POLICYMAKING AND THE PERILS OF PROFESSIONALISM: THE ABA'S ANCILLARY BUSINESS DEBATE AS A CASE STUDY*

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I. INTRODUCTION

The American Bar Association has always acknowledged a responsibility to formulate its public policy proposals with care and dispassion. Reasoning from the lawyer's familiar axiom that good law requires good lawmaking, the ABA resolved in 1919 to develop any "recommendations affecting American social and economic affairs" with the deliberation one would expect of a law-making body, sifting facts and weighing the interests of all.[1] This commitment surely applies to the rules of legal ethics. Those rules constitute public policy in the sense that they are designed today to regulate lawyers, not just to guide or inspire them.[2] And it is here that the ABA influences public policy most directly. Though the ABA can only recommend ethics rules to the state supreme courts, those courts treat the ABA as a "preliminary arena of public government" in which the law of lawyering is "first formulated."[3] Nearly every state adopted the ABA Code of Professional Responsibility in the 1970's,[4] and most have now adopted the ABA Model Rules of Professional Conduct.[5]

The ABA's responsibility for the manner in which it develops ethics rules is heightened by its own views on how lawyers should be regulated. Well aware that lawyers are judged in disciplinary proceedings according to standards derived largely from its own ethics rules, the ABA urges that lawyers be regu-

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1. CORINNE LATHROP GILB, HIDDEN HIERARCHIES: THE PROFESSIONS AND GOVERNMENT 216 (1966).

2. MODEL RULES OF PROFESSIONAL CONDUCT Scope ¶ 6 (Model Rules designed to provide "a structure for regulating conduct through disciplinary agencies").

3. GILB, *supra* note 1, at 140 (referring to the influence of professional associations generally on the rules by which the professions are regulated).

4. By 1972, only two years after the ABA promulgated the *Code of Professional Responsibility*, most of the state supreme courts had adopted it, often verbatim, to govern the lawyers in their jurisdictions. *Report of the ABA Special Commission to Secure Adoption of the Code of Professional Responsibility*, 97 A.B.A. REP. 268 (1972).

5. For a list of the states that have adopted the Model Rules since they were promulgated by the ABA in August 1983, see [Manual] Laws. Man. on Prof. Conduct § 01:3–01:4 (ABA/BNA) (July 15, 1992).

lated through the judicially-controlled disciplinary process and not by the other branches of government.[6] By supporting a regulatory system in which its own rules prevail, the ABA makes itself all the more accountable to the public for the quality of its rulemaking.

In August 1991, the ABA House of Delegates voted 197–186 to incorporate into the Model Rules a broad ban on lawyers' ownership or operation of entities that provide "non-legal services which are ancillary to the practice of law."[7] The ban, which proved to have only a one-year life span, permitted lawyers to provide ancillary services only in connection with the provision of legal services and only "in house," rather than through affiliated entities.[8] Championed by the ABA Litigation Section, Model Rule 5.7 targeted a growing practice widely publicized in the press,[9] namely, large law firms offering law-related services such as environmental consulting not only to the firms' clients but often to other customers as well. Rule 5.7 also limited the extent to which small-firm lawyers could pursue such traditional side lines as managing trusts, providing title insurance, and selling real estate.

Opponents of the rule regrouped and, in August 1992, barely convinced the House to repeal the provision.[10] Because no state has adopted the ban, and

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6. ABA Resolution 103 (adopted by House of Delegates on Feb. 7, 1989) (on file with the author).

7. Henry J. Reske & Don J. DeBenedictus, *Ethics Proposal Draws Fire*, A.B.A. J., Oct. 1991, at 34.

8. Model Rule 5.7 provided as follows:

RULE 5.7 Provision of Ancillary Services

(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 provide 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 neither own a controlling interest in, nor operate, an entity which provides non-legal services which are ancillary to the practice of law, nor 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 neither own a controlling interest in, nor operate, an entity which provides non-legal services which are ancillary to the practice of law, nor otherwise provide such ancillary non-legal services.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.7 (as repealed, Aug. 1992).

9. *See, e.g.*, Thomas F. Gibbons, *Branching Out*, A.B.A. J., Nov. 1989, at 70; Tamar Lewin, *Outside Ventures Transform Law Firms*, N.Y. TIMES, Feb. 11, 1987, at D1; Ruth Marcus, *Lawyers Branch out from the Law*, WASH. POST, Mar. 13, 1986, at A1; Alexander Stille, *When Law Firms Start Their Own Businesses: The Lure of Bigger Profits*, NAT'L L.J., Oct. 21, 1985, at 1.

10. Don J. DeBenedictus, *House of Delegates: Close Vote Rescinds Provision Against Ancillary Business*, A.B.A. J., Oct. 1992, at 110. This time the vote was even closer, 190–183. *Id.*

presumably none will, one could dismiss the whole sequence as a meaningless blip on the ABA screen.[11] But the closeness of the House votes suggests that the issue is likely to reappear.[12] Moreover, ancillary businesses and multidisciplinary law firms, the two experiments implicated by Rule 5.7, are only part of the upheaval occurring today in the delivery of legal services, especially in large law firms.[13] Other disputes over the proper direction of law practice may flare up, and, if they do, some lawyers may again try to use the ABA rulemaking machinery as an arbiter of professional taste. To discharge its rulemaking responsibilities properly in the future, the ABA should draw a lesson from the ancillary business flap.

The lesson to be learned is that the ABA should not debate the merits of ethics rules, as it did here, in the rhetoric or "idiom" of professionalism.[14] I know this will sound paradoxical to the many lawyers who find professionalism synonymous with ethics. I also know such debates will be hard to avoid; if patriotism is the last refuge of scoundrels, professionalism is often the first refuge of lawyers. Still, I can only conclude from the poverty of the arguments briefly prevailing in the ancillary business debate that looking at ethics rules through the lens of professionalism is all too likely to distort policymaking.

This is not to say that ABA leaders should never debate or justify their initiatives in terms of professionalism. While it is a notoriously vague and contested concept, professionalism has great resonance within the bar. Debating its meaning and calling for action in its name can mobilize lawyers and enhance

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11. However, the ancillary business debate has received considerable attention in the law reviews. *See, e.g.*, David Pitofsky, *Law Firm Diversification & Affiliations Between Lawyers & Nonlawyer Professionals*, 3 GEO. J. LEGAL ETHICS 885 (1990); John D. Conners, Comment, *Law Firm Diversification: An Affront to Professionalism?*, 17 OHIO N.U. L. REV. 303 (1990); Marjorie Meeks, Note, *Alter[ing] People's Perceptions: The Challenge Facing Advocates of Ancillary Business Practices*, 66 IND. L.J. 1031 (1991); Howard D. Reitz, Note, *Model Rule 5.7: A Well Intentioned but Misdirected Reform*, 5 GEO. J. LEGAL ETHICS 975 (1992). And at least one law firm backed out of an ancillary business because of the ABA ban. Thom Weidlich, *Ancillary Businesses Prospering Quietly*, NAT'L L.J., Dec. 21, 1992, at 1, 30.

12. After the second vote, the chair of the House of Delegates predicted that the issue would resurface, DeBenedictus, *supra* note 10, at 110, and supporters of Rule 5.7 vowed to bring the issue back to the House, Weidlich, *supra* note 11, at 32.

13. MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 3 (1991). For a useful overview of the changes, see *id.* at 37-76.

14. For historical treatment of the idiom of professionalism, see Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960, in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 144 (Robert L. Nelson et al. eds., 1992) [hereinafter LAWYERS' IDEALS/LAWYERS' PRACTICES]. I speak here of professionalism as a distinctive type of discourse, not a well-defined analytic concept. For an analysis of bar association debates conducted in another idiom, the idiom of "legalism," see TERENCE C. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES AND PROFESSIONAL EMPOWERMENT (1987); Terence C. Halliday, *The Idiom of Legalism in Bar Politics: Lawyers, McCarthyism, and the Civil Rights Era*, 1982 AM. B. FOUND. RES. J. 911. Halliday shows that even bar associations with politically diverse memberships can sometimes achieve a consensus on highly contested issues of public policy by recasting those issues as legal ones; thus, conservative and liberal lawyers were able to join ranks against certain legislative excesses during the McCarthy era, but only on the ground that the excesses were unconstitutional, not that they were bad policy. Conservative lawyers would not have joined a campaign based on policy arguments, and the public would have been less apt to accept such arguments as within the bar's expertise. HALLIDAY, *supra*, at 927–45. Here, I make the very different argument that debating ethical issues in the idiom of professionalism is needlessly divisive for the bar.

their sense of community.[15] In a diverse and changing profession, these are often rhetorical virtues. I would therefore discourage "professionalism talk" at the ABA only when public policymaking is involved, and particularly in the formulation of ethics rules dealing with the business aspects of law practice. When public policy is not involved—when, for example, the ABA simply exhorts lawyers in professionalism's name to keep their ads "dignified"[16] or to do *pro bono* work[17]—I have no complaints.

Before explaining how the idiom of professionalism impoverished the ABA deliberations on Rule 5.7, let me set out some standards, hardly controversial, for judging any public policymaking process. Good policymaking (1) identifies the societal risks specific to the practice in question; (2) gathers reliable data on the magnitude of those risks; (3) identifies the regulatory responses that might reduce or eliminate whatever risks can be substantiated; and (4) carefully compares the benefits and costs of the potential responses, rejecting any response whose costs cannot be justified by offsetting benefits.

As we shall see, Rule 5.7 would never have received serious consideration as a response to the specific risks of ancillary businesses if its proponents had not mesmerized themselves and the House with a long series of "professionalism concerns."[18] Thus entranced, these prohibitionists, like the Prohibitionists of old,[19] became oblivious to the standards of good policymaking. To justify their ban, they emphasized the most speculative risks of ancillary businesses and distorted the available data on those businesses. Playing on the widely shared sense that self-interest and professionalism are inconsistent, they recast the potential benefits of ancillary businesses to clients purely as financial benefits to the lawyers involved, thereby undervaluing the alternative responses of regulating or simply monitoring ancillaries. They also drew a false analogy to medical services for no better reason than the status of medicine as a sister profession. And they put the ABA through a costly and divisive battle[20] with no

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15. For a sympathetic evaluation of professionalism and professional ideals as a potential spur to reform in the legal profession, see Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra* note 14, at 230.

16. The ABA Commission on Advertising has developed a set of "aspirational goals" to encourage lawyers who advertise to make their ads "dignified and tasteful." *See* ABA ASPIRATIONAL GOALS ON LAWYER ADVERTISING (1988), *reprinted in* 1993 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 436–38 (Thomas D. Morgan & Ronald D. Rotunda eds., 1993).

17. The Model Rules call upon all lawyers to provide *pro bono* legal services. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1. But the rule is not regulatory, in the sense that it is "not intended to be enforced through the disciplinary process." *Id.* Rule 6.1 cmt. ¶ 1. I recognize that exhortation, moral suasion, or "jawboning" is sometimes understood as one arrow in the public policymaker's quiver. *See, e.g.*, J.T. Romans, *Moral Suasion as an Instrument of Economic Policy*, 56 AM. ECON. REV. 1220 (1966). For purposes of this Article, however, I want to distinguish the bar's unenforceable aspirations for lawyers from ethics rules designed to be legally enforced. Only the latter are public policy in my terms.

18. *See* Dennis J. Block et al., *Model Rule of Professional Conduct 5.7: Its Origin and Interpretation*, 5 GEO. J. LEGAL ETHICS 739, 764 (1992).

19. *See infra* notes 61, 176 & 177 and accompanying text.

20. One eloquent lament about the time and energy that went into the ancillary business debate comes from Ralph Elliot, a member of the ABA Committee on Ethics and Professional Responsibility. Elliot wrote:

> The [Litigation] Section talks about a loss of something vaguely called "professionalism" and a fear that lawyers could face regulation by non-lawyers if they were to engage in [ancillary business] activities. Its report evokes

realistic expectation that their ban would be adopted at the local level or, if adopted, could be enforced at acceptable cost. In other words, the Litigation Section used the ABA's rulemaking auspices for expressive or symbolic purposes—to tout their vision of what it means to be a professional—not for strictly regulatory purposes.

I shall try to make good on this charge in three steps. Part II describes the policymaking process in which the ancillary business issue became linked to questions of professionalism. Part III shows how the idiom of professionalism marred the deliberations that led to House approval of Rule 5.7. Part IV offers a theory to explain why these matters became linked and suggests how the linkage could have been avoided. The conclusion suggests that the ABA should have learned its professionalism lesson once and for all from the Supreme Court decisions of the 1970's that struck down ethical bans on lawyer advertising and below-minimum legal fees. In the ancillary business debate, those who did not study this history closely were doomed to repeat it.

