

THE LAW FIRM OF THE FUTURE

THE MOVEMENT TOWARD LAW FIRM OWNERSHIP REFORM

An MPF Webinar – January 6, 2021

by

Whitney Cunningham, Esq.

Managing Partner, Aspey Watkins & Diesel

Uri Gutfreund

Law Firm Group Leader, Risk Strategies Company

Carson Pearson, Esq.

Managing Partner, Pearson Butler

John Remsen, Jr.

President, TheRemsenGroup

MPF WEBINAR

POWERED BY

TheRemsenGroup
Smart Strategies for the Forward Thinking Law Firm

TheRemsenGroup.com

BIOGRAPHICAL PROFILE

Whitney Cunningham, Esq.

Managing Partner
Aspey Watkins & Diesel
Flagstaff, Arizona
928.774.1478 – wcunningham@awdlaw.com

Whitney Cunningham's practice focuses on business, real estate and construction matters. He advises entrepreneurs and businesses at all stages of their development, including business formation, shareholder relations, commercial transactions, intellectual property management, and buying and selling of businesses. He also handles complex business and real estate litigation and appeals.

Whitney's clients range from local family businesses to entrepreneurial corporations doing business around the world. He possesses extensive experience in both civil jury trials and complex business and real estate transactions.

Education:

- Georgetown University Law Center, Washington, D.C. J.D., magna cum laude, 1992
- Northern Arizona University, Flagstaff, Arizona. B.S., magna cum laude, 1989

Bar Admissions:

- Supreme Court of Arizona, 1993
- U.S. District Court – District of Arizona, 1993
- U.S. Court of Appeals – Ninth Circuit, 2014
- U.S. Court of Appeals – Federal Circuit, 1995

Professional Affiliations:

- State Bar of Arizona. President, 2013– 2014; Board of Governors, 2002– 2015
- Northern Arizona University. Instructor of Mass Media Law & Ethics, 1993 – 1994
- Arizona Foundation for Legal Services & Education. Board of Directors, 2013 – 2014. Next Generation Fellow, 2010 – present
- American Bar Foundation, Fellow, 2014 – present
- Supreme Court of Arizona. Attorney Regulation Advisory Committee, 2015 – present

Practice Areas:

- Business Law
- Real Estate & Construction
- Civil Litigation & Appeals

January 2021

BIOGRAPHICAL PROFILE

Uri Gutfreund

National Law Firm Practice Leader
Risk Strategies Company
New York, New York
212.826.9744 – ugutfreund@risk-strategies.com

Uri Gutfreund is The National Law Firm Practice Leader at Risk Strategies Company, a top 25 national insurance brokerage and The Founder and Moderator of The Managing Partner Round Table™, a regional peer-to-peer professional development group. This unique program has quickly become a leading venue for thought leaders in the legal industry.

At Risk Strategies, Uri is responsible for the development and execution of all insurance and risk management services to the company's law firm clients. He oversees all law firm specialty areas including: Health, Professional Liability, Property and Casualty, Cyber and EPLI. His practice leadership combines 20 years personal experience with cutting edge innovation remaking law firm insurance programs using the latest technology, peer benchmarking, and real-time best practices to serve the company's law firm clients.

He has been a Registered Professional Liability Underwriter since 2001 and a frequent speaker and is a writer on law firm leadership, law firm business practices and insurance and risk management at national and regional conferences.

September 2020

BIOGRAPHICAL PROFILE

Carson Pearson, Esq.

Managing Member and Co-Founder
Pearson Butler
South Jordan, Utah
801.495.4814 – carson@pearsonbutler.com

Carson Pearson is the managing member and co-founder of Pearson Butler.

Carson primarily works with small business owners and entrepreneurs. His work requires him to be knowledgeable in entity structuring, contracts, qualified plans, charitable structures, trusts, corporate finance, asset protection, insurance concepts, investments, real estate, and estate planning.

Carson has co-founded and operated several successful businesses. Carson has valuable hand-on experience in operations, start-up, and financing of these and other opportunities. In addition to these businesses, he has consulted with several small business ventures on operation, sales, marketing and human resources to increase their profitability or gain profitability and has successfully accomplished both business turnarounds as well as workouts.

He received his Juris Doctorate from the J. Reuben Clark School of Law at Brigham Young University. Carson is a member of the Utah State Bar and routinely performs pro-bono work to the community. Carson is fluent in Spanish and is a proud member of Phi Beta Kappa.

Education:

- Brigham Young University School of Law, J.D., 1999
- University of Utah, 1996

Bar Admissions:

- Utah
- U.S. District Court of Utah
- Utah Supreme Court
- United States Supreme Court

Affiliations:

- Utah State Bar Association
- American Bar Association

Practice Areas:

- Business and Corporate Law
- Tax
- Estate Planning
- Real Estate

January 2021

BIOGRAPHICAL PROFILE

John Remsen, Jr.

President

TheRemsenGroup

Atlanta, Georgia

404.885.9100 – jremsen@therem sengroup.com

John Remsen, Jr., is widely recognized as one of the country's leading authorities on law firm leadership, management, marketing and business development. Since 1997 TheRemsenGroup has consulted with more than 400 law firms and thousands of law firm leaders to help them develop and implement long-term strategic objectives to improve cohesiveness, profitability and sustainability.

John is a frequent speaker and author on law-firm leadership and marketing topics. He has spoken at national and regional conferences of the Legal Marketing Association, Association of Legal Administrators, American Bar Association, and numerous state and local bar associations. His articles have appeared in dozens of highly respected legal publications, including the *ABA Journal*, *Law Practice Management*, *Law Practice Today*, *Law360*, *Legal Management*, *Marketing for Lawyers*, *Marketing the Law Firm*, *Managing Partner*, *National Law Review* and *New York Law Journal*.

Since 1988, John has been an active member of the Legal Marketing Association, and he has served as President of LMA's Southeastern Chapter, Executive Editor of *Strategies* (LMA's newsletter) and a member of LMA's national Board of Directors. He is also an active member of the Association of Legal Administrators and a popular speaker at ALA meetings and conferences.

In 2002, John created The Managing Partner Forum, a highly acclaimed conference series and community for managing partners and law firm leaders. More than 1,200 firm leaders from 900 law firms and 43 states have participated in 26 conferences. In addition, John distributes *The MPF Weekly*, an electronic newsletter to more than 10,500 firm leaders throughout the U.S., Canada and 28 other countries.

John's influence was underscored when he was inducted as a Fellow of the College of Law Practice Management in 2013, in recognition of his 25 years of demonstrated expertise in law firm leadership and management. Founded in 1994, the College honors those who "inspire excellence and innovation in law practice management." Membership is by invitation only and includes just 200 individuals.

And the College was not alone: in 2016, John was recognized by LawDragon as one of the "Top 100 Consultants and Strategists" to the legal profession; and in 2017, John was recognized as one of the world's top "leaders and influencers" in the business of law by the Association of International Law Firm Networks.

A native of West Palm Beach, Florida, John holds an MBA from The University of Virginia (1985) and a bachelor's degree in Business Administration from the University of Florida (1980). Prior to enrolling in graduate school, John was Executive Director of The Florida Council of 100, an organization comprised of Florida's top CEOs and other business leaders.

September 2020

MPF WEBINAR

Law Firm of the Future

**Managing Partner Forum®**
ADVANCING THE BUSINESS OF LAW

The MPF Webinar Series: The Law Firm of the Future

The Movement Toward Law Firm Ownership Reform

An MPF Webinar with Whitney Cunningham and Carson Pearson

January 6, 2021 – 2:00-3:00pm ET





1

**Managing Partner Forum®**
ADVANCING THE BUSINESS OF LAW



John Remsen, Jr.

