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## Extra Law Prices: Why MRPC 5.4 Continues to Needlessly Burden Access to Civil Justice for Low- to Moderate-Income Clients

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# Extra Law Prices: Why MRPC 5.4 Continues to Needlessly Burden Access to Civil Justice for Low- to Moderate-Income Clients

R. Matthew Black\*

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### *I. Introduction*

In 1983, the American Bar Association reframed the ethical rules for the practice of law and created the Model Rules of Professional Conduct.<sup>1</sup> Eventually, all fifty states and the District of Columbia adopted their own version of the Model Rules.<sup>2</sup> With few jurisdictional exceptions, ethical guidelines adopted in the United States restrict lawyers from sharing legal fees with non-lawyers.<sup>3</sup> Additionally, the Model Rules prohibit a lawyer from

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1. See RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE 6 (2013–2014) (setting out a brief history of rules of professional conduct in the legal profession).

2. See *id.* at 7–8 (offering the scope of adoption of the Model Rules of Professional Conduct).

3. See MODEL RULES OF PROF'L CONDUCT r. 5.4(a) (AM. BAR ASS'N 2016) (generalizing a restriction incorporated into the Model Rules of Professional Conduct).

allowing a third party to “direct or regulate the lawyer’s professional judgment . . . .”<sup>4</sup>

While drafting the Model Rules, the American Bar Association’s Commission on the Evaluation of Professional Standards proposed allowing non-lawyer ownership, non-lawyer investment, and non-lawyer management of a law firm.<sup>5</sup> Opponents of expanding law firm ownership to non-lawyers voiced immediate concern that traditional law firms would be unable to compete with aggressive corporate models and that economic pressures would erode the professional independence of lawyers.<sup>6</sup> Although arguments for supporting the status quo in the United States prevailed, other countries with common law traditions have since permitted alternative business structures that allow non-lawyer ownership and management of law firms.<sup>7</sup>

Whether alternative business structures might improve access to justice for low- to moderate-income clients remains a contentious matter.<sup>8</sup> Because alternative business structures are generally unavailable, lawyers rely on 501(c)(3) non-profit status and sliding-scale fee structures to reach an underserved market of low-to moderate-income clientele.<sup>9</sup> Nevertheless, use of a sliding-scale fee structure is rare—perhaps because it fails to maximize law firm profits.<sup>10</sup> A sliding-scale fee structure also does

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4. *Id.* at cmt. 2.

5. See Tyler Cobb, *Have Your Cake and Eat It Too! Appropriately Harnessing the Advantages of Nonlawyer Ownership*, 54 ARIZ. L. REV. 765, 770 (2012) (observing an option considered by the ABA, but later rejected).

6. See 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, 10–11 (1998) (recognizing strong opposition to the expansion of law firm ownership to nonlawyer entities).

7. See Nick Robinson, *When Lawyers Don’t Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism*, 29 GEO. J. LEGAL ETHICS 1, 5 (2016) (suggesting that analyzing alternative paths in other countries may prove beneficial).

8. See, e.g., Bailey Cunningham, *Nonlawyer Ownership of Law Firms: A Recurring Debate*, 104 ILL. B.J. 48 (2016.) (“Nonlawyer ownership, aka ‘alternative business structures’ threatens the professional independence of lawyers, and the ethics rules forbidding it should not be changed.”).

9. See, e.g., OPEN LEGAL SERV., <https://openlegalservices.org/> (last visited Feb. 4, 2019) (demonstrating a firm utilizing both non-profit status and sliding-scale fee structure) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

10. See Michael Zuckerman, *The Utah Lawyers Who Are Making Legal*

not assist clients who need legal services, but do not qualify for LSC-funded programs and are unable to pay even a portion of subsidized legal fees.<sup>11</sup> This Note addresses why using a non-profit model to provide legal services to low- to moderate-income clientele is necessarily self-limiting. This Note further suggests that alternative business structures permitting non-lawyer ownership and operation of law firms are a more effective and efficient means to reach a presently underserved market.

Part II provides a background about Model Rule 5.4 and discusses theories and rationales for why the legal profession in the United States refuses to compromise on deeply entrenched biases against nonlawyer ownership or management of law firms. Part III considers the methods and structures of non-profit law firms currently serving low- to moderate-income clientele and highlights specific examples of similarities and distinctions between varying legal markets. Part IV offers reasons why serving moderate-income clientele through a non-profit model is a self-limiting and ultimately inadequate way of expanding access to justice for a presently underserved market. Finally, Part V advocates permitting non-lawyer ownership and management of law firms. By utilizing business-sector expertise and economies of scale, lawyers can improve access to justice for low- to moderate-income clientele. This Note identifies Wills as a specific practice area already making such a transition.

## *II. Background*

### *A. Origin and Evolution of Model Rule 5.4*

In 1964, the House of Delegates of the American Bar Association created the Special Committee on Evaluation of Ethical Standards.<sup>12</sup> The committee developed the Model Code of

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*Services Affordable*, ATLANTIC (Aug. 7, 2014), [https://www.theatlantic.com/business/archive/2014/08/the-utah-lawyers-who-are-making-legal-services-affordable/375717/?single\\_page=true](https://www.theatlantic.com/business/archive/2014/08/the-utah-lawyers-who-are-making-legal-services-affordable/375717/?single_page=true) (“Part of the reason is that it doesn’t maximize profits—you can’t get rich running it.”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

11. See *id.* (illustrating how non-profit models address access to legal services).

12. See MODEL CODE OF PROF’L RESPONSIBILITY, ix (AM. BAR ASS’N 1980)

Professional Responsibility based on the ABA Canons of Professional Ethics.<sup>13</sup> The ABA adopted the Model Code of Professional Responsibility in 1969.<sup>14</sup> By 1977, the legal profession recognized growing pressure to reconsider priorities inherently promoted by the Model Code of Professional Responsibility.<sup>15</sup> Highly publicized lawyer conduct during the Watergate scandal compounded the pressure for reform by further shifting public sentiment toward the belief that the legal profession was openly self-serving.<sup>16</sup> One specific critique of the legal profession focused on tasks nonlawyers could adequately perform, but were prevented from performing, because of a prohibition against the unauthorized practice of law.<sup>17</sup>

The prohibition against the unauthorized practice of law was among the issues that prompted the ABA to form the Kutak Commission in 1977.<sup>18</sup> The purpose of the Kutak Commission was “to reinforce the idea that lawyers served the public good, and helped improve American social, economic, and political structures.”<sup>19</sup> The Kutak Commission went further than simply amending the Model Rules of Professional Responsibility, and concluded “a comprehensive reformulation was required.”<sup>20</sup> In

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(giving background on establishing the Model Code of Professional Responsibility).

13. *See id.* (explaining how the Canons of Professional Ethics were based principally on the Code of Ethics adopted by the Alabama State Bar Association in 1887).

14. *See id.* (stating further that the MCPR went into effect on January 1, 1970).

15. *See, e.g.,* Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 704 (1977) (“[L]awyers’ ethics are consistently self-serving and . . . pressure for revision of several basic concepts of professional responsibility is both sound and inevitable.”).

16. *See* Michael Ariens, *The Last Hurrah: The Kutak Commission and the End of Optimism*, 49 CREIGHTON L. REV. 689, 699 (2016) (“By 1977, the ABA had worked for over a decade to show that its principal effort was service to the public, not mere self-interest.”).

17. *See* Morgan, *supra* note 15, at 708 (“[T]he important question is not whether lawyers have something to contribute, but, rather, what justification there is for wholly excluding the alternative services which could be provided by nonlawyers.”).

18. *See* Ariens, *supra* note 16, at 702–03 (listing the basic precepts of the Kutak Commission).

19. *Id.* at 699.

20. *See* COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, ABA

spite of recognizing the need to evolve, the legal profession reacted negatively toward change.<sup>21</sup> As part of this reaction, the ABA ultimately rejected a proposal to allow non-lawyer ownership of law firms, and non-lawyer business partnerships with lawyers.<sup>22</sup>

A rule against fee-sharing and partnerships between lawyers and non-lawyers was originally incorporated into the Model Code of Professional Responsibility on the premise of preserving the professional independence of lawyers.<sup>23</sup> The Kutak Commission recognized revising such a rule would permit development of nontraditional forms of organizing a law practice.<sup>24</sup> The Commission acknowledged contemporary rules restricting the unauthorized practice of law were not sufficiently narrowly tailored to prevent an undermining of the legal profession, but instead focused on the particular form a law firm could take.<sup>25</sup> During its consideration of partnerships between lawyers and non-lawyers, the Commission was aware the legal profession needed to expand access to legal services.<sup>26</sup>

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MODEL RULES OF PROFESSIONAL CONDUCT, at \*4 (AM. BAR ASS'N, Discussion Draft 1980) (describing the extent of the Commission's objective in producing the Discussion Draft).

21. See Ariens, *supra* note 16, at 711 (addressing the ABA's rejection of the Commission's departure from "the traditional framework and substantive content of the Code").

22. See Matthew W. Bish, *Revising Model Rule 5.4: Adopting a Regulatory Scheme that Permits Nonlawyer Ownership and Management of Law Firms*, 48 WASHBURN L.J. 669, 670 (2009) (considering an alternative to the current rule captured in Model Rule 5.4).

23. See *id.* at 674 (inferring the ABA intended the structure of the Model Rules DR 3-102 and DR 3-103 to restrict the unauthorized practice of law).

24. See ABA COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS (AM. BAR ASS'N, Report 400 to the House of Delegates 1982), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/kutak\\_8-82.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_8-82.pdf) (explaining the need for expanding the means of making legal services more available) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

25. See *id.* ("The Commission believes the Rules in this area should focus on the actual potential for abuse in such developments rather than the particular form of law practice.").

26. See *id.* ("[T]here is a demonstrable need for expansion of the means of making legal services more available.").

*B. Arguments Against Nonlawyer Ownership or  
Management of a Law Firm*

The legal profession in the United States has long considered itself something more than a business.<sup>27</sup> In 1909, the Court of Appeals of New York decided the case of *Matter of Co-operative Law Co.*<sup>28</sup> In that case, a law firm organized as a corporation under a state Business Corporations Law.<sup>29</sup> The firm operated until 1909 when the legislature passed a statute criminalizing the practice of law by a corporation.<sup>30</sup> During its analysis, the court 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 corporation would control the litigation, the money earned would belong to the corporation and the attorney would be responsible to the corporation only.<sup>31</sup>

The court went on to conclude the law firm could never have been a corporation within any meaning contemplated by the Business Corporations Law, and therefore the business did not lawfully exist.<sup>32</sup>

There are three potential arguments against allowing non-lawyer ownership or management of a law firm. The first is that non-lawyer ownership or partnership of a firm poses a risk to professional independence. The second argument is that non-lawyer ownership or management heightens the possibility for

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27. See *Matter of Co-operative Law Co.*, 198 N.Y. 479, 483 (1910) (“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 . . .”).

28. *Id.*

29. *Id.*

30. See *id.* at 481 (explaining the facts of the case as recited by the New York Court of Appeals).

31. *Id.* at 483–84.

32. See *id.* at 484–85 (reasoning that business ownership of a law firm was not meant as an objective of the legislature because “[s]uch an innovation with the evil results that might follow would require the use of specific language clearly indicating the intention”).



a breach of lawyer/client confidentiality. The final argument stems from fear and uncertainty about how the current business model for many law firms would be destabilized by entry into the legal marketplace of large, corporate business structures.

