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Cover Page Footnote

The Author wishes to thank Ashley Krenelka for introducing her to the topic; editor Jeff Blick for his assistance; and everyone who contributed their thoughts and ideas. The Author would also like to thank her dad and her brother for always providing love and support in everything she does. Finally, the Author would like to dedicate this Comment to her mom, a truly extraordinary person whose life had such an impact on all those around her. She is missed every day. The Author is forever grateful to have had her mother's unconditional love and guidance in her life.

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LAW FIRMS IN THE U.S.: TO GO PUBLIC OR NOT TO GO PUBLIC?

Chandler N. Hodge[*]

I. INTRODUCTION

Law firms collectively face the reality that in today's society their work is a business as much as it is a practice.[1] In order to stay competitive in this reality, firms have already started to behave like businesses.[2] Law firms have grown substantially in size with some containing over one thousand lawyers.[3] Additionally, firms have opened many offices both abroad and within the U.S. in much the same way corporations open multiple offices.[4] Now, some firms even take on the limited liability corporate form as well as market their services much like businesses market theirs.[5] Therefore, no matter how many rules try to preserve the nature of the practice of law, law firms today cannot avoid the reality that they must function both as a business and as a practice.[6]

In May of 2007, Slater & Gordon Limited (S&G), an Australian personal-injury firm, made history when it became the first publicly traded law firm in the world.[7] In essence, S&G faced the reality that all law firms are facing today and took steps to make their law firm like a business in recognition of that reality. Additionally, on November 23, 2006, in the United Kingdom, the Legal Services Bill was introduced in the House of Lords.[8] It was approved on October 30, 2007, by the Queen and is now known as the United Kingdom's Legal Services Act of 2007.[9] The Legal Services Act is meant to overhaul the way legal services are regulated.[10] The Act aims at putting consumers first.

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[1] *See* Bruce MacEwen, Milton C. Regan, Jr. & Larry Ribstein, *Law Firms, Ethics, and Equity Capital*, 21 Geo. J. Leg. Ethics 61, 62 (2008).

[2] *Id.* at 62.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Jason Krause, *Selling Law on an Open Market: The World's First Publicly Traded Law Firm Ignites Debate*, 6 No. 25 ABA J. E-Rep. 2 (2007) (available at WL, ABAJEREP database).

[8] Catherine Fairbairn, *Legal Services Bill [HL]: Bill 108 of 2006-07 Research Paper 07/48* 7, 12, http://www.parliament.uk/commons/lib/research/rp2007/rp07-048.pdf (May 29, 2007).

[9] MacEwen, *supra* n. 1, at 61.

[10] *See id.*

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Thus, it is designed to make the legal field operate like a business. The Act allows U.K. law firms to follow in S&G's footsteps by permitting nonlawyers to be involved in management and ownership.[11] Consequently, the U.K. is also taking steps in recognition of the reality that law firms are as much a business as a practice and should, therefore, be run like one.

With the U.K. and Australia revolutionizing the way law firms operate, the question becomes, is the U.S. soon to follow? Some attorneys have already started speculating about whether this is feasible in the U.S.[12] In order for this to occur in the U.S., the Model Rule of Professional Conduct prohibiting nonlawyer ownership of law firms would have to be changed to allow nonlawyers to own equity in such firms.[13]

Opponents fear this will make the legal profession more a business than a practice. They complain that shareholders would move to the top of the law firms' concerns rather than clients.[14] Others believe it is entirely possible for a publicly traded law firm to operate without being detrimental to the clients because the American Bar Association (ABA) has sufficient rules governing issues of conflict of interest, fraud, and malpractice.[15] Because the U.K. and Australia have taken these steps, it is important for the U.S. to consider this issue in order to stay competitive with its international counterparts.

Section II of this comment will examine what an initial public offering (IPO) is and the justification behind its rampant use in the corporate world. It will also provide a detailed look into the financial earnings of S&G in its first few months as a publicly traded law firm. The U.K.'s Legal Services Act, which allows Britain to follow in the footsteps of Australia, will also be examined. Additionally, Section II will examine the historical background of ABA Model Rule of Professional Conduct 5.4 and why the Bar has always been so firm in keeping law firms in the U.S. from being publicly traded on the stock exchange. Section III will explore the current debate in the U.S. legal community over the possibility of a publicly traded law firm in light of Australia and the U.K. moving in that direction. It will also evaluate the positives and negatives in regard to having publicly traded law firms in the U.S. Section IV will conclude that although the international legal community is embracing the idea of publicly traded law firms, the U.S. and its legal community is better served by upholding Model Rule of Professional Conduct 5.4 by keeping ownership and management of law firms in the hands of lawyers and only lawyers.

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[11] *Id.*
[12] *Id.*
[13] Model R. Prof. Conduct 5.4 (ABA 2007).
[14] MacEwen, *supra* n. 1, at 74.
[15] *See* Bernard Sharfman, Student Author, *Modifying Model Rule 5.4 to Allow for Minority Ownership of Law Firms by Nonlawyers*, 13 Geo. J. Leg. Ethics 477, 481-83 (2000).

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II. BACKGROUND

In order to analyze the positives and negatives of publicly traded law firms in the U.S., it is necessary to have an understanding of what exactly a public company is. The IPO is the method companies in the U.S. follow to become publicly traded. Therefore, this section will begin by explaining the concept of an IPO. This section will also discuss the international happenings that have brought the issue of publicly traded law firms to light in the U.S.; namely Australia's S&G going public and the U.K. passing the Legal Services Act to overhaul its legal industry. This section will conclude with an explanation of how Model Rule of Professional Conduct 5.4 prevents U.S. law firms from currently going public, what the rule stands for, and why the Bar has always supported this rule.

A. The IPO

An understanding of what an IPO is and what it does for an everyday company is necessary in order to evaluate both its application to the law firm context and its positives and negatives. An IPO is a tool many businesses use to raise capital for its companies.[16] For example, an IPO by a biotechnology company could provide capital necessary to fund research and development.[17] Thus, an IPO provides a business with the money it needs to expand and pursue new opportunities. An IPO occurs when a security is sold to the general public for the first time.[18]

In the United States, the Securities Act of 1933[19] dictates that all

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[16] Christopher B. Barry & L. Adel Turki, *Initial Public Offerings by Development Stage Companies*, 2 J. Small & Emerging Bus. L. 101, 103 (1998).

[17] *Id.* at 121.

[18] Jay R. Ritter, *Initial Public Offerings* 1, 2 Contemporary Fin. Dig. 5, 6 (1998) http://bear.cba.ufl.edu/ritter/rittipo1.pdf (last accessed Oct. 19, 2008).

