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The Partnership Mystique: Law Firm Finance and Governance for the 21st Century American Law Firm

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THE PARTNERSHIP MYSTIQUE: LAW FIRM FINANCE AND GOVERNANCE FOR THE 21ST CENTURY AMERICAN LAW FIRM

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ABSTRACT

This Article identifies and analyzes the de facto and de jure end of lawyers' exclusivity over the practice of law in the United States. This development will have profound implications for the legal profession, the careers of individual lawyers, and the justice system as a whole.

First, the Article argues that various financial products that have recently flooded the legal market are functionally equivalent to investing in and owning law firms and create all the same governance challenges as allowing nonlawyers to directly own stock in law firms.

Second, the Article analyzes Arizona's groundbreaking legalization of nonlawyer participation in law firms, effective January 1, 2021, and the effects it will have nationally.

Third, the Article explains that the drawbacks of liberalizing the practice of law are rooted in the conception of shareholder primacy, a bedrock principle of corporate law. This principle would encourage lawyers to prioritize profit maximization for the benefit of their investors over the interests of clients and the courts.

Fourth, despite the apparent dangers, there are reasons to celebrate the end of the era of the legal practice as the exclusive purview

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of lawyers. Lawyers' monopoly on the practice of law hinders inclusion and diversity and, counterintuitively, undermines practitioners' dignity and well-being.

Fifth, the apparent dangers of liberalization can be avoided if states follow Arizona in allowing nonlawyer participation in the practice of law but condition it on organization as an Alternative Business Structure with certain professional responsibilities. More specifically, the Article proposes a type of "benefit entity," which I call "legal benefit entity" (LBE). LBEs will be required to privilege the interests of clients and the courts over those of investors. The final Part explains what an LBE should look like.

TABLE OF CONTENTS

INTRODUCTION

The drawbridge is down. The barbarians are through the gates. The ship has sailed. While the legal profession was asleep at the switch, nonlawyer "takeover" of law firms—resisted strenuously by the bar for at least a century[1]—has become a reality. This has been true de facto for a number of years, and, as of January 1, 2021, it became true de jure in the state of Arizona. It is now widely acknowledged that litigation finance has, in the past decade, without any change to black letter law, felled the centuries-old champerty prohibition[2]—the prohibition on a nonparty funding a party's claim for a profit.[3] This Article will show, for the first time, that litigation financiers have accomplished the same with respect to the similarly entrenched prohibition on nonlawyer participation (ownership and management) in law firms, which the profession has alternately considered and rejected in a cycle that has persisted for more than a century.

Over the past three or so years, litigation finance firms have refocused from providing third-party financing to plaintiffs for single cases to financing portfolios of cases and providing the financing directly to law firms.[4] In addition, litigation finance firms are incubating new law firms and affiliating themselves with such law firms.[5] Financing pools of cases is economically functionally equivalent, or at least a very close approximation, to outright investment in a law firm. And, critically, it creates all the same governance challenges as does allowing nonlawyers to directly own stock in law firms: conflicts of interest, disclosure requirements that conflict with

1. *See infra* Part I.A.

2. *See infra* Part III.B.

3. *Champerty*, BLACK'S LAW DICTIONARY (11th ed. 2019).

4. *See infra* Part III.A.2; *see also* Press Release, Omni Bridgeway, Bentham IMF Unveils New Portfolio Model for Litigation Funding (Nov. 16, 2015), https://omnibridgeway.com/insights/press-releases/all-press-releases/2015/11/16/bentham-imf-unveils-new-portfolio-model-for-litigation-funding [https://perma.cc/M7HL-SVPT]; *Commercial Litigation Funding*, PRAVATI CAPITAL, https://pravaticapital.com/commercial-litigation-funding/ [https://perma.cc/75HC-R5FP]; *Portfolio Finance*, BURFORD CAPITAL, https://www.burfordcapital.com/how-we-work/expertise/portfolio-finance/ [https://perma.cc/P55S-6RAE].

5. *See* Press Release, Omni Bridgeway, *supra* note 4.

the attorney-client privilege, potential short-termism, incentive to interfere in the attorneys' independent judgment, and more.[6]

Meanwhile, the Supreme Court of Arizona recently unveiled revolutionary changes to the rules governing the practice of law in that state.[7] Although this experiment is in its infancy, its effects are sure to permanently change the character of the legal profession in the United States. The new regime abolishes the longstanding prohibition on fee-sharing between lawyers and nonlawyers, explicitly allowing nonlawyers to hold an economic interest in, and even to manage, law firms.[8]

Market trends and forces, both domestic and international, have helped bring about these changes, and they will continue to propel the legal industry in the direction of nonlawyer participation in the business of providing legal services. Direct competitors of American firms, importantly in London, can not only seek investments but may also go public and list on stock exchanges.[9] The so-called Big Four accounting firms have resurged in the global legal services markets and are predicted to increasingly compete with large, multinational law firms (BigLaw).[10] At least one U.S.-based "legal staffing" firm, Axiom, recently embarked on the process of making an initial public offering—though it ultimately opted for private equity investment instead.[11]

As these changes become more entrenched and more clearly on the sunny side of the law, the need for litigation finance boutiques—that specialize in investment in the esoteric and hard-to-value asset that is a lawsuit[12]—will likely fade because investments

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6. *See infra* Part III.B.

7. *See* News Release, Ariz. Sup. Ct. Admin. Off. of the Cts., Arizona Supreme Court Makes Generational Advance in Access to Justice (Aug. 27, 2020), https://www.azcourts.gov/Portals/201/Press%20Releases/2020Releases/082720RulesAgenda.pdf [https://perma.cc/65P3-43AG].

8. *See id.*

9. *See infra* Part III.A.3.

10. *See, e.g.*, Elizabeth Olson, *PwC, the Accounting Giant, Will Open a Law Firm in the U.S.*, N.Y. TIMES (Sept. 22, 2017), https://www.nytimes.com/2017/09/22/business/dealbook/pwc-law-firm-ilc.html [https://perma.cc/2C3Q-XTBR].

11. Roy Strom, *Lawyer Staffing Firm Axiom Takes PE Money, Drops IPO Plans*, BLOOMBERG L. (Sept. 5, 2019, 2:12 PM), https://news.bloomberglaw.com/us-law-week/lawyer-staffing-firm-axiom-takes-pe-money-drops-ipo-plans [https://perma.cc/9WVM-MUUA].

12. *See generally* Maya Steinitz, *How Much Is That Lawsuit in the Window? Pricing Legal Claims*, 66 VAND. L. REV. 1889, 1903-04 (2013).

in law firms do not require any expertise beyond what traditional investors such as banks and hedge funds already have (perhaps with the assistance of lawyer-analysts). Cinema did not eliminate theater, Kindle did not extinguish books, and (for those who grew up in the '80s) video did not "kill the radio star."[13] Lawsuit financing will also likely survive law firm financing, but its market share is likely to shrink significantly.

These inevitable changes have begun to provoke some attempts at regulation, falling mainly into one of two categories: disclosure or licensing-and-ethics. In response to the rise of portfolio financing, at least one prominent group, the New York City Bar Association (NYCBA), has proposed that the practice be legalized and regulated through a disclosure regime.[14] The Arizona experiment, by contrast, creates a licensing regime which imposes attorneys' ethical obligations on Alternative Business Structures (ABSs) and on the nonlawyer participants.[15]

While the Arizona model is much preferable to the NYCBA's disclosure proposal—a vast body of literature has shown that disclosure is ineffective in protecting consumers[16]—both fail to adequately address deep-rooted concerns about the effect of allowing nonlawyer participation on the core values of the legal profession. Decades of discourse have drawn out those concerns in detail. Mainly, the worry is that allowing nonlawyer participation would create conflicts of interest, compromise lawyers' ability to exercise independent judgment, erode clients' trust, undermine the ability of the profession as a whole to deliver public goods like upholding the rule of law, and diminish the dignity of the profession and the well-being of its practitioners.

This Article argues that while the focus on incentives and agency costs (conflicts of interest) is correct, it overlooks a key cause for concern, which can be traced back to a particular conception of corporate governance, one that has dominated U.S. law and discourse for much of the last century: shareholder primacy. This

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13. The Buggles, *Video Killed the Radio Star*, YOUTUBE (Oct. 8, 2010), https://www.youtube.com/watch?v=W8r-tXRLazs [https://perma.cc/4ZPE-YWH2].

14. *See* N.Y.C. BAR ASS'N, REPORT TO THE PRESIDENT BY THE NEW YORK CITY BAR ASSOCIATION WORKING GROUP ON LITIGATION FUNDING 24 (2020).

15. *See* News Release, Ariz. Sup. Ct. Admin. Off. of the Cts., *supra* note 7.

16. *See infra* notes 169-74 and accompanying text.

Article then suggests a way to resolve that tension by taking advantage of new laws that permit entities to organize according to an alternative conception of corporate governance: *stakeholder* primacy.

Under shareholder primacy, by operation of law, the interests of the shareholders reign supreme. The interest of all other stakeholders—consumers, employees, society at large, and others—are subordinate and, in fact, inappropriate for managers to consider when they directly compete with profit maximization. Shareholders' (or "economic interest holders" in the parlance of the Arizona reform[17]) interests, according to this doctrine, are generally understood to exclusively mean profit maximization.[18] Thus, lawyers' ethical duties to clients, the courts, or the public good, to the extent that they could compel choices that would decrease profits, would be in direct competition with economic interest holders' interests.

While the NYCBA's proposed disclosure-focused regime gestures in the direction of resolving this tension by mentioning lawyers' obligation to exercise independent judgment,[19] disclosure, by itself, cannot change the structure of corporate law and the interests it privileges. And the NYCBA's proposal could even be read to favor shareholder (economic interest holder) primacy, as long as clients have been presented with some fine print. The Supreme Court of Arizona's rules explicitly provide for client primacy and impose legal ethical duties on ABSs and nonlawyer participants.[20] But the Supreme Court of Arizona did not directly address the clear contradiction between its new legal ethics regime and the well-established business law on shareholder primacy, setting up a conflict between the two.[21] Nor is it clear that the court could resolve that contradiction on its own. The Supreme Court of Arizona has the power under the state constitution to regulate the practice of law, but it is not clear that it can, *sua sponte*, alter the fundamental structure of corporate law or abandon an established norm like shareholder primacy.[22] In a nutshell, because the reform was done by way of regulations promulgated by the Supreme Court of Arizona, not by

17. *See* News Release, Ariz. Sup. Ct. Admin. Off. of the Cts., *supra* note 7.
18. *See infra* Part I.B.3.
19. *See* N.Y.C. BAR ASS'N, *supra* note 14, at 24.
20. *See infra* Part II.E.3.
21. *See infra* Part III.E.4.
22. *See infra* Part III.E.6.

the legislature, the effect is to create an inevitable collision between shareholder and stakeholder primacy in the new economy for legal services.

Fortunately for the future of nonlawyer participation in providing legal services (which is here whether one likes it or not), shareholder primacy is no longer the only available way to conduct business. The rise of benefit entities is the culmination of a years-long project to construct a viable model of stakeholder primacy that, while turning the fundamental principle of shareholder primacy on its head where it applies, in all other ways coheres with settled U.S. business law.[23] Permitting and requiring entities in which nonlawyers participate in the business of law to organize as "legal benefit entities" (LBEs) would preserve client primacy. Doing so not only "fixes" existing, incomplete regimes, but also clears up a powerful objection to a practice that is otherwise normatively desirable for both clients and the legal profession. Liberalizing participation in providing legal services could not only promote access to justice—the main reason rightfully cited by its proponents over the years—but also reduce barriers for advancement for women and minorities and increase work-life balance for members of the profession. (Yes, that last bit is not an error.)

Therefore, this Article advocates that nonlawyer participation in law firms, including direct ownership and public trading (which would go further than Arizona's reform), be permitted under certain conditions and that one of those conditions be that law firms that opt to proceed on that route organize as LBEs. This would mean that they bind themselves, through their organizational documents enforced by statute, to govern themselves for the benefit of their clients and the courts, not only their investors. In states that do not yet allow benefit entities and that do not wish to make them broadly available but still want to liberalize the legal profession, legislatures could pass limited legislation legalizing LBEs but not making benefit entities available more broadly.

Finally, this argument also implies an important proposition for the business (corporate) law of the professions more generally. In the context of professional services, where the interests of the client

23. *See infra* Part II.A.

or patient should, as a matter of ethics, be placed above the profit-making interests of owners, an exception to the shareholder primacy doctrine should be created through general business law. The Arizona legal profession, for example, has now indicated its preference for such an exception (though without explicitly creating one, as will be discussed below).[24] With the recent invention and advent of benefit entities, we have a business organization form that creates default rules and a statutory regime that allows precisely for that.

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Part I lays out the history and rationales behind the prohibition on nonlawyer participation in the practice of law. Part II argues that such rationales are rooted in a conception of business law characterized by shareholder primacy and explains why that conception leads to the fear of what I call the “Goldman Sachs-ization” of law. Part II also discusses how growing discontent with the doctrine of shareholder primacy has led to the creation of a new business form—the benefit entity. Part III sets forth the claim that nonlawyer participation in law firms is already a *fait accompli*, exploring Arizona’s new legal ethics-based reform, contrasting it with the NYCBA’s disclosure-focused proposal, and arguing that neither approach fully resolves the tension between shareholder primacy and lawyers’ duties to clients and courts. Part IV offers a normative argument for overturning the prohibition on nonlawyer participation and lays out the proposal for replacing shareholder primacy with stakeholder primacy by requiring law firms that wish to include nonlawyers to be organized as LBEs. This Part also includes a note on how the proposal could apply to other professions. Finally, a Conclusion provides some closing thoughts.

24. *See infra* Part III.E.2.

I. THE PROHIBITION ON NONLAWYER PARTICIPATION IN THE BUSINESS OF PROVIDING LEGAL SERVICES—HISTORY AND RATIONALES

Though perhaps recently superseded by events on the ground, the prohibition on nonlawyer participation in law firms has persisted nearly unchanged for more than a century and has served, at least in theory and possibly in practice, to safeguard important public values.

A number of prohibitions and proscriptions in the rules of professional conduct that govern lawyers form the overarching prohibition on nonlawyer participation in the practice of law, including investment in or partial or full ownership of law firms by nonlawyers, and management of law firms. These include rules that directly regulate such participation including the fee-sharing prohibition, which prohibits lawyers from sharing fees with nonlawyers; the prohibition on corporations providing legal services; and the prohibition on the unauthorized practice of law.[25] There are also rules indirectly related that, in sum and substance, are implicated because their core concern is preventing conflicts, including ones that may ensue if nonlawyers participated in the business of providing legal services. These are the prohibition on conflicts of interests and the duties of loyalty, zeal, and independent judgment.[26] Finally, additional rules are also implicated, such as the prohibition on multidisciplinary practices (MDPs) and the duty to keep clients' confidences.[27] Combined, these rules prohibit nonlawyers from joining lawyers to offer legal services and lawyers from raising equity from nonlawyers.

The concerns, discussed in more depth below, can be grouped into three categories. The first relates to the underlying tenets of the attorney-client relationship. Specifically, the core concerns are that the financial interests of nonlawyers, who are not trained and licensed to practice law and are not bound by the rules of professional responsibility, would create conflicts of interest, predominantly in

25. MODEL RULES OF PRO. CONDUCT rr. 5.4(a), 5.4(d), 5.5 (AM. BAR ASS'N 2018).
26. *Id.* at pmbl., rr. 1.7, 1.9.
27. *Id.* at rr. 1.6, 5.4.

the form of a desire to maximize profits of the investors of the firm at the expense of clients, and would restrict lawyers' independent judgment and their ability to loyally and zealously represent their clients.[28] The second category relates to attorneys' roles and obligations as officers of the court, which include, for example, their duty of candor towards the court.[29] Such duties require attorneys to prioritize the integrity of the justice system over their self-interest, including their interest in maximizing profits.[30] The third category relates to the dignity and welfare of practicing attorneys and corresponding concerns that nonlawyer ownership or investment in law firms may undermine both.[31]

Discontent with these prohibitions is as old as the prohibitions themselves. Yet, to date—with the one exception of the new Arizona regime—proponents of reform have been unable to overcome the profession's self-interest in a monopoly on the practice of law and to offer a sufficiently compelling vision for how to preserve professional standards should the monopoly be eliminated. This has led to repeating cycles of failed attempts at reform. These cycles, the rationales for reform, and the reason for the steadfast refusal to reform the rules are explored in this Part.

A. History

The entwined prohibitions on the unauthorized practice of law, nonlawyer ownership of law firms, and sharing of fees have been commonplace throughout the United States since at least the end of the nineteenth century.[32] And, to a large extent, the same objections

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28. Arthur J. Ciampi, *Non-Lawyer Investment in Law Firms: Evolution or Revolution?*, N.Y. L.J., Mar. 23, 2012, at 1, 1-2; *see also* Cindy Alberts Carson, *Under New Management: The Problem of Non-Lawyer Equity Partnership in Law Firms*, 7 GEO. J. LEGAL ETHICS 593, 604 (1994).

29. MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS'N 2018).

30. *See* ABA CTR. FOR PRO. RESP., RECOMMENDATION 10F (2000) [hereinafter RECOMMENDATION 10F], https://web.archive.org/web/20061012023914/http://www.abanet.org/cpr/mdp/mdprecom10f.html [https://perma.cc/HL2H-Q2XQ].

31. *See, e.g.*, Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 888-907 (1999); Andrew Bruck & Andrew Canter, Note, *Supply, Demand, and the Changing Economics of Large Law Firms*, 60 STAN. L. REV. 2087, 2118-26 (2008); Deborah L. Rhode, *Foreword: Personal Satisfaction in Professional Practice*, 58 SYRACUSE L. REV. 217, 220 (2008).

32. Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really*

to those prohibitions have been rehashed—with the same non-result—for more than a hundred years. Later, we will see why the present situation is different and not just another round of the same tired fight.

