

The Pitfalls and False Promises of Nonlawyer Ownership of Law Firms

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ABSTRACT. Whether nonlawyers should have ownership roles in law firms has been and remains a hotly debated topic. The debate concerns potential reforms to Rule 5.4 of the American Bar Association’s Model Rules of Professional Conduct, which sets guidelines for maintaining the professional independence of lawyers, as well as the impact of those revisions on the legal profession. Although advocates for such reform argue that nonlawyers must be allowed ownership roles in law firms in order to foster innovation and increase access to legal services, many lawyers have raised significant concerns about the impact that nonlawyer ownership would have on the independence of lawyers. Lawyers have concerns about allowing nonlawyers – who have not sworn to uphold the ethical obligations that attorneys promise to uphold when becoming members of the bar – to have decision-making authority in the day-to-day practice of law. There is also no evidence that nonlawyer ownership actually improves access to justice for the needy. This Essay argues against rewriting Rule 5.4 to allow nonlawyer ownership of law firms. It concludes that nonlawyer ownership not only fails to solve the problems that advocates of reform promise it will address but in fact creates meaningful risks for the legal profession.

INTRODUCTION

Nonlawyer ownership of law firms (NLO) has been a hotly debated issue in the legal profession for years. The debate concerns potential reforms to Rule 5.4 of the American Bar Association’s (ABA) Model Rules of Professional Conduct, which sets guidelines for maintaining the professional independence of lawyers. One of Rule 5.4’s key provisions prohibits lawyers from forming business entities with nonlawyers in order to practice law and forbids entities owned or controlled by nonlawyers from having ownership stakes in law firms.¹ Rule 5.4 also forbids lawyers from sharing fees with nonlawyers.² Rule 5.4 has long served as

1. MODEL RULES OF PRO. CONDUCT r. 5.4(d) (AM. BAR ASS’N 2020).

2. *Id.* r. 5.4(a).

an effective method of preventing ethical concerns about the professional independence of members of the bar, and its continued vitality was recently reaffirmed by the ABA's House of Delegates.³

Nonetheless, some individuals and businesses—although not many lawyers—are seeking to revise Rule 5.4 to allow for increased possibilities for NLO. Advocates for such reform, such as Ralph Baxter,⁴ claim that reforming Rule 5.4 and similar restrictions on nonlawyer involvement in the practice of law is the only viable option for increasing access to justice and fostering innovation in the legal field.⁵ Baxter goes further and asserts that by refusing to reform Rule 5.4, lawyers have ignored their duty to solve the access-to-justice crisis in the United States, arguing that the profession has some undefined duty to ensure “legal service for all.”⁶ As discussed below, these assertions are unpersuasive, and NLO has not proven to be effective in addressing the access-to-justice crisis.

This Essay argues against rewriting Rule 5.4 to allow nonlawyer ownership of law firms. It concludes that NLO not only fails to solve the problems that advocates of reform promise it will address, but in fact creates meaningful risks for the legal profession. Part I provides a brief overview of Rule 5.4 and the current state of the NLO debate. Part II discusses the bar's historical opposition to reforming Rule 5.4 and explains the concerns raised about nonlawyers increasing their involvement in the legal profession. Part III responds to arguments raised

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3. See Sam Skolnik, *ABA Sides Against Opening Law Firms Up to New Competition (1)*, BLOOMBERG L. (Aug. 9, 2022, 5:36 PM), <https://news.bloomberglaw.com/business-and-practice/aba-sides-against-opening-law-firms-up-to-new-competition> [<https://perma.cc/D87L-BDPS>].
 4. Ralph Baxter, *Dereliction of Duty: State-Bar Inaction in Response to America's Access-to-Justice Crisis*, 132 YALE L.J.F. 228 (2022).
 5. Baxter does acknowledge that it is not “certain” that nonlawyer ownership (NLO) will work to improve access to justice. Baxter, *supra* note 4, at 256.
 6. Baxter, *supra* note 4, at 239. Baxter also misleadingly defines the “state bar” as “the entities in each state that have been delegated the authority to regulate legal service.” *Id.* at 228 n.1. In many states, the state bar association has no such authority. Rather, it is the state's highest court that is empowered to regulate lawyers. It is only in mandatory bar states (about sixty percent of the country's states) that the state bar has the power to regulate lawyers. By using this definition, Baxter's essay unfairly targets all lawyers, asserting that all “organizations and people who have . . . the authority . . . to make legal service work in their states,” including but not limited to state bar associations and the state supreme courts, have failed to make any effort to improve access to justice. *Id.* Baxter's definition is exceedingly broad and misleads the reader into believing that lawyers and those that regulate the legal field have done nothing to improve access to legal services for those who need it. As explained in this Essay, that is simply not the case. This Essay will not use Baxter's definition of state bars but rather uses “state bar” to refer to bar associations in the various states, which is the conventional use of that term.

by Baxter and others in favor of easing Rule 5.4's restrictions, including the failure of NLO to increase access to justice and the myth that NLO is required to foster innovation in the legal profession.

I. THE CURRENT STATE OF THE NLO DEBATE

A. Overview of Rule 5.4

The Model Rules of Professional Conduct are a set of model legal-ethics rules promulgated by the ABA that states typically follow, with modifications made to reflect local practice in each state.⁷ Model Rule 5.4 addresses the professional independence of lawyers.⁸ Rule 5.4, which has been adopted in some form by virtually every state, prohibits lawyers from forming a partnership with nonlawyers if any of the partnership's activities consist of the practice of law and limits the circumstances under which a lawyer may form a professional corporation or association authorized to practice law for profit.⁹ Rule 5.4 also generally prohibits lawyers from sharing legal fees with nonlawyers.¹⁰

The purpose of Rule 5.4 – which the Comments to the Rule expressly state – is to prevent nonlawyers from interfering with lawyers' independent professional judgment and to uphold the obligation of lawyers to maintain their independent professional judgment.¹¹ The restrictions imposed by the Rule aim to address the concern that if nonlawyers, who are not bound by the Rules of Pro-

7. MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2020).

8. *Id.* r. 5.4.

9. MODEL RULES OF PRO. CONDUCT rs. 5.4(b) & 5.4(d) (AM. BAR ASS'N 2020); see CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct - Rule 5.4*, AM. BAR ASS'N (Feb. 22, 2022), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-5-4.pdf [<https://perma.cc/72GM-QSZT>].

10. MODEL RULES OF PRO. CONDUCT r. 5.4(a) (AM. BAR ASS'N 2020).

11. *Id.* r. 5.4 cmts. 1 & 2. Restrictions on fee sharing and bans on nonlawyer partners appeared in ethics rules nearly a century ago and were thereafter continued with the adoption of the Model Rules of Professional Conduct. Louise Lark Hill, *The Preclusion of Nonlawyer Ownership of Law Firms: Protecting the Interest of Clients or Protecting the Interest of Lawyers?*, 42 CAP. U. L. REV. 907, 911-12 (2014). Baxter relies on a single sentence in the 2019 Report of the Arizona Supreme Court's Task Force on the Delivery of Legal Services in claiming that this is not the case and that the ban on fee sharing "was not rooted in protecting the public but in economic protectionism." Baxter, *supra* note 4, at 251 (quoting Task Force on the Delivery of Legal Servs., *Report and Recommendations*, ARIZ. SUP. CT. 15 (Oct. 4, 2019), <https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf> [<https://perma.cc/P4EL-7849>]). As described above, this is expressly contradicted by the history and language of Rule 5.4 itself.

fessional Conduct, have a financial interest in a lawyer's profits, they might prioritize profit over the duties the lawyer owes to clients and adversely influence a lawyer's conduct.

B. What is NLO?

NLO – sometimes also called “alternative business structures” (ABS) – refers to potential reforms of Rule 5.4 that would permit nonlawyers to have greater financial interest and decision-making authority in the legal profession.¹² Currently, the ABA Model Rules do not prohibit all nonlawyer involvement in the practice of law. For example, contrary to the impression left by Baxter, Model Rule 5.4(a)(3) already allows nonlawyers to have management roles in firms and share in the firm's overall profits – although not on the basis of the profitability of individual cases.¹³ Nonetheless, advocates for increased NLO and the growth of ABS seek additional reforms.

Advocates for authorizing NLO claim the primary reason for such changes is to address access-to-justice concerns through increased access to legal services.¹⁴ In practice, however, most ABS entities (that is, entities created with nonlawyers in jurisdictions that have reformed their rules to permit NLO) that have been approved so far are run by individuals or businesses from outside the legal profession who are merely focused on expanding their businesses and profits by partnering with lawyers. They are not focused on tackling the access-to-justice divide. Existing ABS entities include wealth-management firms, accounting firms, litigation-finance companies, hedge funds, private-equity firms, other financial institutions, and alternative legal-service providers that offer customers the ability to create legal documents without hiring a lawyer.¹⁵ For example, alternative legal-service providers like LegalZoom (a licensed ABS entity in Arizona) and Rocket Lawyer (an ABS entity in Utah's regulatory sandbox) are also looking to expand their provision of legal documents to consumers in those states. Likewise, multinational accounting firms such as Deloitte and Ernst & Young are exploring opportunities to partner with law firms to expand their

12. In this Essay, I will use the phrase “nonlawyer ownership” or “NLO” to refer broadly to the movement to reform Rule 5.4 and its state corollaries. Baxter also references rules regarding the unauthorized practice of law in his essay. Baxter, *supra* note 4, at 242-48. I do not address those rules here.

13. MODEL RULES OF PRO. CONDUCT r. 5.4(a)(3) (AM. BAR ASS'N 2020); N.Y. RULES OF PRO. CONDUCT r. 5.4(a)(3) cmt. 1B (N.Y. STATE BAR ASS'N 2021) (adopting the principles of ABA Model Rule 5.4(a) and making clear that profit sharing must be based on the total profitability of the law firm or a department therein and may not be based on fees generated by a single case).

14. See, e.g., Baxter, *supra* note 4, at 229-35.

15. See *infra* Part II.

scope of services.¹⁶ As described below, advocates for NLO have not explained how these ABS entities will improve access to justice, and there is no evidence indicating that they have done so yet or will do so in the future.

C. Recent Reforms Embracing NLO

Two states and several countries outside the United States have reformed Rule 5.4 (or the international equivalent) to allow for increased opportunities for NLO.¹⁷

1. Foreign Jurisdictions

Outside the United States, Australia and the United Kingdom were early adopters of legislation allowing limited forms of NLO.

