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By Electronic Mail

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RE: *Comments of Nine General Counsel on the ABA Commission on Ethics
20/20's Discussion Paper on Alternative Law Practice Structures*

Dear Commission Members:

We write to offer comments to the Commission's December 2, 2011 Discussion Paper on Alternative Law Practice Structures ("Discussion Paper").

I. Introduction

The undersigned are chief legal officers for substantial U.S. based business entities that routinely obtain legal services from a variety of law firms here and abroad. As such, we believe that our input, as both lawyers and client representatives, can provide a perspective both helpful and important as regards the Commission's Discussion Paper and its proposal of a possible modification to Rule 5.4 of the American Bar Association's Model Rules of Professional Conduct.

To that end, we write to express our opposition to this proposed change to Rule 5.4. While the latest proposal may seem modest in comparison to the more dramatic changes that the Commission has considered and rejected, we believe that allowing any form of non-lawyer ownership of law firms will harm the core values of the American legal profession. The proposal opens the door to arrangements that make the practice of law more like other businesses and less like the distinct profession it has always been. Even a limited permission for non-lawyer ownership will make subsequent debates about matters of degree, not principle. The better course is to hold the line now. The proposed change is bad for the legal profession and the clients it serves.

II. History of Rule 5.4 Proposals

By way of background, the ABA has been over this terrain before. In the early 1980s, non-lawyer ownership (and management) was proposed and rejected. The Kutak Commission, a group working to revise what was then the Model Code, proposed a Model Rule 5.4 that would "have permitted lawyers to practice in organizations partly owned by nonlawyers as long as written safeguards existed to protect client

confidentiality, the lawyer’s judgment, and the attorney-client relationship.”¹ The ABA House of Delegates rejected the proposal in its entirety.² Instead, the ABA adopted a version of Model Rule 5.4 that is substantively the same as the current version.³

A dozen years ago, the ABA’s House of Delegates again rejected a proposal for non-lawyer ownership.⁴ The House of Delegates concluded that such a change “threaten[ed] the core values of the legal profession.”⁵ The Commission’s Discussion Paper points to nothing in the subsequent years that has suggested that those core values have changed. Nor does the Discussion Paper suggest that non-lawyer partnership no longer poses a threat to such values. The only thing that has changed in the meantime is the permissiveness of several non-American jurisdictions with regard to non-lawyer firm ownership. The proliferation of such models in foreign jurisdictions is not a compelling reason to alter the foundation upon which this country’s legal profession has been built. The same reasons that justified rejecting non-lawyer ownership of law firms in the past continue to counsel against opening that door—even a crack.

III. Reasons for Rejecting the Proposal

Our opposition to the latest proposed alternation of Rule 5.4 is rooted in the same reasons that have led the ABA to reject non-lawyer ownership in the past. We have witnessed no need for the proposed change, and we fear that the proposal threatens to undermine the unique attorney-client relationship, to exacerbate the law’s drift from a profession into a business, and to hasten the day when the legal profession is no longer self-regulated.

A. No Demonstrated Need

When the ABA began considering alternative business structures last year, the Institute for Legal Reform (“ILR”), affiliated with the U.S. Chamber of Commerce, commented that the Commission had not offered “any evidence that U.S. law firms are hampered in serving their clients because they are prohibited from organizing as

¹ Megan E. Vetula, Note, *From the Big Four to Big Law: The Swiss Verein and the Global Law Firm*, 22 Geo. J. Legal Ethics 1177, 1180 (2009).

² Cindy Alberts Carson, *Under New Mismanagement: The Problem of Non-Lawyer Equity Partnership in Law Firms*, 7 Geo. J. Legal Ethics 593, 595 (1994) (“[T]he Kutak Commission’s version of Model Rule 5.4 enjoyed the dubious distinction of being the only proposed rule to be rejected in its entirety.”)

³ Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve A Chance*, 2 Geo. J. Legal Ethics 383, 385 n.6 (1988) (detailing adopted rule).

⁴ Nathan M. Crystal, *Core Values: False and True*, 70 Fordham L. Rev. 747, 748 (2001) (“In 1999 and again in 2000, the ABA Commission on Multidisciplinary Practice recommended that the ABA amend the Model Rules of Professional Conduct to relax the prohibitions against sharing legal fees and forming partnerships or other associations with nonlawyers when one of the activities of the organization is the practice of law.”).