- President, TheRemsenGroup
- President & CEO, Managing Partner Forum
- Strategic Planning, Marketing/Business Development, Firm Retreats, COO/CMO Search
- Fellow, College of Law Practice Management
- Speaker:
 - American Bar Association
 - Association of Legal Administrators
 - Legal Marketing Association
 - MPF Annual Conference
 - Law Firm Networks
- Education:
 - University of Virginia – MBA
 - University of Florida – BSBA



2

MPF WEBINAR

Law Firm of the Future



Managing Partner Forum®
ADVANCING THE BUSINESS OF LAW



Uri Gutfreund

- National Law Firm Practice Leader, Risk Strategies Company
- Prof'l Liability, Cyber, EPLI, Employee Benefits, Property and Casualty Insurance Plans
The Managing Partner Roundtable
- Speaker:
 - American Bar Association
 - Association of Legal Administrators
 - Managing Partner Summit
 - MPF Annual Conference
 - Law Firm Networks
- Education:
 - BA – Yeshiva University



TheRemsenGroup
Smart Strategies for the Forward Thinking Law Firm

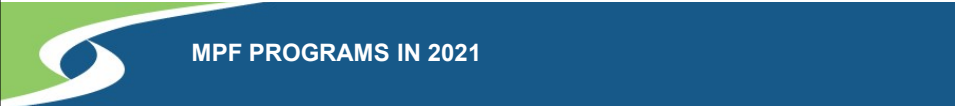


RISK STRATEGIES

3



Managing Partner Forum®
ADVANCING THE BUSINESS OF LAW



MPF PROGRAMS IN 2021

- MPF Webinar Series – First Wednesday @ 2pm ET
- MPF Virtual Conferences – February, June, December
- MPF Listserv and Conference Calls
- *The MPF Weekly* – Friday mornings
- MPF Website – www.ManagingPartnerForum.org
- The MPF Leadership Conference – May 5-6 in Atlanta *
- The MPF Fall Symposium – October 7 in Chicago *



RISK STRATEGIES



TheRemsenGroup
Smart Strategies for the Forward Thinking Law Firm

4

MPF WEBINAR

Law Firm of the Future



Managing Partner Forum®
ADVANCING THE BUSINESS OF LAW



TODAY'S WEBINAR

- Introductions
- Registrant Survey Results
- Panel Discussion
- Live Audience Polling
- Your Questions
- Next MPF Webinar: Wednesday, February 3rd



RISK
STRATEGIES



TheRemsenGroup
Smart Strategies for the Forward Thinking Law Firm

5



Managing Partner Forum®
ADVANCING THE BUSINESS OF LAW



**Whitney
Cunningham, Esq.**

- Managing Partner, Aspey Watkins & Diesel
- 16 lawyers, Founded in 1975
- Flagstaff, Arizona
- Past President, State Bar of Arizona
- Former General Counsel, Machine Solutions
- Education:
 - JD – Georgetown University
 - BS – Northern Arizona University



TheRemsenGroup
Smart Strategies for the Forward Thinking Law Firm



RISK
STRATEGIES

6

MPF WEBINAR

Law Firm of the Future



Managing Partner Forum®
ADVANCING THE BUSINESS OF LAW



Carson Pearson, Esq.

- Managing Partner and Founder, Pearson Butler
- 30 lawyers, 12 practice areas
- Salt Lake City (South Jordan), Utah
- Business and transactional law practice
- Successful entrepreneur
- Education:
 - JD – Brigham Young University
 - BA – University of Utah



TheRemsenGroup
Smart Strategies for the Forward Thinking Law Firm



RISK STRATEGIES

7



Managing Partner Forum®
ADVANCING THE BUSINESS OF LAW



TODAY'S REGISTRANT SURVEY RESULTS

- January 1-5, 2021
- 125 managing partners and firm leaders



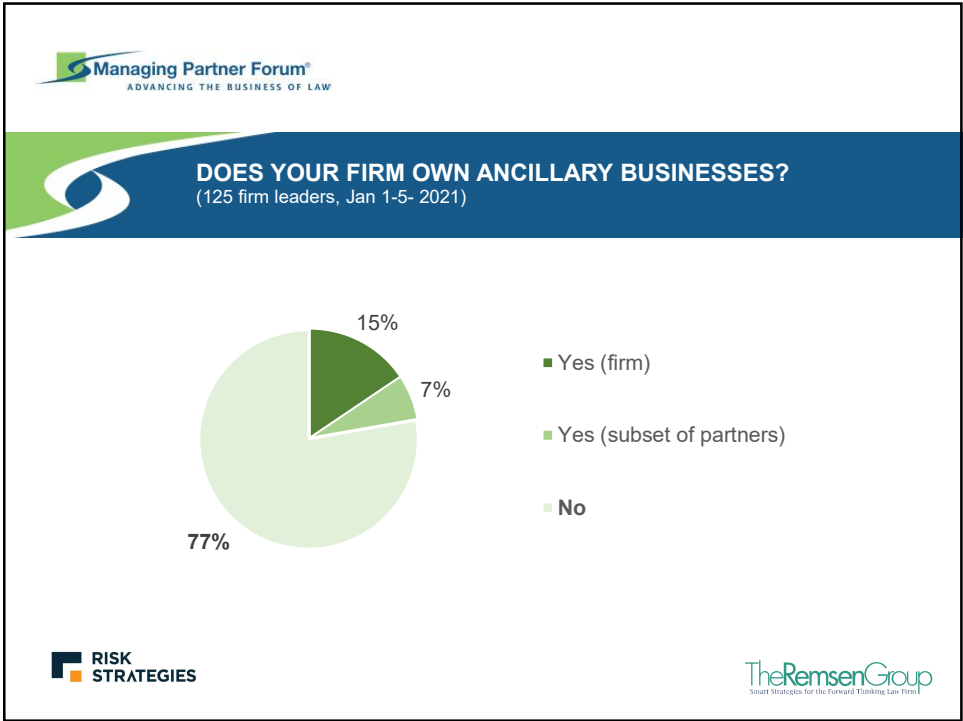
RISK STRATEGIES



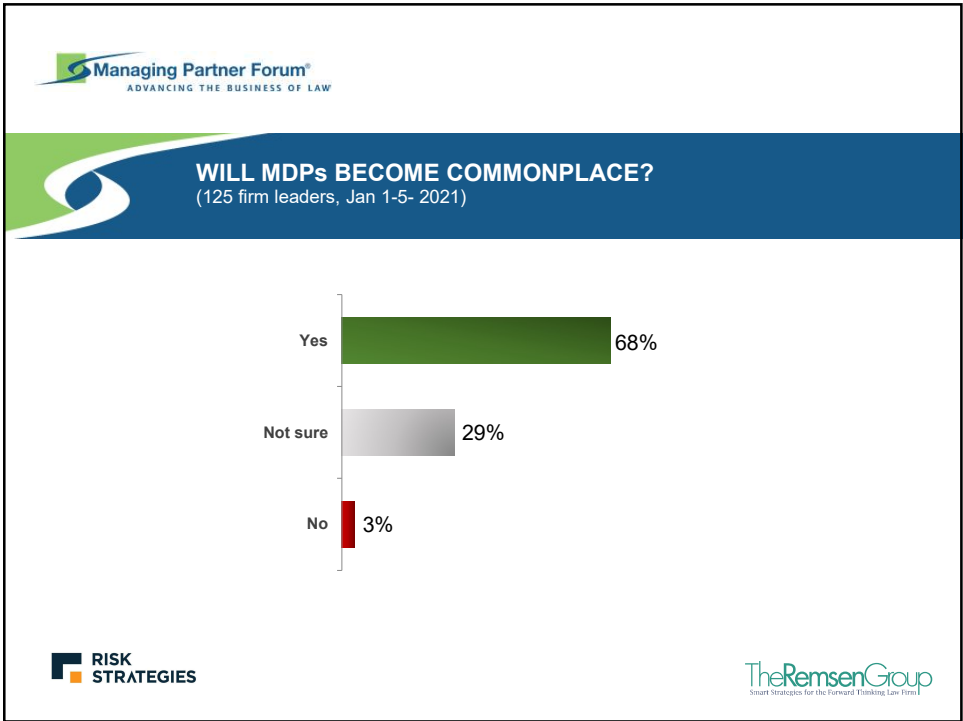
TheRemsenGroup
Smart Strategies for the Forward Thinking Law Firm

