

IN-HOUSE PAY:  
 ARE SALARIES, STOCK OPTIONS, AND HEALTH BENEFITS  
 A “FEE” SUBJECT TO A REASONABLENESS REQUIREMENT  
 AND WHY THE ANSWER CONSTITUTES THE OPENING  
 SHOT IN A CLASS WAR BETWEEN LAWYER-EMPLOYEES  
 AND LAWYER-PROFESSIONALS

Eli Wald\*

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## INTRODUCTION

Seemingly benign questions of statutory interpretation sometimes reveal important insights about the meaning of the law. A famous example is the “No Vehicles in the Park” hypothetical.<sup>1</sup> Is a person driving an emergency vehicle in the park intending to save the life of an accident victim violating the ordinance? Answering the question requires interpreting the plain language meaning and intent of the ordinance: does the term of art “car” include an “emergency vehicle?” Does the ordinance intend to ensure the safety of park visitors, such that it makes sense to exempt from its application an emergency vehicle driven in circumstances meant to save a life because the purpose of the ordinance is pursued?<sup>2</sup> Notably, addressing these inquires entails a lot more than mastering the tools of statutory interpretation. Rather, the questions tease out complex insights about the difference between bright-line rules and open-ended standards as well as jurisprudential choices between formalism with its vision of law as a closed, self-contained independent system, and realism and its commitment to paying attention to context and an understanding of law as a dynamic ever-evolving system.<sup>3</sup>

In-house pay, and specifically, whether in-house salaries, bonuses, stock grants, stock options, and nonmonetary benefits are a “fee” subject to a reasonableness requirement,<sup>4</sup> turns out to be yet another example of an ostensibly be-

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\* Charles W. Delaney Jr. Professor of Law, University of Denver Sturm College of Law. I thank Arthur Best, John Bliss, Bruce Green, Sung Hui Kim, Russ Pearce, Ellyn Rosen, Steve Pepper, Joyce Sterling, Steven Vaughan, Brad Wendel, and David Wilkins for their comments and Diane Burkhardt, Faculty Services Liaison at the Westminster Law Library at the University of Denver Sturm College of Law for her outstanding research assistance.

<sup>1</sup> H. L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958). The hypothetical has been referred to as “the most famous hypothetical in the common law world.” Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1109 (2008), and the “chestnut of legal debates about statutory interpretation.”; Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1255 (2015).

<sup>2</sup> For a similar formulation, see Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 23, 2012), <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism> [<https://perma.cc/S9HW-UUPD>]. (“Does an ordinance that says that ‘no person may bring a vehicle into the park’ apply to an ambulance that enters the park to save a person’s life?”).

<sup>3</sup> See Hart, *supra* note 1, at 606–08.

<sup>4</sup> MODEL RULES OF PROF’L CONDUCT r. 1.5(a) (AM. BAR ASS’N 2019) holds that attorneys’ fees are subject to a reasonableness requirement. It states in relevant part: “[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee . . . .” *Id.* A vast majority of U.S. jurisdictions have adopted Rule 1.5(a). See AM. BAR ASS’N CPR POLICY

nign question of statutory interpretation, which reveals important insights about the meaning of law, law practice and the future of attorney regulation. Construing the plain language meaning of the word “fee” and the various rationales for the traditional reasonableness requirement imposed on attorneys’ fees in the context of in-house practice teases out important insights about the evolving regulation and role of in-house counsel and lawyers more generally.

Moreover, understanding in-house pay entails delving into the rise of a class of lawyer-employees, of which in-house lawyers are but a small subset, and unearthing regulatory tensions and questions “at the intersection of judicial power over the practice of law and legislative power over the conditions of employment.”<sup>5</sup> These questions include whether the judiciary or the legislature should regulate lawyers and whether all lawyers should be subject to the Model Rules of Professional Conduct (Rules). Understanding in-house pay also necessitates acknowledging the emergence of lawyer-businesspersons, of which in-house counsel are but one example, for whom law is not the core of what they do but only a part of their roles and job descriptions. Together, the lawyer-employee and the lawyer-businessperson models challenge the long-standing dominant paradigm of the lawyer-professional, the foundation of law practice, and the regulation of lawyers as we know them.

This Article is organized as follows. Part I offers, for the first time, a statutory interpretation of the Rules that impose a reasonableness requirement on attorneys’ fees in the context of in-house pay. Following a thorough analysis of the meaning, intent, and various rationales of intersecting rules, it concludes that in-house pay is subject to the traditional reasonableness requirement imposed on fees, and then offers a comprehensive analysis of the meaning of reasonableness as applied to in-house counsel.

The rest of the Article explores the consequences and meaning of this novel interpretation for in-house lawyers, the profession and the Rules. Part II examines the rise of the lawyer-employee paradigm, of which in-house lawyers are a subset. It shows that while in-house counsel are employees and therefore part and parcel of the new lawyer-employees class, they are, importantly, powerful employees, more akin to income partners and law firm associates, as opposed to the more typical weak lawyer-employee paradigm, exemplified by staff, temporary, and outsourced lawyers. It concludes that as powerful employees, in-house lawyers should be subject to regulations applicable to lawyer-professionals, such as the reasonableness requirement imposed on in-house pay; but that in general, the Rules ought to be carefully scrutinized before they are applied to the new class of weak lawyer-employees.

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IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, RULE 1.5: FEES (2018), available at [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_5.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_5.pdf) [<https://perma.cc/82W6-GXR7>].

<sup>5</sup> *Chism v. Tri-State Constr., Inc.*, 374 P.3d 193, 214 (Wash. Ct. App. 2016) (Chism was the first case in the U.S. to examine whether in-house pay is subject to a reasonableness requirement).

Part III explores in-house lawyers as an example of lawyer-businesspersons. It shows that similar to the rise of the lawyer-employee, the emergence of the lawyer-businessperson model raises important questions about the future of the regulation of the legal profession, as well as the regulation of nonlawyers who provide legal services. Finally, the Conclusion explains why the rise of the lawyer-employee paradigm and the emergence of the lawyer-businessperson model as alternatives to the dominant lawyer-professional ideal are important developments not only for in-house counsel and lawyers generally but to nonlawyers as well, including clients, legal service providers, and the public.

#### I. REGULATING IN-HOUSE PAY AS A (COMPLEX) DOCTRINAL QUESTION

Rule 1.5(a) states in relevant part: “[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee . . . .”<sup>6</sup> Does in-house pay, including salary, bonuses, stock grants and options, and nonmonetary benefits, constitute a “fee” subject to a reasonableness requirement of Rule 1.5(a)?

##### A. Reasonableness: Attorneys’ Fees and In-House Pay

In *Chism v. Tri-State Construction Inc.*<sup>7</sup>, a Washington state court of appeals confronted the issue for the first time.<sup>8</sup> In the case, Mr. Chism, Tri-State Construction Inc.’s (Tri-State) general counsel, sued Tri-State for breach of compensation contracts to recover allegedly unpaid bonuses.<sup>9</sup> Tri-State counterclaimed, asserting that Mr. Chism’s compensation contracts violated the Washington Rules of Professional Conduct (Wash. RPC) and were void as against public policy.<sup>10</sup> Specifically, Tri-State argued *inter alia* that the compensation contracts violated Wash. RPC Rules 1.5 and 1.8 because they were unreasonable.<sup>11</sup>

The trial court found that Tri-State breached the compensation contracts and willfully withheld Mr. Chism’s bonuses,<sup>12</sup> and dismissed Tri-State’s Rule 1.5 counterclaim.<sup>13</sup> However, the trial court held that Mr. Chism violated Rules 1.7 and 1.8 in part because the bonuses in question were unreasonable, and disgorged more than half of his unpaid bonuses.<sup>14</sup> The court of appeals avoided the substantive question of whether in-house pay is subject to a reasonableness

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<sup>6</sup> MODEL RULES OF PROF’L CONDUCT r. 1.5(a) (AM. BAR ASS’N 2019).

<sup>7</sup> *Chism*, 374 P.3d at 207.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 202.

<sup>10</sup> *Id.*

<sup>11</sup> *See id.* Tri-State also argued that the compensation packages violated Washington Rules of Professional Conduct Rules 1.7 and 1.8 because they gave rise to prohibited conflicts of interest. *Id.* at 207, 209.

<sup>12</sup> *Id.* at 202.

<sup>13</sup> *Id.* at 202, 206.

<sup>14</sup> *Id.* at 203.

requirement, reversing the disgorgement on two procedural grounds.<sup>15</sup> First, the appellate court held that the Washington Supreme Court's disciplinary authority over Washington attorneys is "plenary."<sup>16</sup> Because the issue of the reasonableness of in-house pay was a matter of first impression for the Washington Supreme Court, the trial court lacked the authority to discipline Mr. Chism and disgorge his bonuses.<sup>17</sup> Second and relatedly, because the construction of the Wash. RPC with regard to in-house pay was novel, the rules were vague and their interpretation would only apply prospectively, that is, they could not retroactively apply to Mr. Chism's conduct.<sup>18</sup> Thus, the fundamental substantive issue—whether in-house pay is subject to a reasonableness requirement—has remained undecided.

### 1. *The Plain Language of Rule 1.5(a)'s Reasonableness Requirement*

Like the rules in a vast majority of the states, Wash. RPC Rule 1.5(a) follows Rule 1.5(a) of the Rules and states in relevant part that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee."<sup>19</sup> Rule 1.5(a) thus imposes a mandatory reasonableness requirement on lawyers' fees. Does the term of art "fee" in rule 1.5(a) encompass in-house pay, including salaries, bonuses, stock grants, stock options, and nonmonetary benefits?

In *Chism*, Tri-State made this very claim. The trial court dismissed the claim at the summary judgment stage, finding that as a matter of law a "fee" was different than "wages" and "bonuses," and that accordingly Rule 1.5(a)'s reasonableness requirement did not apply to in-house pay. It concluded that "[Mr. Chism's] status as in house counsel renders the disgorgement of fees . . . based on alleged violations of RPC 1.5 unavailable. . . ."<sup>20</sup> The court of appeals affirmed. Following the conventions of judicial interpretation of statutory language, it held that "[w]hen interpreting the meaning of any RPC, . . . [o]ur goal is to give effect to the intent behind the rule, which we discern, where possible, from the plain language of the rule at issue in the context of the RPCs as a whole."<sup>21</sup> Construing the intent behind Rule 1.5(a), the court of appeals looked to the plain language meaning of the word "fee" and held that "Tri-State's argument equivocates between 'fees,' the explicit object of the rule, and 'wages,' the type of compensation here at issue. This is contrary to the plain meaning and common usage of the words."<sup>22</sup>

With due respect to the *Chism* courts, the interpretive issue here is much more complex than they acknowledged it to be as neither the Rules, nor the Re-

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<sup>15</sup> *Id.* at 215.

<sup>16</sup> *Id.* at 205.

<sup>17</sup> *Id.* at 208–09.

<sup>18</sup> *Id.* at 206, 209.

<sup>19</sup> Compare WASH. RULES OF PROF'L CONDUCT r. 1.5(a) (2015), with MODEL RULES OF PROF'L CONDUCT r. 1.5(a) (AM. BAR ASS'N 2019).

<sup>20</sup> *Chism*, 374 P.3d at 207 (internal citations omitted).

<sup>21</sup> *Id.* (internal citations omitted).