[19] 15 U.S.C. § 77(a) et seq. (2000). After the Great Crash of 1929 and the Great Depression, the government realized it was time for federal regulation of the securities markets. William A. Klein, J. Mark Ramseyer & Stephen M. Bainbridge, *Business Associations: Cases and Materials on Agency, Partnerships, and Corporations* 413 (6th ed., Found. Press 2006). The Securities Act of 1933 generally regulates the primary market, which is where an initial public offering by a corporation takes place. *Id.* Congress designed the Securities Act to mandate the disclosure of material information to investors that would affect their decision to invest or not as well as to prevent fraud. *Id.*

Under this Act, the sale of securities is not allowed unless the company making the IPO has registered with the SEC. *Id.* at 421. In addition to registration, securities cannot be sold until the registration statements are effective and the "prospectus (a disclosure document) [is] delivered to the purchaser before a sale." *Id.* The registration statement contains extensive information about the issuing company's business and finances and can "easily exceed a hundred pages." *Id.* The SEC does not make a determination about whether the offer is a good investment. It only determines if the company has made the required disclosures. *Id.* at 422.

However, on the state level, the primary market is regulated by "blue sky laws," which in some states can prohibit a company's offer if the state deems the investment to be too speculative. *Id.* at 413. In *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 550 (1917), the Court defines blue sky laws as "statutes [that] protect investors from 'speculative schemes which have no more basis than so many feet of "blue sky." ' " *Id.* State blue sky laws often tend to be even more restrictive than those in the Securities Act

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firms who intend to go public must be given clearance from the Securities Exchange Commission (SEC).[20] Additionally, prior to going public, a company must supply financial statements to the SEC. This financial information has to be continually revealed so investors know whether the company is a good investment or not. The level of information contained in these statements is subject to outside factors such as the size of the firm, the age of the firm, and the amount of money being raised.[21]

In the U.S., a firm will usually offer twenty to forty percent of their stock for sale, and its stock price will be determined through the assistance of investment bankers.[22] The average initial rate of return on the stock after an IPO in the U.S. is about sixteen percent.[23] Most IPOs in foreign markets have similar high initial returns, which have led to extensive studies on the "IPO underpricing" phenomenon.[24] The underpricing phenomenon is the idea that the issuers of an IPO could sell their stocks at much higher prices.[25] However, many issuers choose not to sell their shares at high prices initially because of "the high degree of uncertainty about the future prospects of the firm, the ability of its managers, or the quality of its products or ideas."[26]

The underpricing phenomenon only exists in the short run. In the long run, an overpricing phenomenon takes over.[27] Thus, in the three to five years following an IPO, market performance is disappointing. However, this can be alleviated by the participation of venture capitalists in the IPO process.[28] After an IPO, the more the business is able to grow with whatever additional capital was produced, the higher the stock price will be.[29] This leads to investors generating more money when purchasing the shares.[30] Consequently, IPOs, no matter their performance in the short and long run, are the means by which many companies today have raised additional capital to benefit, grow, and value their business.

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and regulators are still struggling to make state laws and federal laws regulating the primary market more consistent. *Id.*

[20] Ritter, *supra* n. 18, at 7.

[21] *Id.*

[22] *Id.*

[23] *Id.* Initial Return is the rate of return from the offer price to the close of trading shortly after the offering. *Id.*

[24] *See* Barry, *supra* n. 16, at 103-04.

[25] *See* Roger G. Ibbotson, Jody L. Sindelar & Jay R. Ritter, *The Market's Problem with the Pricing of Initial Public Offerings*, 7 J. Applied Corp. Fin. 66, 69 (1994).

[26] Barry, *supra* n. 16, at 104.

[27] Barry, *supra* n. 17, at 105; *see also* Tim Loughran & Jay R. Ritter, *The New Issues Puzzle*, 50 J. Fin. 23, 46 (1995) (available at http://www.jstor.org/stable/2329238) (indicating the rate of return of an IPO on average during its first five years is only five percent); Jay R. Ritter, *The Long Run Performance of Initial Public Offerings*, 46 J. Fin. 3, 4 (1991) (available at http://www.jstor.org/stable/2328687) (confirming the performance of IPOs as dismal in the long run).

[28] *Id.*; *see also* Christopher B. Barry et al., *The Role of Venture Capital in the Creation of Public Companies: Evidence from the Going-Public Process*, 27 J. Fin. Econ. 447, 449-51 (1990) (stating that venture capitalism can alleviate the long-run underperformance of IPOs).

[29] estockwise.com, *What is an IPO and How to Go about Investing in It?*, http://www.estockwise.com/estockwise-articles/public-offering.htm (last accessed Oct. 7, 2007).

[30] *Id.*

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B. Australia's S&G: The World's First Publicly Traded Law Firm

S&G is a well known personal-injury firm in Melbourne, Australia and was the first to utilize the IPO in the law firm context.[31] S&G holds about ten percent of the highly fragmented personal-injury market in Australia.[32] In recent years, Australia underwent some regulatory changes. Australia began modifying its law to allow for lawyers to share profits with outsiders.[33] In 2001, New South Wales was the first to actually implement this change.[34] Several jurisdictions followed, and it is predicted the states that have not followed suit will do so this year.[35]

S&G took notice of this change in the regulatory structure, and in 2005, S&G's managing director, Andrew Grech, was given a mandate by S&G's board to prepare for a listing of the firm's stock on the exchange.[36] In December of 2006, the decision to go public was made final. The decision was based on a desire to "fund advertising, work in progress, the costs of the IPO -- and growth through acquisitions."[37] S&G believed that through this IPO it could lead the way in consolidating the personal-injury market.[38] Furthermore, S&G believed this platform for growth would give the staff of the firm a feeling of long-term professional commitment.[39] With additional capital, long-term growth was a definite.[40] Therefore, the young staff could be reassured the firm was committed to growing and would have access to a long-term equity asset.[41]

On May 21, 2007, S&G listed under the handle SGH on the Australian Stock Exchange and became the world's first publicly traded law firm.[42] The stock debuted at a price of $1.32 per share and hit a high of $1.45 per share during the session.[43] Eighty percent of its investors are fund managers.[44] A total of 35 million dollars was raised by the firm with its

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[31] Krause, *supra* n. 7.
[32] Richard Lloyd, *A Public Debut: British Firms Are Watching Australia's Law Firm IPOs with Interest*, 6/2007 Am. Law. 79 (2007) (available at http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1181034331105).
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *See id.*
[40] *Id.*
[41] *Id.*
[42] Krause, *supra* n. 7.
[43] The Sydney Morning Herald, *World First As Law Firm Lists on ASX*, http://www.smh.com.au/news/Business/Slater-amp-Gordon-debut-at-premium-on-ASX/2007/05/21/1179601291947.html (May 21, 2007).
[44] Interview by Bruce MacEwen with Andrew Grech, Managing Director of Slater & Gordon Limited (Aug. 17, 2007) (available at http://www.bmacewen.com/blog/archives/2007/08/a_conversation_with_andre.html). A fund manager is responsible for implementing a fund's investing strategy and managing its portion of trading activities. Investopedia ULC, *Fund Manager*, http://www.investopedia.