8

MPF WEBINAR
Law Firm of the Future



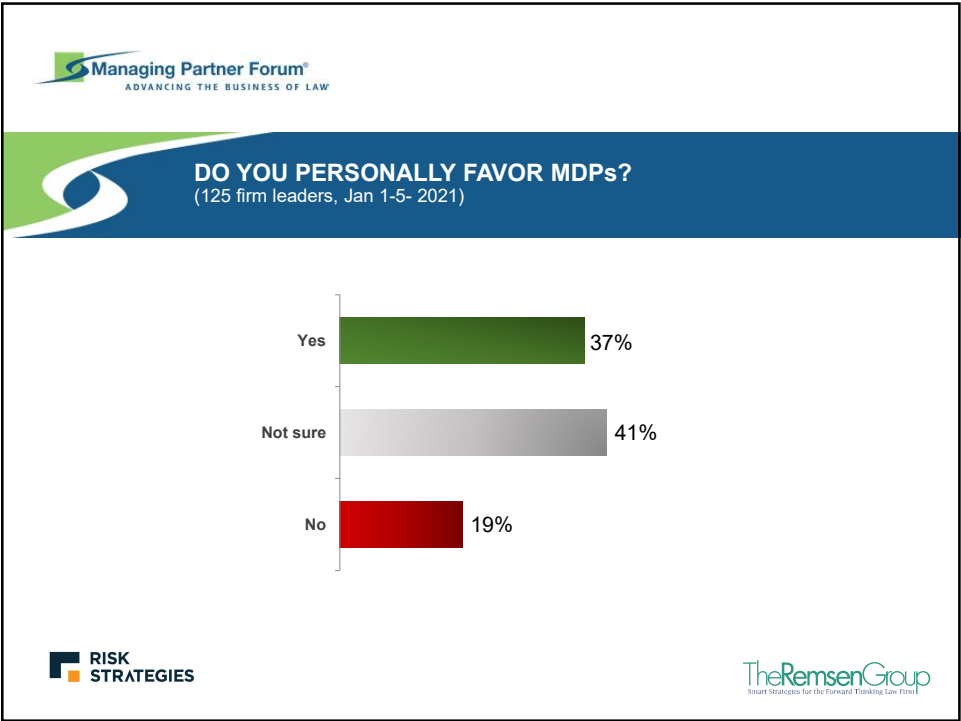
9



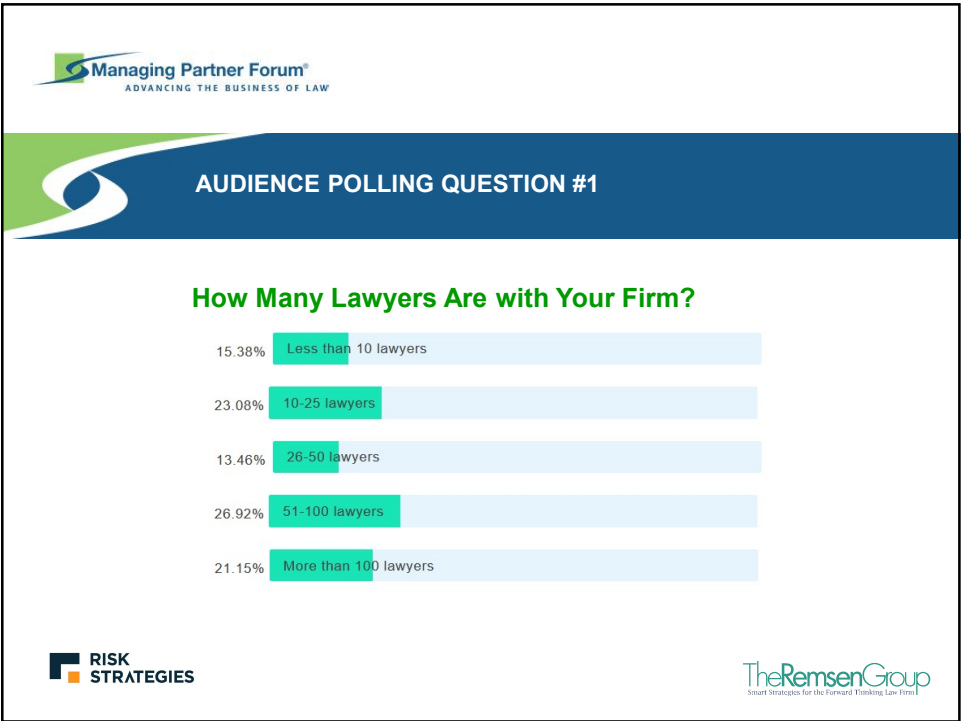
10

MPF WEBINAR

Law Firm of the Future



11



12



Future of Legal Services

Prof. William D. Henderson
Indiana University Maurer School of Law
Editor, Legal Evolution

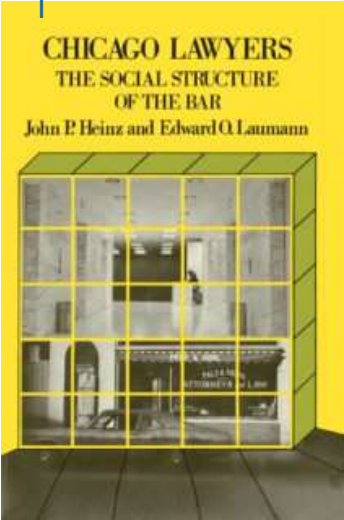
Presented to
**Arizona Task Force
on Legal Services**

