A COFFEE TABLE DISCUSSION OF TOPICS IN ETHICS AND PROFESSIONALISM

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A. Introduction

For some time now, applications to law schools have been diminishing, leading to curriculum changes and even to lower passage rates for Bar Exams. While this is a concerning statistic, the greater problem may be the gap that now exists between the newly-minted lawyer and the practice expectations of the legal market.[1]

Much of law school curriculum is geared towards teaching students the letter of the law, primarily to prepare law students for the Bar Exam. However, gaining a foundational background of the law is only one piece out of many that fit into the puzzle of the practice of law. While young lawyers entering the practice usually are armed with the tools of legal research and analysis, they are often left empty-handed when it comes to the knowledge, skills, and experience needed to successfully meet the expectations of both their employers and clients.

While it remains true that the best approach to learning the *practice* of law is to *practice*, i.e., dive in and do the work, a young lawyer's lack of experience, coupled with the demanding expectations of the profession, can lead to feeling overwhelmed and incompetent, thus causing dissatisfaction with the profession and stunted career progress. This paper discusses the gap between knowledge gained during law school and the experience needed for the practice of law, and provides suggestions as to how veteran attorneys can help solve rather than exacerbate the problem.

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[1] For a more in-depth discussion of the existing gap, *see* Neil J. Dilloff, *Law School Training: Bridging the Gap Between Legal Education and the Practice of Law*, 24 STANFORD LAW & POLICY REVIEW 425 (2013).

B. Time Constraints and Limited Training Leads to Young Lawyer Dissatisfaction

It's no secret that the time demands of an attorney are great. Senior attorneys hire young lawyers to perform most of the basic and time-consuming tasks on cases since it is essential for younger lawyers to learn how to perform those tasks, it is less costly for clients for associates to do this work, and it frees up time for senior attorneys/partners to handle more complex issues and generate new business. Therefore, partners are constantly in the market for quality young attorney help to service their cases and clients. However, since younger attorneys generally perform the time-consuming tasks on cases, and veteran attorneys must handle complex problems while ensuring strong relationships with their clients, time for training is limited. Nevertheless, without proper training, younger attorneys, even those who excelled in law school, are left to make avoidable mistakes on basic tasks associated with cases, therefore falling short of the high standards of the profession. The inability to meet the expectations of the practice leads to disgruntled younger attorneys, their employer senior attorneys, and potentially clients as well.

Most young lawyers enter the practice of law eager and excited to gain professional experience, competence, and satisfaction in their work. However, soon after beginning their career and being thrown into a demanding and complex job that perhaps they weren't quite prepared for, many young attorneys suffer from "imposter syndrome" and don't feel adequately equipped to complete assigned tasks or meet the high expectations of the market. Some young lawyers likely expected to receive more training from veteran attorneys on how to effectively and efficiently gain the requisite skills for the job. The lack of training to prepare a young attorney to enter the practice can negatively impact a young attorney's morale and work ethic, thus leading to employer dissatisfaction with their work, which may inevitably lead to a stunted career path for those lawyers.

C. Rules on Supervision – Do They Help?

While veteran attorneys have many important tasks associated with their role, one task on any attorney's radar should be the supervision and mentorship of young attorneys entering the profession. Notably, the ethical rules require a certain minimum level of supervision and mentorship of young attorneys. Rule 5.1 of the Model Rules of Professional Conduct provides:

> (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
>
> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

Rule 5.1 of the Louisiana Rules of Professional Conduct has identical language. As are many phrases used in the legal field, "reasonable efforts" is vague and context specific. Thus, the rules do not specifically provide that senior attorney should be taking efforts to train and mentor newly-minted lawyers. Furthermore, the rules are aimed at ensuring basic adherence to the Rules of Professional Conduct. However, inexperienced attorneys can make mistakes that fall short of violating the rules of professional conduct, thus leading to frustrated employers and clients alike. Ensuring that ethical standards are met is not enough. While law schools can and should begin modifying curriculum to prepare law students for the demand of the practice of law, until that time, veteran attorneys should recognize the "gap" and do their part to ensure young attorneys are equipped to uphold the standards of the profession.