### 1. *Professional Independence*

A business model where a non-lawyer operates or manages a law firm may raise concerns about professional independence. Professional independence is thought of in two ways.<sup>33</sup> First, professional independence may refer to independence from clients, whereby a lawyer pursues honesty with the client with regard to the client's preferred course of conduct.<sup>34</sup> Second—and pertinent to non-lawyer ownership or management of law firms—professional independence may refer to independence from third parties whose interests could compromise a lawyer's professional duty to the client or the public.<sup>35</sup>

Professional independence from third parties is theoretically protected by a restriction against sharing legal fees with non-lawyers, and a prohibition against practicing law in corporations or associations with non-lawyers.<sup>36</sup> Without such a restriction a lawyer might assign his or her loyalty to “the one who holds the purse strings,” rather than to the client who has entrusted the lawyer with legal representation.<sup>37</sup> The potential threat lies where lawyers would be paid to attain business goals, resulting in a strong incentive to sacrifice client interests and the integrity of the legal system as a whole.<sup>38</sup>

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33. See Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 607–08 (2013) (offering two distinct ways to look at “professional independence”).

34. See *id.* at 608–09 (distinguishing between independence from the client and independence from third parties).

35. *Id.* at 613.

36. See MODEL RULES OF PROF'L CONDUCT r. 5.4 cmt. 1 (AM. BAR ASS'N 2016) (“The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment.”).

37. See Jack F. Dunbar, *Multidisciplinary Practice Translated Means “Let's Kill All the Lawyers”*, 79 MICH. B.J. 64, 66 (2000) (acknowledging concern that client interests would not be controlling over a lawyer's personal economic interests).

38. See *id.* at 67 (arguing that economic power in the hands of nonlawyers

## 2. Breach of Lawyer/Client Confidentiality

A business model where a non-lawyer operates or manages a law firm raises concerns about lawyer/client confidentiality. A lawyer is not permitted to share information about the representation of a client except in extremely limited circumstances.<sup>39</sup> The purpose of confidentiality between a client and a lawyer is to enable trust within the relationship.<sup>40</sup> Trust encourages a client to communicate candidly, and open communication is essential for a lawyer to effectuate adequate representation.<sup>41</sup>

If a lawyer practices under an organization managed or owned by a nonlawyer, client information might become accessible to a non-lawyer, and thus not subject to the same legal protections of lawyer/client confidentiality.<sup>42</sup> Various segments of a business with access to client information might even expose otherwise privileged client communications to discovery or public intrusion.<sup>43</sup> Vicarious non-lawyer access to client information presents a risk to the legal profession that would obligate nonlawyers to adhere to the same standards as lawyers with respect to conflicts of interest.<sup>44</sup> A non-lawyer's obligation to client confidences would become increasingly difficult to keep as a business grows across intersections of geography, client base, and practice areas.<sup>45</sup>

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shifts the goals of the profession into the economic realm, rather than centering considerations on professional ethics).

39. MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2016).

40. *See id.* at cmt. 2 (positing that trust is "the hallmark" of the client-lawyer relationship).

41. *See id.* ("The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.").

42. *See* J. Nick Badgerow, *A Profession on the Threshold: The Bar Considers Multiple Discipline Practices*, 69 J. KAN. B.A. 12, 15 (2000) (suggesting lawyers would need to warn clients that information disclosed to a nonlawyer within the business would probably not be confidential).

43. *See id.* at 15–16 (highlighting a potential alteration in expectations a client might have about client-lawyer confidentiality).

44. *See id.* at 16 (raising the additional context of conflicts of interest under Model Rules of Professional Conduct 1.7 and 1.9).

45. *See id.* at 15–16 (suggesting that as client bases grow, conflicts between branches of the same business would become subject to confusion).

### 3. Destabilization of Legal Monopoly

A business model where a non-lawyer operates or manages a law firm raises concerns about the security of the monopoly lawyers possess over the practice of law. The Kutak Commission's effort to alter Model Rule 5.4 to allow non-lawyer ownership of a law firm was defeated, at least in part, because of the "Fear of Sears."<sup>46</sup> The Fear of Sears was the belief that if large corporations could own law firms, small firms would be unable to compete in the legal marketplace.<sup>47</sup> While protection of a monopoly on the legal services is framed as an interest in maintaining professionalism, the subtext of maintaining professional independence is often interpreted as a long-enduring interest to secure business for lawyers.<sup>48</sup>

A monopoly on the practice of law might be worth maintaining if there was an imminent threat of harm presented by *any* non-lawyer that provided *any* legal services.<sup>49</sup> To be sure, protecting the public from incompetent and unethical legal services is well within the scope of legitimate interests to the bar.<sup>50</sup> But mere qualification as a lawyer is logically insufficient to ensure the provision of adequate legal representation to clients.<sup>51</sup> An absolutist approach precluding *all* non-lawyer representation or business contact with the legal profession in *all* circumstances

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46. See Cobb, *supra* note 5, at 771 (describing a basis for rejecting non-lawyer ownership of law firms).

47. See Adams & Matheson, *supra* note 6, at 10 (describing the grounds for opposing the Kutak Commission's version of Rule 5.4).

48. See James W. Jones, *Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159, 1171 (2000) (giving a history of self-protectionism in the legal profession).

49. See Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 230 (1990) ("[T]he traditional rationale for unauthorized practice constraints—protection of the public from incompetent and unethical services—cannot support the current prohibitions. Although the risk to consumers should not be overlooked, it has been too often overstated.").

50. See *id.* (acknowledging that the restriction against unauthorized practice has some merit).

51. See *id.* (challenging the notion that an inexperienced attorney is more advantageous to a client than an experienced legal technician).

fails to consider alternatives that might, on balance, benefit the public interest at no significant risk of harm to clients.<sup>52</sup>

### *C. Alternative Business Structures Abroad*

#### *1. United Kingdom*

Although arguments against non-lawyer ownership or management of law firms persist in the United States, other countries with common law traditions have approached the issue with more flexibility. The United Kingdom liberalized rules on the ownership of law firms through the Legal Services Act of 2007.<sup>53</sup> The Legal Services Act permits lawyers to form alternative business structures.<sup>54</sup> The scope of the Act allowed alternative business structures to include non-lawyer ownership interest in a firm.<sup>55</sup> The direct impact of the Legal Services Act on low- to moderate-income clientele is difficult to gauge because of other governmental policy choices that immediately followed the Act.<sup>56</sup> Subsequent data gathering shows that the segment of the legal market most immediately impacted by the Legal Services Act has been personal injury claims.<sup>57</sup>

A notable structural model emerging from the Legal Services Act in the United Kingdom was Co-Operative Legal Services, which operated under the umbrella of the Co-Operative Group.<sup>58</sup>

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52. See *id.* at 231 (rejecting the limiting choice that comes with prohibiting the practice of law by all non-lawyers).

53. See Barron Dickinson, *Non-Lawyer Ownership of Law Firms in Florida: Issues with Corporate Governance*, 16 FLA. ST. U. BUS. REV. 99, 117 (2017) (providing a global context for how professionalism and professional independence is evolving in other countries).

54. See Michele DeStafano, *Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 FORDHAM L. REV. 2791, 2817 (2012) (explaining the scope of the Legal Services Act).

55. See Dickinson, *supra* note 53, at 117–18 (describing factors considered to allow nonlawyer investment in a law firm).

56. See Robinson, *supra* note 7, at 19–21 (recognizing that the impact of the Legal Services Act relies on extraneous economic and policy circumstances).

57. See *id.* at 21 (tempering optimism alternative business structures improve access to moderate-income clientele).

58. See *id.* at 26 (describing an alternative business structure aimed at providing services to moderate-income clientele).

The Co-Operative Group has existed in the United Kingdom in some form since 1844, and is owned by independent consumers.<sup>59</sup> The Co-Op model is engaged in numerous areas of commerce, including as a food retailer, a funeral services provider, and a general insurer.<sup>60</sup> The stated objective of the Co-Operative's expansion into legal services was to expand the entire market for legal services.<sup>61</sup>

These new alternatives business structures, however, have not been without their share of trouble. For example, despite operating as one of the largest providers of legal services to moderate-income clients in the key area of family law, Co-Op Legal Services "has not been able to halt a massive increase in the number of unrepresented litigants in UK family courts . . ."<sup>62</sup> Furthermore, Co-Operative Legal Services also endured challenges to its brand connected to management issues and financial problems in other sectors of its broader corporate structure.<sup>63</sup> With only a few years of practice in a new form of non-lawyer-controlled business structure, it is perhaps too early to determine whether the alternative business structures permitted by the Legal Services Act will broaden access to the legal services market for low- to moderate-income clients in the United Kingdom.<sup>64</sup>

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59. See *Co-op History*, CO-OP, <https://www.co-operative.coop/about-us/history> (last visited Feb. 12, 2019) (giving a brief history of the organization and its structure) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

60. *Id.*

61. See *Liberalizing the Law: Supermarket Sweep*, ECONOMIST (Apr. 27, 2013), <https://www.economist.com/news/britain/21576675-cold-wind-competition-sweeps-legal-services-market-supermarket-sweep> (evaluating change in the legal market caused by activities of the Co-operative Group) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

62. See Robinson, *supra* note 7, at 27 (noting a steep increase in unrepresented litigants resulting from legal aid cuts that took place in 2013).

63. See Judith A. McMorrow, *UK Alternative Business Structures for Legal Practice: Emerging Models and Lessons for the U.S.*, 47 GEO. J. INT'L L. 665, 694–95 (2016) (describing challenges to Co-Operative Legal Services).

64. See *id.* at 694 (noting that "the ABS structure allowed the legal unit to weather a rough business year. Had it been a traditional law firm, without outside [financial] support, [Co-Op Legal Services] presumably would have closed.").

## 2. Australia

Australia is another common law country that legislatively expanded non-lawyer ownership or management of law firms.<sup>65</sup> The Legal Profession (Incorporated Legal Practices) Act 2000 widely opened the door for legal service providers in New South Wales to register as companies with the Australian federal corporations agency.<sup>66</sup> The Act evolved to include more opportunity for non-lawyer influence and investment in law firms across Australia.<sup>67</sup>

The result of permitting unlimited non-lawyer investment in Australia has been different than the result of similar legislative choices in the United Kingdom.<sup>68</sup> Motivation to incorporate law firms in Australia is possibly driven more by tax benefits than the goal of restructuring firms into large-scale, corporate models.<sup>69</sup> Additionally, law firm incorporation in Australia does not necessarily lead to non-lawyer ownership or management.<sup>70</sup>

Supporters of the Act argue that investment capital drives law firm growth, which in turn helps large law firms attain economies of scale to engage in more public-oriented or pro bono representation.<sup>71</sup> A prominent example of a public-oriented,

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65. See Dickinson, *supra* note 53, at 121 (describing Australia's embrace of alternative law firm business structures).

66. See Steven Mark & Georgina Cowdroy, *Incorporated Legal Practices—A New Era in the Provision of Legal Services in the State of New South Wales*, 22 PENN ST. INT'L L. REV. 671, 674 (2004) (providing background for the development of alternative business structures in Australia).

67. See *id.* at 688 n.41 (“The Attorneys General of all other Australian states have agreed to enact legislation over the next year or so to allow for the incorporation of legal practices.”).

68. See Robinson, *supra* note 7, at 29 (recognizing differences between impacts in the United Kingdom and Australia with respect to enactment of similar legislation).

69. See CHRISTINE PARKER, PEERING OVER THE ETHICAL PRECIPICE: INCORPORATION, LISTING, AND THE ETHICAL RESPONSIBILITIES OF LAW FIRMS 12 (Melbourne Law School, University of Melbourne), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1132926](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1132926) (arguing that Australian law firms are motivated to incorporate primarily for a beneficial tax rate) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

70. See Robinson, *supra* note 7, at 30 (“[Incorporated legal practices] . . . have become quite common . . . but actual outside ownership . . . is still rare.”).