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IPO.[45] "[$15.4 million of that] will go toward an acquisition program and marketing and advertising."[46] Because S&G was the first of its kind to be listed, it will grow very quickly through "consolidation or by the natural benefits of marketing and getting their name known."[47]

For the year ending June 30, 2007, S&G announced a net profit after tax of 10.655 million dollars, which was 1.6 million higher than was forecasted in the prospectus for the company's May 21 listing.[48] S&G has maintained this positive endorsement from the market despite the fact that the firm's prospectus makes it clear investors are not S&G's number one priority.[49] S&G's prospectus states specifically, "duty to the Court will prevail over all other duties; and the duty to the client will prevail over the Company's other corporate responsibilities and duty to shareholders."[50] S&G also states in their Prospectus:

> Lawyers have a primary duty to the courts and a secondary duty to their clients. These duties are paramount given the nature of the Company's business as an Incorporated Legal Practice. There could be circumstances in which lawyers of Slater & Gordon are required to act in accordance with these duties and contrary to other corporate responsibilities and against the interests of Shareholders or the short-term profitability of the Company.[51]

In U.S. shareholders' agreements, it is customary for maximizing shareholder value to be the number one goal listed on the agreement.[52] However, S&G consulted with the Australian regulatory body for public companies about two years before its IPO to address the concern that the attorney-client privilege would be at odds with the need for "financial and operational transparency to investors" as well as the concern that nonlawyer ownership would make the lawyers' duty to their clients take a back seat.[53] Ultimately, S&G negotiated with the regulatory body to allow for its prospectus to make the above statements, which S&G believed would let investors know that it was in both the investors' and S&G's best interest to maintain the priority of S&G's duty to the courts and the clients as well as

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com/terms/f/fundmanager.asp (last accessed Oct. 7, 2007). A fund can be a mutual fund, a hedge, or any other portfolio of assets. *Id.*

[45] Sydney Morning Herald, *supra* n. 43.

[46] *Id.*

[47] *Id.* (Quoting Scott Marshall, Shaw Stockbroking Head of Research).

[48] Andrew Grech, *Presentation on Preliminary Financial Report,* http://www.slatergordon.com.au/docs/Various%20net%20Docs/FY07%20Preliminary%20Final%20Results%20Presentation.pdf (Aug. 28, 2007).

[49] Sydney Morning Herald, *supra* n. 43.

[50] Slater & Gordon Limited, *Prospectus* § 4.3, http://www.slatergordon.com.au/docs/prospectus/Prospectus.pdf (Apr. 13, 2007).

[51] *Id.* at 12.

[52] Interview, *supra* n. 44.

[53] *Id.*

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address the concerns of nonlawyer ownership.[54]

Andrew Grech, the managing director of S&G, stated that the IPO added a greater degree of focus to the firm.[55] Grech explained further that the due diligence now required of the public firm in making deals to merge and acquire different companies has been beneficial to the company.[56] Because S&G has a different set of stakeholders who are focused on the business results of such deals, S&G makes more efficient deals to raise their bottom line.

Additionally, Grech stated that one of his main concerns was the conflict between the values of the profession and the obligation to one's shareholders. Grech asserted that no such conflict has presented a problem because of the prospectus S&G designed. Grech stated:

> In terms of conflicts, lawyers have proven they're very good at dealing with conflicts—there is nothing about being public that changes that at all. What's important is that we recognize the potential for conflicts and make sure we have policy and processes in place to manage risk in this area. One reason the standing of the legal profession has diminished in the public's eyes is that conflicts have not been dealt with openly. Where lawyers regulate themselves, it's an environment that invites suspicion. What has changed is that we now have independent outside regulators (sure, some are lawyers by training, but they're not operating as the bar council), and where outside regulators demand and operate with transparency, I believe we will benefit as a profession.[57]

Furthermore, Grech stated that the IPO created an "all for one" feeling amongst S&G's practice in other parts of Australia.[58] There is now incentive for these offices to work together instead of focusing on their own practice areas because the collective performance of the company is reflected in the stock price.[59] Consequently, S&G stands behind its decision to go public and has many firms in different parts of the world contemplating if they should follow.

In fact, Integrated Legal Holdings (ILH) is a firm in Australia that may become the second publicly held law firm.[60] ILH would be listed as a holding company with several wholly- owned subsidiaries, including Brett

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] Lloyd, *supra* n. 32.

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Davies Lawyers, Talbot Olivier Lawyers, and a document production website.[61] Brett Davies, who created ILH, is looking to grow but has chosen to attempt the listing under this model because it would avoid the problems inherent in merging several large firms.[62] Under this model, practices bought by ILH could either integrate themselves into an existing firm of the company or stand-alone.[63] Davies also believes that a public firm brings with it a valuable tool for recruitment: stock options.[64] However, whether that equity will compensate employees is up to the market.[65] It is evident that S&G and ILH are leading the way in running law firms as businesses, but it remains to be seen how many will follow.

C. The Legal Services Act: A Chance for British Law Firms to Have Access to External Investment.

Australia is not the only country that has changed its regulatory scheme to allow for publicly traded law firms. In the United Kingdom, on November 23, 2006, the Legal Services Bill (Bill) was introduced to the House of Lords.[66] The Legal Services Act, formerly the Legal Services Bill, was approved by the Queen on October 30, 2007.[67] The Government states that the purpose of the Act is to put the consumer first. In Part 5, Clauses 71-111[68] of the Bill, alternative business structures (ABS) are allowed.[69] These alternative business structures "enable nonlawyers and lawyers to work together to deliver legal and non-legal services."[70] Previously, this had not been allowed in the United Kingdom.[71]

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[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] Fairbairn, *supra* n. 8, at 12.
[67] MacEwen, *supra* n. 1, at 61.
[68] The Legal Services Act 2007 (Commencement No. 1 and Transitory Provisions) Order 2008 Pt 5. Clause 71, dealing with the carrying on of activities by licensed bodies states: "(1) The provisions of this Part have effect for the purpose of regulating the carrying on of reserved legal activities and other activities by licensed bodies. (2) In this Act "licensed body" means a body which holds a license in force under this Part."
Clause 72 of The Legal Services Act of 2007 defines "Licensable body" as:

> (1) A body ("B") is a licensable body if a non-authorised person—
> > (a) is a manager of B, or
> > (b) has an interest in B.
>
> (2) A body ("B") is also a licensable body if—
> > (a) another body ("A") is a manager of B, or has an interest in B, and
> > (b) non-authorised persons are entitled to exercise, or control the exercise of, at least 10% of the voting rights in A.
>
> (3) For the purposes of this Act, a person has an interest in a body if—
> > (a) the person holds shares in the body, or
> > (b) the person is entitled to exercise, or control the exercise of, voting rights in the body.
>
> (4) A body may be licensable by virtue of both subsection (1) and subsection (2).
> (5) For the purposes of this Act, a non-authorised person has an indirect interest in a licensable body if the body is licensable by virtue of subsection (2) and the non-

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Additionally, external investment is permitted by the Act, allowing for nonlawyer ownership of a law firm.[72] While considering the Bill, Lord Thomas of Gresford argued that this portion should be removed because of the fear of conflict of interest problems that might arise.[73] However, Lord Whitty argued that it would be better for the consumer if the range of services many need in a legal transaction were made available to them in a "one-stop" shopping experience.[74] Lord Carlile of Berriew counter-argued that those who would be attracted to this ABS model would be large corporations and lawyers who were only interested in certain types of high-profile cases.[75] Thus, certain small-scale clients would not have access to high-profile attorneys because their problems or issues were not big enough or sexy enough. Several Lords felt this provision should be amended to address these issues.[76]

In particular, Lord Kingsland moved for an amendment which sought to ensure that "in the context of ABS firms, lawyers' duties to comply with their professional conduct obligations would override any other obligations, including their directors' duties to shareholders."[77] Baroness Ashton received advice from the Department of Trade and Industry (DTI) in regards to this proposed amendment.[78] The DTI stated to the Baroness that an override provision, like the one suggested by Lord Kingsland, would create uncertainty for companies trying to comply with both corporate law and this regulatory law.[79] The DTI also noted that the Companies Act of

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authorised person is entitled to exercise, or control the exercise of, voting rights in A.

(6) In this Act "shares" means—

(a) in relation to a body with a share capital, allotted shares (within the meaning of the Companies Acts);

(b) in relation to a body with capital but no share capital, rights to share in the capital of the body;

(c) in relation to a body without capital, interests—

(i) conferring any right to share in the profits, or liability to contribute to the losses, of the body, or

(ii) giving rise to an obligation to contribute to the debts or expenses of the body in the event of a winding up;

and references to the holding shares, or to a shareholding, are to be construed accordingly.

The Legal Services Act 2007 (Commencement No. 1 and Transitory Provisions) Order 2008 Pt 5. The Act's language essentially states that the Legal Services Board created by the Bill will regulate the activities of a licensed body. *Id.* The licensed bodies referred to, are those alternative business structures which include law firms owned by nonlawyers. *Id.*

[69] Fairbairn, *supra* n. 8, at 35.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 47.
[73] *Id.* at 39.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 47.
[78] *Id.*
[79] *Id.*

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2006 already clearly stated that in fulfilling their duties to shareholders some directors must have flexibility to meet a wide range of goals other than maximizing shareholder value.[80] Therefore, the override amendment by Lord Kingsland was taken out of consideration and the provision was left mostly intact.[81]

The Bill is now law, and it allows private owners a stake in law firms.[82] U.K. firms are already eliciting the advice of consultants to ascertain the pros and cons of going public.[83] It is likely the U.K. will watch what is happening with S&G with rapt attention.

D. ABA Model Rule of Professional Conduct 5.4: The Steadfast Tradition of the Bar to Maintain the Independence of the Lawyer

As previously stated, Britain and Australia are two of the first countries to take steps to change their regulatory schemes to allow nonlawyers to invest in a law firm. Beginning in 1928, the ABA took the position in its Canons of Professional Ethics that nonlawyers should be prohibited from investing in firms, and that position has not significantly changed in the last eighty years.[84] In 1969, the ABA instituted the Model Code of Professional Responsibility, which also contained a rule prohibiting nonlawyer investment in law firms.[85] In 1983, the ABA adopted the Model Rules of Professional Conduct and again maintained its position against nonlawyer investment in law firms.[86] This rule has often been a point of contention and debate among lawyers.

In fact, in 1977 when the ABA created the Kutak Commission to consider revisions to the rules that would later be adopted as the Model Rules of Professional Conduct, the commission suggested a rule very different from the ABA's traditional stance on nonlawyer investment.[87] In 1981, the Kutak Commission advised the ABA to change Model Rule of Professional Conduct 5.4 to allow for nonlaywer control of firms.[88] Specifically, the proposed rule stated:

> A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a non-lawyer . . . such as a business corporation, insurance company, legal services organization or govern-

[80] *Id.*
[81] *Id.*
[82] MacEwen, *supra* n. 1, at 61.
[83] *See id.* at 62.
[84] Edward S. Adams & John H. Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 Cal. L. Rev. 1, 4 (1998).
[85] *Id.* at 6.
[86] *Id.* at 8-9.
[87] *Id.*
[88] *Id.*

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> ment agency, but only if the terms of the relationship provide in writing that: (a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; (b) information relating to the representation of a client is protected as required by [the rule on confidentiality of information]; (c) the arrangement does not involve advertising or personal contact with prospective clients prohibited by [the advertising and soliciting rules]; and (d) the arrangement does not result in charging a fee that violates [the rule on fees].[89]

This proposed rule would have allowed law firms in the United States to go public. However, this proposal was rejected in its entirety in 1982.[90] It was the only rule proposed by the Kutak Commission that was flat-out rejected.[91] Because the ABA has always had a strong stance against nonlawyer control, it is not at all surprising that this proposed rule was so quickly rejected and rewritten.

Thus, Model Rule of Professional Conduct 5.4, as rewritten by the ABA House of Delegates, is the regulatory scheme the ABA implemented to continue preventing nonlawyer investment from occurring in the United States.[92] Specifically, Model Rule of Professional Conduct 5.4 states:

> (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
> (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if: (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

The comment to the rule explains that this rule is meant to express "limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another."[93] "Since

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[89] *Id.*
[90] *Id.* at 9.
[91] *Id.*
[92] *Id.* at 10.
[93] Model R. Prof. Conduct 5.4 cmt. 2 (imposing limitations on fee sharing). *Id.* at 5.4.

