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LAW FIRM OWNERSHIP OF ANCILLARY BUSINESSES
IN OHIO – A NEW ERA?

by

STEPHEN R. RIPPS*

INTRODUCTION

A new era is upon the legal profession. Large law firms over the past twenty years have experienced rapid change with respect to both their internal structure and the external environment in which they operate. The law has come to be viewed as big business. Its image as an elite profession has given way to the economic reality of increased competitiveness and bottom-line margins. This self-reflection has proven difficult because large law firms recognize the historical roots of certain traditions, but, simultaneously, must keep an eye toward the future and toward their own professional survival.

Once reliable and stable, the organizational structures of large law firms have become increasingly flexible. It has been predicted that large law firms in the 1990’s will be bigger, more fluid, and more competitive, diversified and commercially aggressive. Complementing this change in growth and structure over the past decade is the large scale involvement of law firms in nonlegal businesses. Commonly referred to as “ancillary businesses,” they can include “subsidiaries of the law firm, internal consulting units, and partnership ventures.”

The purpose of such arrangements is to provide a wider range of services for clients in a more efficient manner. The impact of this structural upheaval has been to make the general practice of law more complex and to force law firms to reexamine traditional rules of ethics. It has also contributed to the need for “ethics consulting,” which has itself now become an important legal field.

The seeds of controversy about ancillary businesses were planted in 1983 when the American Bar Association’s House of Delegates approved Model Rule 5.4 prohibiting non-lawyer participation in law firm businesses. Ohio has

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adopted the ABA Code of Professional Responsibility, not the Model Rules, but the Model Rules may nevertheless have an impact on the interpretation and development of ethical guidelines in Ohio and other Code states. In order to determine the status of ancillary businesses in Ohio today, analysis must proceed in this dual context.

HISTORICAL DEVELOPMENT

The ancillary business movement was spearheaded in the early 1980's by ARNOLD & PORTER, one of Washington, D.C.'s largest and most progressive law firms. At least twenty-eight other D.C. firms have formed subsidiaries, and upwards of seventy-nine firms nationwide have followed suit. Approximately one-half of all ancillary business ventures are located in the Northeast U.S. (including Washington, D.C. which has the most). The rest are scattered across the country, "with notable concentrations in Ohio and Seattle." The motivation behind acquiring ancillary businesses is to provide services in areas separate from, but related to, the practice of law. Such areas include real estate, insurance, public relations, lobbying and investment banking.

As stated earlier, in August, 1983, the American Bar Association’s House of Delegates adopted the Model Rules of Professional Conduct with Model Rule 5.4 prohibiting nonlawyer participation in a law firm. Many jurisdictions adopted the ABA ban, but the District of Columbia continued as one of the only jurisdictions allowing law firm affiliation with nonlegal services. These services were offered not only to clients of the firm, but also to those that were independent of any of the firm’s legal services.

The public ethical debate about ancillary businesses rose to the surface in 1988. The debate focused primarily on D.C. firms, not only because of

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9 Id.
4 Id. Weidlich, supra note 4. Several Ohio firms number among the 250 largest law firms with ancillary businesses: Benesch, Friedlander, Coplan & Aronoff (Cleveland) (title insurance); Frost & Jacobs (Cincinnati) (financial institution consulting); Porter, Wright, Morris & Arthur (Columbus) (private judging and a real estate title company).
7 See Weidlich, supra note 4.
4 See infra note 19.
9 See Susan Gilbert and Larry Lempert, The Nonlawyer Partner: Moderate Proposals Deserve a Chance, 2 GEO. J. OF LEGAL ETHICS 383 (1988) (provides a complete history behind the Kutak Commission and its role in Model Rule 5.4.).
10 Bottom-Line Bar: The Law Isn’t Enough; Firms Branch Into New Services as the Entrepreneurial Spirit
ARNOLD & PORTER's involvement, but also because the D.C. Bar adopted rules on professional conduct allowing non-lawyers, for the first time, to become law firm partners. Critics contended that the rule change would allow non-lawyer partners to subvert the ethical requirements and responsibilities imposed on lawyers. Others felt making law firms more business-like would erode professionalism, result in the unauthorized practice of law by non-lawyers, violate attorney-client privileges, impair a lawyer's independent judgment and result in improper client solicitation. An ABA task force, which was established to study ancillary business activity, recommended non-lawyers be denied partnership status and greater emphasis be placed on the "sanctity of the profession than on lucrative opportunities for multidisciplinary expansion."

