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Say No to Nonlawyer Ownership (NLO)

The law is a treasured legacy. The bar is heir to that legacy. And we attorneys are custodians of that inheritance. It is our awesome privilege to preserve that bequest as we received it, autonomous, passionate and committed to the public interest. The solutions we forge today will paint the picture of what our profession is to become and what our legacy will be. Let then our bequest to the next generation of attorneys and to society be an independent profession, improved but undiminished, free and unfettered, respected and renewed.

NYSBA President Thomas O. Rice to ABA House of Delegates, August 1999

Early in my career, I had the good fortune and privilege of serving as the NYSBA Young Lawyers Section delegate to the American Bar Association House of Delegates. As a young attorney, I was given the opportunity to be part of discussions on important issues affecting our profession on a national level and to work with and learn from the great leaders in our New York delegation. Although my involvement with the bar association required taking precious time away from my new law practice and family, I returned from these meetings rejuvenated and proud of my profession, and excited about my career in the law.

Around that time, the ABA appointed a Commission on Multidisciplinary Practice (MDP) to study the issue of professional service firms owned by nonlawyers (NLOs) adding the provision of legal services to their mix. The ABA Commission issued a report proposing that entities owned or controlled by nonlawyers be allowed to engage in multidisciplinary practice with lawyers and that appropriate changes be made to the rules of ethics and professional responsibility. In response, NYSBA's House of Delegates adopted a resolution opposing such changes in the absence of a sufficient demonstration that these were in the best interests of clients and society and would not undermine or dilute the integrity of the delivery of legal services by the legal profession.

When the MDP report was submitted to the ABA House at its 1999 annual meeting, the New York State Bar Association, led by its then-President Thomas O. Rice, voiced its opposition to the proposal. President Rice addressed the ABA House, simply and eloquently stating that long-term independence of our profession should not be compromised for short-term financial gain. He had laid out his case in his first President's Message, published in the July-August *Journal.* In it he noted that proponents of business expansion plans cannot be permitted to make market-based proposals that allow businesses to dictate how law is practiced. Claimed increases in efficiency cannot be allowed to preempt a lawyer's duty to a client. Our highest priority must be to advance the profession's duties to society by preserving uncompromised loyalty to client interests. NYSBA and other likeminded bar associations around the country voted down the ABA Commission's MDP proposal.

Our Association also undertook a study of the issue. In 2000, the NYSBA Special Committee on the Law Governing Firm Structure and Operation, chaired by Robert MacCrate, former president of both the ABA and the NYSBA, issued its comprehensive report. The report concluded,

> Thus, we have considered and rejected the suggestion that rules against nonlawyer participation in the practice of law should be relaxed. We do so mindful of the fact that denying nonlawyers the ability to have a financial interest or otherwise to participate in law firm governance deprives lawyers of significant opportunities for financial gain. Nevertheless, we believe that it is in the public interest that lawyers forgo this opportunity.

Twelve years later, the ABA Commission on Ethics 20/20 proposed a limited form of nonlawyer ownership of law firms and the sharing of fees with firms that have offices in jurisdictions where nonlawyer ownership is permitted. After substantial opposition from many state bar associations, including ours, the proposal was withdrawn. Again our Association studied the issue, when then-President Vincent Doyle III formed a committee, chaired by past President Stephen Younger, to take a fresh look; the committee

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affirmed the findings of the MacCrate Report.

Yet, the ABA continues to pursue nonlawyer ownership of law firms. The ABA Commission on the Future of Legal Services has asked ABA delegates to adopt proposed model regulatory objectives at the ABA House of Delegates Meeting in February 2016, to "identify and implement regulations related to legal services beyond the traditional regulation of the legal profession."

If approved, the Commission would likely propose amendments to Model Rule 5.4 to allow lawyers and law firms to share legal fees with nonlawyers, who could hold a financial interest in the practice, in the delivery of both legal and nonlegal services.