<sup>22</sup> *Id.*

statement (Third) of the Law Governing Lawyers (2000) (Restatement), define the term “fee.” On the one hand, the word “fee” is not identical to “compensation,” “wages,” “salary,” “bonus,” “stock grant,” “stock option,” or “nonmonetary benefits.” Moreover, as noted by the *Chism* court of appeals, the common usage of these terms is not identical because “fees” tend to suggest payment for legal services by a client in an attorney-client professional relationship, whereas the other terms imply payment for services by an employer in an employee-employer relationship.<sup>23</sup> Yet this seemingly clear distinction begs the question here, where the client is an employer and the lawyer is an employee.

Relatedly, perhaps the court of appeals meant to invoke the classic agency law distinction between independent contractors and employees,<sup>24</sup> suggesting that “fees” denote payment for the former whereas the other terms of art reflect payment to the latter. This distinction too, however, is unhelpful in the context of in-house lawyers. In a traditional independent contractor-principal relationship, the principal controls only the objectives of the relationship; whereas in an employer-employee relationship the employer controls both the objectives and the manner in which they are to be pursued by the employee.<sup>25</sup> This legal definition, however, does not fit the practice realities of in-house lawyers: while they are certainly employees of their entity-clients, in-house lawyer-employees exercise ample control over the manner in which they represent their clients, and the entity-client-employers do not purport to control the manner in which their in-house lawyers practice law on their behalf.<sup>26</sup> In this sense, in-house lawyers, although technically employees, resemble independent contractors who exercise control over the manner in which they pursue their tasks. Thus, defining fees to denote the compensation of independent contractors such as outside counsel and the other terms of art to refer to the compensation of employees such as in-house lawyers begs the question.

On the other hand, a standard definition of attorneys’ fees is “the payment for legal services,”<sup>27</sup> and in-house pay, both a salary and overall compensation, is clearly a payment for legal services.<sup>28</sup> Furthermore, the Restatement states

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<sup>23</sup> *Id.* at n.22.

<sup>24</sup> RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. LAW INST. 2006); RESTATEMENT (SECOND) OF AGENCY § 2 (AM. LAW INST. 1958).

<sup>25</sup> *See, e.g.*, *Hoover v. Sun Oil Co.*, 212 A.2d 214, 214–16 (Del. Super. Ct. 1965); *Humble Oil & Ref. Co. v. Martin*, 222 S.W.2d 995, 998 (Tex. Sup. Ct. 1949); *Murphy v. Holiday Inns, Inc.*, 219 S.E.2d 874, 875, 878 (Va. Sup. Ct. 1975).

<sup>26</sup> As Sung Hui Kim has shown, rather than directly control the manner in which their in-house lawyers practice, entity clients put in place an “ethical ecology” introducing obedience, alignment and conformity pressures intended to incentivize in-house counsel to act as “mere employee[s],” “faithful agent[s]” and “team player[s].” *See* Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1001, 1008, 1019, 1034 (2005) [hereinafter Kim, *The Banality of Fraud*].

<sup>27</sup> *Attorney’s Fee*, FREE DICTIONARY.COM, <https://legal-dictionary.thefreedictionary.com/Attorney+fee> [<https://perma.cc/EY2V-8RFC>] (last visited Sept. 15, 2019).

<sup>28</sup> Notably, most definitions list as examples of fees hourly, flat, contingency, statutory, court-approved and combinations of these arrangements, and not salary or compensation. *See id.*

that “[t]he prohibition on unreasonable payment arrangements is not limited to fees in a narrow sense,”<sup>29</sup> and appears to construe “fees” broadly as a synonym of compensation, for example, by noting that “[t]his Section forbids unlawful fees and unreasonably large fees, while leaving clients and lawyers free to negotiate a broad range of compensation terms,”<sup>30</sup> suggesting that “fees” ought to be construed broadly enough to encompass salaries and bonuses of lawyer-employees.

Revealingly, the court of appeals’ own textual analysis proves the inherent ambiguity of the term “fee” as applied to in-house pay. Quoting Merriam-Webster’s Dictionary’s definitions of “fee” and “wage,” the court of appeals reasoned: “[i]n short, ‘wage’ presupposes an ongoing employer-employee relationship, whereas ‘fee’ suggests retaining a professional on a temporary basis for a specific, limited purpose.”<sup>31</sup> Yet, Merriam-Webster’s Dictionary defines a “fee” as “compensation . . . for professional service,” which applies to in-house pay; and the court’s reasoning does not resolve the issue: whereas “wage” presupposes an ongoing employer-employee relationship, a “fee” does not necessarily suggest a temporary, limited attorney-client relationship. Rather, some lawyers charge clients fees while engaged in ongoing, permanent, stable attorney-client relationships.<sup>32</sup>

The difficulty of discerning the intent of Rule 1.5(a) from its plain language, and, in particular, whether “fee” encompasses in-house pay, is not surprising. The Rules, inclusive of Rule 1.5(a), were adopted in 1983,<sup>33</sup> when the transformation of in-house practice was in its infancy. One “of the most significant changes in corporate legal practice in the United States,”<sup>34</sup> indeed, a “striking development,”<sup>35</sup> has been the rise to prominence of in-house lawyers, and, in particular, of general counsel of large entity organizations over the last fifty years. Once upon a time “castigated,”<sup>36</sup> belittled as “house counsel,”<sup>37</sup> and per-

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<sup>29</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34, cmt. a. (AM. LAW INST. 2000).

<sup>30</sup> *Id.*

<sup>31</sup> *Chism v. Tri-State Constr., Inc.*, 374 P.3d 193, 207 n.22 (Wash. Ct. App. 2016).

<sup>32</sup> Historically, the typical relationship between large law firms and their large entity clients used to be ongoing, permanent, and stable. The relatively recent erosion of these permanent long-term relationships has been a source of great distress for BigLaw; *See* David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2080–84 (2010) [hereinafter Wilkins, *Team of Rivals?*].

<sup>33</sup> *See* MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2019) (Commission on Evaluation of Professional Standards Chair’s Introduction) (describing the evolution of Model Rules of Professional Conduct).

<sup>34</sup> Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1057 (1997).

<sup>35</sup> Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 277 (1985).

<sup>36</sup> Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 479 (1989).

<sup>37</sup> Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011, 1011–12 (1997).

ceived to be lawyers “who had not quite made the grade as partner[s],”<sup>38</sup> General counsel now “sit[] close to the top of the corporate hierarchy as [] member[s] of senior management,”<sup>39</sup> having gained power, prestige and respect.<sup>40</sup> This transformation was beginning to take place in the mid-1970s, and was not reflected in the Rules.<sup>41</sup>

In-house pay reflects this profound transformation. Whereas through the mid-1970s in-house lawyers were paid relatively low salaries reflecting their low status, their rise to power and influence has corresponded with significantly higher compensation. For example, in 2017, the average salary of the 100 general counsel with the highest cash compensation was \$717,183, the average overall compensation of these general counsel was \$2,028,221, and the highest paid general counsel brought home \$6,948,750.<sup>42</sup> Given this profound transformation of in-house pay, it is thus hardly surprising that in the mid to late 1970s when the Rules were being drafted and debated, little attention was given to the issue. Put differently, legislative history is unhelpful here because at most it shows not that the American Bar Association (ABA) considered a broad definition of “fees” and rejected it but rather that it did not contemplate the possibility of salaries being a subset of fees. Moreover, the plain language of a rule must be interpreted in the context of the Rules as a whole,<sup>43</sup> which are rules of reason.<sup>44</sup> Accordingly, even if the ABA had considered that possibility, in-house practice realities have changed so radically between the 1970s and early 1980s and now that such analysis would be outdated.

In any event, given the going rates of in-house pay, the issue of whether it is subject to reasonableness constraint is both topical and timely. Because the

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<sup>38</sup> Chayes & Chayes, *supra* note 35, at 277. Although, as Carl Liggio astutely points out, BigLaw was hard at work perpetuating this perception. Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 EMORY L.J. 1201, 1203 (1997).

<sup>39</sup> Chayes & Chayes, *supra* note 35, at 277.

<sup>40</sup> Hazard, *supra* note 37, at 1011–12; Rosen, *supra* note 36, at 479.

<sup>41</sup> The American Bar Association formed the Commission on Evaluation of Professional Standards in 1977 to undertake a comprehensive review of the Model Code, the then applicable rules of professional conduct. The Commission conducted a six-year review and recommended the adoption of the new Model Rules, which the House of Delegates approved in 1983. The in-house transformation was still in its infancy and therefore could not and did not play any meaningful role in the Commission’s recommendations. MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2019) (Commission on Evaluation of Professional Standards Chair’s Introduction).

<sup>42</sup> Caroline Spiezio, *The 2018 GC Compensation Survey: A New No. 1*, CORP. COUNS. (Aug. 1, 2018), <https://www.law.com/corpcounsel/2018/08/01/cc-mag-080118-fea-cover/?slreturn=20190816011321> [<https://perma.cc/ZQB3-3BGE>] follow the click through link to: <https://advance.lexis.com/search?crd=fddb70a0-d925-4602-b7e4-738e295c7cbd&pdsearchterms=LNSDUID-ALMCORPCMgmd45ejgei&pdbybypassitordocs=False&pdmfid=1000516&pdisurlapi=true> [<https://perma.cc/K83H-Q9FN>].

<sup>43</sup> *Chism v. Tri-State Constr., Inc.*, 374 P.3d 193, 207 (Wash. Ct. App. 2016).

<sup>44</sup> MODEL RULES OF PROF’L CONDUCT, SCOPE cmt. 14 (AM. BAR ASS’N 2019) (“The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.”).



plain language of Rule 1.5(a) and its legislative history are not dispositive when it comes to in-house pay, one must turn to the intent behind the Rule.<sup>45</sup>

## 2. *The Intent of Rule 1.5(a)'s Reasonableness Requirement*

The comments to Rule 1.5 and the Restatement reveal four intersecting rationales for the reasonableness requirement: client protection, increased access to legal services, professionalism and fiduciary duties.

### a. *Client Protection*

The Restatement explains that the reasonableness requirement in Rule 1.5(a) is designed to protect clients, and, in particular, vulnerable unsophisticated clients, from lawyer abuse. The Restatement notes: “A client-lawyer fee arrangement will be set aside when its provisions are unreasonable as to the client. . . . Courts are concerned to protect clients, particularly those who are unsophisticated in matters of lawyers’ compensation, when a lawyer has overreached,”<sup>46</sup> and adds: “[i]nformation about fees for legal services is often difficult for prospective clients to obtain. Many clients do not bargain effectively because of their need and inexperience.”<sup>47</sup> This rationale is also reflected in various statutory provisions imposing limitations on lawyers’ fees meant to protect vulnerable clients.<sup>48</sup>

Notably, the client protection rationale does not aim to shield clients from a few abusive “bad apple” lawyers. Rather, it guards against excesses inherent in day-to-day interactions between ordinary lawyers and ordinary clients. Clients seek out lawyers when they have legal needs,<sup>49</sup> needs that are often stressful

<sup>45</sup> RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* 1–2 (2012) (“[L]egislative intent has traditionally been thought to be the central object of statutory interpretation.”); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 14 (1994) (“Anglo-American scholars from early modern times to the present have argued that original intent is and should be the cornerstone of statutory interpretation.”); See Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1110–11 (noting that proponents of various statutory interpretation schools of thought, including Purposivism and Pragmatism, acknowledge the central role of intent in statutory interpretation).

<sup>46</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 cmt. b (AM. LAW INST. 2000).