Despite the ABA's reluctance to sanction law firm ownership of ancillary businesses, Washington, D.C. took the unprecedented step of specifically renouncing the ban on non-lawyer partners through Rule 5.4 of its own Rules of Professional Conduct. The proposed rule was submitted by the D.C. Bar to the D.C. Court of Appeals in November of 1986. The Washington rule is associated with law firm diversification.

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Grows, CRAIN'S N.Y. BUS., Nov. 14, 1988 [hereinafter Bottom-Line Bar] (age-old practices now coming under scrutiny because of increased variety of lawyer-entrepreneurial activity within past few years); The FTC's Cleveland Regional office was a proponent of a liberal rule to benefit consumers. See Gilbert & Lempert, supra note 9, at 402. Daniel B. Moskowitz, Lawyers Are Preparing to Debate Recent Changes in Legal Profession, WASH. POST, April 9, 1990 at F90. Randall Sanborn, Non-lawyers as Firm Partners, NAT'L L.J., Mar. 5, 1990, at 1.

Non-lawyers as Firm Partners; supra note 10.


Id. (lawfirm ownership of ancillary businesses "most in vogue" in D.C.).


Bottom-line Bar, supra note 10.

Looking Backward, NAT'L L.J., Dec. 24, 1990, at 12. (While ABA should keep such concerns in mind, "the world is changing" and D.C.'s rule is a recognition of the reality of the contribution non-lawyers make to a firm's client base. "Instead of worrying and trying to circle the wagons, lawyers should try to keep the 'invasion' of non-lawyers on their turf. Everyone should give the experiment a chance to succeed.").

Non-Lawyers as Firm Partner, supra note 10 (origins of the D.C. rule change date from the late 1970's). The rule change was adopted on March 1, 1990 and went into effect on January 1, 1991. Id. Rule 5.4 allows non-lawyers to share attorney's fees and permits partnership management in limited situations.

D.C. Rule 5.4 Professional Independence of a Lawyer

a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) An agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
According to the D.C. rule, lay professionals may acquire a financial interest in a law firm or exercise managerial authority if: (1) the professional services provided by the nonlawyer are a necessary part of the provision of legal services to clients,20 (2) the “sole purpose” of the partnership is to provide legal services to clients,21 (3) nonlawyers agree in writing to be bound by the D.C. Bar’s Rules of Professional Conduct,22 and (4) lawyers agree in writing to supervise and accept responsibility for the conduct of lay partners.23

In 1983, the ABA rejected a proposal similar to the one adopted in D.C.24 Similarly, in 1987, the Supreme Court of North Dakota voted down a rule change drafted on the D.C. model; it is the only other high court to consider such an amendment to date.25

The ABA has a long tradition of proscribing nonlawyers from being members of law firms.26 The ABA rules, however, are merely advisory in nature and do not have the binding effect of law.27 The D.C. rule change represents a direct

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;
(3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
(4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b).

(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.
(c) A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.

20 D.C. RULES OF PROFESSIONAL CONDUCT RULE 5.4(b) (1992).
24 See supra note 10.
27 See Pratap Chatterjee, Washington Ruling Stirs Row, FIN. TIMES, July 16, 1990, at 12 (bound by rules of
challenge to the ABA position and has intensified the debate over diversification and ownership of law firms. It may even be that the traditional ban on nonlawyer partners was itself a factor leading to the growth of firm subsidiaries which allowed firms to provide legal and ancillary services. There are no incentives, such as profit sharing, for nonlawyers to economically advance in the law firm. By March 1990, between 75 and 85 firms nationwide were known to provide such services.

Proponents of the D.C. ethics changes have argued that the debate is wrongly focused on “form over substance” and that “lawyers have been involved in business ventures of many kinds for many years.” According to the Chairman of the Committee that drafted the rule, the purpose is to allow lay professionals to participate in the provision of legal-related services without being limited to the second class status of an employee.