D. Suggested Solutions

1. CLE Courses

Continuing Legal Education ("CLE") courses are a great avenue to teach young attorneys the skills needed for the practice of law. There are numerous skills that young lawyers are expected to display and yet have never been given the opportunity to develop. Therefore, CLE instructors should provide courses on the skills attorneys use daily, including some of the following:

- **Speed writing**: Techniques on how to write high-quality briefs fast; speed matters a lot in practice.
- **Problem-solving**: How to solve problems on a time-efficient and practical basis.
- **Resolving Issues:** Have young attorneys work out issues with "opposing counsel" to learn how to resolve the issues prior to the hearing, just like in practice.
- **Shorter motion writing**
- **Persuasive writing:** Teach them to write persuasive, succinct memoranda.
- **Case diagnostics:** Elements, profitability, the likelihood of success, judge surveying, state of the law, etc.
- **Case logistics:** In a complex case, the logistics can be overwhelming and take more time than briefing or hearing attendance.
- **Strategy and case planning:** Teach them to focus on the big picture, to meaningfully prosecute cases, focusing on the ultimate goal.
- **Passion:** Passion can be nurtured.
- **Logic:** Solid logic persuades, in writing, orally, everywhere.
- **Communication:** Teach them email etiquette, to communicate and deal with judicial assistants and chambers, and deal with difficult opposing counsel or judges.

2. Old-Fashioned Apprenticeships

Senior attorneys can also offer old-fashioned apprenticeships to law students during their time in school. Instead of serving as summer law clerks at a firm, students can serve as an apprentice to a partner or multiple partners at a firm. Law clerk positions are beneficial to students by allowing them to experience the culture of a firm while improving their legal research and writing skills, however, most summer law clerks do not experience the opportunity to learn the various aspects of the practice. An apprenticeship, in which a student shadows different members

of the firm, while observing and participating in daily tasks, would allow more insight into the true nature of the practice, providing students with ample opportunity to witness the plethora of skills needed to perform under the pressure of the profession.

3. In-house Training

Additionally, senior attorneys can provide in-house training to their newly hired attorneys. Having a trusted employee to adequately perform the demands of the practice is the reason for hiring younger attorneys; therefore, efficient training during the first couple months of a new lawyer's practice can benefit both the young attorney and their employer.

4. Delegate and Verify

It's inevitable that the most effective way to learn something is to do it; practice makes perfect. Thus, senior attorneys should continue to delegate tasks to younger attorneys, even tasks that a young attorney has never handled. A caveat to this solution: delegate but verify. To gain a mutual trust for one another, and for young attorneys to gain trust in their abilities, senior attorneys should delegate tasks while verifying their expectations. Moreover, senior attorneys should verify not only that their employee understands an assigned task, but also that the task is done properly. The best way to learn how to meet expectations is to know when you are falling short. Without feedback on their work, young attorneys are left to repeat the same mistakes, a very inefficient method that does not improve skills.

For newly-minted attorneys to succeed in the practice of law, mentorship is invaluable. Having a trusted mentor with years of experience can not only bridge the gap between law school and the practice of law but can allow a young attorney to excel, bolstering the esteem of the profession.

II. "Defensive Driving" for Lawyers

Those of a certain age remember that, when learning to drive automobiles, we were told to "drive defensively". That motto applies with perhaps greater force to lawyers who face increasing risks of malpractice claims. In an environment where your client may become your adversary, what can you do to "drive defensively" in your law practice? This paper will outline and briefly discuss several steps you can take to "drive defensively" to avoid malpractice claims and disciplinary action.