We have some evidence of how nonlawyer ownership can work from a regulatory standpoint. Australia, whose practitioners are primarily small firms and solos, has set up a structure called incorporated legal practices, with each state setting up rules governing the practices in its jurisdiction. Each entity's legal practitioner director is ultimately responsible for managing the legal services provided and for reporting any misconduct by the practice, its employees or directors. It is difficult to see how well this self-reporting works because of the legal practitioner director's vested interest in the entity.

In the U.K., change came about because of a perceived lack of competition among firms and what had been called a crisis of confidence in the legal system. The U.K. established a national non-governmental regulator of all groups that regulate the legal profession. There are concerns about the top-down structure of legal regulation and the layers of bureaucracy it creates. Also, the regulations permit law shops in shopping areas, similar to tax preparation shops that proliferate in the United States during tax season.

In our own country, only the District of Columbia has allowed nonlawyer ownership of law firms. For 25 years, D.C.'s version of Model Rule 5.4 has allowed nonlawyers to hold a financial or managerial interest in a partnership with a lawyer. The nonlawyer may perform services that help the firm provide legal services to clients and must abide by the Rules of Professional Conduct. However, it is not widely used because a lawyer practicing outside of D.C. would almost certainly run afoul of rules in other states.

The ABA's latest proposal regarding nonlawyer ownership of law firms cites the need to improve delivery of and access to legal services and driving forces such as technology, globalization and market pressures. The ABA has proposed a series of "Model Regulatory Objectives" to create a framework within which the variety of types and delivery methods of legal services can be regulated.

It has been argued that any attorney with a bank loan is beholden to corporate interests, but an attorney's banker doesn't control the clients accepted or the cases pursued. Nonlawyer ownership of law firms creates a whole new set of fiduciary responsibilities, which have nothing to do with clients or their interests. Investors want to see a profit; shareholders are owed a fiduciary duty. Of course all attorneys need to make a living, but professional judgment should not be compromised by the need to hit certain quarterly goals.

The MacCrate Report still rings true. It noted that any nonlegal entity likely to be attracted to making such an investment would want to be financially dominant in the law firm, and it is reasonable "to assume that financial dominance confers control, either through outright ownership, or through the functional equivalent of outright ownership." Such investment would impose a duty on the principals of the law firm to operate it for the "financial benefit of the investors." Outside investment would create a minefield for lawyers, between legal ethics and independence on the one hand, and investors on the other. As the MacCrate Report noted, "this financial aspect of nonlawyer control of legal practice presents considerable risks to the legal system and the justice system," urging "the greatest caution" about permitting a "dominant nonlegal participant to influence the professional judgment of lawyers and to pass on matters of legal professional ethics." Even so-called passive investment in law firms is problematic. Nonlawyer owners might view "their" law firm as yet another profit center and would be less likely to encourage pro bono or public interest work because there would be no return. The financial objectives of nonlawyer management would be in perpetual competition with lawyers' professional ethics and independent judgments, which are in the best interests of legal clients and the legal system.

First and foremost, lawyers have a duty and responsibility to serve their clients. The attorney-client relationship forms an inviolable bond, and the attorney-client privilege, the hallmark of that relationship, is a seal that under the Rules of Professional Conduct cannot be broken. There simply is no such connection, no such code of professional responsibility in the business world.

We are a proud, strong, and noble profession; we are sworn in as officers of the court, part of a legal system that our society relies on for justice and fairness. Yes, our profession will change, but change should not be determined by profit-seeking entrepreneurs unencumbered by rules of ethical conduct and responsibility. It is incumbent upon us as attorneys and as representatives of the organized bar to remain guided by the Rules of Professional Conduct in our pursuit of ethical and responsible ways to use the new technologies to help us better connect with and serve our clients.

Of course we charge for our services; it's how we make a living, pay our employees, support our families, fund access to justice programs, and so on. That doesn't mean the law is just another business – nor should it be. ■