<sup>47</sup> *Id.*

<sup>48</sup> Statutory restrictions or caps on attorneys’ fees are common in medical malpractice, veterans’ rights, and workers’ compensation representations, see Sachi Barreiro, *How Much Will a Workers’ Compensation Lawyer Cost?*, ALLLAW, <https://www.alllaw.com/articles/nolo/workers-compensation/lawyer-cost-fees.html> [<https://perma.cc/MC8M-B7EN>] (last visited Oct. 14, 2019); *Medicaid Liability/Medical Malpractice 2011 Legislation*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/financial-services-and-commerce/medical-liability-or-malpractice-2011-legislation.aspx> [<https://perma.cc/CJM9-6QH7>] (last updated Aug. 15, 2012); *The Fees Which May Be Charged by an Agent or Attorney*, NAT’L ORG. VETERANS’ ADVOC., INC., <https://www.vetadvocates.org/cpages/fees-which-may-be-charged-by-agent-attorney> [<https://perma.cc/Q8P7-3PKS>] (last visited Oct. 14, 2019).

<sup>49</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 cmt. b (AM. LAW INST. 2000).

and embarrassing. Clients are frequently eager to retain lawyers and address these problems and are therefore less likely to effectively negotiate with lawyers over fees. This rationale is especially applicable to unsophisticated clients who in addition to dealing with the stress caused by legal needs are not used to dealing with lawyers. Moreover, information about fees is not readily available,<sup>50</sup> and clients' inexperience in dealing with lawyers compounds their ineffective fee negotiations. As a result, fee negotiations may regularly result in unreasonable fees but for the objective reasonableness requirement imposed by Rule 1.5(a).

On a quick read, one may be tempted to promptly dismiss the client protection rationale as inapplicable to entity-clients and their in-house lawyers, and indeed, the rationale poorly fits a subset of entity clients. Large entity clients likely do not need the protection of the Rules, because they tend to be sophisticated and have ample information about fees and legal services that they increasingly use to negotiate favorable fee terms vis-à-vis outside and inside counsel.<sup>51</sup> In particular, a large entity client is likely not vulnerable vis-à-vis its in-house counsel: it has experienced executives negotiating on its behalf, and often has other in-house lawyers and outside counsel at its service.<sup>52</sup> Some mid-size entity clients may similarly not be vulnerable to in-house lawyers: a decision to hire an in-house lawyer may follow interactions with outside counsel and be driven in part by a desire to reduce the cost of legal services, indicating that the clients are relatively savvy and knowledgeable about in-house pay.<sup>53</sup>

Yet the kneejerk reaction to overlook the client protection rationale as applied to in-house lawyers ought to be resisted, however, because other entity-clients are in need and will benefit from the client protection rationale as evidenced by the facts of *Chism*. Mr. Chism was an in-house lawyer and general counsel of Tri-State, having previously served as Tri-State's outside counsel, was its source of legal advice and counsel, and the small family entity and its authorized constituents were arguably vulnerable to him, a claim they explicitly made in the litigation.<sup>54</sup> More generally, many small and mid-size entities may be unsophisticated in matters of lawyers' compensation and have little access to information about in-house salaries or the ability to reasonably analyze it, undercutting their ability to effectively negotiate a reasonable compensation package. Put differently, while large entity-clients are likely not in need of pro-

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<sup>50</sup> Bar associations used to maintain minimum fee schedules, which provided information about fees, an uncompetitive practice disallowed by the United States Supreme Court in *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975). See Richard Abel, *The Transformation of the American Legal Profession*, 20 LAW & SOC'Y REV. 7, 7-12 (1986).

<sup>51</sup> See generally Rosen, *supra* note 36, at 479, 483-84; Wilkins, *supra* note 32, at 2081-84.

<sup>52</sup> *Id.*

<sup>53</sup> David Wilkins dubs this the "economic" claim of the in-house counsel movement, see, David B. Wilkins, *The In-House Counsel Movement, Metrics of Change*, LEGAL BUS. WORLD (Jan. 20, 2017), <https://www.legalbusinessworld.com/single-post/2017/01/20/The-In-House-Counsel-Movement-Metrics-of-Change>.

<sup>54</sup> *Chism v. Tri-State Constr., Inc.*, 374 P.3d 193, 196-201 (Wash. Ct. App. 2016) (Tri-State argued that Mr. Chism took advantage of its ailing president to obtain his bonuses).

tection from their in-house counsel, organizational clients are not a monolith. Using large sophisticated powerful corporations as a proxy for the entire universe of entity-clients to conclude that all entity-clients are not vulnerable to their in-house counsel and not in need of protection would be simplistic and inaccurate.

The inconclusive nature of the client protection rationale as applied to in-house lawyers reveals profound insights about contemporary law practice and its regulation: context matters and traditional hierarchies and boundaries are increasingly being blurred, rendering a universal predictable interpretation of the Rules a daunting task. To begin with, elite general counsel of large-entity clients have become, over the last fifty years or so, some of the most powerful lawyers in the legal profession.<sup>55</sup> Yet, at the same time, their employers and the employers' authorized constituents such as CEOs of Fortune 500 companies are as, if not more, powerful and sophisticated as their general counsel and do not need the reasonableness protection of Rule 1.5(a). Thus, ironically and counter-intuitively, the most powerful in-house lawyers are likely not in a position to abuse their clients in the context of pay negotiations. Many other general counsel and in-house lawyers, who may not be as powerful as their elite counterparts, are nonetheless quite powerful vis-à-vis their small entity-clients, which may benefit from the client protection rationale.<sup>56</sup>

Thus, it is not necessarily the most powerful in-house counsel that pose the most threat to their (equally if not more powerful) clients. Rather, it is the somewhat less powerful in-house lawyers, those practicing in small in-house legal departments serving small or relatively unsophisticated entity-clients, who may be able to take advantage of their clients. This mirrors a similar trend outside of the in-house sphere. Whereas BigLaw equity partners are considered some of the most powerful elite within the legal profession, they represent some of the most powerful and sophisticated entity clients who can protect their own interests. In contrast, solo practitioners who within the profession benefit from lower prestige, tend to exercise greater power and influence vis-à-vis their individual relatively unsophisticated clients.<sup>57</sup>

Moreover, the very vulnerability of some corporate entity clients reflects the blurring of the traditional boundary within the legal profession between the corporate hemisphere with its powerful and sophisticated entity clients and the

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<sup>55</sup> *Supra* notes 34–40 and accompanying text.

<sup>56</sup> On the importance of context and the danger inherent in applying universal assumptions about the identity of lawyers and their clients to an increasingly diverse legal profession, see David B. Wilkins, *Everyday Practice is the Troubling Case: Confronting Context in Legal Ethics*, in *EVERYDAY PRACTICES AND TROUBLE CASES* 68, 72–74 (Sarat et al. eds. 1998) [hereinafter Wilkins, *Everyday Practice is the Troubling Case*].

<sup>57</sup> See ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* (1988) (documenting the complex practice realities of large law firm partner who are at the same time powerful within their law firms and the profession but not necessarily vis-à-vis their entity clients); William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 213, 225 (1991) (examining the dominant position of seemingly powerless lawyers with respect to their individual clients).

individual hemisphere with its individual vulnerable clients.<sup>58</sup> Several trends, including increased mobility, the rise of information technology, the use of unbundling and repackaging of legal tasks, the deregulation of organizational forms through which law can be practiced, and globalization have combined to destabilize the hemispheres, which no longer accurately reflect the complex practice realities of the twenty-first century.<sup>59</sup> The end result is this: one can no longer simply assume that entity-clients do not need protection from in-house lawyers or that the most powerful in-house lawyers pose the most threat of negotiating unreasonable pay with their clients. Instead, some entity clients occupying space in the corporate hemisphere may nonetheless be vulnerable vis-à-vis their in-house lawyers.

That the client protection rationale applies well to some entity clients and poorly to others is a function of two interrelated features of in-house practice: the great range of entity clients in size, needs and organization; and the growing variety of in-house lawyers, tasks and roles, juxtaposed against the insistence of the Rules on regulating all in-house counsel, and indeed, all lawyers, with a one-size-fits-all universal code of conduct.<sup>60</sup> The wisdom of this approach notwithstanding,<sup>61</sup> as long as it continues to be the prevailing regulatory method deployed by the ABA, it strongly suggests extending the client protection ra-

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<sup>58</sup> On the individual and corporate hemispheres of the legal profession, see JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319–20 (1982) (finding that the legal profession consists of two categories of lawyers whose practice settings, socioeconomic and ethno-religious backgrounds, education, and clientele differ considerably); JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 30–31, 44 (2005) (documenting that lawyers work in two fairly distinct hemispheres—individual and corporate—and that mobility between these hemispheres is relatively limited).

<sup>59</sup> David B. Wilkins, *Some Realism About Legal Realism for Lawyers: Assessing the Role of Contest in Legal Ethics*, in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 25, 33–38 (Leslie C. Levin & Lynn Mather eds., 2012) [hereinafter Wilkins, *Some Realism About Legal Realism*].

<sup>60</sup> Universalism has long been a key feature of the regulation of American lawyers. See, e.g., Justice Samuel A. Alito, Jr., *Introduction to AM. BAR ASS'N, A CENTURY OF LEGAL ETHICS: TRIAL LAWYERS AND THE ABA CANONS OF PROFESSIONAL ETHICS*, at xxix (Lawrence J. Fox et al. eds., 2009) (“Looking back—briefly—at the history of legal ethics governance in the United States, a number of broad themes emerge . . . [among them] uniform rules or standards applicable to all or most attorneys”). The 1908 *ABA Canons of Professional Ethics* stated their universal premise explicitly, declaring that: “*The canons of the American Bar Association apply to all branches of the legal profession; specialists in particular branches are not to be considered as exempt from the application of these principles.*” STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS (2017) (quoting A.B.A., CANONS OF PROF'L ETHICS, Canon 45 (1963)) (emphasis added). The 1969 ABA Model Code, which replaced the Canons, similarly stated that: “the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities.” MODEL CODE OF PROF'L RESPONSIBILITY PRELIMINARY STATEMENT (AM. BAR ASS'N 1969).

<sup>61</sup> Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227, 230, 251–52, 257 (2014) [hereinafter Wald, *Resizing the Rules of Professional Conduct*] (criticizing the Rules' one-size-fits-all approach for institutionalizing implicit bias against women and minority lawyers and calling for the adoption of a regulatory mode sensitive to contemporary practice realities and a diverse legal profession).

tionale to all clients, including the subset of large and sophisticated entity-clients who may not need it. As the *Chism* and many other courts explain, “the plain language of the rule at issue” must be interpreted “in the context of the RPCs as a whole.”<sup>62</sup> Given the Rules’ insistence on a one-size-fits-all regulatory approach and their overall objective of client protection,<sup>63</sup> in case of some doubt, or, more accurately, when in the face of growing client and lawyer diverse identities, the Rules may over protect some clients and under protect others, the Rules ought to err on the side of client protection and impose the reasonableness requirement on all attorneys, in-house lawyers included.

*b. Increased Access to Legal Services*

Next, the reasonableness requirement of Rule 1.5(a) is explained in terms of increasing access to legal services: “the availability of legal services is often essential if people of limited means are to enjoy legal rights. Those seeking to vindicate their rights through the private bar should not be deterred by the risk of unwarranted fee burdens.”<sup>64</sup> Thus, the Restatement’s increased access to legal services rationale contains two intertwined strands. To increase access to law and lawyers by people of limited means, “reasonableness” means “low” fees such that people of limited means can afford them.<sup>65</sup> To increase access for those who seek to vindicate legal rights, “reasonableness” means “warranted” fees.<sup>66</sup> Neither strand applies with force to in-house lawyers.