A. Always Have an Engagement Letter

According to Rule 1.2(c) of the Model Rules of Professional Conduct, a lawyer "may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent." Rule 1.2(c) of the Louisiana Rules of Professional Conduct has identical language. Comment 6 to Rule 1.2 of the Model Rules of Professional Conduct further provides:

> [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

When the services you provide are limited by agreement with your client, ensure the scope of the representation is in writing. While not required by rule, an engagement letter is a lawyer's first line of defense. Include in your engagement letter specifically *who the client is* and *the scope of your engagement*. For example, if you are representing a client in a property dispute with his former wife, and through a mutual agreement the representation has been limited to the property dispute

alone, lay out those terms explicitly in an engagement letter. State that the client is only the former husband personally, not any businesses he may have an ownership interest in, and that the representation is limited solely to the property dispute with his former wife, not any other domestic relation disputes that may arise between him and his former wife or property disputes with other parties. An engagement letter can serve various purposes: 1) it ensures the prospective client clearly understands the scope of your engagement; 2) it ensures the prospective client clearly understands the identity of the client; 3) it documents/provides proof of engagement; 4) it documents/provides proof of any limited representation; and 5) it limits any potential liability for non-assigned issues.

B. Do Not Guarantee Results

Rule 7.1 of the Model Rules of Professional Conduct states that a lawyer "shall not make a false or misleading communication about the lawyer or the lawyer's services." Comment 3 to Rule 7.1 further provides that:

> A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case.

Guaranteeing results or telling a prospective client about past results can be false or misleading. Most lawyers understand that no two cases are the same and achieving a certain result in one case does not mean the same result will be achieved in a similar case; clients, however, may not understand this. To avoid failing to meet client expectations, avoid setting them too high; don't guarantee results. Explain to your client the possibility of different outcomes. Learn from your client the results they desire and discuss with your client how best to achieve those desired results.

However, never guarantee a certain outcome; you are only setting yourself up for failure, a potential malpractice suit, and/or a disciplinary complaint.

C. Document Risks and Your Advice about Risks

When discussing the results your client wishes to achieve, you should discuss the risks involved with all outcomes. Lawyering requires multiple steps of decision-making. Every decision has associated risks. There is likely to be multiple instances when you should discuss risks with your client; every strategic step in your representation should also involve a discussion with your client about the consequences of making a certain decision.

Along with advising about risks associated with your client's case, you should document the risks discussed and your advice given. If you and your client agree on a certain decision, and a risk which you discussed occurs, you will have proof you that 1) were aware of the risk; 2) your client was aware of the risk; and 3) you mutually decided to take a certain step in the case, regardless of the risks. Thorough analysis of strategic steps and documentation of those steps is important to avoid potential liability and defend against disciplinary complaints.

D. Beware of Non-payment

A client may fail to make timely payment for your legal services for several reasons. If you're not being paid promptly, don't automatically assume that your client is deliberately trying to avoid payment. Invoices may go unpaid for a number of reasons, including: 1) the invoices got lost in emails or the mail; 2) the client simply doesn't have the means to pay; 3) the person in charge of paying your invoice may be on vacation or juggling other responsibilities; or 4) clients with cash-flow problems may put your invoice aside until funds free up. However, clients may also fail to make payments if they are unhappy, unsatisfied, or angry with your work.

Before jumping to the worst conclusion, take steps to help your clients promptly make payments and to determine the reason for nonpayment. Start with sending written reminders or debt collection letters to your client. If you don't receive a response to your reminders and letters, consider calling or meeting with the client to talk through the issue and negotiate a resolution.

To avoid an unexpected malpractice claim or disciplinary report, be aware of your clients' late or non-payment. Ensure that the reason for nonpayment isn't that your client is displeased with your services or prepared to file a complaint against you. Don't wait for the unexpected; contact any client from whom you are not promptly receiving payment.

E. Deliver Bad News Timely

In *Lomont v. Bennett*, 2014-2483 (La. 6/30/15), 172 So.3d 620, the Louisiana Supreme Court held that the intentional concealment of prior malpractice falls under the fraud exception to the three-year peremptive period for legal malpractice lawsuits provided in La. R.S. § 9:5605(E). The Court held that to the extent previous cases "hold an attorney's post-malpractice actions consisting of fraudulent concealment cannot amount to fraud within the meaning of [La. R.S. 9:5605(E)], they are overruled." *Id*. at 629. The Court applied the definition of fraud under Civil Code Article 1953 and stated that any action consisting of intentional misrepresentations or suppressions of the truth, with an intent to obtain an unjust advantage, will prohibit the application of the peremptive period. While no degree of negligence, even gross negligence, will satisfy the standard, a specific intent to conceal prior malpractice to avoiding a legal malpractice lawsuit can fit with the definition of fraud.

