How Notions of Professional Independence Constrain Lawyers

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Introduction

In November 2020, the D.C. Bar Rules of Professional Conduct Review Committee ("the D.C. Bar Committee") issued a set of proposed changes to the D.C. Rules of Professional Conduct ("D.C. Rules"). These changes were meant to address client-generated engagement letters and outside counsel guidelines dictating the terms of relationships with counsel.[1] These changes included five general amendments meant to ensure greater lawyer independence. As laid out in the Bar Committee's draft report, the proposed amendments would:

- Amend Rules 1.7 and 5.6 to remove the . . . open-ended permission for a lawyer and client to expand the scope of what constitutes a conflict of interest under the D.C. Rules, except where broader coverage is required by other law;
- Amend Rule 1.8 to prohibit a lawyer from proposing or accepting conditions that impose liability on a lawyer that is broader than the liability imposed by statute or common law;
- Amend Rule 1.16 to make clear that a lawyer may retain copies of client files, including the lawyer's work product, but may not use that work product in other matters if the Rules' confidentiality provisions prohibit such use;
- Amend Rule 1.6 to make clear that a lawyer is not only permitted, but obligated, to use general (i.e., not client-specific) knowledge gained in the course of a representation for the benefit of subsequent clients; and
- Amend Rule 1.16 to provide that where a lawyer has agreed that her client may make unilateral changes in the terms of a representation, the lawyer may withdraw if the client makes a material change to which the lawyer is unwilling to assent.[2]

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1. *Committee Invites Comment on Proposed Rules Changes Relating to Client-Generated Engagement Letters and Outside Counsel Guidelines*, D.C. B. (November 13, 2020), https://www.dcbar.org/news-events/news/committee-invites-comment-on-proposed-rules-change [https://perma.cc/RBS5-8WUA].

2. D.C. B. Rules of Prof'l Conduct Rev. Comm., D.C. B., Draft Report Proposing Changes to the D.C. Rules of Professional Conduct Relating to Client-Generated Engagement Letters and Outside Counsel Guidelines (Nov. 2020), https://www.dcbar.org/getmedia/47f95789-27ca-4369-bbf4-3cab2097c32e/Draft-Report-on-OCGs-for-comment-11-12-2020-FN [https://perma.cc/6AY9-DZHA].

These provisions were suggested in tandem and purport to have the same objectives. However, they do not seem cohesive. The first proposed amendment, limiting a client and lawyer's ability to expand or contract the definition of conflict of interest, stands in contrast to the third, which protects the lawyer's ability to benefit from their own work product. The third proposed amendment is an example of a reasonable suggestion that serves to protect lawyers and their choices even after the formal part of their relationship with a client ends. The third is an appropriate recommendation that increases lawyers' power of choice. The first proposal, on the other hand, goes too far, serving to restrict lawyerly discretion. The D.C. Bar Committee's explicit aim behind these proposed amendments is to "allow[] clients and lawyers latitude to contract with one another as they see fit," balanced by a desire to "protect[] essential elements of the practice of law."[3] Giving lawyers "open-ended permission" to determine the parameters of their relationships with their clients is the embodiment of lawyer autonomy.[4]

Though overblown definitions of conflicts of interest are not good for the legal profession in theory, lawyers are the best equipped to determine the terms they are comfortable with. It is within a lawyer's job description, after all, to assess contracts and determine legality and fairness. Restricting a lawyer's ability to do so through this amendment is a means of narrowing attorney autonomy under the guise of protecting the field. In reality, the D.C. Bar Committee never explains what it means by "independence" and so proposes rules with no clear perspective or specific intention.[5]

This Note will proceed in four parts. Part I will introduce the D.C. Bar's proposed rule changes and place it in the context of the D.C. Bar's existing Rules of Professional Conduct. Part II will provide an overview of the different conceptions of the professional independence of lawyers and the relationship of the D.C. Bar to this value. Part III will examine the increasing prevalence of outside counsel guidelines and point out some misconceptions about them that may have led to the D.C. Bar's proposed rule. Finally, Part IV will discuss why, considering Parts I through III, the D.C. Bar's proposed rules are ill-advised.