⁵ ABA Comm. On Multidisciplinary Practice, Revised Recommendation 10F (2000), <http://www.abanet.org/cpr/mdp/mdp-report10f.html>.

alternative business structures.”⁶ That remains the case now. The December 2, 2011 Discussion Paper does not marshal any new or additional evidence of such a need. Instead, the Discussion Paper simply avers to generalized reports that some undefined number of firms or practitioners would like to be able to offer partnerships to non-lawyers. The paper gives no indication that such a desire is widespread. Indeed, when the President of the New York Bar appeared before the Commission, he testified that, in his numerous conversations with lawyers throughout the state, “[n]ot once . . . did any lawyer suggest to [him] that nonlawyer ownership was what the legal profession really needed.”⁷

Our own experience has been the same. Our tenures as general counsel have given us no reason to believe that our business clients will be better served by a legal profession that is open to non-lawyer ownership. Quite the contrary, we fear that the inevitable chipping away at the profession’s professionalism ultimately will do a disservice not just to the business clients we serve, but to all clients who seek the trusted and confidential advice of counsel. And our discussions with other lawyers and in-house counsel have revealed no great interest in or need for non-lawyer ownership, let alone any groundswell of support for such a change.

The Discussion Paper suggests that, in the absence of reported problems in the District of Columbia and elsewhere and, in light of anecdotal evidence of a desire for such arrangements, the ABA would be justified in loosening Rule 5.4’s strictures. We think this misses the point. Anecdotal evidence and the experience of a single jurisdiction with a unique and limited motivation for adopting a minority rule hardly support taking a step at odds with the great weight of historical practice and core American legal values. Moreover, the relatively limited experience of other countries with alternative business structures has demonstrated that even modest changes can become the proverbial camel’s nose under the tent, creating pressures that lead to the further relaxation of outside ownership rules. In short, the burden should be on those who desire such a fundamental change to Rule 5.4 to make the case for it, and they have failed to do so.

B. The Attorney-Client Relationship

The attorney-client relationship is rightly praised as a special and unique bond that creates responsibilities that attorneys must diligently seek to fulfill. The animating purpose of Rule 5.4 is to protect that relationship by “prevent[ing] non-lawyers from influencing the practice of law.”⁸ It is our firm belief that *any* non-lawyer ownership of law firms will undermine that relationship.

⁶ Letter from ILR to ABA Comm. on Ethics 20/20 2 (June 1, 2011).

⁷ *ABA Comm. on Ethics 20/20 Public Hearing* 8 (Feb. 2, 2012) (testimony of Vince E. Doyle, III), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_2020_public_hearing_schedule_and_written_testimony_feb_2_2012.authcheckdam.pdf.

⁸ Paul R. Koppel, *Under Siege From Within and Without: Why Model Rule 5.4 Is Vital to the Continued Existence of the American Legal Profession*, 14 *Geo. J. Legal Ethics* 687, 701 (2001).

The proposal now under consideration may pose *less* risk of outside influence than the proposals that the Commission has considered and rejected, but it nonetheless still poses such a risk. Non-lawyers are not officers of the court. Nor do they have an ethical obligation to advance the client’s interests. While the proposed modification to Rule 5.4 would require non-lawyer partners to agree in writing to conform themselves to the Rules of Professional Conduct, the fact remains that non-lawyers are not members of a bar subject to the same consequences for failure to uphold those professional norms. Whatever else is true, non-lawyers cannot be disbarred. Moreover, non-lawyer partners necessarily bring with them non-legal concerns. For instance, a non-lawyer partner may have professional obligations or interests that conflict with those established by the legal profession. There is no guarantee that a non-lawyer partner will—or even can—put the client’s interests first.

We also fear that non-lawyer ownership will undermine the confidentiality at the heart of the attorney-client relationship. Model Rule 1.6 states that an attorney “shall not reveal information relating to the representation of a client unless the client gives informed consent.” The addition of non-lawyer partners to law firms creates potential tension with this fundamental principle by creating uncertainty about which aspects of a non-lawyer’s advice to a client are protected or privileged. While the proposed rule would require non-lawyers to be bound by the Model Rules, that alone does not make clear whether all advice that a client receives from a law firm is privileged, or what the privilege means when the communications involve a non-lawyer partner. We can see no reason why any such potential confusion would benefit clients. The legal profession has never operated with a *caveat emptor* mentality. Rather, attorneys and their good counsel are the very things that clients seek in obtaining representation.

Moreover, the proposed modification to Rule 5.4 gives rise to a related concern that conflicts might arise between norms governing confidentiality in the legal profession and norms governing non-lawyers’ simultaneous obligations to their own professions. The Commission provides no reason why those potential conflicts should be created, let alone any guidance as to how they might be resolved. Furthermore, the Commission does not explain how courts and bar associations, on the one hand, and other professional organizations and regulators, on the other hand, should deal with the hybrid law firms that would result from this proposed rule change.