II. ANCILLARY BUSINESS MEETS PROFESSIONALISM: A SHORT HISTORY

In the 1980's, law firms began to experiment with formal arrangements for providing their clients with the law-related services of professionals such as accountants, economists, and environmental engineers.[21] Some law firms hired these nonlawyers directly; others placed them in subsidiary consulting firms. The subsidiary form was particularly attractive because ethics rules have traditionally barred lawyers from taking nonlawyers as law-firm partners, yet top-notch experts often prefer to take part in these ventures as owners.[22] By 1991, over eighty ancillary businesses were operating,[23] with thirty-one clustered in Washington, D.C.,[24] where large law firms tend to concentrate on transactional, legislative, and regulatory matters rather than on litigation. Topping the list were fifteen government relations or lobbying ancillaries; thirteen in invest-

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> remembrance of a pristine professional past that never was and fears of a subjugated future that never will be. Indeed, many purport to see in the Section's report simply a "save-our-turf" concern, with a subtext of anti-competitive restraints upon trade.
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> This attack of the Litigation Section, in turn, has led various committees and task forces of the ABA to fell whole forests of trees to produce an avalanche of studies and reports on the subject. Most sadly, it has distracted the Standing Committee on Ethics and Professional Responsibility and consumed the major part of its time and energies for the past year as, faithful to its charge, it has felt compelled to examine the issue afresh to see if a more appropriate response than the Litigation Section's could be devised.

ABA Comm. on Ethics and Professional Responsibility, Recommendation and Report to the House of Delegates (May 15, 1991) (Minority Report of Ralph G. Elliot) (on file with the author).

21. Gibbons, *supra* note 9, at 70; Phyllis Weiss Haserot, *Multiprofessional Mixes Are Proliferating*, NAT'L L.J., Oct. 19, 1987, at 16, 18.

22. James W. Jones, *The Challenge of Change: The Practice of Law in the Year 2000*, 41 VAND. L. REV. 683, 690 (1988).

23. Stephanie B. Goldberg, *More Than the Law: Ancillary Business Growth Continues*, A.B.A. J., Mar. 1992, at 54, 55.

24. *Id.*

ment, tax, or financial consulting; and thirteen that consult on international trade.[25]

The D.C. law firm of Arnold & Porter was a pioneer in the field, and its operations are illustrative. By 1988, Arnold & Porter employed twelve nonlawyer professionals directly and had three subsidiaries in fields tied closely to its law practice—one (now sold) that offered lobbying services and consulted on trade matters; one that consults with nonprofit institutions on real estate development projects; and one that complements the firm's banking law practice.[26] Two subsidiaries were set up as partnerships, with the law firm as the sole limited partner; the third is a corporation. In each case, Arnold & Porter lawyers have controlled the subsidiary's board of directors and participated in management and operations.[27]

According to managing partner James Jones, Arnold & Porter developed its ancillaries to accommodate clients whose complex transactions demand a "team effort in which lawyers work closely with other professionals ... to achieve the clients' goals in the most direct and cost-effective way."[28] While clients are free to consult outside professionals—i.e., there is no economic tie-in of legal and ancillary services[29]—Jones and others claim that their firms' ancillary businesses can offer the public certain advantages: enabling clients to do "one-stop shopping,"[30] reducing the cost of service through consolidation,[31] encouraging lawyers and nonlawyers to stay within their own areas of competence by having each other on hand for advice (thereby reducing the risk that nonlawyers will engage in the practice of law),[32] and allowing lawyers to monitor the quality of the ancillary services their clients receive.[33]

Law firms generally hold their ancillary businesses to the ethical standards regarding conflicts of interest, advertising, and the protection of confidences which apply to the provision of legal services,[34] though no rule presently requires them to do so when the ancillary is a separate entity.[35] For example, a law firm would not permit a government relations subsidiary to lobby for two parties who had inconsistent interests in proposed legislation, even if no legal or ethical restrictions barred lobbyists unaffiliated with lawyers

25. *Id.*

26. Jones, *supra* note 22, at 689–91. The lobbying affiliate, APCO Associates, was sold to an advertising company in 1991. Claudia MacLachlan, *Arnold & Porter Sells Subsidiary to Ad Company*, NAT'L L.J., June 17, 1991, at 3.

27. Jones, *supra* note 22, at 690–91.

28. *Id.* at 690.

29. "The clients of a law firm are always free to use unaffiliated consultants and many clients choose to do so .... No 'tying arrangement' is suggested or perceived by clients nor does one exist in fact." Comments Submitted to the ABA Special Coordinating Commission on Professionalism, Professional Affiliations Between Lawyers and Nonlawyers, Tab 1, at 15 (June 5, 1989) (Letter from 25 law firms that own ancillary businesses to Mark Harrison, Chair of the ABA Special Coordinating Comm. on Professionalism (June 5, 1989)) [hereinafter White Paper].

30. Haserot, *supra* note 21, at 16.

31. White Paper, *supra* note 29, Tab 1, at 13–14.

32. *Id.* Tab 3 (Addendum: A Discussion of Ethical Issues (and NonIssues) Raised by Professional Association between Lawyers and Nonlawyers), at 56–57.

33. *Id.* Tab 3, at 59.

34. *Id.* Tab 1, at 7.

35. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328, at 4–5 (1972) (lawyer who also practices a law-related profession from a separate office need not comply in doing so with the ethics rules that govern law practice).

from doing so.[36] This is significant because some ancillaries stay afloat or try to increase their productivity by assisting their affiliated law-firm's clients with matters the firm is not involved in and by taking on some customers who are not clients of the law firm at all.[37] One could say that on such occasions ancillary businesses are extending to new services consumer protections that formerly applied only to lawyers' services.[38] On this view, law firms that operate ancillary businesses are not only entering new service fields, but infusing those fields with the legal profession's ethical values. Yet some bar leaders, mostly litigators at large firms without ancillaries, view the phenomenon as eroding, not extending, lawyer professionalism.[39]

In 1984, stirred by Chief Justice Warren Burger's concern that the bar was moving away from its professional principles,[40] the ABA created a Commission on Professionalism (also called the Stanley Commission), funded largely by the Litigation Section.[41] Among other things, the Stanley Commission's 1986 report urged lawyers to "[e]ncourage innovative methods which simplify and make less expensive the rendering of legal services."[42] One might have thought ancillary businesses would qualify as such an innovation. Yet the Commission lumped the ancillary experiment with two more troubling forms of lawyer involvement in business—investing in clients' companies and serving on their boards of directors—and found the whole lump "disturbing."[43] Having tarred ancillary services with a very old brush—the notion that business and profession are opposing categories[44]—the Commission called for further study.[45]

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36. The constraints of doing business under Arnold & Porter's conflict-of-interest rules is one reason why the firm's lobbying and trade consulting affiliate was "spun off" from the law firm in 1991. *See* Weidlich, *supra* note 11, at 30.

37. Working Group on Ancillary Business Activities, *Interim Report to the Special Coordinating Committee on Professionalism*, 2 PROF. LAW., No. 1, 1990, at 1, 10 (dissent of working group member Dennis J. Block) [hereinafter *Interim Report*].

38. White Paper, *supra* note 29, Tab 3, at 66.

39. Louis Brandeis, I suspect, would have been critical of this reaction. In a famous speech, he once called for the professionalization of business along the lines of the older professions, including law. LOUIS D. BRANDEIS, Address at the Brown University Commencement (1912), *in* BUSINESS—A PROFESSION 1–12 (1933). While it is impossible to say how professional Brandeis would find business to be today, he would presumably have applauded the infusion of lawyers' ethical values into new fields of business activity.

40. ABA Comm'n on Professionalism, "... *In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 248 (1986) [hereinafter *Stanley Report*]. The Commission was chaired by Justin Stanley, a former ABA president.

41. *Id.*

42. *Id.* at 301.

43. *Id.* at 281.

44. The allegation that a professional orientation to work is incompatible with a business orientation has been prominent in lawyers' discourse since at least the early 1900's. *See, e.g.*, JULIUS HENRY COHEN, THE LAW: BUSINESS OR PROFESSION? (rev. ed. 1924). In distinguishing professions from business or "mere trade," Roscoe Pound claimed that gaining a livelihood is the "primary purpose" of those engaged in a business or trade, while in a profession it is an "incidental purpose." ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 4 (1953). *See also* Solomon, *supra* note 14, at 152–53 (tracing in bar discourse from 1926 to 1960 the theme that lawyers must divorce themselves from the profit concerns of the marketplace).

45. *Stanley Report*, *supra* note 40, at 281.

Two ABA units then studied the ancillary business issue and spawned rival policy proposals.[46] The ABA Special Coordinating Committee on Professionalism (SCCOP), created to carry out the Stanley Commission's recommendations, appointed a Working Group on Ancillary Business Activities in July 1989.[47] The Working Group did not consider it within the ABA's province to "declare, for all 700,000 American lawyers, what constitutes the only proper content of each of our particular ways of making a living."[48] Moreover, anticipating that the ancillary phenomenon might call for ethics rulemaking, the Working Group chose to address what it considered the pertinent regulatory issues, but put aside the so-called professionalism issues, which it did not find "amenable to the ordinary apparatus of inquiry and study."[49] In other words, the Working Group treated the making of public policy for the regulation of lawyers as an inappropriate domain for arguments grounded on conceptions of what it means to be a professional. Dennis Block, a corporate lawyer and sometime litigator in the New York firm of Weil, Gotshal & Manges, dissented. He argued that the professionalism issues were "by far the most important" and could serve as a proper basis for ethics rules.[50] This key methodological issue was joined when the Litigation Section set up its own Task Force on Ancillary Business Activities, with Block as chair.[51]

Driven by its professionalism concerns, the Task Force developed the proposal to ban all ancillary services except those that a law firm provides in-house and in connection with a matter on which it is also providing legal services.[52] This proposal, if ever adopted at the local level, would put Arnold & Porter-type subsidiaries out of business and sharply limit in-house programs as well. Interestingly, however, an early version of the proposal exempted sole practitioners from the ban on the grounds that, although many sole practitioners in rural areas have traditionally provided ancillary services that raise the same ethical issues as large-firm operations, solo operations do not "implicate serious professionalism concerns."[53] The final version dropped this exemption, but only on the understanding that if the ban "affected the long-standing provision of ancillary services by lawyers in certain states," those states could adopt the rule in a form that "grandfathered" the services.[54]

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46. I see nothing wrong with the ABA developing its public policy recommendations through a process in which separate ABA entities develop rival positions. Indeed, I have argued elsewhere that the ABA could improve its opinions interpreting the ABA ethics codes by relying more heavily than it has in the past on adversarial procedures. *See* Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 U.C.L.A. L. REV. 67, 156–67 (1981).

47. *Interim Report*, *supra* note 37, at 1. The Working Group was chaired by Mark Harrison, a Phoenix attorney.

48. *Id.* at 4.

49. *See* Block, *supra* note 18, at 781 (quoting a memorandum by the Working Group's Reporter, Professor Daniel Reynolds).

50. *Id.*

51. *Id.* at 793. For a list of Task Force members, most of whom were large-firm litigators, see *id.* at 793 n.243.

52. The Litigation Section's original proposal to the House of Delegates was tabled at the ABA annual meeting in August 1990. *Id.* at 797.

53. *Id.* at 796.

54. *Id.* at 798. The final version was adopted by the House in August 1991. For the text of Rule 5.7 as adopted, see *supra* note 8.

Meanwhile, SCCOP and its Working Group concluded that ancillary services do pose certain ethical risks: Clients and customers might be confused as to when they were entitled to the protections afforded by a lawyer-client relationship; conflicts of interest could arise between a law-firm client and an ancillary customer, or between two customers; and law firms might misuse confidences gained while providing ancillary services.[55] Convinced, however, that ancillary services could benefit clients and that professionalism concerns could not justify a broad ban on ancillary businesses, SCCOP urged the ABA Committee on Ethics and Professional Responsibility (CEPR) to draft an ethics rule that would regulate rather than ban them.[56]

CEPR then developed the rival version of Rule 5.7,[57] which in its final form had three features. First, when a law firm provides ancillary services in-house, all recipients must be treated as clients and fully protected by legal ethics rules, even if nonlawyers do the work. Second, any practicing lawyer associated personally or through a law firm with an "ancillary business entity" must ensure that all entity customers are told about the relationship between the lawyer (or firm) and the entity. Third, all entity customers must be afforded every ethical protection given to law clients unless (a) the service provided is unrelated to any matter on which the lawyer or law firm represents them and (b) the lawyer or law firm makes clear (perhaps through the entity) that the relationship between entity and customer is not that of lawyer and client. CEPR concluded that under these conditions, which minimize the risk of confusion, ancillary customers had no claim to the ethical protections law clients enjoy.[58] Under any other conditions, customers could waive those protections no more than clients can.