71. See Benedict Sheehy, *From Law Firm to Stock Exchange Listed Law*

not-for-profit firm in Australia is Salvos Legal, which is wholly owned by The Salvation Army.<sup>72</sup> Salvos Legal operates in areas such as corporate, commercial, property, and intellectual property.<sup>73</sup> Salvos Legal reinvests all of its profits to another division operated as Salvos Legal Humanitarian.<sup>74</sup> Salvos Legal Humanitarian provides free legal services for indigent clients across Australia.<sup>75</sup> Salvos Legal Humanitarian claims to assist hundreds of indigent clients each week, utilizing donations and pro-bono volunteers in addition to profits from Salvos Legal.<sup>76</sup>

Opponents of the Act argue its benefits may be unrealized because large law firms beholden to investors will not engage in risky or publicly-oriented litigation unless ensured such litigation will return a profit or build the company brand.<sup>77</sup> But whether incorporation of law firms and non-lawyer investment encourages a more publicly-oriented legal market or simply consolidates the legal market in a way that ultimately results in a corporate legal monopoly is unanswered.<sup>78</sup>

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*Practice: An Examination of Institutional and Regulatory Reform*, 20 INTL. J. LEGAL PROF. 3, 24 (2013) (arguing that incorporated legal practices have not significantly affected the administration of justice, but have contributed to corporate governance).

72. See *Our Story*, SALVOS LEGAL, <https://www.salvoslegal.com.au/our-story/> (last visited Feb. 12, 2019) (explaining the corporate structure of Salvos Legal) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

73. See *id.* (listing the firm's various service areas).

74. See *id.* (“[W]e are a social enterprise law firm—all of our profits are used to fund Salvos Legal Humanitarian, our humanitarian arm which operates free legal services for people in need in NSW, Queensland[,] and Victoria.”).

75. See *id.*; *Humanitarian Free Legal Service*, SALVOS LEGAL, <https://www.salvoslegal.com.au/expertise/humanitarian-free-legal-service/> (last visited Feb. 12, 2019) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

76. See SALVOS LEGAL, *supra* note 72 (“We provide free legal services to hundreds of clients every week across our sixteen offices.”).

77. See Robinson, *supra* note 7, at 33 (considering statements that firms with non-lawyer investors must meet expectations set out in market forecasts, and that controversial pro bono work is not oriented to such requirements).

78. See *id.* (restating arguments against reforms in Australia to expand non-lawyer investment in law firms).

*D. The District of Columbia.*

To a lesser degree than seen in common law countries outside the United States, the District of Columbia has a more open posture toward non-lawyer ownership and management of law firms. The District of Columbia remains an outlier in the United States with respect to Model Rule 5.4, becoming the first jurisdiction to allow non-lawyers to become partners in law firms.<sup>79</sup> Rule 5.4 of the Rules Governing the District of Columbia Bar provides:

(b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

(1) The partnership or organization has as its sole purpose providing legal services to clients;

(2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;

(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;

(4) The foregoing conditions are set forth in writing.<sup>80</sup>

Perhaps the District of Columbia adopted a varied version of Rule 5.4 because of the unique networking opportunities available within the political culture of the District.<sup>81</sup> More so than in most U.S. cities, law firms in the District of Columbia stand to benefit substantially from hiring former non-lawyer government officials

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79. See Justin Schiff, *The Changing Nature of the Law Firm: Amending Model Rule 5.4 to Allow for Alternative Business Structures Resulting in Nonlawyer Ownership of Law Firms*, 42 CAP. U.L. REV. 1009, 1019 (2014) (noting the unique allowance of the D.C. Rules of Professional Conduct).

80. D.C. RULES OF PROF. CONDUCT r. 5.4 (2017).

81. See Victoria S. Sahani, *Reshaping Third Party Funding*, 91 TUL. L. REV. 405, 458–59 (2017) (describing the specific circumstances warranting relaxation of Model Rule 5.4 within the District of Columbia).



into their organization and then leveraging the interpersonal connections of those officials to generate business.<sup>82</sup>

Although the liberalization of Model Rule 5.4 in the District of Columbia represents a departure from the ABA Model Code, the change is modest.<sup>83</sup> Subsection (b)(1) provides that every partnership or organization with a non-lawyer investor must have as its sole purpose the provision of legal services.<sup>84</sup> The narrow scope of the rule also limits the number of law firms that take advantage of the rule to those operating exclusively within the District of Columbia.<sup>85</sup> Because the District of Columbia is the only jurisdiction where non-lawyer ownership is permitted, multi-district firms operating in D.C. cannot adopt a structure that could lead to rules violations in other jurisdictions.<sup>86</sup> Unless further action is taken to reduce uncertainty about a firm's ability to engage in fee-sharing with offices outside the District, the potential for experimentation with non-lawyer ownership inside the District will be restrained.<sup>87</sup>

### *III. Current Nonprofit Structures*

#### *A. Process for Obtaining 501(c)(3) Status*

Restrictions on business structures that integrate legal services with non-ownership or management may affect access to legal services for less privileged socio-economic groups. In response, some lawyers have created nonprofit organizations that

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82. *See id.* at 459 (explaining how unique opportunities have flourished in the District of Columbia under the relaxed rule).

83. *See* John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *FORDHAM L. REV.* 83, 98 n.78 (2000) (highlighting the inherent limitations of the District of Columbia rule).

84. *See id.* (recognizing the textual boundaries of the rule).

85. *See* Cobb, *supra* note 5, at 783–84 (suggesting that the rule has a limited impact because it does not invite investment by non-lawyers into firms that operate outside of the District of Columbia).

86. *See id.* at 783–85 (suggesting a reason why more firms in the District of Columbia have not experimented with non-lawyer owners).

87. *See id.* at 785–86 (arguing that fully understanding whether non-lawyer ownership is beneficial or harmful to the legal profession requires additional steps yet to be taken).

attempt to offer legal services to underserved moderate- and low-income clientele.<sup>88</sup> Both public interest law firms and legal aid organizations are eligible to qualify for nonprofit, tax-exempt status as charitable organizations under 26 U.S.C. § 501, I.R.C. § 501(c)(3).<sup>89</sup> However, public interest law firms and legal aid organizations are not functionally identical. A public interest law firm must serve a broad community interest.<sup>90</sup> In contrast, a legal aid organization represents indigent clients in matters specific to the interests of those individual clients.<sup>91</sup> A legal aid organization may charge clients for legal services and still remain qualified for tax-exempt status as long as fees are adjusted according to a client's ability to pay, and not according to the type of service rendered.<sup>92</sup>

Regardless of prospective clientele, starting a nonprofit law firm first requires compliance with registration rules set out by the state bar in the state or states where the firm intends to practice.<sup>93</sup> Properly registering for 501(c)(3) status comes with separate requirements, and ultimately creates additional hurdles for a nonprofit firm seeking to expand legal services to moderate-income clients. The process required by state of Virginia is offered below as an example.

### *1. Process for State Incorporation for a Nonprofit Law Firm*

Some states draw a distinction between legal aid organizations and nonprofit law firms. In Virginia, a legal aid

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88. See Mitch, *Tipping the Scales of Justice: The Role of the Nonprofit Sliding Scale Law Firm in the Delivery of Legal Services*, 20 N.Y.U.J. LEGIS. & PUB. POL'Y 375, 378–79 (2017) (describing a brief history of recognition by the legal profession that low- and moderate-income clients have difficulty accessing legal representation).

89. 26 U.S.C. § 501(c)(3) (2018).

90. See Mitch, *supra* note 88, at 380 (explaining the difference between public interest law firms and legal aid organizations, according to Rev. Rul. 75-74, 1975-1 C.B. 662).

91. See *id.* at 381 (focusing on how a legal aid organization may be postured with respect to indigent clients of various means).

92. See Rev. Rul. 78-428, 1978-2 C.B. 177 (explaining the substantial economic relief provided to the poor and distressed allowed by charging adjusted fees contingent upon client income).

93. See, e.g., Rules of the Supreme Court of Virginia, Pt. 6 § 4 para. 14 (2018).

organization must first qualify as a tax-exempt entity under § 501(c)(3) of the Internal Revenue Code.<sup>94</sup> The primary purpose of a legal aid organization is to provide free legal assistance to those who cannot pay.<sup>95</sup> Beyond expenses and costs, a legal aid organization is strictly prohibited from collecting a fee for legal services.<sup>96</sup> The Legal Services Corporation of Virginia provides substantial grants to legal aid organizations offering direct legal assistance to clients who live at or near the poverty level.<sup>97</sup> However, a nonprofit law firm that collects any fees from low- to moderate-income clients is not considered a legal aid organization, and thus cannot receive grant support from the Legal Services Corporation of Virginia.

The first step toward forming a nonprofit law firm that may collect fees is to confirm Virginia State Bar approval for the name of the firm in accordance with Virginia Rule of Professional Conduct 7.1.<sup>98</sup> Upon name approval, formation of a nonprofit corporation in Virginia requires filing with the State Corporation Commission.<sup>99</sup> Form SCC819 identifies an entity as a Virginia Nonstock Corporation.<sup>100</sup> Under Section 13.1-814 of the Code of Virginia, a Nonstock Corporation does not have owners, and distributions to members are restricted by law.<sup>101</sup>

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94. 15 VA. ADMIN. CODE § 5-10-10(1) (2017).

95. *See id.* (restricting nonprofit organizations from applying to be a licensed legal aid society if they serve a primary purpose other than provide free legal assistance).

96. *See id.* § 5-10-10(4).

97. *See* LEGAL SERVS. CORP. OF VA., REPORT TO THE COMMONWEALTH AND THE GENERAL ASSEMBLY ON THE WORK OF VIRGINIA'S LEGAL AID PROGRAMS: FY 2015-2016 2 (2016).

98. VA. RULES OF PROF'L. CONDUCT r. 7.1, cmt. 5 (2017).

99. *See How to Form a Virginia Nonprofit Corporation: The Steps to Form a 501(c)(3) Nonprofit Corporation in Virginia*, NOLO, <https://www.nolo.com/legal-encyclopedia/forming-nonprofit-corporation-virginia-36091.html> (last visited Feb. 13, 2019) [hereinafter *How to Form a Virginia Nonprofit Corporation*] (explaining how to form a nonprofit corporation in Virginia) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

100. *See id.* (linking to the state corporation commission for the location of form SCC819).

101. VA. CODE ANN. § 13.1-814 (2017); *see* COMMONWEALTH OF VIRGINIA STATE CORPORATION COMMISSION, ARTICLES OF INCORPORATION OF A VIRGINIA NONSTOCK CORPORATION SCC819 2 (2014), <http://www.scc.virginia.gov/publicforms/207/scc819.pdf> (cautioning a person seeking to organize a for-profit business as a Virginia nonstock corporation to

Properly completing registration form SCC819 is not alone sufficient to ensure tax-exempt status according to IRS publication 557, “Tax-Exempt Status for Your Organization.”<sup>102</sup> SCC819 requires additional addenda, including a statement of purpose matching IRS requirements, statements agreeing not to participate in prohibited political activities, and a plan for dissolution of assets.<sup>103</sup>

Once on file with the State Corporation Commission, a lawyer attempting to practice law as a nonprofit entity must file for registration with the Virginia State Bar.<sup>104</sup> The Virginia State Bar permits a law firm to be registered as a professional law corporation, a professional limited liability company, or a registered limited liability partnership.<sup>105</sup>

In Virginia, corporations not organized for profit are exempt from paying income tax under the laws of the United States.<sup>106</sup> If 501(c)(3) status is granted by the IRS, Virginia also exempts such organizations from sales and use tax, although a number of additional qualifications apply.<sup>107</sup> Considering the unavailability of funding from the Legal Services Corporation of Virginia, 501(c)(3) status from the IRS becomes an even more crucial mechanism for lowering operational costs for a nonprofit law firm not serving as a legal aid provider.

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consult an accountant or tax professional) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

102. COMMONWEALTH OF VIRGINIA STATE CORPORATION COMMISSION, *supra* note 101, at 2.

103. *See How to Form a Virginia Nonprofit Corporation*, *supra* note 99 (stating additional requirements necessary to achieve 501(c)(3) status after proper registration as a nonstock corporation is satisfied).