Since the end of the nineteenth century, the prohibition of nonlawyer ownership of law firms has been affirmed by courts, state legislatures, bar associations, and ethical codes. *In re Co-Operative Law Co.* is a landmark case in that regard.[33] The New York Court of Appeals held that an 1899 criminal prohibition of unlicensed law practice extended to a corporation formed by nonlawyers that offered legal services to subscribers provided by "a staff of competent attorneys and counselors at law."[34] Among other things, the court based its conclusion on the grounds that "an attorney employed by a corporation would be responsible to the corporation rather than to the client of the corporation; ... the corporation might be controlled wholly by nonlawyers and organized simply to make money; [and] the public would have no remedy to protect itself from the corporation."[35]

New York's approach was widely followed. By the late 1930s, the American Bar Association's (ABA) Standing Committee on Unauthorized Practice of the Law concluded in its review of practice that "[p]robably nothing is better settled than that a corporation cannot render legal services for or practice law in respect of the affairs of another [even if] it do[es] so by employing a lawyer."[36]

An important milestone in the regulation of the legal profession was the ABA's adoption of the first Canons of Professional Ethics in 1908 (the Canons).[37] The Canons were amended from time to time over the subsequent decades, and in 1928 the ABA House of Delegates adopted three new Canons which, with some modifications, have served as the template for all subsequent regulation

Make Good Neighbors—or Even Good Sense?, 1980 AM. BAR FOUND. RSCH. J. 159, 161-75; Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 580 & n.19 (1989).

33. *See generally In re* Coop. L. Co., 92 N.E. 15 (N.Y. 1910).

34. *Id.* at 15.

35. Andrews, *supra* note 32, at 581.

36. *Report of the Standing Committee on Unauthorized Practice of the Law*, 62 ANN. REP. AM. BAR ASS'N 769, 779 (1937).

37. Edward S. Adams & John H. Matheson, *Law Firms on the Big Board? A Proposal for Nonlawyer Investment in Law Firms*, 86 CALIF. L. REV. 1, 4-6 (1998).

of nonlawyer participation in the business of providing legal services. Canon 33 ensured that all and only admitted attorneys could form a partnership for the practice of law.[38] Canon 34, after being amended in 1937, flatly prohibited dividing legal fees with nonlawyers.[39] Finally, Canon 35 barred nonlawyers from serving as employers of attorneys or as intermediaries.[40]

The next milestone in that development came in 1969, when years of dissatisfaction with the Canons culminated in the adoption by the ABA of the Model Code of Professional Responsibility (the 1969 Code).[41] The 1969 Code ushered in the modern era in which the model drafted by the ABA has become the rule in most, if not all, jurisdictions.[42] Although the Canons were substantially modified by the new Model Code, the essence of the restrictions on lawyer-nonlawyer business associations did not change.

The 1969 Code was overhauled in the early 1980s, resulting in the Model Rules of Professional Conduct (Model Rules), passed by the ABA in 1983 and adopted in 49 out of 50 states since then.[43] The 2016 version of Rule 5.4 provides that a lawyer or law firm shall not: share legal fees with a nonlawyer; form a partnership with a nonlawyer if partnership activities include the practice of law; or allow clients to direct or regulate the lawyer's professional judgment in rendering legal services.[44] A lawyer is also not allowed to practice if a nonlawyer owns any interest in the practice, is a corporate director or another position of similar responsibility in the practice, or if a nonlawyer has the right to direct or control the professional judgment of a lawyer.[45]

Criticism of the restrictive norms are as old as the norms themselves, and several times over the decades a vocal minority of practitioners has attempted to reform the rules. They failed each time.

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38. *Id.* at 4.

39. *Id.*

40. *Id.*

41. MODEL CODE OF PRO. RESP. (AM. BAR ASS'N 1969).

42. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 56-57 (1986).

43. Adams & Matheson, *supra* note 37, at 8; *see also Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ [https://perma.cc/GC3R-M8LU].

44. MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS'N 2016).

45. *Id.*

At least one of the drafters of the Canons pointed out that the emperor has no clothes when he remarked, in 1927, that "aside from professional policy, I think that there is nothing inherently 'unethical' in the formation of partnerships between lawyers largely engaged in certain kinds of work and an expert engineer, student of finance, or some other form of expert."[46] And the drafting committee noted that "there is substantial difference of view in the profession respecting its recommendations as to partnerships, division of fees, intermediaries, and the bonding of lawyers."[47]

The most thorough debate on the nonlawyer provisions accompanied the development of the 1983 Model Rules. Prior to the adoption of those rules, the ABA conducted a three-year study of the existing rules and sought recommendations for revision.[48] The ABA Commission on Evaluation of Professional Standards (the Kutak Commission) recommended that "a lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer ... such as a business corporation" as long as the lawyer's ability to adhere to her ethical duties was in writing.[49]

It was the only recommendation from the Kutak Commission rejected by the ABA.[50]

In 1998, the ABA established the Commission on Multidisciplinary Practice, which ultimately recommended to the House of Delegates that the Model Rules be amended to permit multidisciplinary practices (MDPs).[51] The Commission adopted the approach developed in Australia and the United Kingdom, which was to ensure that individual lawyers were subject to the rules of professional responsibility notwithstanding the type of entity in which they

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46. F.W. Grinnell, *Minority Report of the Special Committee on Supplements to the Canons of Professional Ethics*, 50 ANN. REP. AM. BAR ASS'N 387, 388 (1927).

47. *Report of the Special Committee on Supplements to the Canons of Professional Ethics*, 50 ANN. REP. AM. BAR ASS'N 372, 378 (1927).

48. Adams & Matheson, *supra* note 37, at 8.

49. *Id.* (quoting ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 01:3 (Aug. 20, 1997)).

50. *Id.* at 9.

51. ABA COMM'N ON MULTIDISCIPLINARY PRAC., REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION (1999), https://web.archive.org/web/20000510230706/http://www.abanet.org/cpr/mdprecommendation.html [https://perma.cc/R8WE-JRBK].

practiced or their employment relationship with nonlawyers.[52] A year later, the House of Delegates roundly rejected the Commission's proposal and affirmed its commitment to the complete exclusion of nonlawyers from the business of providing legal services.[53]

In 2009, the ABA Commission on Ethics 20/20 concluded that "the Commission has undertaken a careful study of alternative law practice structures. Based 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."[54]

The ABA reached a similar conclusion in 2016. In February of that year, the House of Delegates adopted a resolution urging states to consider the ABA's own Model Regulatory Objectives for the Provision of Legal Services when considering establishing or regulating non-traditional legal service providers. However, the House of Delegates went on to declare that "nothing contained in this Resolution abrogates in any manner existing ABA policy prohibiting non lawyer [sic] ownership of law firms."[55] Later that year, the ABA Commission on the Future of Legal Services released an issues paper on ABSs. In that paper, the Commission noted that there was no evidence from the jurisdictions which permit them that ABSs cause harm and also that those jurisdictions have not rolled back permissions for ABSs. The paper invited comments on ABSs, but ultimately the Commission did not introduce a resolution permitting them. Rather, the Commission confined its final recommendations to merely noting that continued exploration of the topic would be useful.[56]

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52. *See infra* Part III.A.3.

53. *See* RECOMMENDATION 10F, *supra* note 30.

54. Press Release, ABA Comm'n on Ethics 20/20, ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms (Apr. 16, 2012), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120416_news_release_re_nonlawyer_ownership_law_firms.pdf [https://perma.cc/QW8T-WN9Z].

55. ABA COMM'N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 59 (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf [https://perma.cc/Q7CC-K3QK].

56. *Id.* at 42.

B. The Concerns Underlying the Prohibition

Different segments of the legal profession have somewhat different concerns. At the elite end of the profession, occupied by so-called BigLaw firms, the concerns focus, broadly speaking, on the perceived effects that nonlawyer participation may have on the attorney-client relationship and on attorneys' autonomy and welfare in terms of controlling their careers, how they conduct individual cases, and how many hours they work.[57]

At the other end of the spectrum are solo practitioners and small firms. Their main concern is the fear of being wiped out, as independent businesses, by large corporations in the same manner that mom-and-pop shops have been wiped out by the various mega-chains. Instead of owning their independent business, such practitioners fear that they will be relegated to a lesser professional existence as line employees at the same corporations with little to none of the dignity, independence, and control over their practices they currently enjoy.[58]

There are also shared concerns held by those across the legal profession independent of the size of one's firm. In democratic societies, lawyers hold a special role as guardians of the rule of law, and if that special role is put at risk, that is a concern for all lawyers irrespective of the size of their practice. There are also more practical concerns held in common, like issues surrounding conflicts of interest and duties of confidentiality, as nonlawyers may require information sharing that conflicts with lawyers' professional duties.[59] These arguments are explored in more detail in the following subsections.[60]

57. *See infra* Part I.B.1, I.B.3.

58. *See infra* Part I.B.2-3.

59. *See infra* Part I.B.1-3.

60. The writings on the topic are legion. For a good overview of the arguments for and against reform, see generally ABA COMM'N ON THE FUTURE OF LEGAL SERVS., ISSUES PAPER CONCERNING NEW CATEGORIES OF LEGAL SERVICES PROVIDERS (2015) [hereinafter ABA ISSUES PAPER]. For pieces which address some of the arguments for reform in more detail, see, for example, Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43, 43-48 (2014); Kathleen Eleanor Justice, Note, *There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law*, 44 VAND. L. REV. 179, 211-12 (1991); Edward S. Adams, *Rethinking the Law Firm Organizational Form and Capitalization Structure*, 78 MO. L. REV. 777, 783-90 (2013). For

1. Preserving Trust and Deterring Conflicts

As every law student is instructed throughout law school, a lawyers' role in society is founded on trust. This is true in the obvious sense that clients must trust that their attorneys will adhere to duties such as conducting a zealous representation and maintaining confidentiality.[61] But it is also true in the sense that legal services are "credence goods"—goods that lay consumers, or even sophisticated ones, have difficulty evaluating even long after the service has been rendered.[62] Put in that way, much of the regulation of the legal profession is aimed at producing trust in a situation in which it is impossible for clients to know whether that trust is well placed. This is reflected in the ABA's definition of a profession, which provides that because "clients cannot adequately evaluate the quality of the service, they must trust those they consult."[63]

By a significant margin, the most common category of justification for excluding nonlawyers from entities that offer legal services stems from lawyers' self-understanding that putting nonlawyers into the mix will inevitably disrupt their ability to put clients' interests ahead of all else. The idea here is that to do otherwise would lead to the inevitable erosion of the integrity of the attorney-client relationship.[64]

Two separate but related arguments fall under this category. First, that the restrictions ensure that the trained and certified attorney, and not any nonlawyer, is the one making legal decisions. Second, that keeping nonlawyers out of the picture ensures that, in exercising her judgment, an attorney will take into consideration

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arguments against reform, see, for example, Michael Kelly, Comment, *Ethical Issues Associated with Multidisciplinary Practices in Texas*, 41 ST. MARY'S L.J. 733, 752-68 (2010); Alison Frankel, *Lawyers Remain Deeply Skeptical of Non-Lawyers Investing in Law Firms*, LEGAL BUS. ONLINE (May 18, 2016), https://www.legalbusinessonline.com/news/lawyers-remain-deeply-skeptical-non-lawyers-investing-law-firms/72364 [https://perma.cc/L6WV-GKGW].

61. *See, e.g.*, GREGORY C. SISK, SUSAN SAAB FORTNEY, CHARLES GARDNER GEYH, NEIL W. HAMILTON, WILLIAM D. HENDERSON, VINCENT R. JOHNSON, KATHERINE R. KRUSE, STEPHEN L. PEPPER & MELISSA H. WERESH, LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION 305-09, 475-76 (2018).

62. Uwe Dulleck & Rudolf Kerschbamer, *On Doctors, Mechanics, and Computer Specialists: The Economics of Credence Goods*, 44 J. ECON. LITERATURE 5, 5-6 (2006).

63. ABA COMM'N ON PROFESSIONALISM, "....IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 10 (1986).

64. *See* Ciampi, *supra* note 28.

only the needs of the client. In this version, competing concerns such as the economic bottom line of her employer could influence an attorney to recommend a course of action that would be more profitable or otherwise beneficial for her but less than optimal for her client. For example, she may recommend pursuing damages rather than an injunction,[65] or urge accepting an early and low settlement for the benefit of a quarterly bottom line or as a way to redeploy the investor's capital.[66]

The Restatement captures this argument well, noting that "[a] person entitled to share a lawyer's fees is likely to attempt to influence the lawyer's activities so as to maximize those fees. That could lead to inadequate legal services."[67] The Restatement further elaborates that "permitting such ownership or direction would induce or require lawyers to violate the mandates of the lawyer codes, such as by subjecting the lawyer to the goals and interests of the nonlawyer in ways adverse to the lawyer's duties to a client."[68]

The fear that liberalization of the legal profession would increase conflicts of interest is brought to its logical extreme in the so-called "Fear of Sears" or of the "Walmart-ization" of legal services—the fear that doing so would lead retail giants to offer law as one of their products.[69] What if a client wanted to sue one of Walmart's suppliers? Or what if she wanted to pursue a workers' compensation or union organizing claim that, although not directly related to Walmart, could result in a ruling enforceable against it—especially if implementing the new rule would be costly? And could a Walmart

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65. Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 467-79 (2012) (explaining that in the Chevron-Ecuador environmental class action, the financier required the indigent claimants to pay the Funder's portion of any remedial measures ordered by the court). On the positive externalities of litigation, see Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 575 (1997).

66. Steinitz, *supra* note 65, at 501-503 (analogizing litigation finance to venture capital and explaining, based on economic theory, why financiers may have economic incentives, as well as contractual obligations, to liquidate investments in any given case and distribute or redeploy funds from lawsuit to lawsuit irrespective of the needs of the case, in order to maximize the profits of their own investors).

67. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 10 cmt. b (AM. L. INST. 2000).

68. *Id.* § 10 cmt. c.

69. *See generally* RICHARD SUSSKIND, THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES (2008); Adams & Matheson, *supra* note 37, at 3 & n.9.

employee take the time and put in the creative effort that might be required in any given case or transaction?

2. Professions and the Public Good

The ABA Commission on Professionalism concluded that an occupation constitutes a profession—in contrast with a business, which is concerned with profit-maximization—when the client can expect the practitioner to set aside their own self-interest in favor of the client's and the public's interests.[70] A profession is also different than a business sector in that it subjects itself to self-regulation. The profession's self-regulatory bodies are expected to assure that its members are competent, do not violate clients' trust, and prioritize the clients' interests over their own.[71]

Moreover, the attorney, as a member of the profession, is ultimately an officer of the court, unlike the businessperson. Thus, in addition to serving her client, a lawyer performs the essential function of supporting the smooth operation of the legal system: "*Professional* lawyers ... were those who eschewed the mere 'hired gun' mode of practice, and took more of a public or justice-regarding stance, *as befitted officers of the court*."[72] According to the ABA, consistent with the self-understanding of many of the lawyers it represents, "[t]he law governing lawyers was developed to protect the public interest and to preserve the core values of the legal profession, that are essential to the proper functioning of the American justice system."[73] Because of this, lawyers are subjected to higher standards (additional study, bar admission, character and fitness) and more restriction (ethical rules); in return, they receive protection from the vicissitudes of the market.

Finally, some raise concerns that the imperatives of seeking returns for nonlawyer investors would decrease the time lawyers spend on *pro bono* matters—a point of pride for the profession and a tangible manifestation of its commitment to the public good.[74]

70. ABA COMM'N ON PROFESSIONALISM, *supra* note 63, at 10.

71. *Id.*

72. 1 GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING § 1.08 (4th ed. 2019).

73. *See* RECOMMENDATION 10F, *supra* note 30.

74. *See, e.g.*, Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Own-*

3. The Dignity of the Profession and the Welfare of the Practitioners

Another version offers the view that being a licensed attorney is an *individual* right, hard-won through years of arduous study and examination, and in that sense is not capable of being shared or divided with a nonlawyer. The court in *In re Co-Operative Law Co.* took the view that the practice of law was a "personal right," granted to those possessing special qualifications and a moral character, rather than "a business open to all."[75] The court pointed out that the profession had various qualification requirements that limited its availability such as character requirements, certification, educational requirements, and state examinations. "The right to practice law," the court said, "cannot be assigned or inherited, but must be earned by hard study and good conduct."[76]

The Supreme Court of Massachusetts went even further, noting:

> In addition to adequate learning, [the practice of law] demands on the part of the attorney undivided allegiance, a conspicuous degree of faithfulness and disinterestedness, absolute integrity, and utter renunciation of every personal advantage conflicting in any way directly or indirectly with the interests of his client. Only a human being can conform to these exacting requirements. Artificial creations such as corporations or associations cannot meet these prerequisites.[77]

This individualistic view of the nature of law practice has become embedded in the business model of law firms. As one commentator observed, law firm partners are compensated on a percentage of annual profits and not with any permanent equity in the firm.[78] This can be traced back to the idea that the value of the firm is all and only the contributions of individual lawyers/partners such that when a lawyer leaves a firm or retires, the value that she contributed would leave with her. On that view, "law firms are inherently

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ership, Access, and Professionalism, 29 GEO. J. LEGAL ETHICS 1, 55-56 (2016).

75. *In re* Coop. Law Co., 92 N.E. 15, 16 (N.Y. 1910).

76. *Id.*

77. *In re* Op. of the Justs., 194 N.E. 313, 316-17 (Mass. 1935).

78. Jonathan T. Molot, *What's Wrong with Law Firms? A Corporate Finance Solution to Law Firm Short-Termism*, 88 S. CAL. L. REV. 1, 4 (2014).

loose associations of individual service providers whose contributions to the firm do not last beyond their working years and who should not own a piece of the firm after they leave."[79]

In what could be considered a more modern view of the dignity of the profession, some commentators express concern that attorneys' job satisfaction and work-life balance may suffer if law practices were run on the model of businesses, focused exclusively on profit-maximization and inflicted with short-termism.[80] The worry is that lawyers will be further pressed to increase the number of hours they bill and restricted from exercising their judgment on what a case truly calls for. Much of this criticism has centered on larger law firms, which many feel have already become overly profit-oriented, and, as a result, are pushing attorneys to work longer hours and damaging associate satisfaction.[81]

II. THE SHAREHOLDER WEALTH MAXIMIZATION NORM IN AMERICAN CORPORATE LAW AND THE "GOLDMAN SACHS-IZATION" OF THE PRACTICE OF LAW

Many of the objections to nonlawyer participation in law firms share a common thread: that the concerns of clients and the justice system will become subservient to those of the nonlawyers, especially if they are investors or owners (rather than managers or low-level employees). This Article argues for the first time that such fears are justified, in significant part, for one central reason: arguably the fundamental norm of American corporate law is shareholder primacy.[82] This is the notion that directors and managers

79. *Id.* at 14.