To avoid committing fraudulent concealment of malpractice acts, inform clients of any bad news or negative outcomes once they are discovered. Even if you don't believe an act on your part amounts to malpractice, if a client could potentially view an outcome reached or an obstacle

negatively, simply inform them of the event. We are human and mistakes can happen; however, don't intentionally conceal mistakes in an effort to avoid a malpractice suit. Be transparent with your client and deliver all known information to your client in a timely manner.

F. Conclusion

Just as any driver should be, remain cautious yet defensive as a lawyer. Take adequate precautions to protect yourself against legal malpractice claims and disciplinary complaints. Overall, keep your client informed.[2] Reasonably inform your client of the following: 1) the scope of your engagement; 2) the possibility of different results than planned; 3) the risks associated with certain decisions and your advice regarding said risks; 4) any late payments or failure to pay; and 5) any acts, mistakes, or obstacles that may negatively impact your client's case.

III. The Resurgence of Frivolous Arguments

In the early 1980s, the amendment to Federal Rule of Civil Procedure 11 became effective and led to a swarm of Rule 11 motions challenging pleadings as frivolous. When the cure became worse than the disease, Rule 11 was amended and limited. While it still deterred frivolous filings, Rule 11 motions have since become rare. In recent years, however, judges and lawyers have noticed a new wave of filings that are either frivolous or perhaps just incompetent. What are the ethical implications of such conduct? What can litigants and judges do when they see it?

A. History of Rule 11

As originally enacted in 1938, all that Rule 11 required was that an attorney have "good grounds to support" contentions made and avoid pleadings filed for purposes of delaying litigation.

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[2] Rule 1.4 of the Model Rules of Professional Conduct provides:

(a) A lawyer shall: …

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information ….

This simple mandate added relatively little to the litigation process and merely codified the content of Equity Rules 21 (Scandal and Impertinence) and 24 (Signature of Counsel).[3]

To give Rule 11 more bite and further streamline litigation, the United States Supreme Court amended the rule in 1983 to more clearly discourage dilatory and abusive tactics and frivolous claims and defenses. First, the Amendment expanded the rule's applicability to all documents in a case, not only pleadings. Second, the rule imposed a signature-certification requirement that emphasized the attorney's responsibilities to the court. A lawyer could only sign a document after making a good-faith inquiry into both facts and law to ensure adequate support for the assertions made. Third, the rule *required* that a court impose sanctions for violations. The Amendment also expanded the award of expenses and attorney's fees while extending sanctions to clients when necessary. Where the 1983 Amendment really gained teeth, however, was in replacing the original good-faith formula with a higher standard requiring reasonableness under the circumstances. An attorney could no longer avoid sanctions by signing his or her name with "a pure heart and an empty head." Despite the harshness of the Amendment, it was not "intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."[4]

In 1993, Rule 11 was reworked again to remedy problems ranging from interpretation to application. The 1983 Amendment had "led to a stunning amount of litigation over sanctions for alleged violations" and a "stunning amount of academic commentary on the Rule, including criticism that the required sanctions chilled the assertion of viable claims and created a debilitating amount of satellite litigation."[5] To remedy these effects, the 1993 Amendment provided the courts

[3] FED. R. CIV. P. 11 advisory committee's note to 1937 adoption.
[4] *Id.*
[5] RICHARD FREER, CIVIL PROCEDURE 379 (3d ed. 2012).

with flexibility in issuing sanctions[6] while still broadening the scope of a litigant's responsibilities. Under subdivision (a), signatures are still required for "[e]very pleading, written motion, and other paper." Under subdivision (b), however, an attorney's signature includes four separate certifications: First, it certifies that the document "is not being presented for any improper purpose" such as delay or harassment. Second, it certifies that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Together, these provisions work to deter frivolous arguments while avoiding a chilling effect on creativity. Third and fourth, attorneys certify a good evidentiary basis for factual contentions either asserted or denied.