Just before the House of Delegates took up the rival versions of Rule 5.7 in August 1991, delegates from the Litigation Section sent their House colleagues a letter summing up the differences between them. "In our opinion," they wrote,

> the resolution of the ancillary business controversy goes to the heart of who we are as a profession and what we will become. Next month you must decide whether we wish to continue as a self-regulating profession committed to both its traditional (and unique) ethical obligations and to public service, even at the cost of turning away some profits from non-legal ventures, as the Litigation Section ... recommends. In the alternative, you may decide that the lawyers' traditional ethical obligations should be supplanted by the ethics of the marketplace and that law firms

55. ABA Special Coordinating Comm. on Professionalism, Special Report to the House of Delegates on Ancillary Business Activities of Lawyers and Law Firms 4 (Dec. 1990).

56. *Id.* at 11–12. CEPR is the ABA committee charged with general responsibility for preparing amendments to the ABA ethics codes. *See* Finman & Schneyer, *supra* note 46, at 145. The ancillary business debate was unusual in that the Litigation Section, not CEPR, initially proposed the amendment and CEPR's own proposal was not adopted. *Id.* at 145 n.289.

57. For CEPR's proposed Rule 5.7, see Reitz, *supra* note 11, at 1000–01 app. (quoting ABA Committee on Ethics and Professional Responsibility, Recommendation and Report to the House of Delegates 3–4 (May 15, 1991)).

58. Remarks of Helaine Barnett, Chair of the ABA Comm. on Ethics and Professional Responsibility, to the ABA House of Delegates (Transcript of House Meeting of Aug. 13, 1991, Tape A–13) (on file with the author).

> should be allowed to become profit-oriented conglomerates like other businesses, as [CEPR] proposes.[59]

Because the House meets only twice a year, delegates may have been a bit vague on the precise ethical issues associated with ancillary businesses. Presented with this stark choice, however, a slim majority decided to strike a blow for professionalism.[60] They approved the Litigation Section proposal.[61]

III. HOW THE IDIOM OF PROFESSIONALISM MARRED THE DEBATE

As we have seen, what prompted the Litigation Section to propose a ban on most ancillary business activities was the self-proclaimed "gravity" of its "professionalism concerns."[62] Had these concerns not come into play, neither the Section nor the House would have taken a more restrictive approach than CEPR did. So, to come to some conclusions about the quality of the ABA's deliberations, we must analyze the Section's treatment of these concerns.[63] This analysis shows that the idiom of professionalism distorted the Section's analysis in two respects.

First, the Section tried, quite implausibly to anyone not under the spell of its rhetoric, to link the narrow ancillary business issue with some of the legal profession's broadest concerns, concerns at the heart of many lawyers' conceptions of professionalism. In this way the Section made central to the issue risks that are so peripheral to it, and so speculative in any event, that they should have been disregarded, as SCCOP's Working Group sensibly concluded. As an example of the Section's approach, consider one spokesman's argument that ancillary businesses should be banned because they could ultimately destroy the legal profession's privilege of self-regulation. The argument puts the potential dangers of ancillary business on roughly the same footing as those of global warming:

> [W]hile the writer would concede the likelihood that the ancillary business movement will lead to the loss of self-regulation is no more determinable [than] the likelihood that Merrill Lynch will end up owning Shearman & Sterling, the only relevant question is whether the profession is willing to take that indeterminable risk, when what we are talking about is the likelihood that what will be lost are aspects of the profession that are so fundamental no amount of financial benefit could

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59. *See* Block, *supra* note 18, at 799 (quoting Letter from Judah Best et al., to members of the ABA House of Delegates, July 19, 1991, at 3–4).

60. In congratulating the Litigation Section representative who had defended the Section's proposal on the House floor, Eugene Thomas, a House member and former ABA president, wrote: "Never ... have I been more proud of [the Section] .... You read the House correctly in sensing and verbalizing the professional values on which most of us place the greatest importance." Letter from Eugene Thomas to Ronald Olson, Aug. 16, 1991 (on file with the author).

61. Reske & DeBenedictus, *supra* note 7, at 34. A coalition speaking largely for small-town lawyers, many of whom have traditionally provided ancillary services, persuaded the House to rescind the rule in August 1992. DeBenedictus, *supra* note 10, at 110.

62. *See* Block, *supra* note 18, at 764.

63. I will not evaluate CEPR's proposal because my concern here is with the quality of ABA policymaking, not the content of its policy. One could ask whether CEPR's proposal went too far in regulating the ancillary business experiment, simply made explicit the restrictions that already exist in the *Model Rules*, or should have gone further and given all ancillary business customers the ethical protections accorded to law clients.

> justify the loss. Quite simply, it is too much to ask the profession to wait to see if the worst fears are realized. By the time they occur, the damage will be irreparable.[64]

Besides allowing very general and speculative concerns to swamp the specifics of the ancillary business issue, the idiom of professionalism brought a miscellany of other weaknesses to the Section's analysis: a poor analogy to medicine, sentimentality about lawyers' motives, a mythologizing of the small-town lawyer, thoughtless appeals to tradition, a privileging of lawyers' perceptions of client interests over clients' own perceptions, misplaced fears for the future of the adversary system, and a preoccupation with what Rule 5.7 would "say" to the ABA's audience rather than what it could "do" as a regulation.

A. Speculative Concerns, Poorly Analyzed

Let us begin by evaluating the Litigation Section's "professionalism concerns." The Section claimed that ancillary businesses, even if regulated as CEPR proposed, will reduce the quality or availability of legal services, impair the ability of lawyers to exercise independent judgment on behalf of their clients, undermine the reputation of the legal profession, and destroy the profession's privilege of self-regulation.[65] If these were significant risks, then at least some of them could have been recast as ethical arguments and would have deserved weight. Certainly, the lay public, for whose benefit the ABA purports to formulate ethics rules, would see the relevance of lost quality or compromised judgment to a policy choice between regulating and banning ancillary businesses. Unfortunately, however, none of them is even a palpable risk; they are just "concerns." As such, they could only secure a place in the policymaking process under the blurry but rhetorically powerful heading of "professionalism."

1. Decline in the Quality or Availability of Legal Services

The Litigation Section argued that lawyers who participate in ancillary businesses are apt to do so on a scale that diminishes their legal work.[66] Lacking any data to support this argument, the Section quoted a management consultant's claim that lawyers are attracted to ancillary businesses out of boredom with law practice and an entrepreneurial urge. As these ventures catch on, she wrote, "firm partners are moving from an oversight role to actually running the new businesses in conjunction with non-lawyer professionals."[67] One cannot tell from the quotation whether the Section was chiefly concerned about the impact of ancillaries on the quality or the availability of legal services. Either way, the argument fails.

It is of course true that lawyers have an ethical duty to provide competent legal service.[68] But one hardly promotes quality by telling lawyers who are bored with law practice that they must practice law exclusively. Moreover, an environmental lawyer whose firm operates an environmental consulting business may find it easier, not harder, to concentrate on the legal side of her

64. Lawrence J. Fox, Is Half a Loaf Better than None? Address Before the ABA 17th Nat'l Conf. on Professional Responsibility, Scottsdale, Ariz. 7–8 (May 21–24, 1991).
65. *See* Block, *supra* note 18, at 764–77.
66. *See id.* at 767.
67. *See id.* at 768 (quoting Haserot, *supra* note 21, at 18).
68. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 ("A lawyer shall provide competent representation to a client.").

clients' problems.[69] Even if she does become active in running the consulting unit, she seems more likely to enhance her true legal expertise by doing so than by rounding out her environmental practice with some divorce cases, as the Litigation Section would apparently prefer. And if she is tempted to let her legal skills deteriorate, she will have to reckon the cost in terms of lost clients; she cannot simply impose the cost on her clients by serving them less well, especially at a large firm like Arnold & Porter, which competes with other firms for sophisticated business clients. In any event, ancillary work poses no greater risk of diminishing one's legal skills than practicing part-time for family reasons, having a side line unrelated to law, managing a law firm, or participating as house counsel in a client's business affairs. Yet the Litigation Section expressed no concern on these scores.

Perhaps the point is rather that ancillary ties make lawyers less available to provide legal services, thereby infringing on their ethical duty to help make legal counsel available.[70] But this duty hardly implies that if you practice law you must only practice law, for that principle might well deter some people from going into law in the first place. Moreover, law firms with ancillaries may be able to lower the combined cost of legal and non-legal advice on matters that call for both,[71] thereby making certain legal services more available. Besides, the lawyer who takes time out from law practice to manage a consulting unit makes consulting services more available even as he makes legal services less available. How the Litigation Section could divine that society is better off channeling all this lawyer's time into legal work is unclear. What is clear is that divining and policymaking are two different things.

Supporters of Rule 5.7 argued in particular that ancillary business will reduce the availability of *pro bono* legal services. They claimed that lawyers who own ancillaries will take on the profit orientation of business entrepreneurs and lose the public service orientation that ideally typifies professionals.[72] Worse, since turnabout is fair play, law-firm ownership of ancillaries will create political pressure for state legislatures to allow conglomerates like Sears and American Express to own law firms; once that happens, the public service orientation of law firms will succumb to the imperative of the bottom line.[73]

The short answer to the turnabout point is that state supreme courts, not legislatures, regulate the practice of law.[74] Neither the ABA nor the courts would be sensitive to pressures from the business community to allow Sears to own a law firm. To the contrary, both have recently displayed their hostility to non-lawyer ownership in almost any form.[75]

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69. White Paper, *supra* note 29, Tab 3, at 63 ("[I]n many instances access to professionals with complementary nonlegal expertise will help an attorney to focus on the law and the rendition of competent legal advice.").

70. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1979) ("A lawyer should assist the legal profession in fulfilling its duty to make legal services available.").

71. White Paper, *supra* note 29, Tab 1, at 13–14.

72. *See* Block, *supra* note 18, at 766.

73. *See id.* at 773.

74. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 22–31 (1986).

75. While the ABA House of Delegates was considering the Model Rules for adoption in the early 1980's, a broad proposal to permit nonlawyers to own law firms was roundly defeated after the House was told that the proposal would allow Sears to own a law firm. *See* Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2

Concerns that lawyers are apt to lose their public service moorings through associations with business are also unfounded. If these concerns were valid, we might expect large-firm lawyers, who constantly rub elbows with profit-oriented business clients, to do less *pro bono* work and be more hostile to mandatory *pro bono* proposals than small-firm practitioners, who tend to represent non-business clients.[76] Yet the opposite appears to be true.[77] Moreover, a number of the large law firms that have ancillaries are *pro bono* leaders.[78] For example, a recent survey by the *American Lawyer* gave Arnold & Porter an "A" rating for its *pro bono* work.[79] In 1991, with the firm's ancillary businesses well established, Arnold & Porter lawyers averaged a whopping 129 hours of *pro bono* work, third best among the 100 largest American law firms. And their commitment was as broad as it was deep; nearly two-thirds put in over twenty hours.[80] For comparative purposes, I might note that Dennis Block's firm of Weil, Gotshal & Manges received a "C."[81] Its lawyers, though unencumbered by ancillary duties, averaged 26.3 *pro bono* hours and only 25% put in more than twenty hours.[82] There is simply no empirical basis for the conclusion that ancillary business is the enemy of public service.

2. Loss of Independent Professional Judgment

A lawyer should not let her financial interests or ties to third parties interfere with her judgment in representing clients.[83] The Litigation Section argued that ancillary business jeopardizes the independence of judgment in two ways. First, if an ancillary entity becomes financially important to a law firm, its nonlawyer principals could gain influence over firm policies.[84] Second, there are self-referral problems: A law firm offering ancillary services in any form might compromise its objectivity in advising clients whether they need such services and, if so, who could best provide them. Lawyers may also be too slow to criticize the ancillary services that their own firm or affiliate provides.[85] Properly analyzed, these concerns do not support a ban on ancillary entities, though they may justify CEPR's restrictions.

With respect to the risk that an ancillary's nonlawyer principals will dictate law firm policy, notice first that those principals represent one drop in the

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GEO. J. LEGAL ETHICS 383, 392 (1988). South Dakota was the only state to subsequently consider this proposal, but even there the state supreme court rejected it. *Id.* at 402.

76. The percentage of law-firm income derived from individual as opposed to organizational clients (mostly businesses) varies sharply and inversely with firm size. RICHARD ABEL, AMERICAN LAWYERS 203 (1989).

77. Data suggest that the willingness of lawyers to acknowledge their *pro bono* obligations varies directly with their income. *See id.* at 129 (discussing a survey of Colorado lawyers). Also, lawyer income and prestige varies directly with firm size. *Id.* at 202–06. Of course, the relative willingness of large-firm lawyers to accept *pro bono* obligations may say more about their extensive resources and opportunities to delegate responsibilities to others in their firm than it says about the values that underlie their commitment. *See* Jonathan R. Macey, *Mandatory Pro Bono: Comfort for the Poor or Welfare for the Rich?*, 77 CORNELL L. REV. 1115 (1992).

78. White Paper, *supra* note 29, Tab 3, at 60–61.

79. *Pro Bono Survey: No More, No Less*, AM. LAW., July-Aug., 1992, at 51–52.

