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> Nothing is better settled than the proposition that a corporation cannot practice law. It is even one of those singular matters upon which all lawyers are in apparent agreement. Yet, even this rule appears to embody more than its fair share of lazy and wishful thinking.[1]

I. INTRODUCTION

Historically, a doctrine has existed within the area of unauthorized practice of law regulation which holds that a corporation or other entity cannot be licensed to practice law and thus cannot legally practice law. Even if the entity hires as an employee an attorney duly licensed to render the service, the doctrine forbids the attorney from representing any party other than the employer because if the attorney were to represent a third party, the entity, a nonlawyer, would be representing the third party, and this would violate the rule that corporations may not practice law.[2] The primary motivating rationale of the doctrine is prevention of nonlawyer interference with the attorney-client relationship, especially with regard to the independence of professional judgment of the attorney-employee.[3] In commenting on the doctrine when faced with the question of whether attorneys could practice as professional corporations in the early 1960s, the Ohio Supreme Court stated: "[I]t is obvious that so far as members of the bar are concerned the idea of the practice of law within a corporate structure is an emotional thing. It is much like 'cats, olives and Roosevelt;' it is either enthusiastically embraced or resolutely rejected."[4]

This corporate practice of law rule has become part of two debates involving the provision of legal services in the 1990s and beyond. First, the issue has arisen in the question of whether an insurance company's in-house

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1. H.H. Walker Lewis, *Corporate Capacity to Practice Law—A Study in Legal Hocus Pocus*, 2 MD. L. REV. 342, 342-43 (1938) (citation omitted).

2. For an example of this reasoning, see American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568 (Ky. 1996). For a discussion of the rule, see *infra* Part II(A).

3. *See infra* Part II(C).

4. State *ex rel.* Green v. Brown, 180 N.E.2d 157, 158 (Ohio 1962). In *Green*, the Ohio Supreme Court prohibited attorneys from practicing in professional corporations because court rules required that the practice of law be by a natural person. *Id.* Ohio now allows attorneys to practice in professional corporations. *See* South High Dev., Ltd. v. Weiner, Lippe & Cromley Co., 445 N.E.2d 1106, 1108 (Ohio 1983).

counsel[5] may defend an insured. While insurers in some jurisdictions have long used in-house attorneys to defend insureds, insurers have increased the practice,[6] perhaps in an effort to reduce defense costs.[7] Certainly case law and ethics opinions reflect an increased interest in the practice.[8] There is no doubt that such

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5. The terms "in-house" and "employee" attorney refer to any attorney employed on a salary basis and considered to be an employee of the insurer regardless of whether the attorney is called an "in-house" or "staff" attorney or is rather an attorney in a law firm whose expenses and salary are paid by the insurer. The latter arrangement is sometimes labeled a "captive" law firm. *See, e.g.*, King v. Guiliani, No. CV92 0290370 S, 1993 WL 284462, at *2 (Conn. Super. Ct. July 27, 1993) (attorneys in "Law Offices of Gregory A. Thompson" were employees of insurer because all expenses and salaries of the office were paid by the insurer). *See also* Debra Baker, *A Grab for the Ball*, A.B.A. J., Apr. 1999, at 42, 44-45 (describing the use of captive law firms); Darryl Van Duch, *Insurance Counsel Under Attack*, NAT'L L.J., Dec. 14, 1998, at A1 (discussing claims that captive law firms may be deceptive in violation of consumer protection laws).

6. State Farm began using staff counsel in 1990 and now employs 500 attorneys in 39 firms who represent 25% of policyholders. Allstate staff attorneys handle 50% of the insurer's cases. *See* Baker, *supra* note 5, at 45; *see also* Ronald E. Mallen, *Defense by Salaried Counsel: A Bane or a Blessing?*, 61 DEF. COUNS. J. 518 (1994) (discussing the trend); R. Gaylord Smith & Judy Davis, *Have Criticisms of In-House Counsel Put Outside Counsel in the Dog House?*, 17 INS. LITIG. REP. 512 (1995) (same).

7. *See* Baker, *supra* note 5, at 43 (insurers claim it is a cost reduction measure with no effect on quality of representation). Insurance companies have taken quite a few steps in recent years to control defense litigation costs. *See* Gail Diane Cox, *No Safety Net: Insurance Defense in a Shakeout: In-House Influx and Tort Reform are Behind Upheaval*, NAT'L L.J., Jan. 13, 1997, at A1 (noting a focus on fees); Milo Geyelin, *Crossing the Bar: If You Think Insurers are Tight, Try Being One of Their Lawyers*, WALL ST. J., Feb. 9, 1999, at A1 (discussing insurers' use of billing guidelines for outside attorneys). Billing guidelines have come under scrutiny by ethics bodies as impermissibly infringing an attorney's independence of professional judgment. *See, e.g.*, Ala. Ethics Op. RO-98-02 (1998); Ind. Ethics Op. 3 (1998). Many insurers now send legal bills from outside attorneys to bill auditors. *See* David Rubenstein, *Fee Reductions Backfire on Fireman's Fund, Judge Awards $3 Million for Defamation of a Law Firm*, CORP. LEGAL TIMES, Jan. 1997, at 1 (insurer used auditor of legal bills; firm sued auditor for defamation). This procedure has attracted the attention of ethics bodies as well. *See, e.g.*, Ind. Ethics Op. 4 (1998); S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 97-22 (1997), *available in* 1997 WL861963; Utah State Bar Ethics Advisory Opinion Comm., Op. 98-03 (1998), *available in* 1998 WL 199533.

8. *See, e.g.*, *King*, 1993 WL 284462, at *1 (Conn. Super. Ct. July 27, 1993); *In re* Rules Governing Conduct of Attorneys in Florida, 220 So. 2d 6 (Fla. 1969); Coscia v. Cunningham, 299 S.E.2d 880 (Ga. 1983); Kittay v. Allstate Ins. Co., 397 N.E.2d 200 (Ill. App. Ct. 1979); American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568 (Ky. 1996); *In re* Allstate Ins. Co., 722 S.W.2d 947 (Mo. 1987); Gardner v. North Carolina State Bar, 341 S.E.2d 517 (N.C. 1986); *In re* Youngblood, 895 S.W.2d 322 (Tenn. 1995); ABA Comm. on Professional Ethics, Formal Op. 282 (1950); Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1987-91 (1987), *available in* 1987 WL 109707; N.J. Comm. on Unauthorized Practice, Supp. to Op. 23

a situation presents multiple potential conflicts of interest[9] and thus may not be permissible under the provisions of the *Model Rules of Professional Conduct* ("*Model Rules*") relating to conflicts.[10] Rule 5.4 also poses barriers in that an attorney may not work in partnership with nonlawyers, may not share fees with nonlawyers, and may not allow a nonlawyer to influence the lawyer's exercise of independent professional judgment.[11] But in addition to the *Model Rules*, if

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(1996), *available in* 1996 WL 520891; N.J. Comm. on Unauthorized Practice, Op. 23 (1984), *available in* 1984 WL 140950; N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 519 (1980), *available in* 1980 WL 19218; Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 95-14 (1995), *available in* 1995 WL 813802; Pa. Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Formal Op. 96-196 (1997), *available in* 1997 WL 188817; Code of Virginia Legal Ethics and Unauthorized Practice Opinions, Legal Ethics Opinions Op. 598 (1996); Va. Unauthorized Practice of Law, Op. 60 (1996); *see also* Joplin v. Denver-Chicago Trucking Co., 329 F.2d 396 (8th Cir. 1964) (refusing to strike answer filed by in-house attorney of insurer filed on behalf of insured).

9. For a discussion of the in-house defense issue generally, see Leo J. Jordan & Hilde E. Kahn, *Ethical Issues Relating to Staff Counsel Representation of Insureds*, 30 TORT & INS. L.J. 25 (1994); Robert J. Johnson, Comment, *In-House Counsel Employed by Insurance Companies: A Difficult Dilemma Confronting the Model Code of Professional Responsibility*, 57 OHIO ST. L.J. 945 (1996).

10. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7-1.10 (1998). The *Model Rules* have been adopted in some form in more than two-thirds of all United States jurisdictions. *See* ABA/BNA, LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1:3-4 (1995). For the text of Rule 1.7, see *infra* note 23.

11. Rule 5.4 states:

> (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
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> (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
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> (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and
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> (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.
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> (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.
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> (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
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> (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:
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> (1) a nonlawyer owns any interest therein, except that a fiduciary

an insurer's in-house attorney defends an insured, the traditional corporate practice of law doctrine would label such activity the unauthorized practice of law. Some courts have so noted.[12] Other courts and ethics bodies seem to recognize an exception to the doctrine, while some seem to ignore the issue entirely.[13]

Second, the corporate practice of law doctrine has arisen as part of the recent discussion of the role attorneys employed by accounting firms play or should play with regard to the customers of the accounting firms. Accounting firms have hired lawyers or simply have acquired entire law firms in Europe in order to enter the legal service market there.[14] Lawyers in the United States fear

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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
(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1998); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (1998).

12. *See, e.g., American Ins. Ass'n*, 917 S.W.2d at 568; *Gardner*, 341 S.E.2d at 517. *See also* Grace M. Giesel, *The Kentucky Ban on Insurers' In-House Attorneys Representing Insureds*, 25 N. KY. L. REV. 365 (1998) (discussing of the doctrine as it was used by the Supreme Court of Kentucky in *American Ins. Ass'n*); William K. Edwards, *The Unauthorized Practice of Law by Corporations: North Carolina Holds the Line*, 65 N.C. L. REV. 1422 (1987) (discussing the doctrine in the insurance context as used by the North Carolina Supreme Court in *Gardner*).

13. *See supra* note 8 and accompanying text.

14. "The rules that regulate lawyer conduct in some foreign countries permit various forms of lawyer/nonlawyer affiliations that are prohibited in the United States. As a result, the Big-5 accounting firms have vigorously entered the market for the delivery of legal services in those countries." ABA Comm'n on Multidisciplinary Practices, *Background Paper on Multidisciplinary Practice: Issues and Developments*, Part I (visited Nov. 17, 1999) <http://www.abanet.org/cpr/multicomreport0199.html> [hereinafter *Background Paper*] (describing the efforts of accounting firms outside the United States).

As of 1998, Price Waterhouse Coopers employed 1,663 nontax attorneys in 39 countries. Arthur Andersen employed 1,500 nontax lawyers in 27 countries. KPMG employed 988 nontax lawyers. Ernst & Young employed 851 nontax lawyers in 32 countries, and Deloitte Touche Tomatsu employed 586 nontax lawyers in 14 countries. Only two law firms employed more lawyers than Price Waterhouse Coopers and Arthur Andersen. *See* Richard L. Abel, *Transnational Legal Practice*, 44 CASE W. L. REV. 737 (1994); John E. Morris, *The Global 50*, AM. LAW., Nov. 1998, at 47; David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. L. REV. 407 (1994); Gianluca Morello, Note, *Big Six Accounting Firms Shop World Wide for Law Firms: Why Multidisciplinary Practices Should be Permitted in the United States*, 21 FORDHAM INT'L L.J. 190 (1997); *see also* Cynthia Cotts, *Parisians: Accountants are Coming! French Lawyers Warn Those in U.S. that Accounting Firms May Eat Their Lunch*, NAT'L L.J., June 22, 1998, at A6; John E. Morris, *King Arthur's March on Europe: Arthur*

that accounting firms are doing or will do the same in the United States.[15] The perceived accounting firm activity led the President of the American Bar Association ("ABA") to appoint a Commission to consider whether the rules governing lawyers should be modified to allow attorneys to be a part of multidisciplinary practices ("MDPs").[16] The Introductory Letter to the Commission's Background Paper on Multidisciplinary Practice identified this issue as "the most important issue to face the legal profession this century."[17]

The Recommendation of the ABA Commission suggests that the *Model Rules* be amended so that lawyers can practice in MDPs while at the same time the *Model Rules* can protect "core values," such as "independence of professional judgment, protection of confidential client information, and loyalty to the client through avoidance of conflicts of interest."[18] The Final Report

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Andersen is on a Mission to Conquer the Continent's High-End Legal Markets. Can the Accountants Beat the Lawyers at Their Own Game?, AM. LAW., June 1998, at 49; Melody Petersen, *Paris Lawyers are Seeking Barricades Against the Big 6: Accounting Giants Get Legal Work Abroad*, N.Y. TIMES, June 8, 1998, at D2; Carlta Vitzthum, *Mergers Transform Europe's Law Firms*, WALL ST. J., July 22, 1998, at A11.

U.S. law firms have recognized Europe as a fertile market for legal services and have sought to expand there. *See* Paul M. Barrett, *Courting Trouble: Joining the Stampede to Europe, Law Firm Suffers a Few Bruises*, WALL ST. J., Apr. 27, 1999, at A1; Paul M. Barrett, *Drive to Go Global Spurs Law-Firm Merger Talk*, WALL ST. J., Mar. 18, 1999, at B1; Paul M. Barrett, *Rogers & Wells and U.K. Firm Plan to Merge*, WALL ST. J., May 24, 1999, at A3 (discussing the tentative merger of Rogers & Wells of New York and Clifford Chance of England).

15. *See* Cynthia Cotts, *supra* note 14, at A6 (warning that the accounting firms are going to move into U.S. markets); John Gibeaut, *Squeeze Play*, A.B.A. J., Feb. 1998, at 42; Geoffrey C. Hazard, *Accountants vs. Lawyers: Let's Consider Facts*, NAT'L. L.J., Nov. 9, 1998, at A21; Geoffrey C. Hazard, *The Ethical Traps of Accounting Firm Lawyers*, NAT'L. L.J., Oct. 19, 1998, at A27; *Background Paper*, *supra* note 15, Part II (discussing accounting firm activities in the U.S.).

16. *Background Paper*, *supra* note 14. The New York State Bar Association also appointed a Special Committee on Multi-Disciplinary Practice and the Legal Profession. The New York Committee's report reaches no absolute conclusions but points out areas of further study and consideration and states that "the legal profession should continue to explore the opportunities presented by multi-disciplinary practice with a view toward permitting such practice unless insuperable obstacles appear." New York State Bar Ass'n, *Report of Special Committee on Multi-Disciplinary Practice and the Legal Profession* (visited Jan. 8, 1999) <http://www.nysba.org/whatsnew/multidiscrpt.html>; *see also* Philip S. Anderson, *We All Must be Accountable*, A.B.A. J., Oct. 1998, at 6 (focus should be on the client and the public); John Gibeaut & James Podgers, *Feeling the Squeeze*, A.B.A. J., Oct. 1998, at 88 (discussing the appointment of the commission).

17. *Background Paper*, *supra* note 14, Introductory Letter.

18. *See* ABA Comm'n on Multidisciplinary Practices, *Recommendation of the ABA Comm'n on Multidisciplinary Practices* <http://www.abanet.org/cpr/mdprecommendation.html>. Rule 5.4 prevents lawyer involvement in MDPs. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1998). This Rule was designed to

accompanying the Recommendation states that the Commission does not intend any change to the law of unauthorized practice "except to the extent that an MDP will be permitted to provide legal services to the MDP's clients if it complies with safeguards" stated in the Report.[19]

In any discussion of provision of legal services by accounting firms or MDPs, the corporate practice of law doctrine must be considered. Although accounting firms and, perhaps in the future, MDPs do not always take the corporate form, the logic of the corporate practice of law doctrine would apply because the entity, whether it be a partnership, limited partnership, or limited

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prevent a nonlawyer from controlling a lawyer's judgment and thus to protect the independence of judgment of the lawyer. As stated by the ABA Commission: "The prohibition against MDPs is rooted in the perception that it prevents a layperson from exercising undue influence over the independence of a lawyer in the representation of a client in an attempt to subordinate the protection of clients to the pursuit of profit." *Background Paper*, *supra* note 14, Part III; *see also* ABA Formal Comm. on Ethics and Professional Responsibility, Op. 95-392 (1995).

Originally, the Kutak Commission proposed less prohibitive language but the ABA House of Delegates rejected the more permissive approach after a discussion which included consideration of the effect such would have on competition and lawyer independence of judgment. *See* ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE HOUSE OF DELEGATES 159-64 (1987); *see also* Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 594 (1989).

There is strong argument today that the Kutak Commission's original more-permissive proposal was superior and that Rule 5.4 should now be amended to eliminate restrictions that stand in the way of allowing lawyers to enter into multidisciplinary practices. Thus, attorneys might better compete with accounting firms, consulting firms, and other entities able to offer a fuller panoply of professional services. *See* Andrews, *supra* note 18; James M. Fischer, *Why Can't Lawyers Split Fees? Why Ask Why; Ask When!*, 6 GEO. J. LEGAL ETHICS 1 (1992); Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 FORDHAM L. REV. 559 (1992).

Only the District of Columbia has modified Rule 5.4 to allow attorneys to be in partnerships with nonlawyers and to allow fee-sharing with nonlawyers. *See* D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1999); *see also* Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383 (1988).

19. ABA Comm'n on Multidisciplinary Practice, *Report of the ABA Comm'n on Multidisciplinary Practice* (visited Aug. 1999) <http://www.abanet.org/cpr/mdpreport.html>. In August 1999, the ABA deferred making any decision on MDPs until a later date. *See* Darryl Van Duch, *ABA Honchos Differ Over MDP Vote*, NAT'L L.J., Aug. 23, 1999, at A6; Margaret A. Jacobs, *ABA Puts off Vote on Nonlawyer Partnerships*, WALL ST. J., Aug. 11, 1999, at B9. The Executive Committee of the Association of the Bar of the City of New York also favors permitting MDPs, if restrictions are imposed. *See N.Y. City Bar's Conception of MDPs Would Prevent Firms' Auditing Work*, 15 LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) 373 (1999).

liability company, would be a nonlawyer and would be made up in part of nonlawyers such that the nonlawyer-employing entity would be practicing law. As in the insurance scenario, the attorney-employee would be assisting the unauthorized practice of law. The activities of accounting firms already have been the focus of several unauthorized practice of law regulatory measures.[20]

Exceptions similar to those created for professional corporations could be made for MDPs. A better course is to put the doctrine to rest entirely and focus instead on the evils that may accompany the corporate practice of law in the insurance setting, the accounting firm setting, or in any other context that may appear on the horizon. The *Model Rules* address these evils. Particularly relevant are Rules 5.4[21] and 1.8(f),[22] dealing with attorney independence, and Rule 1.7,[23] which deals with conflicts of interest. The *Model Rules* themselves should also be evaluated to ensure their appropriateness and that their stated goals are valid and intimately related to the restrictions set out in the Rules. Indeed, the ABA Commission on Multidisciplinary Practice has begun such an evaluation as part of a broader and more sustained study of the *Model Rules* and

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20. The Unauthorized Practice Committee of Texas began investigation of Arthur Andersen and Deloitte & Touche. *See* Amanda Bishop, *Law Panel Probing Big Six Firms Attorneys Ask if Accountants are Practicing Law Without Authorization*, DALLAS BUS. J., June 5, 1998, at 1 [hereinafter Bishop, *Law Panel*]; Elizabeth MacDonald, *Texas Probes Andersen, Deloitte on Charges of Practicing of Law*, WALL ST. J., May 28, 1998, at B15. The Arthur Andersen action was dismissed. *See* Amanda Bishop, *Committee Halts Investigation of Andersen's Tax Advisory Practices*, DALLAS BUS. J., Aug. 7, 1998, at 9.

21. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1998) (text provided *supra* note 12).

22. Rule 1.8(f) states:

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
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> (1) the client consents after consultation;
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> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected as required by Rule 1.6.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (1998).

23. Rule 1.7(b) states:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1998).

Rule 5.4 in particular.[24] However, the corporate practice of law doctrine, a part of the murky and suspect unauthorized practice of law regulation, should not be implicated in the debate. Rather, the doctrine should be eliminated for the reasons that follow.

Unauthorized practice of law regulation, both in its origin and use, has been criticized as a device to control competition.[25] The corporate practice of law doctrine seems to have been motivated particularly by the desire of the legal profession to control competition presented by entities such as corporations.[26] The situations which implicate the corporate practice of law doctrine at the beginning of the new millennium also present significant competition issues. No matter what other concerns attorneys have about accounting firms and insurers offering legal services, attorneys would be disingenuous if they did not admit a concern over how these movements in the legal services industry impact their bottom line.[27] The corporate practice of law doctrine cannot survive if motivated only by a desire to limit competition. One must ask whether the doctrine has other rationales or effects validating its existence.

The primary stated rationale of regulating the unauthorized practice of law has been that such protection is necessary to shield the public from unscrupulous nonlawyers.[28] If a goal of the corporate practice of law doctrine is to protect the public from charlatans and others lacking the skill and training necessary to provide adequate legal services, such rationale fails in the case of corporations and other entities who employ licensed attorneys to render services.

The goal of unauthorized practice of law regulation is sometimes stated as protecting the public from the nonlawyer entity not because the renderer of the legal services is lacking in skill but rather because of a fear that the entity employer will exercise impermissible control over the attorney-employee's judgment and thus impermissibly interfere with the attorney-employee's independence of judgment and loyalty to the client.[29] While this may have been a valid concern in past times, it cannot validate the corporate practice of law doctrine today. As an initial matter, if protecting the independence of the judgment applied to the client's matter is the concern, the corporate practice of law doctrine is redundant; the *Model Rules* specifically protect against

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24. The ABA has deferred consideration of the issue. *See* Jacobs, *supra* note 19, at B9.

25. *See infra* Part I(A) & (B).

26. *See infra* Part II(D).

27. Interestingly, attorneys, not the public, complain about the insurance context. *See* Mallen, *supra* note 6, at 518; Smith & Davis, *supra* note 6, at 512; *see also* Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995) (the practice of law is a profit-oriented business).

28. *See infra* Part II(A).

29. *See infra* Part II(C).

impermissible infringement by directing attorneys not to allow such infringement.

However, the goal of the corporate practice of law doctrine goes beyond protecting independence of judgment. Often opinions applying the corporate practice of law doctrine state or imply that the in-house attorney cannot have independent judgment and cannot be the judge of whether his or her judgment is clouded by allegiance or influence of the employer entity. Such a position carries with it an inferior opinion about in-house counsel as a group that does not obtain in this day and age. In addition, such reasoning is based on a view that outside attorneys are, by definition, acting with unimpaired judgment, are always capable of monitoring such issues, and are not motivated by the desire to create or increase profit. Such a view of outside counsel is flawed. Finally, the belief that the influence of the corporation must not be allowed to impact the attorney's decisionmaking because the corporation, being a profit-maximizing entity, would surely direct an attorney toward an unethical path is not necessarily logical. Profit and ethics may not always diverge.[30]

While flawed in theory, the corporate practice of law doctrine is also flawed in application. The doctrine holds that an attorney's actions in representing a third party are the actions of the corporation. Yet, the benefit of the attorney's license to practice law flows not to the corporation. This analysis is not followed with regard to other contexts in which corporations act and is simply illogical.[31]

Finally, even if the doctrine had validity or served a beneficial purpose in the early years of the century, much has changed. These changes call the doctrine into question. For example, unlike in the early 1900s, lawyers now practice in corporate frameworks themselves. While it is true that the entity itself is made up of lawyers, it is simply no longer true that a corporation or other entity cannot practice law.[32] In addition, not-for-profit corporate entities provide legal services to third parties and, thus, practice law.[33] Corporate in-house counsel, as part of their pro bono obligation, represent third parties and, thus, their employer corporation practices law.[34] Many states have recognized specific exceptions so that some corporations and profit-making entities can and do provide legal services to third parties.[35] Finally, while the doctrine was rooted in the notion that a corporation could not practice any of the recognized professions, such as medicine, medicine is often practiced in a corporate or other entity form.[36] Indeed, too much has changed for the corporate practice of law

30. *See infra* Part II(C).
31. *See infra* Part II(B).
32. *See infra* Part III(A) & (B).
33. *See infra* Part III(C).
34. *See infra* Part III(D).
35. *See infra* Part III(E).
36. *See infra* Part III(F).

doctrine, lacking a solid rationale and logic, to continue to contribute to or control debate about changes and developments in the legal services market.

This Article, after providing a brief general discussion of the unauthorized practice of law in Part II, discusses in Part III the corporate practice of law doctrine and its flaws. Part IV discusses changes that have occurred in the last half of the century in the sociology of the practice of law that negatively affect the validity of the doctrine. The Article concludes in Part V with a plea to jurisdictions to discard the corporate practice of law doctrine and be guided by the *Model Rules* as the true regulator of attorney conduct.

II. THE REGULATION OF THE UNAUTHORIZED PRACTICE OF LAW GENERALLY

A. Rationales

The traditional reason for the regulation of the unauthorized practice of law is to protect the public from nonlawyers who are incompetent, unskilled, and unethical.[37] Courts often so state, as did the New York Court of Appeals in *People v. Alfani*,[38] when it noted that the purpose of unauthorized practice regulation is "to protect the public from ignorance, inexperience, and unscrupulousness."[39] Often such statements are paired with a denial that

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37. *See, e.g.*, Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1, 5 (Cal.), *cert. denied sub nom.* Birbrower, Montalbano, Condon & Frank, P.C. v. ESQ Bus. Servs., Inc., 119 S. Ct. 291 (1998) (stating that the prohibition is "designed to ensure that those performing legal services do so competently"). *See also* L. Bruce Ables, *Unauthorized Practice of Law*, 56 ALA. LAW. 289 (1995) ("Unquestionably, the Legislature intended that § 34-3-6 was enacted for the purposes of insuring that lay individuals would not serve others in a representative capacity in areas requiring the skill and judgment of a licensed attorney."); Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 187; Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 3 (1981). *See generally* ABA COMM. ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS 18-19 (1995) [hereinafter NONLAWYER ACTIVITY] (discussing history of unauthorized practice regulation); ABA, 1994 SURVEY AND RELATED MATERIALS ON THE UNAUTHORIZED PRACTICE OF LAW/ NONLAWYER PRACTICE xvii (1996) [hereinafter 1994 SURVEY] (discussing history of unauthorized practice); NATHAN M. CRYSTAL, AN INTRODUCTION TO PROFESSIONAL RESPONSIBILITY 359 (1998) (discussing the rationale); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 829 (1986) (discussing the rationale).

38. 125 N.E. 671 (N.Y. 1919).

39. *Id.* at 673; *see* Spivak v. Sachs, 211 N.E.2d 329, 331 (N.Y. 1965) (regarding the New York statute: "The statute aims to protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for

prevention of competition is the motive. For example, the New Jersey Supreme Court in *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*,[40] stated: "In other words, like all of our powers, this power over the practice of law must be exercised in the public interest; more specifically, it is not a power given to us in order to protect lawyers, but in order to protect the public."[41] Critics of unauthorized practice regulation disagree and argue that an unstated rationale of the doctrine is, indeed, prevention of competition.[42] Other rationales include protecting the judicial system from the injury that would occur if nonlawyers participated in that system and protecting the system of discipline for lawyers since discipline can only occur if permission is required to render legal services.[43]

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such work.").

40. 654 A.2d 1344 (N.J. 1995).

41. *Id.* at 1346; *see also* Hulse v. Criger, 247 S.W.2d 855, 857-58 (Mo. 1952) ("The duty of this Court is not to protect the Bar from competition but to protect the public from being advised or represented in legal matters by incompetent or unreliable persons."); Pioneer Title Ins. & Trust Co. v. State Bar, 326 P.2d 408, 409 (Nev. 1958) ("The reason is not the protection of the lawyer against lay competition but the protection of the public."); Auerbacher v. Wood, 59 A.2d 863, 863 (N.J. 1948) (stating that "guidance is to be found in the consideration that the licensing of law practitioners is not designed to give rise to a professional monopoly, but rather to serve the public right to protection against unlearned and unskilled advice and service in matters relating to the science of the law"). As one commentator has stated:

> There is a common statement by those accused of engaging in the unauthorized practice of law that this committee is only pursuing them because they, the accused, are taking money from lawyers. No member of the committee has ever taken that position about any complaint. The committee is charged with the duty of protecting the public from these individuals who are engaging in various fraudulent activities and also stopping those individuals from creating more legal problems for the public.

Ables, *supra* note 37, at 290.

42. *See, e.g.*, J. W. HURST, THE GROWTH OF AMERICAN LAW 323 (1950); NONLAWYER ACTIVITY, *supra* note 37, at 18-19; 1994 SURVEY, *supra* note 37, at xvii; WOLFRAM, *supra* note 37, at 825-26, 833-34; Christensen, *supra* note 37, at 187; Robert Laurence, *Update: Recent Developments in the Arkansas Law of Garnishment*, 1997 ARK. L. NOTES 95, 98 (requiring a corporation to answer a writ of garnishment through an attorney: "It is difficult to see any policy at work here, other than one protective of the business of lawyering."); Rhode, *supra* note 37, at 8-9. *See also* Jennifer Gerarda Brown, *Rethinking "The Practice of Law,"* 41 EMORY L.J. 451, 455 (1992); Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL'Y REV. 193, 217 (1996); Kathleen Eleanor Justice, Note, *There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law*, 44 VAND. L. REV. 179, 179 (1991).

43. WOLFRAM, *supra* note 37, at 832-33.

B. History

Feeding the theory that unauthorized practice of law regulation has been motivated by anticompetitive concerns is the fact that a wave of unauthorized practice regulation coincided with the Depression, a time when lawyer fees were scarce.[44] Much of the pre-Depression regulation was aimed at corporations.[45] Unauthorized practice of law regulation has appeared to decline in the last third of the twentieth century,[46] though pockets and spurts of activity have occurred.[47] The decline can be traced, in part, to concern that unauthorized practice of law regulation improperly infringes upon First Amendment rights. In a series of cases, the Supreme Court has cast doubt on the constitutionality of unauthorized practice of law regulation by clarifying that restricting a nonlawyer's ability to convey information and the public's right to receive it can violate the First Amendment if it impedes the exercise of associational rights.[48]

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44. As one commentator stated: "Economic depression brought discontent to a head." *Foreword*, 5 LAW & CONTEMP. PROBS. 1, 2 (1938). *See* NONLAWYER ACTIVITY, *supra* note 37, at 13-32 (discussing history of unauthorized practice regulation and specifically the Depression as motivator); 1994 SURVEY, *supra* note 37, at xi-xx (discussing history of unauthorized practice regulation); WOLFRAM, *supra* note 37, at 826; HURST, *supra* note 42, at 251, 323; *see also* Gary Munneke, *Lawyers, Accountants and the Battle to Own Professional Services*, PROF. LAW. 63, 67 (1998); Rhode, *supra* note 37, at 6-9.

45. *See infra* Part II(D).

46. *See* NONLAWYER ACTIVITY, *supra* note 37, at 22-35; Johnstone, *supra* note 42, at 193 n.147 (in 1992, only 22 state bar associations had active unauthorized practice of law committees).

47. *See, e.g.*, Ables, *supra* note 37, at 289 (reporting that the Alabama unauthorized practice of law committee has been "very active"); Elizabeth S. Holmes, *What is the Unauthorized Practice of Law and How is it Regulated?*, 76 MICH. B.J. 580, 581 (1997) (noting that the Michigan Bar receives 150 to 200 complaints each year). *See also* Sherri Kimmel, *Stemming the Tide of Unauthorized Practice*, 13 ME. B.J. 164, 164 (1998); James Podgers, *Legal Profession Faces Rising Tide of Non-Lawyer Practice*, ARIZ. ATT'Y, Mar. 1994, at 24.

48. *See* United Transp. Union v. State Bar, 401 U.S. 576 (1971) (Michigan sought to prohibit union from recommending attorneys to employee members); UMW, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) (Illinois tried to enjoin, pursuant to unauthorized practice statute, a union from having salaried attorneys represent employee members with workers' compensation claims); Brotherhood of R.R. Trainmen v. Virginia *ex. rel.* Va. State Bar, 377 U.S. 1 (1964) (Virginia sought to forbid union's legal aid department from recommending lawyers to injured workers); NAACP v. Button, 371 U.S. 415 (1963) (NAACP could not be prohibited from referring individuals to certain lawyers). *See generally* Rhode, *supra* note 37, at 62.

The decline in unauthorized practice of law regulation may be traced to antitrust concerns as well.[49] In *Goldfarb v. Virginia State Bar*,[50] the Supreme Court made clear that lawyer regulation in general was subject to federal antitrust provisions.[51] The effect of the *Goldfarb* opinion was immediate. In the late 1930s, the ABA and other bar associations entered into agreements with various occupations such as accounting and banking to ensure that those occupations did not practice law.[52] In 1980, the ABA took steps to rescind those agreements, as did other bars, after the United States Justice Department began investigating them as anticompetitive and violative of the antitrust laws.[53]

As further evidence of the decline in the regulation of unauthorized practice of law, in 1977, the ABA discontinued publication of *Unauthorized Practice News*.[54] In 1984, the ABA Committee on the Unauthorized Practice of Law, created in 1930,[55] ceased to exist.[56]

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49. *See* NONLAWYER ACTIVITY, *supra* note 37, at 23-32; Christensen, *supra* note 37, at 199-200; Munneke, *supra* note 44, at 67.

50. 421 U.S. 773 (1975).

51. *Id.* at 787. *Goldfarb* dealt with whether a bar association's minimum fee guidelines were violative of Section 1 of the Sherman Act. *Id.* at 775. The Court held that the federal antitrust statutes applied to lawyers and lawyer regulation. *Id.* at 788. In *Goldfarb*, the "state action" exception did not apply because the minimum fee guidelines were not compelled by the state acting as a sovereign. *Id.* at 791; *see also* WOLFRAM, *supra* note 37, at 826-27; Munneke, *supra* note 18, at 585.

52. Usually this was done regarding groups presenting a competitive threat. *See* Christensen, *supra* note 37, 195-96; *see also* Kathryn D. Folts, Note, *Collection Agencies and the Unauthorized Practice of Law: The Divorce of Function from Form in* Alco Collections, Inc. v. Poirier, 680 So. 2d 735 (La. Ct. App. 1996), 77 NEB. L. REV. 365 (1998). For examples of these accords, see *Illinois Real Estate Broker-Lawyer Accord*, 32 UNAUTHORIZED PRAC. NEWS 1 (1966); *Statement of Principles Between the New York County Lawyers' Association and the Corporate Fiduciaries Association of New York City*, 32 UNAUTHORIZED PRAC. NEWS 1 (1966). For articles discussing accords, see Frederick C. Hicks & Elliott R. Katz, *The Practice of Law by Laymen and Lay Agencies*, 41 YALE L. J. 69, 98 (1931) (discussing an accord between Ohio bankers and lawyers); John G. Jackson, *The Establishment of Cordial Relations Between the Bar and the Corporate Fiduciaries*, 5 LAW & CONTEMP. PROBS. 80, 82 (1938) (discussing accords with the banking industry); Shane L. Goudey, Comment, *Too Many Hands in the Cookie Jar: The Unauthorized Practice of Law by Real Estate Brokers*, 75 OR. L. REV. 889, 923 (1996) (stating that, until 1990, Oregon had a joint committee of lawyers and real estate brokers whose job included "reviewing conflicts between members of the professions in an effort to solve communication problems . . . [and] reviewing and recommending changes in the joint statement of principles between lawyers and realtors").

53. *See* WOLFRAM, *supra* note 37, at 826; James Podgers, *Statements of Principles: Are They on the Way Out?*, A.B.A. J. 129 (1980).

54. *See* Christensen, *supra* note 37, at 190.

55. *See* NONLAWYER ACTIVITY, *supra* note 37, at 17.

56. *See* 1994 SURVEY, *supra* note 37, at xiv.

C. Who Has the Power to Regulate Unauthorized Practice of Law?

The judicial branch of government generally is recognized as having the power to regulate the practice of law,[57] which includes the regulation of the unauthorized practice of law.[58] Many state courts claim an exclusive right to regulate the practice of law.[59] Some courts accept certain legislative incursions, in the interest of comity, if the intrusion does no harm to the courts' regulatory scheme.[60]

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57. *See, e.g.*, NEB. CONST. art. V, § 1; OHIO CONST. art. IV, § 5(B); PA. CONST. art. V, § 10(c); S.C. CONST. art. V, § 4; UTAH CONST. art. VIII, § 4. In *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768 (Tex. 1999), the Texas Supreme Court explained: "The Supreme Court of Texas has inherent power to regulate the practice of law in Texas for the benefit and protection of the justice system and the people as a whole." *Id.* at 769. The court's power derived from Article II, Section 1 of the Texas Constitution which divides state power into three departments. The constitutional provision gives regulation of judicial affairs and the administration of justice to the Supreme Court. Within this authority is the power to regulate the practice of law. *Id.* at 769-71. *See also In re* Integration of the Bar of Minn., 12 N.W.2d 515, 518 (Minn. 1943) (inherent power of court to regulate the unauthorized practice of law); Ryan J. Talamante, Note, *We Can't All Be Lawyers . . . Or Can We? Regulating the Unauthorized Practice of Law in Arizona*, 34 ARIZ. L. REV. 873 (1992) (discussing the judicial power as recognized in Arizona).

58. The power to regulate the practice of law has been deemed to include the regulation of practitioners and the power to define the practice of law. *See* Comment, *Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power*, 28 U. CHI. L. REV. 162, 166 (1960).

Unauthorized practice regulation usually occurs through the action of a committee of the state bar. *See, e.g.*, TEX. GOV'T CODE ANN. §§ 81.103-.104 (1998) (setting forth the membership and duties of the unauthorized practice of law committee); MICH. SUP. CT. R. 16 (Committee on the Unauthorized Practice of Law charged to investigate matters and file and prosecute actions regarding the unauthorized practice of law). *See also* State *ex. rel.* Porter v. Alabama Ass'n of Credit Executives, 338 So. 2d 812 (Ala. 1976) (plaintiff was Chair of the Unauthorized Practice Committee for the State Bar); *In re* Op. No. 26 of Comm. on Unauthorized Practice of Law, 654 A.2d 1344, 1346-47 (N.J. 1995) (discussing the workings of the New Jersey committee); *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d at 771 (stating that the Unauthorized Practice of Law Committee in Texas was created in 1932 as "the Committee on the Lay and Corporate Encroachment of the Practice of Law"); Holmes, *supra* note 47, at 581 (discussing the make-up of the Michigan committee and what it does).