There have been two other relatively unimportant Amendments to Rule 11. The 1987 Amendment was only "technical,"[7] and the 2007 Amendment, which reflects the current version of Rule 11, was simply "part of the general restyling of the Civil Rules."[8]

B. Louisiana Rules of Professional Conduct

A lawyer's ethical obligations extend further than the Federal Rules. Many of Louisiana's Rules of Professional Conduct overlap with the content of Rule 11, including Rules 3.1 and 3.3.

1. Rule 3.1

Any attorney running afoul of Federal Rule 11 is likely also violating Louisiana Rule of Professional Conduct Rule 3.1, which prohibits an attorney from "bring[ing] or [defend]ing a proceeding, or assert[ing] or controvert[ing] an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension,

[6] Importantly, sanctions are no longer required. Rather, "the court *may* impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation" of Rule 11. FED. R. CIV. P. 11 (c)(1) (emphasis added).
[7] FED. R. CIV. P. 11 advisory committee's note to 1987 amendment.
[8] FED. R. CIV. P. 11 advisory committee's note to 2007 amendment.

modification or reversal of existing law." Though this rule is rooted in professional discipline, its overlap with Federal Rule 11 and La. Code Civ. Proc. ann. Art. 863 allows for judicial sanctions in addition to discipline. The ABA's Comments emphasize, however, that there is some degree of discretion with Rule 3.1: "[T]he law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change."[9] What is a zealous use of the legal system in one situation might be a clear abuse of procedure in another. As such, dishonest attorneys might be tempted to shroud a frivolous argument in the cloak of reasonableness, possibly encouraging overworked judges and court staff to adopt meritless arguments. Such a violation of Rule 3.1 can lead to discipline from the Louisiana Disciplinary Board or sanctions under Rule 11 and La. Civ. Code. Proc. ann. Art. 863.[10]

2. Rule 3.3(a)(2)

Attorneys may also run afoul of the professional rules and Rule 11 through a lack of candor by failing to disclose adverse controlling precedent. Rule 3.3(a)(2) states that "[a] lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . ." Whereas violations of Rule 3.1 can sometimes be mistaken for reasonable arguments, violations of Rule 3.3(a)(2) can be determined by a bright line test: "Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision was lacking in candor and fairness to him?"[11] The Rule applies to cases

[9] MODEL RULES OF PRO. CONDUCT r. 3.1 cmt. 1 (AM. BAR ASS'N, 1983).
[10] Article 863 entitles an attorney to a hearing before the imposition of sanctions and a safe harbor for lawsuits "filed within sixty days of an applicable prescriptive date" and the suit is "voluntarily dismissed within ninety days after" the earlier of the filing or date of a hearing on the pleading. LA. C. CIV. PROC. ANN. ART. 863(F).
[11] ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 280 (1949).

that are "directly adverse," but an intentional failure to cite cases "tangentially adverse" can also be a "bold and risky gambit."[12] The best practice, then, is to be candid with the court in citing even tangentially adverse precedent while making nonfrivolous distinctions.

Federal and state courts have been inconsistent in the imposition of sanctions for violations of Rule 3.3(a)(2), with "[s]erious sanctions" being "usually limited to cases in which the lawyer or his associates were involved in the development of the prior precedent."[13] This lack of discipline might be attributed to "the difficulty in determining when failure to cite adverse authority is due to intentional deception"[14] as opposed to mere oversight. After all, there is no requirement that "the lawyer, in addition to advocating the cause of his client, step first into the shoes of opposing counsel to find all potentially contrary authority, and finally into the robes of the judge to decide whether the authority is indeed contrary or whether it is distinguishable."[15] Nevertheless, attorneys should stay vigilant for violations of Rule 3.3(a)(2) or risk sanctions and discipline.