With regard to the “low” strand of reasonableness, entity clients are generally not of limited means. Even mid and small size entity clients with little funds in their corporate treasuries do not easily fit into a traditional understanding of “limited means,” which usually references levels of poverty and inability to pay for legal needs.<sup>67</sup> Entity clients, in contrast, have different types of needs

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<sup>62</sup> See, e.g., *LK Operating, LLC v. Collection Grp., LLC*, 331 P.3d 1147, 1158 (Wash. 2014); *In re Pers. Restraint of Adams*, 309 P.3d 451, 454 (Wash. 2013); *Chism v. Tri-State Constr., Inc.*, 374 P.3d 193, 207 (Wash. Ct. App. 2016) (quoting *LK Operating, LLC v. Collection Grp., LLC*, 331 P.3d 1147, 1147); see MODEL RULES OF PROF’L CONDUCT, SCOPE cmts. 14–15 (AM. BAR ASS’N, 2019) (“The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself . . . The Rules presuppose a larger legal context shaping the lawyer’s role.”).

<sup>63</sup> See MODEL RULES OF PROF’L CONDUCT, PREAMBLE cmt. 12 (AM. BAR ASS’N, 2019) (“The profession has a responsibility to assure that its regulations are conceived in the public interest . . .”).

<sup>64</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 cmt. b (AM. LAW INST. 2000).

<sup>65</sup> *Id.* cmt. a (“This Section . . . does not forbid lawyers to serve for low fees or without charge; such service is often in the public interest.”).

<sup>66</sup> See *id.* cmt. b.

<sup>67</sup> See MODEL RULES OF PROF’L CONDUCT r. 6.1, cmts. 2–3 (AM. LAW INST. 2019) (“[Rule 6.1] recognize[s] the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee . . . Persons eligible for legal services under [this Rule] are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly

not only because generally their needs entail maximization of wealth, but also because in the absence of access to in-house lawyers their needs might be served by outside counsel.<sup>68</sup>

Interpreting reasonableness in the “warranted” sense necessitates delving into the enigma of the stickiness and upward trajectory of legal fees. As the number of lawyers has grown exponentially since the 1960s, outpacing the (also growing) demand for legal services, commentators have wondered why fees for legal services have generally not fallen, resulting in a significant unmet demand for legal services by clients who cannot afford to pay the price, even at times of lawyers’ un- and under-employment.<sup>69</sup> As Heinz and others have explained, the market for legal services consists of at least two hemispheres, a corporate and an individual one.<sup>70</sup> In the corporate “greasing the wheels of the economy” hemisphere, clients can generally afford to pay relatively high fees and demand for legal services is robust. In the individual “justice” sphere, clients often cannot afford to pay for legal services, resulting in unmet demand. Prices for legal services in the individual hemisphere do not drop, however, because it has undersupply of attorneys as lawyers flock to the corporate hemisphere.<sup>71</sup> Indeed, lawyers continue to seek employment in the corporate hemisphere even when jobs in it are scarce rather than switch to the individual hemisphere in part because the costs of legal education and of law practice have escalated leaving them with debts that cannot be serviced easily in the individual sphere, and in part because the individual hemisphere has relatively low professional esteem.<sup>72</sup>

The stickiness of legal fees in the individual hemisphere and rising fees in the corporate hemisphere reveal the irony and counterintuitive legacy of *Goldfarb*.<sup>73</sup> When the U.S. Supreme Court struck down minimum fee schedules, it did so in the name of increasing competitiveness in the market for legal services, expecting that striking down artificially high “minimum fees” would re-

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above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women’s centers and food pantries that serve those of limited means.”) (emphasis added).

<sup>68</sup> Admittedly, entity clients sometimes have indirect compelling needs, for example, the livelihood interests of their employees. See Kent Greenfield, *The Third Way*, 37 SEATTLE U. L. REV. 749, 768 (2014) (advocating for the broadening of corporations’ responsibilities to include the interests of employees and other stakeholders).

<sup>69</sup> For a decade following the Great Recession over-supply of lawyers, some of whom were un- or under-employed, and the emergence of court-sponsored programs targeting some of these junior lawyers for apprenticeships led several commentators to speculate that supply of legal services to the underprivileged may increase. Unfortunately, these predictions have proven to be false. See Eli Wald, *Serfdom Without Overlords: Lawyers and the Fight Against Class Inequality*, 54 U. LOUISVILLE L. REV. 269, 296 (2016).

<sup>70</sup> HEINZ & LAUMANN, *supra* note 58, at 319; HEINZ ET AL., *supra* note 58, at 29.

<sup>71</sup> See Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 961–62 (2000).

<sup>72</sup> On the escalating cost of legal education and rising student debt, see, Eli Wald, *The Contextual Problem of Law Schools*, 32 NOTRE DAME J.L. ETHICS & PUB. POL’Y 281, 284 (2018).

<sup>73</sup> See *Goldfarb v. Va. State Bar*, 421 U.S. 773, 780, 793 (1975).

sult in market-driven lower fees for clients and increased access to legal services.<sup>74</sup> The reality has proven this thinking wrong. Market fees have stayed relatively high and often out of reach for many individual clients. From this perspective, the reasonableness requirement of Rule 1.5(a) can be understood to impose a “maximum fee” meant to combat sticky “unwarranted” fees and increase access to legal services, such that “[t]hose seeking to vindicate their rights through the private bar should not be deterred by the risk of unwarranted fee burdens.”<sup>75</sup>

This “unwarranted” interpretation of the access to legal services rationale, understood in terms of capping fees at a reasonable level to overcome the stickiness of fees in the market for legal services to ensure that average clients are not priced out, applies to in-house lawyers with only limited force. To the extent that in-house pay is somewhat sticky, for example, because it is tied to the compensation of elite general counsel whose compensation in turn tracks those of C-Suite executives,<sup>76</sup> unreasonably high salaries and compensation packages may result in pricing out mid-size and small businesses from the market for in-house lawyers. Just like high legal fees in the corporate hemisphere lead to sticky legal fees in the individual hemisphere, high in-house compensation in the large entity client super-sphere may lead to high sticky in-house compensation throughout the in-house practice universe, resulting in “unwarranted” compensation undercutting the ability of some entity clients to assert their legal rights. Yet, entity clients that cannot afford in-house counsel may still retain outside counsel, and in-house pay may not prove sticky because even at levels lower than that of elite general counsel, it is still likely to attract lawyers given the high status of in-house positions.

In sum, the increased access to legal services rationale does not apply well in the in-house context: entity clients in the corporate hemisphere generally have ample access to lawyers and legal services and are not of “limited means.” Moreover, compensation in the in-house universe is not likely to be sticky even if elite general counsel pay remains relatively high.

*c. Professionalism*

Third, the reasonableness requirement of Rule 1.5(a) and Section 34 may be understood in terms of the social bargain the profession has struck with the public, pursuant to which, the public grants the profession a noncompetitive monopoly over the provision of legal service and in return the profession self-regulates, guaranteeing the quality of legal services.<sup>77</sup> Exactly because the pro-

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<sup>74</sup> Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 STAN. L. REV. 633, 643–44 (2013).

<sup>75</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34, cmt. b. (AM. LAW INST. 2000).

<sup>76</sup> *General Counsel Bonus Structure*, ASS’N CORP. COUNS. (Mar. 22, 2013), <https://www.acc.com/resource-library/general-counsel-bonus-structure> [<https://perma.cc/P+Y5S-X5KK>].

<sup>77</sup> See Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 949, 951 (1963) (explaining that since it is quite difficult for lay customers,

profession has a monopoly, which results in noncompetitive fees, Rule 1.5(a) imposes on lawyers a reasonableness requirement to ensure that fees are not too high and out of touch with competitive market rates.

That Rule 1.5(a)'s reasonableness requirement is justified in terms of more than client protection and access to legal services is evident from the applicable case law. In the leading case of *In the Matter of Fordham*, attorney Fordham was disciplined for charging an unreasonable fee.<sup>78</sup> *Inter alia*, Mr. Fordham argued that the fee in question could not be unreasonable because the clients, the Clarks, gave their informed consent to it.<sup>79</sup> The court rejected the clients' informed consent as a safe harbor argument, holding that the Rule "creates explicitly an objective standard by which attorneys' fees are to be judged,"<sup>80</sup> and adding that "[t]he test as stated in the [Rule] is whether the fee 'charged' is clearly excessive, not whether the fee is accepted as valid or acquiesced in by the client."<sup>81</sup> If the sole rationale for the reasonableness requirement was the protection of vulnerable ill-informed clients from overreaching lawyers, then the informed consent of sophisticated clients would have been accepted by the court as a safe harbor because informed consent would have put to rest concerns about client abuse. The court's rejection of informed consent as a safe harbor and its insistence that Rule 1.5(a) imposes an objective standard irrespective of the client's acquiescence means that the Rule's rationale is broader than client protection and has in part to do with the status of lawyers as professionals as opposed to mere service providers. Indeed, the notion that the profession might restrict compensation in the name of professionalism is not new. For example, some commentators have argued that the professional status of lawyers ought to prevent them from accepting stock options.<sup>82</sup>

The social bargain and monopoly rationale applies to in-house counsel with as much force as it applies to all other lawyers. All lawyers, in-house attorneys

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even ex post, to evaluate the quality of professional services they receive because such services are the product of esoteric knowledge they usually do not possess, the public and the profession strike a social bargain pursuant to which the public grants the profession a monopoly over the provision of services, and the profession, in return, promulgates and enforces rules of conduct that are meant to ensure the quality of professional services). See also ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS* 59, 62 (1988); MAGALI S. LARSON, *THE RISE OF PROFESSIONALISM* 208–09, 211 (1977); TALCOTT PARSONS, *The Professions and Social Structure*, in *ESSAYS IN SOCIOLOGICAL THEORY* 34, 35, 38 (rev. ed. 1954).

<sup>78</sup> *In re Fordham*, 668 N.E.2d 816, 818 (Mass. 1996).

<sup>79</sup> See *id.* at 820.

<sup>80</sup> *Id.* at 824.

<sup>81</sup> *Id.*

<sup>82</sup> Z. Jill Barclift, *Corporate Responsibility: Ensuring Independent Judgment of the General Counsel – A Look at Stock Options*, 81 N.D. L. REV. 1, 3–4 (2005). But see ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 00-418 (2000) (approving lawyers' acquisition of ownership in clients subject to compliance with the conflict of interest rules); John S. Dzienkowski & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients*, 81 TEX. L. REV. 405, 516–19 (2002) (exploring conflict concerns related to stock grants to in-house lawyers); Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee*, 39 S. TEX. L. REV. 497, 539 (1998) (same).



included, benefit from a monopoly over the provision of legal services, which restricts competition from nonlawyer legal service providers and results in non-competitive fees and compensation.<sup>83</sup> The social bargain confers on members of the legal profession this noncompetitive advantage because it views lawyers not as mere service providers but as professionals who owe clients corresponding professional duties such as guaranteeing quality<sup>84</sup> and keeping fees and compensation reasonable.

In the context of in-house practice, one might be tempted to overlook the social bargain rationale on the ground that it contradicts the wishes of both entity clients and their in-house counsel: should not sophisticated entity clients be able to give their informed consent to noncompetitive in-house pay if they so desire? Yet such kneejerk reaction will be ill advised. Entity clients, as we have seen, are hardly a monolith. Some are not powerful or sophisticated vis-à-vis their in-house counsel. Moreover, the professionalism rationale is not dependent on the wishes of some clients, the Clarks' or entity clients'. Rather, the reasonableness requirement is an obligation of all lawyers stemming from their professional status, monopoly over the provision of legal services, and the resulting noncompetitive fees. The informed consent of particular clients in specific cases simply does not suffice to overcome the professional obligation of reasonable fees because the benefits lawyers derive from their professional status are not conferred by these particular clients but rather by the public as part of the social bargain.