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1983, approximately three dozen states and the District of Columbia have adopted some version of the *Model Rules*. Of these, only two jurisdictions, North Dakota and the District of Columbia, have seriously considered resurrecting the Kutak Commission's version of *Model Rule* 5.4."[94]

The ABA justified its opposition to the Kutak commission's view on several grounds. First, the ABA had a "Fear of Sears."[95] The ABA worried that large companies like Sears would open their own law firms that could compete with traditional law firms, that the legal marketplace would be overwhelmed, and that small firms as well as solo practitioners would be put out of business.[96] The ABA also wanted to preserve the independence of the lawyer.[97] They believed that business practices would conflict with a lawyer's ethical obligation. Also, nonlawyer partners motivated by profit might not be sensitive to the ethical issues lawyers face.[98] Furthermore, "nonlawyer ownership would result in economic pressures that would undermine the 'professionalism' of law."[99]

Additionally, the fundamental flaw to public investment in law firms is loyalty to shareholders.[100] Because the primary fiduciary duty of a public company is owed to its shareholders, all of its decisions are based on maximizing shareholder value, which is reflected in the company's share price.[101] This duty is in direct conflict with the great number of duties the lawyer and her firm owe to the client.[102] Pro-bono work could be eliminated in a publicly traded law firm because it does not help the bottom line.[103]

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[94] Cindy Alberts Carson, *Under New Mismanagement: The Problem of Non-Lawyer Equity Partnership in Law Firms*, 7 Geo. J. Leg. Ethics 593, 596 (1994) (footnote omitted) (emphasis in original). North Dakota approved a version of Rule 5.4 that was similar to the Kutak Commission version in 1986. *Id.* However, the version was rejected by the North Dakota Supreme Court in 1987. *Id.* The North Dakota corporation statutes would have prohibited nonlawyer ownership regardless of if the rule had not been rejected. *Id.* In the District of Columbia (D.C.), a version was approved that would allow for a nonlawyer partnership. *Id.* at 597. However, the D.C. Bar came under fire and stated they had not intended to create a rule which would permit corporate ownership of law firms. *Id.* Thus, the Bar amended the proposed rule to "include the requirement that the non-lawyer partner be an individual who would provide professional services to the law firm." *Id.* The proposed rule became effective in January of 1991. *Id.*

[95] Adams, *supra* n. 84, at 10-13; *see also* Sharfman, *supra* n. 16, at 481-83. The "proposed rule would open up the legal profession to ownership by large retail institutions such as Sears or the large accounting firms, creating competition with traditional law firms" *Id.* at 481.

[96] *Id.*

[97] *Id.* at 16.

[98] Carson, *supra* n. 94, at 612 (stating that "[e]ven if non-lawyer partners understand and accept that the lawyers in their firms must abide by professional responsibility rules, they are not likely to understand and accept that these lawyers must go beyond the letter of the rules").

[99] Adams, *supra* n. 84, at 10.

[100] Sharfman, *supra* n. 15, at 494; *see also* 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. Leg. Ethics 687, 695-97 (2001) (stating the arguments for public investment do not trump the flaw of it, which is loyalty to shareholders).

[101] Klein, *supra* n. 19, at 292 (citing *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919)).

[102] *Id.*

[103] Carson, *supra* n. 94, at 630.

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These concerns form the crux of the ABA's argument against nonlawyer investment in law firms.

However, supporters of the proposed rule justified their position as well. Supporters first argued that conflict of interest rules within the ABA Model Rules of Professional Conduct would prohibit corporate giants from swarming the legal marketplace.[104] Additionally, supporters countered the ABA's argument that maximization of shareholder value would affect the independence of lawyers by stating that it was hard to imagine that nonlawyer managers could be any more focused on efficiency and profits than today's lawyer managers, whose focus on the bottom line is a topic of constant debate.[105] Furthermore, a public firm's value is reflected by the market. If a law firm provides lackluster service to its clients in attempts to focus on shareholder value, the shareholder will actually suffer.[106] Thus, it is to the advantage of the shareholder to support a law firm's dedication to the client.

Supporters of the change also argued that confidentiality would not pose an issue because the Model Rules[107] provide an incentive for both lawyers and nonlawyers alike to maintain the confidentiality of their clients.[108] The incentive is found in the fact that the rule explicitly states that a lawyer will be held responsible for the conduct of a nonlawyer if that conduct is in violation of the Model Rules.[109] Thus, even though the nonlawyer owes no duty of confidentiality to the client, the nonlawyer will want to maintain confidentiality because the lawyer will be punished if the nonlawyer does not. This would result in clients not wanting to do business with the firm.[110] The nonlawyer who now has a stake in the firm would be

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[104] Adams, *supra* n. 84, at 14 (arguing conflict of interest rules "place inherent limits on law firm size."). For example, Model R. Prof. Conduct 1.7 "prohibits representing directly adverse clients or clients whose representation may be materially limited by responsibilities to other clients or by the lawyer's own interests." *Id.* Model R. Prof. Conduct 1.9 prohibits representing a person with interests adverse to a non-consenting former client in the same or a substantially related matter. *Id.* at 14-15. Model R. Prof. Conduct 1.10 imputes the disqualification of one lawyer to the entire firm. *Id.* at 15. Model R. Prof. Conduct 1.11 restricts former government lawyers from representing clients in matters in which the lawyers participated personally or substantially while a public officer or employee. *Id.* Therefore, Adams and Matheson believe the "Fear of Sears" is not well founded due to the conflict of interest rules that limit firm size. *Id.* at 12. This is exemplified in the case of *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978). *Id.* at 15. In the case, the law firm of Kirkland & Ellis, was not allowed to represent Westinghouse because Kirkland's Washington office, unbeknownst to its Chicago office, was representing the American Petroleum Institute whose members included the defendants to the case. *Id.* Because Model Rule 1.7 prohibits this, the conflict rules have naturally restricted the size of the law firm by prohibiting it to receive certain business. *Id.*

[105] *Id.* at 23.

[106] *Id.*

[107] Model R. Prof. Conduct 5.3 (ABA 2007).

[108] Sharfman, *supra* n. 15, at 490 (stating that Rule 5.3, which "holds a lawyer who associates with a nonlawyer responsible for the conduct of the nonlawyer if the conduct is a violation of the *Model Rules*," as well as the blackmark that would be put on a company's name if they breached client privilege are considerations that counter the fear of the breakdown of attorney-client privilege with nonlawyer ownership) (emphasis in original).

[109] *Id.*

[110] *Id.*

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hurt by clients not wanting to do business with the firm because success of the firm is important to making that stake rise in value.