In 2001, New South Wales, Australia passed legislation allowing lawyers to share fees and provide legal services with nonlawyers, thereby becoming the first common-law jurisdiction to allow fee sharing and NLO.¹⁸ This legislation contains provisions aimed at trying to make sure that lawyers maintain their professional and ethical obligations when working with nonlawyers.¹⁹

In the United Kingdom, the 2007 Legal Services Act allowed for NLO in England and Wales. The Act also established a regulatory framework that mandates a fitness test for nonlawyers who seek to become owners of law firms and a law-firm management structure that requires the appointment of persons responsible for ensuring compliance with lawyers' professional obligations.²⁰

16. Roger E. Barton, *Changing the Stakes: How Evolving Law Firm Ownership Rules Could (or Could Not) Re-Shape the Legal Industry*, REUTERS (Aug. 19, 2021, 11:07 AM), <https://www.reuters.com/legal/legalindustry/changing-stakes-how-evolving-law-firm-ownership-rules-could-or-could-not-re-2021-08-19> [https://perma.cc/U2LS-DJ72]; *Rule 5.4 and the Future of Your Law Firm*, CRISP, <https://crisp.co/rule-5-4-and-the-future-of-your-law-firm> [https://perma.cc/JW2M-NZJK].

17. See *infra* Part III for my discussion of these reforms.

18. Barton, *supra* note 16.

19. These include: (1) a requirement that legal practices appoint at least one director who is an Australian legal practitioner and holds an unrestricted practicing certificate; and (2) a mandate that all incorporated law firms establish and maintain appropriate management systems to enable the provision of legal services in accordance with the professional obligations of lawyers. Steven Mark & Tahlia Gordon, *Innovations in Regulation – Responding to a Changing Legal Services Market*, 22 GEO. J. LEGAL ETHICS 501, 505-06 (2009). As discussed herein, these restrictions are not sufficient to overcome concerns about NLO.

20. Legal Services Act 2007, c. 29 (UK), <https://www.legislation.gov.uk/ukpga/2007/29> [https://perma.cc/8CUU-R6TR]. These restrictions are also insufficient to overcome concerns regarding NLO.

2. State-Level Changes in the United States

Although the vast majority of American states still prohibit NLO, the concept of nonlawyers sharing ownership of law firms with lawyers has gained some traction recently. Two states—Arizona and Utah—have embraced NLO and granted ABS licenses to a variety of entities. Arizona abolished Rule 5.4 entirely, while Utah instituted a regulatory sandbox to license ABSs in which lawyers and nonlawyers partner to provide legal services.²¹

In 2020, Arizona became the first state to abolish Rule 5.4 and allow nonlawyer ownership of legal-services entities.²² Arizona approved its first ABS in 2021, and as of August 2022, the state had licensed twenty-five such entities.²³ Many of these ABS entities provide transactional, business, and financial services. For example, Elevate Next provides legal services in “general corporate matters,” while Radix Law provides “business law” services.²⁴ Trajan Estate LLC offers legal services for estate planning.²⁵ Other ABS entities, such as Boss Advisors, provide investment, tax, and accounting services for high-net-worth individuals.²⁶

Also in 2020, the Utah Supreme Court approved an experimental regulatory sandbox for ABS entities, which now runs through August 2027.²⁷ A regulatory sandbox is a policy tool through which a government or regulatory body—in Utah’s case, the state’s supreme court—oversees an experiment that permits the limited relaxation of rules in order to allow sandbox participants to develop and

21. See *Alternative Business Structures (ABS) Questions & Answers*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/accesstolegalservices/Questions-and-Answers/abs> [https://perma.cc/H83B-U7SJ]; *Utah Supreme Court Standing Order 15*, UTAH SUP. CT. (2020), <https://www.utcourts.gov/utc/rules-approved/wp-content/uploads/sites/4/2020/08/FINAL-Utah-Supreme-Court-Standing-Order-No.-15.pdf> [https://perma.cc/GZ8K-HLPS].

22. ARIZ. JUD. BRANCH, *supra* note 21; Bob Ambrogio, *Arizona Is First State to Eliminate Ban on Nonlawyer Ownership of Law Firms*, LAW SITES (Aug. 31, 2020), <https://www.lawnext.com/2020/08/arizona-is-first-state-to-eliminate-ban-on-nonlawyer-ownership-of-law-firms.html> [https://perma.cc/R99M-G7TE].

23. *ABS Directory 8-31-2022*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/Portals/26/ABS/Directories/ABS%20Directory%208-31-2022.pdf> [https://perma.cc/KC88-AR48].

24. *Summaries of Alternative Business Structures in 2021*, ARIZ. JUD. BRANCH [5, 13], <https://www.azcourts.gov/Portals/26/Approved%20ABS%20summaries.pdf> [https://perma.cc/9MNB-4CKR].

25. *Id.* at [1].

26. *Id.* at [2]. As discussed further below, these entities are not likely to benefit those most in need of access to justice.

27. *Utah Supreme Court to Extend Regulatory Sandbox to Seven Years*, OFF. LEGAL SERVS. INNOVATION (Apr. 30, 2021), <https://utahinnovationoffice.org/2021/04/30/utah-supreme-court-to-extend-regulatory-sandbox-to-seven-years> [https://perma.cc/Y4RZ-S6W5].

test innovative business models, products, or services.²⁸ Utah’s regulatory sandbox permits entities owned by nonlawyer investors and managers along with entities in which nonlawyers have ownership interests to provide legal services (including offering legal advice).²⁹ Utah’s May 2022 Sandbox Activity Report identified forty-one active ABS entities.³⁰ Like in Arizona, many of the entities that have been approved provide legal-technology services such as creating legal forms online without the help of an attorney (for example, Rocket Lawyer and LawPal) or offer business services (for example, Firmly, LLC).³¹ Utah has also opened law-firm ownership to nonlawyers.³² The first entity to take advantage of this was Law on Call – the first U.S. law firm that is wholly owned by nonlawyers.³³ Law on Call provides registered-agent and corporate-filing services, including free legal forms and assistance with setting up LLCs, in all fifty states.³⁴

Other states might follow in the footsteps of Arizona and Utah if they can overcome strong lawyer opposition. In the last two years, state bars in several states, including California and Florida, have explored adopting NLO.³⁵ Despite vocal opposition from many members of the bar about the loss of professionalism that would result from a regulatory sandbox that had been proposed in 2019, the California State Bar began exploring the issue again in 2020. This resulted in a recommendation from a state bar task force to broaden Rule 5.4 to allow for more fee sharing between lawyers and nonlawyers.³⁶ To date, the state bar has not implemented that recommendation. In fact, given concerns over protecting individuals from “unscrupulous actors” in the legal field, California recently enacted a law that prohibits the state bar from spending money on any new programs that would allow ownership of law firms by nonlawyers or fee sharing

28. *What We Do*, OFF. LEGAL SERVS. INNOVATION, <https://utahinnovationoffice.org/about/what-we-do> [https://perma.cc/24M4-VVWC].

29. *Id.*

30. *Innovation Office Activity Report: Executive Summary*, OFF. LEGAL SERVS. INNOVATION 1 (May 2022), <https://utahinnovationoffice.org/wp-content/uploads/2022/06/IO-Monthly-Public-Report-May-2022.pdf> [https://perma.cc/Q2XB-SZPD].

31. *Authorized Entities*, OFF. LEGAL SERVS. INNOVATION, <https://utahinnovationoffice.org/authorized-entities> [https://perma.cc/5UD3-TD7V].

32. Larry Teitelbaum, *Civil Injustice*, PENN L.J., Spring 2022, at 23, 25, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1121&context=plj> [https://perma.cc/V43X-2ECJ].

33. *Id.*

34. *Id.*

35. *Id.* at 26-27. Although a number of other states have explored regulatory reforms related to Rule 5.4, none have embraced NLO in their states to date. *See id.*

36. *Final Report and Recommendations*, STATE BAR OF CAL. TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVS. 4, 17-19, 31-42 (Mar. 6, 2020), <https://www.calbar.ca.gov/Portals/o/documents/publicComment/ATILS-Final-Report.pdf> [https://perma.cc/6BYV-4J5M].

with nonlawyers.³⁷ Moreover, in August 2022, the California Lawyers Association, California’s voluntary bar association, commended the ABA’s decision, as described below,³⁸ to pass Resolution 402 and reaffirm the notion that the “sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession.”³⁹

In 2019, the Florida state supreme court directed a special committee to study how legal services for consumers could be improved by ensuring that lawyers play a “proper and prominent role in the provision of these services” involving nonlawyers.⁴⁰ The committee was instructed to look at various issues including referral fees, fee sharing, regulation of lawyers, regulation of online legal-service providers, and nonlawyer providers of limited legal services.⁴¹ In 2021, the committee issued a report that recommended establishing a regulatory sandbox modeled after Utah’s in order to test NLO and fee sharing with nonlawyers.⁴² Later that year, however, after Florida lawyers voiced numerous objections to the report’s recommendations, the Florida Bar’s Board of Governors unanimously rejected proposals to allow nonlawyers to own law firms and share in legal fees.⁴³ In March 2022, the Florida Supreme Court agreed with the state bar and declined

37. Act of Sept. 18, 2022, ch. 419, 2022 Cal. Legis. Serv. (West).; *see also* Cheryl Miller, *Revised Bill Poses New Roadblocks to State Bars for Nonlawyers*, LAW.COM (June 16, 2022, 7:39 PM), <https://www.law.com/2022/06/16/revised-bill-poses-new-roadblocks-to-state-bars-plans-for-nonlawyers> [<https://perma.cc/S25N-74L2>] (describing the law’s restrictions on the state bar); Joyce E. Cutler, *California Restrains State Bar from Expanding Nonlawyer Practice*, BLOOMBERG L. (Sept. 19, 2022), <https://news.bloomberglaw.com/business-and-practice/california-restrains-state-bar-from-expanding-nonlawyer-practice> [<https://perma.cc/7VYL-NSZX>] (same).

38. *See infra* Part II.