I. THE AMENDMENTS PROPOSED BY THE D.C. BAR COMMITTEE

At first glance, D.C. Rule 1.7, "Conflict of Interest," is not so different from Model Rule 1.7 published by the American Bar Association ("ABA").[6] The ABA's Rule 1.7 is concerned that "the representation of one client will be directly adverse to another client,"[7] while the D.C. Rule prohibits the advancing of "two

3. *Id*. at 3 ("These essential elements include access to legal services, confidentiality of client information, loyalty to clients, and the independence of lawyers.").

4. *Id* at 5.

5. D.C. RULES OF PROF'L. CONDUCT, R. 1.7 (2018) [hereinafter D.C. RULES].

6. *Compare id*., *with* MODEL RULES OF PROF'L CONDUCT R. 1.7. (2018) [hereinafter MODEL RULES].

7. MODEL RULES R. 1.7.

or more adverse positions in the same matter."[8] Functionally, the two are rather similar. However, the ABA explains the importance of attorney independence as a justification for the rule: "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client."[9] Meanwhile, the D.C. Comments only mention the independent judgment of attorneys when it comes to sexual relationships that may impair a lawyer's judgment.[10] It is strange that the D.C. Bar claims to protect lawyer independence in its proposal to amend Rule 1.7 when it has not shown itself to be particularly concerned with this value elsewhere in the rules. It also seems ironic that the D.C. Bar Committee purports to protect the independence of lawyers as it advocates for a rule that would constrain lawyer discretion. As discussed below, lawyer independence can have several different connotations; it is not clear which of those connotations the D.C. Bar Committee had in mind, if any, when it explained that the 2020 proposed rules were meant to address concerns about lawyer independence.[11]

II. DIFFERENT CONCEPTIONS OF THE PROFESSIONAL INDEPENDENCE OF LAWYERS AND THE D.C. BAR

The D.C. Bar *says* it is concerned about lawyer independence. In the *Model Rules of Professional Conduct*, "Professional Independence of a Lawyer" underscores the importance of the lawyer's responsibility to her clients, regardless of who is paying the fees.[12] The "traditional" limitations on sharing fees and the prohibition of partnerships between lawyers and nonlawyers reveals an explicit concern that the person who pays a lawyer has the ability to influence the lawyer's judgment and how the lawyer does their job.[13] D.C. Rule 5.4 starts off much the same way but takes a sharp turn in two key ways: it allows fee sharing in limited situations, and also authorizes lawyers to form and operate Alternative Business Structures ("ABSs").[14] In fact, the D.C. Bar is one of only two state bar associations that has departed from the *Model Rules* in allowing ABSs.[15] A key, oft-cited reason for the ABA's prohibition of ABSs is that they will be harmful to lawyers' professional independence.[16] It is interesting then, that the D.C. Bar, which allows for this apparently dangerous structure, is considering the aforementioned

8. D.C. RULES R. 1.7
9. MODEL RULES R. 1.7. cmt 1.
10. D.C. RULES R. 1.7.
11. D.C. B. RULES OF PROF'L CONDUCT REV. COMM., *supra* note 2, at 14.
12. MODEL RULES R. 5.4
13. *Id.*
14. D.C. RULES R. 5.4.
15. N.Y. Bar Comm. on Prof'l Ethics, *Formal Opinion 2020-1* (2020).
16. Jayne R. Reardon, *Alternative Business Structures: Good for the Public, Good for the Lawyers*, 7 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 304, 313 (2017) (explaining that although Washington, D.C has allowed ABSs "for decades," there have been several attempts to "legalize" ABSs elsewhere that ultimately fail).

proposals. If we are referencing the same lawyer independence, it is contradictory and confusing to care about it in one place but not another.

In fact, "lawyer independence" is a loaded term that has been used in a variety of contexts. One key connotation of "lawyer independence" is lawyers' independence from their clients, while another key interpretation, implicit in Rule 5.4, is "independence from the pressures and influences of others who might compromise lawyers' loyalty to clients."[17] This designation does not come from the D.C. Bar Committee itself, which never actually explains what it means by 'independence.'