Jan 7, 2019
Phoenix, Arizona

13

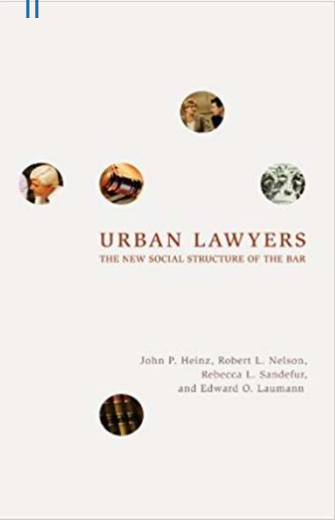
Chicago Lawyers

I



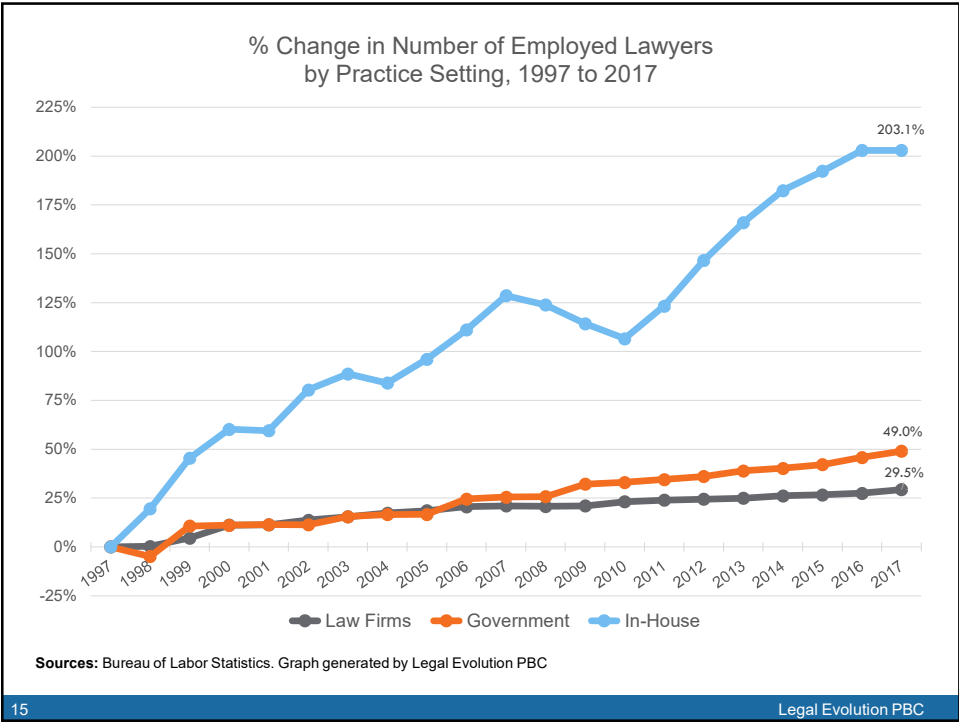
Chicago Lawyers

II



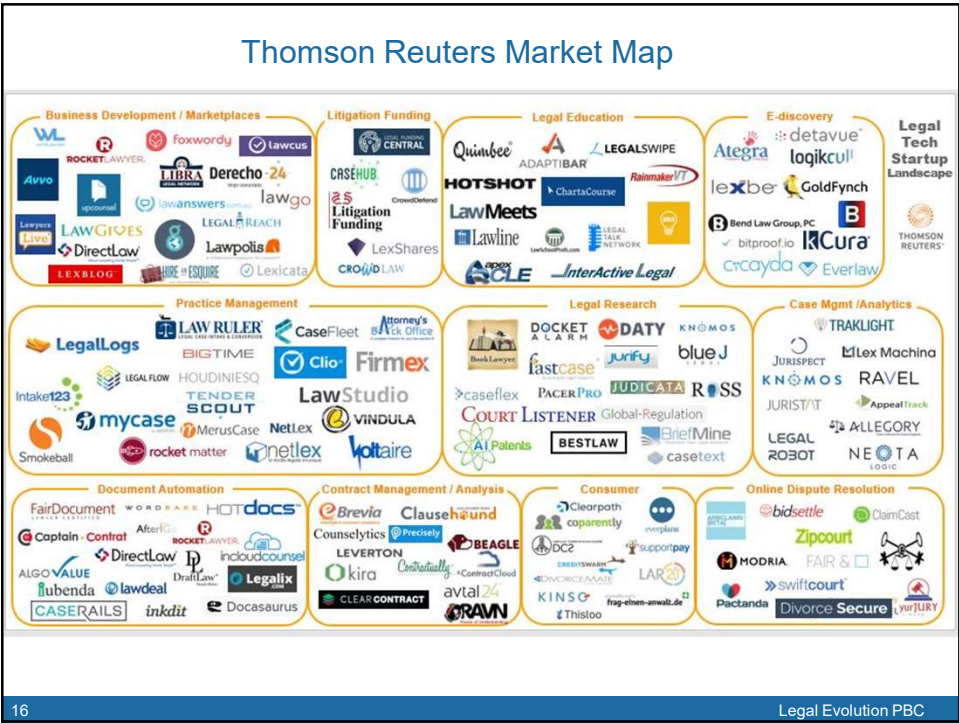
14

MPF WEBINAR
Law Firm of the Future



15 Legal Evolution PBC

15



16 Legal Evolution PBC

16

Key Point #2:

Ethics rules create structure of market

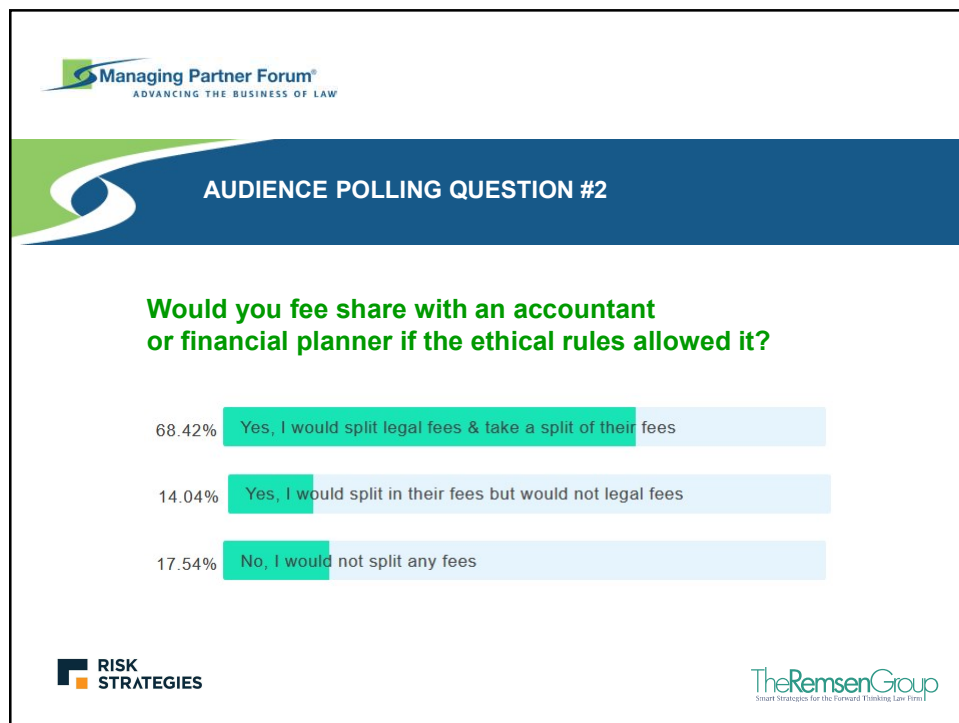
Rule 5.4
Limits on ownership
and co-venturing

Rule 5.5
Who can practice
law with ambiguity
on definition

Rules 7.2-7.3
Limits on marketing
that better match
lawyers with clients

- Rules only protect the minority of public who can afford legal services
- Significantly reduces innovation.

17



18

The Office Of Legal Services Innovation



- Court has authorized 15 entities (in whole or in part) to offer services in the Sandbox in the first 75 days
- Applications come in at a rate of approximately 2 per week.

19

Example of Approved Applications



- Fee Splitting with Accounts and Financial Planners
- Paying for Referrals
- 100% Non-Attorney Owned Entities
- Non-Lawyer Providers
- Non-Lawyer Oversight
- Working with Credit Unions, Insurance Companies, Venture Capital, National Companies
- Phone Apps
- Online Form Based Business

20

MPF WEBINAR
Law Firm of the Future

<https://sandbox.utcourts.gov/approved>

The Office of Legal Services Innovation



[APPLY TO PARTICIPATE IN THE SANDBOX](#)

Approved Applications

Bellow is a list of approved applications from The Office of Legal Services Innovation:

TITLE	LAST MODIFIED
 Amended Auth Packet - Lawpal.pdf	9/22/20
 Amended Auth Packet - Rocket Lawyer.pdf	9/22/20
 Auth Packet - 1LAW.pdf	10/8/20
 Auth Packet - AGS Law.pdf	9/22/20
 Auth Packet - Blue Bee.pdf	9/9/20
 Auth Packet - DSD.pdf	12/9/20