80. *Id.*

81. *Id.*

82. *Id.*

83. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4.

84. *See* Block, *supra* note 18, at 770–72.

85. *Id.* at 765–67.

bucket of outside influences lawyers must contend with. Legal aid lawyers and lawyers in group legal services programs must deal with program directors who have their own ideas about how to provide service.[86] House counsel must often report to corporate managers who are not themselves the client and may have troubling ideas about where the client's interest lies.[87] Some law firms have a "flagship" client whose business is so crucial that the client may be in a position to influence the way other clients are served;[88] some are subject to influence by their creditors[89] or malpractice insurers.[90] While of course we worry about the risk of undue influence that is inherent in all these arrangements, no one proposes to ban them.

Similarly, one can guard against whatever distinctive risk of undue influence ancillaries pose by preventing nonlawyers from becoming law-firm partners. Ethics rules in every state do bar lay partners,[91] though the District of Columbia now permits law firms to make partners of nonlawyers who assist them in providing legal services.[92] There, ironically, the best way to prevent nonlawyers from influencing law firm policy may be to *encourage* ancillary entities. For if they are banned, a law firm could only hire nonlawyer professionals in-house, where, as potential partners, they might well influence policy. In other words, in the very jurisdiction where ancillary businesses are most prominent, the entity form is as likely to be a firewall against nonlawyer influence as to be a source of influence.

As for the self-referral problem, ancillary businesses are again only a minor aspect of a broader problem. Lawyers already have a financial incentive to steer their clients not only to their own law partners but also to those outside lawyers and consultants whom they expect will reciprocate with cross-referrals.[93] They also have a stake in not criticizing the work those outsiders per-

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86. *See, e.g.*, ABA Comm. on Ethics and Professional Responsibility, Formal Op. 324 (1970) (explaining how lawyers in legal services office can achieve an ethical *modus vivendi* with office directors in making decisions about whether and how to represent a client); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974) (same); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 355 (1987) (same for lawyers providing representation under a prepaid legal services plan).

87. Lloyd Cutler has observed that many companies assign house counsel to lay managers in "line" departments where they must report to nonlawyer managers rather than to the general counsel. Lloyd Cutler, *The Role of the Private Law Firm*, 33 BUS. LAW. 1549, 1550–51 (1978). And of course the general counsel must report to management.

88. *See* WOLFRAM, *supra* note 74, at 878 (professional independence of many large law firms threatened by sustained relationship with a single large client such as a bank).

89. *See, e.g.*, Md. State Bar Ass'n Comm. on Ethics, Op. 93–3 (Aug. 21, 1992), *digested in* [8 Current Reports] Laws. Manual on Prof. Conduct (ABA/BNA) 300 (Sep. 23, 1992) (lawyer who was asked to supply a creditor with list of his accounts receivable, including clients' names, told that doing so would breach duty of confidentiality).

90. Insurers have become increasingly interested in pressing law firms to take certain precautions to avoid malpractice exposure. The Attorneys' Liability Assurance Society (ALAS), which is owned by the nearly 400 large firms it insures, employs counsel to consult with the insured firms on matters of loss prevention. Through these consultations, firms have been encouraged, for example, to maintain new-business and ethics committees. Robert E. O'Malley, *Preventing Legal Malpractice in Large Law Firms*, 20 U. TOL. L. REV. 325, 327, 347, 362 (1989).

91. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3–103 (1979); MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4.

92. *Non-Lawyer Partners Rule Released*, NAT'L L.J., Mar. 12, 1990, at 7.

93. White Paper, *supra* note 29, Tab 3, at 31.

form.[94] This means that if ancillary businesses do introduce a new self-referral bias, they may also reduce an old one; law firms with ancillary businesses will presumably have less incentive to cultivate cross-referral arrangements with outside experts. Moreover, though one should not uncritically welcome whatever added bias ancillary ties might create, a law firm will presumably select competent experts to staff an ancillary business and will monitor their work closely, since their reputations may rub off on the firm.[95] This minimizes the risk that ancillary experts will be less qualified than outside experts. One must also remember that law firms with no ties, formal or informal, to law-related experts have offsetting biases of their own, stemming from the fact that legal and law-related services can be substitutes, though usually imperfect ones.[96] Unlike a law firm that owns ancillary businesses, a firm with nothing to gain by making referrals to law-related experts may be inclined to convince clients to substitute its lawyers' services for the potentially less expensive and more useful law-related services they could obtain elsewhere.[97] The Litigation Section produced no evidence on the relative strength of the offsetting biases, yet its point dissolves without such evidence.

The simplest way to minimize referral abuse is to insist that the referring lawyer tell his client about his firm's ancillary ties, as CEPR's version of Rule 5.7 required.[98] True, disclosure might be an inadequate safeguard for clients who are not sophisticated. But one can hardly defend the Litigation Section's ban with paternalistic arguments. What is striking about the Section's animus against the ancillary operations of large law firms like Arnold & Porter is precisely that those firms tend to have highly sophisticated corporate and governmental clients. Any argument for banning ancillary services in order to prevent self-referral abuse seems more applicable to sole practitioners whose clients are apt to be unsophisticated individuals. Yet the Section had no professionalism concerns there.

3. Threats to the Reputation of the Legal Profession

The Litigation Section argued that ancillary businesses will damage the reputation of the legal profession by becoming embroiled in the financial scandals that can plague risky business ventures.[99] Presumably, however, the law

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94. *Id.* Tab 3, at 31 n.48 (many lawyers "loathe to criticize the work of independent nonlegal entities to which they have referred a client, or which regularly refer legal business to them.").

95. *Id.* Tab 3, at 59.

96. *Id.* Tab 1, at 12 (law firm without ancillaries may unduly emphasize the solution to a client's problem which relies most heavily on the law firm's expertise and may fear that an independent consulting firm, if retained, would recommend a solution that minimized the legal side of the problem).

97. A similar problem of offsetting biases has plagued policymakers considering whether to permit lawyers to share in legal fees earned by the unaffiliated lawyers to whom they refer their clients. To allow fees to be split with referring lawyers who have not themselves provided service in a matter is to encourage lawyers to make referrals to the highest bidder, who may not be the best lawyer for the job. To prohibit fee splitting, however, is to encourage lawyers to hold on to cases where the client would be better off with a referral. *Compare* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107 (1979) (referring lawyer may not share in legal fees without sharing in the work) *with* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (referring lawyer may share in legal fee without working on the case if she agrees in writing to share responsibility).

98. *See supra* text accompanying notes 57–58.

99. *See* Block, *supra* note 18, at 768–69.

firms considering whether to set up ancillary businesses can be expected to weigh this risk to their own reputations, which are far more directly at stake than the reputations of other lawyers. Moreover, the Litigation Section's solution, which permits law firms to hire nonlawyers to provide certain ancillary services in-house, might make matters worse. Scandals can occur inside law firms, too. While a firm may find it easier to monitor nonlawyers who work in-house, the firm's reputation (and the bar's) would presumably be more tarnished by an in-house scandal, should one occur.[100] Again, a separate entity provides a firewall.

Recognizing that its reputation argument required some substantiation of the risk that ancillary businesses will become embroiled in scandal, the Litigation Section had to rely on evidence no policymaker should consider probative. First, it quoted a 1988 memorandum to insured law firms from the loss prevention counsel of the Attorneys' Liability Assurance Society (ALAS), a major malpractice carrier for large firms outside New York. The memo asserted that too many ALAS lawyers were engaging in "entrepreneurial activities" that are likely to lead to law suits.[101] In October 1990, however, the memo's authors made it clear that they had not been primarily concerned about ancillary businesses, but about lawyers who invest in, or help manage, their *clients'* businesses.[102] They also stated that not one of the 2000 claims or incidents involving their 350 insured law firms to date had involved "activities challenged by the Litigation Section."[103] Yet Litigation Section supporters continued to use the memo to justify their concern.[104]

Next, the Section cited two recent "scandals," implying that these incidents could have been avoided if Rule 5.7 had been in effect.[105] But neither would have implicated the rule. One involved two lawyers from a Philadelphia law firm who invested in, and served on the board of, a savings-and-loan client that failed.[106] The other involved parties who allegedly committed fraud while importing fruit through an agribusiness entity associated with a Washington law firm.[107] Even if the lawyers or law firms in question owned a sufficient interest in the business ventures to bring Rule 5.7 into play,[108] something the Litigation

100. The malpractice exposure of a law firm with in-house nonlawyer experts might also be greater than that of a firm with separate ancillary businesses, since a parent entity is usually not vicariously liable for the torts of its subsidiaries. But I see no reason to credit this as a *social* benefit flowing from the use of separate entities to provide ancillary services.

101. ABA Litigation Section, Report to the House of Delegates 21 n.17 (1990 Annual Meeting) (quoting Memorandum from Robert O'Malley and William Freivogel, ALAS Loss Prevention Counsel, to All ALAS Loss Prevention Partners 20 (Sept. 2, 1988)).

102. Letter from Robert O'Malley to Mark Harrison, Chair of SCCOP's Working Group, Oct. 18, 1990, at 2 ("In relying on the ALAS 1988 memorandum in the ancillary business context, the Litigation Section appears to have misinterpreted ALAS' position and has used ALAS' memorandum to support a position that the memorandum does not in fact support.") (on file with the author).

103. Letter from William Freivogel to Mark Harrison, Oct. 3, 1990, at 2 (on file with the author).

104. *See, e.g.*, Block, *supra* note 18, at 769 & 769–70 n.130.

105. ABA Litigation Section, *supra* note 101, at 14–15.

106. For an account of the incident, see Rita Henley Jensen, *Blank Rome Waits for More Shoes to Drop*, NAT'L L.J., Apr. 25, 1988, at 2.

107. For an account, see Eleanor Kerlow, *Subsidiary of Heron Burchette Probed by AID*, LEGAL TIMES, Jan. 15, 1990, at 1.

108. Rules 5.7(a) and (c) only proscribed law firm or lawyer ownership of a "controlling interest" in an ancillary business. *See supra* note 8. The rule "does not define the concept of

Section left unclear, Rule 5.7 would presumably still not apply since importing fruit and sitting on the board of a thrift do not seem like services ancillary to the practice of law. They are more like running a restaurant.[109]

But suppose one takes the risk of ancillary business scandals seriously. What are the implications for public policy? Even if the ABA could somehow sort out the reputational costs of such scandals from all the other things that sour the public on lawyers, it would have to consider the offsetting reputational benefits of ancillary operations before it could responsibly ban them on reputational grounds. My guess is that law firms will enhance the profession's reputation by offering innovative ancillary services more than they will injure its reputation by scandal. I also suspect that in today's pro-competitive climate, the ABA would probably lose more good will for the profession by restraining trade through a ban on ancillary business than it would gain by forcing lawyers to forswear the lucre such businesses may provide.[110]

Of course, like the Litigation Section, I could be wrong. The difference is that even if I were confident about my guesses, I would not cite them as reasons for the ABA to adopt a *liberal* rule like CEPR's, because I do not believe the ABA should use ethics rules as institutional advertising for the profession. Reputational gains for the legal profession are no justification in themselves for public policy decisions. Much of the public might be pleased if the profession were to bar lawyers from seeking acquittals for defendants they knew to be guilty, but that is no reason to support such a ban, which would only pander to misperceptions about the lawyer's role. By the same token, the key question for the ABA in deciding whether to ban ancillary businesses is whether on balance they harm or benefit society, not how the ban might be perceived.

4. Loss of the Bar's Right of Self-Regulation

Finally, the Litigation Section argued that "as law firm diversification becomes widespread, and the legal profession becomes indistinguishable from other providers of services ..., the citizens of this country may not permit our profession to propound its own standards and govern itself."[111] Conversely, they argued, if Rule 5.7 prevails, government is unlikely to "re-examine the social contract by which they have granted the legal profession the privilege of self-regulation in return for lawyers fulfilling obligations to society above and beyond the pursuit of wealth."[112] Since self-regulation is a valuable privilege linked in the minds of many lawyers to the bar's status as a profession, such arguments are a staple of bar rhetoric, a device bar leaders often use to secure

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control, which is generally a fact-based inquiry dependent on the particular facts and circumstances." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.7 & cmt. ¶ 9 (repealed Aug. 1992).

109. Letter from William Freivogel to Mark Harrison, *supra* note 103, at 1.

110. The Litigation Section's hopes for such a gain in professional goodwill are reflected in a statement Dennis Block and his colleagues published after the ABA adopted Rule 5.7: "In the end, the ABA ... signaled to society, as well as the ABA's membership," that the law should remain a profession whose members are "firmly committed to fulfilling their unique responsibilities to society, even at the risk of foregoing potential profits." Block, *supra* note 18, at 744.

111. ABA Litigation Section, *supra* note 101, at 24.

112. Block, *supra* note 18, at 811.

rank-and-file support for their initiatives.[113] But even if one accepts the premise that self-regulation is desirable, this argument deserves no credit for policymaking purposes unless one can identify, as the Section did not, a realistic mechanism by which ancillary business could bring down the institutions of self-regulation.