These proposed amendments sometimes go too far in that they effectively threaten to unduly constrain lawyer independence from the other direction. In other words, the D.C. Bar, in trying to protect lawyers from their clients, ends up limiting lawyer independence in unwarranted ways: "[i]f professional independence is to be maximized, the lawyer would presumably have discretion in all cases."[18] Whether or not it should really be the job of the D.C. Bar to control the activities of lawyers when their activities are neither illegal nor unethical is an often-debated question, and it's a question that undergirds this entire debate.[19]

The D.C. Bar Committee's proposed amendment to Rule 5.4 is supposedly in pursuit of lawyerly independence, and yet this independence is never defined.[20] Professor Bruce Green raises the question of whether the idea of lawyer independence is too fuzzy ("one can rationalize almost any procedural measure as a safeguard of 'independence'") and even challenges the motivation behind independence concerns:

> though often clothed in the high-minded rhetoric of protecting the ethical standards and independent judgment of the legal profession, [the . . . bar's resistance to new modes of practice] has been to a considerable extent motivated by . . . desires to protect the incomes of lawyers from economic competition or their status from erosion by groups perceived as interlopers.[21]

If the D.C. Bar is simply using the value of independence as a pretext for proposed rules that protect lawyers from economic competition, it then makes more sense why it did not bother to explain what it meant when it invoked that value. If a lawyer's actions do not break the law or some egregious ethical norms, the bar should not need to protect against that behavior. The disconnect between the "lofty ideals" that the D.C. Bar expresses concern about and the actual model

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17. Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued*, 46 AKRON L. REV. 599, 613–19 (2013) ("'Professional independence' also refers to individual lawyers' independence from third parties who might cause lawyers to compromise their professional duties to the client or, to a lesser extent, the public.").

18. Evan A. Davis, *The Meaning of Professional Independence*, 103 COLUM. L. REV. 1281, 1281 (2003).

19. *See infra* p. 6 and note 33.

20. Green, *supra* note 17, at 618.

21. *Id*. at 619 (quoting Robert W. Gordon *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988)).

rules shows that the true motivations behind the rules are not rooted in a consistent idea of independence, if they are rooted in independence at all.[22] This disconnect manifests in the fact that D.C. allows ABSs.

A. THE D.C. BAR'S TOLERANCE OF ALTERNATIVE BUSINESS STRUCTURES IS INCONGRUENT WITH ITS SUPPOSED CONCERN OVER LAWYER INDEPENDENCE

The D.C. Bar seems to be more lenient about lawyer independence than almost every other state, as it is one of only two states that allows ABSs.[23] There seems to be a discrepancy between this leniency and the fact it is now trying to crack down on lawyer independence.

An ABS is a business format in which lawyers can practice law outside of the three traditional business organizations (sole proprietorships, partnerships, or limited liability companies) or in which lawyers share fees with nonlawyers.[24] Critics of ABSs cite concerns over the practicing of professional independence: "[p]rofessional independence, the argument goes, will be undermined because lawyers naturally will prioritize profits and the interest of their shareholders or nonlawyer managers over their clients' interests."[25] There are also those who express concern over lawyers' abilities to maintain confidentiality once nonlawyers are involved in the lawyer-client relationship.[26] While many states prohibit ABSs, there have been several studies showing increasing segments of the population who do not have access to legal services.[27] ABSs could be one potential solution to this issue.

So, it is only fair to question the motivation behind the proposed new rules: Are these practices truly a threat to lawyer independence? What does the bar

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22. *Id.*

23. Debra Cassens Weiss, *DC Bar considers relaxing its already-lenient rules to allow nonlawyer ownership of law firms,* A.B.A. J. (Jan 27, 2020), https://www.abajournal.com/news/article/dc-bar-considers-relaxing-its-already-lenient-rules-to-allow-nonlawyer-ownership-of-law-firms ("The D.C. Bar's rules are already the most lenient in the nation because they allow lawyers and nonlawyers to jointly own law firms that only provide legal services . . . . Now the D.C. Bar wants to assess whether its already-lenient rules are too restrictive.") [https://perma.cc/N8NU-357Z].

24. *See* Reardon, *supra* note 15, at 308–09. In this Article, ABSs refer to any of the following:

> (1) a business structure allowing nonlawyers to have a larger percentage of ownership or managerial interest; (2) a business structure permitting passive investment in the ABS; or (3) a business structure allowing nonlegal as well as legal services (sometimes referred to as multidisciplinary practices or MDPs). Except in a limited manner prescribed in two jurisdictions, all of these structures would run afoul of the current rules of professional conduct in effect in the United States that prohibit fee sharing with nonlawyers (Rule 5.4(a)–(b)) and the unauthorized practice of law (Rule 5.5).