80. *See generally* Jarrod F. Reich, *Capitalizing on Healthy Lawyers: The Business Case for Law Firms to Promote and Prioritize Lawyer Well-Being*, 65 VILL. L. REV. 361 (2020).

81. *See infra* notes 271-74 and accompanying text.

82. *See, e.g.*, Lynn Stout, *Corporations Don't Have to Maximize Profits*, N.Y. TIMES (Apr. 16, 2015, 6:46 AM), https://www.nytimes.com/roomfordebate/2015/04/16/what-are-corporations-obligations-to-shareholders/corporations-dont-have-to-maximize-profits [https://perma.cc/Q4PP-F8L4]; Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1954-55 (2018) (explaining that shareholder primacy is ubiquitous throughout corporate law and that courts in the last century have endorsed wealth maximization as corporate managers' guiding objective); N. Craig Smith & David Rönnegard, *Shareholder Primacy, Corporate Social Responsibility, and the Role of Business Schools*, 134 J. BUS. ETHICS 463, 465-66 (2016) (same). The argument herein stands whether managers follow the norm because it is law, strictly speaking, or because it is an overpowering social norm.

have a fiduciary duty to maximize value for their shareholders, even at the expense of other worthy goals and stakeholders.[83] As the following paragraphs will show, the tension between shareholder primacy, on the one hand, and the ethical obligations and public-interest commitments of lawyers, on the other, is quite real and pronounced. In that sense, the concerns underlying nonlawyer participation in providing legal services can be restated as a classic question of corporate governance: how to deal with the separation of ownership (or the financial interests of the investors) and control (which is in the hands of the managers of the firm, which frequently will not be the investors themselves).[84]

A. The Shareholder Wealth Maximization Norm

In shareholder-focused corporate governance systems such as the American one, directors' and managers' fiduciary obligations run to the company and its shareholders only. The fundamental elements of the shareholder primacy model are that ultimate control of the corporation (at least de jure if not de facto) rests with the shareholders; corporate managers manage in the interests of these shareholders; the interests of other corporate constituencies (such as employees and customers) are protected by contractual and regulatory means rather than through participation in corporate governance; the minority shareholders are entitled to strong protections from exploitation by controlling shareholders; and the

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83. The literature and jurisprudence on the topic are legion. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440-41 (2001); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001); Jonathan R. Macey, *Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective*, 84 CORNELL L. REV. 1266, 1267-68 (1999); Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 676-77 (2007); Lucian A. Bebchuk, *Reply: Letting Shareholders Set the Rules*, 119 HARV. L. REV. 1784, 1799 (2006).

84. The problem is that the managers of the entity—who are conceptually employees of the shareholders—have greater control over the business's resources and decisions than do the actual owners. *See generally* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 3-5, 64-67 (rev. ed. 1968). Here, the problem is the inverse of the usual one. Usually, the challenge is to ensure managers manage according to shareholder interests. Here, the challenge is to guard managers' ability to manage to the benefit of the clients and courts, irrespective of the investors' economic interests.

market value of the publicly traded corporation's shares is the principal measure of its shareholder's interests.[85]

Other bedrock principles and doctrines of American corporate law—such as the business judgment rule,[86] according to which courts defer to the judgment of the directors, and the *Revlon Doctrine*,[87] according to which when a sale or break up of a company is inevitable the singular responsibility of the board is to secure the highest price available—can all be traced back to this basic principle.

This paradigm (and the corporate form more generally) has been a "brilliant legal technology that allowed entities to raise large sums of money from disaggregated investors,"[88] thus enabling the modern economy we know and depend on today. Further, some leading scholars have argued not only for the normative superiority of the shareholder primacy paradigm but also, descriptively, that the legal systems of the world have converged on shareholder primacy as the organizing principle of corporate governance and that "[t]here is [descriptively] no longer any serious competitor to the [normative] view that corporate law should principally strive to increase long-term shareholder value."[89] This has been dubbed—consistent with the triumphalist zeitgeist of the brief unipolar American-led moment that followed the fall of the Soviet Union—"the end of history for corporate law."[90]

It should be clear from the above summary (simplified though it might be) that a model which gives sole recognition to one set of interests—the shareholders' profit—is incompatible with lawyers' obligations to safeguard the interests of their clients, the courts, and the public. To put a fine point on it, a lawyer working (hypothetically) in a corporation organized on the shareholder primacy model who, for instance, counseled a client to take a small settlement instead of a larger potential payout at trial, or to request an

85. Hansmann & Kraakman, *supra* note 83, at 440-41.

86. *See generally* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004).

87. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184-85 (Del. 1986).

88. FREDERICK H. ALEXANDER, BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE 2 (2018).

89. Hansmann & Kraakman, *supra* note 83, at 439.

90. *Id.*

injunction instead of damages, could put herself and her corporate superiors in legal jeopardy. Courts enforcing norms of shareholder primacy have been hostile to decisions prioritizing any other interests. The seminal case in point is the 1919 *Dodge v. Ford Motor Co.*, in which the Michigan Supreme Court enjoined Henry Ford from operating the Ford Motor Company in a charitable manner for the benefit of his employees or customers rather than strictly to maximize the profits of its shareholders.[91]

These problems that shareholder primacy poses for the exercise of lawyers' ethical obligations are compounded by the phenomenon of short-termism wherein a firm is so focused on generating profits in the immediate term (often, to meet a quarterly goal, including ones upon which bonuses are based) that it makes decisions that harm its long-term prospects. Short-termism is prevalent among players in the hedge fund and private equity spaces—the same players who might be expected to invest in commercial law firms.[92] The worry, then, is that law firms will be pressured to contribute to their investors' bottom lines—for example, by settling a case before the fiscal year is over and bonuses are calculated, underinvesting in a lawsuit, settling early so that the investor can redeploy cash to other investments, and avoiding nonmonetary relief, to name a few examples—at the expense of the clients. In a letter submitted in December 2020 by Lawyers for Civil Justice and the U.S. Chamber Institute for Legal Reform to the Committee on Rules of Practice and Procedure, the two organizations claimed that "each and every funding agreement that has made its way into the record before the Advisory Committee contains provisions *permitting substantial control or influence over the funded litigation*."[93]

91. 170 N.W. 668, 684 (Mich. 1919). A more recent example of this is *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34-35 (Del. Ch. 2010).

92. For an overview of short-termism and the current debate about whether it is harmful, see generally Leo E. Strine, Jr., *Who Bleeds when the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870 (2017); Jonathan Macey, *Their Bark Is Bigger Than Their Bite: An Essay on* Who Bleeds When the Wolves Bite, 126 YALE L.J.F. 526 (2017); Lucian A. Bebchuk, *Don't Let the Short-Termism Bogeyman Scare You*, HARV. BUS. REV., Jan.-Feb. 2021, https://hbr.org/2021/01/dont-let-the-short-termism-bogeyman-scare-you [https://perma.cc/TD7E-4EZY].

93. Letter from Quentin F. Urquhart, Jr., President, Laws. for Civ. Just. & Harold Kim, President, U.S. Chamber Inst. for Legal Reform, to Rebecca A. Womeldorf, Sec'y of the Comm. on Rules of Prac. & Pro., Admin. Off. of the U.S. Cts. (Dec. 21, 2020), https://www.uscourts.

This prevalence can probably be explained, at least in part, by the fact that often lawyers have a one-time relationship with their clients whereas they are repeat players with a small universe of funders. As the market moves from funding single cases to funding portfolios (especially using revolving credit facilities) and direct funding of law firms, the relationship between lawyers and funders becomes even closer, changing from repeat-play to continuous. All in all, other than in the case of very large, repeat-play clients who provide a significant and ongoing source of revenue for the firm (a scenario only likely to exist in corporate law firms and even then, only with respect to their largest clients), given human nature, funders' interests will probably exert more pull than those of the clients. The fear that law firms will be managed solely for the profit of their shareholders, with little regard to the interests of clients, the courts, or the public, can be thought of as the fear of the "Goldman Sachs-ization," of legal services (alluding to the effects that switching from a partnership model to a publicly traded company had on the investment bank Goldman Sachs).[94]

B. Shareholder Primacy's Discontents and the Rise of Benefit Entities

But not everyone, either in the United States or in other market economies, shares the view that shareholder primacy is the end of history for corporate law, either descriptively or normatively.[95] The worldview that corporate purpose is, or should be, broader than maximizing shareholder value has a long history in capitalism and

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gov/sites/default/files/20-cv-ii_suggestion_from_lcj_and_ilr_-_third_party_litigation_funding_0.pdf [https://perma.cc/9HRT-KRU9].

94. *See generally* STEVEN G. MANDIS, WHAT HAPPENED TO GOLDMAN SACHS: AN INSIDER'S STORY OF ORGANIZATIONAL DRIFT AND ITS UNINTENDED CONSEQUENCES (2013).

95. For descriptions of the approaches in other jurisdictions see, for example, Ruth V. Aguilera & Gregory Jackson, *The Cross-National Diversity of Corporate Governance: Dimensions and Determinants*, 28 ACAD. MGMT. REV. 447, 447-48 (2003); Timothy M. Devinney, Joachim Schwalbach & Cynthia A. Williams, *Corporate Social Responsibility and Corporate Governance: Comparative Perspectives*, 21 CORP. GOVERNANCE 413, 414 (2013). For normative critiques see, for example, LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 15-19 (2019); COLIN MAYER, FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT 15-57 (2013).

is as authentically American as the alternative. In the early twentieth century, industrial magnates had a key role in the Progressive movement as they joined the push for greater government regulations and supported, together with unions, reforms in areas such as workers' compensation and child labor laws.[96] The support for such reforms that improved the lives of everyday Americans stemmed from an understanding that the acceptance and ultimate success of capitalism depended on a wide distribution of the fruits of the system and that it was in the self-interest of businesses to support policies that may be costly in the short term but would ultimately strengthen the system in the long term. These moderate, pragmatic views of corporate leaders persisted well into the postwar era.[97]

This is no coincidence given that historically, until the emergence of a norm of freedom of incorporation, in the mid-nineteenth century, corporations were *public* institutions that received a charter from the state to incorporate in order to pursue a public purpose such as building railways and utilities.[98] Echoes of this history persist and are evident in current-day markets for social responsibility.[99] One need only look to the success of the fair-trade movement, socially responsible investment funds and strategies, and the proliferation of environmentally sound products for examples of consumers' willingness to pay a premium for socially conscious goods.[100] Whereas traditional economic analysis assumes that shareholders are interested only in maximizing the monetary value of their shares, examples to the contrary abound and can be seen, for example, in the popularity of socially conscious investment funds that eschew investments in repressive regimes or harmful products such

96. James Surowiecki, *Moaning Moguls*, NEW YORKER (June 30, 2014) (quoting Mark Mizruchi), https://www.newyorker.com/magazine/2014/07/07/moaning-moguls [https://perma.cc/7PPZ-R7D2]; *see also* Archie B. Carroll, *A History of Corporate Social Responsibility: Concepts and Practices*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 19, 19-21 (Andrew Crane et al. eds., 2008).

97. Surowiecki, *supra* note 96; Carroll, *supra* note 96, at 19-21.

98. Will Hutton, Colin Mayer & Philippe Schneider, *The Rights and Wrongs of Shareholder Rights*, 40 SEATTLE U. L. REV. 375, 376 (2017).

99. M. Todd Henderson & Anup Malani, *Capitalism 2.0*, FORBES (Feb. 22, 2008, 11:00 AM), https://www.forbes.com/forbes/2008/0310/030.html?sh=3edc241266a2 [https://perma.cc/84AE-43UK]); *see also* MAYA STEINITZ, THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE 134-35 (2019).

100. Henderson & Malani, *supra* note 99; *see also* STEINITZ, *supra* note 99, at 134-35.

as tobacco. "In 2005 these funds had $2.3 trillion in assets, 10% of all U.S. assets under management. These funds average a return 35 basis points less than comparable nonfiltered funds, meaning that investors put a value of at least $84 billion per year on steering capital to firms that do good."[101]

Normatively, some proponents of this alternative view of corporate purpose, "stakeholder primacy," have gone so far as to argue that a corporate person (corporation) that seeks to maximize shareholder value alone is akin to a sociopath: "shareholder-value thinking causes corporate managers to focus myopically on short-term earnings reports at the expense of long-term performance; discourages investment and innovation; harms employees, customers, and communities; and causes companies to indulge in reckless, sociopathic, and socially irresponsible behaviors. It threatens the welfare of consumers, employees, communities, and investors alike."[102]

And ironically, the absolute reign of shareholder primacy in recent decades meant that while it was the "brilliant legal technology that allowed entities to raise large sums of money from disaggregated investors,"[103] it was simultaneously holding back lawyers, as professionals, from being able to do the same out of fear that they would focus exclusively on profit maximization to the detriment of their clients and the rule of law.

There is some evidence that the zeitgeist within corporate America is shifting again. In April 2019:

> Nearly 200 chief executives, including the leaders of Apple, Pepsi and Walmart, tried ... to redefine the role of business in society—and how companies are perceived by an increasingly skeptical public.
>
> Breaking with decades of long-held corporate orthodoxy, the Business Roundtable issued a statement on "the purpose of a corporation," arguing that companies should no longer advance only the interests of shareholders. Instead, the group said, they

101. Henderson & Malani, *supra* note 99; *see also* STEINITZ, *supra* note 99, at 134-35.
102. STOUT, *supra* note 95, at vi.
103. ALEXANDER, *supra* note 88, at 2.

> must also invest in their employees, protect the environment and deal fairly and ethically with their suppliers.[104]

It is against this backdrop that the movement advocating that deviations from shareholder primacy be permitted and facilitated by corporate law is best understood. The first attempt to moderate the common law rule of shareholder primacy in response to corporate social responsibility, commencing some thirty years ago, was the so-called Constituency Statutes—laws that permit, but do not require, a board of directors to consider the interests of constituencies—persons or groups—other than shareholders in performing their duties.[105] Thirty-three states have adopted such statutes.[106]

While these statutes did not bring about an apocalypse of increased litigation, diminishment of stock value, or deterrence of investment,[107] as some predicted, they also failed to meaningfully enhance social and environmental responsibility by corporations.[108] Constituency Statutes can now be best understood as a social experiment of limited success on its own terms that nonetheless served as an evolutionary step towards today's benefit entities. These arrived on the scene when, as part of the growing and globalizing corporate social responsibility movement, activists developed and advocated the adoption of a Model Benefit Corporation Legislation (MBCL).[109]

In a nutshell, when a state adopts a version of the MBCL, it enables corporations created under the state's general corporation

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104. David Gelles & David Yaffe-Bellany, *Shareholder Value Is No Longer Everything, Top C.E.O.s Say*, N.Y. TIMES (Aug. 19, 2019), https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html [https://perma.cc/937B-ZN2F]; *see also* Andrew Ross Sorkin, *How Shareholder Democracy Failed the People*, N.Y. TIMES (Aug. 21, 2019), https://www.nytimes.com/2019/08/20/business/dealbook/business-roundtable-corporate-responsibility.html [https://perma.cc/7UGG-NX7J].

105. Christopher Geczy, Jessica S. Jeffers, David K. Musto & Anne M. Tucker, *Institutional Investing when Shareholders Are Not Supreme*, 5 HARV. BUS. L. REV. 73, 93-94 (2015).

106. *Id.* at 94.

107. *See id.* at 127; Roberta Romano, Comment, *What Is the Value of Other Constituency Statutes to Shareholders?*, 43 U. TORONTO L.J. 533, 537 (1993); Comm. on Corp. L., *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253, 2253-54 (1990).

108. *See* Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 120-23; ALEXANDER, *supra* note 88, at 160-61.

109. BENEFIT CORP., MODEL BENEFIT CORP. LEGIS. (2017) [hereinafter MBCL], https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/ UB3B-PBDU].

law to opt into becoming a "benefit corporation" under the new statutory provisions.[110] And this status, in turn, means such corporations are *required* to pursue social or environmental goals.[111] Otherwise stated, in a benefit corporation, directors are required to consider the impact of their decisions on all stakeholders.[112]

Maryland enacted the first statute following the MBCL in 2010, and as of today, thirty-seven states have adopted some version of benefit corporation legislation.[113] Some states have enacted statutes aligning closely with the MBCL.[114] Other states, however, have followed Delaware's more relaxed standards.[115] In addition, some states allow for the creation of benefit limited liability corporations, which are more flexible than corporations.[116]

It is vital to understand the incompatibility of shareholder primacy with lawyers' ethical obligations and public commitments in light of the fact that nonlawyer participation in providing legal services is here and likely to stay. And, so far, the forms it has taken do not directly address that incompatibility. Legal Benefit Entities (LBEs), by contrast, would be governed by *stakeholder* primacy, referring to the supremacy of lawyers' obligation to the court system, as officers of the court, and their traditional fiduciary duties to clients.

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110. *Id.* § 101.

111. *Id.*

112. *Id.* Shareholders are, of course, owners of a corporation's common or preferred stock, whereas the term stakeholders refers to any of the constituencies that a corporation's activities and decisions may impact, such as employees, local businesses, the surrounding community, or even global citizens who ultimately internalize a corporation's environmental or social footprint.

113. MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-01 to -08 (LexisNexis 2021); *State by State Status of Legislation*, BENEFIT CORP., https://benefitcorp.net/policymakers/state-by-state-status [https://perma.cc/L2VW-7A64].

114. *See, e.g.*, CAL. CORP. CODE §§ 14600-31 (West 2021); FLA. STAT. §§ 607.601-.613 (2021); 805 ILL. COMP. STAT. 40/1 to 40/5.01 (2013); N.J. STAT. ANN. §§ 14A:18-1 to -11 (West 2021); N.Y. BUS. CORP. LAW §§ 1701-09 (McKinney 2021); VA. CODE ANN. §§ 13.1-782 to -791 (2021).

115. *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 361-68 (2021); COLO. REV. STAT. §§ 7-101-501 to -509 (2021); KAN. STAT. ANN. §§ 17-72a01 to -72a09 (2017); KY. REV. STAT. ANN. § 271B.16-210 (West 2021); TENN. CODE ANN. §§ 48-28-101 to -109 (2021); TEX. BUS. ORGS. CODE ANN. §§ 21.951-.959 (West 2021).