39. *CLA Commends ABA Resolution for Reconfirming Core Values in Law Firm Ownership*, CAL. LAWS. ASS’N (Aug. 15, 2022) <https://calawyers.org/california-lawyers-association/cla-commends-aba-resolution-for-reconfirming-core-values-in-law-firm-ownership> [<https://perma.cc/HT8N-4KYC>].

40. John Stewart et al., *Final Report of the Special Committee to Improve the Delivery of Legal Services*, FLA. BAR 1 (June 28, 2021), <https://www-media.floridabar.org/uploads/2021/06/FINAL-REPORT-OF-THE-SPECIAL-COMMITTEE-TO-IMPROVE-THE-DELIVERY-OF-LEGAL-SERVICES.pdf> [<https://perma.cc/GDK4-H8XU>].

41. *Id.*

42. *Id.* at 5-10, 17-21.

43. Gary Blankenship, *Board of Governors Unanimously Opposes Non-Lawyer Firm Ownership, Fee Splitting Ideas*, FLA. BAR (Nov. 10, 2021), <https://www.floridabar.org/the-florida-bar-news/board-of-governors-unanimously-opposes-non-lawyer-firm-ownership-fee-splitting-ideas> [<https://perma.cc/A7YE-9H7F>]; Letter from Michael G. Tanner, Pres., Fla. Bar, to Hon. Charles T. Canady, C.J., Sup. Ct. of Fla. (Dec. 29, 2021); <https://www-media.floridabar.org/uploads/2021/12/Tanner-letter-to-CJ-re-final-report-12-29-2021-Signed.pdf> [<https://perma.cc/VHC6-FDN4>].

to adopt the recommendations of the special committee (i.e., declined to adopt proposals related to NLO, fee sharing, and expanding the work that paralegals are allowed to perform).⁴⁴

In 2020, Washington, D.C. also began considering loosening its NLO rules.⁴⁵ Although Washington, D.C. has had a modified version of Rule 5.4 since 1991, its current rule allows NLO in certain limited circumstances but does not permit corporations or investment banks to own interests in law partnerships or law practices.⁴⁶ That proposal has not yet been advanced towards approval.

Several other states have considered regulatory reforms related to Rule 5.4, but to date, none has embraced NLO in their states at the level seen in Arizona and Utah.⁴⁷

II. THE BAR'S LONGSTANDING OPPOSITION TO NLO

Despite the recent prominence of the debate over reforming Rule 5.4, most lawyers have long opposed loosening Rule 5.4 and embracing NLO. While there are a variety of compelling reasons for this opposition, the primary concern expressed by lawyers does not, as Baxter argues, come from a self-serving desire to protect lawyers' profits.⁴⁸ Rather, lawyers' opposition to NLO stems principally from a steadfast commitment to professionalism and the ethical practice of law that leads many lawyers to draw the line at forbidding nonlawyers, who may

44. Letter from John A. Tomasino, Clerk of Ct., Sup. Ct. of Fla., to Joshua E. Doyle, Exec. Dir., Fla. Bar (Mar. 3, 2022), https://www.abajournal.com/files/Florida_Supreme_Court_letter.pdf [<https://perma.cc/L73D-HTHL>]. The court has given the state bar until December 30, 2022 to provide alternative proposals for “how the rules governing the practice of law in Florida may be revised to improve the delivery of legal services to Florida’s consumers and to assure Florida lawyers play a proper and prominent role in the provision of these services.” *Id.* at 1-2 (quoting Stewart et al., *supra* note 40); see Mark D. Killian, *Supreme Court Declines to Adopt Recommendations on Nonlawyer Ownership, Fee Splitting, and Expanded Paralegal Work*, FLA. BAR (Mar. 8, 2022), <https://www.floridabar.org/the-florida-bar-news/supreme-court-declines-to-adopt-recommendations-on-nonlawyer-ownership-fee-splitting-and-expanded-paralegal-work> [<https://perma.cc/V8AH-4NV7>].

45. Sam Skolnik, *D.C. Bar Law Firm Ownership Rules May Be in for More Changes*, BLOOMBERG L. (Sept. 3, 2020, 3:21 PM), <https://news.bloomberglaw.com/business-and-practice/d-c-bar-law-firm-ownership-rules-may-be-in-for-more-changes> [<https://perma.cc/CW8J-9WGH>].

46. D.C. RULES OF PRO. CONDUCT r. 5.4(b) & cmt. 8 (D.C. Bar Ass’n 2007).

47. Sam Skolnik, *N.Y., Others Mull Moves to Allow Companies to Co-Own Law Firms*, BLOOMBERG L. (Nov. 23, 2020, 4:45 PM), <https://news.bloomberglaw.com/business-and-practice/n-y-others-mull-moves-to-allow-companies-to-co-own-law-firms> [<https://perma.cc/Z7JS-T7ZZ>].

48. See, e.g., Baxter, *supra* note 4, at 251-54.

have interests that are at odds with their clients, from owning or running legal practices.⁴⁹

In order to be admitted to the bar, lawyers must spend many hours completing courses in professional ethics that impress upon them the duty they owe clients in providing independent advice and avoiding conflicts of interest. Lawyers must pass rigorous admission exams and take an oath to uphold their ethical duties. Indeed, law-school graduates in nearly every U.S. jurisdiction cannot become members of the bar without passing the Multistate Professional Responsibility Exam — a two-hour exam focused exclusively on professional ethics in the practice of law.⁵⁰ Lawyers face serious consequences for violating these rules, including suspension or disbarment.⁵¹ Although nonlawyers may, of course, have their own ethical codes, they do not face the same consequences for ethical violations (for example, they cannot be disbarred), making it difficult to ensure that nonlawyers would uphold the same ethical duties if they were allowed to be involved in providing legal services. More importantly, however, most lawyers hold sacrosanct their ethical duties to their clients and the legal profession, and they fear that reforming Rule 5.4 would weaken their ability to preserve those standards.⁵²

It is unclear how legal-ethics standards will be enforced when nonlawyers — and in some cases, not even live persons — are providing legal advice. For example, 1Law, an ABS in Utah’s regulatory sandbox, describes itself as a “[I]aw firm with nonlawyer investment offering services via chatbot, nonlawyer assistants, and lawyer employees across a range of consumer services.”⁵³ Even assuming

49. See, e.g., Sam Skolnik, *California Bar Swamped by Comments Opposing Ethics Rule Changes*, BLOOMBERG L. (Aug. 6 2019, 6:11 PM), <https://news.bloomberglaw.com/us-law-week/california-bar-swamped-by-comments-opposing-ethics-rule-changes> [https://perma.cc/AJZ7-SWW5] (quoting an immigration lawyer from California stating that the rule change “would empower and allow non-lawyers to take advantage of vulnerable populations needing legal representation”); Letter from Michael G. Tanner to Hon. Charles T. Canady, *supra* note 43, at 3 (“Board members expressed concern that allowing nonlawyers to own interests in law firms inevitably would compromise the independence of the self-regulated legal profession by creating an inherent conflict of interest between lawyer-owners of firms, who must adhere to ethical obligations and advance principles of public service, and unregulated nonlawyer-owners, whose primary goal would be to increase firm profitability.”).

50. *Multistate Professional Responsibility Exam*, NAT’L CONF. OF BAR EXAM’RS, <https://www.ncbex.org/exams/mpre> [https://perma.cc/VG4C-BB3C].

51. See MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS’N 2020); MODEL RULES FOR LAW. DISCIPLINARY ENF’T r. 10 (AM. BAR ASS’N 2020).

52. Baxter also recognizes the sense of duty and professionalism to which lawyers adhere, noting, “[L]awyers, I contend, see themselves as true professionals first and businesspeople second.” Baxter, *supra* note 4, at 254.

53. OFF. LEGAL SERVS. INNOVATION, *supra* note 31. A chatbot is software that simulates human-like conversations, typically through text messages.

that iLaw intends to use chatbots only to answer the simplest of legal questions, iLaw cannot: (1) prevent consumers from asking a chatbot a complex legal question (and expecting a complex answer); (2) ensure that customers will understand that the chatbot is not operated by a lawyer; or (3) teach a chatbot to respond to the nuances embedded in a consumer's legal question, even one that is seemingly simple. For example, if a consumer asked, "Do I need a lawyer to get a divorce?" the chatbot might simply explain that a person is permitted to proceed through divorce litigation without a lawyer. In contrast, a lawyer would answer – as they are often mocked for doing – "it depends" and consider the context of whether that individual's divorce merits engaging a lawyer. Legal-technology firms like Rocket Lawyer and LawPal also emphasize the fact that their services are primarily provided by software that is only *assisted* by lawyers. LawPal, for example, describes itself as providing "[s]oftware-facilitated legal document assistance."⁵⁴ Here, again, lawyers have recognized the risk that consumers – particularly those least familiar with the legal system – will not be equipped to properly utilize this sort of software and will lack the information needed to adequately evaluate their legal needs such that the resulting legal documents may not be suited to the person's circumstances.