The comments to the rule also describe specific scenarios that the committee envisioned the rule as encompassing. Examples include pairing psychologists with family law practitioners to counsel clients, or lobbyists with lawyers who perform legislative services, or accountants with tax lawyers.

Also, under the D.C. rule, no individual or entity could become sole owner of a law firm for investment-type purposes, but rather the ancillary firm must be integral to the provision of legal services within the law firm in order to meet the rules’ requirements for fee sharing and exercising managerial authority. Such a stipulation was included to avoid the characterization of law firms as identical to other commodities, such as insurance or financial services, which...
may be available in a department store setting. 36

The ABA "Takes Charge" - Model Rule 5.7 37

In August, 1991, the ABA House of Delegates adopted amendments to the Model Rules of Professional Conduct, that if adopted by a state, could severely restrict lawyers from participating in ancillary business activities. 38 Model Rule 5.7 was designed to end concerns about law firms engaged in ancillary businesses. The ABA rule was intended to restrict, if not eliminate, the so-called "one stop shopping" that some firms provided to their clients by the law firm's ownership or operation of related nonlegal services or ancillary businesses. The adoption of the rule was also meant to counteract the negative images that some lawyers associated with firms engaged in nonlegal business activities induce. 39

Model Rule 5.7, entitled "Provision of Ancillary Services," provides:

(a) A lawyer shall not practice law in a law firm which owns a controlling interest in, or operates, an entity which provides non-legal services which are ancillary to the practice of law, or otherwise provides such ancillary non-legal services, except as provided in paragraph (b)

(b) A lawyer may practice law in a law firm which provides non-legal services which are ancillary to the practice of law if:

(1) The ancillary services are provided solely to clients of the law firm and are incidental to, in connection with and concurrent to, the provision of legal services by the law firm to such clients;

(2) Such ancillary services are provided solely by employees of the law firm itself and not by a subsidiary or other affiliate of the law firm;

(3) The law firm makes appropriate disclosure in writing to its clients; and

(4) The law firm does not hold itself out as engaging in any non-legal activities except in conjunction with the provision of legal services, as provided in this rule.

(c) One or more lawyers who engage in the practice of law in a law firm shall not own a controlling interest in, or operate, an entity which provides non-legal services which are ancillary to the practice of law, or otherwise provide such ancillary non-legal services, except that their firms may provide such services as provided in paragraph (b).

(d) Two or more lawyers who engage in the practice of law in separate law firms shall not own a controlling interest in, or operate, an entity which provides non-legal services which are ancillary to the practice of law, or otherwise provide such ancillary non-legal services.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.7 (1983).

36 See Showdown on Subsidiaries, supra note 12. (controversy rivals debate over ABA Model Rules in 1983 "when the spectre of Sears & Roebuck someday owning a law firm effectively killed a provision permitting nonlawyer partners.").

Professor Harold Levison of Vanderbilt University has publicly criticized the D.C. rule changes and warned that they lack clarity. For example, the rules do not limit the percentage share of a partnership that nonlawyers could hold. Levison, supra note 14. Cf. Stephanie B. Goldberg, More than the Law: Ancillary Business Growth Continues, A.B.A. J., Mar. 1992, at 37 (Stephen Gillers of New York University "believes that states are unlikely to adopt [M.R. 5.7] and that it will 'balkanize' the Model Rules by encouraging states to ('pick and choose' among them')."

37 Model Rule 5.7, entitled "Provision of Ancillary Services," provides:

38 This rule has since been rescinded. See infra text accompanying notes 48-52.

39 See ABA Considers Ethics Rule on Ancillary Businesses, 7 Laws. Man. on Prof. Conduct, (ABA/BNA) No. 2 at 28 (Feb. 27, 1991) [hereinafter ABA Considers Ethics Rule].
The adoption of M.R. 5.7 pitted two primary groups against each other: the Litigation Section's Task Force on Ancillary Business Activities, and the ABA Standing Committee on Ethics and Professional Responsibility. The position of the Litigation Section was that ancillary services should be allowed only within a law firm, not through a separate entity and only in connection with a current legal matter of the client. The ABA Standing Committee on Ethics and Professional Responsibility advocated allowing lawyers to participate in a large spectrum of ancillary businesses while maintaining a moderate degree of regulation. In 1991, the House adopted the recommendation sponsored by the Section of Litigation that created Model Rule 5.7, which generally restricted ancillary businesses that were not related to the provision of legal services to clients.