116. *See, e.g.*, DEL. CODE ANN. tit. 6, §§ 18-1201 to -1208 (2021); MD. CODE ANN., CORPS. & ASS'NS §§ 4A-1201 to -1208 (LexisNexis 2021); OR. REV. STAT. § 60.754 (2019); 15 PA. CONS. STAT. §§ 8891-98 (2016); UTAH CODE ANN. §§ 48-4-101 to -402 (LexisNexis 2021).

The next Part will outline developments that have ushered in both de facto and de jure nonlawyer participation in providing legal services and show how they fall short of resolving that fundamental tension (although one model, Arizona's new regulatory regime, comes close). The final Part will then discuss how requiring businesses that wish to provide legal services to organize as benefit entities bypasses shareholder primacy in favor of stakeholder primacy and so solves the underlying problem.

III. *FAIT ACCOMPLI*—NONLAWYER PARTICIPATION IN LAW FIRMS IS A REALITY IN THE UNITED STATES

The reality in the United States is that many lawyers have been practicing law within corporations for decades, since the in-house counsel revolution,[117] and that, increasingly, nonlawyers invest in and participate in the management of the practice of law here as well. The dam has fully broken, though, with the rise, mainstreaming, and evolution of both de facto and de jure approaches to nonlawyer participation in providing legal services.

As litigation finance has transitioned to law firm finance, the industry has de facto established nonlawyer participation in providing legal services. Initially, such nonlawyer financiers transacted only with clients so as not to run afoul of the fee-sharing prohibition. Increasingly, those financiers are contracting directly with law firms, providing financing to pursue portfolios of cases, or simply financing firms' operations more broadly.[118] Such funders often receive privileged information about the funded lawsuits under broad interpretations of the attorney-client privilege and work product doctrine, provide legal advice, select and direct legal representation, and influence or even control settlements.[119]

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117. *See* David B. Wilkins, *Is the In-House Counsel Movement Going Global? A Preliminary Assessment of the Role of Internal Counsel in Emerging Economies*, 2012 WIS. L. REV. 251, 251-65 (describing the in-house counsel movement in the United States and Western Europe).

118. *See, e.g.*, *Solutions: Portfolio & Law Firm Financing*, VALIDITY FIN., https://validity-finance.com/legal-finance/solutions/portfolio-law-firm-financing/ [https://perma.cc/3XXK-G4AF] ("[B]ecause our investment is with the firm not in the cases, firm management can choose to use capital for broader strategic purposes—such as hiring lateral lawyers, expanding offices into new markets or covering fixed fee overruns.").

119. On control of attorneys, litigation budgets, and settlement decisions by third-party funders see, for example, Maya Steinitz & Abigail C. Field, *A Model Litigation Finance*

Further, funders are influencing decisions that would have once been taken by the partnership without nonlawyers' influence such as recruitment and the selection and development of practice areas.[120] The proliferation of portfolio financing has caught the attention of and received scrutiny from the NYCBA which, while affirming the practice is inconsistent with New York's fee-sharing prohibition, has proposed reforms that amount to a disclosure regime.[121]

Meanwhile, nonlawyer participation has arrived, de jure, in Arizona effective January 1, 2021. There, the Supreme Court of Arizona abolished the fee-sharing and related prohibitions and replaced them with a robust regulatory regime that creates a new kind of business entity that is subject to extensive licensing and reporting requirements, and which must abide by the obligations of legal ethics.[122]

All of these developments are examined in the subsequent Sections.

Contract, 99 IOWA L. REV. 711, 722 (2014); *see also* Steinitz, *supra* note 65, at 467-79 (describing the litigation finance arrangement in the Chevron-Ecuador litigation which authorized financiers to select lawyers and supervise key litigation decisions and information rights); Daniel Fisher, *Litigation-Finance Contract Reveals How Investors Back Lawsuits*, FORBES (July 6, 2011, 7:12 AM), http://www.forbes.com/sites/danielfisher/2011/06/07/litigation-finance-contract-reveals-how-investors-back-lawsuits [https://perma.cc/2LJC-CAJY]. On provision of legal advice, consider how Chilmark Partners, a corporate bankruptcy advisory firm that recently formed a joint venture with the largest third-party financier, describes its "litigation consulting" services:

> We employ our financial expertise to fashion powerful testimony and insightful advice in complex disputes, whether in litigation in court or in negotiated settlements.
>
> We have assisted counsel with ... [c]rafting economic arguments in support of client's case[;] [d]rafting of discovery requests and review of production[;] [r]eview[ing], analyz[ing], and critiqu[ing] opposing arguments and testimony[;] [a]ssisting counsel during depositions[;] [a]d hoc analysis as requested by counsel[;] [p]reparation of expert reports[; and] [l]ive testimony.

Litigation Consulting, CHILMARK PARTNERS, https://www.chilmarkpartners.com/services/litigation/ [https://perma.cc/7U7H-HKNH].

120. *See, e.g.*, Press Release, Omni Bridgeway, *supra* note 4 ("We help [firms] recruit talent, launch a promising new litigation specialty, or provide a safety net for their own risks, allowing them to pursue new cases. In short, we help incubate firms and practice groups."); *see also Law Firm Financing*, OMNI BRIDGEWAY, https://omnibridgeway.com/litigation-funding/law-firm-financing [https://perma.cc/Y4DR-8LVS] (describing services provided by Omni Bridgeway, formerly Bentham IMF).

121. *See infra* Part III.C.

122. *See infra* Part III.E.

A. Antecedents

The rise of litigation finance and its ongoing transformation into law firm finance is the biggest and most systemic challenge to the traditional prohibition of nonlawyer participation in law firms. But before turning to that phenomenon, this Section examines several other indicators that the traditional rule has been fatally weakened by facts on the ground.

1. From Partnerships to Limited Liability Companies

The first of these may seem unremarkable today, but the ability of law firms to organize as Limited Liability Companies (LLCs) is a recent and revolutionary development. The LLC is a flexible business form that combines advantages of the corporate form, predominantly limited liability, with those of partnerships, predominantly pass-through taxation.[123] Because skepticism about whether benefit entities are likely to become heavily adopted might lead readers of this proposal to doubt the feasibility of a reform of law firms' organization and governance that is premised on such adoption, it is worth recounting the remarkable but unheralded rise of the LLC in some detail. The LLC revolution:

> began modestly with the Wyoming LLC Statute.... [Enacted in 1975 by] William Carney, who observed this development as a young law professor in Wyoming, reflected twenty years later that the statute seemed to be just a special vehicle for oil and gas companies, so unheralded that he heard about it only after it was passed.... [Carney dismissed the development in a footnote, describing] it as an amalgam of corporate, limited partnership, and general partnership provisions that "leaves more questions unanswered than it solves, and for that reason alone does not represent a viable alternative for most enterprises." ... By 1988 only one other state (Florida in 1982) had adopted an LLC statute.

123. Heather Huston, *How to Form an LLC, What Is an LLC, Advantages, Disadvantages & More*, WOLTERS KLUWER (July 29, 2021), https://www.wolterskluwer.com/en/expert-insights/how-to-form-an-llc-what-is-an-llc-advantages-disadvantages-and-more [https://perma.cc/L8GV-CE4B].

> However, the floodgates opened in 1988, and by 1994 all but three states had adopted LLC statutes. This LLC Revolution occurred despite the reluctance of courts, state lawmakers, and federal tax authorities to sanction a new business form.[124]

This account continues to generalize that the "LLC Revolution" shows that many of the impediments to the development of a new business form that theorists foresaw, namely "conservatism of the common law courts, lawmakers' lack of incentives to experiment, and firms' concerns about interstate acceptance of new forms—were actually mirages. By tinkering with agreements and provoking court decisions, lawyers could drive the development of business forms."[125]

Like other businesses, law firms have been flocking to the LLC form.[126] Permitting law firms to organize as LLCs (rather than requiring that they form general partnerships) has had a profound influence on the profession.[127] Most importantly, by eliminating the joint and several liability of partners in a general partnership, it paved the way to the supersizing and the globalization of law firms, as lawyers now felt comfortable practicing with other lawyers they barely knew and could not monitor.[128]

2. Nontraditional Legal Service Providers

Another notable development, and the one that establishes the most direct competition to law firms, is the (re)entrance of the "Big Four" accounting firms into the business of providing legal advice. The major accounting firms (formerly, the "Big Eight") first tried to penetrate the American legal services sector in the late 1990s and early 2000s but these efforts stalled—in retrospect, only temporarily—in the aftermath of the Enron scandal which exposed leading accounting firms' failures as ethics gatekeepers.[129] But a decade or

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124. LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION 119-20 (2010) (footnotes omitted) (quoting William J. Carney, *Close Corporations and the Wyoming Business Corporation Act: Time for a Change?*, 12 LAND & WATER L. REV. 537, 581 (1977)).

125. *Id.* at 121-22.

126. Allison Martin-Rhoades, Robert W. Hillman & Peter Tran, *Law Firms' Entity Choices Reflect Appeal of Newer Business Forms*, BUS. ENTITIES, July/Aug. 2014, at 16, 18.

127. *See* RIBSTEIN, *supra* note 124, at 127-28.

128. *Id.* at 127.

129. *See* Tzahi Sarousi, *The CPA's March Towards Law Firms: The Change of Statuesque*

so later, with the memories of the Enron-era scandals receding, economic rationales prevail and the big accounting firms are back in the game.[130] Researchers who study the sector have concluded that "as impressive as their expansion has been over the last decade ... there are good reasons to believe that the Big Four will be even more successful in penetrating the corporate legal services market in the decades to come."[131] One of these accounting firms, PwC, made headlines in 2017 with its plans to become the first of its cohort to open a U.S. law firm, in Washington, D.C., by creating a separate legal entity dedicated to providing legal services.[132]

The Big Four are not the only businesses to have launched law firm affiliates. Already in 2008, the cofounders of the publicly traded litigation finance firm Juridica Investments set up both a litigation funding firm and a feeder law firm, Fields & Scrantom, that represented cases funded by Juridica.[133] The model was replicated in 2015 and 2016 by leading litigation finance firms Burford Capital and Bentham IMF (now Omni Bridgeway), both of which launched affiliate law firms.[134]

Another firm that looked to disrupt the traditional law firm model was the D.C. law firm Atrium. While it would eventually shutter its doors in March 2020, the legal start-up Atrium replicated the

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Between Law Firms and Accounting Firms, LEGAL BUS. WORLD (June 25, 2018), https://www.legalbusinessworld.com/post/2018/06/25/the-cpas-march-towards-law-firms-the-change-of-statuesque-between-law-firms-and-accountin [https://perma.cc/U5FU-T926].

130. *Id.*

131. David B. Wilkins & Maria J. Esteban Ferrer, *The Integration of Law into Global Business Solutions: The Rise, Transformation, and Potential Future of the Big Four Accountancy Networks in the Global Legal Services Market*, 43 LAW & SOC. INQUIRY 981, 982 (2018).

132. Olson, *supra* note 10.

133. Juridica stopped making new investments in 2015. Sara Randazzo, *Litigation Funding Pioneer Hits a Roadblock*, WALL ST. J. (Nov. 23, 2015, 12:47 PM), https://www.wsj.com/articles/BL-LB-52601 [https://perma.cc/4XWV-XDFG]. The company was then liquidated in 2018. Michelle McGagh, *Struggling Establishment and Juridica Reach End of the Road*, CITYWIRE (Nov. 23, 2018), https://citywireamericas.com/news/struggling-establishment-and-juridica-reach-end-of-the-road/a1178650?section=investment-trust-insider [https://perma.cc/AX74-RFNA]. *See generally* Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 TUL. L. REV. 405, 438-39 (2017).

134. *See* Sahani, *supra* note 133, at 408-09, 438-39; *see also supra* note 120 and accompanying text; Seth Sandronsky, *Under Foreign Non-Lawyer Ownership Rules, U.S. Litigation Funder Opens Law Firm in London*, LEGAL NEWSLINE (Oct. 24, 2016), https://legalnewsline.com/stories/511019541-under-foreign-non-lawyer-ownership-rules-u-s-litigation-funder-opens-law-fi [https://perma.cc/3N99-CUPD].

avant-garde business model of the now-extinct firm, Clearspire. In both ill-fated attempts, two entities were set up, one a law firm and another an entity that created and maintained proprietary IT used by the law firm, all backed up by venture capital (that is, nonlawyer funding and ownership).[135]

3. Global Competitive Forces: The British (and Australians) Are Coming!

In the coming years, global competitive pressures created by ABSs overseas and related developments will likely exert additional pressure on the market for legal services in the United States, making it highly unlikely that the profession will be able to retrench and return to the forceful prohibition of nonlawyer participation in providing legal services. In fact, with its new regime, Arizona can be seen as the first through the floodgates of a new era of the practice of law in America.[136]

Litigation finance, discussed in detail below, provides a compelling, recent example of how competitive pressures can serve to import reforms to the profession into the United States from abroad (and in particular from the United Kingdom).

The United Kingdom and Australia (among other jurisdictions) allow robust participation of nonlawyers in providing legal services—this could have an effect on the entrenched norms of professional responsibility in the United States.[137] This is especially so given that these global forces are converging with the COVID-19 pandemic which may further catalyze changes and innovation as did the financial crisis in 2008, which increased the need for new sources of finance and clients and amplified global competitive pressures. The COVID-19 pandemic with, among other things, the changes it forced in terms of remote work and the attendant dispersal of the workforce, is leading to a reimagining of the practice of law on a scale not seen in living memory.

135. Robert Ambrogi, *Is 'Revolutionary' Law Firm Atrium a Case of Clearspire Déjà Vu?*, ABOVE THE L. (Sept. 18, 2017, 3:29 PM), https://abovethelaw.com/2017/09/is-revolutionary-law-firm-atrium-a-case-of-clearspire-deja-vu/ [https://perma.cc/38J4-AGRD].

136. *See infra* Part III.E.

137. *See* Robinson, *supra* note 74, at 12-14.

Nonlawyer participation in the provision of legal services has, in one form or another, been on the books in the United Kingdom for more than twenty-five years.[138] The change, however, is more conventionally attributed to the passage of the Legal Services Act of 2007, which for the first time allowed nonlawyers to acquire a financial interest in law firms, including through listing law firms on stock exchanges.[139] It also authorized lawyers and nonlawyers to participate together in a business to provide legal services. ABSs are now permitted to operate with some restrictions.[140] For instance, all employees of a legal services provider (lawyers and nonlawyers alike) are subject to the rules of professional responsibility of lawyers.[141] In non-law firm businesses that provide some form of legal services, at least one manager must be a lawyer and is tasked with ensuring that professional standards are upheld.[142]

Although the newly permitted practice of taking law firms public got off to a slow start—the first firm did not list until 2015—there are signs of acceleration.[143] Recently, a fifth law firm announced its intention to go public.[144] In addition to the publicly traded firms, the most recently available numbers show that more than 1,200 have registered as Alternative Business Structures.[145] In Australia, reforms relating to nonlawyer participation in law firms were also spurred by concerns about anticompetitive practices.[146] In the mid-1990s, Australia substantially overhauled its approach to competition policy.[147] As a result, Australian states began to permit

138. *See id.* at 18 & n.73.

139. *See id.* at 5, 18.

140. *Id.* at 18.

141. Nancy J. Moore, *Implications of Globalization for the Professional Status of Lawyers in the United States and Elsewhere*, 40 FORDHAM URB. L.J. 217, 226 (2012).

142. *Id.*

143. *See* Kate Burgess, *Pace of Law Firm IPOs Is Ponderous as Investors Kept at Bay*, FIN. TIMES (Feb. 25, 2018), https://www.ft.com/content/59185fac-17db-11e8-9e9c-25c814761640 [https://perma.cc/BL38-KCBT]; James Booth, *"Stars Aligning" for Boom in Law Firm IPOs in White Hot London Market*, FIN. NEWS (May 6, 2021, 1:16 PM), https://www.fnlondon.com/articles/stars-aligning-for-boom-in-law-firm-ipos-in-white-hot-london-market-20210506 [https://perma.cc/Q42L-P2BH].

144. Booth, *supra* note 143.

145. *Register of Licensed Bodies (ABS)*, SOLICS. REGUL. AUTH., https://sra.org.uk/solicitors/firm-based-authorisation/abs/abs-search.page [https://perma.cc/8NYE-FT6N].

146. *See* Robinson, *supra* note 74, at 28-29.

147. *About the National Competition Policy*, NAT'L COMPETITION COUNCIL, http://ncp.ncc.gov.au/pages/about [https://perma.cc/23R8-SB7H].

nonlawyer investment in law firms.[148] One of the early adopters, the first law firm to ever go public, was Slater & Gordon, a personal injury firm in Victoria.[149]

As the 2016 ABA Commission acknowledged, the sky has not fallen in either the United Kingdom or Australia.[150] Unsurprisingly, therefore, other jurisdictions are now following suit.

B. De Facto Nonlawyer Participation in Law Firms—Litigation Finance

Litigation finance practices have already, de facto, diminished the effect of the prohibition on nonlawyer participation in the business of providing legal services. They have done so following the same model as the successful unraveling of the norms prohibiting third parties from profiting from another's lawsuit. Within the span of the last decade, third-party funding, regarded by both opponents and proponents as the most significant contemporary development in civil justice,[151] has gone from being a crime, a tort, and an ethical violation to a mainstream practice.[152]

Like nonlawyer participation, reforms to the profession allowing litigation finance began abroad. In both the United Kingdom and

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148. Robinson, *supra* note 74, at 28-29.

149. *See generally* John C. Coates, Ashish Nanda & Monet A. Brewerton, *Slater & Gordon (A)*, HARV. L. SCH. CASE STUDY, 10-07, at 1, 3-4; John C. Coates, Ashish Nanda & Monet A. Brewerton, *Slater & Gordon (B)*, HARV. L. SCH. CASE STUDY, 12-11, at 1, 1-3; Richard Ackland, *Stock Market Crash: How Slater and Gordon Became a Casualty of the Neoliberal Dream*, THE GUARDIAN (Aug. 9, 2017, 10:26 PM), https://www.theguardian.com/commentisfree/2017/aug/10/stockmarket-crash-how-slater-and-gordon-became-a-casualty-of-the-neoliberal-dream [https://perma.cc/U2GL-7AUJ].