Id.

25. *Id.* at 344.

26. *Id.*

27. *Id.* at 320, 335.

mean by lawyer independence in this context? Will these new proposals solve the problem they are intended to solve?

B. THE MURKINESS SURROUNDING THE D.C. BAR'S CONCEPTION OF LAWYER INDEPENDENCE CASTS DOUBT ON THE MOTIVATIONS BEHIND THE PROPOSED CHANGES

Notions of the importance of lawyer independence have existed since the dawn of the legal profession.[28] However, conceptions of independence have changed over time.[29] Independence has, at times, referred to lawyers' independence from clients.[30] This view was rooted in the ideals of lawyers being almost like civic teachers or advisors.[31] However, it has also often connoted independence from the pressures and influences of others who might compromise lawyers' loyalty *to* their clients.[32] This independence from the influence of third parties centers on a lawyer's character.[33]

Justice Brandeis lamented the state of the legal profession: "lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people. . . ."[34] Robert Gordon laments the status of lawyers as "value neutral technicians," arguing that in adopting this role, lawyers avoid addressing important ethical dilemmas and instead simply use illegality as a guide. The remedy for this, Gordon argues, is for the bar to "place greater emphases on the lawyer's role as an independent professional—particularly, on his responsibility to uphold the integrity of his profession."[35]

Robert Vischer uses trust instead of independence to analyze the changing relationship between lawyers and their clients, and invokes the famed and fictional Atticus Finch; Vischer invokes Atticus not because of independence but because of his trustworthiness.[36] Vischer argues that affective trust is key and "distinctive" to lawyers, and goes beyond self-interest.[37] For Vischer, this is a trust rooted in a lawyer's relationships with the public, and with their clients specifically.[38]

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28. *See* Green, *supra* note 17, at 607.
29. *Id.*
30. *Id.* at 608.
31. *Id.* at 609.
32. *Id.* at 608.
33. *Id.* at 614–15.
34. Robert W. Gordon, *The Independence of Lawyers,* 68 B.U. L. REV. 1, 2 (1988).
35. *Id.* at 5.
36. *See* Robert K. Vischer, Big Law and the Marginalization of Trust, 25 GEO. J. LEGAL ETHICS 165, 173 (2012) ("Atticus Finch remains the paradigmatic lawyer-hero because of the trust he inspired not only in his client, but in the members of his community."). *See generally* HARPER LEE, TO KILL A MOCKINGBIRD (Harper Collins, 1960).
37. *Id.* at 170 (". . . trust can also be affective–i.e., resulting from our emotions, not just our intellect. When we speak of an attitude of goodwill toward the truster, a feeling of safety in the face of vulnerability, then we speak of affective trust.").
38. Vischer, *supra* note 36, at 165, 167.

Vischer rejects the claim that the trustworthiness of lawyers is mostly out of self-interest, because it is "good business" to be trustworthy.[39] Vischer is concerned with the erosion of trust between clients and their lawyers, but contends that putting in place more regulations dictating the parameters of attorney-client relationships will simply create more skepticism and distance. He argues this because clients will see lawyers as creatures of the state, or actors beholden to local bar associations simply seeking to exert needless control.[40]

This is where the proposed rule fits into the independence discussion. The proposed rule is supposedly meant to protect lawyer independence by imposing rules that will distance lawyers from their clients by dictating how they interact with their clients. Proponents of the rule might argue that it gives lawyers cover: it protects lawyers from having to sign coercive agreements while giving them room to say that they would have signed the agreement had it not been for these darn rules. However, big institutional clients will only continue the trend of expanding in-house teams and avoiding the use of law firms if such restrictive rules are perpetuated.[41] And this would hurt the independence of lawyers on a systemic level.

Vischer talks a good deal about trust, but he seems more concerned with clients' trust of law firms as opposed to lawyers' trust of their clients. On the other hand, the proposed D.C. Bar Committee rule seems to imply that lawyers should be wary of their large institutional clients' motives. Generally invoking independence without the appropriate amount of specificity allows the D.C. Bar to artificially signal that it is concerned with the ethical virtue of its lawyers while doing little to ensure that it can effectively protect those virtues. Because the D.C. Rules of Professional Conduct only rarely invoke lawyer independence as a value, and when they do, they are not explicit in what they mean by the term, the proposed rule feels more like a blunt weapon than a precise way to protect lawyers. If, in its concern about Professional Independence, the D.C. Bar is just invoking a generalized notion of erosion of trust, then both parties are culpable. Because there is no specificity in the Rules as to what type of independence the Bar hopes to maintain or protect, it becomes unclear what the Bar's motivations really are.