The Litigation Section Report had been an effort to ensure ancillary services were solely incidental to and independent of a law firm's delivery of legal services and to guard against misleading or improper solicitation of clients. In contrast to the arguments put forth by the Litigation Section, the Special Coordinating Committee on Professionalism agreed with the opinion of the Standing Committee on Professional Discipline, which had concluded in March 1990 that:

A. ancillary businesses have existed for a long time and are in many circumstances in the consumer interest.
B. ancillary businesses give rise to serious ethical problems.
C. the scale of current ancillary business activities dwarfs that of past activities and without specific oversight mechanisms and required disclosure, the current disciplinary system will prove inadequate to police the conduct of lawyers who participate in or own such entities.

The Special Coordinating Committee came to similar conclusions.

A. the public may be confused about the role of lawyers operating ancillary businesses with respect to important protections that they do not have (e.g.,

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40 See Lawrence J. Fox, ABA House of Delegates Takes a Stand for Professionalism, PROF. LAW., November 1991, at 5.
41 ABA Considers Ethics Rule, supra note 39, at 29. See also Lawrence J. Fox, Restraint is Good In Trade, Ancillary Business for Lawyers Needs Limits, NAT'L L. J., Apr. 29, 1991, at 17.
44 See ABA Finds Ethical Problems, supra note 15 (summary of Litigation Section Report) Cf. Report of Stanley Commission (1986) (ABA commission on professionalism) (recognized the increased involvement of lawyers in business activities, but was unfavorable toward idea of diversification).
45 ABA Special Coordinating Committee on Professionalism, Special Report to the House of Delegates on Ancillary Business Activities (1990).
attorney-client privilege.)

B. existing rules of ethics are not adequate to preserve confidentiality of information obtained by lawyers in the course of conducting ancillary business or to ensure that the public is aware of the limitations of confidentiality.

C. concern with increasing commercialization of the practice of law is not enough for the committee to conclude that ancillary businesses per se will lead inevitably to a loss of professionalism, nonlawyer ownership of firms, or loss of self-regulatory authority.

The Special Coordinating Committee also addressed some of the concerns raised by the Litigation Section Report:

A. Independent Professional Judgment: Recent escalation of ancillary business activities per se does not raise a significant threat to the independence of lawyers' professional judgment. The committee recognizes that lawyer's pecuniary interest in ancillary businesses may increase the potential for compromising lawyers' objective assessment of the nonlawyer, but such potential already exists for evaluating qualifications or work product of persons in the lawyer's own office or in unaffiliated businesses which regularly send work to the lawyer.

B. Quality of Legal Work: 1) Individual lawyers who choose to pursue separate business interests will do so whether or not their firms own or operate businesses ancillary to the practice. 2) As the Working Group observed, assistance of nonlawyers may serve to free lawyers from necessarily becoming intimately familiar with other disciplines.

C. Public Service Obligations: By itself the ancillary business trend is not likely to negatively affect the profession's fulfillment of its obligations to society. The development of ancillary businesses cannot be pinpointed as the reason for the decline in pro bono work.46

The Special Coordinating Committee was not persuaded that involvement in ancillary business activity per se would lead to nonlawyer management or control of law firms. However, it recognized the importance of self-regulation and prohibition against ownership of law firms by nonlawyers. In this regard, it reaffirmed the importance of ABA Model Rule 5.4.47

46 Some commentators argue that by increasing profitability a law firm may be able to free up resources to do more pro bono. The Special Coordinating Committee recommended study of the correlation between profitability and public service activities, but the committee has not yet undertaken such a study. See Gilbert & Lempert, supra note 9, at 407 n. 88.