150. *See* ABA ISSUES PAPER, *supra* note 60, at 7 n.49.

151. *See generally* GEOFFREY MCGOVERN, NEIL RICKMAN, JOSEPH W. DOHERTY, FRED KIPPERMAN, JAMIE MORIKAWA & KATE GIGLIO, RAND CORP., THIRD-PARTY LITIGATION FUNDING AND CLAIM TRANSFER (2010), https://www.rand.org/content/dam/rand/pubs/conf_proceedings/2010/RAND_CF272.pdf [https://perma.cc/5VG7-66X2]; U.S. CHAMBER INST. FOR LEGAL REFORM, STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD-PARTY INVESTMENTS IN LITIGATION 1-6 (2012), https://instituteforlegalreform.com/wp-content/uploads/2020/10/TPLF_Solutions.pdf [https://perma.cc/T8BE-C64Y].

152. *See* Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1286-1301 (2011); Thomas J. Salerno & Jordan A. Kroop, *Third-Party Litigation Funding: Where Do We Go Now?*, 37 AM. BANKR. INST. J. 18, 18-19 (2018); David R. Glickman, *Embracing Third-Party Litigation Finance*, 43 FLA. ST. U. L. REV. 1043, 1051-54 (2016).

Australia, concerns that the self-regulation of lawyers was anticompetitive led to massive reforms in the 1990s and 2000s.[153] Changes to champerty laws—which govern litigation finance—in Australia and the United Kingdom at the turn of the millennium caused such competitive pressures on U.S.-based firms that they effectively felled the centuries-old champerty doctrine, which prohibited third-party litigation funding.[154] In less than a decade, champerty went from an entrenched red line for lawyers to a concern of the past.

New York-based megafirms, which directly compete with London's "Magic Circle" firms, were disadvantaged by not being able to offer the same third-party financing as their London competitors.[155] Worse yet, the London firms developed their advantage just as the financial crisis of 2008 shrunk corporate litigation budgets, causing severe ripple effects in American BigLaw.[156] The market-based solution was obvious: allow New York firms to compete by looking the other way or expressly approving of third-party funding.

Third-party funding's breakthrough was premised on contracting with clients, not with lawyers, who generally agreed that a direct engagement between a funder and a lawyer/law firm would be held not only as champertous, but also as violative of the fee-sharing prohibition, the conflict rules, and the duties of loyalty and independent judgment.[157]

But in the past couple of years, the emboldened industry, which has increasingly gained explicit acceptance in the form of favorable court rulings and bar opinions,[158] has evolved from contracting exclusively with clients and providing largely passive investments to active investing—that is, taking control of litigation—and to

153. *See* Steinitz, *supra* note 152, at 1278.

154. *See id.* at 1281.

155. *See id.*

156. *See* Rachel Rothwell, *2008 Crash Offers Glimpse of Our Future*, LAW SOC'Y GAZETTE (May 11, 2020), https://www.lawgazette.co.uk/commentary-and-opinion/2008-crash-offers-glimpse-of-our-future/5104203.article [https://perma.cc/H4M5-AY8A].

157. *See* Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615, 618 (2007).

158. *See* Nathan Crystal, *Litigation Finance: An Overview of Issues and Current Developments (Part I)*, 28 S.C. LAW. 12, 12 (2017). The Minnesota Supreme Court is the most recent to join the national trend to abolish or limit champerty. *See* Maslowski v. Prospect Funding Partners LLC, 944 N.W.2d 235, 236 (Minn. 2020).

contracting directly with lawyers and firms.[159] Third-party funders directly contract with law firms by financing portfolios of cases, establishing lending facilities, and accepting anticipated, contingency-based legal fees as collateral.[160]

For example, Omni Bridgeway, one of the market leaders, recently announced that it had "begun to provide funding to law firms based on their existing track record and basket of cases," viewing the expansion in part as a way to "help incubate firms and practice groups."[161]

Financing firms directly and receiving the return on the investment—often contingent on successful resolution of cases—from fees derived from a portfolio of cases is, economically speaking, just a hair's breadth away from nonlawyer ownership of contingency firms whose main assets are their future fees (and that traditionally use bank loans as a main form of finance beyond the partners' own resources). The main asset and source of revenue streams of a contingency fee firm is the fees generated by successful cases. Therefore, the value of a contingency fee firm is derived, economically speaking, largely from the value of its portfolio of cases. (This excludes additional but much more minor assets firms might own such as equipment and software.) And, in turn, owning a right directly in the revenues from its portfolio of cases is similar to owning a share of the firm whose majority of value is derived from the expected future revenues of that same portfolio of cases. These practices are only slightly different from investing in law firms as an entity. And while the similarity to nonlawyer ownership is closest in the case of contingency firms, the case is similar, if a bit less pronounced, when third-party funders are providing funding to portfolios of cases or other forms of financing to law firms that have other business models.

Law firm finance also implicates other relevant rules of legal ethics. It is hard to see how the practice is something other than fee-sharing (more on that below). Financiers' active management of cases they invest in is arguably very close to, if not in fact, the

159. *See* Crystal, *supra* note 158, at 12-13.
160. *See id.*; Press Release, Omni Bridgeway, *supra* note 4.
161. *See* Press Release, Omni Bridgeway, *supra* note 4.

practice of law by nonlawyers.[162] And the support that financiers provide, as described above, for matters such as firm and practice incubation and recruiting is an awful lot like participation in management.

Critically, these investment arrangements, or ownership substitutes, create the same type of concerns that would arise from direct ownership, namely, conflicts of interests, prioritization of profit-maximization, possible short-termism, and other associated concerns surveyed in Part II.

C. New York and the Disclosure-Focused Paradigm

Although its recommendations are not binding, the NYCBA is an influential organization, so it is instructive to note that it recently and reluctantly came out in favor of liberalizing Rule 5.4. The first act in this mini-drama came in July of 2018, when the NYCBA issued a Formal Ethics Opinion, according to which

> a lawyer [who] enter[s] into a financing agreement with a litigation funder, a non-lawyer, under which the lawyer's future payments to the litigation funder are contingent on the lawyer's receipt of legal fees or on the amount of legal fees received in one or more specific matters.... violates Rule 5.4's prohibition on fee sharing with non-lawyers.[163]

But given how widespread portfolio financing had become, backlash from the legal profession[164] compelled the NYCBA to form a working group to revisit the question. The working group did not dispute the conclusion of law reached in the original Formal Ethics

162. *See* CHILMARK PARTNERS, *supra* note 119; *see also Funding Criteria*, HARBOUR LITIG. FUNDING, https://www.harbourlitigationfunding.com/working-with-us/what-we-look-for/ [https://perma.cc/3DJS-4UDX]. For an example of the extensive monitoring which litigation financiers engage in with regards to their funded cases, see Press Release, Omni Bridgeway, Covenant Holders v AET (Seas SAPFOR Litigation) (June 1, 2017), https://omnibridgeway.com/insights/press-releases/all-press-releases/press-release/2017/06/01/covenantholders-v-aet-seas-sapfor-litigation [https://perma.cc/5GJ4-GHR8].

163. Ass'n of the Bar of the City of N.Y. Comm. on Pro. Ethics, Formal Op. 2018-5, at 1 (2018).

164. *See* Paul B. Haskel & James Q. Walker, *New York City Bar Opinion Stuns the Litigation Finance Markets*, LEXOLOGY (Aug. 16, 2018), https://www.lexology.com/library/detail.aspx?g=eed0a03b-ae12-4157-917f-00bdad2b2dfc [https://perma.cc/C7VU-PFPT].

Opinion, but it did conclude that "lawyers and the clients they serve would benefit if lawyers have less restricted access to funding."[165] However, the working group was unable to reach a consensus on what such liberalization should look like, perhaps due to the controversial nature and implications of the emerging practice—especially considering the strongly held divergent views of various stakeholders, including different factions of the bar.[166] Instead, the report offered two alternative proposals without endorsing either.[167]

Compared to Arizona's approach, both proposals offer a light touch as far as regulating the practice is concerned. Both nod in the direction of lawyers' independent judgment, duty to avoid conflicts, and duty to maintain confidences. Beyond that, both proposals are, in essence, disclosure regimes. One proposal is that lawyers be allowed to receive investments as long as they obtain informed consent from clients. The other requires disclosure only, without consent.[168]

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165. *See* N.Y.C. BAR ASS'N, *supra* note 14, at 2.

166. *See id.* at 90.

167. *Id.* at 24.

168. Proposal A proposes the following:

> [A] lawyer or a law firm may share legal fees with an entity in exchange for the entity's providing financial assistance to the lawyer specifically for the use with respect to a legal representation of one or more clients, provided that:
>
> (i) the entity and its representatives do not participate, directly or indirectly, in the decision-making regarding the representation;
>
> (ii) the lawyer or law firm maintains professional independence;
>
> (iii) the client provides written informed consent to the financial arrangement; and
>
> (iv) the lawyer or law firm complies will all other applicable Rules, including Rule 1.6 [on confidentiality] and Rule 1.7 [on conflicts of interest].

Id.

Proposal B proposes the following:

> [A] lawyer or law firm may share legal fees with an entity in exchange for the entity's providing financing for the lawyer's or law firm's practice provided that:
>
> (i) the lawyer and law firm do not permit the entity to participate directly or indirectly in a matter except for the benefit of the client;
>
> (ii) the lawyer and law firm do not disclose confidential client information except as Rule 1.6 may permit;
>
> (iii) the lawyer and law firm comply with Rule 1.7; and
>
> (iv) the lawyer or law firm informs the client in writing that they are sharing or may share fees with an entity in exchange for the entity's providing financing for the lawyer's or law firm's practice.

Id. at 29.

Much has been written about the inadequacy of disclosure regimes, including a vast body of empirical work, concluding that disclosure is "the most common and least successful regulatory technique in American law."[169] In a masterful book on the topic, Ben-Shahar and Schnieder explain how and why mandated disclosure "is a Lorelei, luring lawmakers onto the rocks of regulatory failure."[170] Mandated disclosure, they explain, aims to "address[ ] the problem of a world in which nonspecialists must make choices requiring specialist knowledge."[171] Disclosure is appealing because it reflects fundamental American beliefs in free markets and autonomy; it seems to regulate with a light touch; it is relatively easy to enact; its failures are hard to detect; and "even if it does little evident good, it does little obvious harm."[172]

In a nutshell, disclosure fails because it is impossible to convey complexity simply.[173] Even assuming consumers want, as part of their decision-making process, to assemble relevant data, identify outcomes, and articulate their own preferences, they would still need to understand the disclosures. But, while even experts struggle with such tasks, "[i]n truth, many people cannot read most disclosures. Over forty million adults are functionally illiterate; another fifty million are only marginally literate.... Innumeracy is worse."[174] This is before we address overload—the amount of disclosures consumers are presumed to be reading, both in terms of any given piece of disclosure as well as in the aggregate.

In reality, rather than protect consumers, disclosure in fact shields the discloser from tort liability, antifraud statutes, and other causes of action. By extension, most law firm clients will neither read, understand, nor have the bargaining power to negotiate fine print about their law firm's sources of capital. A cynic might say that this is a feature, not a bug, of the proposed regulation and a sign of what is to come if and when lawyers and financiers are left to self-police their conflicts.

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169. OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 3 (2014).

170. *Id.* at 4.

171. *Id.* at 5.

172. *Id.* at 5-6.

173. *Id.* at 8.

174. *Id.*

Further, a client's knowledge of or consent to the firm's receipt of external financing has no bearing on shareholders' rights; clients have no power to consent on behalf of the shareholders in the company providing the financing, to a suspension of the shareholder primacy rule. Hence, the head-on collision between client and court primacy and shareholder primacy would be as unresolved under the proposed New York approach as it is under Arizona's new regime.

D. Other States: A Movement to Reexamine Nonlawyer Participation

Arizona and New York are not alone in revisiting the question of whether and how to amend Rule 5.4. The District of Columbia has long allowed ownership and fee sharing by nonlawyers in limited circumstances.[175]

In 2015, Washington State became the first state to allow fee sharing and joint ownership of a law practice between a lawyer and nonlawyer in a narrow context: "The Supreme Court of Washington has approved revisions to the Rules of Professional Conduct governing lawyers in that state that allow lawyers and limited license legal technicians to form partnerships and share fees."[176]

Similarly, in August 2020, Utah's Supreme Court piloted a two-year program allowing nonlawyers to offer legal services.[177] The pilot has been described by Utah's Supreme Court as "allowing innovation-focused legal entities to push new products in a 'regulatory sandbox,'" with a view towards amending Utah's "rules of professional conduct to loosen the ethical restrictions on lawyers with regard to ... fee-sharing."[178]

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175. Victoria Shannon, *The Funder as Co-Counsel: A Glimpse into the Future of Law Firm Ownership*, MODEL LITIG. FIN. CONT. (Mar. 11, 2013), http://litigationfinancecontract.com/ the-funder-as-co-counsel-a-glimpse-into-the-future-of-law-firm-ownership [https://perma.cc/ 84J8-DDZS].

176. Robert Ambrogi, *Washington OKs Fee Sharing and Joint Ownership Between Lawyers and LLLTs*, LAWSITES (Apr. 3, 2015), https://www.lawsitesblog.com/2015/04/washington-oks-fee-sharing-and-joint-ownership-between-lawyers-and-lllts.html [https://perma.cc/64YM-77R3].

177. Utah Sup. Ct. Standing Ord. No. 15 (2020).

178. Dan Packel & Dylan Jackson, *The Fight over the Future of Law Firm Ownership Has Put an Industry at Odds*, N.J. L.J. (Feb. 24, 2020), https://www.bloomberglaw.com/document/ X8CUQ6CC000000?jcsearch=hdi45ifiem#jcite [https://perma.cc/64X5-PYYU].

In California, a proposed amendment to the Rule that "would expand the existing exception for fee-sharing arrangements with a nonprofit organization ... provided that the nonprofit organization qualifies under section 501(c)(3) of the Internal Revenue Code" is pending for public comment.[179]

And in Illinois, the Chicago Bar Association launched a task force to explore a reform of the Rule.[180]

This is what a movement looks like.

E. Arizona's Revolution and the Ethics Paradigm

Commencing January 2021, Arizona is leading the way with the farthest-reaching reform to the practice of law of any state in the nation. The reform consists of two main prongs. One is the introduction of a licensure track that will allow nonlawyers, "Legal Paraprofessionals" (LPs), to provide legal services—including representation in court—on a limited basis.[181] The second is replacing Arizona's version of Model Rule 5.4, which prohibits nonlawyers from sharing in lawyers' fees, holding an economic interest in a law firm, or participating in the management of a law firm, with a regime regulating nonlawyer participation.[182] Of the two changes, the second is of most interest to us here.

Under the new regime, firms can now include "Authorized Person[s]," defined as anyone who "possess[es] ... [a]n economic interest in the [ABS] equal to or more than 10 percent of all economic interests ... or ... [t]he legal right to exercise decision-making authority on behalf of the [ABS]."[183] Decision-making authority can be direct or indirect and can come in the form of "[c]ontrol *or*

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179. STATE BAR OF CAL., PROPOSED AMENDED CALIFORNIA RULE OF PROFESSIONAL CONDUCT 5.4 (2020), https://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2020-Public-Comment/Proposed-Amended-California-Rule-of-Professional-Conduct-54-Financial-and-Similar-Arrangements-with-Nonlawyers [https://perma.cc/7UEA-YUCK].

180. Packel & Jackson, *supra* note 178.

181. News Release, Ariz. Sup. Ct. Admin. Off. of the Cts., *supra* note 7.

182. *Id.*

183. Ariz. Sup. Ct. Admin. Ord. No. 2020-173 § A (2020) [hereinafter Order 173], https://www.azcourts.gov/Portals/22/admorder/Orders20/2020-173F.pdf [https://perma.cc/7XDR-JPUS].

participat[*ion*] in the management or affairs of the ABS," by operation of law or contract.[184]

At the most abstract level, the regulatory regime can be said to be comprised of five elements. First, before accepting investments from Economic Interest Holders, or granting them management authority, a firm must be structured as an ABS—subjecting it to extensive licensing requirements. Second, the core legal ethics rules (such as conflicts of interest, duty of confidentiality) extend to the ABS (as an entity) as well as its Authorized Persons, including nonlawyers. Third, the new rules impose various obligations on ABSs and turn lawyers in an ABS into 'gatekeepers' responsible for the ABS's and its Authorized Persons' compliance.[185] Fourth, the amendments to the rules clarify that lawyers' entire set of professional and ethical responsibilities remain applicable even when a lawyer is practicing as part of an ABS—even when taking on a nonlawyer as an investor and, by implication, becoming their fiduciaries.[186] Fifth, critically, the licensing and regulation of ABSs is the province of the Arizona Supreme Court, making the Arizona Supreme Court *the regulator* of ABSs, Economic Interest Holders, and lawyers.[187] So, a Singaporean who is passively investing in an Arizona law firm would be regulated by the Arizona Supreme Court. Notably, the stricter of the two New York Task Force's proposals[188] is baked into the Arizona rules which, even prior to the reform, defined "unprofessional conduct" as "accept[ing] compensation for representing a client from anyone other than the client without the client's knowledge and approval."[189]

The following paragraphs explain these five elements in greater detail, and the following Section compares and contrasts this regulatory regime to the one built into benefit entities.

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184. *Id.* (emphasis added). I will generally use the term Authorized Persons, except when referring to passive investors, in which case I will use the term Economic Interest Holders.

185. *Id.* § 6(3)(b).

186. *Id.* § K.

187. *Id.* § D.

188. *See supra* note 168 and accompanying text.

189. Ariz. Sup. Ct. Ord. No. R-20-0034, at 56 (2020) [hereinafter Order Amending Rules], https://www.azcourts.gov/Portals/215/ABS%20Documents/Final%20Order_R-20-0034.pdf [https://perma.cc/2NV7-Z8HJ].