Supporters further argued that the traditional rule promulgated by the ABA prohibits the creation of new methods to provide legal services. "[L]aw firms miss potential clients because they lack the necessary capital to innovate, invest, and thereby attract new clients."[111] Law firms have to look toward its existing partners or bring in new partners to generate more capital.[112]

Supporters of the proposed change argued that if law firms were allowed to incorporate and go public in the U.S., the firms would have access to this necessary, additional capital in exchange for losing some control over the firm's ownership.[113] This additional capital would allow lawyers to: (1) train new associates more effectively; (2) take on riskier cases; (3) invest in new technology; and (4) merge with other law firms.[114] Furthermore, the traditional law firms would no longer face competition from nonlawyer professionals who could offer quasi-legal services on the cheap.[115] Consequently, it is evident that there were strong arguments both for and against a change to Model Rule of Professional Conduct 5.4.

III. ANALYSIS

The issue of having publicly traded law firms is a complex one because, as is evident from Section II, as long as 20 years ago there were many valid arguments for and against a change in the ABA rules to allow for a public firm. In today's society, new competitive pressures that face law firms indicate that nonlawyer ownership will inevitably have to be confronted again. New discussion and new arguments for and against a change in the rules to allow for a publicly traded law firm in the U.S. are currently being debated in light of the actions taken by the U.K. and Australia.

For example, because law firms have to compete for both clients and lawyers, today more ardently than ever, many advocates of public law firms opine that initial public offerings will provide firms with the capital to do this effectively.[116] Furthermore, proponents of the public law firm argue that having a profitability standard like share price will align attorneys' goals even further with their clients', will give law firms incentives to make

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[111] Koppel, *supra* n. 100, at 696.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at 694.
[116] MacEwen, *supra* n. 1, at 65.

offers to attorneys they are trying to recruit, and will make firms run efficiently like public corporations.[117]

However, opponents of the publicly traded law firm today argue that although new capital and alignment with clients' goals might result, there is still: (1) the issue of the mandatory disclosures public law firms would have to make to the SEC that could possibly violate attorney-client confidentiality; (2) the potential nonlawyer interference with an attorney's professional judgment; and (3) the potential for profitability to lower the importance of a firm's duty to its clients and the court.[118] Furthermore, for every solution offered to counter an objection to publicly traded law firms, several more problems appear that need addressing. Solutions created, which would seem to get around having to change the ABA rules, result in the creation of new uncertainty in regard to external investment in law firms. Consequently, because there is such uncertainty in the consideration of allowing law firms to go public, it is in the best interest of the U.S. legal profession to keep the Model Rules of Professional Conduct intact.

A. Publicly Traded Law Firms: A Solution to Competitive Pressures Facing US Firms Today?

Today, law firms need capital to expand and to finance cases and deals in order to compete effectively with other law firms. This means law firms are facing the same issue that investment banks, an industry once dominated by partnerships, did 30 years ago.[119] The number of legal transactions is increasing, resulting in a need for capital that the partners alone cannot provide. This same problem plagued investment banks and resulted in these banks eventually going public.[120]

Furthermore, there are many middle-of-the-road law firms that would benefit from obtaining capital through a public offering. For example, S&G used the money it obtained through its public offering to expand through acquisition and to build its brand through advertising.[121] Top-tier law firms would not benefit from this because they trade on their reputations and not on advertisement.[122] However, mid-sized firms could

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[117] *Id.* at 63-65.

[118] *Id.* at 69-77.

[119] Lindsey Fortado, *British Law Firms May Follow Australian Lead in Going Public*, http://www.iht.com/bin/print.php?id=6125875 (June 14, 2007). Investment banks resisted going public for quite some time until the number of transactions and the need for capital became so high that partners alone could not satisfy the need. *Id.* Merrill Lynch first listed its shares in 1971. *Id.* Goldman Sachs was the last major investment bank to go public and this occurred in 1999. *Id.* Forty years passed before almost all the investment banks in the US accepted the need to go public and many anticipate it will take a similar time period for law firms to do so if the opportunity becomes available. *Id.*

[120] *Id.*

[121] Lloyd, *supra* n. 32.

[122] Larry E. Ribstein, *Want to Own a Law Firm?*, http://www.american.com/archive/2007/may-0507/want-to-own-a-law-firm (May 30, 2007).

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capitalize off of having additional funding to acquire smaller competitors and become more dominant.[123] This, of course, would mean the death of the small firm because such firms would be acquired by mid-size firms to give the mid-size firms the necessary competitive advantage against larger, reputable firms.[124] The IPO would basically serve to buy these firms a reputation that would allow them to compete with the larger firms who already have established reputations.[125]

Thus, the competitive pressures from a large-size firm that face a mid-size firm would be eliminated if the mid-size firm could generate capital in this manner. However, although the publicly traded law firm might alleviate these competitive pressures, it still would not mean that the potential problems created by having a public law firm would be solved, and it would be the end of the small law firm.

B. Are There Any Fail Safe Solutions to the Objections to Having Publicly Trade Law Firms in the U.S.?

As Section III A indicates, the competitive pressures that would be eliminated through a publicly traded law firm do little to argue against the problems that would still remain. However, solutions have been offered to the main objections to outside ownership that still exist today. The objection that outside ownership would permit nonlawyers to interfere with lawyers' exercise of professional judgment could possibly be combated by offering only a minority of shares to outside investors. For example, S&G still owns fifty-six percent of its shares.[126] Thus, outside investors do have an interest, but their voice is not a majority.

This indicates that in a minority-of-outside-ownership-set-up such as this, the outside investors would not be a strong enough presence to truly interfere with the attorneys' professional judgment. Additionally, establishing rules that would prohibit investors from involvement in any matter that the firm is handling or having access to client information could help to prevent interference with the lawyer's professional judgment.[127]

However, the SEC has strict disclosure requirements promulgated through the Securities Act of 1933 and Securities Exchange Act of 1934.[128] These Acts have the purpose of providing investors with reasonable information to make an informed investment decision.[129] Therefore, even

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[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] Milton Regan, Jr., *Taking Stock*, 29 Am. Law. 61 (Aug. 2007) (also available at http://www.law.com/jsp/PubArticle.jsp?id=900005487389).
[127] *Id.*
[128] *See* Klein, *supra* n. 19, at 413.
[129] *Id.*

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though the law firm may be trying to protect its client's interest and its own professionalism, the firm could subject itself to Section 10 and Rule 10b-5 violations by not disclosing information or making misleading statements to the investors that affect their decisions.[130] There is currently no fail-safe way of avoiding the issue of SEC disclosures for public companies without encountering new problems. Furthermore, it actually creates a new objection with no current potential solution: the conflict between attorney-client privilege and SEC disclosure requirements.