21



Managing Partner Forum®
ADVANCING THE BUSINESS OF LAW

The MPF Webinar Series: The Law Firm of the Future

The Movement Toward Law Firm Ownership Reform

An MPF Webinar with Whitney Cunningham and Carson Pearson

January 6, 2021 – 2:00-3:00pm ET



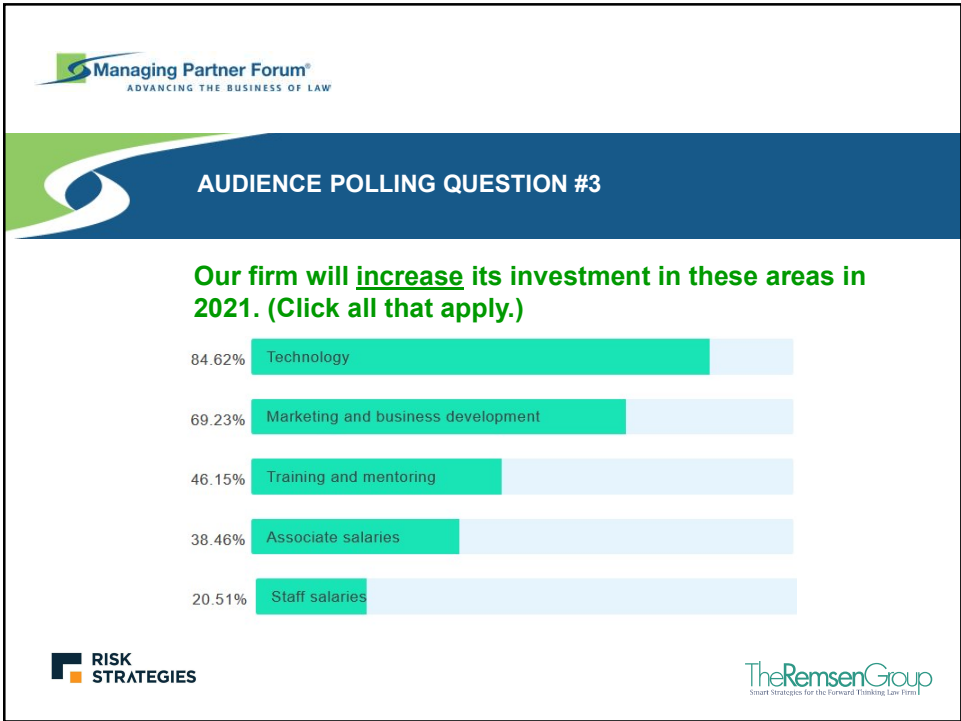


22

MPF WEBINAR
Law Firm of the Future



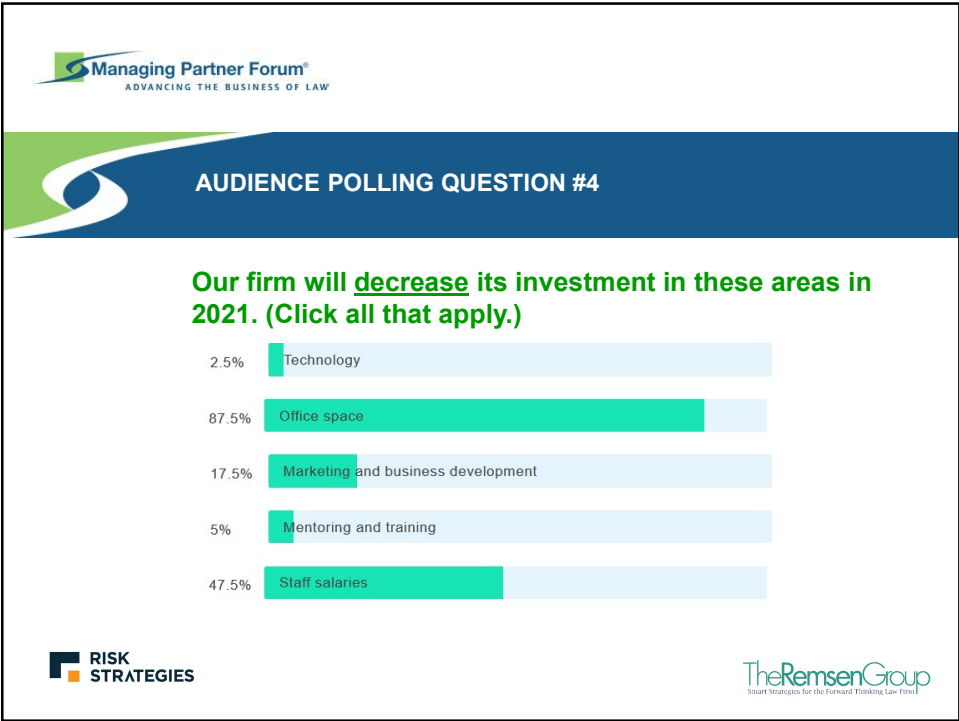
23



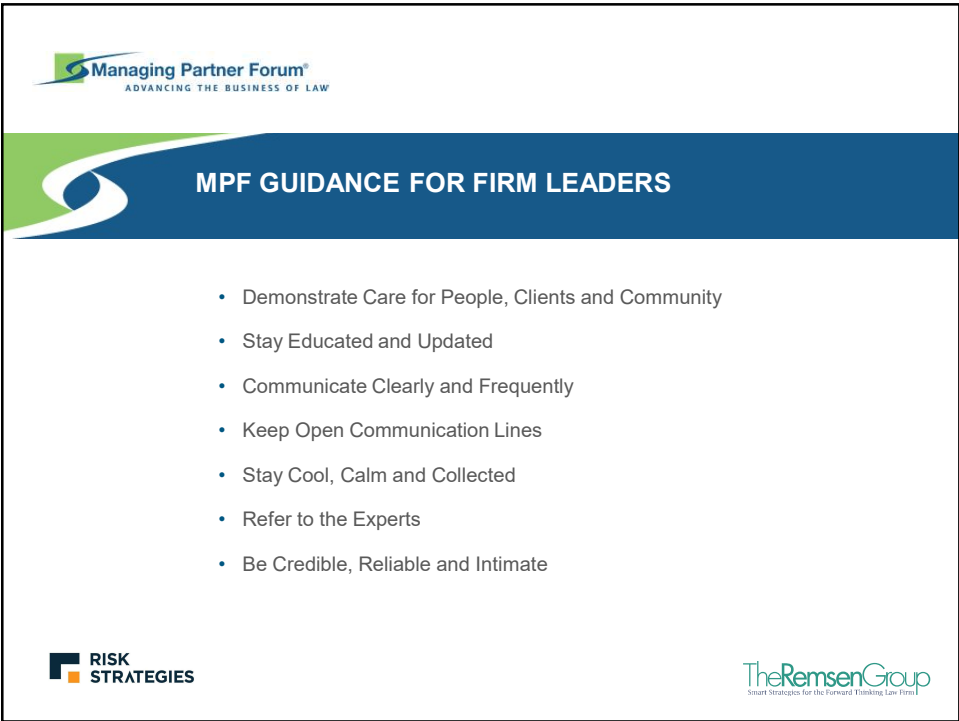
24

MPF WEBINAR

Law Firm of the Future



25



26

MPF WEBINAR

Law Firm of the Future



Managing Partner Forum®
ADVANCING THE BUSINESS OF LAW



CONTACT US

Whitney Cunningham, Esq.
928.774.1478
wcunningham@awdlaw.com

Uri Gutfreund
212.826.9744
uri.gutfreund@risk-strategies.com

Carson Pearson, Esq.
801.495.4104
carson@pearsonbutler.com

John Remsen, Jr.
404.885.9100
jremsen@theremsen.com



RISK
STRATEGIES



TheRemsenGroup
Smart Strategies for the Forward Thinking Law Firm

27



Managing Partner Forum®
ADVANCING THE BUSINESS OF LAW

The MPF Webinar Series: The Law Firm of the Future

The Movement Toward Law Firm Ownership Reform

An MPF Webinar with Whitney Cunningham and Carson Pearson

January 6, 2021 – 2:00-3:00pm ET





TheRemsenGroup
Smart Strategies for the Forward Thinking Law Firm



RISK
STRATEGIES

28

Financial Accounting News

N.Y., Others Mull Moves to Allow Companies to Co-Own Law Firms

By Sam Skolnik

Nov. 23, 2020, 4:45 PM

-
- New states consider legal rules tinkering once confined to the West
 - Changes could boost access to justice—and competition from Big Four
-

New York and Illinois are joining a growing list of states considering legal system rules changes that could give companies more opportunities to compete with law firms.

Connecticut, North Carolina, and Florida are exploring similar moves designed to boost low-income consumer access to legal services. The changes may pave the way for more nonlawyer co-ownership of law firms and open the market to Big Four accounting firms and technology companies.