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39. *Id.* at 170 (*citing* RUSSELL HARDIN, TRUST & TRUSTWORTHINESS 1 (2002) ("The "less space [there is] for the cultivation of affective trust between lawyer and client," the more we erode what it is to be a lawyer.)).

40. *Id.*

41. Vischer, *supra* note 36, at 178:

> On the client side, the focus has not been so much on splitting up particular legal matters, but on splitting up the company's legal needs into separate matters, rather than investing in an overarching relationship with a particular firm. This has corresponded to the rising power of in-house counsel vis-à-vis outside attorneys, which is another trend making lawyers less distinct from other business service providers.

III. THE INCREASING PREVALENCE OF OUTSIDE COUNSEL GUIDELINES AND MISCONCEPTIONS ABOUT THEIR COERCIVENESS

Outside counsel guidelines are contracts that dictate the terms of the relationship between clients and their law firms. These contracts have increasingly been initiated by large corporate clients, with terms that define what a conflict of interest is and sometimes control the types of behaviors lawyers can engage in.[42]

In 2015, Steven Vaughn and Claire Coe researched this possible shift in the UK whereby clients, instead of law firms, became the ones setting the terms of engagement.[43] In instances in which large institutional clients were choosing firms via panel processes, essentially pitting firms against one another to vie for work, "appointments [were] often accompanied by detailed, mandatory sets of terms and conditions," called outside counsel guidelines.[44] Some firms interviewed felt forced to accept these guidelines.[45] However, other firms said that they routinely pushed back on the terms that they "could not get comfortable with."[46] Most notably, Vaughn and Coe did not find the size or heritage of the firm to correlate with a firm's likelihood to accept or push back on outside counsel guidelines.[47] These results lead to the conclusion that the pressure some firms feel when working with large institutional clients may be more of a perceptional issue than an actual power imbalance. Vaughn and Coe were not convinced that the problem was widespread enough to warrant any regulatory intervention.[48] Vaughn and Coe explained that they would require more research on how big law firms "engage, interact, and manage long term relationships with their often highly sophisticated client base" to determine whether regulatory intervention is necessary.[49]

Christopher Whelan and Neta Ziv, focusing on U.S. firms, point out that outside counsel guidelines can include diversity requirements, prohibitions against "obstructive or coercive tactics in litigation," and more.[50] This is ironic because it regulates lawyers in the same way that the D.C. Bar's guidelines do, attempting

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42. Max Welsh,*See generally Lawyers Should Negotiate Outside Counsel Guidelines*, A.B.A.: L PRAC. TODAY (Sept. 14, 2017), https://www.lawpracticetoday.org/article/lawyers-negotiate-outside-counsel-guidelines/ [https://perma.cc/CLE6-QZQG].

43. Steven Vaughan & Claire Coe, *Independence, Representation and Risk: An Empirical Exploration of the Management of Client Relationships by Large Law Firms*, at 4 (Oct. 19, 2015) https://www.sra.org.uk/globalassets/documents/sra/research/independence-report.pdf?version=4a1ab7 [https://perma.cc/3YCD-4CAQ].

44. *Id.*

45. *Id.* at 1.

46. *Id.* at 5.

47. *Id.* at 22 ("Interestingly, we did not find any relationship between either the size of the firm or its heritage (US versus English law firms), in terms of an ability, or willingness, to push back on terms.").

48. *Id.* at 5.

49. *Id.* at 13–14.