C. Profession or Business?

Traditionally, the attorney-client relationship has been treated as fundamentally different from a business relationship—because it is. The relationship is protected by a unique privilege for attorney-client communication and by the professional ethic that lawyers must unequivocally put client interests first. In recent years, we have witnessed a thirst for profits that has led to the increasing conglomeration of law firms and the disregard of what were once sacrosanct conflict rules. Given that the constant chase after higher profits and the relentless pursuit of growth have already enhanced the influence of business concerns on the practice of law, we are deeply troubled by a proposed change

that would only further undermine the tradition that law is a profession rather than a business. Taking a step that will encourage a firm's partners to place an even higher premium on profit and wealth can only exacerbate a problem that is already threatening lawyers' sense of professionalism.

Even under the more limited form that the ABA is considering, non-lawyer investment cannot help but inject outside concerns into a partnership's calculations. It changes a firm from a group of like-minded attorneys zealously pursuing their clients' interests, into a group with inherently mixed motives and responsibilities, where some partners have a professional duty to the client's interests and others do not. It is not hard to imagine that non-lawyer partners might place considerations of economic gain ahead of a client's interests. That is not a criticism of those who seek profit. It is simply a recognition of the reality that our profession often mandates conduct and practices that are not profit maximizing or optimizing. Investors operate under a different code.

Moreover, the experience of countries such as Australia illustrates that the impulse to start relaxing the longstanding rules upon which the legal profession has been built can quickly lead to a radical transformation of the practice of law. That experience suggests that allowing non-lawyers control over law firms—even if only in small measure—will pave the way for a fundamental reworking of the profession. The far better course is to refuse to open the door to non-lawyer ownership even a crack. The arguments for a clean rule against non-lawyer ownership rest on matters of principle. Permitting even a limited form of non-lawyer ownership transforms the debate from a matter of principle to a matter of degree and creates a built-in constituency in favor of further change. The ABA should resist this pernicious trend at the outset. After all, the role of the ABA is to *strengthen* the practice of law as a profession, not to erode its foundations by weakening its very commitment to professionalism.

D. Outside Regulation of the Legal Profession

The Commission has recognized concerns that non-lawyer ownership of law firms “could diminish the profession’s current judicially-based system of regulation by expanding the scope of professional regulation beyond its traditional focus on lawyers, thus making external regulation more likely.”⁹ We share those concerns.

As one scholar has noted, “[i]n comparison to all other professions, the legal profession is the most free of external governmental control.”¹⁰ This absence of external

⁹ Memorandum from Co-Chairs, ABA Comm. on Ethics 20/20 3 (Dec. 2, 2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf.

¹⁰ Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 Tenn. L. Rev. 179, 255 (2001); *see also id.* (“Given the enormous amount of independence that is afforded to lawyers in this context, they have a special responsibility to the public and to the system of law to regulate their behavior in the public interest.”).

control is a good not because it allows lawyers to avoid regulations, but because it allows lawyers to shape their professional norms, be responsive to lawyers' practical experiences, and serve the public good by teaching and guiding members of their own profession. By opening law firms to non-lawyer ownership, the Commission would risk opening the practice of law to the obligations and responsibilities of non-lawyers, which inevitably will conflict with the obligations and responsibilities of lawyers. Moreover, there is a very real concern that legislatures or non-judicial entities might claim a right to regulate this new form of practice.¹¹ If law firms are no longer made up of solely lawyer-partners, it will be that much harder to resist the argument that lawyers should be subject to regulation by non-lawyers, rather than by the state bars and judicial institutions that understand the ethical norms upon which the profession has been built. The legal profession's independence—which allows it to put the good of both clients and the profession itself first—is a virtue that should be maintained, not undermined.

IV. Conclusion

We recognize the diligent efforts the Commission has put forth in considering new forms of legal practice. The Commission has made the right choice by rejecting various more permissive proposals regarding alternative law practice structures. We only hope that the Commission does the same with the proposal now under consideration.

Very truly yours,

/s/
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¹¹ See, e.g., Elizabeth Chambliss, *Professional Responsibility: Lawyers, A Case Study*, 69 Fordham L. Rev. 817, 848 (2000) (“The emergence of new organizational forms such as multidisciplinary partnerships can only hasten the arrival of a new entity-level regulatory paradigm.”).

/s/

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