59. *See, e.g.*, Merco Constr. Eng'rs, Inc. v. Municipal Court, 581 P.2d 636 (Cal. 1978); Professional Adjusters, Inc. v. Tandon, 433 N.E.2d 779 (Ind. 1982). *See generally* Comment, *supra* note 58.

60. *See, e.g.*, Singer Hutner Levine Seeman & Stuart v. Louisiana State Bar Ass'n, 378 So. 2d 423, 426 (La. 1979) (upholding legislative acts that aid the exercise of judicial power, striking down what does not); *In re* Tracy, 266 N.W. 88, 93 (Minn. 1936) (stating that courts generally apply comity to acts of the legislature if they can do so "without ceasing to function as independent judges" and if the laws "[are] found to be reasonable

Given that the power to regulate the practice of law rests with the judiciary, it is perhaps odd that many states have statutes making the unauthorized practice of law a crime.[61] However, such statutes may be the sort of legislative incursion which the judiciary honors in the interest of comity. For example, in *Merco Construction Engineers, Inc. v. Municipal Court*,[62] after recognizing that the judiciary has "[t]he exclusive right to determine who is qualified to practice law,"[63] the California Supreme Court stated: "We deem it established without serious challenge that legislative enactments relating to admission to practice law are valid only to the extent they do not conflict with rules for admission adopted or approved by the judiciary."[64]

In contrast, courts have refused to allow legislatures to permit nonlawyers to practice. The courts refuse on the basis that such actions infringe on judicial power and conflict with judicial goals and rules regarding who may practice.[65] Thus, if corporations are to be allowed to practice law, the judicial branch, by way of rules or case law, must so state.

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and just in their application . . . and [are] considered sound expressions of public policy"). *See generally* Debra L. Thill, Comment, *The Inherent Powers Doctrine and Regulation of the Practice of Law: Will Minnesota Attorneys Practicing in Professional Corporations or Limited Liability Companies Be Denied the Benefit of Statutory Liability Shields?*, 20 WM. MITCHELL L. REV. 1143, 1163-66 (1994).

61. *See, e.g.*, CAL. BUS. & PROF. CODE § 6126 (West 1990) (misdemeanor for practice of law by one not a member of the state bar); NEV. REV. STAT. § 7.285 (1997) (misdemeanor).

62. 581 P.2d 636 (Cal. 1978).

63. *Id.* at 637-38.

64. *Id.* at 638. Minnesota courts accepted the legislative definition of the practice of law as a matter of comity in *Cowern v. Nelson*, 290 N.W. 795, 797 (Minn. 1940); *see also* Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783 (1976).

65. *See, e.g.*, Kyle v. Beco Corp.,707 P.2d 378 (Idaho 1985) (only the court can say that nonattorneys can appear; the legislature cannot); Turner v. Kentucky Bar Ass'n, 980 S.W.2d 560 (Ky. 1998) (statute authorizing nonlawyer to represent parties in workers' compensation proceedings is a violation of the separation of powers doctrine and comity did not apply); West Virginia State Bar v. Earley, 109 S.E.2d 420, 438 (W. Va. 1959). The court in *Earley* stated:

> Any enactment by the Legislature which undertakes or attempts to authorize the practice of law by a person not duly licensed by the courts or to permit laymen to engage in the practice of law, is void and of no force and effect as an attempt to exercise judicial power by the legislative branch of the government.

Id.

D. Defining the Practice of Law

A serious defect in unauthorized practice of law regulation is the inability of states to create a workable definition of the practice of law. The *Model Rules* do not define the practice of law but rather state in Rule 5.5:

> A lawyer shall not:
> (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
> (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.[66]

Comment 1 to Rule 5.5 states: "The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons."[67] Unfortunately, the states have crafted very broad definitions of the practice of law that are difficult

66. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1998).

67. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 cmt. (1998). Many states have adopted Rule 5.5 without change. *See, e.g.*, ALASKA R. OF PROF. CONDUCT Rule 5.5; RULES OF CONDUCT OF THE STATE BAR OF CAL. Rule 1-300; IND. R. OF PROF. CONDUCT Rule 5.5; KY R. OF SUP. CT. 3.130 (5.5).

to apply.[68] Some states have statutory definitions.[69] For example, a Texas statute defines the practice of law as follows:

> (a) In this chapter the "practice of law" means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.

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68. *See* Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581 (1999); Elizabeth Michelman, *Guiding the Invisible Hand: The Consumer Protection Function of Unauthorized Practice Regulation*, 12 PEPP. L. REV. 1 (1984); Alan Morrison, *Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question*, 4 NOVA L. J. 363 (1980).

69. The statutes of the various jurisdictions are, of course, not identical. A Minnesota statute provides:

> It shall be unlawful for any person or association of persons, except members of the bar of Minnesota admitted and licensed to practice as attorneys at law, to appear as attorney or counselor at law in any action or proceeding in any court in this state to maintain, conduct, or defend the same, except personally as a party thereto in other than a representative capacity, or, by word, sign, letter, or advertisement, to hold out as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor at law, or in furnishing to others the services of a lawyer or lawyers, or, for a fee or any consideration, to give legal advice or counsel, perform for or furnish to another legal services, or, for or without a fee or any consideration, to prepare, directly or through another, for another person, firm, or corporation, any will or testamentary disposition or instrument of trust serving purposes similar to those of a will, or, for a fee or any consideration, to prepare for another person, firm, or corporation, any other legal document, except as provided in subdivision 3.

MINN. STAT. ANN. § 481.02.1 (West 1998). A Michigan statute, in contrast, states in part:

> It is unlawful for any person to practice law, or to engage in the law business, or in any manner whatsoever to lead others to believe that he is authorized to practice law or to engage in the law business, or in any manner whatsoever to represent or designate himself as an attorney and counselor, attorney at law, or lawyer, unless the person so doing is regularly licensed and authorized to practice law in this state. Any person who violates the provisions of this section is guilty of contempt of the supreme court and of the circuit court of the county in which the violation occurred, and upon conviction is punishable as provided by law.

MICH. COMP. LAWS ANN. § 600.916 (West 1996).

> (b) The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.[70]

A new section "c" was added by the Texas Legislature in 1999 and states:

> (c) In this chapter, the "practice of law" does not include the design, creation, publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney. This subsection does not authorize the use of the products or similar media in violation of Chapter 83 and does not affect the applicability or enforceability of that chapter.[71]

Thus, the statute gives a definition but appropriately notes that the judicial branch has the ultimate power to define the practice of law.

Regardless of whether there is a defining statute, case law gives broad definition to the practice of law for unauthorized practice regulation purposes.[72]

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70. TEX. GOV'T CODE ANN. § 81.101 (West 1997).

71. H.B. 1507, 76th Leg. (Tex. 1999). The new statutory language was a response to cases such as *Unauthorized Practice of Law Comm. v. Parsons Tech. Inc.*, No. CIV.A.3: 97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), *rev'd*, 179 F.3d 956 (5th Cir. 1999) (reversed in light of new statutory language).

72. *See, e.g.*, Cleveland Bar Ass'n v. Misch, 695 N.E.2d 244, 247 (Ohio 1998) (stating that the practice of law "includes giving legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are preserved"); Fought & Co., Inc. v. Steel Eng'g & Erection, Inc., 951 P.2d 487, 495 (Haw. 1998).

> [T]he practice of law is not limited to appearing before the courts. It consists, among other things of the giving of advice, the preparation of any document or the rendition of any service to a third party affecting the legal rights . . . of such party, where such advice, drafting or rendition of service requires the use of any degree of legal knowledge, skill or advocacy.

Id. (citing SEN. STAND. COMM. REP. NO. 700 (Hawaii 1955), *available in* 1955 SENATE JOURNAL 661) (ellipses in original); *see also* Holmes, *supra* note 47, at 580 (noting that courts define it on a case-by-case basis).

A recent California court stated:

> It is well settled in California that "practicing law" means more than just appearing in court. '. . . [T]he practice of law . . . includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be [] pending in a court.'

Estate of Condon v. McHenry, 76 Cal. Rptr. 2d 922, 925 (Ct. App. 1998) (quoting People *ex. rel.* Lawyers' Inst. v. Merchants' Protective Corp., 209 P. 363, 365 (Cal. 1922) (omissions and alteration in original)). In *People v. Ring*, 70 P.2d 281 (Cal. App. Dep't

Typical is the statement in *Davies v. Unauthorized Practice Committee of the State Bar*,[73] in which a Texas appellate court defined the practice of law as follows:

> According to the generally understood definition of the practice of law, it embraces the preparation of pleadings and other papers incident to actions of special proceedings, and the management of such actions and proceedings on behalf of clients before judges in courts. However, the practice of law is not confined to cases conducted in court. In fact, the major portion of the practice of any capable lawyer consists of work done outside of the courts. The practice of law involves not only appearance in court in connection with litigation, but also services rendered out of court, and includes the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.[74]

Some courts have applied such definitions liberally and sometimes controversially to find a wide variety of activities to constitute the unauthorized practice of law.[75]

Super. Ct. 1937), the court determined that the *Merchants' Protective* description of the practice of law had been accepted by the legislature and no further definition was needed. *See also* Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1, 14-15 (Cal. 1998), *cert. denied sub nom.* Birbrower, Montalbano, Condon & Frank, P.C. v. ESQ Bus. Servs. Inc., 119 S. Ct. 291 (1998) (quoting *Merchant's Protective*, 209 P. at 363; *Ring*, 70 P.2d at 281).

In deciding specific cases, courts have focused on a variety of factors. *See, e.g.*, Gardner v. Conway, 48 N.W.2d 788 (Minn. 1951) (stating that the existence of the practice of law is determined by "trained legal mind" test); Oregon State Bar v. Security Escrows, Inc., 377 P.2d 334, 338 (Or. 1962) (focusing on the "character" of the task and whether it would require the "exercise of discretion"). *See also* Michael Braunstein, *Structural Change and Inter-Professional Competitive Advantage: An Example Drawn From Residential Real Estate Conveyancing*, 62 MO. L. REV. 241 (1997) (discussing techniques for defining the practice of law in the real estate context); Goudey, *supra* note 52, at 293 (same). *See generally* WOLFRAM, *supra* note 37, at 835-36 (describing types of definitions).

73. 431 S.W.2d 590 (Tex. App..1968).

74. *Id.* at 593.

75. Decisions from Texas courts are perhaps the most far-reaching. *See, e.g.*, Unauthorized Practice of Law Comm. v. Parsons Tech., No. CIV.A.3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999) (finding that selling software was the unauthorized practice of law reversed on basis of newly enacted statute), *rev'd*, 179 F.3d 956 (5th Cir. 1999); Fadia v. Unauthorized Practice of Law Comm., 830 S.W.2d 162 (Tex. App. 1992) (publishing, marketing, and distributing will manual is unauthorized

E. Criticism of the Doctrine

Much of the of the criticism surrounding the regulation of the unauthorized practice of law involves the doctrine's rationale. The legal profession professes to regulate the unauthorized practice of law to protect the public. Yet, the legal profession does not evaluate the need for protection, the public's desire for protection, or the cost of such protection in specific cases or in general.[76] The doctrine's rationale supports the regulation in theory but courts rarely evaluate whether the rationale supports the doctrine in practice. Interestingly, in several cases that specifically addressed the issues of public benefit and regulatory cost, the courts found the regulation to be contrary to the public interest.[77] In *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*,[78] the New Jersey Supreme Court considered the practice of title companies and realtors in residential real estate closings. In holding that these entities could continue to have closings without attorneys present for the sellers or buyers, the court noted:

> While the risks of non-representation are many and serious, the record contains little proof of actual damage to either buyer or seller. Moreover, the record does not contain proof that, in the aggregate, the damage that has occurred in South Jersey exceeds that experienced

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practice of law); Palmer v. Unauthorized Practice Comm. of State Bar, 438 S.W.2d 374 (Tex. App. 1969) (holding that sale of will forms is unauthorized practice of law). *See also* John Council, *No Sale for Unlicensed Cyberlawyer UPLC Prevails in Latest Strike Against Self-Help Publishers*, TEX. LAW., Feb. 1, 1999, at 1; Greg Miller, *A Turf War of Professionals vs. Software*, L.A. TIMES, Oct. 21, 1998, at A1 (discussing Texas's efforts to have software declared to be the unauthorized practice of law).

76. *See generally* Christensen, *supra* note 37, at 201-03 (the legal profession does not consider costs of the regulation nor the need for it from the public perspective); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977) (public interest in justice at low cost is last consideration); Morrison, *supra* note 68, at 369 (costs have not been a relevant consideration); 1994 SURVEY, *supra* note 37, at xvii (noting that if unauthorized practice of law regulation is to be based on public protection, specific harm must be established). *See also* ABA/BNA, LAWYERS MANUAL OF PROFESSIONAL CONDUCT 21:8011 (1984).

77. *See, e.g.*, State Bar v. Guardian Abstract & Title Co., 575 P.2d 943, 949 (N.M. 1978). The court in *Guardian Abstract* stated that:

> There was no convincing evidence that the massive changeover in the performance of this service from attorneys to the title companies during the past several years has been accompanied by any great loss, detriment or inconvenience to the public. The uncontroverted evidence was that using lawyers for this simple operation considerably slowed the loan closings and cost the persons involved a great deal more money.

Id.

78. 654 A.2d 1344 (N.J. 1995).

> elsewhere. In this case, the absence of proof is particularly impressive, for the dispute between the realtors and the bar is of long duration, with the parties and their counsel singularly able and highly motivated to supply such proof as may exist. The South Jersey practice also appears to save money.[79]

The New Jersey court concluded with the following:

> There is a point at which an institution attempting to provide protection to a public that seems clearly, over a long period, not to want it, and perhaps not to need it—there is a point when that institution must wonder whether it is providing protection or imposing its will. It must wonder whether it is helping or hurting the public. We have reached that point in this case.[80]

Further, commentators have noted the problem created by the fact that the legal profession, in regulating the unauthorized practice of law, sets the bounds of the profession's own market monopoly.[81] The obvious conflict of interest taints all unauthorized practice decisions with the flavor of anticompetitve action. A survey by Professor Deborah Rhode reflected that consumers in the late 1970s thought unauthorized practice regulation was "self-protective," "monopolistic," and "greedy."[82] Although time has passed, the same sorts of comments now surround unauthorized practice actions against accounting firms and insurers.[83]

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79. *Id.* at 1346.

80. *Id.* at 1360-61 (footnote omitted).

81. Morgan, *supra* note 76 (noting the self-interest present); Rhode, *supra* note 37, at 97 (noting that "[e]nforcement of sweeping prohibitions has rested with those least capable of disinterested action"); Comment, *supra* note 58, at 162 (noting the self-interest).

82. Rhode, *supra* note 37, at 40.

83. With regard to the Texas's unauthorized practice of law action against several accounting firms, James Turner, the executive director of HALT, an organization advocating legal reform, stated: "There is a territorial reaction when others deliver practices that are cheaper but just as good." Bishop, *Law Panel, supra* note 20, at 1. With regard to the insurer context, an insurance official stated: "It's strictly an economic issue. The defense lawyers can see a significant amount of business going to staff counsel." Baker, *supra* note 5, at 45.

In Kentucky, in 1997, in response to a proposed unauthorized practice opinion requiring attorneys, not nonlawyers, to handle real estate closings, a newspaper editorial stated that "people need all the protection they can get from . . . unscrupulous practices," but that the problems created by nonlawyer participation must be documented. "So far," said the editorial, the Bar Association has not "made a compelling case that would justify the anticompetitive grab." *KBA Hasn't Made its Case for Controlling Real Estate Closings*, LOUISVILLE COURIER-J., Sept. 22, 1997, at A10. The editorial speculated that

III. THE CORPORATE PRACTICE OF LAW DOCTRINE

A. The Rule

The corporate practice of law doctrine states that no corporation can practice law.[84] Writing in 1931, one commentator noted that "this limitation has been regarded as the distinguishing characteristic which makes the practice of law a profession rather than a business."[85] Although some jurisdictions allow corporations to appear for themselves in small claims court[86] and other specific venues[87] without an attorney, generally a corporation cannot appear pro se by way of nonlawyer employees but must always be represented by an attorney.[88]

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the requirement of an attorney would increase the cost of 100,000 closings each year by $175 per closing. Thus, the ultimate question was a $17.5 million a year economic question. *Id.*

84. *See* George R. Bundick, *The Corporate Practice of Law*, CASE & COMMENT, Spring 1931, at 7 ("There is no canon more familiar to the members of the legal profession than the one which prohibits corporations from engaging in the practice of law."); *see also* Lewis, *supra* note 2, at 342.

85. Bundick, *supra* note 84, at 7.

86. *See, e.g.*, ARIZ. SUP. CT. R. 31(4)(g); D.C. CT. APP. R. 49; KY. S. CT. R. 3.020; N.J. R. OF GEN. APP. 6:11. *See also* 705 ILL. COMP. STAT. 220/5 (West 1999); ME. REV. STAT. ANN. tit. 4, § 807(3)(c)(1) (West 1996); MD. CODE ANN., BUS. OCC. & PROF. § 10-206(4) (1998); MO. REV. STAT. § 482.310 (1998); N.H. REV. STAT. ANN. § 503:11 (1999). *See generally* Ron Smith, *Unauthorized Practice of Law Practices in Small Claims Court: Should Anybody Care?*, 33 WASHBURN L.J. 345 (1994).

87. *See, e.g.*, ARIZ. SUP. CT. R. 31(a)(4) (providing many exceptions such as a superior court proceeding regarding general stream adjudication); DEL. SUP. CT. R. 57 (justice of the peace court). *See also* ARK. CODE ANN. § 16-22-211 (d) (Michie 1994) (excluding a "corporation or voluntary association lawfully engaged in the examination and insuring of titles to real property"); COLO. REV. STAT. §13-1-127 (1998) (exception for workers compensation, closely held corporations and such); ME. REV. STAT. ANN. tit. 35-A, § 1317 (West 1996) (exception for public utilities proceedings); MICH. COMP. LAWS ANN. § 450.681 (West 1998). The Michigan statute provides:

> This section shall not apply to any corporation or voluntary association . . . lawfully engaged in the examination and insuring of titles of real property, nor shall it prohibit a corporation or voluntary association from employing an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may be a party, or from employing an attorney or attorneys to render legal aid without charge to any employes of such corporation or voluntary association.