47 ABA Special Coordinating Committee on Professionalism, Special Report to the House of Delegates on Ancillary Business Activities (1990).
Former Rule 5.7 of the Model Rules of Professional Conduct limited law firms to providing “non-legal services which are ancillary to the practice of law” only when such services were “incidental to, in connection with, and concurrent to, the provision of legal services.”

At the ABA annual meeting in August of 1992, the House of Delegates voted to repeal the rule by a vote of 190-183. The repeal action had been sponsored by six ABA practice sections, the Illinois Bar and AAA-CPA.

Opponents of the repeal of the rule argued that while it was theoretically aimed at large urban firms that had recently expanded their range of services into non-traditional areas such as lobbying and consulting, the livelihood of many smaller practitioners, who offered trust, title, tax and insurance services, was threatened as well. Ancillary businesses simply do not fit into the learned law profession.

The strongest support for maintaining Rule 5.7 came from the Section on Litigation, which had supported passage of the rule in 1991 and continued to advocate that the ABA should opt for “professionalism over profit.”

Ohio: Ancillary Businesses and The Future of MR 5.7

The State of Ohio has not adopted the ABA Model Rules of Professional Conduct (1983), but rather has followed the ABA Code of Professional Responsibility (1969). It should be noted that the ABA’s adoption of Model Rule 5.7 in 1991 was to be more expressive of lawyer conduct relating to ancillary businesses. Prior to that, in 1983, the ABA “substituted the traditional prohibitions against lawyers sharing fees or forming partnerships with nonlawyers that had appeared as Disciplinary Rules in the Model Code of Professional Responsibility.” Both of these rules, first M.R. 5.4 and then M.R. 5.7, were promulgated

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50 See ABA Backs ‘Choice’ Position on Aborting Rescinds Rule Barring Ancillary Business, 61 U.S.L.W. 2093 (Aug. 18, 1992) (no state bar association had adopted rule 5.7 in the year after it was added. Lawyers in Illinois “resoundingly defeated” Rule 5.7 when it was submitted to the 32,000 members for a vote.)

51 ABA Repeals Model Rule 5.7, Ancillary Business, ATTY-CPA, Fall 1992, at 1 [hereinafter ABA Repeals Model Rule 5.7].

52 De Benedictis, supra, note 49, at 110; Weston, supra note 43.

53 Id.

54 See Gilbert & Lempert, supra note 9.
to make up for the deficiencies perceived in the Code.\textsuperscript{55}

The substitution of these Disciplinary Rules was adopted in August 1983 as Model Rule 5.4. The State of Ohio did not take a position on M.R. 5.4. It has, in effect, developed its own "common law" for ancillary businesses and there has been no organized bar opposition.

The ABA through its Special Coordinating Committee on Professionalism has reported that clients recognize and appreciate the diversification of law firms as complementing the traditional provision of legal services. Clients choose to work with a diversified law firm because of the firm's ability to solve complex problems in a cost-effective manner. Clients seem to value this approach to complex legal-business problems and believe that the diversification is cost-

\textsuperscript{55} For example, ABA Model Code DR 3-102, DR 3-103 and DR 5-107 provide:

DR 3-102 Dividing Legal Fees with a Non-Lawyer.
(A) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:
(1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.
(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.
(3) A lawyer or law firm may include non-lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement providing such plan does not circumvent another disciplinary rule.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102 (1980).

"DR 3-103 Forming a Partnership with a Non-Lawyer.
(A) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-103 (1980).

DR 5-107 Avoiding Influence by Others Than the Client.
(A) Except with the consent of his client after full disclosure, a lawyer shall not:
(1) Accept compensation for his legal services from one other than his client.
(2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.
(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.
(C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
(1) A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
(2) A non-lawyer is a corporate director or officer thereof; or
(3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107 (1980).
effective and in their best interest. The nonlegal services can be provided by a subsidiary structured as a corporation, partnership or a limited partnership.

Some of the concerns that generally are discussed about lawyer - non-lawyer affiliations are the threat to the professionalism of lawyers posed by such an arrangement or the possible negative effect that the ancillary business has on the lawyer's independent professional judgment. Those concerns, however, do not belie the proposition "that there is nothing in the affiliation of lawyers and non-lawyers per se that causes serious ethical problems."