“Large barriers have been removed for these issues to be normalized,” said Zack DeMeola, director of legal education and the legal profession for the Institute for the Advancement of the American Legal System. “It’s not as much of an uphill climb as it was once was for other states.”

The new state efforts would mark milestones in the drive to make civil legal services more affordable for middle class and poor litigants. Change campaigns that once existed in a small group of Western states, including Arizona, Utah, and California, are now edging closer to the national movement reform advocates seek.

Arizona in August became the first state to formally allow nonlawyers to co-own law firms and other legal service operations, effective Jan. 1. Also in August, Utah approved a pilot program that lets providers such as Rocket Lawyer offer state residents access to the company’s independent attorney network. California, like Utah, is considering a test regime though is several steps behind that state in gaining approval.

Now state court officials in New York and Illinois have formed working groups to study regulatory innovation, the first steps in what could be multi-year rules reform efforts. Several other states, including Florida, North Carolina, and Connecticut now have similar task forces up and running.

Loosening law firm ownership rules in more states would further open an historically closed-off profession to new types of business models, including apps like Legal Zoom. Easing restrictions also may encourage “WalMart Legal”-type walk-up or online stores that offer discounted rates for basic legal services like writing a will or filing for a divorce.

Changes, especially if they occur in enough important legal markets like New York, California, Illinois, Florida, and Washington, D.C., may renew pushes by the Big Four accounting firms—KPMG, PwC, Deloitte, and EY—to practice law in the U.S., a long-held goal.

If enough large states change their rules, “the Big Four could participate in the legal market in ways they have not been able to in the past,” DeMeola said.

The companies have so far been reluctant to comment publicly on changes in Arizona and other states. A KPMG spokeswoman declined to comment, while representatives of the other Big Four companies could not be reached for comment.

Fundamental Principles

New York Chief Judge Janet DiFiore in June announced the creation of the Commission to Reimagine the Future of New York’s Courts. The panel is examining new technology, online platforms and other possible changes, including new regulations, to expand access to justice and improve delivery of services.

A commission working group has interviewed reform experts, including Utah Supreme Court Justice Deno Himonas and former Arizona Supreme Court Chief Justice Scott Bales, said Hank Greenberg, a shareholder with Greenberg Traurig and the panel’s chair.

Greenberg declined to gauge the likelihood that New York will follow Arizona’s path of scrapping the state’s version of Rule 5.4, which prohibits nonlawyers from co-owning legal operations. He also wouldn’t speculate as to whether New York might create a “regulatory sandbox” as Utah did, allowing the state to test new and expanded legal service models, including those with nonlawyer investment or ownership.

The commission “is carefully considering whether such innovations are appropriate for New York and has not reached any final conclusions,” Greenberg said. The panel will likely issue its report within the next few months, he said.

One reform skeptic, Patterson Belknap partner Stephen Younger, a previous president of the New York State Bar Association, said New York has been “steadfastly” opposed to such reforms in the past.

“I would be surprised if they move in the direction of Utah or Arizona,” he said.

New York historically has resisted major rule changes because of deeply held concerns over upholding lawyer independence and legal ethics standards, several attorneys said in February at the American Bar Association’s midyear conference in Austin, Texas.

The state’s prohibition against nonlawyer ownership of law firms, fee-splitting, and the unauthorized practice of law, “is something akin to theology,” Greenberg said at the conference.

A New York City Bar committee last month issued an opinion that lawyers should be able to enter business relationships with law firms that have nonlawyer owners when they’re located in jurisdictions that permit such ownership and other conditions are met.

The Movement Toward Law Firm Ownership Reform

Several large states have joined debate over the roles of nonlawyers

- State that eliminated the rule that forbid nonlawyers from co-owning legal services operations
- States pursuing "regulatory sandboxes" to test legal businesses co-owned by lawyers and nonlawyers
- States and jurisdictions exploring several types of regulatory reform changes
- States that have issued reports recommending reforms, but have not yet acted on them



Source: Bloomberg Law review of state bar and state court records

Bloomberg Law

Nonlawyer Owners

In Illinois, a task force sponsored by the Chicago Bar Association and the Chicago Bar Foundation recommended that lawyers be able to partner with nonattorneys to provide legal tech solutions, among other recommendations, according to a 199-page report issued in late September.

The Chicago task force submitted its report and recommendations to the Illinois Supreme Court in early October, according to Bob Glaves, executive director of the Chicago Bar Foundation.

The court has formed a "special working group" made up of representatives from two of the court's standing committees, Glaves said. The working group will conduct a detailed review of the Chicago report and make recommendations by early February, he said.

"The Court's approach to reviewing it on an expedited basis with the help of this internal working group makes good sense," Glaves said.

There's also been a push in states around the country for programs that fund and train limited license legal technicians. Such programs are designed to lower family law court costs by letting people seek help from limited licensees instead of fully accredited attorneys.

Though Washington state earlier this year dismantled its limited-license program, four states, Colorado, Minnesota, New Mexico, and Oregon, are at different stages in developing pilot programs, DeMeola said.

Big Four Blues

The moves in New York and Illinois come as Big Four accountancies have been bolstering their legal services arms elsewhere around the globe. At least one, Deloitte, has also launched a partnership with New York-based law firm Epstein Becker Green.

The companies pose a potential threat to law firms not just because accountancies boast annual revenues in the tens of billions of dollars, which dwarf those of the largest U.S. firms, or because they're tech-forward in ways most law firms aren't.

"The Big Four possess versatile, adaptive business models that have been very effective," DeMeola said. "Law firms, not so much."

Boosting Momentum

Reform opponents have expressed concerns about potential harm to legal consumers, in part because of ethical hazards that nonlawyer profit motives may pose.

Yet some legal ethics experts believe reform is needed—especially in the wake of Covid-19 and resulting economic dislocation—and that there are ways to boost access to justice while protecting consumers.

Two national groups, the ABA and Conference of Chief Justices, earlier this year gave their respective backing to states looking to test innovative approaches. The ABA passed its resolution after a tough convention fight.

"All of this should be done carefully—and that's the point of the Utah sandbox," said Jan Jacobowitz, immediate past president of the Association of Professional Responsibility Lawyers.

Not all state efforts will allow for the formation of regulatory sandboxes like Utah's, or grant other significant changes to the rules, Utah Supreme Court Justice Himonas said.

"But that's okay," he said. Even smaller reforms will help alleviate the access-to-justice crisis and add to a sense that momentum is building.

"I suspect that 10 years from now, allowing for outside ownership will be ubiquitous," Himonas said.

The change will happen, he said, "once it's been shown that the sky has not fallen, and that disciplinary rates haven't gone through the roof" in states that opened up their systems.

To contact the reporter on this story: Sam Skolnik in Washington at sskolnik@bloomberglaw.com

To contact the editors responsible for this story: Chris Opfer at copfer@bloomberglaw.com; John Hughes in Washington at jhughes@bloombergindustry.com

More from Bloomberg Tax

Latest Stories in Financial Accounting News

Covid Vaccine Rollout Puts R&D Accounting Under Fresh Scrutiny

The groundbreaking research behind one of the most anticipated scientific developments in years would seem like a slam-dunk boost to pharmaceutical companies' 2020 earnings. It's not. Thanks to U.S. accounting rules developed more than four decades ago, the research underpinning coronavirus vaccines is counted as an expense that dings earnings, not an asset that enlarges it.

DuPont Secures Arbitration of Chemours Suit Over PFAS Liability

Chemours Co. must arbitrate claims that its former parent, DuPont de Nemours Inc., deceived it about billions in liabilities related to PFAS, a class of "forever chemicals," when the companies separated in 2015, Delaware's top court ruled Tuesday.

Businesses Buying Others Get Guidance on Revenue Accounting

When one business buys another and acquires half-filled contracts with customers as part of the deal, the business must look at the promises in the contract and follow revenue recognition accounting guidance, U.S. accounting rulemakers proposed on Tuesday.