88. *See, e.g.*, Stage Door Dev., Inc. v. Broadcast Music Inc., 698 So. 2d 787, 787 (Ala. Civ. App. 1997); Arkansas Bar Ass'n v. Union Nat'l Bank, 273 S.W.2d 408, 410 (Ark. 1954); Woodford Mfg. Co. v. A.O.Q., Inc., 772 P.2d 652, 654 (Colo. Ct. App. 1988), *cert. denied*, 797 P.2d 748 (Colo. 1990); Oahu Plumbing & Sheet Metal, Ltd. v. Kona Constr., Inc., 590 P.2d 570, 572-73 (Haw. 1979); Kyle v. Beco Corp., 707 P.2d 378, 382 (Idaho 1985); Greer v. Ludwick, 241 N.E.2d 4, 10 (Ill. App. Ct. 1968);

Chief Justice Marshall long ago stated in *Osborn v. United States Bank*,[89] "[a] corporation . . . can appear only by attorney, while a natural person may appear for himself."[90]

In addition, a corporation cannot render legal services to another party. This prohibition applies even when the corporate employee rendering the legal service is a licensed attorney.[91] The Tennessee Court of Appeals, in *Third National Bank v. Celebrate Yourself Productions, Inc.*,[92] stated: "It is well established that a corporation cannot practice law, nor can it employ a licensed practitioner to practice for it."[93] Many states have statutes that expressly forbid corporations from practicing law.[94] An Arkansas statute specifically notes that the fact that within the corporation whose party renders the legal service is an attorney does not cleanse the act.[95] Other states, in prohibiting the practice of

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Hawkeye Bank & Trust Nat'l Ass'n v. Baugh, 463 N.W.2d 22, 26 (Iowa 1990); Land Management, Inc. v. Department of Envtl. Protection, 368 A.2d 602, 604 (Me. 1977); Union Sav. Ass'n v. Home Owners Aid, Inc., 262 N.E.2d 558, 560-61 (Ohio 1970); Plantations Legal Defense Servs., Inc. v. Grande, 403 A.2d 1084 (R.I. 1979); Old Hickory Eng'g & Mach. Co. v. Henry, 937 S.W.2d 782, 785 (Tenn. 1996); West Virginia State Bar v. Earley, 109 S.E.2d 420 (W. Va. 1959). *See also* 19 AM. JUR. 2D *Corporations* § 2172 (1986 & Supp. 1999); ABA/BNA, LAWYERS MANUAL ON PROFESSIONAL CONDUCT 21:8006 (1984).

89. 22 U.S. (9 Wheat.) 738 (1824).

90. *Id.* at 830.

91. *See generally* 7 AM. JUR. 2D *Attorneys at Law* § 109 (1986 & Supp. 1997); Edward B. Bulleit, *The Automobile Clubs and the Courts*, 5 LAW & CONTEMP. PROBS. 22, 23 (1938) (stating that a corporation cannot do indirectly what it cannot do directly).

92. 807 S.W.2d 704 (Tenn. Ct. App. 1990).

93. *Id.* at 706.

94. For example, Hawaii's statute states in part that "[i]t shall be unlawful for any person, firm, association, or corporation to engage in or attempt to engage in or to offer to engage in the practice of law." HAW. REV. STAT. ANN. § 605-14 (Michie 1998); *see* ARK. CODE ANN. § 16-22-211 (Michie 1994); GA. CODE ANN. § 15-19-51(1999); 705 ILL. COMP. STAT. 220/1 (West 1999); LA. REV. STAT. ANN. § 37:213 (West 1999); MASS. GEN. LAWS ANN. ch. 221, § 46 (West 1999); MICH. COMP. LAWS ANN. § 450.681 (West 1998); MINN. STAT. ANN. § 481.02 (West 1990 & Supp. 1999); MO. REV. STAT. § 484.020 (1998); N.H. REV. STAT. ANN. § 311:11 (1995); N.C. GEN. STAT. § 84-5 (1995); S.D. CODIFIED LAWS § 47-13A-10 (Michie 1991); TENN. CODE ANN. § 23-3-103 (1997) (providing that "nor shall any association or corporation engage in the 'practice of law' or do 'law business'"). *See generally* 7 AM. JUR. 2D *Attorneys at Law* § 109 (1986 & Supp. 1997). For a view from the first half of the century, see Note, *The Practice of Law by Corporations*, 44 HARV. L. REV. 1114 (1931) (noting that half the states have such statutes prohibiting the practice of law by corporations). The ban on corporate practice is, at least, logical in light of the nonlawyer rationales regarding unauthorized practice regulation if the corporation is using nonlawyers to practice law.

95. ARK. CODE ANN. § 16-22-211(c) (Michie 1997).

law by corporations, rely on more general statutes that provide that only licensed persons may practice law.[96] Many states also have case law stating the same.[97]

B. *Flawed Logic in the Application of the Corporate Practice of Law Doctrine*

The case law generally abides by the following reasoning. First, courts note that only those with a license may practice law. Second, the courts note that a corporation can never be licensed to practice law because it cannot attain the educational and character requirements necessary for a license.[98] Thus, a

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96. *See, e.g.*, CONN. GEN. STAT. ANN. § 51-88 (West 1997).

97. *See, e.g.*, State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1 (Ariz. 1961); State Bar Ass'n v. Connecticut Bank & Trust Co., 144 A.2d 347(Conn. 1958); Remole Soil Serv., Inc. v. Benson, 215 N.E.2d 678 (Ill. App. Ct. 1966); Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1964); Alco Collections, Inc. v. Poirier, 680 So. 2d 735 (La. Ct. App. 1996); Bay County Bar Ass'n v. Finance Sys., Inc., 76 N.W.2d 23 (Mich. 1956); State *ex rel.* Freebourn v. Merchants' Credit Serv., Inc., 66 P.2d 337 (Mont. 1937); State *ex rel.* Norvell v. Credit Bureau, 514 P.2d 40 (N.M. 1973); Gardner v. North Carolina State Bar, 41 S.E.2d 517 (N.C. 1986); Third Nat'l Bank v. Celebrate Yourself Prods., Inc., 807 S.W.2d 704 (Tenn. Ct. App. 1990); Nelson v. Smith, 154 P.2d 634 (Utah 1944). *See also* Rozmus v. Rozmus, 595 N.W.2d 893 (Neb. 1999) (holding that corporation lacked standing in matter in which its attorney- employees had been disqualified due to the corporate practice of law doctrine); D.C. CT. APP. R. 49; OKLA. STATE BAR R. art. 2, § 7(a); OR. RULE C.P.R. DR 1-104.

98. In *In re Co-operative Law Co.*, 92 N.E. 15 (N.Y. 1910), the court stated:

> The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose. . . . No one can practice law unless he has taken an oath of office and has become an officer of the court, subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension or removal. It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in.

Id. at 16. "A corporation, as such, has neither education, nor skill, nor ethics." State v. Bailey Dental Co., 234 N.W. 260, 262 (Iowa 1931); *see also* American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568, 571 (Ky. 1996) (stating that "'a corporation [ ] cannot obtain license to practice law, since it is wholly incapable of acquiring the educational qualifications necessary to obtain such license, nor can it possess in its corporate name the necessary moral character required therefor'") (quoting Hobson v. Kentucky Trust Co., 197 S.W.2d 454 (Ky. 1946))); State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1, 10 (Ariz. 1961) (holding that the "extensive and rigid requirements which must be met to hold a license to practice law" cannot be satisfied by a corporation). *See generally* H. Bradley Jones, *The Professional Corporation*, 27 FORDHAM L. REV. 353, 354-55 (1958); Joseph N. Morency, Jr., *Corporations—Doing Professional Service*

corporation cannot practice law. Typical is the Connecticut Supreme Court's statement in *State Bar Ass'n v. Connecticut Bank & Trust Co.*:[99]

> The practice of law is open only to individuals proved to the satisfaction of the court to possess sufficient general knowledge and adequate special qualifications as to learning in the law and to be of good moral character. . . . Only a human being can conform to these exacting requirements. Artificial creations such as corporations or associations cannot meet these prerequisites and therefore cannot engage in the practice of law.[100]

The courts then state that even if the employee of the corporation rendering the legal service is a licensed attorney, that attorney-employee is an agent of the corporation such that the corporation is practicing law. The corporation is not given the benefit of the employee's license, however, so the corporation is practicing law without a license,[101] and the attorney-employee is aiding the unauthorized practice of law.[102]

The logic of this analysis regarding attorney-employee situations is bothersome at best. The corporation suffers the burden of the attorney-employee's actions but cannot benefit from the attorney-employee's licensure. In the context of the parallel doctrine of the corporate practice of medicine,

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Through Others, 45 MICH. L. REV. 885, 886 (1947); Hicks & Katz, *supra* note 52, at 69, 72; Lewis, *supra* note 2, at 343-44.

99. 140 A.2d 863 (Conn. 1958).

100. *Id.* at 870.

101. *See Nelson v. Smith*, 154 P.2d 634 (Utah 1944), in which the court stated:

> The fact that the defendants in some instances employ a regularly licensed attorney to prepare necessary legal papers and conduct the trial of a suit does not make their conduct legal. One cannot do through an employee or an agent that which he cannot do by himself. If the attorney is in fact the agent or employee of the lay agency, his acts are the acts of his principal or master. . . . If the attorney be in fact the agent or employee of a layman, his act is that of the layman (his principal). Such principal would be engaging in the illegal practice of law if he through such an agent rendered legal services to a third party. . . .

Id. at 640; *see also* State Bar Ass'n v. Connecticut Bank & Trust Co., 140 A.2d 863, 870-71 (Conn. 1958) ("As it cannot practice law directly, it cannot do so indirectly by employing competent lawyers to practice for it"); *In re* Co-op. Law Co., 92 N.E. 15, 16 (N.Y. 1910) ("As it cannot practice law directly, it cannot indirectly by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate.").

102. In the criminal context, courts have held that an attorney, as an agent of the corporation, cannot be deemed a co-conspirator of the corporation because an agent and the corporation are deemed to be one entity for purposes of conspiracy law. *See, e.g.*, Heffernan v. Hunter, 189 F.3d 405 (3d Cir. 1999).

commentators have noted the oddity of this reasoning. One commentator has noted that such analysis is like saying that a trucking company cannot run the business of trucking because the company cannot obtain a license to drive trucks.[103] Another criticism voiced in the medical context is that the medical licensure statutes prohibit practice by a "person" without a license. According to the courts, only an individual, meaning "person," may be licensed. A consistent interpretation of "person" would conclude that only an individual can violate the statute. Yet, corporations are found to have violated the statute.[104] This issue does not present itself as clearly in the corporate practice of law doctrine because often there is not only a licensure statute but also an express statement that corporations cannot practice law.[105]

C. Rationales and Their Weaknesses

The traditional rationale for regulation of the unauthorized practice of law, competency,[106] is not an issue when the attorney rendering the legal service is

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103. *See* Mark A. Hall, *The Corporate Practice of Medicine, in* HEALTH CARE CORPORATE LAW 3-20 (Mark A. Hall & Justin G. Vaughan eds., 1994) [hereinafter Hall, *The Corporate Practice*]; Mark Hall, *Institutional Control of Physician Behavior: Legal Barriers to Health Care Cost Containment*, 137 U. PA. L. REV. 431 (1988) [hereinafter Hall, *Institutional Control*]; Andre Hampton, *Resurrection of the Prohibition on the Corporate Practice of Medicine: Teaching Old Dogma New Tricks*, 66 U. CIN. L. REV. 489, 497 (1998); Lewis, *supra* note 2, at 343-44.

104. *See* Hampton, *supra* note 103, at 496-97; Alanson W. Willcox, *Hospitals and the Corporate Practice of Medicine*, 45 CORNELL L. Q. 432, 437-39 (1960); Jeffrey R. Chase-Lubitz, Note, *The Corporate Practice of Medicine Doctrine: An Anachronism in the Modern Health Care Industry*, 40 VAND. L. REV. 445, 466 (1987); Adam M. Freiman, Comment, *The Abandonment of the Antiquated Corporate Practice of Medicine Doctrine: Injecting a Dose of Efficiency into the Modern Health Care Environment*, 47 EMORY L.J. 697, 704 (1998).

105. *See, e.g.*, MINN. STAT. ANN. § 481.02(2) (West 1998). *See also* Morency, *supra* note 98, at 886.

106. Another area in which competence has less effect is in the context of the problem of the multi-jurisdictional practice of law. *See generally* GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 5:5:100, at 812, § 5:5:203, at 817 (2d ed. 1998) (discussing the multi-jurisdictional morass). Because states require that the attorneys practicing law in the individual states have a license from that state or otherwise have specific authorization of a court, attorneys licensed in other states cannot take any of the actions stated in the definition if those actions would be deemed to be within the target state. In fact, the *Model Rules*, which govern attorney conduct in the majority of United States jurisdictions, state that a lawyer cannot "practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5(a) (1998); *see* Carol A. Needham, *The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice*, 36 S. TEX. L. REV. 1075 (1995); John F. Sutton, Jr., *Unauthorized Practice of Law by Lawyers: A Post-Seminar Reflection on "Ethics and*

licensed in the appropriate state. While such an attorney would not practice law unauthorizedly by representing a third party if not employed by the corporation, the activity is the unauthorized practice of law if the attorney is an employee. The corporate practice of law doctrine when applied to corporations rendering legal services to third parties through attorney-employees is rationalized as a protection against corporate infringement on the exercise of independent judgment of the attorney and the concomitant damage to the whole of the attorney-client relationship that follows from such infringement.[107] That damage includes the creation of substantial conflicts of interest.

The rationale of protecting the independence of the attorney and thus the attorney-client relationship centers on the personal nature of that relationship.[108] The reasoning is that the attorney-client relationship of trust and confidence cannot exist when the corporate employer controls the attorney. An early and often-quoted statement of this position occurred in *In re Co-Operative Law Co.*,[109] in which the New York Court of Appeals, in 1910, stated:

> The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation, and not to the directions of the client. . . . [The attorney's] master would not be the client but the corporation, conducted it may be wholly by laymen, organized simply to make money and not to aid in the administration of justice which is the highest function of an attorney and counselor at law. . . . There would be no remedy by attachment or disbarment to protect the public from imposition or fraud, no stimulus to good conduct from the traditions of an ancient and honorable profession, and no guide except the sordid purpose to earn money for stockholders.[110]

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the Multijurisdictional Practice of Law," 36 S. TEX. L. REV. 1027 (1995); Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665 (1995); *see also* Carol A. Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 U. KAN. L. REV. 453 (1997).

107. *See, e.g.*, American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568 (Ky. 1996); *In re* Co-Op. Law Co., 92 N.E. 15 (N.Y. 1910).

108. Christensen, *supra* note 37, at 187-89; Jones, *supra* note 98, at 354-55; Morency, *supra* note 98, at 886; 7 AM. JUR. 2D *Attorneys at Law* § 111 (1986 & 1999 Supp.); *see also* Hicks & Katz, *supra* note 52, at 72.

109. 92 N.E. 15 (N.Y. 1910).

110. *Id.* at 16.

Thus, this rationale focuses specifically on the idea that an attorney employed by a corporation but representing another client would have his or her independence of judgment impermissibly constrained and would experience significant conflicts[111] as a result of the employer corporation exercising employer-like control.[112]

Four questionable assumptions support this rationale for prohibiting the corporate practice of law when an attorney renders the legal service. First is the assumption that attorney-employees are not independent or capable of independence. Second is the assumption that outside attorneys are independent. Third is the assumption that outside attorneys are not profit-motivated. Fourth is the assumption that profit motive by definition subverts ethical behavior.

First, the doctrine is supported by the assumption that attorney-employees of corporations could not possibly exercise independent professional judgment in representing a party other than the employer corporation and that attorney employees are incapable of discerning when, according to the rules of ethics dealing with conflicts and independence of judgment, the attorney could not continue ethically with the representation of a third party. In *In re Co-operative Law Co.*,[113] the court stated that in-house counsel's "master would not be the client but the corporation."[114] A more recent example of this assumption is found in *American Insurance Ass'n v. Kentucky Bar Ass'n*,[115] in which the Kentucky Supreme Court, in reviewing the issue of whether an insurer's

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111. *See, e.g., In re* Opinion Number 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344, 1355-56 (N.J. 1995) (reasoning not a problem for not-for-profit corporation); American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568, 571 (Ky. 1996) ("In fact, no situation is more illustrative of the inherent pitfalls and conflicts therein than that in which house counsel defends the insured while remaining on the payroll of the insurer.").

112. For another example of this sort of reasoning, see *Richmond Ass'n of Credit Men v. Bar Ass'n of the City of Richmond*, 189 S.E. 153 (Va. 1937). *See also* Cal. Eth. Op. 1987-91 (1987), *available in* 1987 WL 109707 ("The rationale prohibiting a corporation from retaining attorneys to provide legal services to third parties was premised on the personal relationship of trust and confidence between attorney and client which would be undermined by a corporation undertaking to furnish its members with legal advice, counsel and professional services.").

> But even in the absence of such direction by the executives the result would be the same. The attorney in preparing such papers does so as the agent of the corporation by whom he is employed. His first obligation of loyalty is to the corporation. His acts are the acts of the corporation, and even though the corporation acts through an attorney, it is nevertheless practicing law.

Hexter Title & Abstract Co., Inc. v. Grievance Comm., 179 S.W.2d 946, 953-54 (Tex. 1944).

113. 92 N.E. 15 (N.Y. 1910).

114. *Id.* at 16.

115. 917 S.W.2d 568 (Ky. 1996).

attorney-employee could represent insureds, referred to the "Pollyanna postulate that house counsel will continue to provide undivided loyalty to the insured."[116]

These courts assume that attorney-employees are not capable of recognizing when their own independence of professional judgment is constrained impermissibly by the employer corporation. These courts further assume that the attorney-employee will sacrifice the client in the interest of the employer corporation. The fallacy of these assumptions is obvious. There is no need to protect the public from these attorneys. They are governed by the same ethical rules, laws, and fiduciary responsibilities as any other attorneys. In *In re Weiss, Healey & Rea*,[117] the New Jersey Supreme Court stated: "These are not second class lawyers; these are first class lawyers who are delivering legal services in an evolving format."[118]

Attorney-employees were not common in the early portion of the twentieth century,[119] when the unauthorized practice of law regulation regarding corporations was developed and when courts decided cases such as *In re Co-Operative Law Co.* The legal profession of the time viewed in-house attorneys as inferior lawyers. Attorney-employees were thought of as "kept" attorneys.[120] The opinions of courts and regulatory bodies of the time evidenced the beliefs of the time. In addition, the idea of a set of ethics rules for lawyers was relatively new,[121] as were educational and licensing requirements for lawyers.[122]

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116. *Id.* at 571. The Kentucky Supreme Court referred to in-house counsel in the context of one of the insurers' arguments as follows: "[T]he untapped resource of 'competent, trained and scrupulous' in-house insurance defense counsel." *Id.* at 571.

117. 536 A.2d 266 (N.J. 1988).

118. *Id.* at 269.

119. *See* Arthur Medow, *Organization of a "Large" Corporate Law Department*, 34 BUS. LAW. 825, 825 (1979); C. Barry Schaefer, *Proposed Model Rule 5.4: Is It Necessary for Corporate Staff Counsel?*, 15 CREIGHTON L. REV. 639, 640 n.3 (1982).

120. *See* Walter B. Davis, *Reflections of a Kept Lawyer*, 53 A.B.A. J. 349 (1967) (noting this view); *see also* ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATIONS OF THE LARGE LAW FIRM 56 (1988) (discussing opinions of attorneys); Jeffrey S. Slovak, *The Ethics of Corporate Lawyers: A Sociological Approach*, 1981 AM. BAR FOUND. RES. J. 753, 772 ("second class citizens" of the legal profession); Jeffrey S. Slovak, *Giving and Getting Respect: Prestige and Stratification in a Legal Elite*, 1980 AM. BAR FOUND. RES. J. 31 (same); Theodore J. Schneyer, *Professionalism and Public Policy: The Case of House Counsel*, 2 GEO. J. LEGAL ETHICS 449, 481 (1988) (same). One attorney, discussing his career noted:

> At that point in time, it was the late 60s, I got a sense in just talking to people that in-house departments were going to change their focus a bit . . . [to] build up . . . whereas, historically, they had been conduits to outside law firms and not done a lot of the real legal work.