104. *See Rules of the Supreme Court of Virginia*, Pt. 6 § 4 para. 14 (2017) (stating rules and regulations governing the professional conduct of the practice of law through professional law corporations).

105. *See id.* (listing the different governance structures that law firms may take).

106. VA. CODE ANN. § 58.1-401 (explaining tax exemptions for nonprofits).

107. VA. CODE ANN. § 58.1-609.11 (same).

## 2. Process for IRS Qualification as a Nonprofit

In order to apply for 501(c)(3) status with the IRS in any state, a nonprofit law firm must complete IRS Form 1023 and include the firm's articles of incorporation.<sup>108</sup> An application must also include a description of all the firm's proposed activities, bylaws, and financial data.<sup>109</sup> Submission of an application for tax-exempt status may take place before the firm begins operation, or may be submitted after a period of operation not exceeding 27 months.<sup>110</sup> A nonprofit firm receiving 501(c)(3) status is permitted to accept tax-deductible donations.<sup>111</sup> A tax-exempt firm is thereafter generally required to file form 990 to report donations, and must also meet other annual requirements set out in section 501.<sup>112</sup>

### B. Benefits of 501(c)(3) Status for Nonprofit Law Firms

Obtaining 501(c)(3) status offers benefits to law firms attempting to provide legal services to low- to moderate-income clients. Reducing operational costs through tax exemption, soliciting tax deductible contributions from donors, and qualifying attorneys for student loan forgiveness are advantages nonprofit firms might leverage in order to operate a viable model.

#### 1. Tax Exemption

In 2016, the federal government taxed a qualified personal service corporation at a flat rate of 35%.<sup>113</sup> Law offices are personal service corporations if all of the corporation's activities substantially involve the performance of services in the law, and at least 95% of the corporation's stock, by value, is directly or indirectly owned by (1) employees performing services in the law,

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108. DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., CAT. NO. 46573C, TAX-EXEMPT STATUS FOR YOUR ORGANIZATION, PUBLICATION 557 22 (Jan. 2018).

109. *See id.* at 4. (explaining requirements for nonprofit registration)

110. *See id.* at 5.29 (same).

111. *See id.* at 21. (same).

112. *See id.* at 8 (same).

113. DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., INSTRUCTIONS FOR FORM 1120: U.S. CORPORATION INCOME TAX RETURN 17 (2016).

(2) retired employees who performed services in the law, or (3) the estates of such employees.<sup>114</sup>

Regardless of nonprofit status, law firms may not need to pay state income tax. Once again using Virginia as an example, law firms generally only need to file Virginia form 502 as pass-through entities.<sup>115</sup> State income tax for law firms is instead collected through personal state income tax.<sup>116</sup> In Virginia, the only advantage lost at the state level by not being qualified as a 501(c)(3) is with respect to sales and use tax.<sup>117</sup> A law firm not qualifying as tax-exempt for federal income tax purposes is not eligible for exemption from state income taxes.<sup>118</sup> A later section discusses the reasons federal tax-exempt status is necessary—yet, still insufficient—to structure a viable model for reaching low- to moderate-income clients.

## 2. Donations

Charitable organizations qualifying for tax-exempt status may receive tax-deductible donations from individual contributors.<sup>119</sup> Contributions to nonqualified organizations are not tax-deductible.<sup>120</sup> In 2017, contributions to charitable organizations in the United States rose to a new high, reaching approximately \$390 billion—which accounted for over 2% of GDP.<sup>121</sup> While only about 30% of Americans ultimately itemized

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114. See *id.* at 17–18. (listing the IRS requirements for qualified personal service corporations).

115. See COMMONWEALTH OF VA., DEP'T OF TAX'N, INSTRUCTIONS FOR PREPARING 2017 FORM 502: VIRGINIA PASS-THROUGH ENTITY RETURN OF INCOME AND RETURN OF NONRESIDENT WITHHOLDING TAX 2 (2017) (explaining which corporate entities are not required to pay Virginia state income tax).

116. See *id.*

117. See VA. CODE ANN. § 58.1-609.11(C)(1)(a) (describing exemptions for nonprofit organizations).

118. See *id.* (same).

119. See 26 U.S.C. § 170 (2018) (describing allowable deductions for charitable contributions and gifts).

120. See DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., CAT. NO. 15050A, Publication 526 6 (Mar. 2018) (identifying nondeductible contributions).

121. See *Charitable Giving Statistics*, NAT'L PHILANTHROPIC TR., <https://www.nptrust.org/philanthropic-resources/charitable-giving-statistics/> (last visited Feb. 20, 2019) (summarizing studies regarding charitable giving by

tax deductions before the Tax Cuts and Jobs Act of 2017,<sup>122</sup> the incentive to donate to charitable organizations was still substantial, especially to high-income earners.<sup>123</sup> Securing 501(c)(3) status allows a nonprofit law firm to attract donors interested in itemizing tax deductions who might otherwise find a different cause to support. The ability to accept donations enhances the credibility of a nonprofit law firm in the eyes of the community it serves while simultaneously opening the door to additional resources that would otherwise be out of reach.<sup>124</sup>

### 3. Student Loan Forgiveness

The average law school graduate borrows over \$110,000 to finance their degree.<sup>125</sup> As of 2014, the overall median starting salary for a lawyer was \$63,000 per year.<sup>126</sup> With the burden of paying off student debt increasing and starting salaries remaining largely stagnant, lawyers beginning in the profession may weigh

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Americans) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

122. See generally Tax Cuts and Jobs Act of 2017, Pub. Law No. 115-97, 131 Stat. 2054, 2072 (2017) (raising the amount of the standard deduction and thus significantly decreasing the incentive to donate to 501(c)(3) entities).

123. See Scott Greenberg, *Who Itemizes Deductions?*, TAX FOUND. (Feb. 22, 2016), <https://taxfoundation.org/who-itemizes-deductions/> (summarizing data provided by the IRS for the 2013 tax year) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

124. See *Primary Benefits of a 501(c)(3) Corporation*, NONPROFITLEGALCENTER.COM, <http://www.nonprofitlegalcenter.com/non-profit-resources/primary-benefits-501c3-corporation/> (last visited Feb. 20, 2019) (explaining advantages of gaining 501(c)(3) status) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

125. See Staci Zaretsky, *Will You Ever Be Able to Pay Off Your Law School Debt?*, ABOVE THE L., <https://abovethelaw.com/2017/09/will-you-ever-be-able-to-pay-off-your-law-school-debt/> (last visited Feb. 20, 2019) (discussing the ominous burden of student loan debt for young legal professionals) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

126. See *Employment Rate for New Law School Graduates Rises by More Than Two Percentage Points—But Overall Number of Jobs Falls as the Size of Graduating Class Shrinks*, NALP (July 30, 2015), [https://www.nalp.org/2014\\_selected\\_pr#table1](https://www.nalp.org/2014_selected_pr#table1) (demonstrating a relatively stable starting salary median since the financial crises of 2008) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

early relief of such debt as an important factor when choosing employment.

In some circumstances, loan forgiveness through the Public Service Loan Forgiveness (PSLF) program is available if a borrower fulfills certain criteria.<sup>127</sup> The PSLF program may encourage lawyers to consider legal jobs that might otherwise be unworkable for borrowers carrying large amounts of debt. Loan forgiveness under the PSLF is not considered income for tax purposes, thereby offering potentially significant relief in exchange for publicly-oriented legal work.<sup>128</sup>

One of the criteria for receiving loan forgiveness is ten years of full-time employment at a qualifying employer.<sup>129</sup> Employment at a nonprofit that is tax-exempt under Section 501(c)(3) of the Internal Revenue Code fulfills the criteria of qualifying employment.<sup>130</sup> While the future of the loan forgiveness program is uncertain and subject to change by Congress,<sup>131</sup> nonprofit law firms can currently leverage the possibility of loan forgiveness as a benefit to prospective employees in order to offset lower compensation. The ten-year duration requirement might also stabilize employee turnover for nonprofit law firms that would otherwise struggle to retain lawyers seeking higher salaries at traditional firms after gaining a few years of experience.

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127. See *Public Service Loan Forgiveness*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service#qualifying-employment> (last visited Feb. 21, 2019) (explaining the qualifications to receive student loan forgiveness) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

128. See *Public Service Loan Forgiveness Questions and Answers*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service/questions> (last visited Feb. 20, 2019) (clarifying that the balance of forgiven loans is not taxable as income) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

129. *Id.* (explaining the qualifications to receive student loan forgiveness).

130. See FED. STUDENT AID, *supra* note 127 (same).

131. See Zack Friedman, *Trump May End Student Loan Forgiveness Program*, FORBES, (Feb. 14, 2018), <https://www.forbes.com/sites/zackfriedman/2018/02/14/trump-student-loan-forgiveness/#23ee1685768d> (examining the latest budget proposal from the Trump administration) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).



### C. LSC-Funded Programs

An important source of funding to nonprofit law firms seeking to increase legal access is the Legal Services Corporation (LSC).<sup>132</sup> Often, there is a state organization serving as a supplemental counterpart to federal LSC funding. However, funding from LSC grants at the federal and state levels have limited reach and application. Understanding the role of the LSC architecture provides a better grasp of the challenges to extending legal services to low- to moderate-income clientele.

#### 1. LSC Impact

The Legal Services Corporation is an independent 501(c)(3) that “promotes equal access to justice and provides grants for high-quality civil legal assistance to low-income Americans.”<sup>133</sup> LSC receives appropriations from Congress, and received \$385 million in fiscal year 2016.<sup>134</sup> In turn, LSC is a source of funding for legal service providers who serve clients with annual incomes below 125% of the federal poverty guidelines.<sup>135</sup> Using only this criteria, more than sixty million Americans are eligible for services supported by LSC funding.<sup>136</sup> The federal poverty threshold in 2016 was \$14,850 for an individual and \$30,380 for a family of four.<sup>137</sup>

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132. *Who We Are*, LSC, <https://www.lsc.gov/about-lsc/who-we-are> (last visited Feb. 20, 2019) (providing a description of “the single largest funder of civil legal aid for low-income Americans”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

133. *Id.*

134. See Debra Cassens Weiss, *Trump Budget Eliminates Legal Services Corp. Funding*, ABA J. (Mar. 16, 2017), <http://www.abajournal.com/news/article/trump-budget-eliminates-funding-for-legal-services-corp/> (explaining the implications of the Trump administration’s proposed budget for fiscal 2017) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

135. See LSC, *supra* note 132.

136. See LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 6 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [hereinafter *THE JUSTICE GAP*] (giving an overview of how the Legal Services Corporation attempts to serve low income clients).

137. See *id.* at 60.

LSC offers basic field grants to increase access to civil legal services in accordance with Title X of 42 U.S.C. § 2996.<sup>138</sup> Eligibility for basic field grants requires assurances that the recipient will adhere to the Rules of Professional Conduct, LSC Performance Criteria, and ABA standards.<sup>139</sup> Basic field grants are used to deliver civil legal services in accordance with an approved grant application and cannot be used for any statutorily restricted purposes.<sup>140</sup>

For example, in Virginia the LSC provided over six million dollars in basic field grants in 2015, funding six programs and supporting the close of over 20,000 cases.<sup>141</sup> Nearly 15% of Virginians live at or below 125% of the federal poverty line, rendering about 1.2 million Virginians facially eligible for representation through LSC funded programs.<sup>142</sup>

The types of services supported by LSC grants are generally related to family law, consumer issues, employment matters and housing and foreclosure cases.<sup>143</sup> Approximately 45% of the Virginia cases closed in 2017 by LSC funded programs concerned family law, about 20% related to housing, 16% percent related to consumer law, and 9% related to employment and income.<sup>144</sup> While LSC funding represents vital cash flow for nonprofits providing civil legal services to low-income clients, it is by no means sufficient to meet the total legal needs of even the most

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138. See 42 U.S.C. § 2996 (2018) (setting out the general purpose and objectives of the Legal Services Corporation).