50. Christopher J. Whelan & Neta Ziv, *Privatizing Professionalism: Client Control of Lawyers' Ethics*, 80 FORDHAM L. REV. 2577, 2579 (2012).

to stress the proper values of the legal profession and the lawyer's traditional role of public service. The D.C. Bar's proposed rules paint outside counsel guidelines as problematic, when many U.S. firms use outside counsel guidelines to achieve the same objectives the D.C. Bar's proposed rules are aimed at. Ziv and Whelan call this "private regulation," a third type of regulation of lawyers, after state regulation and self-regulation.[51] As Ziv and Whelan point out, the requirements of these outside counsel guidelines vary widely: some require lawyers to simply act "ethically," while others seek to expand what is defined as a conflict of interest for lawyers when they work with other clients.[52] Ziv and Whelan aptly refer to this as a "form of control," but lawyers do not need to be more controlled than they already are.[53]

It is not necessary to overly regulate Big Law. In the same way that big corporations feel compelled to respond to the current political and social moment by implementing progressive policies, so too can be the case with law firms. As environmental and social governance becomes increasingly intertwined with the companies' reputations, the market is doing its job. Additional incentives are not needed to enforce the kind of good behavior that we associate with the traditional public service duties of lawyers.[54] As Ziv and Whelan put it, "if 'doing good' corresponds with 'doing well' for the corporation, the higher the probability the [law firm will enforce the policy]."[55] For example, outside counsel guidelines that require fair litigation tactics can be seen as not just enforcing ethical standards but as policies that are "good business."[56] On the other hand, Big Law firms can resist policies that they are averse to upon their own balancing of the arguments for and against these contracts.

In Vaughn and Coe's study, they sought to determine whether smaller or less established law firms were more susceptible to pressure from clients, as opposed to larger or more well-established firms.[57] Of the law firms that felt empowered to push back against overreaching outside counsel guidelines, they did not find a

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51. *Id*. at 2580, 2583.

52. *Id*. at 2579.

> These guidelines and norms are not the outcome of private negotiation between lawyer and client, but are imposed unilaterally upon lawyers retained by the corporate client. Thus they are evolving into a new kind of regulation, this time by private clients, hence the notion of "privatizing professionalism." We are interested in learning about this form of control and how it is affecting the practice of lawyers.

53. *Id*.

54. THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER 25(2010) ("[T]he overarching reality today is that lawyers are not set apart and special. They are economic actors, specially trained, but driven by all the vices—and virtues—of a capitalist economic system.").

55. Ziv & Whelan *supra* note 49, at 2590.

56. *Id*.; MORGAN, *supra* note 54, at 25 ("[T]he overarching reality today is that lawyers are not set apart and special. They are economic actors, specially trained, but driven by all the vices—and virtues—of a capitalist economic system.").

57. Welsh, *supra* note 42.

positive correlation between the size of a firm and that firm's comfort level in pushing back.[58] The takeaway is that this is not a question of bargaining power: lawyers have the power and ability to stand up to their clients when they ask for too much. If it is impossible for them to comply without jeopardizing the law and their bar membership, they will resist.

Corporate law firms' relationships with big institutional clients is seen as a threat to the lofty yet ambiguous concept of attorney independence. However, corporate law in America has become its own culture, a beast of its own kind. Although it may seem like big law firms are unwieldy and lack accountability, they also are the closest analog to corporations in the legal world.[59] Because the structure of Big Law is so different from the rest of the legal profession, many of these firms can be more easily compared to corporations than to smaller local firms. It's no surprise that other countries, and the D.C. Bar, have made law firms more business-friendly by enabling ABSs. Critics have lamented the corporate nature of big law firms since the 1960s.[60] Today, no one would contest that the practice of law has become a business.[61] Perhaps it is time to stop trying to fight the tide of a tsunami that has already changed the reality on the ground. The commercialization of the legal profession[62] does not have to erode attorneys' independence. There seems to be an assumption that the commercialization of the law firm has decreased the "public benefits" that lawyers provide to society, but there is little evidence to support this.[63]

Plus, the market has increasingly served to incentivize major corporations to serve the public good. Despite a lack of monetary incentives for corporate investment in diversity and environmental and social governance, big companies are still making those investments.

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58. *See* Vaughn & Coe, *supra* note 43, at 1.

59. *See* MORGAN, *supra* note 54, at 19–69 (Morgan takes issue with the term "profession" as applied to lawyers and arguing that not only are American lawyers "not part of a profession," it is problematic to elevate Law as more than "just another business or industry." Instead, Morgan argues that lawyers are increasingly "economic actors.").

60. Marc Galanter & Thomas Palay, *The Many Futures of the Big Law Firm*, 45 S.C. L. REV. 905, 908 (1994) (**"**Contemporary misgivings about the commercialization of law practice are part of a long tradition of lamentation over the decline from the virtuous professionalism of an earlier day.").

61. *Id*.