Laurel-Ann Dooley, *Seeing the Forest and the Trees*, NAT'L L.J., Sept. 13, 1999, at B1.

121. The ABA adopted the original *Canons of Professional Ethics* in 1908. The *Canons* were generally aspirational. *See* HAZARD & HODES, *supra* note 106, § 201.

122. *See generally* SUSAN K. BOYD, THE ABA'S FIRST SECTION 28-36 (1993) (ABA

The assumption about attorney-employees reflected in the New York court's statement in *In re Co-Operative Law Co.* must be considered in the historical context of its origin.

The corporate practice of law doctrine might be valid if everything in the practice of law were the same as it was in 1910. The role and position of attorney-employees is clearly not the same. A large percentage of the practicing bar now practices in-house.[123] Not only have the numbers of attorney-employees increased but in-house attorneys also have gained prestige in the last twenty years. Corporations now hire attorneys to do very sophisticated legal work.[124] Attorneys with much power, experience, and prestige commonly move in-house.[125] Cases and ethics opinions which assume that attorney-employees are

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Section of Legal Education and Admissions to the Bar 1993) (discussing the development of standards).

123. *See Kirkpatrick & Lockhart LLP, 200 Largest Legal Departments*, CORP. LEGAL TIMES, Aug. 1999, at 64 (noting that some corporations have hundreds of in-house attorneys).

124. For a more extended discussion of the current role for in-house attorneys, see Grace M. Giesel, *The Business Client is a Woman: The Effect of Women as In-House Counsel on Women in Law Firms and the Legal Profession*, 72 NEB. L. REV. 76, 789-94 (1993); Grace M. Giesel, *The Ethics of Employment Dilemma of In-House Counsel*, 5 GEO. J. LEGAL ETHICS 535, 541-45 (1992); Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479 (1989); *see also This Top Lawyer Keeps on Trucking*, NAT'L L.J., Aug. 23, 1999, at B1 (noting that in-house attorneys handle almost everything); Henry W. Ewalt & Glen D. Nager, *Co-Counseling with Outside Counsel Works for Westinghouse*, CORP. LEGAL TIMES, Sept. 1994, at 35 (noting that in-house attorneys are paired with outside counsel in litigation and participate in trial); Angela Ward, *Turner Broadcasting's Korn Tuned in to Growth Company's Rapid Expansion Keeps Legal Department Busy*, CORP. LEGAL TIMES, Dec. 1994, at 16 (stating that company's in-house attorneys handle complex transactions; farm out only the "very small things").

125. *See, e.g.*, Peter Aronson, *Watchful Eyes In-House Attorneys Join Health Care Firms as Compliance Officers*, NAT'L L.J., Sept. 13, 1999, at A1 (Wolf, Block partner moves in-house); Kelley R. Bowers, *After 28 Years at the Firm, Marriott GC Finds Room to Grow*, CORP. LEGAL TIMES, Apr. 1997, at 30 (former managing partner of O'Melveny & Myers says that more lawyers will move in-house due to attractiveness of the position); *Her Polish Has Helped Apple Regain Its Shine*, NAT'L L.J., Aug. 30, 1999, at B1 (route to the general counsel's office included a stint at respected firms). A classic example of a corporation seeking the best from the private bar is General Electric's hiring in the late 1980s and early 1990s. *See* Anthony Borden, *Ben Heineman's In-House Revolution*, AM. LAW., Sept. 1989, at 100 (discussing generally the plan to bring in the best); Steven Brill, *Miserable on the Outside, Happy on the Inside*, AM. LAW., Sept. 1990, at 5 (GE attorneys include partners from elite firms such as Sidley & Austin; Morgan, Lewis & Bockius; Williams & Connolly; Dewey, Ballentine and others); Audrey Duff, *The Long Arm of General Electric*, AM. LAW., Dec. 1990, at 38 (GE hired Dewey, Ballentine partner with international expertise); D. M. Osborne, *The Sidley-Heineman Connection*, AM. LAW., May 1990, at 33 (GE hired Sidley & Austin partner with environmental regulatory expertise); *see also* Grace M. Giesel, *The Kentucky Ban on Insurers' In-House*

lesser attorneys, not capable of guarding their independence of professional judgment, reflect an outdated impression of the attorney's role in the legal profession and society.

A second assumption closely tied to the first is that outside attorneys always exercise independent judgment and protect that judgment, and that outside counsel will appropriately recognize and prevent impermissible conflicts between entities with divergent interests. A stark example of the fallacy of the assumption is an insurance defense attorney who receives a large percentage of his or her work from one insurer. Such an attorney represents third parties, the insureds, but does not wish to displease the insurer. This attorney may be in an ethical position no different from an attorney-employee defending insureds. Yet, the corporate practice of law doctrine would prohibit the attorney-employee representation but not the outside counsel representation. These situations beg the question of the significance of the formalistic distinction between an employee and an outside attorney. Even in contexts in which an attorney's relationship with an outside party is not so obvious, an attorney's desire to retain a valuable client can threaten to impermissibly interfere with the lawyer's representation of another client.[126]

A third assumption is that outside attorneys are impervious to profit motive.[127] Attorneys in traditional firms as well as professional corporations and limited liability entities have another entity capable of exercising control over the attorney's judgment and capable of creating a conflict of interest for the attorney—the firm itself. Many commentators have noted that the practice of law has become a business.[128] Anyone aware of the conduct of today's law firms cannot deny that firms, like corporations, strive to create the largest possible profit.[129] The large numbers of people involved in firms create an impersonal, profit-driven environment as exists in lay corporations. Professional corporations for lawyers can be defended on the basis that any entity made up of lawyers is permissible because ethics will be kept foremost within the entity.

Attorneys Representing Insureds, 25 N. KY. U. L. REV. 365, 381-84 (1998).

126. *See* Baker, *supra* note 5, at 45 (discussing insurers' argument that outside attorneys may have the same conflict).

127. *Conference of Delegates of State and Local Bar Associations*, 4 A.B.A. J. 14, 19 (1920) (hereinafter *Conference*) (corporation is a profit-maximizer; an attorney is not).

128. *See generally* Pearce, *supra* note 27, at 1229-30; David G. Oedel, *Deming, TQM and the Emerging Managerial Critique of Law Practice*, 37 ARIZ. L. REV. 1209 (1995); S.S. Samuelson & L.J. Jaffe, *A Statistical Analysis of Law Firm Profitability*, 70 B.U. L. REV. 185 (1990); William Kummel, Note, *A Market Approach to Law Firm Economics: A New Model for Pricing, Billing, Compensation, and Ownership in Corporate Legal Services*, 1996 COLUM. BUS. L. REV. 379 (1996).

129. *See* Marc S. Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and Growth of Large Law Firms*, 76 VA. L. REV. 747, 752 (1990) (more openly commercial and profit-oriented).

The reality may be quite different as the entity takes on a life of its own.[130] Even without the influence of an entity, an outside attorney may be as profit-conscious and profit-driven as any Fortune 500 corporation.

The fourth questionable assumption underlying the corporate practice of law doctrine is that any entity geared toward profit cannot also promote ethical representation. Professor Russell Pearce has dubbed this notion the "Business-Profession dichotomy."[131] This assumption may or may not be true. It certainly seems possible that corporations could offer for-profit services to third parties by way of attorney-employees. Any unethical behavior would certainly subject the attorney to discipline. In addition, such corporations, to the extent they practice law, could be subject to registration with the bar and discipline for unethical conduct by their attorney-employees. The point is that ethics and profit can and do coexist. They do in many law firms. Why can profit and ethics not coexist in other entity forms?

D. The Taint of Anticompetitive Motive

While the taint of anticompetitive motive covers all unauthorized practice of law regulation, it seems especially strong when the competitor is a corporation. In the early days of the regulation of the unauthorized practice of law, the targets were often corporate entities.[132] In fact, the first true burst of unauthorized practice of law regulation occurred when the New York County Lawyers Association formed an Unauthorized Practice of Law Committee to

130. *See* Morency, *supra* note 98, at 889 ("Is it so clear that a 'law factory' or large partnership will maintain the close personal relationship any better than will a small corporation?").

131. Pearce, *supra* note 27, at 1230.

132. *See, e.g., In re* Lawyers Co-op., 92 N.E. 15 (N.Y. 1910); *In re* Associated Lawyers Corp., 119 N.Y.S. 77 (1909); *see also* George W. Bristol, *The Passing of the Legal Profession*, 22 YALE L.J. 590 (1913) (discussing the corporation as competition and saying that corporations practicing law is why attorneys do not pay bar dues); Roy D. Simon, Jr., *Fee Sharing Between Lawyers and Public Interest Groups*, 98 YALE L.J. 1069, 1078 (1989) (noting that unauthorized practice regulation was a response to the emergence of giant corporations offering legal services); I. Maurice Wormser, *Corporations and the Practice of Law*, 5 FORDHAM L. REV. 207 (1936) (discussing the New York activity).

deal with trust company and title company incursions.[133] The phenomenon has been described as follows:

> [T]he business corporation posed a threat to lawyers both because corporate business tended to develop legal needs that lawyers seemed not yet able to meet, and because corporations had, or could develop, the capacity to compete effectively with lawyers in providing traditional kinds of legal services.[134]

This attitude has not shifted over the years and occasionally courts and commentators make statements reflecting fears of competition.[135] For example, in *Hexter Title & Abstract Co. v. Grievance Committee*,[136] the Texas Supreme Court made the following comment about the possibility of corporations practicing law: "Ultimately most legal work, other than the trial of cases in the courthouse, would be performed by corporations and others not licensed to practice law. The law practice would be hawked about as a leader or premium to be given as an inducement for business transactions."[137]

An article written in the midst of the debate over whether attorneys should be allowed to practice in the form of professional corporations asked: "What lawyer in private practice would welcome such corporate competition?"[138] The depth of feeling concerning the corporate practice of law is apparent in the author's later comment that corporations "appear to encircle the embattled private practitioner of law like a mythical crop of dragon's teeth."[139] And, in

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133. *See Conference*, *supra* note 127, at 19 (noting that corporations take business from lawyers); *Foreword*, *supra* note 44, at 2 (noting that in the 1910s lawyers began to worry about unauthorized practice of law and "it was corporate practice of law that was considered to be particularly menacing"); Lewis, *supra* note 2, at 351 (providing that incursions by corporations were first felt before World War I); Edwin M. Otterbourg, *Collection Agency Activities: The Problem From the Standpoint of the Bar*, 5 LAW & CONTEMP. PROBS. 35, 35 (1938) (discussing collection agencies as a public menace prior to the formation of the New York County committee).

134. Christensen, *supra* note 37, at 178.

135. *See, e.g.*, Bundick, *supra* note 84, at 7 (corporations take money away from attorneys); Charles Leviton, *Automobile Club Activities: The Problem From the Standpoint of the Bar*, 5 LAW & CONTEMP. PROBS. 11, 19 (1938) (noting that lawyers are on relief because of corporations taking business); Hicks & Katz, *supra* note 52, at 70 ("Lay agencies today actively competing with the legal profession include trust, title and insurance companies, banks, tax experts, accountants, collection agencies, notaries and real estate brokers.").

136. 179 S.W.2d 946 (Tex. 1944).

137. *Id.* at 953.

138. Jones, *supra* note 98, at 353.

139. Jones, *supra* note 98, at 353-54. Regarding the incursion by corporations, Hicks & Katz stated:

> The immediate effect would be to deprive lawyers of the most lucrative part

Hobson v. Kentucky Trust Co.,[140] Kentucky's highest court stated that the private attorney plaintiff alleged that the trust company was practicing law "without being licensed or sworn so to do, and in unlawful competition with the plaintiffs."[141]

Indeed, one of the issues tangled up in this regulation is that in the first two-thirds of the century, lawyers could not advertise but corporations could. Since nonlawyer entities such as corporations could advertise, they were perceived as having a competitive advantage in the market for legal services. It was, perhaps, this advertising that motivated complaints that corporations were practicing law unauthorizedly.[142]

More recent evidence exists as well. The assistant chairman of the insurance committee of the Defense Research Institute, a group of 21,000 defense attorneys, stated recently: "We view staff counsel as competition, and no one likes competition."[143] A 1981 Kentucky Unauthorized Practice Opinion tellingly stated: "if corporations were permitted to offer as inducement legal services for the public in connection with their business, the end result would be that all legal work other than actual courtroom trial of cases would be performed by corporations."[144]

> of their present practice. Strict economic necessity, plus the instinct of self-preservation, would probably force many attorneys to abandon their professional ideals. The resulting cut-throat competition would deleteriously affect the administration of justice, thus defeating the aims of both laymen and lawyers.

Hicks & Katz, *supra* note 52, at 71.

140. 197 S.W.2d 454 (Ky. 1947).

141. *Id.* at 456.

142. States maintained bans on attorney advertising until the United States Supreme Court, in a line of cases, made clear that such blanket prohibitions could not withstand constitutional muster. *See* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988); Zauderer v. Office of Discipline Counsel Supreme Ct., 471 U.S. 626 (1985); *In re* R.M.I., 455 U.S. 191 (1982); *In re* Primus, 436 U.S. 412 (1978); Onral v. Ohio State Bar Ass'n, 486 U.S. 447 (1978); Bates v. State Bar, 433 U.S. 350 (1977).

For cases exhibiting this link between advertising and unauthorized practice of law activity, see *Frazee v. Citizens Fidelity Bank & Trust Co.*, 393 S.W.2d 778 (Ky. 1964) (the plaintiff complained that the bank was unauthorizedly practicing law and was advertising and soliciting business when attorneys could not). *See also* Bristol, *supra* note 132, at 592, 608-09 (noting that corporations can solicit business; attorneys cannot); Bulleit, *supra* note 91, at 23 (stating that a practical objection is that corporations solicit business for attorneys affiliated with them and use "commercial methods" which private attorneys cannot use); Bundick, *supra* note 84, at 7 (noting that corporations are practicing law and advertising that they can); *Conference*, *supra* note 127, at 27 (noting that trust companies advertise and lawyers cannot reply); Leviton, *supra* note 135, at 12 (noting that clubs advertise heavily and that such was shocking "to one schooled in the traditions of the profession").

143. Baker, *supra* note 5, at 45.

144. Kentucky Unauthorized Practice Op. U-32 (1981).

Further evidence of the competition motive with regard to corporations can be found in the comments made in 1983 when the ABA House of Delegates considered a version of Rule 5.4 of the *Model Rules* that did not restrain nonlawyer involvement in law practice. One participant in the debate remarked:

> You each have a constituency. How will you explain to the sole practitioner who finds himself in competition with Sears why you voted for this? How will you explain to the man in the mid-size firm who is being put out of business by the big eight law [sic] firms? How will you explain that?[145]

Thus, an anticompetitive motive is sometimes explicit when the question involves actions by corporations. Given the obvious unsavoriness of such comments, many who share the view may refrain from stating such a view but may be governed by it anyway.

IV. OTHER OCCURRENCES NEGATIVELY AFFECTING THE DOCTRINE

A. Lawyers Practicing as Professional Corporations

Before the early 1960s, sole proprietorships and partnerships were the only available form of organization for attorneys and other professionals.[146] Until that time, the corporate practice of law doctrine was believed to prohibit attorneys from practicing in a corporate form. Even if the corporation was made up of attorneys only, the corporation, a nonlawyer, would be practicing law if the corporation's agents, the attorneys employed by the corporation, practiced law. The fact that the corporation's shareholders were all attorneys did not affect the analysis since the corporate entity could not be licensed to practice law even if all of its shareholders and employees were licensed to practice law.[147]

Beginning in the late 1950s and continuing throughout the 1960s, lawyers sought to change this universally accepted rule. Fueled by the desire of lawyers to be allowed to enjoy the more favorable federal tax treatment provided to corporations with regard to profit-sharing plans and pension plans, attorneys throughout the United States lobbied to be permitted to form and practice law

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145. Andrews, *supra* note 18, at 595 n.107 (quoting Unedited Transcript of the ABA House of Delegates Session 28, 37, 45-48 (Feb. 8, 1983)); *see also* Simon, *supra* note 132, at 1082-83.

146. *See* Jennifer J. Johnson, *Limited Liability for Lawyers: General Partners Need Not Apply*, 51 BUS. LAW. 85, 92 (1995); Stephen E. Kalish, *Lawyer Liability and Incorporation of the Law Firm: A Compromise Model Providing Lawyer-Owners with Limited Liability and Imposing Broad Vicarious Liability on Some Lawyer-Employees*, 29 ARIZ. L. REV. 563, 563 (1987); Thill, *supra* note 60, at 1146-47.

147. *See, e.g.*, State *ex rel.* Green v. Brown, 180 N.E.2d 157 (Ohio 1962) (forbidding attorneys from using a corporate form).

in professional corporations.[148] The proponents of professional corporations argued that because the owners of the professional corporation would, by definition, be attorneys, the dangers sought to be prevented by the corporate practice of law doctrine would not exist. The attorneys who made up the professional corporation would be skilled and competent, and the danger that a nonlawyer corporation would impermissibly interfere with the attorneys' independence of judgment would not exist because the professional corporation would be "no more an 'intermediary' than a professional partnership or association requiring duties among partners or associates as well as duties toward the patient or client."[149]

Those opposing allowing attorneys to practice in professional corporations argued the traditional reasons used to justify the rule that corporations cannot practice law: that a corporation is not capable of maintaining a personal attorney-client relationship; that the lawyer will owe his or her first loyalty to the employer, not the client; that the corporation will interfere with the attorney-client relationship and the lawyer's duties to the client; that limited liability is inappropriate; and that a corporation cannot be licensed.[150] The Florida Supreme Court, in *In re the Florida Bar*,[151] stated:

> Traditionally, prohibition against the practice of a profession through the corporate entity has been grounded on the essentially personal relationship existing between the lawyer and his client, or the doctor and his patient. This necessary personal relationship imposes upon the lawyer a standard of duty and responsibility which does not apply in the ordinary commercial relationship. The non-corporate status of the lawyer was deemed necessary in order to preserve to the client the

148. *See In re* Florida Bar, 133 So. 2d 554, 555-56 (Fla. 1961) (stating that "the principal reason for this change in attitude" is taxes); *In re* Bar Ass'n, 516 P.2d 1267, 1268 (Haw. 1977) (stating that the "principal motive in seeking permission for its members to incorporate is to enable the attorneys of this State to qualify for the federal tax advantages which would accompany such incorporation"); *In re* Rhode Island Bar Ass'n, 263 A.2d 692, 695 (R.I. 1970) (allowing professional corporations for the tax benefits); *see also* Kalish, *supra* note 146, at 564; Martin C. McWilliams, Jr., *Limited Liability Law Practice*, 49 S.C. L. REV. 359, 363 (1998); David Paas, *Professional Corporations and Attorney-Shareholders: The Decline of Limited Liability*, 11 J. CORP. L. 371, 372-74 (1986); Jones, *supra* note 98, at 362-71; Michael J. Lawrence, Note, *The Fortified Law Firm: Limited Liability Business and the Propriety of Lawyer Incorporation*, 9 GEO. J. LEGAL ETHICS 207, 211 (1995); Note, *Professional Corporations and Associations*, 75 HARV. L. REV. 776 (1962).