139. See *2018 Grant Terms and Conditions*, LSC, <https://lsc-live.app.box.com/s/ay5a931g2ien57ll4fb0in4ridujlc7x> (last visited Jan. 25, 2019) (setting out expectations for recipients of basic field grants) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

140. See *id.* (noting the restricted activities under the grant).

141. See *Virginia State Profile*, LSC, <https://www.lsc.gov/grants-grantee-resources/our-grantees/virginia-state-profile> (last visited Feb. 20, 2019) [hereinafter *Virginia State Profile*] <https://www.lsc.gov/grants-grantee-resources/our-grantees/virginia-state-profile> (reporting the impact of LSC funding in the state of Virginia) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

142. See LEGAL SERVS. CORP., *supra* note 136, at 62 (calculating the number of potential eligible clients to receive representation through LSC supported programs).

143. See generally LEGAL SERVS. CORP., *supra* note 136.

144. See LEGAL SERVS. CORP., *supra* note 141 (breaking down case closures and staffing in 2017).

disadvantaged clients.<sup>145</sup> In 2017, LSC estimated more than half of legal issues submitted to LSC funded programs received inadequate or no assistance because of a lack of resources.<sup>146</sup>

## 2. LSC Restrictions

Even if available resources were sufficient, there are still many issues and needs that cannot be supported using LSC funds. LSC funding may not generally be used in support of a fee-generating case.<sup>147</sup> The purpose of this restriction is to keep limited public legal resources from being used where other private legal representation is accessible.<sup>148</sup> Although LSC funds are available under limited circumstances for fee-generating cases, exceptions are not easily qualified.<sup>149</sup>

Categorically, accepting LSC funds may also restrict attorneys not only from using LSC funds to represent certain clients on certain claims, but also restrict attorneys from using private funds or other public funds to represent clients or participate in various activities.<sup>150</sup> Such categories include representing prisoners in civil litigation, participating in any class action lawsuit, abortion litigation, and representing non-U.S. citizens unless specifically permitted to do so by statutory exception.<sup>151</sup> Other categories are less restrictive and may allow an attorney to participate in certain activities so long as LSC funding or private funding is not

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145. See LEGAL SERVS. CORP., *supra* note 136, at 13 (recognizing that many legal needs remain unmet by programs supported in-part through LSC funding).

146. *Id.* at 8.

147. 42 U.S.C. § 2996f(b)(1) (2018) (identifying a limitation on grants and contracts in connection with legal assistance to eligible clients).

148. 45 C.F.R. § 1609.1 (2017) (“This part is designed . . . [t]o ensure that recipients do not use scarce legal services resources when private attorneys are available to provide effective representation . . .”).

149. 45 C.F.R. § 1609.3 (2017) (setting out how fee-generating cases must have been rejected by the local lawyer referral service, or by two private attorneys; or that neither the referral service nor two private attorneys will consider the case without payment of a consultation fee).

150. See LSC, *supra* note 139 (explaining the limitations on attorneys who accept LSC funding).

151. See *id.* (listing, though not comprehensively, the restrictions dictating how LSC funding can be used).

appropriated for a particular purpose.<sup>152</sup> For example, attorneys receiving LSC funding may participate in public school desegregation proceedings, but only by using other publicly designated funds, and not private funds or LSC funds.<sup>153</sup> Finally, lawyer engagement is sometimes permitted, but with a restriction on using LSC funds.<sup>154</sup> For example, an attorney wishing to represent a client in an action against the LSC may do so as long as he or she does not use LSC funding.<sup>155</sup> The attorney may use other private funding or other public funding.<sup>156</sup>

### 3. State LSC Funding

As noted above, LSC funding provided by Congress only makes up between 27% and 55% of funding for individual LSC supported programs in Virginia.<sup>157</sup> State governments sometimes fund LSC programs through a similar state structure, seen in states such as New Jersey, Delaware, Nevada, Utah, and Virginia.<sup>158</sup>

The Legal Services Corporation of Virginia (LSCV) provides civil legal services to Virginia's low-income residents through funding from the Virginia General Assembly.<sup>159</sup> In 2015–2016,

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152. *See id.* (recognizing a distinction between the most limiting restrictions, and restrictions that permit greater attorney autonomy).

153. *Id.*

154. *Id.*

155. *Id.*

156. *See id.* (identifying categories wherein only LSC funding is restricted from use).

157. LEGAL SERVS. CORP., *supra* note 136.

158. *See* NEV. LEGAL SERVS. INC., <https://nslaw.net> (last visited Jan. 8, 2018) (demonstrating a state structure designed to provide additional support to LSC funding) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); LEGAL SERVS. N.J., <https://www.lsnj.org/LegalServicesOffices.aspx> (last visited Jan. 8, 2018) (same) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); LEGAL SERVS. CORP. DEL., INC., <https://www.lscd.com> (last visited Jan. 8, 2018) (same) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); UTAH LEGAL SERVS., <https://www.utahlegalservices.org> (last visited Jan. 8, 2018) (same) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

159. *See* REPORT TO THE COMMONWEALTH AND THE GENERAL ASSEMBLY ON THE WORK OF VIRGINIA'S LEGAL AID PROGRAMS; FY 2015–2016, LEGAL SERVICES CORP. OF VA., ii (2016) <https://static1.squarespace.com/static/5632a199e4b0292ace726ae4/t/587e4d80cd0f68450bf9b7b1/1484672409265/LSCV+FY15-16+>

nearly eleven million dollars were distributed to legal aid programs across Virginia.<sup>160</sup> State funding from the LSCV made up over 50% of funding received by programs also receiving federal LSC support.<sup>161</sup> Meanwhile, LSC funding only accounted for 32% percent of funding received by programs in Virginia receiving LSC support.<sup>162</sup>

Without both LSCV and LSC funding, legal aid services would not be able to provide anywhere close to the current level of services presently available. But because funding from the state and federal levels combined still fails to meet the needs of even the most economically disadvantaged clientele, funding for underserved moderate-income clientele is unlikely to be considered through LSC sources at any time in the near future.

#### *D. Sliding-Scale Non-LSC Funded Law Firms.*

As noted above, LSC funding is facially inadequate to meet civil litigation demands for persons living below 125% of the federal poverty line. Additionally, extensive limitations are placed on representation of such persons even where funding is available. Thus, law firms have experimented with alternative ways to deliver services to those clients struggling to find access to justice.

Earning income falling below 125% of the Federal Poverty line reflects grim circumstances. In 2017, a family of four could have earned no more than \$30,750 to qualify for legal services supported by federal LSC funding.<sup>163</sup> Meanwhile, the same family of four could have earned up to \$33,948 and qualified for full Medicaid

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Overview\_Revised+1-13-2017\_1pm.pdf (explaining the source and purpose of state money used to fund civil legal services in Virginia) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

160. *Id.*

161. See LEGAL SERVS. CORP., *supra* note 141 (breaking down the distribution of LSC funding against other sources).

162. *Id.*

163. *U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs: Annual 2017 Federal Poverty Guidelines for the 48 Contiguous States*, U.S. DEPT OF HEALTH & HUM. SERVS., OFF. OF THE ASSISTANT SECRETARY FOR PLAN. AND EVALUATION, <https://aspe.hhs.gov/poverty-guidelines> (last visited Feb. 7, 2018) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

coverage.<sup>164</sup> In other words, a sick patient in a family of four could be fully covered by Medicaid, but fail to qualify for the opportunity to receive legal support from an LSC funded program if a HIPPA violation occurred during medical treatment.

### *1. Targeted Population for Sliding-Scale Law Firms.*

While access to legal representation for Americans living below 125% of the Federal Poverty Level is limited, about 60% of Americans live at or below 400% of the Federal Poverty Level.<sup>165</sup> The incomes for households between 125% and 400% of the Federal Poverty Level ranged from \$30,751 to \$98,400 in 2017.<sup>166</sup> Nonprofit firms accepting fees from clients, or representing clients for this income range, may entirely lose access to both federal and state LSC funding.<sup>167</sup> But some firms nevertheless choose to operate as a nonprofit in hope of serving clients within this income range.<sup>168</sup>

As noted above, a law firm may qualify for tax-exempt status as a legal aid organization only if it collects fees based on a client's ability to pay, rather than by the services rendered.<sup>169</sup> Because legal aid organizations receiving LSC funding must generally provide services without charging a fee, and must not provide services to persons earning more than 125% of the federal poverty threshold, the effective policy conclusion might be that persons below the federal poverty threshold do not possess any ability to pay for any services rendered. So far, the IRS has not prohibited

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164. HEALTHCARE.GOV, <https://www.healthcare.gov/> (last visited Jan. 12, 2018) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

165. See *Distribution of the Total Population by Federal Poverty Level (Above and Below 400% FPL)*, THE HENRY J. KAISER FAM. FOUND., <https://www.kff.org/other/state-indicator/population-up-to-400-fpl/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited Jan. 12, 2018) (aggregating data and creating estimates for Census-defined family units in 2016) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

166. *Id.*

167. See LEGAL SERVS. CORP., LSC RESTRICTIONS AND OTHER FUNDING SOURCES 1 (2018) <https://lsc-live.app.box.com/s/whds6u09dcvquut3c5t40f48hzpjlj8y> (“No representation in f available or the case meets one of the exceptions stated in 45 C.F.R. Part 1609”).

168. *Id.*

169. Rev. Rul. 78-428, *supra* note 92.

nonprofit law firms from charging fees, even to the most indigent clients.<sup>170</sup> What the IRS does prohibit is for a non-profit firm to charge a market rate for services to clients who can pay for legal representation, while the firm also applies a sliding scale fee structure to clients who cannot afford to pay for legal services at the market rate.<sup>171</sup> In short, a nonprofit, tax-exempt law firm may create a fee structure that charges fees and extends support to persons earning above or below 125% of the federal poverty guideline up until such client could afford legal services at the market rate.<sup>172</sup> But market rate services may not be rendered in order to subsidize services provided to persons without the ability to pay.<sup>173</sup> No client of a nonprofit law firm may be charged the full market rate for legal services.<sup>174</sup>

## 2. Examples of Sliding Scale Law Firms.

The concept of a sliding-scale law firm is long-established. Since 1967, SWLA Law Center in Louisiana has operated as a private, not-for-profit law firm supported through a combination of donations and client fees.<sup>175</sup> The stated goal of the SWLA Law

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170. See *id.* (suggesting that a tax-exempt firm may charge fees to even the most indigent clients because “[t]he fees charged do not negate . . . from the substantial economic relief provided to the poor and distressed by the organization.”).

171. See 26 C.F.R. § 1.501(c)(3)–1(b) (explaining that an organization cannot carry on activities broader than the purpose specified for which its tax exempt status was granted); Treas. Reg. § 1.501(c)(3)–1(b) (2017) (same).

172. See AM. BAR ASS’N, *Alternate Fee Arrangements*, [https://www.americanbar.org/groups/delivery\\_legal\\_services/initiatives\\_awards/alternative\\_fees/](https://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/alternative_fees/) (last visited May 5, 2019) (“Sliding-scale fees are based on a client’s ability to pay, often determined by income and family size, derived from the Federal Poverty Guidelines.”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

173. See Rev. Rul. 78-428, *supra* note 92 (“The fees charged do not negate or significantly detract from the substantial economic relief provided to the poor and distressed by the organization.”).