Similarly, particular lawyers, in-house counsel included, cannot opt out of their professionalism obligations, the reasonableness of fees included, because the obligations are part of the social bargain entered into by the profession and the public. Furthermore, even if they could opt out of certain professional obligations, in-house lawyers ought to exercise caution before doing so. Importantly, rejection of the social bargain and monopoly rationale for imposing a reasonableness requirement on fees and in-house compensation, and, more generally, of professionalism-imposed duties on lawyers qua lawyers entails more than Rule 1.5(a). If in-house lawyers were to reject the duties imposed on them by virtue of their status as professionals, conceptually they risk opening the door to forfeiting corresponding professional prerogatives, such as being able to offer their clients confidentiality and restricting the provision of legal services by nonlawyers.<sup>85</sup> This concern, to be sure, is anything but a theoretical possibility. In Europe, in-house lawyers have fewer professional prerogatives including significantly reduced confidentiality, exactly because they are not

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<sup>83</sup> Cf. Arrow, *supra* note 77, at 949, 951.

<sup>84</sup> *Id.*; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 1 (1975).

<sup>85</sup> See, e.g., Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 4 (1998) (arguing that confidentiality confers upon lawyers a noncompetitive advantage that is not in the best interest of clients and the public).

considered to be independent professionals and are seen more as embedded employees of entity clients.<sup>86</sup>

Put differently, in-house lawyers and the legal profession more generally cannot pick and choose among the nexus of professional obligations and benefits their status as professionals imposes and confers on them. Rejection of professional duties amounts to triggering the process of de-professionalizing and de-reregulating the practice of law, which the organized bar has long resisted.<sup>87</sup> In this context, the *In the Matter of Fordham* court's rejection of informed client consent as a safe harbor for unreasonable fees becomes, no pun intended, more reasonable from the profession's point of view.

*d. Fiduciary Duties*

The attorney-client relationship is a fiduciary relationship, in which attorney-agents owe clients-principals a fiduciary duty of loyalty.<sup>88</sup> Thus, lawyers are not mere agents but rather special fiduciaries who owe clients heightened fiduciary duties.<sup>89</sup> Arguably, the duty of loyalty encompasses the reasonableness requirement such that charging clients unreasonable fees constitutes an act of disloyalty in violation of lawyers' fiduciary obligations.

The fiduciary rationale applies to in-house lawyers who owe entity-clients a fiduciary duty of loyalty.<sup>90</sup> The Restatement (Third) of Restitution and Unjust Enrichment states in relevant part that "[a] person who obtains a benefit (a) in breach of a fiduciary duty . . . is liable in restitution to the person to whom the

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<sup>86</sup> Case C-550/07 P, *Akzo Nobel Chems. Ltd. v. European Comm'n*, 2010 E.C.R. I-8360, I-8393 (lawyers employed as in-house counsel are not sufficiently independent of their corporate entity employers and thus cannot not engage in privileged communications with their client, the corporation); J. Triplett Mackintosh & Kristen M. Angus, *Conflict in Confidentiality: How E.U. Laws Leave In-House Counsel Outside the Privilege*, 38 INT'L LAW. 35, 36 (2004).

<sup>87</sup> See DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 1–4 (2003).

<sup>88</sup> The Restatement defines the attorney-client relation in terms of an agency relationship, with its corresponding host of default fiduciary duties. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (AM. LAW INST. 2000) (the "relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services . . .").

<sup>89</sup> Deborah A. DeMott, *The Lawyer as Agent*, 67 FORDHAM L. REV. 301, 301–02 (1998); Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 ST. MARY'S L.J. 909, 924–25 (2009); W. Bradley Wendel, *Should Lawyers Be Loyal to Clients, the Law, or Both?*, 5–6 (forthcoming 2019) (on file with author); W. Bradley Wendel, *The Problem of the Faithless Principal: Fiduciary Theory and the Capacities of Clients*, 124 PA. ST. L. REV. 107, 144–45 (2019).

<sup>90</sup> This conclusion raises intriguing questions about the fiduciary duties of nonlawyer corporate agents to the entity and whether and how lawyers' duty of loyalty differs than the duty of nonlawyers. See *infra* CONCLUSION.

duty is owed.”<sup>91</sup> Comment e. explains that “[a] person occupying a fiduciary or confidential relation to another,” here an in-house lawyer, “is ordinarily required to observe ‘the utmost good faith’ in dealings within the scope of the relation.”<sup>92</sup> In particular, “[o]ver and above the duty of loyalty described in the preceding Comment, *this obligation of heightened good faith bars the fiduciary from taking undue advantage of the beneficiary in direct dealings between them . . .*,”<sup>93</sup> such as accepting an unreasonable salary and overall compensation. A 2005 draft of the Restatement included the following illustration, explicitly applying a reasonableness requirement to in-house pay:

Corporation’s President hires General Counsel to handle a pending regulatory investigation at an annual salary of \$1 million. General Counsel works diligently for a period of 12 months, achieving a favorable result. In recognition of General Counsel’s services to Corporation, President awards him a bonus consisting of cash and other allowances having an aggregate value of \$20 million. On suit brought by shareholders in the name of Corporation, the court finds that a bonus of \$20 million (paid in addition to his regular salary) is “clearly excessive” for General Counsel’s services to Corporation and that General Counsel’s acceptance of the bonus constitutes a breach of General Counsel’s fiduciary duty to Corporation. Corporation has a claim by the rule of this Section to recover the amount by which \$21 million exceeds a reasonable compensation for General Counsel’s services for the 12-month period.<sup>94</sup>

As was the case with the social bargain and monopoly rationale, some in-house counsel (and other lawyers) may resist fiduciary-based reasonableness restrictions on fees and compensation on the ground that they increasingly view themselves and are understood by their clients to be little more than service providers, as opposed to fiduciaries. Yet, the dismissal of fiduciary duties and the treatment of clients as arm’s length customers, as opposed to fiduciaries, entails the same risk of snubbing professional duties—the erosion of corresponding prerogatives that have long been a staple of and defined the practice of law.

In sum, the intent behind Rule 1.5(a) interpreted in the context of the Rules as a whole strongly suggests that the reasonableness requirement ought to apply to in-house compensation. Although the client protection rationale does not apply to all entity-clients equally because some large entity-clients tend to be savvy and not in need of protection from in-house lawyers, other entity clients are very much in need of protection. As importantly, the overall bent of the Rules in favor of client protection and a one-size-fits-all regulatory approach mitigates toward imposing the reasonableness requirement on in-house lawyers. Next, while the increased access to legal services rationale generally poorly fits in-house practice realities, the professionalism rationale explained in terms of

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<sup>91</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 (AM. LAW INST., 2011).

<sup>92</sup> *Id.* at cmt. e.

<sup>93</sup> *Id.* (emphasis added).

<sup>94</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43, cmt. e., Illustration 26 (AM. LAW INST., Tentative Draft No. 4, 2005).

the social bargain, monopoly over the provision of legal services and the corresponding monopolistic benefits of confidentiality and noncompetitive fees strongly applies to in-house lawyers. Finally, the fiduciary rationale imposes on in-house lawyers a duty of utmost good faith which prevents them from accepting unreasonable pay. Consequently, in-house lawyers' salaries and overall compensation are subject to a reasonableness requirement.

3. *Consistency Across the Rules: Rule 1.5(a) and Rule 1.8(a)*

The conclusion that the reasonableness requirement of Rule 1.5(a) applies to in-house compensation is supported by analysis of Rule 1.8(a). Rule 1.8(a) states in relevant part that:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: (1) *the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client* and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client . . . .<sup>95</sup>

Conceptually, an employment agreement is a business transaction between an in-house attorney and an entity client and certain components of overall compensation, such as stock grants and stock options, constitute the acquisition of an ownership and security interest in the client, triggering the fairness and reasonableness requirements of Rule 1.8(a).

The Comment makes it clear that in-house pay is subject to a reasonableness requirement, imposed either by Rule 1.5(a) or by Rule 1.8(a). It states in relevant part that: "It [the Rule] does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee."<sup>96</sup> Thus, if salary and overall in-house compensation are "ordinary fee arrangements between client and lawyer," as the above analysis argues,<sup>97</sup> then Rule 1.5(a) and its reasonableness requirement apply. If salary and overall compensation are not "ordinary fee arrangements," then they are part of a business transaction subject to the reasonableness requirement of Rule 1.8(a). Indeed, the Comment clearly applies to stock grants and options, stating that "its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee."<sup>98</sup> Thus, the Comment identifies a clear conceptual fork in the road to a consistent and coherent construction of Rules 1.5(a) and 1.8(a): either in-house pay, including salaries, is a "fee" subject to the reasonableness requirement of Rule

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<sup>95</sup> MODEL RULES OF PROF'L CONDUCT r. 1.8(a) (AM. BAR ASS'N 2019) (emphasis added).

<sup>96</sup> *Id.* r. 1.8 cmt. 1.

<sup>97</sup> *Supra* Section I.A.1-2.

<sup>98</sup> MODEL RULES OF PROF'L CONDUCT r. 1.8(a) cmt. 1 (AM. BAR ASS'N 2019).

1.5(a); or it is not, in which case it constitutes a business transaction and subject to the heightened reasonableness requirement of Rule 1.8(a).

Unfortunately, the *Chism* courts unnecessarily confused this straightforward point. The trial court, having ruled that in-house bonuses were not a “fee” for purposes of Rule 1.5(a), inconsistently held that bonuses were a “fee” arrangement for purposes of the comment to Rule 1.8(a).<sup>99</sup> Perhaps mindful of the internal contradiction in its own analysis, the trial court then concluded that while salaries and bonuses were a “fee” for purposes of Rule 1.8(a), they were not an “ordinary fee arrangement” (because on the facts of the case they were a modification of an existing fee arrangement) and therefore held that 1.8(a) applied.<sup>100</sup> With due respect, this analysis makes little sense. If in-house compensation, including salaries and bonuses, is not a “fee,” then the distinction between “ordinary fee” and “nonordinary fee” is irrelevant. Instead, salaries and bonuses will be subject to the reasonableness requirement of Rule 1.8(a) not because they are nonordinary fees, but because they are not a fee and thus a business transaction subject to Rule 1.8(a). If, on the other hand, salaries and bonuses are a fee, then they are subject to Rule 1.5(a), not 1.8(a).

Note that as the Comment to Rule 1.8 makes clear, in-house pay is clearly subject to a reasonableness requirement, either 1.5(a)’s “standard” reasonableness requirement, which applies to all “fees,” or 1.8(a)’s “heightened” reasonableness requirement (adding fairness, full disclosure and transmittal in writing to reasonableness), which applies to business transactions with clients.<sup>101</sup> Which reasonableness requirement better fits in-house practice? The court of appeals disapproved of applying the heightened reasonableness requirement of Rule 1.8(a) to in-house lawyers’ salaries and bonuses. It pointed out, correctly, that subjecting in-house pay to the heightened reasonableness requirement of Rule 1.8(a) would burden the lawyer-employee—client-employer relationship and “disturb the settled expectations of many lawyer-employees” by subjecting employment benefits to the scrutiny of Rule 1.8(a).<sup>102</sup> The court of appeals added that such an interpretation would subject “standard wage contracts for lawyer-employees . . . to greater scrutiny overall than standard fee contracts, which are generally exempt from the rule [1.8(a)],”<sup>103</sup> and only subject to the lesser-imposing reasonableness requirement of Rule 1.5(a). Notably, the court of appeals could have achieved its policy outcome—exempting in-house pay from the heightened reasonableness requirement of Rule 1.8(a)—by simply holding that in-house pay is a “fee” per Rule 1.5(a), in which case per the Comment to Rule 1.8(a) the latter Rule would be inapplicable. Indeed, logically

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<sup>99</sup> *Chism v. Tri-State Constr., Inc.*, 374 P.3d 193, 210 (Wash. Ct. App. 2016).