149. Jones, *supra* note 98, at 362.

150. *See In re Florida Bar*, 133 So. 2d at 557; *In re Bar Ass'n*, 516 P.2d at 1268; *In re Rhode Island Bar Ass'n*, 263 A.2d at 696-97; *Green*, 180 N.E.2d at 158; *see also* Jones, *supra* note 98, at 354-55; Kalish, *supra* note 146, at 563; Thill, *supra* note 60, at 1148.

151. 133 So. 2d 554 (Fla. 1961).

> benefits of a highly confidential relationship, based upon personal confidence, ability, and integrity.[152]

The Rhode Island Supreme Court, in *In re Rhode Island Bar Ass'n*,[153] stated:

> The usual reasons put forth against the practice of law as a corporate entity are that the relationship of attorney and client is one of trust and confidence in the highest degree, that such a relationship calls for strict regulation of the admission of attorneys so as to insure that only persons having the qualifications of character, integrity and learning shall be permitted to practice, that only natural persons can conform to such exacting requirements, and that when an attorney is employed by a corporation his first allegiance is to his corporate employer and not to his client.[154]

Eventually the attorney's tax benefit argument ruled the day and states began allowing attorneys to form professional corporations.[155] As the Florida Supreme Court stated in *In re the Florida Bar*:[156]

> If a means can be devised which preserves to the client and the public generally, all of the traditional obligations and responsibilities of the lawyer and at the same time enables the legal profession to obtain a benefit not otherwise available to it, we can find no objection to the proposal.[157]

Allowing attorneys to practice in professional corporations was a rather drastic change to the legal profession and a significant modification to the principle that a corporation cannot practice law, a principle that, until the professional corporation movement, was thought to be an irrefutable truth. Perhaps the change was so swift and relatively easy because it was attorneys who wanted the change so that they would no longer be deprived of favorable tax treatment.

The action of the ABA significantly aided the approval of professional corporations. In Formal Opinion 303, issued in 1961, the ABA approved of professional corporations for attorneys with certain restrictions. First, the lawyer rendering the service must remain personally liable to the client. Second, any restrictions on the liability of others must be made apparent to the client. Third,

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152. *Id.* at 556.

153. 263 A.2d 692 (R.I. 1970).

154. *Id.* at 696.

155. *See generally* Kalish, *supra* note 146, at 563-64; Paas, *supra* note 148, at 372-73.

156. 133 So. 2d 554 (Fla. 1961).

157. *Id.* at 556; *see also In re* Rhode Island Bar Ass'n, 263 A.2d 692, 696 (R.I. 1970) (professional corporations allowed but entity must be licensed).

all stockholders must be lawyers and no profit-sharing can include nonlawyers. Fourth, management duties must be performed by attorneys.[158] With regard to the historic concern expressed in the *ABA Canons of Ethics*[159] in Canon 35 that the services of the lawyer not be controlled by any nonlawyer entity that intervenes between client and lawyer,[160] the ABA Opinion stated: "There is no intervention of any lay agency between lawyer and client when centralized management provided only by lawyers may give guidance or direction to the services being rendered by a lawyer-member of the organization to a client."[161] In addition, with regard to Canon 47, which prohibited the aiding of the unauthorized practice of law,[162] the ABA opinion noted:

> The professional association or professional corporation, though an entity distinct from its members, even though governed by a central committee, is not a lay agency if the committee does and can only consist of lawyers. Thus, no violation of Canon 47 is involved merely because the form of organization provides for centralized management by lawyers.[163]

The general acceptance of professional corporations for attorneys took several steps. First, the jurisdictions had to enact professional corporation

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158. *See* ABA Comm. on Professional Ethics, Formal Op. 303 (1961).

159. The *Canons* were first adopted in 1908, but Canons 33 through 47 were added later. The *ABA Canons of Professional Ethics* were replaced by the *Model Code of Professional Responsibility* in 1969. *See* HAZARD & HODES, *supra* note 106, § 202.

160. Canon 35 stated:

> The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries.
>
> A lawyer may accept employment from any organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

ABA CANONS OF PROFESSIONAL ETHICS Canon 35 (1969).

161. ABA Comm. on Professional Ethics, Formal Op. 303 (1961).

162. Canon 47 states: "No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate." ABA CANONS OF PROFESSIONAL ETHICS Canon 47 (1969).

163. ABA Comm. on Professional Ethics, Formal Op. 303 (1961).

statutes. All fifty states and the District of Columbia now have such statutes.[164] Many of these statutory provisions expressly allow attorneys to form professional corporations. For example, the Delaware Act states that "[i]t is the legislative intent to provide for the incorporation of an individual, or group of individuals who render the same professional service to the public, for which such individuals are required by law to be licensed or to obtain other legal authorization."[165] "Professional service" is then defined to include services rendered by "attorneys-at-law."[166]

Because the practice of law is regulated by the judiciary of each jurisdiction,[167] the fact that a particular jurisdiction's professional corporation statute specifically granted attorneys the right to form a professional corporation did not end the discussion. Courts had to approve the use of the professional corporation form by attorneys. The courts generally have approved of the practice with certain restrictions.[168] A pervasive concern was that attorneys not be able to limit their liability.[169] The *Model Code of Professional Responsibility*

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164. *See, e.g.*, DEL. CODE ANN. tit. 8, § 601 (1998); 805 ILL. COMP. STAT. 10/1 (West 1998); KY. REV. STAT. ANN. § 274.005 (Michie 1998); MASS. GEN. LAWS ANN. ch. 156A, § 2 (West 1998); NEB. REV. STAT. ANN. § 21-2201 (Michie 1998); S.C. CODE ANN. § 33-19-101—700 (Law. Co-op. 1998); VT. STAT. ANN. tit. 11, § 801 (1998). *See also* MODEL BUS. CORP. ACT PC-46 to PC-48 (Supp. 1996) (listing all states' statutes).

165. DEL. CODE ANN. tit. 8, § 601 (1998).

166. DEL. CODE ANN. tit. 8, § 603(1) (1998); *see also* CAL. BUS. & PROF. CODE § 6160 (West 1998) (allowing a professional law corporation); KY. REV. STAT. ANN. § 274.005(3) (Michie 1998) (listing attorneys as rendering the kind of personal service the act is intended to cover); MASS. GEN. LAWS ANN. ch. 156A, § 2(b) (West 1998) (same); NEB. REV. STAT. ANN. § 21-2202 (Michie 1998) (same); N.C. GEN. STAT. § 55B-2 (1997) (same); 15 PA. CONS. STAT. ANN. § 2902 (West 1999) (same); R.I. GEN. LAWS § 7-5.1-2 (1998) (same); VA. CODE ANN. § 13.1-543 (Michie 1998) (same).

167. *See* discussion *supra* Part II(C).

168. *See, e.g.*, ILL. S. CT. R. 721 (allowing attorneys to practice as professional corporations, limited liability companies, and such like forms with certain restrictions); MASS. RULES OF THE S. CT. Rule 3:06 (1998) (allowing professional corporations, limited liability companies, and limited liability partnerships, with restrictions); NEB. S. CT. RULES, *Professional Service Corporations* (allowing professional corporations with restrictions); R.I. SUP. CT. R. 10 (allowing attorneys to use professional corporations); VT. R. OF COURT, CODE OF PROFESSIONAL RESPONSIBILITY, definitions (1997) (defining "law firm" to include "professional legal corporation"); VA. R. OF CT. pt. 6, sec. 4, para. 14 (allowing professional corporations and limited liability forms, with restrictions).

169. *See, e.g.*, Beane v. Paulsen, 26 Cal. Rptr. 2d 486 (Ct. App. 1993); First Bank & Trust Co. v. Zagoria, 302 S.E.2d 674 (Ga. 1983), *overruled by* Henderson v. HSI Fin. Serv., 471 S.E.2d 885 (Ga. 1996); *In re* Bar Ass'n, 516 P.2d 1267 (Haw. 1973); Zimmerman v. Hogg & Allen, P.A., 207 S.E.2d 267 (N.C. Ct. App. 1974), *rev'd on other grounds*, 209 S.E.2d 795 (N.C. 1974); We're Assoc. Co. v. Cohen, Stracher & Bloom, 480 N.E.2d 357 (N.Y. 1985); Grayson v. Jones, 710 P.2d 76 (Nev. 1985); South High Dev., Ltd. v. Weiner Lippe & Cromley Co., 445 N.E.2d 1106, 1107 (Ohio 1983); Stewart v. Coffman, 748 P.2d 579 (Utah 1988); Melby v. O'Melia, 286 N.W.2d 373 (Wis. Ct.

("*Model Code*") in Ethical Consideration 6-6 took no position on the liability issue but was drafted to allow each state to decide the question for itself.[170] Rule 5.4(d) of the *Model Rules* refers to professional corporations, thus explicitly recognizing their legitimacy but taking no position on liability.[171]

Unfortunately, federal tax revisions in the 1980s virtually eliminated the tax advantages of the professional corporation status.[172] However, by allowing attorneys to practice in that form, with or without liability limitations, the states created an exception to the long-standing doctrine that a corporation cannot practice law.

B. Attorneys Practice as Limited Liability Companies

A question in the 1990s was whether attorneys could practice in entities such as limited liability companies.[173] Attorneys practicing in partnerships have always been liable jointly and severally for partners' actions.[174] Although by the 1990s attorneys could form professional corporations, restrictions on liability limitations often accompanied the ability of attorneys to form those corporations.[175] At the time that attorneys sought the right to practice as professional corporations, the limited liability that usually accompanied a

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App. 1979). *See also* DEL. CODE ANN. tit. 8, § 608 (1998) (constraining the liability limitation of the corporate form). *See generally* Kalish, *supra* note 146; McWilliams, *supra* note 148, at 363; Paas, *supra* note 148, at 374 (all discussing the liability issue).

170. The Ethical Consideration specifically states: "A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Ethical Consideration 6-6 (1980).

171. Rule 5.4(d) states in part: "A lawyer shall not practice with or in the form of a *professional corporation* or association." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(d) (1998) (emphasis added).

172. *See* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981); Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982); *see also* Kalish, *supra* note 146, at 564; Paas, *supra* note 148, at 374 (noting that tax implications now do not lead to the formation of professional corporations).

173. Much has been written about this issue. *See* Dirk G. Christensen & Scott F. Bertschi, *LLC Statutes: Use by Attorneys*, 29 GA. L. REV. 693 (1995); Johnson, *supra* note 146, at 85; McWilliams, *supra* note 148, at 359; Lawrence, *supra* note 148, at 207; John Richards, Note, *Illinois Professional Service Firms and the Limited Liability Partnership: Extending the Privilege to Illinois Law Firms*, 8 DEPAUL BUS. L. J. 281 (1996); Mark Rosencrantz, Comment, *You Wanna Do What? Attorneys Organizing as Limited Liability Partnerships and Companies: An Economic Analysis*, 19 SEATTLE U. L. REV. 349, 349 (1996); Thill, *supra* note 60, at 1143; *see also* ABA Formal Ethics Op. 96-401 (1996) (approving of limited liability form).

174. *See* UNIFORM PARTNERSHIP ACT § 13 (1914); REVISED UNIFORM PARTNERSHIP ACT §§ 305-06 (1994); *see also* Lawrence, *supra* note 148, at 212.

175. *See supra* note 169 and accompanying text.

corporate form was not really the issue. Rather, attorneys were concerned about obtaining the tax benefits associated with the corporate form.[176] Developments in the practice of law after the acceptance of professional corporations created an environment in which attorneys became interested in finding ways to limit liability, not for their own acts, but for the acts of other attorneys with whom they practiced. In the age of hundreds of firms with hundreds of lawyers,[177] and the age of firms with offices around the globe,[178] a lawyer's desire to limit his or her liability for the actions of another lawyer he or she has never met does not seem unreasonable.

The Kaye, Scholer savings and loan debacle was important in pointing out the liability dangers of modern, big firm practice. Kaye, Scholer, Fierman, Hayes & Handler settled a matter involving claims of wrongdoing by three of the firm's lawyers for $41 million. Insurance covered only $25 million so the firm's partners were responsible for $16 million.[179] Attorneys in firms across the nation acknowledged their vulnerability as a result.[180]

In addition, the move to limited liability entities such as limited liability companies may have been precipitated by an expansion of malpractice liability concepts[181] and an increased frequency of malpractice actions.[182] Finally, attorneys may be attracted to the limited liability company form because it

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176. *See supra* note 149 and accompanying text.

177. *See The NLJ 250: Annual Survey of the Nation's Largest Law Firms*, NAT'L L.J., Nov. 16, 1998, at C5 (noting that all firms listed had more than 100 attorneys, and that the three largest firms had more than a thousand attorneys); *see also 1000 Largest Law Firms*, CORP. LEGAL TIMES, June 1999, at 67 (367 firms with 100 or more attorneys); Galanter & Palay, *supra* note 129, at 749 (discussing the phenomenon).

178. Baker and McKenzie probably leads the pack with over fifty offices in such far-flung places as Beijing, China; Kuala Lumpur, Malaysia; Paris, France; and Dallas. *See The NLJ Annual Survey of the Nation's Largest Law Firms, Where the Lawyers Are: A City by City Breakdown*, NAT'L L.J., Nov. 16, 1998, at C19.

179. *See* Rosencrantz, *supra* note 173, at 365-67; Amy Stevens & Paulette Thomas, *How a Big Law Firm was Brought to its Knees by Zealous Regulators*, WALL ST. J., Mar. 13, 1992, at A1.

180. *See* Anthony E. Davis, *The Long-Term Implications of the Kaye Scholer Case for Law Firm Management—Risk Management Comes of Age*, 35 S. TEX. L. REV. 677 (1994) (discussing the effect of the Kaye, Scholer matter on attorneys' views about limited liability); Rosencrantz, *supra* note 173, at 365-67 (same).

181. *See* McWilliams, *supra* note 148, at 359 & n.2; Rosencrantz, *supra* note 173, at 368.

182. *See* Christensen & Bertschi, *supra* note 173, at 693, 720-21 (noting the explosion of number and size of legal malpractice verdicts as a reason for limited liability); Johnson, *supra* note 146, at 87 (noting the size and number of such actions in connecting with attorneys turning to limited liability entities); Richard C. Reuben, *Added Protection: Law Firms are Discovering that Limited Liability Business Structures Can Shield Them From Devastating Malpractice Awards and Double Taxation*, A.B.A. J., Sept. 1994, at 54. *See generally* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657 (1994).

allows for partnership-style pass through taxation with the added complement of limited liability.[183]

Most states have general limited liability company statutes,[184] and most of the statutes permit attorneys to practice in that form.[185] Many courts, the

183. *See* Christensen & Bertschi, *supra* note 173, at 693; Lawrence, *supra* note 148, at 211-12. A limited liability company is similar to a professional corporation but allows partnership tax treatment with the added benefit of limited liability and retention of control and management. *See* Thomas E. Geu, *Understanding the Limited Liability Company: A Basic Comparative Primer (Part One)*, 37 S.D. L. REV. 44, 45 (1992). Patterned after the German GmbH, the form has the limited liability veil with partnership taxation. *See* Ingrid L Lenhardt, *The Corporate and Tax Advantages of a Limited Liability Company: A German Perspective*, 64 U. CIN. L. REV. 551, 552 (1996).

Management in a limited liability company is very flexible because it is set by the agreement among the owners, known as the "operating agreement." *See* McWilliams, *supra* note 148, at 370.

184. *See, e.g.*, CAL. CORP. CODE § 17000 (West 1991); COLO. REV. STAT. ANN. § 7-80-101 (West 1993); DEL. CODE ANN. tit. 6, § 18-101 (1993); FLA. STAT. ANN. § 608.401 (West 1993); 805 ILL. COMP. STAT. ANN. 180/1-1 (West 1993); KAN. STAT. ANN. § 17-7601 (1995); N.J. STAT. ANN. § 42:2B-1 (West 1993); S.C. CODE ANN. § 33-44-101 to 1207 (Law. Co-op. 1990); WYO. STAT. ANN. § 17-15-101 (Michie 1999). *See also* Christensen & Bertschi, *supra* note 173, at 725 (listing of all the state statutes as of 1995).

Wyoming enacted the first limited liability company statute in 1977. In 1988, the IRS issued a revenue ruling that recognized that the Wyoming limited liability company qualified for partnership tax treatment and since that time limited liability companies have become accepted business entities throughout the states. *See* Rev. Rul. 88-76, 1988-2 C.B. 360. The IRS has issued rulings recognizing partnership tax status with regard to many states' limited liability company statutes. *See, e.g.*, Rev. Rul. 93-93, 1993-42 I.R.B. 13 (Arizona); Rev. Rul. 93-38, 1993-21 I.R.B. 4 (Delaware). Private letter rulings have also been issued. *See* Thill, *supra* note 60, at 1176 n.81. *See generally* Geu, *supra* note 183; Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 375 (1992).

185. *See, e.g.*, FLA. STAT. ANN. § 621.03(1) (West 1993) (defining "professional service" to include that rendered by attorneys); IOWA CODE ANN. § 490A.1501(4) (West 1999) (listing the law in defining "profession" regarding the formation of professional limited liability companies); N.C. GEN. STAT. § 55B-2(6), 57C-2-01(c) (1996) (defining limited liability companies that may render professional services to include the practice of law). *See generally* Karen M. Maycheck, Comment, *Shareholder Liability in Professional Legal Corporations: A Survey of the States*, 47 U. PITT. L. REV. 817 (1986) (discussing statutory treatments).

As with professional corporations, many statutory frameworks include protections for the professional setting. *See, e.g.*, IND. CODE ANN. § 23-18-3-4(a) (West 1999) ("This article does not alter any law applicable to the relationship between a person rendering professional services and a person receiving professional services, including liability arising out of the professional services."); MICH. COMP. LAWS ANN. § 450.4905(2) (West 1990) ("This act shall not be construed to abolish, repeal, modify, restrict, or limit the law now in effect applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional services and to the standards for professional conduct.").

ultimate arbiters of attorney conduct, have agreed.[186] For example, in *Henderson v. HSI Financial Services, Inc.*,[187] the Georgia Supreme Court, setting aside prior precedent,[188] determined that limited liability was not contrary to the applicable rules of professional conduct and did no disservice to the profession or the public.[189] The court thus approved of limited liability in principle for attorneys even though the issue before the court involved a professional corporation.[190]

Once again the ABA assisted attorneys in the campaign of attorneys to obtain freedom of organizational form. In 1996, the ABA, in Formal Ethics Opinion 96-401, stated that the limited liability partnership form is proper if the attorney remains personally liable and the entity is identified clearly as a limited liability partnership.[191]

As a matter of practice, firms have flocked to limited liability forms.[192] So long as the firm is not a partnership, an exception is made to the rule that only attorneys, not nonlawyer entities, can practice law.

States still balk at the liability limitation issue. For example, Rhode Island does not allow professionals to use limited liability companies. *See* R.I. GEN. LAWS § 7-16-3 (1956).