1. Alternative Business Structures and Licensure

An ABS is "a business entity that includes nonlawyers who have an economic interest or decision-making authority in the firm and provides legal services in accord with [Arizona] Supreme Court Rules."[190] In order to be engaged in the *authorized* practice of law, such an entity must be licensed and must include at least one lawyer who is an active member in good standing of the State Bar of Arizona and who supervises the practice of law conducted by the ABS.[191] "Any lawyer who provides legal services through an unlicensed ABS is engaged in the unauthorized practice of law."[192]

The new rules establish a Committee on Alternative Business Structures (the Committee) which, inter alia, administers the licensing.[193] The existence of Authorized Persons must be disclosed and any failure to do so is both independent ground for sanction as well as an aggravating circumstance of other violations.[194] And Authorized Persons' conflicts of interest and affiliations (for example, parents and subsidiaries) must also be disclosed.[195] Perhaps anticipating a temptation to circumvent the disclosure requirement, as well as understanding the potential conflict created by a triangular relationship between lawyers, their clients, and their investors, the Supreme Court of Arizona made the first grounds for denial or revocation of a license the commission of "material misrepresentation, omission, fraud, dishonesty, or corruption in the application form" on the part of an applicant or any Authorized Persons.[196]

When recommending to the Arizona Supreme Court whether to grant a license, the Committee must place the public interest first, including "(A) protecting and promoting the public interest; (B) promoting access to legal services; (C) advancing the administration of justice and the rule of law; (D) encouraging an independent, strong, diverse, and effective legal profession; and (E) promoting

190. Order 173, *supra* note 183, § A.
191. Order Amending Rules, *supra* note 189, at 9-10, 51.
192. *Id.* at 42.
193. Order 173, *supra* note 183, § D(5).
194. Order Amending Rules, *supra* note 189, at 67.
195. Order 173, *supra* note 183, § G(1)(b)-(c).
196. *Id.* § E(2)(d).

and maintaining adherence to professional principles."[197] The Committee must also consider the governance structure of the entity seeking a license and whether it ensures that the core tenets of legal ethics will be upheld.[198]

2. Extension of Core Ethics Requirements to ABSs and Nonlawyers

The new rules regard all of the newly authorized forms of nonlawyer participation as "the practice of law." Therefore, the amended rules extend core elements of the code of legal ethics to both ABSs and to Authorized Persons. First, as noted, as a prerequisite for licensure as an ABS, the Committee must satisfy itself that the applicant has adequate governance structures and policies in place to ensure that the "lawyers providing legal services to consumers act with independence *consistent with the lawyers' professional responsibilities*."[199] This can be regarded as a catchall provision that incorporates by reference all of lawyers' ethical obligations. An applicant for ABS status must also convince the Committee, specifically, that confidentiality will be maintained.[200] And, in another catchall, the applicant must also demonstrate that "lawyers' duties and responsibilities to clients" will take precedence over "any other business policies or procedures."[201]

In addition, the Committee must satisfy itself that the applicant's governance structures allow a "lawyer [to] make[ ] decisions in the best interest of clients."[202] This can also be seen as a type of stakeholder governance requirement.

Each ABS and its Authorized Persons must adhere to the Rules of the Arizona Supreme Court and to a code of conduct.[203] The "minimum standards of conduct" enumerated in the code do "not allow the legal representation of clients, if the representation involves a conflict of interest;" prohibit taking "any action or engag[ing] in

197. *Id.* § E(2)(a)(1).
198. *Id.* § E(2)(a)(2).
199. *Id.* § E(2)(a)(2)(A) (emphasis added).
200. *Id.* § E(2)(a)(2)(D).
201. *Id.* § E(2)(a)(2)(E).
202. *Id.* § E(2)(a)(2)(C).
203. *Id.* §§ G(2)(a), K(1)-(2).

activity that interferes with the professional independence of lawyers;" prohibit "tak[ing] an action or engag[ing] in any activity that misleads or attempts to mislead a client, a court, or others;" requires maintenance of "effective governance structures, arrangements, systems, and controls to ensure ... [c]ompliance with the requirements of supreme court rules" and the code of conduct; and requires ensuring that "[m]anagers, economic interest holders, decision-makers ... do not cause or substantially contribute to a breach of the [Arizona Rules of Professional Conduct]."[204] Grounds for disciplining members of the bar as well as affiliate members, nonmembers, and ABSs include violations of professional conduct rules in any jurisdiction; violation of a canon of judicial conduct; and the knowing violation of any rule or any order of the court.[205]

3. Lawyers' Professional Responsibilities Are Not Superseded by Fiduciary Duties to Investors

A main effect of the reform is that in Arizona, lawyers will now have a pair of otherwise-equal fiduciary duties: one to their clients—by virtue of the ethics rules—and the other to their investors—by virtue of the general principles of business law.[206] This is in addition to likely never-before-seen attractions such as active investors who can, and likely will, invest in multiple firms, including ones that may be on adverse sides of a case, or on different sides of the same transaction, and lawyers working for/owning firm A&B LLP who also invest in law firm X&Y LLP. By clarifying that "[m]embers of an ABS who are members of the state bar bear the responsibility of the ethical and professional obligations of the profession as well as the standards stated herein,"[207] the amended regulations resolve any conflict in favor of the client.

In fact, throughout the regulations, the principle of lawyers' independent judgment is enshrined as paramount. The involvement of the Authorized Persons and their interests is subordinated to the

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204. *Id.* § K(1).

205. Order Amending Rules, *supra* note 189, at 56, 74.

206. *See generally* HOLGER SPAMANN, CORPORATIONS § 2 (2017), https://opencasebook.org/casebooks/261-corporations/sections/2-the-basics/ [https://perma.cc/U39A-GDBD].

207. Order 173, *supra* note 183, § K.

best interests of the clients. And the lawyers are charged with ensuring that the foregoing is indeed the case:

> A lawyer in a firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the conduct of nonlawyers engaged in activities assisting lawyers in providing legal services and those who have access to attorney-client information, is compatible with the professional obligations of the lawyer. Reasonable measures include, but are not limited to, adopting and enforcing policies and procedures designed ... to prevent nonlawyers in a firm from directing, controlling, or materially limiting the lawyer's independent professional judgment on behalf of clients or materially influencing which clients a lawyer does or does not represent.[208]

However, nowhere is the head-on collision with shareholder primacy acknowledged and, perhaps consequently, the *primacy* of the clients and courts as stakeholders is not made *explicit* anywhere in the new rules or their commentary.

4. Lawyers as Gatekeepers

The new rules mandate that all ABSs must designate a "[c]ompliance lawyer" who must be "an active member of the State Bar of Arizona ... [and who] is responsible for ensuring compliance with the rules governing ABSs" and Arizona's legal ethics rules.[209] The compliance lawyer is an enforcer (and even a snitch) or, to apply a theoretical term, a gatekeeper. In the corporate governance literature, gatekeepers are defined as "independent professional[s] ... positioned so as to be able to prevent wrongdoing by withholding necessary cooperation or consent.... [T]hey are repeat players who provide certification or verification services to [stakeholders] vouching for someone else who has a greater incentive than they to deceive."[210] Otherwise stated, gatekeepers are agents "who act[ ] as

208. Order Amending Rules, *supra* note 189, at 41.
209. Order 173, *supra* note 183, §§ A, G(3).
210. JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 2 (2006).

a reputational intermediary to assure investors as to the quality of the 'signal' sent by," in our case, the ABS.[211]

Among other things, the compliance lawyer must be sufficiently qualified to "ensure that ethical obligations, protection of the public, and standards of professionalism are adhered to,"[212] and she must take reasonable steps to ensure that Authorized Persons and others "associated with" the ABS "do not cause or substantially contribute to a breach of the regulatory requirements of this code or *the ethical and professional obligations of lawyers*."[213] Here, again, we see a wholesale incorporation by reference of the code of legal ethics. The gatekeepers must notify the state bar of breaches and of facts which may constitute a breach.[214] Furthermore, the gatekeepers are responsible for ensuring the ABS's and its employees' adherence to the regime's disclosure requirements (including conflicts) and ensuring that adequate governance structures and policies are in place to maintain lawyers' independence, work standards, confidentiality, and other duties to the client.[215]

Interestingly, it is not only the ABS that is responsible, both directly and through the employ of the compliance lawyer, to monitor compliance by Authorized Persons and others. The converse is also true: "An authorized person, including any manager, economic interest holder, or decision-maker in an ABS is individually responsible for compliance by the ABS with this code of conduct."[216] One can think of this as an agents-watching-agents way to address the structural conflicts that nonlawyer participation introduces, as well as any temptation to violate ethical requirements.[217]

211. *Id.*

212. Order 173, *supra* note 183, § G(3)(a)(5).

213. *Id.* § G(3)(b)(3) (emphasis added).

214. This "duty to report ... appl[ies] to lawyers who *work in* or have ownership interests in an ABS." Order Amending Rules, *supra* note 189, at 49 (emphasis added).

215. Order 173, *supra* note 183, §§ E(2)(a)(2), G(3)(b).

216. *Id.* § K(2).

217. Steinitz, *supra* note 152, at 1325 n.200 ("Developed in the context of institutional shareholders' monitoring corporate managers, the concept of 'agents watching agents' involves situations where the self-interests of one set of agents involves monitoring other agents, who have a different set of self-interests which, in turn, may conflict with the interests of the principals." (quoting Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 850 (1992))).

5. The Arizona Supreme Court as Regulator—A Storm on the Horizon?

As is true in most states, the practice of law in Arizona is regulated by the state supreme court[218] and its subsidiary, the state bar.[219] This *oversight* function is, of course, distinct from the court's *adjudicatory* function. As an *adjudicator*, the court can, of course, interpret and apply the law, considering the legislature's acts, precedent, and the state constitution. Without digressing into a discussion of the judicial function and the limits of judicial review, on occasion that interpretation amounts to significant change. It is important to make these elementary observations because it is not at all clear that the court can effect the same magnitude of change in the law in its role as an *overseer*, by interpreting the concept of "the practice of law" so broadly that it encapsulates investments (including passive ones) in law firms.[220] Certainly, it can update the rules governing the legal profession, abolish Rule 5.4, and permit nonlawyers to participate in the business of providing legal services. But, given the separation of powers between court and legislature, it seems a stretch to argue that, in so doing, it can change the business law that governs corporations and which favors shareholder primacy.

That the practice of law is under the authority of states' supreme courts is a well-settled matter in the United States. The Arizona State Constitution, for instance, states that "[t]he judicial power shall be vested in an integrated judicial department."[221] This has been interpreted in the leading early cases as meaning that "the practice of law [falls] exclusively within the authority of the Judiciary."[222] The court has defined the practice of law as "those acts, whether performed in court or in the law office, which lawyers

218. Order 173, *supra* note 183, § D(1) ("The supreme court is authorized to regulate the practice of law as a function of its responsibility to administer an integrated judiciary.").

219. Order Amending Rules, *supra* note 189, at 51.

220. Order 173, *supra* note 183, § K (extending the Supreme Court of Arizona's regulatory function to Authorized Persons and LPs); Order Amending Rules, *supra* note 189, at 9, 67, 88 (jurisdiction).

221. ARIZ. CONST. art. VI, § 1.

222. *In re* Creasy, 12 P.3d 214, 216 (Ariz. 2000) (quoting *In re* Smith, 939 P.2d 422, 424 (Ariz. 1997)).

customarily have carried on from day to day through the centuries."[223] Beyond this doctrinal definition, the Arizona Rules of the Supreme Court further define the practice of law and provide a non-exhaustive list of conduct that is considered the practice of law.[224] None of the enumerated activities, it should be noted, appear to cover investment in a law firm nor its management.[225] And Arizona's ABS regime extends the rules governing complaints, investigations, and disciplinary proceedings to Authorized Persons, ABSs, and their members.[226] Disciplinary measures are to be meted *by a judge* (not the bar association).[227] The sanctions available, in addition to suspension or revocation of an ABS's license,[228] span the entire gamut of the court's authority—for example, injunctions, civil contempt, civil penalties, costs and expenses—and go beyond the sanctions that a bar association may ordinarily impose.[229]

However, the new reality of nonlawyer participation and, especially, investing, including passively, in law firms stretches the system beyond what was likely originally envisioned when the constitutional order was put in place. This becomes clearest when considering the case of a passive investor. Let us consider the hypothetical of a Singaporean investor who passively invests in both an Arizona law firm and a chain of dry cleaners. This investor from a world away will now have one of her investments regulated by the Arizona Supreme Court as *overseer*, the other by the legislature (and the Arizona Supreme Court as *adjudicator*). One investment will conform to her usual expectations about the law governing the conduct of a business entity—that is, it will work to maximize return on her investment. The other will not. The directors and officers of the dry-cleaning chain will have the duties and obligations set by statute and decades of court holdings, while those of the ABS will have the duties and obligations set by the court. It is not

223. *Id.* at 217 (quoting State Bar of Ariz. v. Ariz. Land Title & Tr. Co., 366 P.2d 1, 14 (Ariz. 1961)).
224. ARIZ. SUP. CT. R. 31.
225. *Id.*
226. Order 173, *supra* note 183, § H(1)-(2); Order Amending Rules, *supra* note 189, at 73.
227. Order 173, *supra* note 183, § H(1)-(2); Order Amending Rules, *supra* note 189, at 73.
228. Order Amending Rules, *supra* note 189, at 18-19.
229. Order 173, *supra* note 183, § H(2).

clear that the power granted to the court by the Arizona Constitution encompasses such far-reaching results.

Critically, this investor is now subject to two irreconcilable bodies of law: Arizona's business law, which is premised on shareholder primacy,[230] and Arizona's legal ethics, which are premised on stakeholder primacy.[231] In addition, the investor is *generally* governed by business law and its shareholder primacy principle—the obligation to maximize *his own shareholders'* profits.

The solution may be simple: that the general rules of construction apply and *lex specialis derogat legi generali*.[232] Namely, the more specific rules will prevail over more general rules if one accepts that business law is *legi generali* and the regulation of the practice of law is *lex specialis*. However, considering the ABS regime as *lex specialis* presupposes that the court has the power to alter business law through its oversight function. That is a proposition which, at the least, is contestable and will no doubt be contested. In addition to questions about business law and the regulation of the professions, it implicates the separation of powers between the judiciary and the legislature. In order to avoid constitutional controversy, the Arizona legislature should ratify the court's reform and require the usage of benefit entities—as should any state that wants to follow suit.

6. The Path to Change: The Institutional Angle

It may not have escaped the reader that past attempted reforms in the United States have been conducted entirely by and through the bar associations. In the United Kingdom and Australia, conversely, the commissions tasked with making recommendations as to whether, and if so how, to liberalize the legal services sector have not been monopolized by the profession itself.[233] While lawyers were

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230. *See* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 277-78 (1998).

231. *See supra* Part I.

232. *Lex specialis derogat legi generali*, BLACK'S LAW DICTIONARY (11th ed. 2019).

233. Jay C. Carlisle, *English White Paper Law Reforms: An Outline for Equal Access to Justice?*, 62 N.Y. ST. BAR J. 54, 56 (1990); MJ Quinn, Note, *Reform of the Legal Profession in England and Wales*, 12 N.Y. L. SCH. J. INT'L & COMP. L. 237, 261, 285-86 (1991).

represented, the commissions included nonlawyer representatives as well.[234]

In Arizona, something similar may explain why the state managed to break away from the nationwide impasse. Under Arizona's constitution, it is Arizona's Supreme Court that "is authorized to regulate the practice of law as a function of its responsibility to administer an integrated judiciary."[235] The reform was enacted neither by way of bar association task force reports and changes to the state's rules of professional responsibility nor by way of state legislation.[236] Rather, the Arizona Supreme Court ordered the creation of a Task Force under its own auspices. The Task Force was chaired by the Vice Chief Justice of the Arizona Supreme Court and comprised partly of lawyers practicing in law firms, but mostly of representatives of the judiciary, the private sector, and academia.[237] The task force issued a report that was adopted by a (unanimous) vote of the Arizona Supreme Court and enacted into law by way of administrative orders.[238] These administrative orders amended the Arizona Rules of the Supreme Court,[239] the Arizona Rules of Evidence,[240] and the Arizona Code of Judicial Administration.[241] While justices are jurists, and therefore socialized much like the members of the bar, they are first and foremost members of the bench. Entrusted with the administration of justice and possessing a systemwide view of impediments thereto, one can surmise that their primary fealty is to the justice system rather than the profession's ability to maximize profits.

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234. Carlisle, *supra* note 233, at 56-57; *Past Commissioners*, AUSTL. L. REFORM COMM'N, https://www.alrc.gov.au/about/commissioners/past-commissioners/ [https://perma.cc/7GD7-KW7W].

235. Order 173, *supra* note 183, § D(1).

236. The reform was studied and recommended by the Arizona Supreme Court's Task Force on the Delivery of Legal Services, chaired by the Vice Chief Justice. *See* News Release, Ariz. Sup. Ct. Admin. Off. of the Cts., *supra* note 7.

237. *Member List of the Task Force on Delivery of Legal Services*, ARIZ. JUD. BRANCH (Jan. 10, 2019), https://www.azcourts.gov/Portals/74/LSTF/MemberList011019LSTF.pdf [https://perma.cc/6GVZ-DW54].

238. *Legal Services Reforms*, ARIZ. JUD. BRANCH, https://www.azcourts.gov/accesstolegalservices [https://perma.cc/RN2S-J6RG].

239. Order Amending Rules, *supra* note 189, at 2.

240. *Id.*

241. Order 173, *supra* note 183.

This path is worth considering because it is both critical for understanding “why Arizona?” and for pondering whether other states are likely to follow. It also bolsters the following observation. The upshot of Arizona’s path to the reform (as well as that of the United Kingdom and Australia), is that process matters and may have been outcome-determinative in achieving a reform that has eluded the rest of the country for a century. If one would like to see similar changes in other states, going through the legislatures and/or committees in which lawyers are represented but are not in control of the process is likely a necessary-though-insufficient factor in any similar reform.

IV. Law Firms as Benefit Entities: A Proposed Solution

> The lawyers’ hierarchy of duties was always the court, number one, and the client, number two. A duty to shareholders’ need for revenue, profits and dividends, inevitably would create incompatibility.[242]

This Part offers the normative argument that investment in law firms should be allowed as long as it is conditioned on governance requirements that place the courts and the clients decisively ahead of shareholders. It further suggests that benefit entities provide a ready-made legal technology to do so, consistent with the relevant state’s existing corporate law.