Let's be precise about what those institutions are. Although the state supreme courts often defer to the ABA in selecting ethics rules, it is those courts, not bar associations, which ultimately have regulatory authority.[114] Invoking the separation of powers doctrine, the courts have made their authority nearly exclusive as against the other branches of state government.[115] Consequently, state legislatures and executive agencies could only regulate law practice by amending state constitutions or convincing the courts to defer regularly to them. These remain very unlikely developments, notwithstanding the state supreme courts' limited expertise on the subject of ancillary business. After all, the state supreme courts have been consolidating their exclusive control over law practice throughout this century,[116] even as an ever smaller percentage of lawyers spend their time in the practice setting courts know best—the courtroom.[117]

Moreover, by requiring that any ancillary service be entangled with legal services and provided only within law firms, Rule 5.7 could actually heighten whatever danger exists that legislative or executive agencies will try to regulate law practice. Grasping the point, one lawyer suggested to SCCOP's Working Group that law firms engaging in an ancillary business be *required* to use a separate entity in order to segregate legal services from any services that are subject to state regulation.[118] Only under that "mirror image" of Rule 5.7, he pointed out, could a lawyer who also sells insurance be regulated "without the insurance commissioner affecting the law practice."[119]

Of course, the state supreme courts cannot prevent Congress or federal agencies from regulating lawyers.[120] Dennis Block, the chair of the Litigation Section's Task Force, was presumably sensitive to this point since he has opposed the efforts of the Securities and Exchange Commission to exercise

113. For example, when the ABA's Kutak Commission encountered strong resistance to its early drafts of the Model Rules, Kutak told the *Wall Street Journal*: "If we don't get our house in order, ... somebody is going to write our rules for us .... I don't think anybody wants that." John Curley, *Lawyers Squabble About a New Code of Ethics*, WALL ST. J., Feb. 6, 1981, at 44, col. 1. Similarly, in 1976, the ABA president crusaded for a bar-administered mandatory *pro bono* program. His pitch for the program ended this way: "[T]imely actions by the organized bar recognizing that each and every lawyer must do some public service are essential if substantial self-regulation by lawyers is to continue." Chesterfield Smith, *Lawyers Who Take Must Put—At Least a Bit*, 1 J. LEGAL PROF. 27, 31 (1976).

114. WOLFRAM, *supra* note 74, at 24–27.

115. *Id.* at 27–31.

116. *Id.* at 27.

117. On the surprising breadth of judicial regulation of law practice, which goes far beyond the courts' direct interest in protecting the integrity of the judicial process, see *id.* at 29.

118. Letter from Wesley Hackett to Mark Harrison, Mar. 27, 1990, *reprinted in* 2 PROF. LAW., No. 1, 1990, at 16, 20.

119. *Id.* at 20.

120. WOLFRAM, *supra* note 74, at 33 (act of Congress not invalid simply because it regulates lawyers as a state legislature could not under the state constitution); *id.* at 855 (state supreme courts have no power to regulate lawyers in a manner inconsistent with federal law).

disciplinary authority over the lawyers who appear before it.[121] But what is the mechanism by which ancillary business activity could result in federal regulation of law practice? The Litigation Section hinted that, unless the ABA acted first, the Federal Trade Commission (FTC) might get its nose into the regulatory tent[122] by banning or restricting ancillary businesses as an unfair trade practice. The FTC might do this, the argument went, to protect clients from referral abuses, just as the Department of Health and Human Services had recently imposed restrictions on doctors' owning the laboratories and diagnostic clinics to which they refer patients.[123]

The astonishing thing about this theory is that months before the House adopted Rule 5.7, the FTC declared publicly that it welcomed ancillary businesses and had no wish to impede their development.[124] "[L]aw firm diversification has the potential to provide significant benefits to consumers," wrote the director of the FTC's Bureau of Competition, but "[t]he Litigation Section's approach would reduce these benefits substantially."[125] In other words, the only conceivable risk of FTC intervention would arise if the ABA and the state courts *adopted* the ban on ancillary businesses, which the FTC might regard as an unlawful restraint on trade.[126]

B. Other Flaws Associated with the Idiom of Professionalism

If the Litigation Section's "professionalism concerns" provided no real support for Rule 5.7, its insistence on analyzing the issue in terms of professionalism may very well account for the specific policymaking flaws identified earlier. I turn to those flaws now.

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121. *See* Dennis J. Block & Charles J. Ferris, *SEC Rule 2(e)—A New Standard for Ethical Conduct or an Unauthorized Web of Ambiguity?*, 11 CAP. U. L. REV. 501 (1982).

122. For discussion of earlier ABA efforts to discourage federal agencies from regulating lawyers, see Michael P. Cox, *Regulation of Attorneys Practicing Before Federal Agencies*, 34 CASE W. RES. L. REV. 173 (1983–84).

123. Letter from Judah Best & Ronald Olson to Members of the House of Delegates, Aug. 2, 1991, *summarized in* Block, *supra* note 18, at 799–800.

124. *See FTC Unit Lauds Law-Firm Diversification*, LEGAL TIMES, Apr. 8, 1991, at 14 (quoting Letter from Kevin Arquit, Director of the FTC Bureau of Competition, to George Kuhlman, Counsel to the ABA Comm. on Ethics and Professional Responsibility, Mar. 27, 1991).

125. *Id.* at 14.

126. In 1992, the FTC warned a professional organization in Texas that its restrictions on optometrists entering into partnerships with others might be anti-competitive. *See* Edward Felsenthal, *Antitrust Suits Are on the Rise in the Health Field*, WALL ST. J., Oct. 26, 1992, at B1, B2. An FTC challenge to Rule 5.7 would be unlikely, however, since state supreme court adoption of Rule 5.7 would constitute "state action" and probably immunize the rule from antitrust scrutiny. *See* Bates v. State Bar of Arizona, 433 U.S. 350, 359–63 (1977) (anticompetitive restrictions on lawyer advertising imposed by state supreme court acting as sovereign exempt from liability under Sherman Act). While the Supreme Court has left open the question whether the state action exemption applies to restraints of trade scrutinized under the Federal Trade Act rather than the Sherman Act, *see* FTC v. Ticor Title Ins. Co, 112 S. Ct. 2169, 2177–78 (1992), there is no reason to believe it does not. During the ancillary business debate, the ABA Antitrust Section provided an excellent analysis of the potential antitrust exposure of the ABA and the state courts if they were to adopt Rule 5.7. *See* ABA Antitrust Section Task Force on Ancillary Business Activities of Lawyers, Report to the Council of the Antitrust Section of the American Bar Association (Jan. 1991) (on file with the author). The report concludes that the proposed rule is unlikely to give rise to antitrust liability. *Id.* at 21.

1. A Faulty Analogy to Medicine

Looking at a legal ethics issue through the lens of professionalism tempts the observer to treat other professions' experiences as analogous simply because they too are professions. Succumbing to temptation, the Litigation Section drew a faulty analogy to medicine to justify its proposal.

Just before the House voted on Rule 5.7, Section delegates warned their colleagues that recent federal restrictions on physicians' affiliates gave "new urgency to the need for the ABA to act decisively on the ancillary business issue, before governmental agencies imposed their own regulations."[127] The reference was to a ruling by the Department of Health and Human Services limiting both the interests physicians may hold in certain health care facilities and the percentage of total revenues these facilities may earn through referrals from doctor-owners.[128] The rationale for the Department's ruling was that self-referral too often leads to illegal kickbacks, overutilized facilities, and overcharging.[129] By highlighting this ruling, the Litigation Section implied that law-firm ancillaries pose the same problems and would invite the same kind of regulatory response.

This implication is false. The typical patient seems far less able to assess either his need for a recommended referral or the competence of the recommended providers than the sophisticated clients of the large law firms that have recently formed ancillary businesses. And even if one focuses on the long history of self-referral by rural lawyers who own title insurance companies and the like—lawyers whose clients are not sophisticated—one finds no pattern of abuse,[130] contrary to the situation in medicine. Why not? Self-referral problems are greatly compounded in medicine by the fact that insurers, rather than patients, pay for most services. This dissolves the patient's natural skepticism about the need for recommended tests and procedures and leaves a remote insurance company as the only monitor of the need for recommended services.[131] What prompted the federal government to regulate medical self-referral is its own interest in stopping unnecessary Medicare and Medicaid expenditures.[132] Neither private nor government insurance plays any role in lawyers' referring clients to their ancillary businesses.

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127. *See* Block, *supra* note 18, at 800.

128. Dep't of Health and Human Servs., Rules and Regulations, 56 Fed. Reg. 35, 952 (July 29, 1991). *See also* Robert Pear, *U.S. Limits Doctors in Their Referrals*, N.Y. TIMES, July 26, 1991, at A1. After a heated battle the American Medical Association House of Delegates in December 1992 declared it unethical for doctors to send patients to clinics in which the doctors have invested. Robert Pear, *AMA Opposes Clinton Plan to Set Cap on Medical Costs*, N.Y. TIMES, Dec. 9, 1992, at A14.

129. *See* Block, *supra* note 18, at 799.

130. Justin A. Stanley, *Lawyers in Business*, 8 N. ILL. U. L. REV. 17, 18 (1987) ("part-time businessman lawyer has not posed a major [ethical] problem for the profession").

131. *See* John P. Bunker, *Surgical Manpower: A Comparison of Operations and Surgeons in the United States and in England and Wales*, 282 N. ENG. J. MED. 135, 137 (1970) (patients become indifferent to the cost of medical treatment when it is covered by insurance); Theodore J. Schneyer, *Informed Consent and the Danger of Bias in the Formation of Medical Disclosure Practices*, 1976 WIS. L. REV. 124, 138 (same).

132. According to one expert, the federal government's decision to regulate physician self-referral was occasioned by the fact that "[p]rivate and public insurance programs are rebelling against the apparent higher cost of self-referral." Brian McCormick, *Setbacks on Self-Referral Bans*, AM. MED. NEWS, July 27, 1992, at 1, 32 (quoting Thomas Crane, a lawyer who helped draft the new federal regulations).

2. Sentimentality About Lawyers' Motives

One of the bar's cherished conceits[133] is that lawyers, as professionals, are motivated by a desire to serve rather than to make money. Professionals must earn a living, of course, but only as a by-product of providing service. Business, according to the same conceit, is driven by the bottom line.[134] And although the nonlawyers who staff ancillaries—economists, engineers, and the like—consider themselves professionals, proponents of Rule 5.7 insist that ancillary business is, well, business. They do so because lawyers at firms like Arnold & Porter have acknowledged in unguarded moments that the prospect of making profits by offering a fuller range of services had a bearing on their decision to form ancillaries.[135] These admissions allegedly show that lawyers who own ancillaries either lack or are losing the public service orientation that characterizes true professionals.

This reasoning fueled the argument for banning ancillary businesses. Responding to James Jones' claim that law firms like Arnold & Porter were forming these businesses in order to provide needed service to clients (itself an appeal to professional values),[136] ABA President Stanley Chauvin, Jr. saw only greed. "I truly doubt," he wrote in the *ABA Journal*,

> that the lawyers who create ancillary businesses are motivated by a desire to serve clients or the public more effectively and at lower cost. The risk of putting the lawyer-client relationship in jeopardy appears more likely to be motivated by profit. The client's best interest is sacrificed in favor of the law firm's quest to make money. Every firm needs to make money, but lawyers should never do this at the expense of sacrificing the interests of the clients they are pledged to serve ....
>
> [W]hen we consider our clients' rights—when we consider any risks to them against any prospective gains to the law firm—there is only one conscientious conclusion: The risks far outweigh the gains.[137]

One reason Chauvin's risks outweigh his gains is that lawyers' profits, seen through the lens of professionalism, cannot count as gains. But the real danger that his analysis poses for policymaking stems from professionalism's preoccupation with motive. *Of course* Arnold & Porter is "in it" substantially for the money. But so what? Not everything that lawyers do for personal gain runs contrary to the interests of clients; any law firm that decides to open a branch office, set up a merger-and-acquisition department, or lay off associates will be moved by profit considerations[138] without necessarily hurting clients.

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133. By "conceit" I do not mean "delusion." I mean an attractive self-concept that may or may not be warranted by the facts.

134. *See, e.g.*, POUND, *supra* note 44, at 4.

135. *See* Block, *supra* note 18, at 753. Indeed, Arnold & Porter has reportedly had the temerity to boast that its ancillary businesses are steering new clients to the law firm. Peter H. Stone, *Arnold & Porter Banking Affiliate Scrutinized in Securities Probe*, LEGAL TIMES, Dec. 9, 1991, at 1, 21. Even if the boast is true, it would not necessarily imply, as Dennis Block has suggested, *see* Block, *supra* note 18, at 761–62, that Arnold & Porter is engaging in improper solicitation of law clients through its affiliates. A lawyer may accept clients whom third parties have referred to her, provided that she does not compensate those parties for the referrals. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2(c).