186. *See, e.g.*, COLO. R. CIV. P. 265 (okay if the lawyers follow certain restrictions and register with the bar and obtain adequate insurance); ILL. SUP. CT. R. 721 (recognizing the limited liability company form for attorneys); IND. R. FOR ADMISSION Rule 27 (allowing attorneys to practice as professional corporations, limited liability companies, and limited liability partnerships); IOWA CODE OF PROF. RESP. FOR LAWYERS DR 2-102 (adding provisions for limited liability companies); MASS. SUP. CT. R. 3:06 (recognizing limited liability companies and partnerships); MO. SUP. CT. R. 4-5.4(d) (referring to lawyers practicing as LLCs); MONT. R. OF PROF. CONDUCT Rule 5.4(d) (referring to lawyers practicing as limited liability companies); N.J. R. OF CT. § 1:21-1C (allowing attorneys to practice as limited liability partnerships); N.J. R. OF CT. 1:21-1B (allowing attorneys to practice as limited liability companies); VA. SUP. CT. R. pt.6, sec. 4, para. 14 (recognizing professional limited liability companies). *See also* Ala. St. Bar Disc. Comm. Ethics Op. RO-93-16 (1993) (retaining personal liability for own actions); Conn. Bar Ass'n Ethics Op. 94-2 (1994) (with personally liability for their own conduct); D.C. Bar Ass'n, Ethics Op. 235 (1994) (with personal liability); Kan. Bar Ass'n Ethics Op. 91-06 (1991); Mich. Bar Ass'n Ethics Op. R-17 (1994).

187. 471 S.E.2d 885 (Ga. 1996).

188. *See* First Bank & Trust Co. v. Zagoria, 302 S.E.2d 674 (Ga. 1983).

189. *Henderson*, 471 S.E.2d at 886-87.

190. *Id.* at 886.

191. *See* ABA Formal Ethics Op. 96-401 (1996).

192. Over half of the firms listed in a recent survey of the 250 largest firms are in a limited liability form. *See The NLJ 250: Annual Survey of the Nation's Largest Law Firms, A Special Supplement*, NAT'L L.J., Nov. 16, 1998, at C19.

C. Not-for-Profit Corporations

Another exception is often recognized for corporations that render legal services, but not for pecuniary gain.[193] Several states expressly exclude these organizations from the scope of unauthorized practice of law regulation.[194] For example, the Michigan unauthorized practice statute states that "[t]his section shall not apply . . . nor shall it apply to organizations organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy. . . ."[195]

A literal reading of the statutes, court rules, and case law of other jurisdictions would lead to the conclusion that no corporation, even a not-for profit one, could practice law via attorney-employees.[196] Yet, even in states in which there is no express safe harbor for not-for profit organizations, courts have allowed these organizations to have attorney-employees represent third

193. *See generally* Samuel J. Levine, *Legal Services Lawyers and the Influence of Third Parties on the Lawyer-Client Relationship: Some Thoughts from Scholars, Practitioners, and Courts*, 67 FORDHAM L. REV. 2319 (1999); John E. Theuman, Annotation, *Restrictions on Right of Legal Services Corporation or "Public Interest" Law Firm to Practice*, 26 A.L.R. 4th 614 (1981 and Supp. 1998). *See also* Lewis, *supra* note 2, at 348 (discussing early acceptance).

194. *See, e.g.*, 705 ILL. COMP. STAT. ANN. § 220/5 (West 1999) (providing that "nor shall it apply to associations organized for benevolent or charitable purposes or for assisting persons without means in the pursuit of any civil remedy or the presentation of a defense in courts of law . . . or to corporations organized not for pecuniary profit"); LA. REV. STAT. ANN § 37:213 (West 1988) (prohibition not applicable to benevolent or charitable organizations); N.H. REV. STAT. ANN. § 292:1-a (1987) (allowing representation of the poor); N.J. RULES OF COURT Rule 1:21-1(e) (prohibition does not apply to nonprofit organizations). *See also* Dixon v. Georgia Indigent Legal Servs., Inc., 388 F. Supp. 1156, 1165-66 (S.D. Ga. 1975) (relying upon a statutory exception).

195. MICH. COMP. LAWS ANN. § 450.681 (West 1990).

196. *See* Wayne Moore, *Are Organizations That Provide Free Legal Services Engaged in the Unauthorized Practice of Law?*, 67 FORDHAM L. REV. 2397, 2398 (1999) (discussing this point regarding the District of Columbia); *see also In re* New Hampshire Disabilities Rights Ctr., Inc., 541 A.2d 208, 211 (N.H. 1988) (finding that the practice proposed did not fit within an express statutory exception to the general rule that corporations cannot practice law); *In re* Educ. Law Ctr., Inc., 429 A.2d 1051, 1059 (N.J. 1981) (application of literal rule results in finding of violation).

parties.[197] In *In the Matter of Education Law Center, Inc.*,[198] the New Jersey Supreme Court considered whether a charitable corporation, in effect a public interest law firm, was practicing law unauthorizedly. The court noted the dangers of corporate representation in general: "[Attorneys] may be subject to pressures from the corporation and [ ] the attorney-client relationship may be interfered with. However, we are satisfied that because of the scrupulous care taken by ELC to avoid these dangers, they are not present in this case."[199] The court then concluded: "[c]onsequently, we hold that ELC is engaged in the practice of law but that such practice is not unauthorized under our Rules."[200] New Jersey subsequently adopted an exception for nonprofit corporations.[201]

In contrast, in *In re Disabilities Rights Center, Inc.*,[202] Justice Souter, writing at the time for the New Hampshire Supreme Court, refused to look beyond the statute. The Disability Rights Center had argued that the corporate prohibition should not apply when the attorneys are in fact exercising independent judgment because the rationale for the rule was to protect against infringement of that independence of judgment.[203] Justice Souter stated: [W]henever a corporate employee furnishes legal services to a corporate customer, however independent the employee's judgment may be, the corporation is as a matter of law providing legal services in the manner that . . . [the corporate prohibition] generally prohibits.[204] However, the New Hampshire court then found that the state statute impermissibly infringed upon the constitutional associational rights of the Disabilities Rights Center.[205]

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197. *See, e.g., In re* 1115 Legal Serv. Care, 541 A.2d 673, 675 (N.J. 1988) (allowing legal service corporation with clients only from collective bargaining unit); Azzarello v. Legal Aid Soc'y, 185 N.E.2d 566, 570 (Ohio Ct. App. 1962) (allowing legal aid society); Touchy v. Houston Legal Found., 432 S.W.2d 690, 695 (Tex. 1968) (holding that if it is a legal aid society in effect, it should not be prohibited); Scruggs v. Houston Legal Found., 475 S.W.2d 604, 607 (Tex. App. 1972) (holding that Foundation was a true legal aid society and thus outside the parameters of the regulation of the unauthorized practice of law).

198. 429 A.2d 1051 (N.J. 1981).

199. *Id.* at 1055.

200. *Id.*

201. *See* N.J. RULES OF COURT, RULES OF GEN. APP. Rule 1:21-1(e).

202. 541 A.2d 208 (N.H. 1988).

203. *Id.* at 210-11.

204. *Id.* at 212.

205. *Id.* The court stated:

> Organizations, their members and their staff lawyers may assert a protected first amendment right of associating for noncommercial purposes to advocate the enforcement of legal and constitutional rights of those members, or of others within a definite class whom the organization exists to serve. When such advocacy may reasonably include the provision of legal advice or take the form of litigation, the organization may itself provide legal representation to its members or

The Legal Services Corporation Act, enacted in 1974,[206] required that federally funded legal services programs be incorporated and that some directors be non-lawyers.[207] The Act also stated that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession."[208] In *Bank of Hartford, Inc. v. Bultron*,[209] a Connecticut Superior Court reviewed whether Neighborhood Legal Services, a recipient of federal funds from the Legal Services Corporation, should be disqualified as unauthorized to practice and in violation of the corporate practice of law doctrine. The court looked at the situation at hand and compared the situation with the goals of the corporate prohibition and concluded that the facts did not implicate the rationales for the prohibition and thus the prohibition should not apply.[210] In *Martens v. Hall*,[211] the United States District Court for the Southern District of Florida found the unauthorized practice claim irrelevant regarding an attorney-employee of the Florida Rural Legal Services, Inc. because the attorney, not the corporation, was the provider of legal services.[212]

Thus, in the limited nonprofit context there has been recognition that the prohibition on the corporate practice of law is too broad given its rationale and goals. In addition, the practice of law by not-for-profit corporations is yet another exception to the prohibition on the corporate practice of law doctrine.

D. In- House Attorneys and Pro Bono Work

Another weakness in the corporate practice of law doctrine is the profession's acceptance of pro bono work by in-house counsel. If an in-house counsel does legal work for a party other than the corporate employer, the application of the corporate practice of law doctrine would dictate that the corporation, through the actions of its in-house attorney, practiced law unauthorizedly when the in-house attorney rendered legal services to the third party. Yet, the profession seems to accept pro bono representation by in-house

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> beneficiaries despite State regulations restricting legal practice and the solicitation of clients, provided that the organization and its lawyers do not engage in the specific evils that the general State regulations are intended to prevent.

Id. at 213.

206. Pub. L. No. 93-355, § 2, 88 Stat. 378 (1974) (codified as amended at 42 U.S.C. §§ 2996a-l (1994)).

207. 42 U.S.C § 2996c(a) (1994).

208. 42 U.S.C. § 2996(6) (1994).

209. No. SP-H-9296-65684, 1992 WL 436242 (Conn. Super. Ct. Dec. 21, 1992).

210. *Id.* at *6.

211. 444 F. Supp. 34 (S.D. Fla. 1977).

212. *Id.* at 35.

counsel.[213] While some have recognized the issue of the unauthorized practice of law, in-house counsel pro bono has been justified as fitting within the recognized exception for the provision of legal services on a nonprofit basis for those in need of legal services.[214] There is no doubt that the provision of pro bono services by in-house counsel is beneficial to the profession and the public. Yet, the acceptance of in-house counsel pro bono is a policy decision to create an exception to the corporate practice of law doctrine. The point is not that there should be no exception. Rather, the point is that there *is* an exception; the corporate practice of law doctrine has yet another hole in what is professed to be a solid rock.

E. Insurance Companies

An insurer corporation who furnishes an in-house attorney to defend an insured practices law unauthorizedly under the traditional corporate practice of law doctrine. Even if the attorney represents the insured corporation, the attorney also represents the insured, a third party. The attorney-employee's actions are the actions of the corporation such that the corporation practices law.[215] Yet, courts, legislatures, and ethics bodies have allowed such representation. For example, the Tennessee Supreme Court, in *In re Youngblood*,[216] found a defense provided by an insurer's in-house counsel not to be the unauthorized practice of law, noting that other jurisdictions had so concluded because of the "identity or community of financial interest between insured and insurer in defending the claim and . . . the insurer's contractual obligation to defend the insured at the insurer's expense."[217] This reasoning addresses loyalty issues, but does not in any way address the corporate practice of law doctrine per se. Though acknowledging the danger to lawyer independence and the danger of fee-splitting, the Tennessee Supreme Court concluded, quoting California State Bar Formal Opinion 1987-91,[218] that "'the

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213. *See* Susan Hackett, *Breaking New Ground: How Corporate Pro Bono Can Work*, BUS. L. TODAY, May/June 1998, at 50; Moore, *supra* note 196, at 2400; *Corporate Counsel Association Elects Sara Holtz President*, LIABILITY WK., Nov. 7, 1994, *available in* 1994 WL 2541813 (reporting that Ford Motor Company received the American Corporate Counsel Association Foundation's Pro Bono Award for a legal hotline for elderly Michigan residents).

214. *See* William O. Flannery, *Corporate Law Department Pro Bono Programs*, 37 BOSTON B. J. 12, 26 (1993); Robert L. Hill & Thomas J. Calvocoressi, *The Corporate Counsel and Pro Bono Service*, 42 BUS. LAW. 675, 693 (1987).

215. *See* Bristol, *supra* note 132, at 593 ("lucrative branch" of legal practice has been captured); Lewis, *supra* note 2, at 345-46 (discussing this occurrence at an early date).

216. 895 S.W.2d 322 (Tenn. 1995).

217. *Id.* at 330-31.

218. Cal. State Bar Comm. on Professional Responsibility and Conduct, Formal

mere fact that the lawyers are employees of [an] Insurance Company does not necessarily compromise the attorney's independent professional judgment,"[219] nor was it fee-splitting.[220] Rather, the *Youngblood* court stated that the

> specific facts of each situation must be examined to determine if the attorney is aiding a non-attorney in the practice of law. The mere showing of employer-employee, without a definition of the duties, loyalties, prerogatives, and interests of the parties, is not a sufficient basis on which to conclude that the attorney-employee is aiding a non-attorney in the practice of law.[221]

A Tennessee statute in effect at the time of the *Youngblood* decision stated:

> No person shall engage in the "practice of law" or do "law business," or both, . . . unless such person has been duly licensed therefor, and while such person's license therefor is in full force and effect, nor shall any association or corporation engage in the "practice of the law" or do "law business," or both . . . Any person, firm, association or corporation who violates the prohibition . . . commits a Class A misdemeanor . . . .[222]

In *In re Allstate Insurance Co.*,[223] the Missouri Supreme Court stated that representation of an insured by an insurer's in-house counsel was not the unauthorized practice of law even though a Missouri state statute banned corporations from practicing law.[224] The court refused to distinguish between proper and improper conduct on the basis of the attorney's status as an in-house attorney or an outside attorney. The court noted that if a corporation practiced

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Op. 1987-91 (1987), *available in* 1987 WL 109707.

219. *Youngblood*, 895 S.W.2d at 331.

220. *Id.* at 330.

221. *Id.* at 331.

222. TENN. CODE ANN. § 23-3-103 (1994). To the extent that the legislative statement is outside of the power of the legislature, judicial statements agree. *See also* Third Nat'l Bank v. Celebrate Yourself Prod., Inc., 807 S.W.2d 704, 706-07 (Tenn. Ct. App. 1990) (expressing the judicial view that corporations cannot practice law).

223. 722 S.W.2d 947 (Mo. 1987).

224. *Id.* at 948. Section 484.020(1) of the Missouri Revised Statutes, in effect at the time of the case, stated:

> No person shall engage in the practice of law or do law business, as defined in section 484.010, or both, unless he shall have been duly licensed therefor and while his license therefor is in full force and effect, nor shall any association or corporation, except a professional corporation . . . engage in the practice of the law or do law business as defined in section 484.010, or both.

MO. REV. STAT. § 484.020(1) (1994).

law by way of an in-house attorney, the same occurred when the actor was an outside retained attorney.[225] The court stated:

> The primary purpose of section 484.020(1) is to preclude a corporation with non-professional shareholders from having a proprietary interest in or sharing in the emoluments of a law practice. In this respect it makes no difference whether the legal services are rendered by employed lawyers or by independent contractors.[226]

Thus, the court approved the representation.

Other courts and ethics bodies have agreed. ABA Formal Opinion 282 concluded that "[t]here is nothing basically unethical in a lawyer, who is employed and compensated by a collision insurance company, defending a person in an action based upon damage to person and property brought by a third party."[227] The California State Bar Standing Committee of Professional Responsibility and Conduct concluded, after first noting that a corporation could not practice law, that an attorney-employee may represent an insured if "appropriate safeguards" are taken.[228] The Committee continued: "[I]t cannot be presumed that simply because the attorneys handling defense cases are salaried employees of Insurance Company that they will act unethically or will otherwise sacrifice their professional obligations to the insureds in favor of Insurance Company."[229] In *King v. Guiliani*,[230] a Connecticut Superior Court noted that the "prohibition against the practice of law by corporations has deep roots in Connecticut."[231] Yet, the Connecticut court concluded that "[t]he

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225. *Allstate Ins. Co.*, 722 S.W.2d at 950.

226. *Id.*

227. ABA Comm. on Professional Ethics and Grievances, Formal Op. 282 (1950). See also *Coscia v. Cunningham*, 299 S.E.2d 880 (Ga. 1983), in which the Georgia Supreme Court considered a Georgia statute that prohibited a corporation from practicing law but allowed a corporation to employ an attorney "in and about [its] own immediate affairs or in any litigation to which they are or may be a party." *Id.* at 882. The Georgia court determined that an in-house attorney retained to defend an insured is allowed because it is a representation within the realm of the corporation's affairs. *Id.* at 883.

In *Kittay v. Allstate Ins. Co.*, 397 N.E.2d 200 (Ill. App. Ct. 1979), the Illinois Court of Appeals noted the statutory ban on corporate practice but held that the defense of an insured by an in-house counsel was within the exception for a corporation to practice if interested by reason of a policy of insurance. *Id.* at 202.

228. Cal. State Bar Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1987-91 (1987), *available in* 1987 WL 109707, at *2.

229. *Id.* at *3.

230. No. CV92 02903705, 1993 WL 284462 (Conn. Super. Ct. Jul. 27, 1993).

231. *Id.* at *3. Yet, Connecticut had no express statutory prohibition regarding the practice of law by corporations. *Id.* at *4. *See also* State Bar Ass'n v. Connecticut Bank & Trust Co., 140 A.2d 863, 870 (Conn. 1958) ("Artificial creations such as corporations or associations cannot meet these prerequisites and therefore cannot engage in the

overwhelming weight of authority is to the effect that the salaried employee attorney may properly represent the interests of the insured and the insurance company provided they do not conflict."[232]

A few state statutes expressly except insured representation by an insurer's in-house attorney from unauthorized practice of law regulation. A Maryland provision states that the statute's admission to the Bar provisions "[do] not apply to: . . . (3) an insurance company while defending an insured through staff counsel."[233] An Illinois statute prohibits corporate practice[234] but later states:

> Nothing contained in this act shall prohibit a corporation from employing an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may be a party, or in any litigation in which any corporation may be interested by reason of the issuance of any policy or undertaking of insurance, guarantee or indemnity.[235]

This provision has been interpreted by the courts to mean that an insurer's in-house attorney can represent an insured.[236]

F. Corporations in the Medical Profession

The corporate practice of law doctrine has long been linked to prohibitions regarding corporate practice in other professions such as dentistry, optometry, and medicine. For example, in *American Insurance Ass'n v. Kentucky Bar Ass'n*,[237] in affirming the corporate practice of law doctrine, the Kentucky

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practice of law.").

232. *King*, 1993 WL 284462, at *6. The New Jersey Committee on Unauthorized Practice held that though a corporation cannot practice law except when its own interest is involved, the furnishing of legal services to an insured by a liability insurance company "involves such a community or identity of financial interest so as to define the service involved as in the insurer's own interest." N.J. Comm. on Unauthorized Practice, Op. 23 (1984), *available in* 1984 WL 140950, at *1; N.J. Supplement to Op. 23 (1996), *available in* 1996 WL 520891, at *4; *see also* Va. Unauthorized Practice Op. 60 (1985) (evaluating attorney-employee representation of the insured when no coverage question existed but the claim was not necessarily within policy limits; that even so the insurer had a "direct financial interest" because it will owe all or part of the recovery; therefore, no unauthorized practice of law occurs).

233. MD. CODE ANN., BUS. OCC. & PROF. § 10-206 (b)(3) (1995).

234. 705 ILL. COMP. STAT. ANN. § 220/1 (West 1999).

235. 705 ILL. COMP. STAT. ANN. § 220/5 (West 1999); *see also* MASS. GEN. LAWS ANN. ch. 221, § 46 (West 1993). One might argue, however, that this exception does not apply to an attorney-employee as opposed to a retained attorney.