174. See *Non-Profit Law Firms and Co-Pay Clinics: An Option for Affordable Legal Services*, AM. BAR ASS’N, [https://www.americanbar.org/content/dam/aba/administrative/delivery\\_legal\\_services/lis\\_del\\_smith\\_client-centric\\_slides.pdf](https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/lis_del_smith_client-centric_slides.pdf) (“Look to what private attorneys are charging in the area and reduce cost from there (for example, 1/3 to 1/4 of market price.”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

175. See *Frequently Asked Questions*, SWLA LAW CTR., <http://swla-law->

Center is to “serve those whose household incomes are too low to be able to afford a private attorney, but are too high to qualify for Legal Aid.”<sup>176</sup> As a matter of scope, SWLA Law Center handles only civil matters in non-fee generating cases, focusing primarily on family law, property rights, and wills.<sup>177</sup> With the support of donations, SWLA Law Center claims to gather more than half of its funding from the reduced fees charged directly to clients.<sup>178</sup>

Open Legal Services of Salt Lake City, Utah represents a slightly different conceptualization of the sliding-scale law firm.<sup>179</sup> Because Open Legal Services is registered as a 501(c)(3), it may not seek fees from any of its clients at the standard market rate, but instead must charge clients based on their ability to pay.<sup>180</sup> Open Legal Services offers transparency about its fees.<sup>181</sup> At the low-end, Open Legal Services charges \$75 per hour to clients at or below 125% of the Federal Poverty Level.<sup>182</sup> The fee jumps to \$115 per hour for clients making between 200% and 250% of the Federal Poverty Level.<sup>183</sup> Finally, clients making between 250% and 300% of the Federal Poverty Level pay an hourly rate of \$145.<sup>184</sup> While

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center.com/faq.html (last visited Jan. 22, 2018) (explaining how SWLA operates and which clientele are served) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

176. *Id.*

177. *See Practice*, SWLA L. CTR., <http://swla-l-center.com/practice.html> (last visited Jan. 22, 2018) (defining the scope of representation offered by SWLA Law Center) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

178. *See Home*, SWLA L. CTR., <http://swla-law-center.com/index-2.html> (last visited Jan. 22, 2018) (purporting to operate with more than 50% of operational costs covered by client fees, and the remainder generated from donations from community partners and sources such as United Way) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

179. *See Zuckerman*, *supra* note 10, (describing a sliding scale model that attempts to specifically reach moderate-income clients).

180. *See Rev. Rul. 78-428*, *supra* note 92 (“The fees charged by the organization are not based upon the type of service rendered, but are based upon the indigents’ abilities to pay.”).

181. *See Do I Qualify*, OPEN LEGAL SERVS., <https://openlegalservices.org/do-i-qualify/> (last visited Jan. 22, 2018) (explaining the sliding-scale model used by Open Legal Services) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

182. *Id.*

183. *Id.*

184. *Id.*



Open Legal Services only presents its fees as a general estimate for potential clients, it also notes a ten-hour retainer fee is usually required up front, resulting in a minimum base representation amount of \$750.<sup>185</sup>

Comparing SWLA Law Center and Open Legal Services, there are two notable differences. The first is Open Legal Services takes not only civil cases, but also criminal cases.<sup>186</sup> The second, and perhaps more significant, is Open Legal Services is structured with the objective to meet all of its operational needs from client fees.<sup>187</sup> A review of Open Legal Services' financial reporting documents shows significant growth in revenue from services provided, amounting to \$424,208 in 2016.<sup>188</sup> However, in both 2015 and 2016, revenue from program services was below total expenses for the firm, and each year the difference was balanced by donations.<sup>189</sup> Donations to Open Legal Services rose from \$9,641 in 2015 to \$49,690 in 2016, but the entire increase in revenue from donations was translated into firm salaries rather than into fixed assets.<sup>190</sup>

#### *Part IV. Nonprofit Law Firms are Incapable of Filling the Justice Gap.*

LSC-funded law firms are already incapable of meeting demands for clients earning below 125% of the federal poverty

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185. *Id.*

186. *See Criminal Law*, OPEN LEGAL SERV., <https://openlegalservices.org/criminal-law/> (last visited Jan. 22, 2018) (providing a list of criminal matters that Open Legal Services might handle) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

187. *See Donate*, OPEN LEGAL SERV., <https://openlegalservices.org/about/donate/> (last visited Jan. 22, 2018) ("Our business is structured so that we can meet all of our operational needs from client fees.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

188. *See* DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., FORM 990, OPEN LEGAL SERV. 2016, <https://openlegalservices.org/wp-content/uploads/2017/12/2016-990-Scanned.pdf> (showing a year-over-year increase of revenue from \$378,155 in 2015) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

189. *See id.* (recognizing that in both 2015 and 2016, total expenses for the firm were not covered by program service revenue and fell short by \$21,663 in 2016).

190. *Id.*

line.<sup>191</sup> Non-LSC-funded non-profit law firms do not appear structurally capable of meeting the legal demands of all low- to moderate-income clients. And even under optimal conditions, the ability of a non-profit, sliding-scale law firm to grow and thrive is stifled by Model Rule 5.4 and IRS restrictions.<sup>192</sup> Two factors that help defeat a sliding-scale model geared toward moderate-income clients are: (1) operational flaws associated with non-profit management,<sup>193</sup> and (2) the inability of nonprofit firms to hire and retain skilled lawyers pressured into seeking high-earnings by oppressive law school debt.<sup>194</sup>

#### *A. Non-Profit Law Firm Management.*

##### *1. Lawyers are Poorly-Equipped to Grow Nonprofit Firms.*

Lawyers do not receive the training necessary to develop and grow non-profit firms effectively. As noted above, operating a non-profit law firm requires adherence to IRS restrictions not applicable to most law firms.<sup>195</sup> Law practice management has slowly evolved over the last twenty years in recognition of the numerous skills required for lawyers to be professionally successful.<sup>196</sup> Scholarship around the subject of law practice

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191. *The Justice Gap*, *supra* note 136 at 8 (stating that an estimated 1.1 million eligible legal problems were projected to go unmet by an LSC-funded legal aid organization in 2017).

192. See MODEL CODE OF PROF'L RESPONSIBILITY r. 5.4 (AM. BAR ASS'N 1980) (limiting how attorneys share fees); see also Rev. Rul. 78-428, *supra* note 92 (explaining how a firm must set specific fees to remain tax exempt).

193. See Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999, 1082 (2013) ("It has been a flaw in nonprofit directors' thinking that profit should not be central to a nonprofit's operations, and that flaw is furthered if not founded in the IRS's commerciality doctrine and substantial purpose tests.").

194. See Luize E. Zubrow, *Is Loan Forgiveness Divine? Another View*, 59 GEO. WASH. L. REV. 451, 454 (1991) (stating that law schools should cancel law school debt "because of increased educational debt, there is a shortage of qualified lawyers willing to work for poverty law organizations, nonprofit advocacy groups, and the government").

195. DEPT OF THE TREASURY, *supra* note 108.

196. See Gary A. Munneke, *Managing a Law Practice: What You Need to Learn in Law School*, 30 PACE L. REV. 1207, 1214 (2010) (recognizing increasing

management addresses human resources, fees and billing, compensation, marketing, and trends within the profession.<sup>197</sup> But nonprofit law firms, from the outset, do not resemble for-profit law firms.

Nonprofit law firms must have a board of directors, and a board of directors may retain authority to direct the plans and policies of an organization.<sup>198</sup> For example, Open Legal Services lists ten board members as directly involved with the oversight of the organization.<sup>199</sup> Although the board of directors at a nonprofit law firm may not directly control the professional judgment of a lawyer at the firm, the board may determine lawyer compensation, rental space for the firm, and other major aspects of organizational heading.<sup>200</sup> If not carefully structured, election to, and decisions by, a board of directors can become highly politicized.<sup>201</sup> This dynamic is one with which many young or inexperienced lawyers are naturally unfamiliar.

In addition, nonprofit law firms must comply with reporting requirements that are not relevant to for-profit firms.<sup>202</sup> These requirements may prompt the generation of governing mechanisms such as employee review processes, strategies for avoiding conflicts of interests, supervision of solicitation for donations, and training in areas such as maintaining donor privacy.<sup>203</sup>

What is readily apparent is that a basic understanding of law firm operations leaves much to be understood about the unique requirements of operating a nonprofit law firm. The operational requirements of a nonprofit law firm are an addition to, not a

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publication on articles and resources addressing how to manage law firms).

197. *See id.* at 1215–17 (listing articles related to topics of interest for managing law firms).

198. *See* BRUCE R. HOPKINS, *STARTING AND MANAGING A NONPROFIT ORGANIZATION: A LEGAL GUIDE*, 16–17 (6th ed. 2013) (explaining that the authority structure of a nonprofit can become muddled).

199. *See* DEP'T OF THE TREASURY, *supra* note 188 at 7 (listing board members for Open Legal Services).

200. *See* HOPKINS, *supra* note 198, at 51–52 (explaining ways that a nonprofit organization may be impacted by decisions through a board of directors).

201. *See id.* at 17–18 (discussing various election systems for a board of directors).

202. *See id.* at 95 (discussing IRS reporting requirements via Form 990).

203. *See id.* at 97–98 (listing relevant nonprofit governance principles).

substitution for, an already demanding professional business model. The complexities of managing a nonprofit structure require time, and necessarily detract from representing clients and growing the firm in a way that can reach a larger market share. In spite of a decades-old recognition that access to justice for moderate-income Americans is inadequate, relatively few firms have entered the market in an attempt to access moderate-income clients.<sup>204</sup> The demands of the model may simply be too daunting.

## *2. Fundraising Efforts Face Difficult Marketing Challenges.*

Nonprofit law firms are required to charge below-market rates for legal services, making fundraising an essential element for meeting overhead expenses.<sup>205</sup> Marketing fundraising efforts cannot reasonably hope to be both successful and passive. Successful marketing of fundraising efforts are more effective if customers can spread the word about personal experiences with a developed brand, as well as promote social proof to encourage donations.<sup>206</sup> Open Legal Services, for example, has employed a number of marketing strategies by building their brand through storytelling, promoting the unique value of the firm, and highlighting media features such as articles published in *The Atlantic*.<sup>207</sup> Yet in spite of economic growth and increase in charitable donations by individuals, donations to Open Legal Services have been flat.<sup>208</sup> In 2014, contributions and grants

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204. See Karen A. Lash, et. al., *Equal Access to Civil Justice: Pursuing Solutions Beyond the Legal Profession*, 17 YALE L. POL'Y REV. 489, 492 (1998) (recognizing twenty years ago that moderate-income Californians had little or no equal access to civil justice).

205. See *supra* note 171 (explaining nonprofits may not provide services at market rates).

206. See *Nine Valuable Marketing Lessons from a Nonprofit—Charitywater.org*, KISSMETRICS BLOG, <https://blog.kissmetrics.com/marketing-lessons-from-charitywater/> (last visited Jan. 28, 2019) (describing the successful marketing techniques of a major nonprofit) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

207. See *Open Legal Services in the News*, OPEN LEGAL SERVS., <https://openlegalservices.org/about/in-the-news/> (last visited Jan. 28, 2019) (listing stories featuring the firm or members of the firm with access links) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

208. See *Charitable Giving Statistics*, NAT'L PHILANTHROPIC TRUST, <https://www.nptrust.org/philanthropic-resources/charitable-giving-statistics/>

represented 18% of total revenue, while in 2016, contributions and grants represented 11% of total revenue.<sup>209</sup> While at first glance, this allocation of revenue stream away from contributions and grants may suggest improved self-reliance, it more pointedly raises the question of how a firm that cannot charge market rates for legal services can increase caseload without increasing the deficit created by charging below-market rates. The numbers suggest the answer has been for the firm to dramatically raise its hourly rates. In the three years since the publication of a widely circulated article in *The Atlantic*, Open Legal Services has raised its rates for its lowest-earning clients by 50%.<sup>210</sup>

This is not to criticize Open Legal Services for adjusting its fee structure to meet the demands of its business model. This is merely to illustrate that a reduced ratio of contributions and grants requires an increase in hourly fees to compensate for a larger caseload. Operational costs might only be reduced to a certain point. At which point costs are fully minimized, the addition of a case at less than the market rate can only be balanced by donations.