An overriding concern relates to fee sharing, which lawyers worry will lead to less control over their practices, particularly when it comes to decisions about settling contested litigation. For example, nonlawyer owners of law firms, who are not bound by legal-ethics rules, may be incentivized to push for a settlement in which they have an interest in sharing fees rather than continuing litigation to obtain the best result for the client. Other concerns include advertising for legal services in a way that violates the Rules of Professional Conduct,⁵⁵ the unauthorized practice of law,⁵⁶ conflicts of interest arising from the lawyer's connection with nonlawyers,⁵⁷ and the preservation of client confidences through attorney-client privilege.⁵⁸

Opposition to reforming Rule 5.4 initially came to prominence in 2000 when the ABA rejected the June 8, 1999 Report and Recommendations of the ABA Commission on Multidisciplinary Practice.⁵⁹ That Commission had proposed,

54. *Id.*

55. See MODEL RULES OF PRO. CONDUCT rs. 7.1, 7.2 & 7.3 (AM. BAR ASS'N 2020).

56. See *id.* r. 5.5.

57. See *id.* rs. 1.7, 1.8 & 1.9.

58. See *id.* r. 1.6.

59. Comm'n on Multidisciplinary Prac., *Report to the House of Delegates*, AM. BAR. ASS'N (June 8, 1999), https://web.archive.org/web/20000510230706/http://www.abanet.org/cpr/mdp_recommendation.html [<https://perma.cc/C7SA-R3NH>]; see Laurel S. Terry, *The Work of the ABA Commission on Multidisciplinary Practice*, in MULTIDISCIPLINARY PRACTICES AND PARTNERSHIPS: LAWYERS, CONSULTANTS AND CLIENTS 2-1, 2-4 (Stephen J. McGarry ed., 2002).

among other things, that lawyers be permitted to form business relationships with nonlawyers and to allow entities owned or controlled by nonlawyers to engage in multidisciplinary practice.⁶⁰ In 2000, the New York State Bar Association (NYSBA) issued the MacCrate Report, a “seminal and expansive” report which encouraged the ABA to reject allowing nonlawyers to engage in multidisciplinary practice.⁶¹ In terms of nonlawyer investment in law firms, the report concluded that the arguments in favor of investment were not convincing because “[t]he type of law firm most likely to benefit from outside investment—*i.e.*, smaller firms and firms facing shortfalls in revenues—‘are not likely candidates for outside equity investment.’”⁶² As to NLO, the report reiterated that lawyers may work with nonlawyer professionals so long as lawyers retain ultimate control over the services provided to clients.⁶³ In July 2000, following the MacCrate Report, the ABA House of Delegates soundly rejected the Multidisciplinary Practice Commission’s recommendations to revise Rule 5.4 by a margin of three-to-one.⁶⁴ The ABA concluded that sharing legal fees with nonlawyers and the ownership and control of law firms by nonlawyers were inconsistent with the core values of the legal profession.⁶⁵

Over the next two decades, despite pressure to revise Rule 5.4 and increasing public interest in the debate over NLO, the ABA repeatedly rejected attempts to ease Rule 5.4’s restrictions. For example, in 2002, the ABA’s Ethics 2000 Commission recommended no significant change to Model Rule 5.4.⁶⁶ In 2012, the ABA Commission on Ethics 20/20 again declined to propose changes to ABA

60. Comm’n on Multidisciplinary Prac., *supra* note 59, at ¶¶ 1-2; see Terry, *supra* note 59, at 2-13 to -18.

61. *Report of the Task Force on Nonlawyer Ownership*, N.Y. STATE BAR ASS’N 3 (Nov. 17, 2012), <https://nysba.org/app/uploads/2020/02/NLOReportFinal.pdf> [<https://perma.cc/AQX4-VUWT>]; Report of the Special Comm. on the L. Governing Firm Structure and Operation, *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers*, N.Y. STATE BAR ASS’N (April 2000), <https://archive.nysba.org/WorkArea/DownloadAsset.aspx?id=26673> [<https://perma.cc/48AM-ZLAY>] [hereinafter MacCrate Report].

62. N.Y. STATE BAR ASS’N, *supra* note 61, at 8 (quoting MacCrate Report, *supra* note 61, at 378); see MacCrate Report, *supra* note 61, at 377-79.

63. N.Y. STATE BAR ASS’N, *supra* note 61, at 10.

64. *Id.* at 15; Terry, *supra* note 59, at 2-5.

65. Terry, *supra* note 59, at 2-5 to -6.

66. Comm. on Eval. of the Rules of Pro. Conduct, *Report on ABA Model Rules of Professional Conduct*, AM. BAR ASS’N (2002), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_hod_o82001.pdf [<https://perma.cc/D43Z-M2XW>].

policy prohibiting nonlawyer ownership of law firms.⁶⁷ In 2020, the ABA House of Delegates maintained its position that no revisions should be made to Rule 5.4, even while approving Resolution 115 calling on states to consider innovative approaches to solving the access-to-justice crisis.⁶⁸ Resolution 115 aimed to address the crisis of access to civil justice by encouraging states “to consider regulatory innovations that have the potential to improve the accessibility, affordability, and quality of civil legal services, while also ensuring necessary and appropriate protections that best serve clients and the public.”⁶⁹ Although the report accompanying Resolution 115 originally contemplated the possibility of changes to Rule 5.4, after vigorous debate,⁷⁰ the final Resolution explicitly stated that “*nothing* in this Resolution should be construed as recommending any changes to any of the ABA Model Rules of Professional Conduct, including Rule 5.4, as they relate to nonlawyer ownership of law firms, the unauthorized practice of law, or any other subject.”⁷¹ The resolution that was adopted recognized that “regulatory innovations that are emerging around the US are designed to spur new models for competent and cost-effective legal-services delivery, but it is not yet clear which, if any, specific regulatory changes will best accomplish these goals consistent with public protection.”⁷² Ultimately, all the resolution called for was data collection and a study of what was happening in states like Arizona and Utah that had already adopted NLO.⁷³

67. Press Release, Am. Bar Ass’n, 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/Q3C6-CAJC>].

68. See Matt Reynolds, *To Increase Access to Justice, Regulatory Innovation Should Be Considered*, ABA House Says, ABA J. (Feb. 17, 2020, 5:40 PM CST), <https://www.abajournal.com/news/article/resolution-115> [<https://perma.cc/GPC9-GQS3>].

69. *Resolution 115: Encouraging Regulatory Innovation*, AM. BAR ASS’N (Feb. 17, 2020), https://www.americanbar.org/groups/centers_commissions/center-for-innovation/Resolution115 [<https://perma.cc/3ZFS-8G22>].

70. See Reynolds, *supra* note 68.

71. AM. BAR ASS’N, *supra* note 69 (emphasis added).

72. Don Bivens, *Report to the House of Delegates: Revised Report*, AM. BAR ASS’N CTR. FOR INNOVATION 3 (Feb. 2020), <https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/r115resandreport.pdf> [<https://perma.cc/U2ZA-2Z52>]. Substantial revisions were made to this Report before this resolution was approved by the ABA House, including eliminating language relating to nonlawyer partnerships and nonlicensed attorneys. See Reynolds, *supra* note 68.

73. Bivens, *supra* note 72.

Most recently, at the ABA's annual meeting in 2022, the ABA House of Delegates overwhelmingly passed Resolution 402, which reaffirmed the ABA's commitment to existing ethical values and its steadfast opposition to NLO.⁷⁴ The Resolution restated the ABA's commitment to two key principles and values: (1) "sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession;" and (2) prohibitions against lawyers "sharing legal fees with non-lawyers and from directly or indirectly transferring to non-lawyers ownership or control over entities practicing law should not be revised."⁷⁵ The report accompanying the Resolution emphasized that one of the primary reasons for reaffirming the ABA's opposition to rule changes related to concerns about the ethics and accountability of lawyers:

Lawyers are subject to the highest ethical standards and are accountable when they do not meet them. These requirements are not true of non-lawyers. Courts have repeatedly held that Rules of Professional Conduct not only control the conduct of bar members, but also express an important public policy protective of society. . . . Among other things, these rules oblige a lawyer to use supervisory authority over non-lawyers in the law firm to assure compliance with ethical constraints because bar authorities have no jurisdiction over non-lawyers. Where the non-lawyers are not subject to a lawyer's management authority but share in the fee, there is no way to assure that the twin pillars of confidentiality and conflicts of interest are observed by the non-lawyer. Any state rules of professional conduct will not have the salutary effect of protecting the public to the extent they are inapplicable to a participant in the provision of legal services not required to follow them.⁷⁶

Resolution 402 did indicate that nothing in that resolution was meant to override Resolution 115,⁷⁷ which had called on states to keep data on any efforts

74. Skolnik, *supra* note 3. Baxter criticizes comments made by the author of this Essay that passage of this resolution was a "victory for all lawyers." Baxter, *supra* note 4, at 239. Contrary to Baxter's suggestion, this comment was not anticonsumer but rather a recognition that the ABA had acted to preserve the independence of the legal profession, which in turn helps to protect consumers.

75. *Resolution 402*, AM. BAR ASS'N (Aug. 8-9, 2022), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2022/402-annual-2022.pdf> [<https://perma.cc/NFB8-22P4>].

76. Rory T. Weiler et al., *Resolution 402: Report*, ILL. STATE BAR ASS'N ET AL. 5 (Aug. 2022), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2022/402-annual-2022.pdf> [<https://perma.cc/NFB8-22P4>].

77. AM. BAR ASS'N, *supra* note 75.

at regulatory reform.⁷⁸ Nonetheless, it is believed that the passage of Resolution 402 will help the fight against NLO in other states that consider embracing it.⁷⁹ Moreover, the landslide vote in favor of Resolution 402 provides further evidence that lawyers across the country are strongly opposed to NLO.⁸⁰

The ABA's continued rejection of NLO and its repeated focus on ethical concerns mirror longstanding and significant opposition by state bars to such reforms. For example, in 2012, a NYSBA Task Force on NLO surveyed New York lawyers working in a variety of settings, including small-firm practitioners, large-firm practitioners, and corporate counsel.⁸¹ The survey results were clear: lawyers opposed NLO across the board. 78.4% of all respondents opposed NLO, and 77.1% of lawyers reported they would not consider granting ownership interests to nonlawyers (in the case of law firms) or would not consider it beneficial (in the case of in-house counsel).⁸² Many lawyers, especially those in small firms or solo practices, commented on the burden that NLO would impose on them, particularly in regards to conflicts of interest.⁸³

The State Bar of California's Board of Trustees received similar negative reactions in 2019 when it invited comments on potential reforms, including a regulatory sandbox.⁸⁴ Approximately 73% of the commenters opposed one or more of the state bar's proposals, which included expanding NLO.⁸⁵ Comments from legal professionals opposing NLO reflected similar concerns to those raised by

78. AM. BAR ASS'N, *supra* note 69.

79. For example, the California Lawyers Association commended the ABA's decision to pass Resolution 402 and reaffirm the notion that the "sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession." CAL. LAWS. ASS'N, *supra* note 39.

80. See Matt Reynolds, *Sharing Fees with Nonlawyers Is Inconsistent with Profession's 'Core Values,' ABA House Says*, ABA J. (Aug. 9, 2022, 2:43 PM CDT), <https://www.abajournal.com/web/article/resolution-402-aba-house-of-delegates-position-on-sharing-of-legal-fees-with-nonlawyers> [https://perma.cc/SQQ7-KT9C] (noting that Resolution 402 "passed overwhelmingly").

81. N.Y. STATE BAR ASS'N, *supra* note 61, at 39-43.

82. *Id.* at 43-44, 48. The survey received over 1,200 responses. *Id.* at 39-40.

83. *Id.* at 49-50.