236. *See* Kittay v. Allstate Ins. Co., 397 N.E.2d 200, 202 (Ill. App. Ct. 1979) (allowing insurer's in-house attorney to defend insured under this statutory provision).

237. 917 S.W.2d 568 (Ky. 1996).

Supreme Court stated that Kentucky law "proscribes a corporation from being licensed to practice a learned profession" and cited a case involving optometry to bolster the statement.[238]

The prohibition on corporations practicing medicine originated much like that for the practice of law. In an effort to improve the quality of the medical profession and to distinguish physicians from "irregulars," the American Medical Association ("AMA") developed a set of ethical principles to guide the practice and successfully convinced the states to enact licensing requirements for physicians.[239] In the early part of the twentieth century, corporations began to enter the medical field by employing doctors and marketing health services or by employing doctors to provide services to the employees of the corporation.[240] Opponents of corporate involvement in the health care market were concerned that such practices would lead to commercialization and exploitation, that physicians' judgment would be infringed upon by lay control, and that physicians would no longer have perfect loyalty to the client but rather would succumb to the tug of the corporate employer.[241]

In 1890, the AMA noted that corporate involvement infused the practice of medicine with too much "spirit of trade."[242] And, in 1912, the AMA revised its ethical code to condemn any contract which interfered with the provision of adequate medical care or reasonable competition among doctors.[243] In 1934, the

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238. *Id.* at 570; *see also* Kendall v. Beiling, 175 S.W.2d 489, 493 (Ky. 1943) (stating that "there is scarcely any judicial dissent from the proposition that a corporation cannot lawfully engage in the practice of law or of medicine"). Early medical doctrine cases also cited and relied upon cases involving lawyers. *See, e.g.*, Bartron v. Codington County, 2 N.W.2d 337, 344 (S.D. 1942) (using decisions regarding the corporate practice of law doctrine for precedent and guidance in the medical setting).

239. *See* DONALD E. KONOLD, A HISTORY OF AMERICAN MEDICAL ETHICS 1847-1912 (1962); PAUL STARR, 1 THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE ch. 6 (1982); Hampton, *supra* note 103, at 499-500; Chase-Lubitz, *supra* note 104, at 448-52.

240. *See* J. BURROW, ORGANIZED MEDICINE IN THE PROGRESSIVE ERA 119 (1977); 1 STARR, *supra* note 239, at 198-202; Frieman, *supra* note 104, 699-700; Chase-Lubitz, *supra* note 104, at 455-56.

241. See, for example, *Dr. Allison, Dentist, Inc. v. Allison*, 196 N.E. 799 (Ill. 1935), in which the court stated:

> No corporation can qualify. It can have neither honesty nor conscience, and its loyalty must, in the very nature of its being, be yielded to its managing officers, its directors, and its stockholders. Its employees must owe their first allegiance to their corporate employer and cannot give the patent [sic] anything better than a secondary or divided loyalty.

Id. at 800. *See also* Hall, *Institutional Control*, *supra* note 103, at 514-15; Chase-Lubitz, *supra* note 104, 457-58; Note, *Right of Corporation to Practice Medicine*, 48 YALE L.J. 346, 350 (1938).

242. *In re* American Med. Ass'n, 94 F.T.C. 701, 898 (1979) (quoting an internal AMA report).

243. Joseph Laufer, *Ethical and Legal Restrictions on Contract and Corporate*

AMA redrafted the ethics statement to prohibit lay profit and payment by a fee schedule, salary, or a fixed rate per capita.[244] The AMA found such activity to be "beneath the dignity of professional practice, [ ] unfair competition with the profession at large, [ ] harmful alike to the profession of medicine and the welfare of the people, and [ ] against sound public policy."[245]

The AMA's ethical proscriptions were dealt a death blow in *American Medical Ass'n v. FTC*.[246] The FTC found that the ethical prohibitions "had the purpose and effect of restraining competition by group health plans, hospitals, and similar organizations, and restricted physicians from developing business structures of their own choice."[247] The FTC order, which was upheld by the courts, was that the AMA was to stop "restricting participation by non-physicians in the ownership or management of organizations."[248]

The prohibition on the corporate practice of medicine, however, was not dependent on the ethical proscription. From the early days of corporate involvement in the practice of medicine, legal prohibitions have developed just as they did in the attorney arena. The legal prohibitions were usually a creature of judicial decision, although a few states have had explicit statutory prohibitions.[249] In a typical judicial decision, a court would rely on a state medical licensing statute which limited who could practice medicine[250] and reason that the statute required that a person, to be licensed, must have certain characteristics such as good character and a certain level of education that a corporation cannot have. Thus, a corporation employing a physician practiced

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Practice of Medicine, 6 LAW & CONTEMP. PROBS. 516, 518 (1939) (citing PRINCIPLES OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASSOCIATION (1912)); *see also In re* AMA, 94 F.T.C. 701, 1011 n.59 (quoting PRINCIPLES OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASSOCIATION (1912)).

244. *See* Laufer, *supra* note 242, at 519; *see also* Hampton, *supra* note 103, at 499; Chase-Lubitz, *supra* note 104, at 461 n.113.

245. Laufer, *supra* note 242, at 519 (quoting the AMA's 1934 amendments to PRINCIPLES OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASSOCIATION (1934)).

246. 638 F.2d 443 (2d Cir. 1980).

247. *Id.* at 449.

248. *Id.* at 450; *see also* Frieman, *supra* note 104, at 708-12.

249. *See, e.g.*, COLO. REV. STAT. ANN. § 12-36-134(7) (West 1999) (prohibiting a corporation from the practice of medicine).

250. *See* BURROW, *supra* note 240, at 58 (discussing licensing developments); Chase-Lubitz, *supra* note 104, at 451-52 (licensing statutes were created initially to increase the quality of medical care rendered).

medicine without a license and violated the statute.[251] For example, in *Dr. Allison, Dentist, Inc. v. Allison*,[252] the court stated:

> To practice a profession requires something more than the financial ability to hire competent persons to do the actual work. It can be done only by a duly qualified human being, and to qualify something more than mere knowledge or skill is essential. The qualifications include personal characteristics, such as honesty, guided by an upright conscience and a sense of loyalty to clients or patients, even to the extent of sacrificing pecuniary profit, if necessary. These requirements are spoken of generically as that good moral character which is a prerequisite to the licensing of any professional man. No corporation can qualify.[253]

It is exactly the same as the reasoning used in the legal corporate practice cases. The reasoning has been criticized. The acts prohibit practice by a "person" without a license and person is then defined by the court to be a human being. Thus, arguably a corporation cannot violate the statute.[254] Another criticism has been to note the lack of logic of the reasoning used. In other words, to say that a corporation can practice medicine via an employee doctor but that the corporation does not benefit from the doctor's license, is faulty reasoning.[255] Of course, the opinions are replete with policy discussion to support the weak logic.[256]

The corporate practice of medicine doctrine still exists in many jurisdictions.[257] However, it is not at all alive and healthy. In many jurisdictions

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251. *See, e.g.*, Pacific Employers' Ins. Co. v. Carpenter, 52 P.2d 992, 994 (Cal. Ct. App. 1935); People v. United Med. Serv., 200 N.E. 157, 163 (Ill. 1936); Ezell v. Ritholz, 198 S.E. 419 (S.C. 1938). *See also* Note, *supra* note 241, at 347. *But see* State *ex rel.* Sager v. Lewin, 106 S.W. 581, 583 (Mo. Ct. App. 1907); State Electro-Medical Inst. v. State, 103 N.W. 1078, 1079 (Neb. 1905); Bartron v. Codington County, 2 N.W.2d 337, 342 (S.D. 1942).

252. 196 N.E. 799 (Ill. 1935).

253. *Id.* at 800; *see also* Garcia v. Texas State Bd. of Med. Exam'rs, 384 F. Supp. 434, 438 (W.D. Tex. 1974) (quoting this language).

254. *See* Sara Mars, Note, *The Corporate Practice of Medicine: A Call for Action*, 7 HEALTH MATRIX 241, 251 (1997) (stating that approach "stretches the purpose of state medical practice acts and licensure requirements to an illogical breaking point"); *see also* Hampton, *supra* note 103, at 496-97; Willcox, *supra* note 104, at 437-39 (1960).

255. One commentator has noted that such is the same as saying that a trucking corporation cannot operate because it cannot obtain a drivers' license. *See* Hall, *The Corporate Practice*, *supra* note 103, at 3-20; Hampton, *supra* note 103, at 497.

256. *See, e.g.*, *Garcia*, 384 F. Supp. at 438; Ezell v. Ritholz, 198 S.E. 419, 423-24 (S.C. 1938); State *ex rel.* Loser v. Nat'l Optical Stores Co., 225 S.W.2d 263, 268-70 (Tenn. 1949).

257. *See, e.g.*, Conrad v. Medical Bd., 55 Cal. Rptr. 2d 901, 902 (1996) (stating that

it has largely been ignored and lies unenforced.[258] Even if it is recognized, many exceptions have been recognized as well. States allow physicians to practice in professional corporations and limited liability entities.[259] Many states do not apply the ban to nonprofit corporations.[260] Hospitals are sometimes exempted.[261] The creation and utilization of Health Maintenance Organizations, some of which are corporations, a development promoted by the federal government,[262] has greatly limited the applicability of the doctrine.[263]

A significant outcry has occurred for the elimination of the corporate practice of medicine doctrine altogether on the theory that it no longer has relevance to the modern day health care industry, that in its unenforced state it is a "legal landmine,"[264] that it interferes with physician freedom, that it interferes with efficient marketing of health care, and that other techniques can address the issues the doctrine supposedly was designed to address.[265] Once

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"the corporate practice [of medicine] doctrine provides that a corporation may not engage in the practice of the profession of medicine"). Some jurisdictions do not have the doctrine. *See, e.g.*, D. Cameron Dobbins, *Survey of State Laws Relating to the Corporate Practice of Medicine*, 9 HEALTH LAW 18 (1997) (discussing Joint Declaratory Ruling of the Alabama Medical Licensure Commission and the Alabama Board Of Medical Examiners (Oct. 21, 1992) (Alabama has no prohibition against corporate employment of physicians if the employment agreement requires the doctor to "exercise independent judgment")).

258. *See* Michael A. Dowell, *The Corporate Practice of Medicine Doctrine Must Go*, HEALTHSPAN, Nov. 1994, at 7; Hall, *Institutional Control*, *supra* note 103, at 510; Punch, *Freestanding Center's Growth Raises Questions About Corporate Practice Laws, Mode*, HEALTHCARE, May 5, 1984, at 32; Mars, *supra* note 254, at 243.

259. *See* Lee Joseph Dunn Jr., *Professional Corporations: Their Development and Present Status with Respect to the Practice of Medicine*, 24 U. FLA. L. REV. 625 (1972); Alycia C. Regan, *Regulating the Business of Medicine: Models for Integrating Ethics and Managed Care*, 30 COLUM. J.L. & SOC. PROBS. 635, 664-65 (1997).

260. *See, e.g.*, MICH. COMP. LAWS ANN. § 450.1101 (West 1990); California Physicians' Serv. v. Garrison, 172 P.2d 4, 11-12 (Cal. 1946). *See also* Willcox, *supra* note 104, at 466; Mars, *supra* note 254, at 256.

261. *See, e.g.*, COLO. REV. STAT. ANN. § 25-3-103.2 (West 1999); TENN. CODE ANN. § 63-6-204c (1997); Berlin v. Sarah Bush Lincoln Health Ctr., 688 N.E.2d 106, 107 (Ill. 1997). *See also* Jessica A. Axelrod, *The Future of the Corporate Practice of Medicine Doctrine Following* Berlin v. Sarah Bush Lincoln Health Center, 2 DEPAUL J. HEALTH CARE L. 103, 109-10 (1997).

262. The federal government promoted the development of Health Maintenance Organizations with the Health Maintenance Organization Act of 1973. *See* Health Maintenance Organization Act of 1973, Pub. L. No. 93-222, § 2, 87 Stat. 914 (codified at 42 U.S.C. §§ 300e-1 to e-17 (1994)).

263. *See* Frieman, *supra* note 104 at 707, 735-36; Hampton, *supra* note 103, at 501.

264. James Blumstein, *Health Care Reform and Competing Visions of Medical Care: Antitrust and State Provider Cooperation Legislation*, 79 CORNELL L. REV. 1459, 1471 (1994).

265. *See* Dowell, *supra* note 258, at 7; Hall, *Institutional Control*, *supra* note 104,

again, a premise of the corporate practice of law doctrine, that corporations cannot practice in the professions such as medicine, no longer obtains.

V. CONCLUSION: FORGET THE CORPORATE PRACTICE OF LAW DOCTRINE—REGULATE WITH RULES OF PROFESSIONAL CONDUCT

Long ago, H.H. Walker Lewis stated: "If, however, there is a real evil in the practice of law by corporations it should be met on real grounds. Only mythological demons can long be exorcised with hocus pocus."[266] The *Model Rules* protect more directly against the evils feared if corporations can practice law via attorneys than does the "hocus pocus" of the corporate practice of law doctrine.

Initially, when the corporate practice of law doctrine developed, no controlling ethics rules covering this conduct existed.[267] Not remarkably, the corporate practice of law doctrine developed, therefore, as an unauthorized practice of law doctrine. In 1928, the *ABA Canons of Ethics* were amended and several provisions relevant to the corporate practice of law doctrine were enacted.[268] Canon 33 stated that lawyers should not be partners with nonlawyers if the partnership business was the practice of law.[269] Canon 34 prohibited a division of fees with a nonlawyer,[270] and Canon 35 provided that "[t]he professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer."[271] These provisions seemed to reflect the beliefs of the bench and bar,[272] although even at that early date, there was a difference of opinion. A Minority Report to the ABA Special Committee on Supplementing the Canons of Professional Ethics stated that there was "nothing inherently 'unethical' in the

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at 509-15; J. Anthony Manger, *Scrap the Corporate Practice of Medicine Doctrine*, HEALTHSPAN, May 1994, at 2; Willcox, *supra* note 104, at 432; John Wiorek, *The Corporate Practice of Medicine Doctrine: An Outmoded Theory in Need of Modification*, 8 J. LEGAL MED. 465 (1987). *But see* Hampton, *supra* note 103, at 489 (arguing that the doctrine should be revived).

266. Lewis, *supra* note 2, at 354.

267. *See*, ABA CANONS OF PROFESSIONAL ETHICS (1969). Canons 1 through 32 were enacted in 1908. *See* WOLFRAM, *supra* note 37, at 54. None of them touched upon the corporate practice of law.

268. *See* Andrews, *supra* note 18, at 584 (citing 53 REPORTS OF THE ABA 119-130 (1928) (proceedings of the 51st Annual Meeting)).

269. ABA CANONS OF PROFESSIONAL ETHICS Canon 33 (1969).

270. ABA CANONS OF PROFESSIONAL ETHICS Canon 34 (1969).

271. For the full text of Canon 35, see *supra* note 160. *See also* Simon, *supra* note 132, at 1080 n.46 ("One purpose of Canon 35 was to stifle the 'commercialization of the practice of law' that was thought to occur when lawyers working for nonprofit groups advertised that they provided legal services.").

272. *See* Andrews, *supra* note 18, at 585.

formation of partnerships between lawyers engaged in certain kinds of work and an expert engineer, student of finance, or some other form of expert."[273] Canon 47 was later added to forbid the aiding of the unauthorized practice of law.[274]

In 1969, the *Model Code* was released and a version of it soon became the applicable statement of the standards of ethics for most jurisdictions.[275] The *Model Code*, in effect, retained the restrictions of Canons 33, 34, and 47.[276]

The *Model Rules* came into existence in 1983 and a majority of jurisdictions now follow them.[277] Rule 5.4 basically continues the prohibitions originally found in Canons 33, 34, 35. Rule 5.5 repeats, in essence, Canon 47.[278] In addition, the *Model Rules* address conflicts of interest as well.[279]

These Rules make the corporate practice of law doctrine as applied to situations involving attorney-employees superfluous. The doctrine's legitimate motivation seems to be the protection of the independence of judgment of the attorney and the prevention of conflicts. The *Model Rules* contain provisions to protect against these dangers in the form of Rules 1.8(f), 5.4, and 1.7. In fact, the current version of Rule 5.4 in effect bans the corporate practice of law. If the *Model Rules* prohibit the conduct, so be it. But the *Model Rules* should be the guide, not a troublesome prophylactic doctrine at best loosely related to its goals and often honored, as discussed in Part IV of this Article, at best selectively.

At present there is debate about whether the *Model Rules*, specifically Rule 5.4, should be revised to eliminate restrictions on the form of entity in which an attorney may practice and to eliminate barriers to attorneys joining together with nonlawyers in a multidisciplinary way.[280] A similar debate, but with perhaps less fervor, occurred when the idea of ancillary business for lawyers arose in the late 1980s and early 1990s.[281] Even if Rule 5.4 is so modified, no one suggests that

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273. *See* Andrews, *supra* note 18, at 586 (quoting 52 REPORTS OF THE ABA 388 (1927) (Minority Report of F.W. Grinnel)).

274. ABA CANONS OF PROFESSIONAL ETHICS Canon 47 (1969).

275. *See* HAZARD & HODES, *supra* note 106, § 202.

276. Canon 33's nonlawyer partnership restriction became the *Model Code*'s DR 3-103(a). Canon 34 became DR 3-102(a). Canon 47 became DR 3-101(a). Canon 35 found life in DR 5-107(C), which prohibits a professional corporation if a nonlawyer has the right to control a lawyer's professional judgment, in 5-107(B), which provides that no one who recommends, employs or pays a lawyer to render service for another can control the lawyer's professional judgment, and in EC 3-3, which provides that a lawyer may not submit his judgment to the control of others. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).

277. *See supra* note 10 and accompanying text.

278. *Compare* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1998) *and* ABA CANONS OF PROFESSIONAL ETHICS Canon 47 (1969).

279. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7-1.10 (1998).

280. *See supra* notes 18-19 and accompanying text; *see also* 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 (1998).

281. *See, e.g.*, Cindy Alberts Carson, *Under New Mismanagement: The Problem*

Rule 5.4(c) should be eliminated. Rule 5.4(c) states that "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."[282] Thus, the core value of lawyer independence is protected.[283] The *Model Rules* will, under any conceivable scenario, continue to require independence of lawyer judgment and continue to protect against conflicts of interest. The troublesome corporate practice of law doctrine should be eliminated from the discourse.

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of Non-Lawyer Equity Partnership in Law Firms, 7 GEO. J. LEGAL ETHICS 593 (1994); John D. Conners, Comment, *Law Firm Diversification: An Affront to Professionalism?*, 17 OHIO N.U. L. REV. 303 (1990); Marjorie Meeks, Note, *Alter[ing] People's Perceptions: The Challenge Facing Advocates of Ancillary Business Practices*, 66 IND. L.J. 1031 (1991). *See also* Arash Mostafavipour, *Law Firms: Should They Mind Their Own Business?*, 11 GEO. J. LEGAL ETHICS 435 (1998).

282. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1998).

283. *See also* Rule 1.8(f), which states: "A lawyer shall not accept compensation for representing a client from one other than the client unless: . . . (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship. . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (1998).