When the affiliated business is a separate entity, the affiliated firm and its personnel are held to the same ethical standards that apply to the law firm. Law firms should have a committee overseeing the ethical standards of the affiliated business. Through full disclosure, the clients of the law firm are free to choose an unaffiliated business, and similarly, clients who bring their nonlegal business to a business that is affiliated with a law firm are also free to use a different law firm for their legal work.

The affiliated business is usually held to the same ethical requirements in areas such as confidentiality and advertising as are applied to the law firm. The affiliated business and the law firm are considered as one for ethical purposes. While operational practices vary in each instance, most law firms and their affiliations follow the model used by ARNOLD & PORTER in connection with its affiliated firms.

First, all potential clients of the affiliate are screened through the law firm's conflict of interest system. If a conflict is discovered, it is resolved by the governing committee of the law firm, not the affiliate. Second, all promotional literature of the affiliate is cleared by the law firm's ethical committee. Third, all promotional literature and all retainer agreements used by the affiliate disclose the relationship with the law firm, emphasizing that the affiliate's client is not required to use the legal services of the law firm in connection with the matter for which the affiliate has been retained. The client may choose another law firm to work with the affiliate.

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56 There is not enough data, however, to evaluate whether ancillary businesses are profitable ventures from the law firm's perspective. See, e.g., Weidlich, supra note 4 (The Cleveland firm of Arter & Hadden, which owned several title companies and consulting companies, found such joint arrangements to be financial disappointments: "We've gotten out of all those businesses. The trouble is that you devote the time energy and money on it, and if you did it for another office, you'd get a better margin. Law firms are used to hefty margins.").

57 Weidlich, supra note 4.

58 Jones, supra note 29.
There are detractors who believe that law firm diversification is a serious risk to the legal profession. Some believe ownership of an ancillary business threatens clients with inflexible conflict of interest problems and undermines professionalism. In spite of the initial passage of M.R. 5.7 in 1991 reflecting the rigid position of the Litigation Section, it appears the trend is in favor of allowing ancillary businesses because it enhances client representation. In fact, the narrow vote for passage of the 1991 M.R. 5.7 was rescinded in August of 1992 before the House of Delegates. Prior adherence to the Litigation Section’s prohibitory approach to ancillary businesses was abandoned in favor of a more permissive regulatory approach.

**Independent Professional Judgment, Conflicts of Interest and Full Disclosure to Clients**

It is obvious that ethical issues such as independence of professional judgment, conflicts of interest, preservation of client confidences and full disclosure to clients arise as a result of ancillary business activities. A law firm that wants to engage in an ancillary business should have a consultant versed in legal ethics to aid in guiding it through these issues, in preparing disclosure and consent forms and to render an opinion that fits the exact position of the firm. Generalities are just that, and review and analysis must be accorded for each situation. The following are discussions relating to those ethical issues.

Independent professional judgment promotes accountability and loyalty to the client. Ohio’s DR 5-101(A), DR 5-104(A) and DR 5-105(C), as does Canon 5, deal with conflicts that may arise between clients as well as conflicts that may arise between a client and a lawyer’s personal interests. They encourage com-

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59 But see Weidlich, supra note 4 (The number of ancillary businesses fall short of the “groundswell” that was predicted in the late 1980’s. This may be due in part to the sluggish economy of the first few years and by the uncertainty resulting from the ABA debate over Model Rule 5.7.).

60 The Ohio Code of Professional Responsibility provides: “Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.” OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (Anderson 1983). “A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.” OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 5-104(A) (Anderson 1983). DR 5-105(C) provides:

In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

**OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (Anderson 1983).**
mon sense and disclosure. Less flexible is DR 5-107 dealing with the influence by others than the client in the professional relationship.\textsuperscript{61}

The Code, as does Rule 5.4 of the ABA Model Rules of Professional Conduct, prohibits a lawyer from practicing in a firm where: (1) a nonlawyer owns an interest in the firm, (2) a nonlawyer is a “director or officer;” or (3) a nonlawyer has the right to control the professional judgment of the lawyer.\textsuperscript{62} While these rules shape and restrict the forms that lawyer-nonlawyer associations may take, they do not prohibit per se separate nonlegal ancillary businesses. Therefore, the attorney and even the nonlawyer in a supervisory capacity in the ancillary business must remain sensitive to the need of the lawyer in the ancillary business to exercise independent professional judgment.