<sup>100</sup> *Id.*

<sup>101</sup> MODEL RULES OF PROF’L CONDUCT r. 1.8 cmt. 1 (AM. BAR. ASS’N 2019) (“[Rule 1.8(a)] does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client’s business or other nonmonetary property as payment of all or part of a fee.”).

<sup>102</sup> *Chism*, 374 P.3d at 210.

<sup>103</sup> *Id.*

that was the only consistent interpretation open to the court of appeals: finding that salaries and bonuses were an “ordinary fee arrangement” per the Comment to Rule 1.8(a) meant that they were a “fee” and thus subject to Rule 1.5(a), a point lost on the court of appeals.

Moreover, applying Rule 1.8(a) to in-house pay, as the trial court found, would create a confusing schism. Rule 1.8(a) only applies to a “lawyer” and a “client,” that is, it only applies if an attorney-client relationship exists. Thus, if in-house pay was deemed a business transaction triggering Rule 1.8(a), the Rule would apply to situations when an outside counsel is negotiating with her client to become its in-house counsel (because an attorney-client relationship already exists between the parties), but would not apply when a client would be negotiating an in-house position with a lawyer who does not represent it.<sup>104</sup> In sum, as the Comment to Rule 1.8 states, “ordinary fee arrangements between client and lawyer,”<sup>105</sup> that is, ordinary compensation matters in the attorney-client relationship, inclusive of in-house compensation, ought to be governed by Rule 1.5(a), not Rule 1.8(a).

#### 4. *Applying a Reasonableness Requirement to In-House Pay*

A plain language, as well as an intent-based interpretation of Rule 1.5(a), suggests that “fee” ought to be construed to include in-house pay. Such an important and timely issue, however, should not wait until it makes its way to state supreme courts or risk conflicting interpretations by different courts. Instead, the ABA should address the issue by revising the first sentence of Rule 1.5(a) and comment 1 respectively to read:

1.5(a) “A lawyer shall not make an agreement for, charge, or collect an unreasonable fee *or compensation* or an unreasonable amount for expenses. *The reasonableness requirement applies to the compensation of in-house lawyers.*”<sup>106</sup>

[1] “Paragraph (a) requires that lawyers charge fees *and forms of compensation* that are reasonable under the circumstances.”

In the alternative, the ABA can leave Rule 1.5(a) and comment 1 intact and add to its terminology section, Rule 1.0, a new definition as follows:

1.0(x) “*Fee*” denotes the payment for legal services provided by a lawyer to a client, including payment by an organizational client to its in-house counsel in the form of salaries, bonuses, or nonmonetary benefits.

Notably, even if the ABA were to amend the Rules to clarify that “fee” includes in-house salaries and bonuses, three doctrinal issues warrant attention.

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<sup>104</sup> *Id.* at 211 n.28.

<sup>105</sup> MODEL RULES OF PROF’L CONDUCT r. 1.8 cmt. 1 (AM. BAR ASS’N 2019).

<sup>106</sup> Appendix A collects all the proposed amendments to the Rules discussed in this Article.

a. *Stock Grants and Stock Options*

Consider stock grants and stock options, a common component of in-house counsel's compensation.<sup>107</sup> Recall that Comment 1 to Rule 1.8 states in relevant part that "[the Rule] does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although *its requirements must be met when the lawyer accepts an interest in the client's business or other non-monetary property as payment of all or part of a fee.*"<sup>108</sup> Accordingly, while most aspects of in-house compensation, namely salaries, bonuses and nonmonetary benefits would be governed by Rule 1.5(a), stock grants and stock options would be governed by the stricter Rule 1.8(a). Notably, this is exactly the current state of affairs for all lawyers, whose fees are generally subject to Rule 1.5(a), except that stock grants and stock options are subject to Rule 1.8(a), explained by a concern regarding a conflict of interest inherent in fees that grant lawyers an interest in the client's business.<sup>109</sup>

In addition to Rule 1.8(a), stock grants and stock options are also regulated, indirectly, by Rule 5.6(a). Rule 5.6(a) states in relevant part that: "A lawyer shall not participate in offering or making: . . . a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship."<sup>110</sup> The Rule has routinely been interpreted to forbid in-house lawyers from becoming parties to noncompete agreements.<sup>111</sup> In the context of in-house practice, however, Rule 5.6 imposes a harsh constraint because stock grants and stock options are a common feature of in-house compensation packages and the grant of stocks and stock options is often subject to the execution of a noncompete agreement.<sup>112</sup>

Currently, some in-house lawyers and their entity clients may awkwardly ignore the constraints of Rule 5.6(a), yet even if some in-house lawyers are willing to engage in misconduct by ignoring the rule and risk disciplinary action, violating Rule 5.6(a) creates uncertainty as to the enforceability of non-compete clauses for in-house counsel. A stock grant or option agreement between an in-house attorney and an entity-client is *prima facie* valid,

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<sup>107</sup> Barclift, *supra* note 82, at 16; Dzienkowski & Peroni, *supra* note 82, at 517; Liggio, *supra* note 38, at 1026 n.16; Moore, *supra* note 82, at 538.

<sup>108</sup> MODEL RULES OF PROF'L CONDUCT r. 1.8 cmt. 1 (AM. BAR ASS'N 2019) (emphasis added).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* r. 5.6(a).

<sup>111</sup> See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-381 (1994); N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 708 (2006); Tonio D. DeSorrento, *Enforceability of Restrictive Covenants: Are In-House Counsel to be Exempt from Non-Competes?*, 20 GEO. J. LEGAL ETHICS 487, 492-93 (2007).

<sup>112</sup> M. Scott McDonald, *Noncompete Contracts: Understanding the Cost of Unpredictability*, 10 TEX. WESLEYAN L. REV. 137, 151 (2003) ("It is increasingly common to see noncompete provisions tied to stock options or stock grants."); Yifat Aran, Note, *Beyond Covenants Not to Compete: Equilibrium in High-Tech Startup Labor Markets*, 70 STAN. L. REV. 1235, 1273-76 (2018).

notwithstanding an offending noncompete clause in violation of Rule 5.6(a).<sup>113</sup> If a dispute arises between in-house counsel and the client over a violation of the noncompete, for example, when the client seeks to enforce the noncompete and enjoin its former in-house lawyer from taking an in-house position with a business competitor, the former in-house counsel will ask a court to set aside the offending noncompete clause as violative of Rule 5.6(a) and thus of public policy. In other words, a noncompete clause in a stock grant agreement that violates Rule 5.6(a) does not automatically void the entire agreement. Rather, a court will have to entertain a motion to strike the clause as against public policy. This posture entails inherent uncertainty, as a court considering such a motion, may refuse to set the clause aside and enforce the noncompete, for example, if the in-house counsel who executed it was aware of Rule 5.6(a), or if she exercised stock options or cashed out stock grants pursuant to the agreement. In the alternative, the court may strike the noncompete clause, either letting the rest of the agreement stand, or invalidating the entire agreement.

In addition to the inherent uncertainty regarding enforceability of noncompete clauses entered into by in-house counsel, which the lawyers can avoid by simply complying with the noncompete, this state of affairs forces in-house counsel to make an uncomfortable choice: forgo a common form of compensation or violate Rule 5.6(a) even when no disputes arise with the entity-client. Worse, the knowing violation of Rule 5.6(a) may trigger other violations of the Rules, such as failure to report one's own misconduct on the part of the in-house attorney pursuant to Rule 8.3(a),<sup>114</sup> and failure to put in place reasonable

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<sup>113</sup> Misconduct is a matter of discipline, not civil liability, and, in particular, a violation of the Rules does not in-and-of-itself invalidate any civil agreement or lead to civil liability. The Scope section of the Rules explains that: "The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. *They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.* The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule." MODEL RULES OF PROF'L CONDUCT, SCOPE, cmt. 20 (AM. BAR ASS'N 2019) (emphasis added). The comment adds that: "Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." *Id.* Thus, although a violation of the Rules does not automatically invalidate a contract, misconduct may serve as a ground for setting a contract or a clause aside as violative of public policy.

<sup>114</sup> Rule 8.3(a) states that: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." *Id.* r. 8.3(a). While the rule itself mandates reporting of "another lawyer[']s" misconduct, it has often been interpreted to also require self-reporting. *See, e.g.,* Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2007-1 (2007) ("A lawyer is required to self-report his or her professional misconduct, as well as report others' misconduct . . ."); Vincent R. Johnson, *Legal Malpractice Litigation and the Duty to Report Misconduct*, 1 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 40, 44 n.5 (2011). To the extent that Rule 8.3(a) requires self-reporting, surely a knowing violation of the rule for personal gain—securing stock grants—would entail "fitness as a lawyer."



procedures to ensure compliance with the Rules on the part of the general counsel as head of the in-house legal department pursuant to Rule 5.1(a).<sup>115</sup>

The comment to Rule 5.6(a) explains that it is grounded in respect for the client's freedom to choose a lawyer.<sup>116</sup> Consider the following typical example. Lawyer, a partner at Law Firm A, represents Client. Lawyer wishes to move to Law Firm B. If Lawyer were subject to a noncompete agreement with Law Firm A prohibiting Lawyer from representing current clients of Law Firm A upon leaving the firm, Client will not be able to move with Lawyer to Law Firm B and will be deprived her choice of lawyer, namely, Lawyer.

Note, however, that this typical concern does not apply to in-house counsel. When an in-house counsel leaves her position with an entity client, because the entity was the in-house counsel's only client, no current client exists that may wish to move with the in-house counsel to another entity and will be deprived her choice of counsel. Indeed, the only party that may be denied its choice of counsel is not a current client of the in-house counsel but the potential new entity employer, typically not a client who lacks access to lawyers and legal services.

That the main rationale for Rule 5.6(a)—protecting current clients' choice of counsel—does not apply to in-house lawyers is hardly a surprise: the Rule was promulgated before the rise of in-house counsel and before stock grants and stock options became a common feature of executive compensation, in-house lawyers included. Moreover, although several ethics opinions have construed Rule 5.6(a) to apply to in-house lawyers,<sup>117</sup> arguably that interpretation was erroneous, ignoring the in-house context in favor of applying the rule to all lawyers consistent with the one-size-fits-all regulatory approach of the ABA.

Moreover, as the typical example of lawyer mobility illustrates, Rule 5.6(a) was designed to prohibit noncompete agreements between lawyers and their law firms, which may restrict clients' choice of counsel.<sup>118</sup> However, in the in-house context the noncompete agreement is not between lawyers and their law firms but rather between entity-clients and their in-house lawyers. To the extent that such agreements between clients and lawyers restrict the right of lawyers to practice they are conceptually similar to limitations imposed by the conflict rules on lawyers' practice and should not be the subject of Rule 5.6(a).<sup>119</sup> Ra-

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<sup>115</sup> Rule 5.1(a) states that: "A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." MODEL RULES OF PROF'L CONDUCT r. 5.1(a) (AM. BAR ASS'N 2019). For purposes of Rule 5.1(a), an in-house legal department is a law firm. *See id.* r. 1.0(c).