© 2020 The Bureau of National Affairs, Inc. All Rights Reserved

BY WHITNEY CUNNINGHAM

In Favor of Alternate Business Structures



The Arizona Supreme

Court Task Force proposes to eliminate ER 5.4, which generally prohibits sharing fees with nonlawyers, and specifically disallows nonlawyer ownership or managerial control of a law practice, is a good and important proposal whose time has come.

Lawyers have been prohibited from partnering with nonlawyers for a long time, and so too deliberations of whether they should be. In 1982, the ABA's Kutak Commission proposed allowing alternate business structures in which lawyers might ply their trade within organizations owned or managed by nonlawyers so long as there would be no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, confidences would be maintained, and fees would be fair.¹

That proposal was rejected. Traditional hierarchical law firm structures were preserved, and an entire generation's worth of entrepreneurship and innovation within the legal industry quelled on pain of professional discipline.

There are good reasons why lawyers should want to explore new ways of doing business, several of which are contained in the task force report. Most obvious may be the large swath of our communities that are

unable to access affordable legal services. The proof, set forth elsewhere in this issue, that the legal needs of many are unmet, is compelling and un rebutted.

Ethics rules such as 5.4, by design, are intended to restrict the ability of lawyers to deploy innovative solutions to meet market demands. This is done under a regime of prophylactic limitations (no partnering with nonlawyers, no fee-sharing with nonlawyers). The argument goes that professional independence is key, so nonlawyers must not be allowed to sway the judgments of lawyers.

The irony is that as lawyers we spend our days helping clients navigate legal and moral challenges, but we are apparently so lacking in skills of self-reflection that we cannot navigate such challenges for ourselves. We must be cocooned from the pernicious influence of those who have not sat for the bar exam.

Eliminating ER 5.4 removes an unnecessary constraint and facilitates innovation. To be clear, permitting alternate business structures is not an access to justice initiative, though new structures may further that goal better than all our collective sermonizing about the importance of pro bono work.

New partnerships will reach underserved market segments to the benefit of legal service consumers—and profitably for the companies that do it well. Those practicing in traditional law firms will no longer be required to repurpose their most skilled lawyers as business managers to run the firms. They may instead partner with actual business managers and keep their skilled lawyers doing what they do best. Current partnership structures and tax rules that more or less mandate emptying operating accounts at the end of each fiscal year are not conducive to raising capital, but new structures that permit lawyers to team with capital managers will improve the profession's ability to compete in a capital-intensive marketplace. The list of advantages new business structures will bring is as diverse as the businesses themselves are likely to be.

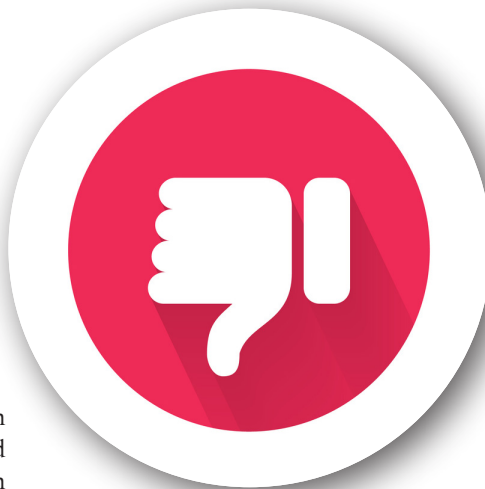
Some of these changes may be disruptive, but to block change to avoid disruption is merely protectionist unless a compelling case can be made that lawyers are unable to navigate this new system. There is no compelling case of that. Consider that lawyers who represent businesses often assist their clients in partnering with others who bring value, such as expertise or capital. Lawyers create these partnerships by writing contracts that define who makes decisions, how work gets done, and, if profits come, how they are divided. For clients, these partnerships bring access to expertise, capital, innovation, technology, scalability and myriad other advantages.

—continued on p. 36

WHITNEY CUNNINGHAM is a former President of the State Bar of Arizona and is the managing partner at Aspey Watkins & Diesel in Flagstaff.

BY HON. PETER B. SWANN

The Case Against the Elimination of ER 5.4



This proposal is important. It is as worthy of your attention as any issue that has ever been discussed in this publication. If adopted, it will permanently upend the Arizona legal system, with no way back. After the many task forces and rule changes that our profession has seen over the past few years, it's easy to get "rule fatigue," ignore the changes, and assume life will just go on as usual. Not so here.

By opposing the alternative business structure proposal, I am not (as the lead article might suggest) nostalgically clinging to a Jimmy Stewart image of the legal profession from years gone by. Nor am I of the view that all is currently well with the legal profession. But the proposal currently before the Supreme Court is the wrong medicine that will make today's problems seem quaint by comparison. (Remember the '80s, when private arbitration was going to save the world?)

Legal services are too expensive, and the legal system has evolved to make resolution of even simple disputes so slow and labor-intensive that most of the public is denied meaningful access to the courts. The task force was supposed to look for solutions to these problems, and it is no small irony that when lawyers gathered together under the auspices of the Supreme Court, they turned their attention to finding ways to enrich themselves. (I suggested that the task force look inward, at ways of streamlining court processes to deliver justice efficiently, and hope that a future task force will do so.)

As Mr. Cunningham acknowledges, this

is "not an access to justice initiative." And it truly has nothing to do with access to justice. Vague references to "innovation" and "a capital-intensive marketplace" make good fodder for brochures, but they do nothing to explain how this proposal would benefit the public or the profession. And they do nothing to explain why those with no concern for fiduciary obligations (including disbarred lawyers) should own the profession. Perhaps that's why no other state has adopted such a proposal.

So what would this proposal do? It would allow literally any individual or corporation, foreign or domestic, to own law practices—as many as they want. As we all know, a partner has a very different impact on a business than a lender. Businesspeople, including lawyers, instinctively know that they have to operate in a way that benefits their partners. When those partners are lawyers, there is an intrinsic understanding of what the profession requires. But when they are not, profit becomes the sole motivation.

My roots are in the private sector, and I embrace the notion that to boost profits, one can: (1) raise rates, (2) cut costs and (3)

compete more effectively. So what would this look like in a real practice?

Start with the insurance defense model. Thanks to ER 1.5, a lawyer representing an insured owes an undivided loyalty to the insured, despite the fact that the insurer pays the bills. But the insurers are savvy consumers, and frequently limit the services that they will pay for even if the client's best interests demand more. Ask anyone who does that work, and they will tell you that their professional life is more difficult with such restrictions and that they often fear for their clients' interests. (They also generally earn less than other lawyers). Yet insurance companies have a critical attribute that investors do not: They have skin in the game. An insurer has an incentive to win cases, because it will ultimately bear the full cost of defeat.

While an insurer's self-interest provides an incentive to provide adequate representation, an investor's self-interest does not. An investor has no reason to care if a client has prevailed—it cares only about whether the value of its capital has been maximized. Investors can be expected to require practice

—continued on p. 40

HON. PETER B. SWANN is the Chief Judge of the Arizona Court of Appeals, Div. I. Judge Swann served on the Task Force that advanced the proposal to eliminate ER 5.4, as did Judge Maria Elena Cruz of Division I. The views expressed here are those of Judge Swann—they are not advanced on behalf of the Court of Appeals.

—continued from p. 35



techniques that represent the lowest cost, not the best measures for a client. And if the notion is that consumers will somehow enjoy lower-cost services, the necessary consequence is that many lawyers will earn less while working in a more regimented environment.

Under current law, lawyers owe an undivided fiduciary duty to their clients. Lawyers who have partners are safe in the knowledge that those partners, by virtue of their status as lawyers, owe the same duties to their clients. The current proposal would shatter that model. Lawyers in partnership with nonlawyers would take on new fiduciary duties to their partners, and those duties will frequently conflict with the duties they owe to their clients. In effect, the proposal *creates* conflicts of interest rather than combats them.

The response by the proponents is that lawyers already face tough challenges subordinating their personal interests to those of clients, so what's another challenge? Lawyers, under this view, already have ethical spines of steel and are well-equipped to deal with the challenges that partnerships with nonlawyers will present.