Relating to the questions of professional independence are issues of conflicts of interest. The issue raised is whether affiliations between lawyers and nonlawyers pose different categories of conflicts of interest problems than those found in traditional legal practices.\textsuperscript{63}

DR 5-104(A) governs direct business dealings between the lawyer and his client and DR 5-105(A) governs conflicts between clients.\textsuperscript{64}

Of special importance is DR 5-105(C), which allows multi-client representation if the clients consent to the representation “after full disclosure of the

\textsuperscript{61} DR 5-107(B) and (C) provide:

(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

(C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

1. A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
2. A non-lawyer is a corporate director or officer thereof; or
3. A non-lawyer has the right to direct or control the professional judgment of a lawyer.

OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B), (C) (Anderson 1983).

\textsuperscript{62} See OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(C) (Anderson 1983). See also OHIO CODE OF PROFESSIONAL CONDUCT Rule 5.4 (1983).

\textsuperscript{63} The conflicts between a lawyer and client are set forth in DR 5-101(A). That section provides: “Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.” OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (Anderson 1983).

\textsuperscript{64} DR 5-105(A) provides: “A lawyer shall decline proffered employment if the exercise of his independent
possible effect of such representation on the exercise of his independent professional judgment on behalf of each. 6 5

The Code recognizes that conflicts are part of the practice of law which may be waived by informed consent unless they are such that the independent professional judgment of the lawyer would be so eroded that adequate representation is not practical. Because of the underlying policies of the Code, including loyalty to clients and protection of client confidences, it is recommended that emphasis be on treating the affiliated business as part of the law firm itself for client conflict screening purposes. Therefore, as an operating device, the affiliate should not be permitted to represent clients with conflicting interests unless that representation would be permissible if undertaken in legal matters by the law firm itself. For example, the law firm might be unduly influenced by its own business interests in the affiliated firm, or the law firm might be unduly tempted to avoid rendering advice that would undermine the client’s relationship with the affiliated firm.

The lawyer has a duty to preserve the confidentiality of information provided to him by the client. 6 6 DR4-101 prohibits the lawyer from disclosing information received from the client during the professional relationship unless

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6 5 OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A) (Anderson 1983).
6 6 DR 4-101 provides:

(A) "Confidences" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under D 4-101(C), a lawyer shall not knowingly:
   (1) Reveal a confidence or secret of his client.
   (2) Use a confidence or secret of his client to the disadvantage of the client;
   (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure;

(C) A lawyer may reveal:
   (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
   (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
   (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
   (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others
the client consents after full disclosure. The lawyer shall exercise reasonable care to prevent employees and associates from disclosing or using confidences or secrets of a client. Such principles are analogous to the situation where the nonlawyer is an "affiliate" rather than an employee or associate.

The primary key in avoiding present and future misunderstandings is always full disclosure, which should be in writing. The client who requires multi-disciplinary services should be fully informed as to the ownership and control of the nonlegal affiliate that will perform client services. The law firm and the affiliate should fully inform the client about who is making the service available, who will actually perform the services and to whom the fees will be paid, emphasizing that only the firm, and not the business, can offer legal services. These full disclosure requirements also relate to advertising, promotion and referrals.

As to referrals from the law firm to the consulting affiliate, the attorney making the referral owes a duty to the client to refer the client to a qualified person. This is especially needed when the law firm refers a client to its affiliate. Full disclosure to the client as to the relationship and the nature of the relationship between the firm and affiliate is required.

Regarding referrals from the affiliated business to the law firm, there may be an issue of referral fees. Because the relationship between the firm and the affiliate in almost all instances has been disclosed to the client, the client would be in a better position to make an informed judgment about the quality of the referral suggested by the attorney.