The challenges that participation of nonlawyers, as owners and managers, presents to the practice of law are real and must be addressed. However, they are not dissimilar to what other professions face and the benefits to the public and to many (albeit perhaps not all) members of the profession are considerable. Liberalization is likely to lead to increased access to justice and, perhaps counterintuitively, could enhance the dignity and diversity of the profession and the welfare of the practitioners. In that light, a blanket prohibition barring all nonlawyer participation seems an overly blunt tool to deal with the risks. Especially considering that independent judgment and client focus are, in the abstract and all other things being equal, logically unrelated to the organizational

242. Ackland, *supra* note 149.

form of the business entity in which the practice of law occurs. Moreover, the floodgates have already opened. Nonlawyer participation, and even functional equivalents of ownership, with attendant indirect management of law firms are already upon us. The only question that remains is how best to regulate them.

Fortunately, neither the Arizona Supreme Court nor other courts and legislatures liberalizing Rule 5.4 need to look far for a legal model that definitively supplants shareholder primacy in favor of stakeholder primacy: the benefit entity (including benefit corporations and benefit LLCs). This Part concludes with a proposal that nonlawyer participation, as Economic Interest Holders and/or managers, should be permitted on the condition that firms seeking this route organize as legal benefit entities (LBEs), laying out the details of the proposal and explaining how such organizations will help reduce the risk that introducing nonlawyers may raise.

A. In Defense of Nonlawyer Participation

While the prevailing majority's reasons for restricting the participation of nonlawyers in the legal profession have not changed much in the past century, academic debates have furnished ever more sophisticated and trenchant critiques of the status quo. The ABA recently described the four main arguments in favor of allowing Alternative Business Structures involving nonlawyer ownership as increased access to justice, enhanced financial flexibility, greater operational flexibility, and increased cost-effectiveness and quality of services.[243] These, and others, are explored below.

The following Subsection argues that LBEs will maintain client trust by continuing to regulate individual attorneys *and* by subjecting the business entity to a legally enforceable requirement that it operate for the benefit of its clients. LBEs will reduce inefficiencies and thereby, arguably, increase access to justice by creating competition, permitting and encouraging economies of scale, and driving down costs. LBEs will also improve the dignity of the profession and welfare of practitioners by removing many of the

243. ABA ISSUES PAPER, *supra* note 60, at 7-9.

obstacles to diversity and providing an alternative to the billable hour, the primary driver of dissatisfaction.

1. Independent Judgment and Client Focus Are Unrelated to Current Organizational Forms

Without the shareholder primacy doctrine's prohibition of decisions not aimed at maximizing profit, attorneys' ability to exercise independent judgment, zealously represent the interest of the client, and maintain client confidentiality bear no conceptual or logical relationship to the corporate form of the entity in which lawyers practice. Proponents of reform have long made that argument in theory, and that theory is now supported by several years of empirical data from jurisdictions that allow nonlawyer participation.[244]

Reformers have, over the decades, pointed out several errors in the reasoning of those who maintain that practicing with, or reporting to, nonlawyers would compromise lawyers' ability to adhere to their ethical obligations (assuming, absent shareholder primacy, that such adherence would not place the lawyer or her superiors in legal jeopardy). The report of the Kutak Commission, for instance, argued that the link between the form of practice and professional judgment is "at best tenuous" and might amount to economic protectionism, noting also that even then there were enough exceptions to the general rule to raise questions about its equitable application and pointing out that strict adherence to the law impeded innovation.[245] One commentator noted that the idea that there is a strong relationship between exercising independent judgment, avoiding conflicts, and maintaining loyalty, on the one hand, and organizational form, on the other, rests on faulty assumptions, including that "attorney-employees are not independent or capable of independence" and that "profit motive by definition subverts ethical behavior."[246]

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244. ABA ISSUES PAPER, *supra* note 60, at 4-7.

245. AM. BAR ASS'N COMM'N ON EVALUATION OF PRO. STANDARDS, PROPOSED FINAL DRAFT: MODEL RULES OF PROFESSIONAL CONDUCT 176-78 (1981).

246. Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 178-179 (2000).

The existence and universal acceptance of both in-house counsel and of lawyers paid by insurance companies to represent the insured give the lie to the first assumption.[247] We also readily accept conflicts that might undermine an outside attorney's independence, as in the case of an insurance defense attorney who gets a substantial amount of work from the same insurer.[248] As to the question of profit motive, it beggars the imagination of anyone familiar with modern law practice to contend that lawyers are immune from the profit motive simply because they are organized into an LLP or LLC.[249] It is arguable whether lawyers as a profession were ever unconcerned with maximizing their incomes.[250] But if they were, that attitude passed away at least a generation ago, felled by the American Lawyer's publication of the Profits-Per-Partner (PPP) matrix, the rise of limited liability law practices (LLPs and LLCs) which facilitated the growth in size of law firms, globalization, and the increased lateral mobility of partners.[251] Furthermore, lawyers pursuing profit presents no greater challenge than tensions between ethics and profit that exist in other professions rooted in trust and the public good. Many such professions have successfully transitioned away from the individual practice model. Medicine, for instance, relies on ethical rules and other forms of liability to deter and remediate conflicts of interests and breaches of duties.[252]

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247. *See In re* Coop. L. Co., 92 N.E. 15, 16 (N.Y. 1910); Am. Ins. Ass'n v. Ky. Bar Ass'n, 917 S.W.2d 568, 572-73 (Ky. 1996).

248. Giesel, *supra* note 246, at 181.

249. John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 142-43 (2000); Andrews, *supra* note 32, at 602; Carole Silver, Nicole De Bruin Phelan & Mikaela Rabinowitz, *Between Diffusion and Distinctiveness in Globalization: U.S. Law Firms Go Global*, 22 GEO. J. LEGAL ETHICS 1431, 1441-44 (2009).

250. Giesel, *supra* note 246, at 158.

251. *See* MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 52-53 (1991); Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1879, 1896 (2008).

252. *See* Hadfield, *supra* note 60, at 59-60; MARK A. HALL & JUSTIN G. VAUGHN, HEALTH CARE CORPORATE LAW: FORMATION AND REGULATION §§ 3.4-3.5.2 (1993). These reforms were, however, opposed by large sections of the medical industry when they were being implemented. *See* Douglas R. Wholey, Jon B. Christianson & Susan M. Sanchez, *The Effect of Physician and Corporate Interests on the Formation of Health Maintenance Organizations*, 99 AM. J. SOCIO. 164, 164-65 (1993). Other professions that saw the decline of the partnership

It is also important to point out that the one type of entity that arguably did, on the basis of its organizational form alone, constrain conflicts, the general partnership, has long been out of fashion. In a general partnership, partners had no limited liability but rather joint and several liability for each other's decisions and therefore had an incentive to monitor one another. The nearly universal move to limited liability entities for law practice has eliminated the incentive and cut the tie between corporate form and ethics.

In sum, instead of linking ethics to organizational form, the analytically correct and therefore normatively desired link is between regulation and *behavior*. In every other context, constraining corporations in order to achieve social ends has focused on corporate behavior while remaining agnostic on corporate structure: "lawyer discipline would survive law firm restructuring. The question is whether the regulation ought to focus on *lawyer behavior* or *law firm structure*. There is little mandatory regulation of corporate structure, yet corporate behavior itself is heavily regulated by federal and state law."[253] Indeed, lawyers always had fiduciary duties to co-owners—their partners—that could potentially conflict with their fiduciary duties to their clients. Nonetheless, professional responsibility norms and ethos bounded the degree to which lawyers acted to an extent we found acceptable.

The experience in other countries validates this point. Summarizing several empirical studies of the effects of liberalization of the prohibition on nonlawyer participation in Australia and the United Kingdom, the ABA Commission on the Future of the Legal Profession in the United States noted in an informal issues paper that "[t]here is no evidence that [nonlawyer participation] has caused harm. There is currently no evidence that the introduction of ABS has resulted in a deterioration of the legal profession's 'core

model in recent decades include investment banking, advertising, accounting, and consulting. *See* Alan D. Morrison & William J. Wilhelm, Jr., *The Demise of Investment Banking Partnerships: Theory and Evidence*, 63 J. FIN. 311, 311-15 (2008); Andrew von Nordenflycht, *Is Public Ownership Bad for Professional Service Firms? Ad Agency Ownership, Performance, and Creativity*, 50 ACAD. MGMT. J. 429, 429-30 (2007). A few have gone a step further and have gone public. *See, e.g.*, MANDIS, *supra* note 94, at 93-97, 104-06. Many professions have moved away from the partnership model in favor of incorporation.

253. GEO. UNIV. L. CTR., CTR. FOR THE STUDY OF THE LEGAL PRO., LAW FIRMS, ETHICS, AND EQUITY CAPITAL: A CONVERSATION 31 (2007) (comment of Professor Larry Ribstein).

values.'"[254] The Commission quoted a report from the U.K. Legal Consumer Panel, which concluded that "the dire predictions about a collapse in ethics and reduction in access to justice as a result of ABS have not materialised."[255] Studies of Australia similarly support the conclusion that allowing nonlawyer participation in providing legal services will not precipitate a collapse in the core values of the profession.[256]

2. Access to Justice: Professions and the Public Good

Perhaps the most trenchant and persistent critique of the current regime is that, in truth, it is motivated by the self-regulating bar's desire to protect its members from competition. This protectionism, in turn, raises the cost of legal services such that it is, at best, more expensive than it needs to be and, at worst, prohibitively expensive for most members of society.[257]

According to the most recent edition of the Rule of Law Index, published annually by the World Justice Project, the United States scored 0.45 out of 1.0 on the affordability and accessibility of civil justice, tying with Honduras and Bangladesh at 109th out of 128 countries.[258] That is a precipitous drop from the 2012-2013 edition, when its score was 0.53 out of 1.0 for a rank of 67th out of 97 (tied with Uganda).[259] Rather than pay high prices for legal services, many are representing themselves or foregoing legal recourse altogether. A recent study conducted by the University of Chicago

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254. ABA ISSUES PAPER, *supra* note 60, at 12.

255. *Id.*; LEGAL SERVS. CONSUMER PANEL, CONSUMER IMPACT REPORT 15 (2014), http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/Consumer%20Impact%20Report%203.pdf [https://perma.cc/LKJ5-CXLT].

256. ABA ISSUES PAPER, *supra* note 60, at 5, 8, 11-12.

257. *See, e.g.*, Cassandra Burke Robertson, *Private Ordering in the Market for Professional Services*, 94 B.U. L. REV. 179, 180, 182-83 (2014).

258. *WJP Rule of Law Index: United States*, WORLD JUST. PROJECT (2020), https://worldjusticeproject.org/rule-of-law-index/country/2020/United%20States/Civil%20Justice/ [https://perma.cc/TU5P-S3LG].

259. WORLD JUST. PROJECT, RULE OF LAW INDEX: 2012-2013, at 175 (2013), https://worldjusticeproject.org/sites/default/files/documents/WJP_Index_Report_2012.pdf [https://perma.cc/3WQV-FXN3]; *see also* Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227, 1227 (2014).

on behalf of the Legal Services Corporation—the largest funder of civil legal aid in the United States—found that low-income Americans received either inadequate or no legal assistance for 86 percent of their civil legal problems and low-income Americans seek legal help for only 20 percent of their civil legal problems.[260] In New York in 2013, "98% of tenants in eviction cases and 95% of parents in child support cases were unrepresented."[261]

As several commentators have observed,

> The principal obstacle to increasing access to legal assistance is the cost of the business model in which legal services have conventionally been available to ordinary consumers.... The model foregoes the cost-reducing benefits of scale, branding, technology, and the ordinary efficiencies that would come from having lawyers specialize in legal functions, while others (software engineers, financial analysts, business managers, marketing experts, and so on) specialize in all the other functions.[262]

That model, in turn, is maintained in part by lawyers "using their special access to the regulatory levers to protect themselves from competition by alternative providers and business models."[263] The effects of protectionism and preventing nonlawyer investment in law firms are not only to decrease competition that nonlawyers might pose to lawyers, but also the competition that start-ups and small firms might pose to incumbent firms. This harms the users of the system—that is, the clients—who have to pay higher rates. For many Americans, legal services are prohibitively expensive, rendering access to justice illusory.

A word of caution is warranted here. The emphasis in the commentary on access to justice as the main reason to favor reform

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260. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 30 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/M8GK-AXUY].

261. *Id.* at 9; *see also* N.Y. STATE CTS. ACCESS TO JUST. PROGRAM, REPORT TO THE CHIEF JUDGE AND THE CHIEF ADMINISTRATIVE JUDGE OF THE STATE OF NEW YORK 16, 46 (2015), https://www.nycourts.gov/LegacyPDFS/ip/nya2j/pdfs/NYA2J_2015report.pdf [https://perma.cc/EDL5-PVMM].

262. Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191, 1193-94 (2016).

263. *Id.* at 1194.

notwithstanding, even though litigation funding has grown exponentially in the United States for at least fifteen years, there is no evidence that it has increased access to justice. And there is some evidence from Australia and the United Kingdom that "for reasons under-explored in the literature, the access benefits of non-lawyer ownership are generally oversold, potentially diverting attention from more promising access strategies."[264]

Proponents of reform argue that the restructuring of the legal profession must rest on four pillars: a licensing scheme that allows entities other than lawyer-only firms to engage in the business of providing legal services; more permissive rules on ownership and fee sharing between lawyers and nonlawyers; creating more classes of legal professionals; and allowing nonlawyers to perform at least some types of legal services.[265] This Article joins those proponents, and offers a novel, practical approach to abolishing the fee-sharing prohibition and replacing it with a regulatory scheme based on enforceable norms of client and court primacy.

3. Ending the Hunger Games: The Dignity of the Profession and the Welfare of Practitioners

One of the main implications of allowing nonlawyer participation in the business of providing legal services is the decline of the "hunger games"—the modern permutation of the venerable "Cravath model" and the "tournament of lawyers."[266] Ultimately, this could benefit the women and minorities who are casualties of the up-or-out feature of that century-old system.[267]

The conditions of the practice of law, especially in mid- to large-size corporate law firms, have arguably degraded to such an extent over the years that it is hard to argue that lawyers would be *worse*

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264. Robinson, *supra* note 74, at 1.

265. Hadfield & Rhode, *supra* note 262, at 1215-16; Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, 143 J. AM. ACAD. ARTS & SCIS. 83, 90 (2014); *see also* BENJAMIN H. BARTON, GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION 173-75, 212-14 (2015); DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS 24-26, 40-43, 47-50 (2015); Hadfield, *supra* note 60, at 43-44; David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 846-47 (1992).

266. Galanter & Henderson, *supra* note 251, at 1873, 1875-76.

267. *See infra* notes 275-76 and accompanying text.

off working in a more traditional corporation (or LLC). In fact, there is evidence to suggest they would be better off. What used to be called the "tournament of lawyers"—the seven- or eight-year competition for partnership that ended with "up or out"—has changed drastically.[268] Globalization; technological changes; the advent of lateral partner mobility;[269] reduced client loyalty; the arrival of firm ranking and the publication of profits-per-partner metrics; the rise of the limited liability partnership (LLP), which propelled the exponential growth in firm size but also loosened the internal bonds and firm cultures; the introduction of the nonequity partner and various permanent associates tracks (for example, of-counsels); introduction of de-equitization of partners; and the consequent extension of the tournament into a lifelong state have all modified the tournament.[270]

Instead of the "tournament of lawyers" we now have the "hunger games." Partnership has become ever more elusive, and, with the introduction of de-equitization, tenure in the partnership less secure. Meanwhile, the conditions for participating in the tournament—the demands placed on law firm associates—have become increasingly oppressive. This has resulted in ever-increasing demands for billable hours; ever-decreasing chances of "winning" the tournament; highly interpersonally competitive workplaces; decreasing diversity; and astronomical levels of job dissatisfaction.[271]

A recent study of nearly thirteen thousand lawyers in the United States found that "[l]evels of depression, anxiety, and stress among attorneys ... are significant, with 28%, 19%, and 23% experiencing mild or higher levels of depression, anxiety, and stress, respectively. In terms of career prevalence, 61% reported concerns with anxiety at some point in their career and 46% reported concerns with

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268. Galanter & Henderson, *supra* note 251, at 1873, 1875-76.

269. That was brought about by the collection and dissemination of the profits-per-partner data by *The American Lawyer* magazine. *See* GALANTER & PALAY, *supra* note 251, at 71, 104.

270. On all of these factors, see generally Galanter & Henderson, *supra* note 251, at 1871, 1875-76, 1898; RIBSTEIN, *supra* note 124, at 127-28; RICHARD SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE 3, 10-14 (2013).

271. The billable hour in and of itself is the cause of much misery. *See, e.g.*, Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 245, 251 n.70 (2000); William H. Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 151-52 (1987).

depression."[272] These levels were much higher than the general population.[273] As one commentator put it, "[a]s law firms work to maximize profits and cut costs, partners and associates complain of low morale and poor quality of life."[274] This is true of both associates and partners.

Law firms are not only particularly unhappy places to work, they are also among the least diverse, a situation that has worsened in the wake of successive economic crises.[275] This is so, despite decades of diversity efforts and initiatives.[276] Research suggests this is structural; a number of authors have pinpointed certain aspects of the Cravath model or tournament of lawyers system as contributing to the lack of diversity and opportunities for diverse attorneys in law firms.[277] A new 2019 ABA report documents a "stampede" of women out of the profession.[278] While more than 50 percent of law students nationally are women, by age fifty, women make up only 27 percent of the profession.[279] And while 45-50 percent of entering associates are women it remains the case, as it has for decades, that only 20 percent of partners and only 16 percent of equity partners are

272. Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46, 51 (2016). Additional data, which paints a complex picture of lawyer satisfaction, is available through the American Bar Foundation's "After the JD" project. *See After the JD*, AM. BAR FOUND., http://www.americanbarfoundation.org/research/project/118 [https://perma.cc/34BR-24RB].

273. Krill et al., *supra* note 272, at 52.

274. Molot, *supra* note 78, at 3; *see also* Fortney, *supra* note 271, at 271-72.

275. Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That*, WASH. POST (May 27, 2015), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/ [https://perma.cc/3KUJ-4HG7]; Allison E. Laffey & Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, AM. BAR ASS'N (May 2, 2018), https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/ [https://perma.cc/KH2Q-E9VQ].