Marketing for the purpose of obtaining donations must deal with the attractiveness of an individual's donation from the donor's perspective. There are over 1.5 million tax-exempt organizations in the United States.<sup>211</sup> Law firms attempting to solicit donations

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(last visited Jan. 28, 2019) (showing that Americans gave \$410.02 billion in 2017, representing a 5.2% increase from 2016); see also *U.S. Economy at a Glance: Perspective from the BEA Accounts*, BUREAU OF ECON. ANALYSIS, <https://www.bea.gov/newsreleases/glance.htm> (last visited Jan. 28, 2019) (reporting that personal income growth, while anemic, is increasing) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *Nonprofit Disclosure Documents*, OPEN LEGAL SERVS., <https://openlegalservices.org/nonprofit-disclosures/> (last visited Jan. 28, 2019) (giving access to reporting that shows, with a \$40,000 anomaly in 2016, effectively no growth in donations for the periods reported) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

209. See OPEN LEGAL SERVS., *supra* note 207 (demonstrating a decrease in percentage of contributions and grants that represented total revenue).

210. See Zuckerman, *supra* note 10 (noting that the anecdotal case selected for the article demonstrated a legal fee of \$40 per hour, while the current minimum fee at Open Legal Services is \$75 per hour, with a ten hour minimum retainer).

211. See *Quick Facts About Nonprofits*, NAT'L CTR. FOR CHARITABLE STATS., <http://nccs.urban.org/data-statistics/quick-facts-about-nonprofits> (last visited Jan. 28, 2019) (breaking down basic public charity statistics through 2016) (on

on behalf of moderate-income clients face substantial competition from organizations with arguably more compelling narratives. Additionally, seventy-percent of Americans consider themselves middle class, meaning donations in support of legal services for “moderate income” clients would be an exercise in cognitive dissonance for all but the highest-earning Americans (so long as these Americans also recognize they are high-earning).<sup>212</sup> Convincing “middle class” Americans to support a nonprofit legal firm that does not provide free services to “lower class” Americans may not be a plausible sell. High-earning Americans may also find the cause less gratifying than supporting LSC-funded legal aid organizations supporting the lowest-earning Americans. The urgency to support legal services for low- to moderate-income clients is therefore minimized compared to the need to support legal services for desperately poor clientele.

*B. Non-Profit Law Firms Cannot Hire and Retain Skilled Lawyers.*

One of the most important business strategies necessary to a successful law firm is the recruitment and retention of skilled lawyers. Law firms are better positioned to hire and retain skilled talent when recognizing the expectations and concerns of lawyers entering the workforce.<sup>213</sup> While flexibility of hours and styles of leadership are important factors to young lawyers, economic realities discourage young lawyers from making long-term commitments to non-profit law firms, especially where the lawyers themselves would be qualified for discount services. Again, using Open Legal Services as an example, in 2016 the president of the

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file with the Washington & Lee Journal of Civil Rights & Social Justice).

212. See Emmie Martin, *70% of Americans Consider Themselves Middle Class—But Only 50% Are*, CNBC (Jun. 30, 2017), <https://www.cnbc.com/2017/06/30/70-percent-of-americans-consider-themselves-middle-class-but-only-50-percent-are.html> (describing the long-observed difference between middle-class status and the perception of middle-class status) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

213. See Cheryl Cran, *The Future of Work in the Legal Profession: What Firm Leaders Need to Know About Working with Their Young Talent*, 43 No. 6 L. PRAC. 38 (2017) (explaining the shift in expectations young lawyers have for their first jobs as well as their careers).

firm earned \$48,500.<sup>214</sup> But a single mother earning this amount would qualify for representation by Open Legal Services.<sup>215</sup>

For law students who borrow, the average graduate faces over \$110,000 in debt.<sup>216</sup> Unlike most debt, student loan debt is not dischargeable in bankruptcy.<sup>217</sup> The current interest rate for an unsubsidized Federal Stafford Loan is 6%.<sup>218</sup> Therefore, for \$110,000 of loan debt accruing 6% interest, a borrower must pay \$1,221 each month for ten years in order to expunge the debt.<sup>219</sup> In 2015, “the median private sector salary was \$68,300 and the median public sector salary was \$52,000.”<sup>220</sup> Both of these salaries fall into the 22% taxable income bracket for 2018.<sup>221</sup>

214. DEP’T OF THE TREASURY, *supra* note 188, at 7.

215. See OPEN LEGAL SERVS., <https://openlegalservices.org/cost/> (last visited Jan. 28, 2019) (presenting a chart of annual incomes whereby clients may qualify for services) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

216. See Staci Zaretsky, *Will You Ever Be Able to Pay Off Your Law School Debt??*, ABOVE THE L. (Sept. 26, 2017), <https://abovethelaw.com/2017/09/will-you-ever-be-able-to-pay-off-your-law-school-debt/> (discussing the challenges of managing law school debt) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

217. See Robert Farrington, *Law School and Student Loan Debt: Be Careful*, FORBES (Dec. 18, 2014), <https://www.forbes.com/sites/robertfarrington/2014/12/18/law-school-and-student-loan-debt-be-careful/#6a12565e11f9> (recognizing that students who take on enormous amounts of debt run the risk of never being able to pay it off) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

218. See *Interest Rates*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/types/loans/interest-rates> (last visited Jan. 28, 2019) (describing the various interest rates of federal student loans) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

219. See *Student Loan Payment Calculator*, STUDENT LOAN HERO, <https://studentloanhero.com/calculators/student-loan-payment-calculator/> (last visited Jan. 28, 2019) (plugging in data at 6% interest in order to derive monthly payments and total interest paid) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

220. See Ilana Kowarski, *U.S. News Data: Law School Costs, Salary Prospects*, U.S. NEWS (Mar. 15, 2017), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2017-03-15/us-news-data-law-school-costs-salary-prospects> (summarizing data reported from law schools regarding earnings of graduates) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

221. See *2018 Tax Brackets*, TAX FOUND. (Jan. 2, 2018), <https://taxfoundation.org/2018-tax-brackets> (estimating tax brackets for unmarried individuals) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

Taking the facts above, suppose a lawyer in the private sector earned \$68,300 in 2018 and carried \$110,000 in law school debt at 6% interest. He or she would actually bring home only \$4,439 per month after taxes, less \$1,221 for law school debt payment. The lawyer's actual living expenses would therefore need to be satisfied by \$3,218. Expecting a reasonable rent rate for a one-bedroom apartment in a mid to major U.S. city to be about \$1,200 per month, the lawyer would retain only about \$2,000 for *all* remaining expenses, or about \$500 per week.<sup>222</sup> Meanwhile, a lawyer working in the public sector earning \$52,000 under the same analysis, would bring home only \$239 per week. The lawyer would have to maintain this lifestyle for ten years in order to clear \$110,000 of law school debt. That is to say, the pressure on a young lawyer to earn more money as quickly as possible is significant. For a financially strained firm, lawyer turnover merely adds additional expenses that must be absorbed by limited resources. But in current market conditions, training and integrating replacement attorneys is unlikely to provide long-term returns.

Because growth of a non-profit, non-LSC funded law firm is curtailed by economic structural limitations and employment realities, starting firms of this kind remains an unattractive option for most law school graduates or mid-career professionals. For firms already attempting to reach an underserved market of low-to moderate-income clients, the economies of scale necessary to lower costs of providing services cannot be achieved easily, if at all. The larger a non-profit, non-LSC funded firm becomes, the more capital it must raise through grants and contributions. Because grants and contributions are not likely to be easily accessed by firms serving moderate-income clients, the firm necessarily outgrows its own ability to expand. Little choice remains but for the firm to raise hourly rates, thus virtually pricing out the clientele it was intended to serve.

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222. See Andrew DePietro, *Here's What an Average Apartment Costs in 50 U.S. Cities*, HUFFPOST (Jun. 7, 2016), [https://www.huffingtonpost.com/gobankingrates/heres-what-an-average-apa\\_b\\_10346298.html](https://www.huffingtonpost.com/gobankingrates/heres-what-an-average-apa_b_10346298.html) (compiling data on rent rates for one-bedroom apartments in select U.S. cities) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).



### V. Potential Benefits of Relaxing Model Rule 5.4

The idea that Model Rule of Professional Conduct 5.4 could be relaxed to broaden access to legal services is nothing new.<sup>223</sup> Yet in spite of continued lawyer underemployment,<sup>224</sup> as well as broad recognition that moderate-income earners do not seek legal counsel to meet their needs,<sup>225</sup> there has been no substantive change in Model Rule 5.4 since the Kutak Commission. The percentage of people with moderate means who seek legal advice is only about half.<sup>226</sup> The legal needs of low- to moderate-income persons arguably do not require the special attention of a lawyer. But an argument resting on this premise is deeply cynical.<sup>227</sup> Low- to moderate-income persons who are nonlawyers do not know without consulting a lawyer which legal issues require a lawyer's attention and which issues do not.<sup>228</sup>

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223. See George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession's Shift to a Corporate Paradigm*, 70 FORDHAM L. REV. 775, 798–99 (2001) (explaining the possibility of expanding legal services through the model provided by the medical profession).

224. See Andrew Soergel, *Hiring Outlook Bleak for New Law Grads*, U.S. NEWS & WORLD REP. (Aug. 18, 2016), <https://www.usnews.com/news/articles/2016-08-18/hiring-outlook-bleak-for-new-law-grads> (recognizing that the class of 2015 acquired fewer private practice jobs than any graduating class over nearly two decades) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

225. See AM. BAR ASS'N. COMM'N ON THE FUTURE OF LEGAL SERV., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES, 11–12 (2016), [https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport\\_FNL\\_WEB.pdf](https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf) (reemphasizing present strategies to improve access to justice for poor and moderate-income clientele are insufficient) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

226. See Ian Weinstein, *Coordinating Access to Justice for Low- and Moderate-Income People*, N.Y.U. J. LEGIS. & PUB. POL'Y 501, 504–05 (2017) (presenting the low rate of engagement between moderate-income persons and legal professionals).

227. See AM. BAR ASS'N. COMM'N ON THE FUTURE OF LEGAL SERV., *supra* note 225, at 14 (“[T]he study did not delve into the severity of the legal problems people confront and left open the question of how many would benefit from formal assistance (including from a lawyer.”).

228. See *id.* (“When asked why they do not seek out a lawyer, most individuals reply that they ‘do not think of their justice problems as legal’ and do not recognize their problems as having legal solutions.”).

Rethinking Model Rule 5.4 is productive because it permits business structures whereby a firm interested in providing services to an underserved market at discounted rates may provide services at full price in order to subsidize a corporate mission.<sup>229</sup> The mission need not require 501(c)(3) tax-exempt status.<sup>230</sup> Rethinking Model Rule 5.4 is also productive because it allows nonlawyer corporations to provide services in areas where low- to moderate-income persons can easily identify their own needs.<sup>231</sup> There are a number of practice areas where a corporation might develop mechanisms to reduce costs of legal counsel, including family law, housing issues, immigration, and access to healthcare and public benefits—to name a few.<sup>232</sup> Rather than attempt exploration of all possible impacts to all applicable practice areas, the potential impact on the practice area of wills and estates planning is considered below.<sup>233</sup>

#### A. Need for Estate Planning

According to a Gallup poll taken May 4–8, 2016, only about 44% of Americans “have a will that describes how they would like their money to be handled after their death.”<sup>234</sup> The percentage of Americans with a will and part of a household earning between \$30,000 and \$75,000 per year decreased by ten percent between

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229. See Schiff, *supra* note 79, at 1018 (“It is apparent that the modern law firm emphasizes profitability and, as such, more frequently conducts itself just like any business. Therefore, a rule restricting this natural progression, as Model Rule 5.4 does, simply cannot stand.”).