<sup>116</sup> *Id.* r. 5.6 cmt. 1 ("An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer.").

<sup>117</sup> DeSorrento, *supra* note 111 at 492–93 (internal citations omitted).

<sup>118</sup> *Supra* note 116 and accompanying text.

<sup>119</sup> Rules 1.7 and 1.9, for example, conceptually restrict a lawyer's right to practice due to duties owed respectively to current and former clients, and such "restrictions" are in part a

ther than applying Rule 5.6(a) mechanically and harshly to in-house lawyers in circumstances that fail to adhere to the Rule's rationale, Rule 5.6(a) should be amended as follows to clarify that it does not apply to agreements between clients and their in-house counsel:

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement or an agreement concerning the grant of stock grants or stock options to in-house counsel as part of a compensation agreement subject to a reasonable noncompete provision;

*b. Fee Modifications*

The established interpretation of Rule 1.5(a) holds that its reasonableness requirement applies to both the initial fee arrangement between attorney and client and to any fee agreement modifications after the attorney-client relationship is formed.<sup>120</sup> Moreover, changes in fee arrangements that involve a lawyer acquiring an interest in the client's business require compliance with Rule 1.8(a).<sup>121</sup> Accordingly, if in-house salaries, bonuses and nonmonetary compensation such as health benefits were to be deemed fees, then any modification to these terms would be subject to Rule 1.5(a), and any modifications to in-house lawyers' stock grants and options would be subject to Rule 1.8(a). To be sure, "fee modification" may be agreed upon in the original "fee" arrangement. For example, a lawyer may advise a client in an initial fee arrangement that the lawyer may reasonably increase her fees annually without subjecting herself to Rule 1.8(a).<sup>122</sup> Thus, a client-employer may reference adjustments or anticipate raises to a lawyer-employee's salaries, bonuses, and nonmonetary compensation in the initial employer-employee agreement.

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function of agreements between clients and attorneys, manifested in clients' informed consent. MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(4), 1.9(a) (AM. BAR ASS'N 2019).

<sup>120</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-458 (2011).

<sup>121</sup> *Id.*; *Chism v. Tri-State Constr., Inc.*, 374 P.3d 193, 209 (Wash. Ct. App. 2016) (internal citations omitted).

<sup>122</sup> ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 120; MODEL RULES OF PROF'L CONDUCT r. 1.5 cmt. 2 (AM. BAR ASS'N 2019) ("When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee . . . for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees . . . must be promptly established."); see also Douglas R. Richmond, *Changing Fee Arrangements During Representations: What are the Rules?*, 15 PROF. LAW. 2, 17 (2004).

c. *A Personal Conflict of Interest Negotiating One's Own Fees, Rule 1.7(a)(2)*

In *Chism*, Tri-State argued (and the trial court agreed) that bonus negotiations between Mr. Chism and the entity-client violated Rule 1.7.<sup>123</sup> Rule 1.7(a)(2) prohibits lawyers from “represent[ing] a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer.”<sup>124</sup> Specifically, Tri-State argued that an in-house lawyer’s negotiations with a client regarding a bonus involve the lawyer’s personal interest in the bonus and thus constitute a conflict.<sup>125</sup>

Outside of the in-house context, the Rules elegantly sidestep the argument that Rule 1.7(a)(2) applies to fee negotiations between attorney and client. At the outset of the attorney-client relationship when the fee arrangement is negotiated for the first time, the lawyer does not represent the client and thus Rule 1.7 does not apply. Notably, however, Rule 1.5(a) applies at this stage guaranteeing that the fee is reasonable, as well as to fee modifications.<sup>126</sup>

In one instance, however, Rule 1.7(a)(2) arguably applies to fee negotiations, when a lawyer negotiates with a current client a fee for a new matter, because one could assert that the lawyer’s representation of the client in the pending matter could be materially limited by the lawyer’s personal interest in negotiating the fee in the new matter. Such an argument ought to be rejected for at least two reasons. First, in an ongoing attorney-client relationship, the attorney does not represent the client in the fee negotiations. Second, burdening the fee negotiations with an informed consent requirement, the practical impact of applying Rule 1.7(a)(2) to the situation would be impractical and unnecessary given that Rule 1.5(a), which applies to the new matter, already guarantees that the fee in the new matter will be reasonable.

The same rationale should apply to negotiations between in-house lawyers and their clients. At the outset of the relationship the in-house lawyer does not represent the client and thus Rule 1.7(a)(2) does not apply to the compensation negotiations, but Rule 1.5(a) does. Subsequently, fee modifications, including bonus negotiations, will be subject to Rule 1.5(a) and not Rule 1.7(a)(2) because the in-house lawyer does not represent the entity-client in the fee modification negotiations and because Rule 1.5(a) guarantees the reasonableness of the modified in-house compensation.

To recap the analysis to this point, the best interpretation of the Rules, which the ABA may confirm in clarifying amendments,<sup>127</sup> is as follows: the reasonableness requirement of Rule 1.5(a) generally applies to in-house pay

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<sup>123</sup> *Chism*, 374 P.3d at 207.

<sup>124</sup> MODEL RULES OF PROF’L CONDUCT r. 1.7(a)(2) (AM. BAR ASS’N 2019).

<sup>125</sup> *Chism*, 374 P.3d at 208.

<sup>126</sup> *Supra* Section I.A.4.b.

<sup>127</sup> *See infra* Appendix A.

with the exception of stock grants and stock options, which are subject to the heightened requirements of Rule 1.8(a). Rule 5.6(a) should not preclude the grant of stock and stock options to in-house lawyers subject to a reasonable noncompete provision. Modifications to in-house pay, just like modifications to all fees, are generally subject to Rule 1.5(a), except in circumstances that involve modifications to stock grants and options, which are subject to Rule 1.8(a). Finally, Rule 1.7(a)(2) does not impose an additional constraint on in-house pay, above and beyond the reasonableness standard of Rule 1.5(a).

*B. What's Reasonable? Assessing the Reasonableness of In-House Pay*

Rule 1.5(a) states in relevant part that;

The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.<sup>128</sup>

The Comment adds that “[t]he factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance.”<sup>129</sup>

To begin with, per the second factor, in-house compensation may take into account that employment as in-house counsel precludes other employment by the lawyer, rendering a salary, as opposed to an hourly rate or a flat fee, a reasonable arrangement. Importantly, taking a position as an in-house counsel not only foregoes the representation of clients other than the entity-employer, but may also result in reduced opportunities for training and mentoring compared to traditional law firms, as well as a more limited diet of well-rounded work assignments.<sup>130</sup>

Applying the other Rule 1.5(a) factors demands careful contextual attention. The world of in-house counsel is incredibly diverse with the practice varying greatly depending on client needs and job responsibilities,<sup>131</sup> such that the application of the first, fourth, fifth, sixth, and seventh factors will vary depending on the circumstances.

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<sup>128</sup> MODEL RULES OF PROF'L CONDUCT r. 1.5(a) (AM. BAR ASS'N 2019).

<sup>129</sup> *Id.* r. 1.5 cmt. 1.

<sup>130</sup> Eli Wald, *Getting in and out of the House: Career Trajectories of In-House Lawyers*, 88 *FORDHAM L. REV.* (forthcoming 2020) (on file with author).

<sup>131</sup> *Id.*

Per the first factor, the reasonableness of in-house pay will depend on the time and labor required. Some clients, such as Tri-State, only need a part-time in-house attorney working on average 1.5 hours a day,<sup>132</sup> whereas others will expect a more traditional 9 to 5 workday and still others may expect service around the clock based on the twenty-four-seven hypercompetitive model of Big Law.<sup>133</sup> Next, some in-house lawyers may be subject-matter experts with corresponding limited time and labor requirements, for example, an associate general counsel for intellectual property affairs. Others may be the general counsel charged with overseeing all the legal affairs of the client-entity, and even within the general counsel universe, time and labor expectations may vary greatly depending on clients' needs. Indeed, some general counsel, for example, elite general counsel serving large entity clients, may assume broader responsibilities as legal advisors, counsel, business leaders, compliance officers, human resource officers etc., significantly increasing their time and labor.<sup>134</sup>

Moreover, the entire notion of in-house counsel's "time and labor required" differs from that of outside counsel. Traditionally, outside counsel's "time" has been quantified and measured for purposes of fee calculations in terms of billable hours.<sup>135</sup> Yet, not only do in-house lawyers traditionally not record billable hours, but that concept overlooks an important aspect of in-house lawyers' time investment in "soft" hours, getting to know the industry, the particulars of the entity-client, the various constituents of the client, and the non-legal bases of knowledge relevant for doing the job right.<sup>136</sup> In particular, travel may be a significant aspect of some in-house lawyers' work-related commitments, yet play a minor role in the professional lives of others.<sup>137</sup> In order to do the job effectively and become persuasive, let alone influential within their entity-clients, in-house counsel often invest ample soft hours that ought to be acknowledged and reflected in their pay.<sup>138</sup>

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<sup>132</sup> Chism, 374 P.3d at 196.

<sup>133</sup> Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 *FORDHAM L. REV.* 2245, 2263 (2010) [hereinafter Wald, *Glass Ceilings and Dead Ends*].

<sup>134</sup> PRASHANT DUBEY & EVA KRIPALANI, *THE GENERALIST COUNSEL: HOW LEADING GENERAL COUNSEL ARE SHAPING TOMORROW'S COMPANIES* 136 (2013); BEN W. HEINEMAN, JR., *THE INSIDE COUNSEL REVOLUTION: RESOLVING THE PARTNER-GUARDIAN TENSION* 32 (2016); E. NORMAN VEASEY & CHRISTINE T. DI GUGLIELMO, *INDISPENSABLE COUNSEL: THE CHIEF LEGAL OFFICER IN THE NEW REALITY* 39 (2012).

<sup>135</sup> WILLIAM G. ROSS, *THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS* 21 (1996); Douglas R. Richmond, *In Defense of the Billable Hour*, 14 *PROF. LAW.* 1, 4 (2003); Douglas R. Richmond, *The New Law Firm Economy, Billable Hours, and Professional Responsibility*, 29 *HOFSTRA L. REV.* 207, 210 (2000).

<sup>136</sup> Eli Wald, *In-House Myths*, *WIS. L. REV.* 407, 427–32 (2012) [hereinafter Wald, *In-House Myths*] (exploring the notion of "soft" in-house hours).

<sup>137</sup> *Id.* at 434–35.

<sup>138</sup> Compare ROSS, *supra* note 135, at 231, and Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 *FORDHAM URB. L.J.* 171, 179 (2005), with Wald, *In-House Myths*, *supra* note 136, at 428–29 (exploring the notion of "soft" in-house hours).

The first factor also references “the novelty and difficulty of the questions involved,”<sup>139</sup> which may vary greatly among in-house lawyers: some deal primarily with routine, relatively simple, matters; whereas others address complex and difficult challenges.<sup>140</sup> Similarly, the last clause of the first factor, “the skill requisite to perform the legal service properly,”<sup>141</sup> may vary greatly among in-house lawyers. For some subject-matter experts, it would mean narrowly construed legal skills, for others the job would require having the skills of a generalist, and yet for others the necessary skills would entail non-legal expertise and knowledge.