84. See Cheryl Miller, *California Lawyers Slam Proposals for Fee-Sharing, Nonattorney Ownership*, LAW.COM (Sept. 23, 2019, 10:25 PM), <https://www.law.com/therecorder/2019/09/23/california-lawyers-slam-bar-proposals-for-fee-sharing-non-attorney-ownership> [https://perma.cc/XBK8-H44T]; Skolnik, *supra* note 49 (quoting a comment from a California lawyer arguing that the rule changes "would empower and allow non-lawyers to take advantage of vulnerable populations needing legal representation").

85. *State Bar of California Task Force on Access Through Innovation of Legal Services: Final Report and Recommendations*, STATE BAR OF CAL. TASK FORCE ON ACCESS THROUGH INNOVATION OF LEGAL SERVS. 13 (Mar. 6, 2020), [https://www.calbar.ca.gov/Portals/o/documents/public Comment/ATILS-Final-Report.pdf](https://www.calbar.ca.gov/Portals/o/documents/public%20Comment/ATILS-Final-Report.pdf) [https://perma.cc/GVV9-54PJ].

the New York survey respondents, including: concerns regarding clashes between the motivation for profit and the best interests of clients and the potential for unqualified nonlawyers to flood the market; a lack of regulation of the provision of legal services by nonlawyers; and a preference for “less radical initiatives for improving access to justice,” such as more funding for legal services programs, that commenters felt were “not being adequately explored.”⁸⁶

Similarly, in Florida, a proposal to allow NLO and fee sharing with nonlawyers was unanimously opposed by the Florida Bar’s Board of Governors in 2021 and by many Florida lawyers who commented on the proposal. Members of the state’s Board of Governors expressed their substantial concerns over the proposal at its November 2021 meeting.⁸⁷ These included “profound conflicts of interest . . . between lawyers and their ethical obligations and nonlawyers that the court can’t regulate who are entirely driven by profits,” “no real evidence that the proposal will improve access to justice,” threats to the independent judgment of lawyers, and significant opposition from members of the bar.⁸⁸ The Florida Bar also reported receiving comments on the proposal from hundreds of lawyers, with the vast majority opposing the special committee’s main proposals.⁸⁹ Opponents included four bar sections, various local bar associations, and twenty former bar presidents.⁹⁰ The Board voted unanimously to reject any amendment to the rules prohibiting NLO.⁹¹

It is thus evident that lawyers – who are uniquely well equipped to assess the ethical implications of legal reforms – have long harbored significant concerns about the dangers posed by NLO and have, for the last two decades, successfully opposed most attempts to revise Rule 5.4.⁹² There is no indication that this opposition is likely to subside despite increased interest by certain groups in easing the rules that prohibit nonlawyers from holding financial stakes in law firms.

86. *Id.*

87. Gary Blankenship, *Board of Governors Unanimously Opposes Non-Lawyer Firm Ownership, Fee Splitting Ideas*, FLA. BAR NEWS (Nov. 10, 2021), <https://www.floridabar.org/the-florida-bar-news/board-of-governors-unanimously-opposes-non-lawyer-firm-ownership-fee-splitting-ideas> [<https://perma.cc/A7YE-9H7F>].

88. *Id.*

89. Gary Blankenship, *Hundreds of Bar Members Oppose Special Committee Proposals*, FLA. BAR NEWS (Nov. 4, 2021), <https://www.floridabar.org/the-florida-bar-news/hundreds-of-bar-members-oppose-special-committee-proposals> [<https://perma.cc/TA5A-2FN9>].

90. *Id.*

91. *Regular Minutes: Nov. 8, 2021*, FLA. BAR BD. OF GOVERNORS 3, <https://www-media.floridabar.org/uploads/2021/12/Regular-Minutes-November-8-2021-meeting.pdf> [<https://perma.cc/3WAQ-SP33>].

92. Baxter views this commitment to preserving lawyers’ ethical obligations as a failure by lawyers to take “meaningful action to remedy the [access to justice] crisis.” Baxter, *supra* note 4, at 229. This unfair and unsupported view is debunked below. See discussion *infra* Section III.A. In

III. DEBUNKING THE ARGUMENTS IN FAVOR OF NLO

Proponents for loosening restrictions against NLO, including Baxter, typically raise two connected arguments in favor of their proposed changes: (1) that nonlawyers will increase innovation in the practice of law and delivery of legal services; and (2) that this innovation will increase access to justice by expanding the amount and availability of low-cost legal services that will be available to indigent populations. Baxter takes this a step further and insists that reforming Rule 5.4 is the *only way* to improve access to justice and that lawyers who oppose NLO are actively seeking to prevent the expansion of legal services.⁹³

These arguments are unpersuasive and unsupported by data that would justify such a significant change in a longstanding rule of professional conduct. There is no dispute that a disturbing access-to-justice gap exists in the United States – one that most state bars have been fighting vigorously to ameliorate.⁹⁴ However, there is no evidence that NLO has made or will make a dent in this crisis. Nor is there any proof that involving nonlawyers is necessary to promote innovation in the legal profession. Moreover, unlike proponents of loosening Rule 5.4's restrictions – who insist on looking for ways to outsource the provision of legal services to those without the necessary training – many lawyers are devising and implementing innovative ways to increase the provision of legal services *by lawyers* without risk of undermining their ethical obligations. As this Part describes, advocates of NLO have presented only theoretical arguments about *possible* benefits that changes to the Rule *might* produce. Thus, Baxter and other advocates for expanding NLO fail to present a compelling case that such reform is actually needed.

A. Access to Justice

Advocates of NLO have not presented any compelling evidence that NLO will improve access to justice in a meaningful way. Rather, the benefits of NLO are generally oversold and potentially divert attention from more promising strategies.

fact, lawyers have played crucial roles in: (1) enforcing ethical rules and doing so in a manner that promotes meaningful access to legal services; (2) providing substantial pro bono services to the needy; and (3) advocating for government funding of indigent legal services.

93. Baxter, *supra* note 4, at 248.

94. See *Justice for All: A Roadmap for 100% Civil Access to Justice*, NAT'L CTR. FOR STATE CTS. 1 (https://www.ncsc.org/__data/assets/pdf_file/0031/64975/5-year-report.pdf) [<https://perma.cc/T6TC-LBU6>] (noting that more than seventy percent of low-income households face legal problems each year and in three out of four cases people are unrepresented).

As a threshold issue, it is important to define what I mean by “access to justice.” It seems Baxter and some who share his views on NLO are referring to *any* provision of legal work to *any client*.⁹⁵ This is not the mainstream view in the legal profession where “access to justice” typically refers to providing low cost or free legal services to indigent persons, particularly those who need representation in court cases.⁹⁶ But using such a broad definition of “access to justice” as mere access to an increased amount of legal services is the only way that Baxter and those who agree with him can argue that NLO effectively increases access to justice. When one looks to access to civil legal services for the poor, it is clear that NLO has not narrowed the justice gap.

The fact that NLO has failed to improve access to justice is evident in jurisdictions that have expanded NLO. Despite being early adopters of NLO reform, there is no clear evidence that low- and moderate-income populations in the United Kingdom or Australia have received greater access to legal services.⁹⁷ Indeed, as one legal scholar has explained, since making their reforms, the primary “new types of actors provid[ing] legal services” in both countries are “law firms that are listed on stock exchanges, law firms owned by major insurance companies, and legal services offered by brands better known for their grocery stores.”⁹⁸ Not surprisingly, despite these profit-focused entities entering the legal field, there has been no noticeable reduction in either country’s justice gap.⁹⁹

Similarly, in Utah and Arizona, where Rule 5.4 has been relaxed or abrogated, most approved entities are not tackling access-to-justice issues. Instead, those

95. See Baxter, *supra* note 4, at 248-49.

96. See, e.g., NAT’L CTR. FOR STATE CTS., *supra* note 94, at 1 (“[C]ivil legal problems often include evictions, mortgage foreclosures, domestic violence, wage theft, child custody, child support, and debt collection.”).

97. See *Under New Management: Early Regulatory Reform in the United Kingdom and Australia*, PRACTICE (Jan./Feb. 2021), <https://thepractice.law.harvard.edu/article/under-new-management> [<https://perma.cc/SBC2-SDTQ>].

98. Nick Robinson, *When Lawyers Don’t Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism*, 29 GEO. J. LEGAL ETHICS 1, 5 (2016).

99. See, e.g., Karen E. Rubin, *Non-Lawyer Ownership of Law Firms is Trending—But Is It a Good Idea?*, OHIO BAR (Mar. 22, 2021), <https://www.ohiobar.org/member-tools-benefits/practice-resources/practice-library-search/practice-library/2021-ohio-lawyer/non-lawyer-ownership-of-law-firms-is-trending--but-is-it-a-good-idea> [<https://perma.cc/TA4A-FGDC>] (“At least one scholar, drawing on case studies and quantitative data derived from the U.K. and Australian experiences, has argued that ‘the access[-to-justice] benefits of non-lawyer ownership are generally oversold, potentially diverting attention from more promising access strategies.’” (quoting Robinson, *supra* note 98, at 1) (alteration original)).

states have merely allowed nonlawyers to profit from providing legal services.¹⁰⁰ For example, legal-technology entities such as Savvi Technologies put the onus on consumers – who lack legal training – to manage their legal needs themselves. According to Utah’s Office of Legal Services Innovation, Savvi Technologies is “[a] legal technology company with a platform that assists in the formation of documents and then allows the consumer to manage their organizational needs ongoing.”¹⁰¹ Advocates of NLO have not explained how it improves access to justice to provide consumers with just half of what they need – that is, legal forms without a lawyer to explain or help complete them. Similarly, Hello Divorce targets “[c]onsumers wishing to manage their divorce themselves,” most likely individuals who cannot afford a divorce attorney.¹⁰² While Hello Divorce may save these individuals money, it deprives them of the sound legal advice they may need to navigate the dissolution of a marriage. LawHQ, another Utah sand-box ABS, offers software-development services to block spam telephone calls.¹⁰³ Software to block spam calls might be useful, but blocking telemarketers is certainly not the top priority for most people seeking affordable or free legal services.