136. *See supra* text accompanying note 28.

137. L. Stanley Chauvin, Jr., *A Conscientious Conclusion*, A.B.A. J., Mar. 1990, at 8.

138. In suggesting that decisions to lay off associates are motivated by considerations of profit-and-loss, I do not mean to say that law firms openly admit this. As Professor Jack Balkin has pointed out, law firms are more likely to cite "professional" reasons:

The real public policy question is one of effects, of costs and benefits, not motives.[139] Chauvin's analysis makes no place for the claimed benefits of ancillaries for clients and consumers—effects which, if they materialize, will mean profits for lawyers.

3. Mythologizing the Small-Town Practitioner

Good public policy avoids arbitrary distinctions. The Litigation Section was willing to exempt from its ban or to grandfather the ancillary services that sole practitioners provide.[140] How did Section supporters distinguish the ancillary services long offered on Main Street from those offered today on Washington's "M" Street? Justin Stanley, chair of the ABA Commission on Professionalism, argued:

> What is happening today is quite different from what has happened in the past. Then isolated acts of individual lawyers were involved; acts which for the most part were not driven by predetermined policy decisions. Today, in addition to isolated acts of lawyers, ... law firms as entities are involved in business activities. These activities are not iso-

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> The lawyers let go by large New York law firms after the 1987 stock market crash quickly learned that employment practices in service sectors, and even in professional service sectors, had mutated into a model of employer-employee relations quite like those that Ford or General Motors applied to blue-collar workers. Only cognitive resistance to recognizing this transformation led partners at these firms to engage in the disreputable claim that all of these attorneys were let go because they were not good lawyers, *thus preserving the rhetoric of a preindustrial professionalism to justify what were clearly profit-motivated layoffs.*

J.M. Balkin, *What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1974–75 (1992) (emphasis added). *See also* Sheryl Gross-Glaser, *Firing Trends: Laid-Off New York Associates Keep Headhunters Busy*, A.B.A. J., Aug. 1990, at 23 (citing evidence that large New York firms fired as many as 1500 associates in the 1987 cutbacks and that many associates were hampered in finding new jobs by their old firms' denials that the layoffs were economically motivated). Here, a vulnerable class of lawyers were seemingly hurt by their superiors' insistence on invoking the rhetoric of professionalism to justify themselves.

139. To be sure, the relevant effects may sometimes include subtle "cultural" consequences in addition to the more obvious and measurable "instrumental" ones. *See* Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936 (1991). Professor Pildes makes this point in discussing how policymakers should evaluate proposals requiring lawyers to provide *pro bono* service. Some proposals would allow lawyers to "opt out" of the *pro bono* requirement by making a cash payment in lieu of service or by shifting the work onto junior lawyers in their firms. Other proposals would not allow opting out. Pildes argues that in choosing between a plan with an opt-out and a plan without one, policymakers should consider not only how efficiently the two plans would deliver service, but also how the plans would affect lawyers' understandings of themselves and their profession. *Id.* at 947–51. He criticizes opt-outs for channeling all the *pro bono* work to the lawyers with the lowest professional status, which in turn will devalue the work, and for forgoing the opportunity to bring wealthy lawyers into contact with lower-class clients. *Id.* at 936.

My point, however, is not that policymakers should disregard the cultural consequences of ancillary businesses or of a rule prohibiting them. It is rather that those who assert that ancillary businesses will have adverse cultural consequences for the legal profession should be expected to support their assertions. The Litigation Section never did this. Their campaign seems to have been an expression of *preexisting* cultural values—the values litigators associate with professionalism—rather than a sober assessment of the impact ancillary businesses will have on the transactional lawyer's understanding of herself. *See infra* text accompanying notes 159–69, 176–84.

140. *See supra* text accompanying notes 53–54.

> lated or accidental, but instead, are based on prior economic policy decisions by the firms and often involve large sums of money.[141]

This is myth. SCCOP's Working Group estimated that "fully one-half of lawyers [social scientists have] studied in rural and small-town settings operate businesses in addition to their law practices."[142] These businesses are not weekend hobbies. The rural lawyer who obtains a real estate broker's license in order to supplement the income from his law practice is not acting on the spur of the moment to give a few clients a little extra help. Nor are the lawyers who own local title insurance companies or prepare hundreds of tax returns every spring. Moreover, these businesses are sometimes structured as separate units; New England law firms have long operated subsidiaries in the business of managing trusts.[143] And many small-town practitioners do not supply their ancillary services solely to law clients, or when they do serve clients, solely in connection with legal services.[144] All in all, it seems likely that total lawyers' earnings from these small-town side lines dwarf the sums that large law firms now earn from their ancillaries or will earn in the foreseeable future.

Because Stanley's distinction seems so unjustified by the facts, one wonders what made him think of it in the first place. I suspect that it originates in a lingering image of the traditional small-town lawyer as a professional archetype[145]—someone whose practices are *by definition* professional and whose ancillary services must therefore be motivated by a desire to provide service rather than make money. If I am right, then a professionalism myth induced the proponents of Rule 5.7 to build an arbitrary distinction into Rule 5.7, contrary to good policymaking standards.

4. Thoughtless Appeals to Tradition

Because, for most lawyers, professionalism implies respect for tradition, debating an ethics rule in terms of professionalism gives arguments based on tradition a rhetorical advantage. Such arguments do not necessarily make bad policy;[146] traditions like the lawyer-client privilege may reflect hard-won wisdom that deserves weight in choosing ethics rules even if that wisdom is not easily reduced to demonstrable costs and benefits.[147] But, to judge by the ancillary business debate, those who couch their policy initiatives in the idiom of

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141. Stanley, *supra* note 130, at 21.
142. *Interim Report*, *supra* note 37, at 5.
143. *Id.*
144. *Id.*
145. In his empirical study of lawyers in a relatively small Midwestern city, Joel Handler described the image well:

> The image of the early lawyer and the foil for the portrait of the twentieth century lawyer is the general practitioner. He practiced alone or with a single partner .... In his office he prepared deeds and mortgages, drafted contracts and notes; but his practice centered on courtroom work .... He served his established clients but remained aloof and exercised independent judgment on the justice of the claims of prospective clients .... The model is Abraham Lincoln.

JOEL F. HANDLER, THE LAWYER AND HIS COMMUNITY: THE PRACTICING BAR IN A MIDDLE-SIZED CITY 4 (1967).

146. On the constructive uses of tradition in making law, even law that departs substantially from the past, see Martin Krygier, *Law as Tradition*, 5 L. & PHIL. 237 (1986).

147. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 118 cmt. c (Tentative Draft No. 2, 1989) (attorney-client privilege rests on empirical assumptions never tested but widely believed to be sound).

professionalism are apt to confuse respect for tradition with reaction to change. Like judges working with precedent, good policymakers must *interpret* traditions broadly enough to accommodate new circumstances.[148] In the case of ancillary business, the new circumstance that accounts for much of the emerging demand for law-related services is the complexity of business transactions in today's highly regulated and increasingly global economy.[149]

If one views the new ancillaries against the historical backdrop of the law-related services small-town lawyers have rendered for decades, one need not conclude that they assault tradition. But supporters of Rule 5.7 often focused on the narrower question of whether the new ancillaries represent a departure for large firms themselves, which of course they do. Justin Stanley, mistaking the news for the new, cited the many recent stories in the trade press about corporate law firms setting up ancillaries as a sign that such businesses represent a fundamental "break with tradition."[150] His rhetoric may have been effective but his logic is escapable. For those who know how to read it, the small-town ancillary business tradition provides ample precedent for the big-firm ancillaries.

5. Privileging the Lawyer's Assessment of Client Interests

Good policymaking takes into account all the interests at stake in the issue at hand. In the case of ancillary business, these include the interests of clients and consumers. Yet the requirements of professionalism are by definition clearer to professionals than to laymen. As a result, examining ancillary business through the lens of professionalism tends to privilege lawyers' views on what is good for clients over the views of clients or consumers themselves. In this respect, the idiom of professionalism seems inherently paternalistic. While paternalism may be justified in some lawyer-client interactions,[151] and therefore in some ethics rules,[152] it is rarely justified in the process of *making* ethics rules, a setting in which sophisticated spokesmen for the client or lay point of view can usually be found. Because lay groups are not directly represented in the House of Delegates, the ABA, before deciding whether to ban ancillary businesses, should have gathered extensive evidence about client and consumer perceptions of the risks and benefits of ancillary business. This was not done.

148. *See* Krygier, *supra* note 146, at 251–54 (drawing the analogy between judges working with precedent and other decisionmakers who must interpret and reinterpret cultural traditions).

149. Interestingly, lawyers in Western Europe are now studying the advisability of creating multidisciplinary, as well as multinational, professional firms. For the debate in England, see LORD CHANCELLOR'S DEPARTMENT, THE WORK AND ORGANIZATION OF THE LEGAL PROFESSION ch. 12 (Jan. 1989); LORD CHANCELLOR'S DEPARTMENT, LEGAL SERVICES: A FRAMEWORK FOR THE FUTURE ch. 12, ¶ 12.2 (July 1989) (government proposes to remove statutory barriers to solicitors forming partnerships with members of other professions). Legislation passed in 1990 permits English solicitors to form interdisciplinary partnerships. Roger J. Goebel, *Lawyers in the Eurpean Community: Progress Towards Community-Wide Rites of Practice*, FORDHAM INT'L L.J. 556, 562 & n.9 (1991–92). For a brief discussion of multidisciplinary practice on the Continent, see LINDA S. SPEDDING, TRANSNATIONAL LEGAL PRACTICE IN THE EEC AND THE UNITED STATES 121–23 (1987).

150. Stanley, *supra* note 130, at 19.

151. *See* David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454.

152. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (lawyer may not represent conflicting interests, even with disclosure and client consent, when the representation

Moreover, the modest evidence that was gathered on these points was all collected by SCCOP's Working Group and CEPR, bodies which did not view the issue in terms of professionalism. SCCOP received a report from twenty-five law firms summarizing their experiences in operating ancillary businesses;[153] the report may have been self-serving, but at least it came from firms with experience in providing ancillary service to clients and customers. CEPR invited comments from the FTC,[154] which could be expected to view the matter from a consumer perspective. The Litigation Section contributed nothing to this fact-gathering effort. If professionalism is the issue, why bother?

6. Misplaced Fears for the Future of the Adversary System

For many lawyers, especially litigators, professionalism is tied up with faith in the adversary system as a method for resolving disputes. At the same time and without inconsistency, the argument has become commonplace (subscribed to even by the Stanley Commission on Professionalism) that law schools should teach new methods of dealing with legal problems, such as alternative methods of dispute resolution and negotiation skills.[155] In an article defending ancillary businesses, Arnold & Porter's James Jones merely reiterated this point. "Law schools," he wrote,

> have designed their curricula to instill a strong faith in the adversary system .... Although finely honed advocacy skills are an important tool for all lawyers in our society, the law school's almost single-minded devotion to the principles of advocacy may also be a bane to the legal profession.
>
> In their zeal to teach the virtues of our adversary system, the law schools may have overlooked the equally important skill of compromise and negotiation. ... [It is] a time when lawyers need more than ever to view their clients' problems broadly and to achieve innovative solutions that may well exceed the narrow limits of traditional lawyering ....[156]

Supporters of Rule 5.7 seized on Jones' statement as a reason to adopt the rule. "In effect," wrote Dennis Block, Jones was arguing "that in order to affiliate with other professionals, lawyers needed to reconsider, if not abandon, their commitment to the adversary system ...."[157] Yet Jones was hardly inciting lawyers to affiliate with nonlawyers or even implying that zealous advocacy had no place in a law firm that operates ancillary businesses. Why, then, did his opponents characterize his statement as a thumbs-down review of the adversary system? The answer, I suspect, is that accusing an opponent of abandoning the profession's faith in the adversary system gets good rhetorical mileage in bar debates.[158] But the accusations against Jones were themselves an example of

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is likely to be materially impaired); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (lawyer shall not make agreement prospectively limiting his malpractice liability to a client).

153. *See* White Paper, *supra* note 29.

154. *See supra* notes 124–25 and accompanying text.

155. *Stanley Report*, *supra* note 40, at 268.

156. Jones, *supra* note 22, at 695.

157. Block, *supra* note 18, at 756.

158. On the frequent use of the "adversary system excuse" by lawyers to support their ethical positions, see DAVID LUBAN, *The Adversary System Excuse, in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83 (1984); Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 L. & SOC. INQUIRY 677, 703, 712, 719.

adversarial excess in what was after all a policymaking forum, not a courtroom. The birth of ancillary businesses specializing in transactional and regulatory work has no demonstrable significance, good or bad, for the future of the adversary system as a technique for resolving disputes.