C. What should litigants and judges do when they spot unethical conduct?

Under Rule 11, a court may impose sanctions on its own initiative by ordering "an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)," or a party may serve a Motion for Sanctions based on alleged violations, followed by a 21-day correction period. Sanctions include "striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other education programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc."[16]

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[12] *Massey v. Prince George's County*, 918 F. Supp. 905, 908 (D. Md. 1996).
[13] *Matthews v. Kindred Healthcare Inc.*, 2005 WL 3542561, at *5 n.4 (W.D. Tenn. Dec. 17, 2005).
[14] Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J. L. & TECH. 82, 94 (2007).
[15] *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 205 (7th Cir. 1985).
[16] FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

Beyond the sanctions suggested by Rule 11, an offending attorney may also be reported to the Louisiana State Disciplinary Board, as any violation of Rule 11 is also a violation of Louisiana's Rules of Professional Conduct. Yet, if an attorney tries a court's patience through frivolous or dishonest litigation, attorney discipline might seem too little, too late. Here, judges and litigators can look outside of Rule 11 as suggested in the Committee Advisory Notes: "Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions."[17] Statutes may permit the award of attorney's fees to prevailing parties or otherwise modify principles governing such awards. Further, Rule 11 does not diminish (1) the law of contempt; (2) the court's ability to exercise its inherent powers; or (3) sanctions, the award of expenses, or remedial actions authorized under other rules, such as 28 U.S.C. § 1927[18].

IV. Law as a Business, or Business as Law

A. Accounting Firm Presence in the Legal Market – The MDP Models

Accounting firms have been expanding in scope of practice since the early 1980s when the largest accounting firms—KPMG, Ernst & Young, PricewaterhouseCoopers, and Deloitte (collectively known as the "Big Four")—began providing legal services and branding themselves as multi-disciplinary partnerships ("MDPs"). By hiring in-house lawyers for non-client facing positions, the Big Four expanded their global presence and stretched the regulatory boundaries of an MDP. In the United States, however, the Big Four's development of legal networks was slowed by the Sarbanes-Oxley Act of 2002. Following an early 2000s lull, the 2008 global recession enabled the Big Four to respond to gaps in legal services created by the lack of financial security facing many mid-tier law firms. As a result, the Big Four gained a stronghold in the developing

[17] FED. R. CIV. P. 11 advisory committee note to 1993 amendment.
[18] ("Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.").

markets of Asia, Europe, Latin America, and Africa. For the past decade, the Big Four have been highly competitive with law firms in the global legal services market, offering integrated solutions to clients seeking streamlined, comprehensive services.[19]

Accounting firms have since found the legal services market to be an increasingly lucrative alternative to traditional tax and auditing markets due to both the legal services market's size and the synergies between tax, corporate finance, and law.[20] On an international scale, accounting firms already account for a significant share of the global legal services market, with the Big Four each offering full legal services to 69 countries on average. With the Big Four continuing to diversify and expand their practice fields—coupled with globalization—accounting firms continue to be increasing in reach and significance with relation to the legal services market.[21]

B. Trend in Growth Toward Big Law

Bloomberg Law called the 2010s the "Decade of Mergers" for Big Law.[22] Consider the recent mergers of Squire Sanders and Patton Boggs; Arnold & Porter and Kaye Scholer; Troutman Sanders and Pepper Hamilton; and of course the creation of Dentons, a multinational firm with over 10,000 active attorneys. In the United States, alone, there are now over 30 law firms with at least 1,000 active lawyers.[23] With globalization and increased competition from nonlegal professionals and MDPs on the rise, this list of mega firms will only continue to grow, especially

[19] David B. Wilkins & Maria J. Esteban Ferrer, *The Integration of Law into Global Business Solutions: The Rise, Transformation, and Potential Future of the Big Four Accountancy Networks in the Global Legal Services Market*, 43 LAW & SOCIAL INQUIRY 981 (2018).
[20] Gianluca Morello, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi- Discipline Practices Should be Permitted in the United States*, 21 FORDHAM INTERNATIONAL L.J. 190 (1997).
[21] Meg McEvoy, *ANALYSIS: The Big 4 Is Knocking - Are State Bars Answering?*, BLOOMBERG LAW (Sept. 18, 2019), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-the-big-4-is-knocking-are-state-bars-answering.
[22] Meghan Tribe, *Decade of Mergers: 10 Big Law Tie Ups That Shaped the 2010s (2)*, BLOOMBERG LAW (Dec. 26, 2019), https://news.bloomberglaw.com/us-law-week/decade-of-mergers-10-big-law-tie-ups-that-shaped-the-2010s.
[23] John C. Coffee, Jr., *The Future of the Large Law Firm: Growth, Mergers, and Inequality*, THE CLS BLUE SKY BLOG (Jan. 6, 2020), https://clsbluesky.law.columbia.edu/2020/01/06/the-future-of-the-large-law-firm-growth-mergers-and-inequality/.