Another prominent objection to the publicly traded law firm is the new duty it would create for the firm to its shareholders, which would conflict with the firm's duty to its clients and the court. S&G combated this objection by the design of their prospectus that was discussed in Section II.B. Although corporate law is clear that directors do not have a legal duty to maximize shareholder value, [131] the lack of an explicit duty[132] does not mean that a publicly traded law firm will not start practicing toward the share price rather than the client.[133] It would be foolish to say that because there is not a duty, something will not happen. Yet again, there is currently no fail-safe solution to these objections. Consequently, although there have been some solutions offered to some objections against publicly traded law firms, the solutions often leave more problems to address before one can state with certainty that going public is a good decision to make.

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[130] *Id.* at 449. The Securities Exchange Act of 1934 § 10 makes it:

> [U]nlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . ., any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors . . . .

Id. (citing 15 U.S.C. 78(j) (2000)). Rule 10b-5, a rule promulgated by the SEC states:

> [It is] unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as fraud or deceit upon any person, in connection with the purchase or sale of any security.

Id. (citing 17 C.F.R. 240.10b-5 (2007)). This rule provides a private right of action for those investors who believe they were subject to a violation of rule. *Id.*

[131] *See* Klein, *supra* n. 19, at 328-532.

[132] *See id.*

[133] MacEwen, *supra* n. 1, at 69-70.

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C. Can Capital be Raised Through Another Means that Would Avoid All the Problems Created by a Publicly Traded Law Firm?

In a discussion between several members of the U.S. legal community, after S&G went public, an idea was proposed to circumvent all these objections and problems. One of the members of the community, Bruce MacEwen, suggested "creat[ing] a derivative financial instrument, tradable as if it were a stock, engineered to reflect the implicit value of the firm."[134] He did not go into detail about the instrument, but there are many people in the financial field who spend their careers creating such instruments.[135] He suggested that the instrument be sold and bought by lawyers within the firm, by executives and other nonlawyers in the firm, and by investors outside the firm.[136]

This would cure one of the competitive disadvantages law firms are subject to. Law firms do not have the kinds of incentives corporations and businesses have to offer when recruiting employees.[137] Associates are often enticed to join investment banks or consulting firms, or even to take in-house counsel positions with former corporate clients that can offer stock options that can be invested for meaningful wealth creation.[138] The same is true for partners and executives at the law firm.[139]

Because there are "[n]o stock options, no routine opportunit[ies] to invest in deals . . . no supra-normal income windfalls,"[140] a derivative instrument such as this, would provide such opportunities to partners, associates, and executives, as well as put law firms on the same level as other businesses.[141] Additionally, it provides an opportunity for managing partners to "bene[fit] from . . . the handsome performance of the law firm's

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[134] *See id.* at 65.
[135] *Id.* at 66.
[136] *Id.* at 65. This idea is similar to the idea behind the Blackstone arrangement. *Id.* at 67. Blackstone was a private firm in the business of buying underperforming companies in the hopes turning them around. *Id.* Blackstone is a general partner in various investment funds. *See* David Weidner, *Blackstone Files for $4 Billion IPO: Private-Equity Firm Discloses Returns of 31% for Flagship Investments*, http://www.marketwatch.com/news/story/blackstone-files-4-billion-ipo/story.aspx?guid=%7BF3E49B94-6DF3-4F6C-B9F7-ECBE53BE1B07%7D (last updated Mar. 23, 2007). The general partner is a limited partnership which is the entity that is going public. MacEwen, *supra* n. 1, at 67. Blackstone decided to go public to access new sources of permanent capital, to add to the company's compensation package, to enhance the firm's brand and to give itself a currency for acquisition. Weidner, *supra* n. 136. Because it is a limited partnership going public rather than a corporation, it avoids the New York Stock Exchange requirement of having a majority of independent directors. *Id.* Those outsiders who purchase an interest in the company have minimal governance rights and weak fiduciary protection. *Id.* The outside investors have limited voting rights and will not elect the general partner or directors. *Id.* Thus, the public will have little say in how things are done at Blackstone because voting power will be limited, and the company will not be bound by rules many shareholders take for granted. *Id.* A unique arrangement such as this was the inspiration beyond how this fictional derivative instrument could work. MacEwen, *supra* n. 1, at 67.
[137] MacEwen, *supra* n. 1, at 65.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*

'stock' in a way that any corporate CEO would as a matter of routine."[142] Furthermore, it would enable U.S. law firms to compete with Australia's public law firms as well as the U.K.'s future public law firms while avoiding the obstacles the ABA rules put forth.

Professor Mitt Reagan of the Georgetown University Law Center does not believe this creative solution would pass the ABA Model Rules of Professional Conduct's scrutiny.[143] Professor Reagan concedes that the derivative instrument would avoid the problem of nonlawyer interference with the lawyer's professional judgment because the derivative would potentially align the lawyer's interest with the firm's goals rather than just profitability.[144] Therefore, the attorney would avoid influence because his financial benefit would depend upon the firm achieving its goals and doing well as a whole.

However, Professor Reagan rejects the argument that Model Rule of Professional Conduct 5.4(d)(1) would not apply to this derivative instrument.[145] He acknowledges that it can be argued that this rule is avoided because the nonlawyer does not own an interest in the firm; rather she owns an interest in a security issued by the firm. The nonlawyer is a passive investor in this scenario.[146] He further acknowledges that, as a passive investor, the nonlawyer could not influence the judgment of the lawyer and would not assume a position of influence in a law firm.[147] He feels, however, that such an instrument would not be accepted by the state bar.[148]

Professor Reagan believes Model Rule of Professional Conduct 5.4(d)(1) was designed to prohibit nonlawyers from owning any type of financial interest in a law firm that is dependent on the financial performance of the firm.[149] This derivative instrument would create such an interest, and thus the ABA would prohibit it.[150] Additionally, the ABA wanted to avoid having attorneys practice to the share price.[151] Even though this is a derivative rather than a stock, lawyers could still be driven in their representation by a desire to maintain the value of the derivative.[152]

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[142] *Id.*
[143] *Id.* at 69.
[144] *Id.* at 68. Professor Reagan bases this conclusion on his hypothesis that such a derivative instrument would be similar to "compensation schemes that are based on the financial performance both of the firm and of individual lawyers." *Id.*
[145] *Id.*
[146] *Id.* at 69.
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.* Professor Reagan compares this to shareholders in the corporate sector. *Id.* Although shareholders have little influence over managerial decisions, managers themselves have become so obsessed with share price, that it has actually negatively affected corporations. *Id.*

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Furthermore, the attorney would still have the desire to keep the price of the derivative instrument high, which could cause her to behave in a manner that would put her own welfare above that of the client.[153] This would violate a lawyer's fiduciary duty to keep the interests of her client above her own.[154]