7. The Temptation to Enact Symbolic Legislation

Supporters may have hoped that once the House of Delegates adopted Rule 5.7, many states would follow suit. But they could hardly have expected this to happen, because opposition to the rule was intense. Their aim, at least in large part, was to have the nation's leading bar association make a statement about the core values of the profession by declaring ancillary business unprofessional. After the House adopted Rule 5.7, Litigation Section spokesmen conceded privately that it was "not likely to be adopted anywhere," but asserted that the Section had nonetheless "made its point."[159]

The idiom of professionalism encourages ethics rulemaking for expressive purposes like this because the idiom is tied up with heartfelt ideas about what it means to be a lawyer or a professional.[160] But using the ABA rulemaking process for expressive or symbolic purposes, as the Litigation Section did, has two serious drawbacks. First, it downplays the policymaker's duty to be clear. Since it is always possible that an ABA ethics rule will become law even if its proponents intend otherwise, the proponents have an obligation to put forward a rule that is clear enough that it can be enforced both effectively and without unduly chilling legitimate conduct.[161] Preoccupied with the expressive rather than the regulatory function of their ancillary business rule, the Litigation Section never faced up to the formidable problem of designing a ban that could be enforced at acceptable cost. ABA entities more sensitive to regulatory issues saw the problem. After Rule 5.7 was adopted, the ABA Committee on Professional Discipline, a body with close ties to local disciplinary counsel, called for reconsideration on the ground that it was unenforceably vague.[162]

The trouble was that Rule 5.7 gave different legal treatment to three kinds of work—legal services, ancillary services, and non-ancillary services[163]—without drawing satisfactory lines between them.[164] Take just one

159. Letter from Mark Harrison, Chair of SCCOP's Working Group, to Lee Cooper, Chair of the House of Delegates, Aug. 27, 1991, at 2 (on file with the author).

160. *See supra* note 59 and accompanying text.

161. Geoffrey Hazard, reporter to the Kutak Commission which drafted the Model Rules, argues that the first duty of those who design a modern ethics code for lawyers is to strive for clarity so that the rules can be correctly applied and effectively enforced. *See* Geoffrey Hazard, Jr., *The Legal and Ethical Position of the Code of Professional Responsibility*, *in* 5 SOCIAL RESPONSIBILITY: JOURNALISM, LAW, MEDICINE (Luther Hodges ed., 1979).

162. ABA Standing Comm. on Professional Discipline, Resolution (Oct. 27, 1991). *See also* Letter from Eugene Thomas to Ronald Olson, *supra* note 60, at 2 ("The Standing Committee on Professional Discipline is already asserting that [Rule 5.7] will not be adopted because bar counsel is [sic] virtually unanimous in the view that, as written, the amendment is unenforceable.").

163. *See supra* note 8.

164. Rule 5.7 itself provided no definitions for these categories of service. Comments to the rule offer some guidance, but not much. Ancillary services are those that satisfy "all or most" of the following criteria: they (1) are "provided to clients of a law firm (or customers of a business owned or controlled by a law firm)"; (2) "clearly do not constitute the practice of law"; (3) "are readily available from those not licensed to practice law"; (4) "are functionally connected to the provision of legal services"; (5) "involve intellectual ability or learning"; and (6) "have the potential for creating serious ethical problems in the lawyer client relationship." MODEL RULES

example of the problem.[165] Rule 5.7 never made it clear whether lobbying is a legal service or an ancillary one, in which case a law firm could lobby only in matters in which it is simultaneously providing true legal services.[166] Consequently, lawyers could not predict with any confidence whether they would be in compliance if their firm provided lobbying *but no other* service to a client (or should that be, "client"?). If the drafters intended lobbying to be a legal service, so that pure, unadulterated lobbying is allowed, law firms might nonetheless be chilled from lobbying for fear of committing a disciplinable offense. On the other hand, if pure lobbying was meant to be impermissible, law firms might nonetheless conclude that it was allowed, creating an enforcement problem for disciplinary bodies. This vagueness should have weighed heavily against Rule 5.7. Proponents seem not to have weighed it at all.

Of course, the proponents may have correctly anticipated that no jurisdiction would actually adopt Rule 5.7, so that these enforcement-related problems would never materialize. In that case, their crusade poses another problem: Adopting an ethics rule for purely expressive purposes jeopardizes the ABA's role as lawgiver for the legal profession. Lawyers presumably accept the ABA's legitimacy as a lawgiver because they expect ABA rules to reflect a substantial consensus within the profession.[167] Yet the incentive to seek purely expressive or symbolic victories is strongest on issues marked by a value dissensus.[168] The appropriateness of lawyers owning and operating ancillary busi-

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OF PROFESSIONAL CONDUCT Rule 5.7 cmt. ¶ 6 (repealed Aug. 1992). Among the activities which are *neither* legal services nor ancillary services, and are therefore permissible, are law-firm owned "restaurants, shops, or taxi services." *Id.* Rule 5.7, cmt. ¶ 7 (repealed Aug. 1992). Finally, when law-firm services are performed by nonlawyers, "there should be a presumption that the services do not constitute the practice of law and may be" an ancillary service. *Id.* Rule 5.7, cmt. ¶ 8 (repealed Aug. 1992).

165. Geoffrey Hazard has pointed out that many of the things lawyers have traditionally done could conceivably be declared ancillary rather than legal services under Rule 5.7. Courts could conclude, for example, that "a lawyer's advocacy before a court is law practice but advocacy before a legislative committee is an affiliated activity; that field investigation of personal injury is not law practice but insurance adjusting; and that internal investigation of corporate misconduct is not law practice if it centers on gathering facts." Geoffrey C. Hazard, Jr., *ABA Rethinks Misguided Restrictions*, NAT'L L.J., Mar. 18, 1991, at 15, 16. Hazard also notes that the long history of trying to enforce statutes prohibiting the unauthorized practice of law illustrates the "elusiveness of defining lawyers' unique functions." *Id.* at 15. One lawyer's service that has long fallen into the twilight zone between legal and nonlegal is preparing tax returns. *See, e.g.*, RESTATEMENT OF THE LAW GOVERNING LAWYERS § 122 cmt. b (Tentative Draft No. 2, 1989) (preparing tax returns defies categorical classification for purposes of applicability of attorney-client privilege).

166. For example, a law firm seeking a zoning variance for a developer (a legal service) could simultaneously lobby for a change in the zoning laws that would make the variance unnecessary. Notice that if lobbying is deemed to be an ancillary service, Rule 5.7 could encourage a law firm that is asked simply to lobby for a change in the zoning laws to suggest in addition a "true" legal service (seeking the variance) that the developer may not really want. The legal service would be necessary to give the firm an "ethical cover" for providing the requested ancillary service.

167. On the growing difficulty of achieving a consensus in ABA debates on ethics rules, see Ted Schneyer, *supra* note 158 (describing the conflicts that emerged during the ABA debates over adoption of the Model Rules).

168. Joseph R. Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 SOC. PROBS. 175, 188 (1967) (challenge to primacy of one subculture's values by another subculture spurs a felt need for symbolic restatement of those values in legal terms; "it is when consensus is least attainable that the pressure to establish the legal norms appears to be greatest"). Speaking of the dangers of laws that address highly contested intercultural disputes, the late Lon Fuller once wrote that "[i]t is unfortunately a familiar political technique to placate

nesses is such an issue. Just as many Americans felt alienated from a legal system that denigrated their values by enacting Prohibition,[169] so the many lawyers who find nothing objectionable about ancillary business could lose confidence in the ABA as a lawgiver.

Moreover, as it becomes apparent that the ABA is willing to adopt ethics rules for expressive rather than regulatory purposes, the prospects for local adoption and enforcement of ABA rules may dim. Why, after all, should state supreme courts and their disciplinary agencies go to the trouble of adopting and enforcing rules that may have been promulgated for expressive purposes? As the prospects for local adoption dim, the temptation to use the ABA's rulemaking process for expressive rather than regulatory purposes may grow in turn—a vicious circle.

For those who feel as I do that the ABA, with its large and representative membership, remains a desirable forum in which to hammer out the rules that govern law practice, the enforcement problems inherent in Rule 5.7 and the threat the rule poses to the ABA's legitimacy as a lawgiver must count as costs of the Litigation Section's campaign. These costs could have been avoided had the Section simply put before the House a resolution urging lawyers in the name of professionalism to refrain from setting up ancillary businesses. Instead, it tried to use the ABA's rulemaking machinery for inappropriate purposes.

IV. WHAT ACCOUNTS FOR THE LITIGATION SECTION'S RHETORIC AND WHAT CAN BE DONE TO PREVENT SIMILAR BREAKDOWNS IN POLICYMAKING

Part III shows that the Litigation Section's arguments for banning ancillary businesses were very weak; that the flaws in those arguments were often linked to the idiom of professionalism; and, paradoxically, that the Section's resort to that idiom accounts for its success, however temporary, in convincing the House to adopt Rule 5.7. If Part III is persuasive on these points, it follows that the idiom of professionalism, whatever its positive uses, poses a danger to the quality of public policymaking, at least where the business aspects of law practice are concerned. How might the ABA avoid similar breakdowns in future debates over ethics rules? One way to approach this question is to try to understand what prompted the Litigation Section's campaign.

One of the ironies of the idiom of professionalism is that, precisely because it sounds so highminded, it invites the most cynical assessments of the motives of those who employ it. Many observers will undoubtedly infer from the weakness of their arguments that the proponents of Rule 5.7 were simply trying to exploit the rhetorical power of professionalism to protect their own interests. Some will suppose that elite litigators acted out of fear that their own firms would join the ancillary business bandwagon and that this would shift power and prestige away from them toward partners specializing in transac-

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one interest by passing a statute, and to appease an opposing interest by leaving the statute largely unenforced." LON L. FULLER, THE MORALITY OF LAW 153 (1964).

169. *See* JOHN KAPLAN, MARIJUANA: THE NEW PROHIBITION 18 (1970) (prohibition was interpreted as a negative statement by rural Protestants about the cultural values of urban Catholics). Sociologist Joseph Gusfield has argued that "enemy deviants," those who violate a rule because it conflicts with their own values, pose a greater danger to the rulemaker's legitimacy than other deviants. Gusfield, *supra* note 168.

tional work.[170] Others will say that large firms without ancillaries hoped to prevent rival firms like Arnold & Porter from wooing their clients away with the promise of more complete service.[171]

But however valid self-interest might be as an explanation for some ethics rules,[172] I do not believe it satisfactorily explains the Litigation Section's campaign for adoption of Rule 5.7. It seems unlikely that partners at a strong New York law firm like Weil, Gotshal & Manges[173] view the operation of ancillary businesses by large firms in Washington as a substantial economic threat. Nor is it likely, in a period of sustained growth in litigation involving big companies,[174] that the elite litigators who represent such clients were acting out of a fear that the ancillary business movement would marginalize them in their own firms; these litigators are bringing in a great deal of business. Moreover, I have found no evidence, aside from the sheer flimsiness of their claims, that proponents of Rule 5.7 were insincere in making the arguments they did. To paraphrase Professors Robert Gordon and William Simon, if professionalism is "simply ideology" that masks self-interest, then proponents of Rule 5.7 were apparently no less duped by that ideology than anyone else.[175]

What might better account for the crusade against ancillary business? Cultures, like individuals, can experience "identity crises." In periods of turmoil, some groups within a culture may be tempted to use the lawmaking process to reaffirm the centrality of their values by stamping as less worthy other groups who engage in behavior that reflects conflicting values.[176] Prohibition is the classic example. Prohibition came about when predominantly rural Protestants (the "Drys") felt that their traditional values were threatened by the conflicting values that waves of immigrants (the "Wets") were bringing to the cities. Attitudes toward alcohol consumption crystallized as a symbol of this broader cultural conflict. Though alcohol abuse could be controlled without banning consumption altogether, and though the Drys could not have expected

170. *See infra* note 171.

171. *See, e.g.*, Elliott, *supra* note 20 (many purport to see in the Litigation Section's campaign "a 'save-our-turf' concern, with a subtext of anti-competitive restraint upon trade"); Larry Smith, *The Debate from the Black Lagoon: ABA Renews an Old Show*, OF COUNSEL, Oct. 21, 1991, at 2 (ancillary business debate represents a "power struggle" between the New York and Washington legal establishments; protectionism rather than just ethics is what "really motivates" the opposition to ancillary business).

172. Among the many scholars who have found economic self-interest lurking behind ethics rules adopted by the ABA in the past, see, e.g., Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977) and Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981).

173. Between 1978 and 1992, Weil, Gotshal & Manges vaulted from 37th to 10th place in the ranks of largest American law firms. Thom Weidlich, *The Top 10: Then and Now*, NAT'L L.J., Sept. 28, 1992, at 3 (Supp.). For a profile of the firm's financial success, see Alison Frankel, *A Screaming Success*, AM. LAW., Oct. 1992, at 68.

174. *See* Marc Galanter, *The Life and Times of the Big Six; Or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 942–45 (substantial percentage of the growth in federal court caseloads from 1960 to 1986 involved business litigation, often complex suits between large companies).