as law firms expand not only in scale, but in *scope*. For example, legislative, regulatory, and consulting services are now expected by clients with more diverse appetites for legal services. As a result, the evolving legal services market is disproportionally affecting the potential longevity of smaller law firms as they try to keep up with increased price competition, online alternatives, and loss of revenue due to nonlegal professional entities in the business and corporate legal markets.[24] And any firm on the brink of falling behind the changing times is susceptible to acquisition by multinational firms offering a more diverse array of legal services.

C. State Modifications to Rule 5.4(b) and the ABA

The domestic legal regulatory landscape is also evolving to meet the diversity in legal services. Several states have recently passed regulations facilitating diversity in legal services.

1. Arizona

In August 2020, the Arizona Supreme Court passed a rule permitting "[a]n entity that includes nonlawyers who have an economic interest or decision-making authority . . . [to] employ, associate with, or engage a lawyer or lawyers to provide legal services to third parties" if certain criteria are met.[25] This rule allows the creation of certain Alternative Business Structures ("ABS") to increase innovation within the legal industry while still "encouraging an independent, strong, diverse, and effective legal profession."[26] As of February 2022, eighteen ABS licenses have been approved within Arizona.[27]

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[24] Claire O'Connor, *Law Firms in the US: Industry Report 54111*, IBISWorld (Aug. 2019).

[25] Ariz. R-20-0034 (31.1)(c) (2020). Specifically, the entity must (1) "employ[] at least one person who is an active member in good standing of the State Bar of Arizona"; (2) be "licensed pursuant to ACJA § 7-209," which requires consideration of regulatory objectives and examination of the entity's self-governance structures; and (3) limit provision of legal services only to "persons authorized to do so and in compliance with the Rules of Supreme Court."

[26] ACJA § 7-209.

[27] ARIZONA SUPREME COURT, ABS DIRECTORY FEBRUARY 2022 (2022), available at https://www.azcourts.gov/Portals/0/ABS/2021%20Directory/ABS%20Directory%20February%202022.pdf?ver=p_SGja8K2SLAQq-upQXa7g%3d%3d.

2. Oregon

The Oregon Legislature passed a bill in 2021 permitting the licensure of paraprofessionals "with the approval of the Oregon Supreme Court" in the areas of family law and landlord-tenant proceedings,[28] "two . . . areas of law with the greatest unmet need for legal assistance in Oregon."[29] The Oregon Supreme Court is currently considering a proposal by the Oregon State Bar.

3. Utah

In 2020, the Utah Supreme Court adopted a hybrid policy allowing non-traditional legal service providers to practice law within a regulatory "sandbox" to test ABS and regulatory policies. The regulation within the sandbox is (1) "based on the evaluation of risk to the consumer", (2) "relative to the current legal services options available", (3) conducted to "establish probabilistic thresholds for acceptable levels of harm", and (4) "empirically driven."[30]

4. Washington, D.C.

Washington, D.C. adopted its own Rule of Professional Conduct 5.4(b) permitting nonlawyers to practice law in partnership with lawyers if certain conditions are met. This rule marks a major policy change, though its utility has not yet been tested because lawyers practicing across state lines would still be violating other states' codes of professional conduct.[31]

D. ABA Opinion 499

Even the American Bar Association has caught on to this trend. On September 8, 2021, the ABA released a formal opinion stating that "[a] lawyer may passively invest in a law firm that includes nonlawyer owners . . . operating in a jurisdiction that permits ABS entities, even if the lawyer is admitted to practice law in a jurisdiction that does not authorize nonlawyer ownership of

[28] S.B. 768, 81st Or. Legis. Assemb. (2021).
[29] *Paralegal Licensing Proposal*, OREGON STATE BAR, https://www.osbar.org/lp.
[30] Utah SO No. 15 (2020).
[31] D.C. Bar Rule 5.4(b).

law firms." [32] This opinion allows for lawyers to invest in an ABS but notably does not allow for lawyers to actually practice law through the ABS or hold any managerial authority in an ABS.

