that banks end up influencing how firms run their businesses. He cited Dewey LeBoeuf as an example.

Munneke would distinguish multi-disciplinary practice from investment/ownership issues. There are already teams of lawyers that work with nonlawyers. In particular, because the current rules allow law firms to have ancillary businesses, nonlawyer ownership exists to the extent ancillary businesses can be owned by a nonlawyer. New York recognized this reality and tried to establish rules to ensure clients were advised of these arrangements. But sometimes ancillary services are indistinguishable from traditional law firm services.

Munneke said that before any new ABA proposal on alternative law practice surfaces, he would like to study situations where nonlawyers are in a position of influence so he could begin to piece together what protections are needed to preserve the lawyer-client relationship and articulate those protections as standards. In 1969, when the Code of Professional Responsibility was adopted, a few lines were devoted to the issue. In 1983, when the Model Rules were adopted, a few pages addressed the issue (particularly conflicts), and New York allowed law firm

affiliations in Rules 5.7 and 5.8. Munneke indicated that we are moving in the right direction with lawyer regulation. In essence, we should look at what has already happened and ask how we can protect the attorney-client privilege and preserve our core values now.

Munneke said there may be certain unwaivable conflicts that impact nonlawyer ownership, but that concern has not been thought out yet. He thought we might be able to draft rules to cover situations that do not present unwaivable conflicts.

Regarding the ABA's choice of law proposal, Munneke recognized that New York should want British law offices to be able to transact business here. He acknowledged that Opinion 911 is more advisory. To make sure choice of law rules are not abused, Munneke suggested that a restructuring be considered so that affiliated law firms can work around the current rules.

G. Paul Saunders

At its April 25, 2012 meeting, the Task Force heard from Paul Saunders, Chair of the NYS Judicial Institute on Professionalism created by former Chief Judge Judith S. Kaye to review issues related to lawyer independence. He expressed concern that nonlawyer ownership will negatively impact the professional independence of lawyers.

Saunders began by explaining the workings of the Institute. The Institute consists of 20 members all appointed by the Chief Judge. For the last 15 years, the Institute has had a broad mandate to examine issues of lawyer professionalism, and bring together representatives of the legal profession, judiciary, and academy for dialogue about the profession. The Institute is supported by the Office of Court Administration, but is independent and sets its own agenda. Saunders informed us that Lou Craco's Committee on the Profession and the Courts preceded the Institute.

Saunders informed the Task Force that for the last two-and-a-half years, the Institute has been examining lawyer independence. He noted that the Craco Committee emphasized that lawyer independence is one of the single most important hallmarks of the legal profession. The Institute decided to study this issue from several perspectives. In the Fall of 2009, it began holding convocations to examine the question, and will eventually publish the results and proceedings. The Institute held its first convocation at Fordham Law School on the subjects of lawyer independence, big firm practice, and the role of law firm general counsel. The second was held in Albany and focused on lawyer independence for government lawyers. They discussed how lawyers representing small government entities, such as town or school boards, must render their legal advice in public, and the difficulties involved in trying to give legal advice to an elected official. The Institute held a third convocation at Hofstra Law School on small firm practice and solo practitioners. The fourth convocation will be held this Fall at the Judicial Institute at Pace. The convocation will focus on in-house corporate counsel and will feature IBM's general counsel, Bob Weber.

Saunders said that the Institute has not taken a formal position on nonlawyer ownership but he shared his thoughts on the issue. Rule 2.1 of the New York Rules and the ABA Model Rules requires lawyers to exercise independent professional judgment and render candid advice when representing a client. Unlike the ABA Model Rules, under New York's Rule, a violation of this rule is not enforceable by disciplinary proceedings. Still, he indicated that independence is essential to our profession as distinguished from other professions.

Saunders expanded on the policy behind Rule 2.1 and whom it protects. Most think the Rule protects clients so that they will not break the law. Saunders said that Professor Michaels has studied this Rule and concluded that the real purpose is not to protect clients, because many

other rules do that; rather, the purpose is to protect third parties and society. Craco's keynote address at the Institute's last convocation elucidated this concept. Lawyers need independence in two senses: one sense of independence is our collective autonomy from supervision by others; the other is our ability to give disinterested advice to clients. We are an independent autonomous profession only because we are called on to give our best disinterested advice free from exterior pressures. In this respect, we are actually performing a service to the public; we are delivering the rule of law.

Saunders continued that nonlawyer ownership is related to independence in three ways. First, ours is a noble profession because we are autonomous, we govern our own professional conduct, and we have a set of rules that we subscribe to. Few other professions can say that. Nonlawyers are not required to be independent. As a result, nonlawyer ownership might threaten the autonomy of the profession that is essential to its continued existence.

Second, nonlawyer ownership may threaten our collective ability to give candid, totally dispassionate legal advice. In Europe, there is no lawyer-client privilege for in-house counsel, because in-house counsel are not independent. In-house counsel in Europe cannot give independent legal advice to their boss/owner because their job, salary, or a promotion may depend on it. Saunders said that the same argument might be made concerning nonlawyer ownership of a law firm because other forces affect one's independence as a lawyer.

Third, there is the argument that nonlawyer ownership "threatens" public notions that the law is a noble profession. Public perception is very important to our profession and to our continued autonomy. According to Saunders, that is not to say that law is not a business. Rather, he believes that we do not need any more signs suggesting the "business" aspect of the law to the public. What we need are more signs that the practice of law is a profession, a noble

profession. The Institute is dedicated to the preservation of professionalism and our collective calling.

When asked whether there are any alternative law firm structures that would not raise independence concerns, Saunders responded that the farther away the nonlawyer is from having anything to do with the practice of law, the better.

As to access to justice, Saunders replied that nonlawyer ownership may increase availability of services to people who are unable to afford a lawyer. However, he did not think we needed nonlawyer ownership to achieve this. Our problem is a collective unwillingness to make legal services more affordable.

Saunders said that although lawyers are regulated by the courts, we are still autonomous. At the margins, the rules are enforced by a disciplinary board, but usually discipline is achieved by lawyers understanding the rules and governing themselves.

Saunders opined that the need for law firm capital and resources does not alleviate independence concerns. Non-equity ownership and commoditization of legal advice diminish the perception of our profession. We need the public to understand that we are a profession, not a drug store. Saunders believes that attorney advertising has diminished our profession and that we are approaching a slippery slope by addressing the possibility of nonlawyer ownership.

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