Other areas of concern generally raised under the topic of professionalism are the impermissible use of lay intermediaries and the unauthorized practice of
law. If anything, the use of professional personnel as an affiliate enhances the attorney-client relationship and assures that the nonlawyer will not be engaged in legal services. While the rules prohibiting the unauthorized practice of law ensured competence in the profession, there is nothing in the affiliation relationship that diminishes the responsibility. This responsibility can be upheld by orientation and training programs for nonlawyers in the affiliation to ensure that they refrain from law practice.

The Board of Commissioners on Grievance and Discipline of the Ohio Supreme Court has not rendered an opinion on ancillary businesses. However, the Ohio State Bar Association addresses this issue. In the context of real estate transactions, the opinion states that conflicts of interest are obvious when a law firm representing either a buyer or a seller of real estate obtains services from a title insurance company owned by the law firm, has an interest in, or represents an attorney. In this type of matter, it is incumbent on the law firm to explain fully to the client all the potential conflicts and the possible need for the attorney to withdraw from representation of the client.

The opinion gives guidance to the lawyer who has a beneficial interest in the title company. The lawyer may direct the client to obtain title insurance from the company provided that the lawyer makes a judgment that the transaction would not interfere with the client's interests and full disclosure is made to the client regarding the law firm's interest in the service business. The full disclosure would be in writing and would include: (1) the lawyer's interest in the company; (2) the compensation the business would receive from the transaction; (3) any indemnity agreement the lawyer has with the business (title insurer in this case); (4) the impact the transaction would have, if any, on the lawyer's professional judgment; and (5) the amount of commissions and fees that the lawyer would receive. A lawyer may accept fees for the legal services performed and a commission as agent for the title company, as long as the lawyer has exercised the duty of disclosure, and consent of the client and maintenance of independent professional judgment are adhered to.

those to whom he was recommended by it to do such work if:
(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and
(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

70 See OHIO CODE OF PROFESSIONAL RESPONSIBILITY EC 3-2, 3-3, DR 3-101(A) (Anderson 1983).
An important consideration for law firms in Ohio is that Opinion #37 may be the only written opinion of the bar association that considers ancillary businesses. Assuming this to be correct, then it is logical that the bar association may rely on the ABA ethical opinions in solving any ancillary business problems. ABA opinions will derive from discussions about M.R. 5.7 and could have an impact on Ohio law firms even though Ohio has not adopted the Model Rules. The debate over M.R. 5.7 is far from over.

The current chair of the ABA House of Delegates, Philip S. Anderson, who began his term at the close of the 1992 Annual Meeting and will serve until 1994, predicted that a rule could be drafted that would satisfy those who voiced opposition to its most recent formulation. This may signal a resurgence of efforts aimed at regulating attorney involvement in ancillary businesses, particularly in light of the narrow margin by which the rule was rescinded. This conclusion is consistent with recent action taken by the California state bar to examine attorney conduct outside the law firm setting, which may foreshadow a change in focus from the national to the state level with regard to the ancillary business issue. Then Ohio can monitor any compromise but with concern about its practitioners and their traditions.

Therefore, assuming that ABA ethical opinions will affect consideration of this issue by the Ohio Bar, controversy surrounding the ongoing debate over the repeal of M.R. 5.7 could have an impact on Ohio law firms even though Ohio has not adopted the Model Rules. It would be preferable for Ohio to adhere to its flexible approach regarding ancillary businesses rather than attempting to mimic the narrow limitations of former rule 5.7.

72 See Weidlich, supra note 4, at 322 (quoting Lawrence Fox, chair of Litigation Section's Ancillary Business Committee: "We have to come up with a proposal and put this issue to rest once and for all... I think we have to find a policy that gets us 60 percent [of the vote] because the problems are going to continue... ").
73 Weidlich, supra note 4 (quoting Lawrence Fox, chair of the Litigation Section's Ancillary Business Committee, who doesn't think there will be a consensus on the issue in time for the ABA's annual meeting in August of 1993); see also Lawrence Fox, Ancillary Businesses Pose Ethical Problems, NAT'L L. J., Feb. 13, 1993.
74 ABA Repeals Model Rule 5.7, supra note 51.