230. Cf. SALVOS LEGAL, *supra* note 72 (demonstrating the Salvation Army model employed in Australia).

231. See Robinson, *supra* note 7 (referencing the Co-Operative model employed in the United Kingdom).

232. See AM. BAR ASSOC., *Programs to Help People of Modest Means Obtain Legal Help*, [https://www.americanbar.org/groups/delivery\\_legal\\_services/resources/programs\\_to\\_help\\_those\\_with\\_moderate\\_income/](https://www.americanbar.org/groups/delivery_legal_services/resources/programs_to_help_those_with_moderate_income/) (last visited Jan. 28, 2019) (naming programs that provide services within these practice areas at a low cost across the nation) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

233. See *infra* Part IV.A.

234. Jeffrey M. Jones, *Majority in U.S. Do Not Have a Will*, GALLUP NEWS (May 18, 2016), <http://news.gallup.com/poll/191651/majority-not.aspx> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

2005 and 2016, falling to 38%.<sup>235</sup> The same year, 31% of all American households represented this income earning range.<sup>236</sup> Likewise, the percentage of Americans with a will and part of a household earning less than \$30,000 fell to 31%,<sup>237</sup> while 44% of Americans represented households in this income earning range.<sup>238</sup> In short, about 75% of American households earn less than \$75,000 per year, and more than six out of ten Americans living in these households do not have a will.<sup>239</sup>

As the American population ages over the next several decades, wealth transfer will occur at levels not previously observed.<sup>240</sup> While it is true individuals should make wills to ensure guardianship of children, protection of a business, control of the disposition of assets, or allaying stress of loved ones, there are also broader implications.<sup>241</sup> Intestacy is likely to result in high transaction costs and inefficient allocation of resources, especially when the decedent requires substantial care prior to death.<sup>242</sup> Intestacy disproportionately affects descendants of middle or lower-class economic status.<sup>243</sup> Fear of death may discourage

235. *Id.*

236. See Matthew Frankel, *Here's the Average American Household Income: How Do You Compare?*, USA TODAY (Nov. 24, 2016), <https://www.usatoday.com/story/money/personalfinance/2016/11/24/average-american-household-income/93002252/> (breaking down household incomes by percentage of Americans falling within specific ranges of income) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

237. Jones, *supra* note 234.

238. Frankel, *supra* note 236.

239. Jones, *supra* note 234.

240. See Eido Walny & Kelly Dancy, *Family Feuds: Mediating Estate and Probate Disputes*, 88 SEP WIS. LAW. 24, 26 (2015) (recognizing an imminent and unprecedented shift in wealth transfer through inheritance, approaching \$41 trillion by 2052).

241. See *5 Reasons You Should Create a Last Will*, ROCKETLAWYER, <https://www.rocketlawyer.com/article/5-reasons-you-should-create-a-will.rl> (last visited Jan. 28, 2019) (warning of the personal impacts on loved ones that can develop by not preparing a last will) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

242. See Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 878 (2012) (explaining the widespread intestacy results in economic unfairness, and how such should be resolved through public policy strategies).

243. See *id.* (recognizing that high-earning Americans are much more likely to have concluded testamentary instruments).

people of all income levels from making a formal will, but inaccessibility to an expensive and complex will-making process is also a deterrent.<sup>244</sup> Something can and should be done to address this problem.

Access to prepared documents has improved over the last twenty years through document assembly software.<sup>245</sup> Perhaps the most recognizable brand in the area of legal documents preparation is LegalZoom.<sup>246</sup> LegalZoom offers customers document preparation support to construct a last will, living trust, living will, and power of attorney.<sup>247</sup> For additional cost, customers may purchase access to an independently-contracted lawyer who reviews prepared documents, although customers are not required to purchase this access.<sup>248</sup> Depending on answers to preselected questions,<sup>249</sup> the range of cost to the customer may fall well below rates charged by an attorney, depending on the geographic location, experience, and expertise of the attorney.<sup>250</sup> The potential

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244. See *id.* at 879 (arguing the fear of death alone is insufficient to explain aversion to will-making, given the evidence of widespread non-testamentary transfers).

245. See Benjamin P. Cooper, *Access to Justice Without Lawyers*, 47 AKRON L. REV. 205, 208 (2014) (noting the rise of such programs as TurboTax and LegalZoom).

246. See generally LEGAL ZOOM, <https://www.legalzoom.com/index-c.html> (last visited Jan. 28, 2019) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

247. See generally *id.*

248. See *Estate Planning Bundle*, LEGAL ZOOM, <https://www.legalzoom.com/personal/estate-planning/estate-planning-bundle.html> (last visited Jan. 28, 2019) (explaining how LegalZoom connects customers to external, independent lawyers who can, at their discretion, provide legal advice). (on file with the Washington and Lee Journal of Civil rights & Social Justice).

249. See *Your Personalized Estate Plan*, LEGAL ZOOM, <https://www.legalzoom.com/personal/estate-planning/estate-planning-bundle.html> (Follow “Start my Estate Plan” hyperlink; then “Virginia” in the drop-down box) (exploring various price ranges for a customer in the state of Virginia) (last visited May 5, 2019) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

250. See *USAO Attorney’s Fees Matrix—2015–2017*, JUSTICE.GOV, <https://www.justice.gov/usao-dc/file/889176/download> (last visited Jan. 28, 2019) (providing a methodology and matrix of attorney fees for calculation of reasonable attorney fees) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

for client savings is substantial, and the service is merely a function of internet access and moderate expense.<sup>251</sup>

Although internet document preparation may be an improvement over no access at all, developing a will is a highly private endeavor.<sup>252</sup> For many, following the directions on a prepared form or exchanging electronic communication with a contracted attorney may provide an inferior experience with those who are able to sit down with a responsive human being and gain assurance that a legal document has been properly executed.

*B. Relaxing Model Rule 5.4 Allows Corporations to Begin to Fill the Gap*

Corporations have demonstrated an ability to fill gaps in access to other areas where professional expertise is also available.<sup>253</sup> Teeth whitening, eye care, pharmacy services, and tax preparation have all been integrated into corporate models without significantly risking the health, safety, or security of customers in need of those services.<sup>254</sup> There is little reason to believe legal services in areas such as wills and trusts need be held to any greater standard.<sup>255</sup> Tax preparation services are considered below as a reasonable comparison and intersection point to increase access to wills preparation.<sup>256</sup>

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251. See *Helping 20 Million People. Just Like You.*, ROCKETLAWYER, <https://www.rocketlawyer.com/about-us.rl> (last visited Jan. 29, 2019) (showing the ease by which an internet user may obtain legal support) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

252. Jenna Cho, *What Every Estate Planning Lawyer Wants You to Know About Death and Dying*, FORBES (Jun. 13, 2016, 6:02 PM), <https://www.forbes.com/sites/jeenacho/2016/06/13/what-every-estate-planning-lawyer-wants-you-to-know-about-death-and-dying/#3860de7d1a87> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

253. See, e.g., *Express Exam*, 1800CONTACTS, <https://www.1800contacts.com/express-exam/landing> (last visited Jan. 29, 2018) (explaining the willingness businesses to offer traditionally-in person services, like eye exams) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

254. See generally, e.g., *id.*

255. See LEGALZOOM, *supra* note 248 (serving as an example that trust and estate legal services can be performed online).

256. See *infra* notes 257–263 and accompanying text.

In 1955 H&R Block was founded as an income tax return preparation company.<sup>257</sup> Presently, H&R block has 12,000 retail offices worldwide.<sup>258</sup> Employees of H&R Block must qualify in each state where they operate to prepare income taxes, and training by H&R Block meets the educational standards in each state to fulfill the requirements for training in tax preparation.<sup>259</sup> H&R Block is not limited to the simplest tax returns, but charges for returns based on complexity.<sup>260</sup>

Wills and trusts, like tax services, can be extremely individualized and complicated, yet delivered under a corporate structure that provides training, liability coverage, and economies of scale that permit the reduction of the price of services.<sup>261</sup> If LegalZoom was permitted to hire employees to support the completion of the documents it provides, it too could experiment with a brick and mortar presence, and bundle easily commoditized services such as wills and trusts. Similar to Vision Centers found in Walmart,<sup>262</sup> access to legal services would become visible to the clients who need the services, and in a format that is neither intimidating nor aloof. It might well be that legal services for low- to moderate-income clients is less a function of price than of product placement.<sup>263</sup>

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257. See H&R BLOCK, <https://www.hrblock.com/> (last visited Jan. 28, 2019) (giving a brief history of H&R Block) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

258. *Id.*

259. See *Income Tax Course*, H&R BLOCK, <https://www.hrblock.com/corporate/income-tax-course/> (last visited Feb. 7, 2019) (explaining that requirements for training and certification may vary from state to state in accordance with state law) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

260. See *Tax Offices*, H&R BLOCK, <https://www.hrblock.com/tax-offices/> (last visited Jan. 28, 2019) (expressing a differentiation in price based on complexity) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

261. See Denis Clifford, *Making a Living Trust: Can You Do It Yourself?*, NOLO, <https://www.nolo.com/legal-encyclopedia/making-living-trust-yourself-29736.html> (last visited Jan. 28, 2019) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

262. See *Vision Centers*, WALMART, <https://www.walmart.com/cp/walmart-vision-centers/1078944> (last visited Feb. 13, 2018) (describing the services and products offered at Vision Centers) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

263. See *id.* (“[D]escribing how Walmart Vision Centers provide value and “[t]he convenience you need.”).

## *VI. Conclusion*

The notion all legal services are the exclusive realm of lawyers and cannot be managed by nonlawyers, is asserted at the expense of low- to moderate-income persons.<sup>264</sup> Model Rule 5.4 presents a false choice: Either sacrifice the sanctity of the legal profession or perpetuate a system that fails to provide access to those in need of legal services.<sup>265</sup> No other general profession deals in such absolutist terms, nor is there any substantial reason to believe the legal profession will denigrate into combo meals and Presidents' Day sales.<sup>266</sup>

The way Americans consume products and services has fundamentally shifted.<sup>267</sup> Experiments by sliding-scale firms to reach moderate-income clients are not changing, and will not change, the consumer landscape.<sup>268</sup> The legal profession should allow corporations to tap into the large numbers of underemployed lawyers in order to access the segment of clients who cannot afford, or do not wish to seek out, traditional legal counsel.<sup>269</sup> By increasing the visibility of legal services and making those services more approachable, low- to moderate-income clients will become more inclined to seek attorneys at traditional law firms when possible.<sup>270</sup> The price of insecurities within the legal profession should not be paid in unnecessary, adverse legal outcomes for low- and moderate-income clientele.<sup>271</sup>

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264. *See supra* Part IV (demonstrating the systemic exclusion of low- to moderate-income clients from essential legal services).

265. *See supra* Part IV (arguing those in need of access to legal services are deprived of such access without rational cause).

266. *See id.* (“[O]pponents worry that, upon modification, the practice of law will be tainted in such a way that lawyers are no longer considered professionals.”).

267. *See* Michael Stone, *10 Brand Marketing Trends to Watch in 2019*, FORBES (Jan. 28, 2019, 4:12 PM), <https://www.forbes.com/sites/michaelstone/2019/01/28/10-brand-marketing-trends-to-watch-in-2019/#162428ac4708> (“The blurring of online and offline retail will continue at an increased pace. Online retailers will aggressively march into brick and mortar”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

268. *See supra* Part II.D.

269. *See supra* notes 223–228 and accompanying text.

270. *See supra* note 262–263 and accompanying text.

271. *See* Adams, *supra* note 6, and accompanying text.