The blurred line between nonlawyers offering legal services and using legal services merely to augment their existing profit-making business is exemplified by Trajan Estate, LLC, an estate-planning firm in Arizona that is run by an individual who also owns a financial-planning firm.¹⁰⁴ This ABS entity therefore caters to wealthy individuals who can afford an array of estate-planning legal services. Moreover, Trajan Estate’s application for approval as an ABS structure notes that “estate planning clients of the ABS will be encouraged also to address

100. It is worth noting that in his analysis, Baxter refers to “legal service” – a term usually reserved for legal aid and similar services to the indigent – as including *all* legal services that are provided by ABS entities. Baxter, *supra* note 4, at 248-56. This does little to show that ABS entities have increased access to justice to the needy.

101. OFF. LEGAL SERVS. INNOVATION, *supra* note 31.

102. Off. Legal Servs. Innovation, *Recommendation to the Court App No. 0044 – Hello Divorce, Inc.*, UTAH SUP. CT. 1 (Apr. 22, 2021), <https://utahinnovationoffice.org/wp-content/uploads/2021/04/Auth-Packet-Hello-Divorce.pdf> [<https://perma.cc/6H2U-48FM>].

103. OFF. LEGAL SERVS. INNOVATION, *supra* note 31.

104. See Comm. on Alternative Bus. Structures, *Meeting Agenda – Tuesday, March 9, 2021*, ARIZ. SUP. CT. (Ariz. 2021), <https://www.azcourts.gov/LinkClick.aspx?fileticket=BaGkF1Svu9c%3D&portalid=0> [<https://perma.cc/XW3M-FKB5>] (recommending Trajan Estate for ABS licensure in Arizona); Trajan Wealth, *Trajan Estate Is Approved by Arizona Supreme Court as the First Alternative Business Structure*, CISION PR NEWSWIRE (Mar. 24, 2021, 6:14 PM ET), <https://www.prnewswire.com/news-releases/trajan-estate-is-approved-by-arizona-supreme-court-as-the-first-alternative-business-structure-301255377.html> [<https://perma.cc/5KZ4-CWJB>].

their financial planning.”¹⁰⁵ Since nonlawyers are not bound by the same ethical rules as lawyers, there is no safeguard in place to prevent clients seeking legal assistance for their estate planning needs from Trajan Estate from also being “encouraged” in unethical ways to use and pay for the services of the financial advisory firm that is connected with that ABS. Moreover, the lawyers at Trajan Estate have every financial incentive to steer their clients to the affiliated investment advisor – whether it benefits their clients or not.

Arizona has approved many other ABS entities that provide primarily business and financial services, including Arete Financial, LLC (tax and accounting services) and BOSS Advisors (tax, accounting, and business services such as entity formation and dissolution, “key performance indicator analysis,” due diligence, and business-plan analysis).¹⁰⁶ Although each of these entities claims they can improve access to affordable legal services, none offers the sorts of legal services that are typically in high demand among individuals seeking free or reduced-cost legal services, such as assistance with family-law disputes, housing issues, benefits advice, criminal legal issues, and immigration.¹⁰⁷ Moreover, their target clients are individuals and businesses with means, not the indigent.

Another area where ABS growth has been significant in Arizona and Utah is online legal-technology companies. These entities, like Rocket Lawyer in Utah, offer individuals and small-to-medium-sized businesses online legal services primarily by providing software that helps them complete legal forms and provides answers to discrete legal questions.¹⁰⁸ At core, these services leave it up to the client, typically without the input of a lawyer, to prepare legal documents. Although these entities have lawyers available to assist customers with issues that go beyond the capabilities of the software, it remains unclear whether these on-call attorneys can ensure that the ethical standards imposed on lawyers are met. Nothing about Rocket Lawyer’s promise that getting legal advice will be “quick and easy[]” indicates that there will be time and consideration given to abiding by ethical standards.¹⁰⁹

It is unsurprising that these profit-driven ABS entities are unlikely to cure access-to-justice issues in this county. The widest gap in access to justice is for legal services for low- and middle-income Americans, and the legal services they

105. Application for Initial License of Alternative Business Structure, ARIZ. SUP. CT. (Dec. 30, 2020) (Trajan Estate, LLC application for ABS approval) (on file with author).

106. ARIZ. JUD. BRANCH, *supra* note 24.

107. ABA Standing Comm. on Pro Bono and Pub. Serv., *Supporting Justice: A Report on the Pro Bono Work of America’s Lawyers*, AM. BAR ASS’N 14 fig.10 (Apr. 2018), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/lis_pb_supporting_justice_iv_final.pdf [<https://perma.cc/TR8X-84HT>].

108. See ROCKET LAWYER, INC., <https://www.rocketlawyer.com> [<https://perma.cc/3JZM-P7NH>].

109. *Id.*

need are typically not the profitable areas of law to which nonlawyers are attracted.¹¹⁰ Areas with the greatest need include family law, debt-collection cases, landlord-tenant suits, and mortgage foreclosures.¹¹¹ ABSs in Arizona and Utah do not focus on providing attorneys to defend these types of litigations, and the vast majority of them do not even assist with court litigation at all.¹¹²

With regard to a few ABS entities that, at least on paper, appear to provide services that could improve access to justice – such as the Utah ABS, Trajector Legal, which offers legal services to veterans who have suffered personal injuries – it is unclear whether lawyers or nonlawyers control the delivery and quality of the legal services provided by that entity.¹¹³ Trajector Legal plans to structure its ABS with fifty percent or more nonlawyer ownership through a holding company.¹¹⁴ While Utah has an Innovation Office that oversees its ABS sandbox, the Innovation Office cannot dictate or monitor how these entities provide legal services to the public. Because nonlawyers are not bound by the same rules of professional conduct as lawyers, this modest increase in access to legal services through ABS entities likely risks trading lower prices for unacceptably low quality. But legal services are not commodities for which it is acceptable to have a price/quality spectrum that increases access with a lower quality product. Significantly, in the case of Trajector Legal, there is already an abundance of lawyers who handle personal-injury cases on contingency-fee arrangements. As a result,

110. C. Thea Pitzen, *Can Nonlawyers Close the Legal Services Gap?*, AM. BAR ASS'N (Apr. 21, 2022), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2022/april-2022/can-nonlawyers-close-legal-services-gap-two-states-remove-ban-fee-sharing-partnerships-nonlawyers [https://perma.cc/AF9Z-TYKQ].

111. See ABA Standing Comm. on Pro Bono and Pub. Serv., *supra* note 107, at 13-14; Lewis Creekmore, Ronké Hughes, Lynn Jennings, Sarah John, Janet LaBella, C. Arturo Manjarrez, Michelle Oh, Zoe Osterman & Marta Woldu, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP. 22 (June 2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [https://perma.cc/M3R5-DFEK].

112. See ARIZ. JUD. BRANCH, *supra* note 24, <https://www.azcourts.gov/Portals/26/Approved%20ABS%20summaries.pdf> [https://perma.cc/9MNB-4CKR]; OFF. LEGAL SERVS. INNOVATION, *supra* note 31.

113. OFF. LEGAL SERVS. INNOVATION, *supra* note 31; see Off. Legal Servs. Innovation, *Sandbox Authorization Packet: Legal Claims Benefits*, UTAH SUP. CT. [3-4] (Mar. 22, 2021), <https://utahinnovationoffice.org/wp-content/uploads/2021/04/Auth-Packet-Legal-Claims-Benefits.pdf> [https://perma.cc/2ANN-MUCN] (approving Trajector Legal under its former business name “Legal Claims Benefits, LLC”).

114. Off. Legal Servs. Innovation, *supra* note 113, at [3].

this is not the sort of area in which those with deserving cases lack access to counsel.¹¹⁵

Baxter claims that “most people and small businesses cannot find anyone to help them understand their rights and obligations, make their legal decisions, or represent them in court” and that they “have less experience with the law, less understanding of their rights and obligations, and less preparation to navigate the legal system.”¹¹⁶ He then bemoans “the flood of unrepresented litigants” in the courts and opines that at a time when “confidence in our government [is] at historic lows, the day-to-day perception among people and small businesses that the judicial system only works for the banks, insurance companies, and landlords reduces even further their belief that ‘justice for all’ is a reality in America.”¹¹⁷

Critically, Baxter provides *no support* for his proposition that NLO will help solve any of the problems he describes. Although it is undisputed that a huge gap in access to legal services exists in the United States, none of the inequities Baxter cites have been shown to be solved by increasing the availability of NLO. As noted above, the vast majority of ABS entities licensed in Arizona or Utah do not offer to represent indigent clients *in court*. Only a few offer any type of courtroom representation, and those that do are primarily focused on personal-injury and mass-tort litigation, which are areas of law that are already well served by lawyers in private practice, often with contingency-fee arrangements that do not require clients to pay any legal fees unless and until they win money damages.¹¹⁸ Thus, increasing NLO will not decrease the number of unrepresented individuals in court – where the access-to-justice gap is widest.¹¹⁹ The software programs

115. Similarly, it was recently announced that the plaintiffs’ personal-injury firm, Scout Law Group, had formed an ABS with a Miami-based investment firm to expand the firm’s personal-injury and mass-tort practice, a field that is already highly concentrated by lawyers offering contingency-fee options to clients. Kevin Penton, *Ariz. Law Firm Partly Owned by Investment Firm Launches*, LAW360 (Sept. 21, 2022, 4:02 PM), <https://www.law360.com/pulse/articles/1532573> [<https://perma.cc/WKU6-UAGB>].

116. Baxter, *supra* note 4, at 229, 231.

117. *Id.* at 232 (footnote omitted).

118. See e.g., William R. Towns, *U.S. Contingency Fees: A Level Playing Field?*, WORLD INTELL. PROP. ORG. (Feb. 2010), https://www.wipo.int/wipo_magazine/en/2010/01/article_0002.html [<https://perma.cc/PUQ4-9RAC>] (contingency-fee arrangements are “[o]ften used in personal injury, medical malpractice and commercial collection cases”); Patricia Munch Danzon, *Contingent Fees for Personal Injury Litigation*, 14 BELL J. ECON., 213, 213 (1983) (“Contingent fees are the dominant form of payment for plaintiff attorneys in personal injury litigation in the United States.”).

119. One recent study found that at least one party was self-represented in the majority of civil matters in U.S. courts. Paula Hannaford-Agor, Scott Graves & Shelley Spacek Miller, *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts*, NAT’L CTR. FOR STATE CTS. iv (2015), [https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.aspx](https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.aspx) [<https://perma.cc/88DP-VHYS>].

or financial managers that consumers hire through an ABS entity do not possess the skills and qualifications to represent them in court in underrepresented cases; indeed, they do not even hold themselves out as such.