Professor Reagan also introduces a public goods argument in objection to the derivative instrument theory. He argues that lawyers produce a distinct good through litigation and unique transactions: the law.[155] He further argues that such a derivative instrument may align the lawyer's incentives too effectively with the client, resulting in attorneys having little incentive to attend to the quality of the public good they produce in every representation.[156] The lawyer will be less likely to want to affect and change "the law" through his work because he just wants to satisfy his client and see the derivative instrument price rise.[157] Consequently, Professor Reagan finds that a state bar would likely interpret this derivative instrument to be prohibited by the ABA rules because, although it is not actually a stock, it looks, performs, and behaves the same way as a stock, thus subjecting it to the ABA rule.[158]

It is obvious by both the abundance of potential solutions to the objections to outside investment in law firms, as well as the abundance of new problems created by such solutions, that the issue is problematic to the legal community. Although S&G has been successful since their law firm went public, no one can say with any certainty what will happen in the long-run. Additionally, no can they say whether that means a public law firm will always be successful in every country that attempts it. The complexity of this issue has sparked much debate, but the question remains whether this is a viable option for the future of law firms in the U.S.

D. The Nature of Business in America: Why Model Rule of Professional Conduct 5.4 Should Remain Intact.

Although it is possible with a change in the ABA rules for outside investment in a law firm to occur, it is not something law firms in America should pursue. To begin with, the abundance of unanswered questions raised in Sections III.A, B, and C show there is too much uncertainty that

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[153] *Id.* at 70.

[154] *Id.* Professor Reagan compares this argument to the agency cost argument. *Id.* "What is the likelihood that any given variable will increase the probability that an agent will be faithless to her principal?" *Id.* However, Professor Reagan admits that such self-serving tactics on the part of a law firm will result in the drop of value of the derivative. *Id.* Therefore, the breach of this fiduciary duty would be a destructive move. *Id.* Professor Reagan argues that this is not as straightforward as it seems, and the market will not completely limit agency costs. *Id.*

[155] *Id.* at 70.

[156] *Id.* at 70-72.

[157] *Id.* at 71.

[158] *Id.* at 69.

remains regarding whether the public law firm is a viable option for American law firms. Why would attorneys want to risk the integrity of the practice of law on something so uncertain? Because there are more questions than answers to the problems raised by public law firms, the U.S. should maintain its stable policy of preserving the independence of lawyers.

The nature of business in the U.S. further supports this conclusion. No matter how one arranges the prospectus of an IPO, the bottom line will slowly but surely, always take precedence. This has been true time and time again in businesses in America. For example, Wachovia Bank went public.[159] In 1999, the bank's "[f]lagging service standards forced customers to fend for themselves or consider taking their banking business elsewhere."[160] The company's customers were no longer the focus of the company and thus, the company suffered financially.[161]

Those in support of publicly traded law firms may object here and say that that is exactly why outside ownership of law firms would still work. If the firm fails to put the client first, their profits will fall, and they will have to revamp their business as Wachovia Bank did in 2004.[162] However, the legal profession should not want to risk having law firms in positions like Wachovia Bank. As much as the practice of law is a business, it is still a profession. To put clients' best interests at risk, even if it will self-correct in the long-run, is detrimental to the practice of law as a profession. Attorneys are dealing with issues that affect their clients' lives, jobs, wealth, and even freedom. To put those at risk for any amount of time is a dangerous proposition. Unique and creative ideas aimed at keeping the clients in the forefront will only provide short-term assurance for the clients. The practice of law is too important to society to risk putting profitability above the client, even if it is for a short time.

Furthermore, the corporate environment in America is more intense and competitive than it has ever been. There is a race to go global, to be the first mover in any business idea, and in general, to be the biggest, the best, and the most profitable.[163] Although international markets are subject to those same types of competitive pressures, the work environment in other countries still manages to seem less intense and draining than "Corporate

[159] *See* Kelly McSwain-Campbell & Dennis Jacobe, *Wachovia Takes Customer Engagement to the Bank: How the Company's Increased Focus on Meeting Customer Needs Is Producing Sharply Better Returns for Stockholders*, http://gmj.gallup.com/content/10519/Wachovia-Takes-Customer-Engagement-Bank.aspx (July 8, 2004).
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] MacEwen, *supra* n. 1, at 61 (discussing that law firms were beginning to resemble their corporate clients by expanding domestically and internationally, seeking more clients, and hiring large amounts of lawyers to work at the firms).

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America." It would seem foolish to put law firms into that same environment of pressure and intensity.

It is true that law firms today have begun to resemble their corporate clients because firms have faced competitive pressures both from clients and lawyers, have grown in size, have expanded globally, and have adopted the limited liability corporate form.[164] However, to allow law firms to go public and truly become their corporate clients would effectively destroy the practice aspect of the law in favor of law as a business. Additionally, law firms are not capital intensive like most firms that go public.[165] Firms are ruled by billable hours, which does not lend itself to capital appreciation.[166] Consequently, most firms will not need to tap capital markets.[167] Why raise several problems by changing a rule when most firms do not need access to the capital market?

If these rules against nonlawyer ownership remain intact, then the legal profession has not fully succumbed to the law being a business. Yes, the firms will still pay attention to their financial performance because of the competitive pressures they face, but with the rules in place, the firms will never become obsessed with the bottom line, even for a short period of time, to the detriment of the clients and the profession.

IV. CONCLUSION

Consequently, although the international legal community might be ready to take this step, the United States should take its time and stay the course set out by ABA Model Rule of Professional Conduct 5.4. As Bruce MacEwen said, "I'm not proposing that law firms go public--let them experiment with that in the U.K. first and we'll learn how to avoid train wrecks over here . . . ."[168] Businesses in America have vowed time and time again to put the client first, but many have failed and become obsessed with maximizing shareholder value. Because the client's interest has the potential to be jeopardized even for a short amount of time, law firms should not be subject to outside investment. The sanctity of the profession must be preserved.

Additionally, although law firms face the pressure their corporate clients do, the practice aspect of the legal profession is more important than the business aspect. Law firms currently are admittedly both practices and businesses, but to allow outside investment would most likely have the effect of eliminating the practice aspect of the firm and making the firm all

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[164] *Id.*

[165] International Investing, *Public Law Firms Don't Make Sense*, http://www.gocurrency.com/international-investing/2007/10/30/public-law-firms-don%E2%80%99t-make-sense/ (Oct. 30, 2007).

[166] *Id.*

[167] *See id.*

[168] MacEwen, *supra* n. 1, at 67.

https://ecommons.udayton.edu/udlr/vol34/iss1/7

business. The United States and the ABA cannot allow this to be a possibility for firms. A publicly traded law firm would create more problems than it would solve. As such, law firms in the U.S. should remain firms and not businesses.

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