276. Laffey & Ng, *supra* note 275; ROBERTA D. LIEBENBERG & STEPHANIE A. SCHARF, WALKING OUT THE DOOR: THE FACTS, FIGURES, AND FUTURE OF EXPERIENCED WOMEN LAWYERS IN PRIVATE PRACTICE 2, 4, 8, 17 (2019), https://www.alm.com/intelligence/wp-content/uploads/2019/11/WALKING-OUT-THE-DOOR-FINAL-AS-OF-NOV-14-2019-pm.pdf [https://perma.cc/8MMH-PL4F].

277. David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493, 520-23 (1996); Veronica Root, *Retaining Color*, 47 U. MICH. J.L. REFORM 575, 587-88, 596, 612 (2014).

278. LIEBENBERG & SCHARF, *supra* note 276, at 1.

279. *Id.*

female.[280] Women comprise less than 25 percent of management committee members, practice group leaders, and heads of office.[281] Early indications are that the pandemic is only further exacerbating the problem.[282]

The experience of racial and ethnic minorities is no less depressing.[283] While the percentage of minority associates has increased, it still lags behind minority law graduates. And much of the (slow) growth at the partnership level has been among Asians and Hispanics; growth in African Americans in the partnership ranks peaked in 2008 and declined for seven years thereafter.[284]

U.S. corporations are hardly a panacea of gender and racial equity, far from it, but the numbers do look better overall than they do in top U.S. law firms. According to a recent study by McKinsey, the senior levels in Fortune 500 companies are comprised of: at the Vice President level, 6 percent women of color, 13 percent men of color, and 24 percent white women; at the Senior Vice President level, 5 percent women of color, 13 percent men of color, and 23 percent white women; and at the C-Suite level, 3 percent women of color, 12 percent men of color, and 19 percent white women.[285] These numbers fall far, far short of the ideal. But they do suggest that Fortune 500 companies are, nonetheless, more hospitable to women and people of color than law firms.

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280. *Id.*

281. *Id.*

282. *Seven Charts that Show COVID-19's Impact on Women's Employment*, MCKINSEY & CO. (Mar. 8, 2021), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/seven-charts-that-show-covid-19s-impact-on-womens-employment [https://perma.cc/WWX3-9H9U].

283. Literature attempting to explain the lack of diversity includes Galanter & Henderson, *supra* note 251, at 1913-21 (explaining the specific linkage between the Cravath model and gender and racial disparities in advancement within large firms); JANET E. GANS EPNER, VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 12-13 (2006); Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755, 1796-98 tbl.16 (2006).

284. For more on the experience of minority lawyers, see, for example, David B. Wilkins, *"If You Can't Join 'Em, Beat 'Em!" The Rise and Fall of the Black Corporate Law Firm*, 60 STAN. L. REV. 1733, 1734-39 (2008); ERIC CHUNG, SAMUEL DONG, XIAONAN APRIL HU, CHRISTINE KWON & GOODWIN LIU, A PORTRAIT OF ASIAN AMERICANS IN THE LAW 17 (2017), https://static1.squarespace.com/static/59556778e58c62c7db3fbe84/t/596cf0638419c2e5a0dc5766/1500311662008/170716_PortraitProject_SinglePages.pdf [https://perma.cc/G7LV-RBQY].

285. *Women in the Workplace 2020*, MCKINSEY & CO., (Sept. 30, 2020), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace [https://perma.cc/Q5SE-NPSB].

While the compensation—especially at the very top—could be lower for lawyers practicing in firms owned and/or managed by nonlawyers, it is worth remembering that, in one survey, a substantial number of partners, "lawyers who, in the eyes of many, have reached the pinnacle of their profession—[reported that they] would choose a different career if they could do it over again."[286] Consistently, lawyers in private practice report the lowest levels of satisfaction and the highest levels of substance abuse compared to public interest lawyers—those in government, academia, and the judiciary.[287] In stark contrast, service as in-house counsel at a corporation ranks among the most satisfaction-inducing and coveted environments for lawyers.[288]

With the "hunger games" of the Cravath up-or-out model eliminated, and the ushering in of a normal corporate work culture, those who seek a better work-life balance—be it for caretaking responsibilities or other reasons—will now have available to them midlevel management positions they can stay in for years. As their caretaking responsibilities subside, or their work-life balance priorities change, they will still be employees of the firm and able to toss their hat in the ring for a senior position. This should help firms retain members of underrepresented groups, who will remain available as role models and mentors to those with similar profiles. Rather than "leav[ing] before they leave,"[289] women and minorities will be able to look up the corporate ladder, and around, and see that a long-term path for them at the firm is not a statistical improbability. And this, hopefully, will contribute to a virtuous cycle of retention and promotion.

Further, as the corporate finance of law firms matures and comes to resemble that of other companies, new financial benefits will open up. For example, partners will be able to cash out on their way out.

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286. Molot, *supra* note 78, at 9 n.29 (quoting Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 888 (1999) (internal quotation marks omitted)).

287. *See* Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554, 557-69 (2015); Douglas Quenqua, *Lawyers with Lowest Pay Report More Happiness*, N.Y. TIMES (May 12, 2015, 2:42 PM), https://well.blogs.nytimes.com/2015/05/12/lawyers-with-lowest-pay-report-more-happiness/ [https://perma.cc/9P3V-552R].

288. *See* CHUNG ET AL., *supra* note 284, at 28.

289. SHERYL SANDBERG, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD 93 (2013).

Nonlawyer managers, such as chief marketing and chief operating officers, will be able to receive compensation in stocks and options, aligning incentives and improving efficiencies.

At the other end of the profession—solo and small firms—changes can be even more fundamental with some such firms ceasing to be economically viable and instead large corporations, such as chain stores, banks, and accounting firms, taking over the market for more routinized, small-scale legal work (this will probably be as much the result of the introduction of paraprofessionals as it would be from allowing investment in and management of legal practices). While this change could present a loss of autonomy to some, it is not unreasonable to assume that others would welcome the steady paycheck, steady work hours, and benefits that would come with such employment.

None of this is to say, conclusively, that working as a lawyer for a law firm that is structured more like a regular corporation would be in every way better than working for the typical contemporary law firm. But the foregoing Section should, at the very least, serve to rebut the notion that such a shift would degrade lawyers' working conditions, autonomy, and dignity.

B. The Proposal: Law Firms as Benefit Entities

If moving away from lawyers' monopoly on legal services is desirable in order to increase access to justice and diversity and to shore up the dignity of the profession, the question becomes *how* alternative organizational forms of practice and the participation of nonlawyers can be structured to maintain and, moreover, despite the general shareholder primacy doctrine, *allow* the profession's commitment to its core values. The answer is to require new types of law practices to organize as LBEs, with courts and clients having the ability to enforce the attendant requirements through courts' regulatory function and clients' private rights of action. At their core, LBEs would include enforceable commitments to prioritize the interests of clients and the courts—thus maintaining the *status quo*, according to which lawyers owe an undiluted duty of loyalty to their clients—and serve as officers of the court.[290]

The proposed LBE requirement should be complemented by a licensure regime modeled after the one adopted in Arizona as well as the authorization of licensed and regulated legal paraprofessionals, also modeled on Arizona.[291] Where constitutionally (or legislatively) permitted by state constitutions and laws, monitoring and enforcement should be entrusted to the hands of the states' highest courts because judges are best suited to identify and understand problematic behaviors. Arizona's data-gathering requirement would be highly beneficial as well.[292] In a nutshell, I propose that Arizona's model be followed with the ABSs taking the form of LBEs.

The most important aspect of benefit entities is that in creating them the legislatures have manifested their intent that, in some contexts—importantly, when investors are on notice that they are investing in an entity that is guided by stakeholder rather than shareholder primacy—businesses be allowed to prioritize the former. In so doing, legislatures clarified that it is legally permissible for managers to prioritize interests other than shareholder profit and have signaled to courts that they are expected, all other things being equal, to enforce stakeholder primacy in any dispute. In other words, many state legislatures have already created a model that solves the problem posed by the Arizona reform.

The state laws creating and authorizing benefit entities provide for stakeholder governance in a number of ways. The most important of those ways is the requirement that such entities have general and specific "benefit purposes." The core provision in the MBCL imposes a duty on directors to "consider the interests of a specific list of stakeholders as well as the ability of the corporation to accomplish its general benefit purpose (and its specific benefit purpose, if there is one)."[293] A "[g]eneral public benefit" is defined as "[a] material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation

290. MODEL RULES OF PRO. CONDUCT rr. 1.7, 3.3 (AM. BAR ASS'N 2016).

291. News Release, Ariz. Sup. Ct. Admin. Off. of the Cts., *supra* note 7.

292. Order 173, *supra* note 183, § G(2)(c).

293. ALEXANDER, *supra* note 88, at 68 (discussing MBCL § 301(a)). Because it is the most common, this Section will focus on the MBCL as the model.

assessed taking into account the impacts of the benefit corporation as reported against a third-party standard."[294]

In addition to the general benefit purpose, most statutes allow (but do not require) entities to choose one or more specific public benefit purposes. This is achieved by a catchall provision that permits the benefit corporation to mandate in its constitutional documents a purpose "conferring any other particular benefit on society or the environment."[295] For the avoidance of any doubt, and to bridge any gap between shareholder and stakeholder governance, the benefit entity statutes clarify that the creation of the general and any specific corporate public benefit is in the best interests of the corporations.[296] And the business judgment rule is explicitly preserved with respect to fiduciary claims.[297]

The general benefit purpose of an LBE could be to safeguard courts and the rule of law. Some firms may elect to go beyond, pledging to do work that protects the environment, civil rights, human rights, religious rights, free speech, or other social goals which lawyers already regularly promote as a matter of course. Their specific benefit purposes can be the various ways in which firms can serve their clients through litigation, transaction, compliance, and other work.

By making the primacy of nonlawyers' (as well as lawyers') commitments to clients and the courts a requirement for outside investment in a provider of legal services—something which would be clearly stated in the constitutional documents of the firm—regulators will ensure that investors would be on notice that, should profit-seeking conflict with the interests of clients or of the courts, the latter will take precedence. Investors can decline to invest in such enterprises or price their investments accordingly but, given the transparency of the requirement, would have no grounds to demand that the managing lawyers prioritize profits over ethics as they pursue individual cases or as they govern the firm as a whole.

294. MBCL, *supra* note 109, § 102.

295. ALEXANDER, *supra* note 88, at 74.

296. MBCL, *supra* note 109, § 201(c).

297. *Id.* § 301(e); *see also id.* § 301 cmt. ("Subsection (e) confirms that the business judgment rule applies to actions by directors under this section.").

Most importantly, benefit entity statutes are legislative acts that are the result of years of careful design aimed at creating the ability to choose stakeholder governance without disrupting the rest of business law. As legislative acts, benefit entity statutes eliminate the separation of powers concerns that arise from states' high courts, in their professional oversight capacity, creating new kinds of entities exempt from the bedrock tenets of general business law. The MBCL took years to design, and its approach was refined through the input of dozens of academics, practitioners, and judges; pored over in scholarship; and dissected in conferences and convenings over the course of many years. It then passed the scrutiny of thirty-seven state legislatures.[298] Setting aside the question of whether they are legally competent to do so, state court judges are certainly capable of replicating that careful work. But why? Doing so would be a massively inefficient duplication of effort in addition to raising difficult legal questions about the scope of the courts' powers in the exercise of their oversight function.

To emphasize the importance of general and specific benefits, and to ensure that they are not simply window dressing, statutes based on the MBCL provide for "benefit enforcement proceedings."[299] The two possible causes of action are a "failure ... to pursue or create general public benefit or a specific public benefit set forth in its articles of incorporation" and a "violation of [the directors'] obligation, duty, or standard of conduct under this [*chapter*]."[300] While overall the MBCL follows "conventional corporate law by focusing on fiduciary duties and board procedures to enforce" stakeholder primacy, it deviates in that it establishes court review over whether a benefit corporation is meeting its benefit purpose.[301] In the case of LBEs, states should follow Arizona, which provides for clear enforcement measures vested in the state supreme court, the Bar, the compliance lawyers, and the Authorized Persons. States should also consider granting clients a private right of action.

298. *Supra* notes 113-16 and accompanying text.
299. MBCL, *supra* note 109, § 102.
300. *Id.* § 305(a)(1)-(2).
301. ALEXANDER, *supra* note 88, at 71.

Another hallmark of the MBCL is a requirement that the benefit corporation publish an "annual benefit report" based on a third-party standard.[302] The report must describe the company's efforts to achieve the general and specific benefits to which it committed, its success in those efforts, any obstacles, and its rationale for choosing the third-party reporting standard.[303] For LBEs, the third party should be the state bar associations and the third-party standard should be the states' rules of professional conduct. This will ensure that LBEs create a public record of their compliance with the obligations of legal ethics. That record could be used by investors to price investments, by the courts to monitor compliance, and even by potential clients to evaluate firms they may wish to engage. Indeed, many firms are already creating similar reports, featuring their success on behalf of their clients, pro bono work, and diversity efforts, to use for marketing and recruiting purposes. Individual jurisdictions could of course choose to impose more robust reporting requirements, as did Arizona.[304] These may even be normatively desirable to ensure that investors, the courts, and the public have adequate information about legal service providers' compliance with their ethical obligations.

In summary, states that wish to liberalize the prohibition on nonlawyer participation in the business of providing legal services should adopt a two-prong approach: reform the rules governing the legal profession and modify the bedrock norm of shareholder primacy in business entities. Arizona provides an excellent model for the first prong—its new regime updates the rules governing the practice of law, institutes a licensing regime, and nominates a regulator. Arizona's reforms include eliminating the fee-sharing prohibition and revising the definition of the unauthorized practice of law to allow participation by nonlawyers. Depending on the state's constitutional structure, a version of the Arizona model could be put in place by either the courts or the legislature, as appropriate in the jurisdiction. To effectuate the second prong and to protect firms that include nonlawyers from potential conflicts between profits and ethics, state legislatures should enact an LBE statute (or amend

302. MBCL, *supra* note 109, § 401(a).
303. *Id.* § 401(a)(1).
304. *See* Order 173, *supra* note 183, § G(2)(c)-(3)(b)(6).

their existing benefit entities laws to provide for LBEs) that explicitly enshrines stakeholder primacy and designates clients and the courts as the stakeholders.

C. A Note on Benefits Entities and the Professions

While this Article restricts itself to a discussion of the legal profession, it is worth noting that its core tenets could be applied to other professions, especially ones in which the professional is a fiduciary and/or where the public's interest in the functioning of the profession is paramount. An example would be doctors and mental health professionals and the health care system. On the one hand, such professionals should be allowed to seek outside capital. This would decrease their costs, with the savings hopefully being rolled onto the clients/patients. Such professionals should also be able to partner with other professionals whose expertise are syngenetic and where the whole would exceed the sum of the parts. Why not let psychologists or social workers practice under one roof with family lawyers? Why should clients not benefit from having their accountants collaborate with the tax or wills and trusts attorneys?

The global adoption of ABS laws—in Australia, the United Kingdom, and Arizona—that implicitly communicate a desire that lawyers, qua professionals, place clients and the justice system first show that, far from an-end-to-corporate-history in the form of global shareholder primacy, developed economies are gravitating towards such a carveout for at least one profession.

Clearly imposing client/patient primacy obligations on such professionals, assigning the right regulator to enforce them, and providing private rights of action will allow us to wash the baby rather than throw it out with the bathwater. Benefit entities now pave the road to doing just that while creating an exception to the shareholder primacy rule for the professions that does not do away with shareholder primacy more generally, in other areas of the economy.

CONCLUSION

We are at the start of an era of fundamental reform in the market for legal services in the United States. The unlikely allies in launch-ing this reform have been litigation (now law firm) financiers, on the one hand, and a coalition of scholars and reformers within the profession, on the other. The financiers kicked in the door in the name of profit, confident from their victory against the champerty doctrine that the law would catch up with their practices. The reformers, meanwhile, have been more patient and more concerned with monopoly, the high cost of legal services, and access to justice. Now that the law is catching up, in Arizona at least, the model is very much from the reformers' camp. Superior in nearly every way to the NYCBA's disclosure-focused proposal, Arizona's model is poised to influence other states looking to liberalize the market for legal services. In a twist of irony, this may mean that litigation and law firm financiers fade away. Traditional investors' discomfort with the ambiguous legality of litigation finance and the complexity of valuing legal claims[305] will wane, and firmer legal footing and the more straightforward calculations for investing in a business (that is, in a law firm) will attract more traditional funders (who will presumably offer more favorable terms).

Competitive forces, too, played a role. As with litigation finance, pressure from global law firms abroad, and especially in London, propel reforms without which major U.S. firms stand to lose clientele. In that context, Australia's and the United Kingdom's successful liberalization projects deserve attention for what they can tell us about how nonlawyer participation might work. But in the shorter term, as states begin to form exploratory commissions and study groups to look at their next steps, the reform processes followed in Australia, the United Kingdom, and Arizona should be our focus as much as the substance of their reforms. In each place the reform was successful in part because nonlawyers participated in and even led the decision-making.[306] This is in contrast to the United States where reform has always been considered, and rejected, by bar associations without participation of nonlawyers. Lawyers, and jurists more generally (judges and scholars), should absolutely have a seat at the table, even a prominent one, but not a throne.

305. Steinitz, *supra* note 12, at 1902.

306. *See* Justin D. Petzold, Comment, *Firm Offers: Are Publicly Traded Law Firms Abroad Indicative of the Future of the United States Legal Sector?*, 2009 WIS. L. REV. 67, 76.

Ending lawyers' monopoly over the provision of legal services will likely have a range of benefits, most notably an increase in access to justice, in the diversity of the profession, and the well-being of the practitioners. But lawyers' century-long insistence that they must be excluded from the capital markets lest they find themselves forced to compromise their duties to their clients and the courts when the purse strings are tugged must be taken seriously. Compromise would, indeed, be forced upon them in any traditional business entity legally bound to follow the principles of shareholder primacy. But in an LBE, organized under state laws permitting benefit entities, lawyers and nonlawyers alike could be compelled with equal legal force to put the interests of their clients and the courts before those of shareholders. Owners and investors, on notice of the stakeholder primacy, would price their investments accordingly and would have no grounds to contest a director's or officer's decision to act in the best interests of a client even when doing so means making less money. Stakeholder primacy is the way out of the conundrum, a way to have our cake and eat it too.