Baxter is correct that individuals and businesses with less experience in the law face a higher hurdle to understanding their rights and obligations under the law and how to navigate the legal system. However, he ignores the most logical solution to this problem: providing a lawyer who is well versed in legal practice and rules to advise them. These clients do not need an investment manager or a software system that requires them to fill in the critical terms of their own legal documents—such as what the ABS entities approved in Utah and Arizona commonly do.

It is also difficult to comprehend how involving more “banks, insurance companies,” and other profit-driven entities in providing legal services, as Baxter advocates, would foster trust in the legal system among more Americans. If anything, turning the keys to law firms over to financial institutions that are not bound by the same ethical constraints as lawyers will increase public mistrust of the legal process—not reduce it.

Further, contrary to Baxter’s notion that lawyers are doing little to improve access to justice, lawyers already provide enormous amounts of pro bono work and continue to look for ways to provide legal services to indigent clients for free. According to a 2018 ABA report, eighty-one percent of attorneys have provided pro bono services at some point in their careers.¹²⁰ Moreover, about eighty percent of the attorneys surveyed stated that they believed that providing pro bono services was somewhat or very important to their practice, and most attorneys in private practice who provided pro bono services were motivated to do so by their ethical obligations and professional duties.¹²¹ This support for doing pro bono work is codified in Model Rule 6.1, which states, in part, that every lawyer “has a responsibility to provide legal services to those unable to pay.”¹²² Almost all states have adopted some version of this rule and encourage lawyers to complete at least fifty hours of pro bono work per year.¹²³ Law firms, law schools, corporate-counsel offices, and government law offices have worked toward integrating pro bono functions and policies into their day-to-day practice.

Local governments have also worked to adopt programs to foster lawyer involvement in legal work for the indigent. For example, NYSBA has “supported the New York City Council’s ‘Right to Counsel’ legislation that provides free legal representation in eviction cases—a move that increased representation in

120. ABA Standing Comm. on Pro Bono and Pub. Serv., *supra* note 107, at 6.

121. *Id.* at 18, 34.

122. MODEL RULES OF PRO. CONDUCT r. 6.1 (AM. BAR ASS’N 2020).

123. ABA Standing Comm. on Pro Bono and Pub. Serv., *supra* note 107, at 3.

Housing Court from 1 percent to 40 percent.”¹²⁴ In Massachusetts, lawyers can provide pro bono legal advice from their offices or homes by volunteering with Massachusetts Legal Answers Online, a project coordinated with the ABA.¹²⁵ Unlike proposals to expand NLO by revising Rule 5.4, these programs increase access to justice in concrete and specific ways that are targeted to those in need. One certainly would not expect for-profit entities such as Rocket Lawyer or Legal Zoom to provide their services for free to the indigent, and there is no evidence that they do so.

Baxter also places the onus of solving the access-to-justice problem exclusively on the shoulders of lawyers, positing that it is the duty of the profession to provide “legal service for all.”¹²⁶ As Baxter would have it, lawyers need to adjust their practices to provide much-needed legal services, rather than considering other, potentially more effective alternatives to solve this societal problem. Although he asserts that it is the duty of state bars to ensure that every person has access to legal services, no other profession is tasked with such an expansive and expensive charge. Doctors are not held accountable for ensuring that every sick person has medical care; nor are accountants charged with ensuring that everyone has help filing their taxes; nor are real-estate developers tasked with ensuring that everyone has a home. That is because these are societal problems that require action on a much broader scale and are, thus, the responsibility of federal, state, and local governments. Baxter and others who advocate for reforming Rule 5.4 fail to acknowledge this key notion. Instead, looking to adopt and expand programs of the type described in Section III.B below is the best avenue for closing the access-to-justice gap.

In addition to ignoring solutions for legal services for the indigent outside of NLO, Baxter ignores the other existing avenues for legal assistance beyond pro bono services that would serve individuals and small businesses simply looking to obtain more affordable legal advice. The truth is that affordable options for legal assistance already exist in our country. For example, fee arrangements allow for flexibility in how a client pays for legal services.¹²⁷ For instance, the contingency-fee structure allows many Americans to obtain legal assistance with a wide array of legal matters without the financial burden of paying an hourly rate for

124. Teitelbaum, *supra* note 32, at 27.

125. *Massachusetts: Free Legal Answers*, AM. BAR ASS’N, <https://mass.freelegalanswers.org/Attorneys/Account/Agreement> [<https://perma.cc/8XK9-TSB8>].

126. Baxter, *supra* note 4, at 239.

127. See *Alternative Fee Arrangements*, AM. BAR ASS’N, https://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/alternative_fees [<https://perma.cc/YVF7-V9XP>] (noting that alternative fee arrangements provide resources to help lawyers make their “services more affordable, accessible and transparent to low-and moderate-income clients”).

legal services.¹²⁸ Additionally, lawyers who represent clients in house closings or prepare routine wills are able to do so relatively inexpensively and often at a flat fee.¹²⁹

The United Kingdom's experience with ABS provides a helpful example here. ABS firms licensed in the United Kingdom have been disproportionately concentrated in certain sectors, particularly the personal-injury field, where—between 2012 and 2013—ABS firms accounted for 33.5% of the market share.¹³⁰ Although the rush of ABS-licensed firms into the U.K. personal-injury market (which does not explicitly embrace contingency-fee arrangements) brought in new types of investors, it did almost nothing to increase access to personal-injury lawyers for those who could not afford an attorney. Before ABS entities were licensed in the United Kingdom, “[79%] of those who brought a personal injury matter in England and Wales reported they did not pay for their solicitor because the solicitor was compensated by their insurance company, was contracted under a no win no fee arrangement, or was provided through legal aid, a trade union, or some other source.”¹³¹ Because the United Kingdom has embraced a variety of options for expanding access to lawyers for affordable or free legal services, ABS has made little difference in addressing access to justice there. The same would likely be true in the United States, should the United States adopt more of the reforms advocated herein that are targeted at improving access to justice, rather than jumping to allow for-profit NLOs to enter the legal market.

128. See, e.g., *Fees and Expenses*, AM. BAR ASS'N (Dec. 3, 2020), https://www.americanbar.org/groups/legal_services/milvets/aba_home_front/information_center/working_with_lawyer/fees_and_expenses [<https://perma.cc/8AEV-DNRB>] (noting that contingency fees are used “most often in cases involving personal injury or workers’ compensation”); Towns, *supra* note 118 (noting that contingency-fee arrangements have become “a standard practice in the U.S. for financing certain types of civil lawsuits”); Danzon, *supra* note 118, at 213 (“Contingent fees are the dominant form of payment for plaintiff attorneys in personal injury litigation in the United States.”).

129. Mary Randolph, *How Much Will a Lawyer Charge to Write Your Will?*, NOLO, <https://www.nolo.com/legal-encyclopedia/how-much-will-lawyer-charge-write-your-will.html> [<https://perma.cc/TX8F-F6KS>] (“It’s very common for a lawyer to charge a flat fee to write a will and other basic estate planning documents. The low end for a simple lawyer-drafted will is around \$300.”); Gina Freeman, *Average Closing Costs in 2022: Complete List of Closing Costs*, MORTGAGE REPORTS (Jan. 21, 2022), <https://themortgagereports.com/35800/guide-to-mortgage-closing-costs-what-average-mortgage-costs-are-and-how-to-keep-yours-low> [<https://perma.cc/7RC4-MFPS>] (stating that attorney fees for house closings are “400+”).

130. Robinson, *supra* note 98, at 20.

131. *Id.* at 25-26.

B. Lawyers Are Innovative

Advocates of expanding NLO also cannot show that nonlawyers need to be allowed to own law firms in order for the innovation to occur that they claim is required to improve access to justice. In fact, lawyers and nonlawyers are already working together—under existing ethics rules—to innovate legal services.

Moreover, as the ABA recognized in 2020 when passing Resolution 115,¹³² innovation can and should occur *without* changing Rule 5.4. In its report, the ABA identified a number of innovative programs that are being promoted by members of the bar to expand access to legal services. Examples include online dispute resolution, new tools and forms of assistance for pro se litigants, expanded virtual court services, streamlined litigation processes, technology to facilitate pro bono work, and technology and innovation to help lawyers deliver their services more efficiently.¹³³ For instance, New York's Navigator Project allows nonlawyers to help unrepresented persons navigate the court system with support from members of the New York bar.¹³⁴ The Navigator Program does not send nonlawyers into the courtroom or ask them to provide legal advice; rather, it utilizes nonlawyer volunteers to answer questions about how the court system works and where to find certain information.¹³⁵ Alaska and Hawaii—states with large rural populations—have also instituted similar legal-navigator programs offering assistance in navigating family-law and housing problems, such as divorce, child custody and eviction.¹³⁶ Virtual legal-advice clinics, like Massachusetts Legal Answers Online and the ABA's Free Legal Answers website, broaden the involvement of attorneys in providing high-quality legal assistance.¹³⁷ The ABA's Free Legal Answers program, for example, allows users to post civil legal questions that are answered by pro bono attorneys licensed in the poster's state. Topics covered include those most commonly requested by pro bono clients: family, divorce, custody, housing, eviction, homelessness, consumer-rights, financial-assistance, employment, unemployment, health-and-disability, civil-rights, income-maintenance, juvenile, and education law.¹³⁸ Additionally, New York's Legal Information for Families Today program provides legal forms in

¹³². AM. BAR ASS'N, *supra* note 69.

¹³³. Bivens, *supra* note 72.

¹³⁴. N.Y.C. Hous. Ct., *Court Navigator Program*, NYCOURTS, https://nycourts.gov/courts/nyc/housing/rap_prospective.shtml [<https://perma.cc/3WB3-PAZM>].

¹³⁵. *Id.*

¹³⁶. Teitelbaum, *supra* note 32, at 28.

¹³⁷. *Free Legal Answers*, AM. BAR ASS'N, <https://abafreelegalanswers.org> [<https://perma.cc/HG2C-PB2S>].

¹³⁸. *Id.*

numerous languages to litigants in family court and offers live chat hotlines to answer questions.¹³⁹ Unlike for-profit ABS entities such as Rocket Lawyer and Law Pal, which seek to use technology to eliminate a lawyer's role in providing legal services, these innovative programs seek to use technology to improve services for litigants who otherwise could not afford a lawyer.