62. *Id*. at 906.

63. *Id*. at 926 ("That recent growth in the scale of law firms has decreased the production of public benefits by lawyers is far from clear. We think these are questions that deserve exploration."). Galanter & Palay also state:

> More and more the amount of [a lawyer's] income is the measure of professional success. More and more he must look for his rewards to the material satisfactions derived from profits as from a successfully conducted business, rather than to the intangible and indubitably more durable satisfactions which are to be found in professional service more consciously directed toward the advancement of the public interest.

Id. at 907 (quoting Harlan Fiske Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 6–7 (1934)).

It is already possible to see the legal world moving in this same direction. The D.C. Bar is concerned about what it means for big firms to be beholden to big corporations—to be more concerned about client relationships than the responsibilities of the legal profession. However, major corporate clients can be a *positive* influence on big firms as well. Big firms in major cities across the country are investing in diversity and equality.[64] In addition, more large firms are launching Environmental, Social & Governance ("ESG") practices to advise corporate clients on those matters. Paul Weiss, for instance, has an ESG Advisory Practice that "helps clients develop integrated ESG strategies that safeguard corporate reputation, mitigate risk and leverage opportunity."[65] If the crux of the D.C. Bar's concern about overblown outside counsel guidelines is that firms will care more about their relationships with their corporate clients than their own independence, the corporate law world is making ESG investments precisely because of these relationships. Corporate clients *can* be a *good* influence on the firms they work with.

IV. THE D.C. BAR COMMITTEE'S PROPOSED CHANGES ARE ILL-ADVISED

The D.C. Bar pretends that its Bar Committee's proposed changes are all meant to improve lawyer independence. These proposed changes are ill-advised. The D.C. Bar Committee does not even seem to care much about lawyers' Professional Independence. One need only look at Washington, D.C.'s unique allowance of ABSs, widely seen as a threat to lawyer independence, to understand how incongruent it is for the D.C. Bar to begin caring about independence at this point.[66] Also, the D.C. Rules do not even talk about independence in their justification of D.C. Rule 1.6, whereas the ABA makes Professional Independence a central part of that rule.[67] When the D.C. Rules do invoke independence, it is not even clear what kind of independence they are talking about. As Green pointed out, the value of lawyer independence changes over time and depends on the context in which it is invoked. The D.C. Bar should clarify what it means by independence if it is going to suggest several rules that interfere with the relationships between law firms and their long-standing clients.

Law firms are strong enough to withstand the pressure of overreaching outside counsel guidelines. Given the lack of correlation between law firm resistance to outside counsel guidelines and law firm size, it is within any law firm's discretion to determine how to respond to these contracts. If bar committees are concerned about corporate clients who build up in-house legal departments while

64. *2022 Outlook on Law Firm Diversity and Inclusion*, NAT'L L REV. (Jan. 3, 2022), https://www.natlawreview.com/article/2022-outlook-law-firm-diversity-and-inclusion [https://perma.cc/4V2R-ZRMM].

65. *Sustainability* & Environmental, Social and Governance (ESG) Advisory Practice, Paul Weiss, Rifkind, Wharton & Garrison LLP https://www.paulweiss.com/practices/sustainability-esg/practice-overview/our-practice [https://perma.cc/GZJ9-ZJZF] (last visited Apr. 26, 2022).

66. *See* Cassens Weiss, *supra* note 23.

67. D.C. RULES R. 1.6.

increasingly using law firms for discrete tasks, the worst thing to do would be to erode the trust between lawyers and their clients, thereby making it more difficult for these corporations to work with law firms.[68] One hallmark of big law is its long-standing and strong relationships with clients. To undermine these relationships would hurt more than help.

CONCLUSION

Lawyers do not need to be babysat. There is a healthy regulatory scheme in place to protect lawyers from their clients and clients from their lawyers. However, when it comes to lawyer independence, no controls are necessary above the basic provisions that already exist. Lawyers are trained professionals in a self-regulating industry and are capable of using good judgment to protect their independence when managing relationships with clients. The micro-managing of lawyer-client relationships could discourage business for Big Law firms while disempowering lawyers from the reasonable negotiations they could be conducting with their clients. The D.C. Bar's proposed rules are not based in any consistent perspective on professional independence, and will do more harm than good.

68. *See* Vischer, *supra* note 36, at 176.