Anyone who has spent time in the profession knows that this is wishful thinking. Lawyers are already pushed to their psychological limits by the demands of the profession, and many would be unable to resist the instructions of the entity writing their paycheck. Lawyers, after all, are human.

At best, the task force proposals are unfinished work. There is no provision for regulating the new entities it would create, only an acknowledgment that entity regulation is an important topic for future study. That study is now in its early stages, and includes ambitious goals for licensing the new entities, deciding which business models to approve, and creation of a discipline system. While such regula-

tions might go a long way to mitigating some of the concerns I express here, they haven't been written, and a successful implementation would mean the creation of an entirely new bureaucracy within the Supreme Court. The creation of a new agency and a set of business-savvy rules to guide it cannot be left as afterthoughts in a footnote—they must be scrutinized by the bar and the public before any credible case can be made that this proposal does not present serious risks to the justice system.

One critical issue that even the anticipated entity-regulation proposal does not address is conflicts of interest. Under the proposal, there is no meaningful impediment to nonlawyers ignoring the conflict-of-interest rules that now govern (and would still govern) lawyers. A nonlawyer could own multiple firms—even on different sides of the same case. In smaller communities, a nonlawyer could effectively monopolize the entire practice of law. And nothing in the current proposed rules would require transparency—a client would not need to be told that her lawyer is in partnership with an entity, much less one that might also



R-20-0034

Read Petition R-20-0034 and comment on it at:
<https://www.azcourts.gov/Rules-Forum>
 (under the sub-forum "Rules of the Supreme Court").



be controlling the other side of the dispute. Even without ownership of multiple law firms, the prospect for real (and undisclosed) conflicts between the investors' business interests and the clients of the lawyers they control is obvious.

Who owns these investors? We won't know, because the proposal includes no disclosure requirements. Even lawyers working in one of these law firms would not necessarily know where the true capital is coming from. In federal court, lawyers must submit disclosure statements concerning the ownership of their corporate clients to ensure that the judges do not have hidden conflicts. Under this proposal, the law firms themselves would carry an intrinsic risk of undisclosed conflicts. These are real problems that the task force simply did not address, and hopefully will be addressed in the future code proposals.

Lawyers enjoy a privileged position in the court system and are frequently referred to as officers of the court. As a member of the court system, I take that status very seriously. Indeed, that judicial imprimatur is part of what lawyers

have to sell, and the Court should resist the suggestion that it make that status available for sale by anyone and everyone. It is not merely that a lawyer has managed to pass the bar exam—a lawyer also undertakes a solemn oath to the legal system and endures significant restrictions on his or her freedom for the privilege of practicing law.

Most lawyers struggle mightily to fulfill their duties under the current system, but many already fall short. Yet under this proposal, entities who need not be identified, and individuals who would never pass character and fitness, will be free to call the shots for lawyers without any concern for ethical rules. The response, again, is that lawyers themselves are still bound by the rules and can be trusted to say “no” to the demands of their new partners. This is an inspiring notion, but it is also completely unrealistic.

I acknowledge the possibility that with a tight set of entity regulations, a meaningful conflict of interest rule and mandated transparency, outside capital might be safely incorporated into the profession. But before

you, I or the Court form an opinion, these rules must be written, published and scrutinized. Will those rules go far enough? Or will they create a cumbersome mess of regulation that stifles the “innovation” we hope for? The creation of a new regulated industry is no small task, and these questions should be answered *before* the proposal is adopted.

The proposal in its current form imposes no limits on which nonlawyers can participate in the practice of law. It contains no architecture for benign alternative business structures. And it contains no “pilot project” element. The pending petition asks the Arizona Supreme Court to become an island in the American legal system, not merely dipping an exploratory toe in the water but irrevocably leaping off the cliff into a completely uncharted future.

When you ask why no other state has adopted such a proposal, bear these facts in mind. Though some creative approaches to systemic reform are doubtless worth study, this proposal is simply not ready for prime time. **AZ**



If lawyers are permitted to participate in this arena of varied business structures, they too will gain access to the same advantages. The winners of this shift will include consumers of legal services, who will see new ways to access legal help, at affordable prices, provided by lawyers (or, if the Supreme Court approves another recommendation of the task force, by a new category of licensed legal technician).

Arguments against eliminating ER 5.4 sometimes give voice to a nostalgic reaction to preserve an honorable profession and way of life.

In reality, the argument against the rule change is really an expression of a lack of confidence in lawyers to do our jobs under changing market conditions. If lawyers are not prohibited from partnering with nonlawyers, the argument implies, then we will fail to preserve confidentiality, loyalty and professional independence.

The idea that nonlawyer profit-seekers

and the pressures they would bring would be the legal industry's boogeyman is a myth. Lawyers already operate under the pressures of profit-taking. Every spring we read about the latest eye-popping profits-per-partner statistics for the AmLaw 100, and every fall the equally eye-popping end-of-year asso-

The argument against the rule change is really an expression of a lack of confidence in lawyers to do our jobs under changing market conditions.

ciate bonuses for these same firms. Young associates labor under the billable hour and collections requirements of their bar-credentialed employers. All practitioners navigate the demands made by clients, partners, opposing counsel, judges, banks, landlords and even family. Lawyers in industry and insurance law departments already balance the

pressures of their corporate boards. Lawyers as well as anyone know how to handle pressure.

As lawyers, we are committed to key, impactful duties, such as confidentiality (ER 1.6), loyalty (ER 1.7), and professional independence (ER 1.8). The Task Force proposes no rule change that lessens any of these obligations. The new partnerships that will result by allowing nonlawyers and lawyers to be in business together must preserve these and other fundamental aspects of lawyering currently and prospectively set forth in the Ethics Rules. A lawyer who violates them in the name of entrepreneurship will be disciplined accordingly.

Stated differently, allowing nonlawyer ownership does not mean *any* nonlawyer ownership structure or business practice is permissible. The range of possibilities is broad, but it is bounded by our core, fundamental obligations to clients.

The rule changes proposed by the task



force do not give nonlawyer investors and managers any rights not already held by lawyer investors and managers. Every lawyer partner in a professional corporation has the same right to profitability that a nonlawyer would have. Eliminating ER 5.4 does not create this tension. Keeping ER 5.4 does not alleviate it. Of all professions, though, lawyers are specially equipped to create these new structures in a way that preserves the fundamentals of our profession.

The time to act is now. It may be true that the attorney-client relationship is a sacred fiduciary relationship, but only for those corporations and individuals wealthy enough to participate in our current system. Increasingly, individuals and businesses are looking for ways to avoid us altogether. When this is not possible, affording legal help comes at a steep price. Anyone whose practice includes representing middle-class individuals or mom-and-pop businesses

knows that accessing legal help involves tapping retirement accounts or credit cards, and mortgaging future plans and dreams. Even well-funded clients actively pursue alterna-

Accessing legal help involves tapping retirement accounts or credit cards, and mortgaging future plans and dreams.

tives to traditional legal services—which is why the fastest growing segment of employers of lawyers is corporate law departments, not law firms or the government.

A final note concerning regulation of entities. Our Supreme Court is considering proposals on how to regulate entities in which nonlawyers may have ownership or managerial interests, and such regulation will undoubtedly play a helpful role to ensure core duties are preserved, but the task

force recommendation to eliminate ER 5.4 does not depend on such entity regulation. The duties imposed by the Ethics Rules apply to lawyers, irrespective of the business structure in which they practice. Law firms are not disciplined. Lawyers are. One lawyer's transgression is not, under the current system, imputed to other partners unless that other partner individually committed sanctionable conduct. In other words, we as lawyers have the same duties, but there is no unified duty. We hold ourselves individually responsible, and we will continue to do so moving forward. **AZ**

endnote

1. ABA Commission on Ethics 20/20 Working Group on Alternative Business Structures, April 5, 2011, available at <https://bit.ly/2SJUNPj>.