175. Gordon & Simon, *supra* note 15, at 233.

176. KAPLAN, *supra* note 169, at 3–4.

Prohibition to eliminate consumption, they nonetheless supported it as an official declaration that their values continued to define American life.[177]

There is a useful, if distant, analogy here. The legal profession is itself a culture.[178] It is now undergoing profound changes in structure and composition, changes that may both reflect and produce conflicting notions of what it means to be a lawyer and a professional.[179] Some lawyers who are unhappy with the present upheaval blame it on others whose values are relatively commercial or entrepreneurial, and worry that those values are in the ascendancy.[180] Foreclosed by law and political realities from banning the practices that most clearly manifest commercial values—advertising and intense fee competition[181]—they have focused on the embryonic ancillary business movement as a relatively vulnerable target and a symbol of the broader commercialism supposedly afflicting the profession.

Because the perceived dichotomy between profession and business has always been the basis for criticizing the commercialization of law practice,[182] the idiom of professionalism became the rhetorical means by which to attack the ancillary business movement. The ABA's ethics rulemaking process—i.e., the profession's own lawmaking forum—was the natural site at which to wage the attack. And the natural champions of professionalism's anti-business values were litigators—lawyers who specialize in what they consider the bar's core function of adjudicating, lawyers who only do what one absolutely must be a lawyer to do, lawyers who (like English barristers) tend to stay uninvolved in their clients' business affairs. Litigators in elite firms may find the ancillary business movement particularly disturbing not just because it is led by transactional lawyers, whose work is very different from theirs, but because it is led by equally elite lawyers, whose values and practices may set a powerful example for the future.[183]

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177. For a rich account of the Prohibition movement along these lines, see JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT (1963).

178. *See* BURTON BLEDSTEIN, THE CULTURE OF PROFESSIONALISM (1976); William J. Goode, *Community Within a Community: The Professions*, 22 AM. SOC. REV. 194 (1957).

179. Geoffrey Hazard has made the point:

> Lawyers, in our imagination, used to be straight-laced barristers and reclusive office counsellors. Today some members of our profession wear loud ties. Many of them are lobbyists, agents in sports and the entertainment industry, international relations consultants, labor negotiators, intellectual property brokers, workout specialists and political campaign strategists ....
>
> These devolutions from the pure model blur the image of what lawyers are supposed to be. By the same token, they blur the model of what lawyers are supposed to do.

Hazard, Jr., *supra* note 165, at 15.

180. *See* Solomon, *supra* note 14, at 172–73.

181. *See infra* notes 188–98 and accompanying text.

182. *See* authorities cited *supra* note 44.

183. In a thoughtful article, Professor Harold Levinson recently expressed a concern, much like the Litigation Section's concern, that law firms which operate ancillary businesses may lose the independence of judgment necessary to function as law firms ideally should in our society. *See* L. Harold Levinson, *Independent Law Firms that Practice Law Only: Society's Need, the Legal Profession's Responsibility*, 51 OHIO ST. L.J. 229 (1990). Yet he is not nearly as worried as the Litigation Section that the operation of ancillary businesses by elite Washington firms will start an epidemic which in fairly short order will leave the traditional or independent law firm an endangered species. *Id.* at 244. Accordingly, his proposed preventive measures are considerably less drastic. Unconvinced that society requires *all* law firms to have all the

On this account, the campaign for adoption of Rule 5.7 was an effort by elite litigators to restore a core meaning or shared identity to a profession whose members perform increasingly differentiated tasks and are therefore increasingly divided in their conceptions of what it is to be a lawyer.[184] Their aim was to have the ABA place beyond the professional pale a practice which serves as a constant reminder that the constellation of values elite litigators espouse, values we associate with the English barrister, are not now (if they ever were) paradigmatic for American lawyers.

This account lends a certain poignance to the Litigation Section's campaign, but cannot justify it. Lawyers have always played a leading role in public policymaking in the United States;[185] with so few lawyers now in the legislatures, one alternative way for the profession to continue to do so is for the ABA to provide the American polity with good policymaking models. The Section's emphasis on professionalism made the process culminating in House approval of Rule 5.7 a poor model indeed. Ironically, professionalism became an impediment to the ABA's discharging one of its professional responsibilities to the public.

Is there a cure for this policymaking disease? I believe that an effective antidote to the rhetoric of professionalism can be extracted from the approach that SCCOP, its Working Group, and CEPR took to the ancillary business debate. They are the heroes of my account. They recognized that every worthwhile argument on the ancillary business issue—indeed, on any issue dealing with the regulation of lawyers—can be made without invoking the rhetoric of professionalism. They also recognized that the constructive uses of this rhetoric do not include declaring the practices or values of an important segment of the bar to be beyond the professional pale, for such intolerance can only lead to more fragmentation in the community of lawyers. These are the principles SCCOP's Working Group seemed to have in mind when it concluded that policy arguments based on professionalism "were not amenable to the ordinary apparatus of inquiry" and that it was not the ABA's role to "declare, for all 700,000 American lawyers, what constitutes the only proper content of each of our particular ways of making a living."[186] The ABA would do well to heed these principles of tolerance and careful inquiry in future ethics debates.

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attributes of traditional independence (no lay partners, a diverse client base, non-participation in clients' businesses, etc.), he would, for the time being, simply have the bar establish and publicize standards of law firm independence and leave it to the "informed market" to determine the fate of law firms that do and do not comply with these standards. *Id.* at 255.

184. *See* Hazard, Jr., *supra* note 165, at 15. *See also* Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra* note 14, at 177, 179 (lawyer professionalism not a "unitary set of values, but instead consists of multiple visions of what constitutes proper behavior by lawyers," visions that reflect the particular institutional settings in which lawyers work).

185. *See, e.g.*, HEINZ EULAU & JOHN D. SPRAGUE, LAWYERS IN POLITICS (1964); HALLIDAY, *supra* note 14; ALBERT P. MELONE, LAWYERS, PUBLIC POLICY AND INTEREST GROUP POLITICS (1977); MARY LOUISE RUTHERFORD, THE INFLUENCE OF THE AMERICAN BAR ASSOCIATION ON PUBLIC OPINION AND LEGISLATION (1937).

186. *See supra* notes 48–49 and accompanying text.

V. CONCLUSION

I hope it is clear that the object of this Article is to strengthen the quality of ABA policymaking, not to celebrate the birth of the new ancillary businesses, which may or may not prove to be a good thing. What the reader may find harder to understand is why my indictment of professionalism as a policymaking idiom is so broad. After all, I have only shown that the idiom proved damaging in one particular instance of bar policymaking. The reason my indictment is so broad is that two Supreme Court decisions made it painfully clear, years before the ancillary business debate, how easily the rhetoric of professionalism can compromise both the quality of bar policies and the defensibility of those policies outside the bar. It should not have happened again, but it did because supporters of Rule 5.7 examined these cases only long enough to observe that the decisions pose no *legal* obstacle to banning ancillary business.[187] They ignored the cases' other implications for the ABA as a policymaker.

In *Goldfarb v. Virginia State Bar*,[188] the Court found a county bar association liable under the Sherman Act for issuing a minimum-fee schedule potentially enforceable through the disciplinary process against lawyers who undercharge.[189] The Court rejected the association's argument that the Act contained an implicit exemption from liability for anti-competitive practices instituted by "learned professions."[190]

Although it became clear after *Goldfarb* that fee schedules could be insulated from antitrust liability by having the state supreme courts rather than the bar reissue them,[191] responsible lawyers have not proposed that the courts do so. *Goldfarb* taught them that minimum fee schedules were bad public policy. But too few have drawn the broader lesson that professionalism "concerns," unsupported by facts and careful analysis, are apt to generate policy mistakes. The bar, after all, had cited professionalism concerns and very little else to justify its use of minimum fee schedules in the first place.[192] Lawyers, it was said, should not undercut one another's fees, because as professionals they should be "above competition," a practice associated with trade or business.[193] So bent were lawyers on restricting fee competition in order to display or maintain their anti-commercial values that they ignored the undesirable effect on the availability of legal services of fees made artificially high by the restrictions.

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187. *See* Block, *supra* note 18, at 811 n.289, 812–14 (no First Amendment or antitrust obstacles to ABA and state supreme court adoption of Rule 5.7).

188. 421 U.S. 773 (1975).

189. *Id.* at 793.

190. *Id.* at 786–88.

191. The schedules would then be protected by the Sherman Act's exemption for state action. *See* Bates v. State Bar of Arizona, 433 U.S. 350, 359–63 (1977). For discussion of the point, see *supra* note 126.

192. The very fee schedule at issue in *Goldfarb* described itself as a "conscientious effort to show lawyers in their true perspective of dignity, training and integrity." *Goldfarb*, 421 U.S. at 777 n.4. Despite the high-sounding rhetoric, or perhaps even because of it, *see supra* text accompanying note 171, critics have argued that minimum fee schedules represented a deliberate effort by lawyers, especially economically marginal lawyers, to fix prices and thereby limit competition. *See, e.g.*, Wallace Rudolph, *The Law as a Trade*, 51 NEB. L. REV. 392, 398 (1972).

193. *See, e.g.*, ABA Comm. on Professional Ethics, Formal Op. 302 (1961) (justifying minimum-fee schedules). *Cf.* ABA Comm. on Professional Ethics and Grievances, Formal Op. 292 (1957) (lawyers' competitive bidding for legal work would "tend to reduce the profession to a mere money making business" and "lower the dignity of the profession").

Two years after *Goldfarb*, in *Bates v. State Bar of Arizona*,[194] the Court struck down on First Amendment grounds the bar's longstanding ban on lawyer advertising. Using a First Amendment balancing test, the Court had to evaluate the Arizona State Bar's justifications for the ban. According to the Court, the bar placed

> particular emphasis on the adverse effects that it feels price advertising will have on the legal profession. The key to professionalism, it is argued, is the sense of pride that involvement in the discipline generates. It is claimed that price advertising will bring about commercialization, which will undermine the attorney's sense of dignity and self-worth. The hustle of the marketplace will adversely affect the profession's service orientation, and irreparably damage the delicate balance between the lawyer's need to earn and his obligation selflessly to serve. Advertising is also said to erode the client's trust in his attorney: Once the client perceives that the lawyer is motivated by profit, his confidence that the attorney is acting out of a commitment to the client's welfare is jeopardized. And advertising is said to tarnish the dignified public image of the profession.[195]

Sound familiar? The Court found these unproven and mostly unprovable assertions, which are so reminiscent of the Litigation Section's arguments against ancillary business, too speculative to offer *any* support for the advertising ban, let alone to justify it. It called the "postulated connection" between advertising and the erosion of professionalism "severely strained,"[196] and considered the assertion that advertising would diminish lawyers' reputations completely "open to question."[197]

Whatever one thinks about the merits of lawyer advertising, an issue that continues to be debated, *Bates* should have taught bar leaders how powerless is the idiom of professionalism to justify their policy choices nowadays when those choices are scrutinized in forums outside the bar itself. In the long run, if the ABA is to maintain its primacy as a policymaker for the practice of law, it should be prepared to justify its ethics rules to the press and the public as well as the courts. Since arguments based on vague notions of professionalism are unlikely to do the trick in those forums, they should not be relied upon inside the bar, either. Surely we lawyers can find more to profess in justifying our ethics rules than professionalism itself.

Rejecting the bar's professionalism concerns in *Bates*, the Supreme Court declared that the bar's "belief that lawyers are somehow 'above' trade has become an anachronism."[198] And yet, as the ancillary business debate shows, the distinction between profession and business remains anything but an anachronism in the minds of many lawyers today.[199] This is why the idiom of profes-

194. 433 U.S. 350 (1977).
195. *Id.* at 368.
196. *Id.*
197. *Id.* at 369. The Court pointed out that a profession that eschews advertising "while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients" may actually invite public "cynicism." *Id.* at 370–71.
198. *Id.* at 371–72.
199. And in the minds of a minority of Supreme Court justices. For an unsuccessful attempt to revive arguments from professionalism as justifications for regulations on lawyer advertising, see Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 487–91 (1988) (O'Connor, J., dissenting). In Justice O'Connor's view,

sionalism can still exert a powerful influence in bar debates concerning the business aspects of law practice. It is also why ABA leaders should take pains to consign the idiom to the museum of discredited policymaking tools. If the ABA wishes to be taken seriously as a policymaker for the practice of law, then it must approach the task more rigorously than the Litigation Section did in this case.

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fairly severe constraints on attorney advertising can continue to play an important role in preserving the legal profession as a genuine profession. Whatever may be the exactly appropriate scope of these restrictions ..., this Court's recent decisions reflect a myopic belief that "consumers," and thus our Nation, will benefit from a constitutional theory that refuses to recognize either the essence of professionalism or its fragile and necessary foundations .... In one way or another, time will uncover the folly of this approach.

Id. at 491.