In addition to these innovative methods of providing needed legal services to those who otherwise lack access to such services, law firms have been developing internal tech incubators to improve their delivery of services. Indeed, one report indicates that alternative legal-services providers formed by law firms are fast-growing participants in the market.¹⁴⁰ For example, in June 2022, Cleary Gottlieb Steen & Hamilton LLP announced the launch of an internal entity called ClearyX, described as a new platform “designed to reimagine how legal services can be delivered using innovative combinations of people, process and project-management discipline, augmented by a range of technologies.”¹⁴¹ ClearyX aims “to explore the use of existing and emerging legal technologies and act as an incubator for new products, processes and services that can improve client experiences and increase efficiency through flexible business models and pricing.”¹⁴² The availability of these innovative programs to increase access to legal assistance shows that, contrary to Baxter's thesis, lawyers are quite capable of implementing “new process design, new service models, new operating models, new financial models, new software, and new marketing strategies” as well as generating “new ideas for how to market to clients not accustomed to using lawyers, how to deliver quality service at much lower fee structures while still making a viable income, and how to leverage technology to make all this happen.”¹⁴³ As lawyers gain experience with programs like ClearyX, they will be able to apply this innovative technology to all aspects of their practice, including pro bono services.

139. LIFT, <https://www.liftonline.org/about/what-we-do> [https://perma.cc/669J-H6MG]. This group recently rebranded itself as Family Legal Care.

140. Press Release, Thomson Reuters, Alternative Legal Service Providers Are Quickly Becoming Mainstream for Law Firms & Corporations, Creating a \$14 Billion Market (Feb. 11, 2021), <https://www.thomsonreuters.com/en/press-releases/2021/february/alternative-legal-service-providers-are-quickly-becoming-mainstream-for-law-firms-and-corporations-creating-a-14-billion-market.html> [https://perma.cc/U4EN-L9RT].

141. *Cleary Gottlieb Launches ClearyX, A Platform for Highly Efficient, AI and Data-Driven Legal Services*, CLEARY GOTTLIEB (June 23, 2022), <https://www.clearygottlieb.com/news-and-insights/news-listing/cleary-gottlieb-launches-clearyx> [https://perma.cc/G3HH-Z7D5].

142. *Id.* Other global law firms are adopting similar approaches. Alex Heshmaty, *The Proliferation of Alternative Legal Services Providers*, LEXISNEXIS (Aug. 24, 2021), <https://www.lexisnexis.co.uk/blog/future-of-law/the-proliferation-of-alternative-legal-service-providers> [https://perma.cc/Y4AN-MWRP].

143. Baxter, *supra* note 4, at 249 (footnote omitted).

Moreover, Baxter is wrong in claiming that Rule 5.4 needs to be reformed because it supposedly “prohibits” providing “incentive compensation” to nonlawyers who have the “requisite skills and experience” needed to foster innovation in the legal industry.¹⁴⁴ Many law firms have nonlawyer executives, including chief operating officers or technology managers.¹⁴⁵ Under current ethics rules, law firms can already provide incentive compensation to and share overall profits with such nonlawyer managers.¹⁴⁶ Rule 5.4 prohibits sharing fees with nonlawyers on a case-specific basis, which makes sense—the motive to profit from individual cases should be limited to those who are trained in legal ethics and grasp the need for lawyer independence.¹⁴⁷ If nonlawyers are necessary to make firms more innovative, sharing in the firm’s overall profits ought to sufficiently motivate them.

Baxter also argues that nonlawyers are unable to help clients due to fear of severe penalties for the unauthorized practice of law.¹⁴⁸ Again, Baxter ignores the flexibility already built into the current rules of professional conduct which allow nonlawyers to help lawyers provide legal services, albeit under the supervision of a qualified lawyer. For example, in the Comments to Model Rule 5.5, the ABA explains that

limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.¹⁴⁹

¹⁴⁴. *Id.* at 250 (emphasis omitted).

¹⁴⁵. See, e.g., Jennifer Hill, *The Changing Role of Law Firm Leadership*, ALA WHITE PAPER 3 (2019), <https://www.alanet.org/docs/default-source/whitepapers/ala-white-paper---september-2019.pdf> [<https://perma.cc/XH4H-R8SG>] (“[T]he biggest change in law firm leadership over the past two decades—aside from the way that technology has changed the role—is from where leadership is sourced.”); *id.* at 14 (nearly 30% of individuals who responded to a 2019 survey had worked with a nonattorney CEO of a law firm); Christopher Niesche, *The Culture of Law: Can Non-Lawyers Successfully Run Law Firms?*, LAW.COM (Mar. 29, 2021, 12:05 AM), <https://www.law.com/international-edition/2021/03/29/the-culture-of-law-can-non-lawyers-successfully-run-law-firms> [<https://perma.cc/HKP7-3EV5>].

¹⁴⁶. MODEL RULES OF PRO. CONDUCT r. 5.4(a) (AM. BAR ASS’N 2020).

¹⁴⁷. *Id.*

¹⁴⁸. Baxter, *supra* note 4, at 242.

¹⁴⁹. MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 2 (AM. BAR ASS’N 2020).

Nor does the rule prohibit outsourcing support services, such as document review or due diligence.¹⁵⁰ The legal-navigator programs described above provide just one example of how this can work well to provide free or low-cost legal services to the needy. Moreover, in the business context, lawyers commonly utilize paralegals and legal assistants to provide more administrative services – such as preparing corporate filings – as a complement to the work being provided by attorneys.

C. *Lack of Consumer Complaints Is a Red Herring*

Another argument offered in favor of embracing NLO is that in jurisdictions where ABS and NLO have been expanded, very few consumer complaints have been reported about the legal services being provided to the public. For example, as of June 2022, Utah disclosed that there had been only eleven complaints reported to the Office of Legal Services Innovation, and even fewer were harm-related complaints.¹⁵¹

This argument is a red herring. Nearly all consumer complaints about legal services go unreported. In 2018, the most recent year for which the ABA published data on lawyer discipline, less than one-quarter of one percent of all practicing lawyers with active licenses in forty-five states and the District of Columbia had been publicly disciplined for attorney misconduct.¹⁵² Moreover, as Baxter acknowledges, complaints are “[a]lmost all” filed by “state bars or competing lawyers; they are rarely filed by consumers.”¹⁵³ Thus, the lack of major consumer complaints clearly does not mean that NLO services are unaffected by the inherent conflicts that they face.

D. *Failure to Respond Sufficiently to Ethical Concerns*

Finally, proponents of expanding Rule 5.4 have not satisfactorily responded to the many ethical concerns about NLO that have been raised by various members of the bar, including those concerns that are described in this Essay.¹⁵⁴

150. See ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 451 (2008).

151. Ctr. for Innovation, *Innovation Trends Report 2022*, AM. BAR ASS’N 37 (2022), <https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/aba-cfi-innovation-trends-report2022.pdf> [<https://perma.cc/2C44-LK3Y>].

152. *Profile of the Legal Profession*, AM. BAR ASS’N 103 (2021), <https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf> [<https://perma.cc/98WE-FCPA>].

153. Baxter, *supra* note 4, at 242 n.66.

154. Baxter suggests that raising concerns about the prospect of nonlawyers – who are not bound by ethics rules – influencing lawyer judgments is an “indictment of 99.6% of the population.”

The general attitude among advocates of NLO, including Baxter, is that lawyers are just another set of service providers with no special responsibilities to their clients. For example, Baxter suggests that “many, if not most,” tasks that lawyers complete do not require legal training, and some could be performed by high-school students with no legal education.¹⁵⁵ While Baxter may have been an exceptional high-school student, his assertion is simply false. Baxter’s examples of tasks that do not require legal training oversimplify the nuanced nature of the practice of law. While it may be true that a paralegal, legal assistant, or courier could deliver a document to a court – as Baxter suggests – that same individual is unlikely to be able to answer questions that may be raised by a court clerk or respond to other client needs that might come up during the filing.¹⁵⁶

Moreover, proponents of NLO, like Baxter, seem to advocate for quantity over quality, insisting that more competition is needed to allow for lower-priced, more available legal services.¹⁵⁷ But this insistence on more supply does not address the “Walmart effect” that many lawyers reasonably fear. Their concern is that allowing NLO will result in large, well-funded ABS entities controlled by nonlawyers that will simply drive out of business smaller law firms that have well-trained lawyers, are often located in (and integral to) smaller or rural communities and are unable to compete with large corporations. Allowing this would leave markets with few lawyers who are integral participants in their communities.¹⁵⁸ Baxter’s lack of concern about this well-grounded fear does not comfort those who oppose reforming Rule 5.4.

CONCLUSION

Lawyers have legitimate fears that allowing nonlawyers to own law firms will cross the ethical line and impair lawyers’ independent legal judgments. Without

Id. at 238. This is nonsense. There is legitimate concern that those who have not been trained in legal ethics and do not have a law license to lose could prioritize profits over client interests. This is not an “indictment” of nonlawyers but simply a recognition that businesses prioritize profits. By definition, a profession (whether it be law, medicine, or accounting) excludes those who have not received specialized training, taken an admission exam, and agreed to follow a professional creed. See, e.g., *Profession*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/profession> [<https://perma.cc/82XS-RXVE>] (defining profession as “any type of work that needs special training or a particular skill” and “the people who do a particular type of work, considered as a group”).

155. Baxter, *supra* note 4, at 243.

156. See MODEL RULES OF PRO. CONDUCT r. 5.1 (requiring lawyers to supervise their nonlawyer staff).

157. Baxter, *supra* note 4, at 253.

158. See Rubin, *supra* note 99 (“Will the ‘Wal-Mart effect’ simply drive smaller law firms, unable to compete on price, out of the market entirely?”).

demonstrated proof that permitting nonlawyer ownership of law firms will improve access to justice or is necessary to promote innovation in the provision of legal services, there is no basis to ease the longstanding restrictions imposed by Rule 5.4. Rather, as shown by the ABA's recent reaffirmation of its policy against NLO, state bars ought to respect the concerns that the vast majority of lawyers have expressed about NLO compromising their independent legal judgments and should decline to change Rule 5.4's prohibition against NLO.

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