E. The Future of "Self" Regulation

1. Rule 1.10

One hundred years ago, lawyers primarily practiced independently or in very small firms. As firms became larger, however, ethical problems involving conflicts of interest inevitably arose. In 1931, the ABA released Formal Opinion 33, prohibiting an attorney from "accept[ing] litigation against a past client if such requires that the attorney contest the same issue for which he previously was an advocate in the prior litigation. Nor may a partner of such attorney accept such litigation even though he was not a partner at the time of the prior litigation." The ABA later codified this imputation rule in Model Rule 1.10: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 . . . ."

So what is a multinational mega-firm to do? One solution is the use of the Swiss model and "vereins," whereby a global entity might brand itself as a single firm, but "no confidential client information is shared across the [individual] constituent entities unless the client explicitly consents to shared representation by more than one verein member."[33] Another is the English model, where clients are represented by individual attorneys and not necessarily by the attorney's firm.[34] Regardless of how American self-regulation of the legal profession develops in response to mega-firms and MDPs, what is clear is that the solution must stem from "how the clients'

[32] ABA Comm. On Ethics & Pro. Resp., Formal Op. 499 (2021).
[33] Cassandra Burke Robertson, *Conflicts of Interest and Law-Firm Structure*, 9 ST. MARY'S JOURNAL ON LEGAL MALPRACTICE & ETHICS 64, 76 (2018).
[34] *Id.* at 74.

interests are affected by law firm structure and practice,"[35] including the client's preferred choice of counsel and the prioritization of confidentiality and loyalty.

2. Rule 5.1

As legal services become increasingly available by nonlawyers—combined with the growth of MDPs and ABS entities—compliance with standards of professional conduct become all the more important (whatever those standards may be). Some states allowing for multidisciplinary approaches to legal services have implicitly recognized this importance through enabling language, while Washington D.C. explicitly mandates that lawyers with a "financial interest or managerial authority" in the entity be "responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1"[36]

3. Rule 5.4

There has been extensive debate as to whether the increased relaxation of Model Rule 5.4(b) and increased allowance of ABS will have a positive or negative effect on regulation in the legal industry. Literature indicates that the effects of non-lawyer ownership will likely differ depending on (1) the type of law, and (2) the type of non-lawyer influence. Non-lawyers are more likely to be profit-driven and business-oriented, thus reducing the significance of any potential increase of access to legal services that may occur. In the opinion of some, professionalism within non-lawyer owned firms will likely exist at similar levels to that which currently exists within the legal market, with an exception being a likely increase in conflicts of interest.[37]

[35] *Id.* at 80.
[36] Washington D.C.'s Rule 5.4(b).
[37] Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism*, 29 GEORGETOWN J. OF LEGAL ETHICS 1 (2016).

F. Conclusion

Is the public better served by an ABS ethical framework? The Justice system exists for the good of the public, not lawyers. Will the juxtaposition of increased diversity and increased consolidation within the legal market serve "access to justice" or a greater concentration of the providers of legal services? And, with all the interconnected regulatory shifts at play across the country, will profit-motivation truly lead to more inclusive breadth of legal services options for the those on the lower end of the socioeconomic spectrum? These are difficult and relevant questions that cannot be answered with certainty or confidence. To hazard a guess, the more likely outcomes will be a slow drift of states toward allowance of more flexibility toward ABS and a reactive approach of ethics regulators to these larger market changes. As for the firms and lawyers that provide these services, we can expect more change as technology and non-traditional providers affect the way legal services are delivered to the public with an overall gravitation toward Big Law. After all, businesses developed and "used complex corporate structures long before law firms even began to consider it."[38] And "[u]ltimately, the growth of multistate and multinational practice should tend to make professional standards more uniform."[39]

[38] Cassandra Burke Robertson, *Conflicts of Interest and Law-Firm Structure*, 9 ST. MARY'S JOURNAL ON LEGAL MALPRACTICE & ETHICS 64, 86 (2018).
[39] John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 1047 (2009).