The fourth factor, “the amount involved and the results obtained,” will also vary depending on context.<sup>142</sup> Smaller entity clients will tend to have routine matters with relatively modest amounts at stake whereas large entity clients will have larger amounts in play.<sup>143</sup> The amount involved and the results obtained will also depend on the nature of the services performed in-house: some entities will rely on their in-house legal departments to handle all of their affairs, including their “make or break” litigation and transactional work; whereas other entity clients will prefer to use outside counsel for these type of matters.<sup>144</sup> The same contextual approach will guide the assessment of the fifth factor, “the time limitations imposed by the client or by the circumstances.”<sup>145</sup> Depending on in-house counsels’ job descriptions and responsibilities, some will regularly face tight turnaround times and strict deadlines whereas others will enjoy a more relaxed work environment, affecting the reasonableness of the compensation.

“[T]he nature . . . of the professional relationship with the client,”<sup>146</sup> an aspect of the sixth factor, may include considerations such as whether one is an in-house lawyer or the general counsel, as well as whether one served previously as an outside counsel to the entity client. The “length of the professional relationship” indicates that seniority and experience with the client are relevant to assessing the reasonableness of the compensation,<sup>147</sup> as are “the experience, reputation, and ability of the lawyer or lawyers performing the services” per the seventh factor.<sup>148</sup>

Notably, the eighth and third factors require close scrutiny when applied to in-house practice. As we have seen above, stock options have emerged as a common component of some in-house lawyers’ compensation, triggering Rule

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<sup>139</sup> MODEL RULES OF PROF’L CONDUCT r. 1.5(a)(1) (AM. BAR ASS’N 2019).

<sup>140</sup> See Chayes & Chayes, *supra* note 35, at 277; Rosen, *supra* note 36, at 483.

<sup>141</sup> MODEL RULES OF PROF’L CONDUCT r. 1.5(a)(1) (AM. BAR ASS’N 2019).

<sup>142</sup> *Id.* r. 1.5(a)(4).

<sup>143</sup> Liggio, *supra* note 38, at 1207.

<sup>144</sup> *Id.*

<sup>145</sup> MODEL RULES OF PROF’L CONDUCT r. 1.5(a)(5) (AM. BAR ASS’N 2019).

<sup>146</sup> *Id.* r. 1.5(a)(6).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* r. 1.5(a)(7).

1.5(a)'s eighth factor, "whether the fee is fixed or contingent,"<sup>149</sup> and once again, the unique context of in-house practice warrants careful consideration of the Rule. Traditionally, contingency fees, ranging from 15 to 35 percent, have been deemed reasonable even when they were found to be higher compared to an hourly fee exactly because of the risk of nonpayment inherent in a contingency fee arrangement.<sup>150</sup>

To some extent, the rationale behind the eighth factor carries over to the world of in-house counsel. Stock grants and stock options as part of an in-house lawyer's compensation introduce risk because stock may not appreciate (or even depreciate) and options at the time they mature may be worth nothing, such that the contingency and higher risk involved may explain and deem reasonable higher contingent compensation as compared with fixed compensation.<sup>151</sup>

Indeed, one aspect of stock as a component of compensation suggests even greater flexibility in assessing the reasonableness of contingent in-house compensation as compared to traditional contingency fees. While some aspects of traditional contingency fees are outside of a lawyer's control, such as the facts of the case, the governing law, and the jurors' or judge's sentiments; a typical lawyer undertaking a matter on a contingency fee has ample control over whether to take the case, and, if taken, on the outcome of the case by virtue of the quality of the representation she provides to the client. In contrast, the typical in-house lawyer will have little impact on the contingency involved with the value of the stock or stock options, which will be determined by market performance and considerations. Because in-house counsel, compared to plaintiffs' attorneys, have relatively little control over the contingent nature of their compensation, they assume greater risk when accepting stock as a component of compensation, which may support higher compensation as reasonable.

At the same time, important differences ought to inform the assessment of contingency pay as a component of reasonableness. In general, the Rules permit contingency fee arrangements in Rule 1.5(c) notwithstanding the conflict of interest they introduce vis-à-vis the client to increase access to legal services for those who cannot afford to pay and the corresponding concern that, absent

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<sup>149</sup> *Id.* r. 1.5(a)(8).

<sup>150</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 567 (4th ed. 1992) (The economic rationale for fee enhancement in contingency cases has been explained as follows: "A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is high because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans"); Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 *UCLA L. REV.* 29, 43 (1989). The risk rationale has been adopted by courts. *See, e.g., Ketchum v. Moses*, 17 P.3d 735, 742 (Cal. 2001) ("A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.") (citations omitted).

<sup>151</sup> *See* Barclift, *supra* note 82, at 7–10.

contingency arrangements, some meritorious claims will not be brought by underprivileged clients who cannot afford to pay lawyers to do so.<sup>152</sup> Notably, no analogous rationale supports approving contingency compensation for most in-house lawyers. Whatever the rationale may be, from prevailing practice realities in the corporate executive compensation sphere, to aligning the interests of in-house lawyers and their clients, to accommodating corporate entities' preferences for flexibility and efficiencies in structuring compensation, most corporate entities do not offer stock grants or stock options to their in-house lawyers because they otherwise cannot afford them.<sup>153</sup> Because stock grants and options do not serve the goal of increasing access to legal services for those who cannot afford to pay for them and instead simply reflect risk allocation between in-house counsel and their entity clients, the contingency risk shouldered by in-house counsel is of different and smaller nature than the one shouldered by plaintiffs' attorneys and is hence subjected to the requirements of Rule 1.8(a) as a business transaction.<sup>154</sup>

Finally, "the fee customarily charged in the locality for similar legal services,"<sup>155</sup> the third factor, traditionally takes into account relevant cost of living, the cost of doing business, and other relevant practice considerations, for example, accounting for the fact that lawyers in large metropolitan centers charge higher fees than their counterparts in mid-markets or smaller towns; or that urban lawyers charge higher fees than their rural colleagues within the same jurisdiction.<sup>156</sup> The same insight naturally applies to in-house lawyers who may practice in in-house legal departments across different localities, which vary in size, structure, tasks and roles.

The nature of in-house practice, however, may require a more flexible and expansive interpretation of the third factor to encompass not only what other in-house lawyers make, but also what outside counsel charge, and, just as importantly, what other corporate executives/employees in the entity make. In-house legal departments tend to hire experienced lawyers, often partners and associates from within the ranks of their outside counsel.<sup>157</sup> Thus, a relevant factor in assessing the reasonableness of in-house compensation needs to be the fees and compensation of these outside counsel lawyers, which entity clients

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<sup>152</sup> Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 307 (1998); Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI. KENT L. REV. 625, 627–28 (1995); see also Richard M. Birnholz, *The Validity and Propriety of Contingent Fee Controls*, 37 UCLA L. REV. 949, 953 (1990).

<sup>153</sup> See Barclift, *supra* note 82, at 7–10; Liggio, *supra* note 38, at 1206.

<sup>154</sup> *Supra* Section I.A.4.a.

<sup>155</sup> MODEL RULES OF PROF'L CONDUCT r. 1.5(a)(3) (AM. BAR ASS'N 2019).

<sup>156</sup> See, e.g., *Kaloo v. Unlimited Mech. Co. of NY, Inc.*, 977 F. Supp. 2d 209, 212 (E.D.N.Y. 2013) (stating that the "court should . . . 'attempt to approximate the market rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation' ") (quoting *Green v. City of N.Y.*, 403 Fed. Appx. 626, 629 (2d Cir. 2010)).

<sup>157</sup> Wald, *In-House Myths*, *supra* note 136, at 445–46.



will pay attention to in terms of being able to recruit and retain their in-house lawyers. At the same time, in order to be able to do their jobs effectively, including being taken seriously, respected, and deferred to by their nonlawyer colleagues outside their in-house legal departments, in-house lawyers' compensation will need to be on par with, and reflect, the compensation of nonlawyer counterparts.

Notably, while taking account of nonlawyers' compensation in assessing the reasonableness of in-house lawyers' pay is necessary and sensible, it is a significant expansion of the Rule. Generally speaking, executive compensation in corporate America is not subject to an objective reasonableness standard. Rather, determinations of executive compensation are considered part of the duty of care in the corporate governance apparatus, which means that they are subject to the Business Judgment Rule.<sup>158</sup> Briefly, this means that as long as executive compensation decisions are well-informed and free of conflicts of interest, courts do not substantively second-guess them and do not review them for reasonableness, instead deferring to the business judgment of the authorized corporate constituents who made them.<sup>159</sup> Some commentators have harshly criticized the application of the Business Judgment Rule doctrine to executive compensation, arguing that it results in waste, or unusually high and unreasonable compensation packages that escape judicial scrutiny.<sup>160</sup>

A classic example of excessive compensation concerns is the litigation surrounding the executive compensation packages at Disney.<sup>161</sup> To entice Mr. Ovitz away from his lucrative Hollywood job and take the reins at Disney, the Disney Board offered him a lucrative compensation package.<sup>162</sup> When Mr. Ovitz left Disney a mere thirteen months later, his severance package entitled him to approximately \$130 Million and Disney shareholders sued, arguing essentially that the compensation package was unreasonable and constituted a waste of corporate funds.<sup>163</sup> In a highly watched, unanimous decision, the Delaware Supreme Court rejected the claim, affirmed the Business Judgment Rule,

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<sup>158</sup> See Kenneth R. Davis, *Cash of the Titans: Arbitrating Challenges to Executive Compensation*, 86 TEMP. L. REV. 245, 252–53 (2014); Randall S. Thomas & Harwell Wells, *Executive Compensation in the Courts: Board Capture, Optimal Contracting, and Officers' Fiduciary Duties*, 95 MINN. L. REV. 846, 865, 877–78 (2011).

<sup>159</sup> See *Smith v. Van Gorkom*, 488 A.2d 858, 872–73 (Del. 1985); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

<sup>160</sup> Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1, 29 (2006); see also Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 26 (2005); Peter C. Kostant, *Meaningful Good Faith: Managerial Motives and the Duty to Obey the Law*, 55 N.Y. L. SCH. L. REV. 421, 425–26 (2011); Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456, 486 (2004).

<sup>161</sup> *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 35 (Del. 2006).

<sup>162</sup> *Id.* at 35–37.

<sup>163</sup> *Id.* at 35. In hiring Mr. Ovitz, the board approved an employment agreement that included a generous non-fault termination provision. When Ovitz failed to perform up to expectations in his new position, the board terminated his employment without cause. *Id.* at 41, 45–46.

and *de facto* refused to substantively second guess the compensation package for reasonableness. In particular, the Court refused to scrutinize the compensation package afforded to Mr. Ovitz on the merits because the executive compensation decision-making process followed by the Disney Board was informed.<sup>164</sup>

The practical import of taking into account comparable corporate executive compensation in assessing the reasonableness of in-house lawyers' compensation is that arguably unreasonable corporate executive compensation, or, at least, corporate executive compensation not subject to a reasonableness constraint, will inform and shape the notion of in-house lawyers' reasonable pay. In other words, taking account of corporate executive compensation in assessing the reasonableness of in-house lawyers' pay allows the unreasonable (or at least the possibly unreasonable) to shape and inform what's reasonable.

This challenge, compelling as it may be, reveals complex insights about in-house lawyers, their identities, practice realities, professional status within the profession and their entity-clients, and the corresponding difficulties of regulating them effectively within the Rules' gamut. On the one hand, ignoring corporate executive compensation in assessing the reasonableness of in-house lawyers' pay means ignoring a materially relevant aspect of what it is that in-house lawyers do and how to assess the value they generate and the compensation they deserve. On the other hand, acknowledging the relevance of corporate executive compensation in assessing the reasonableness of in-house lawyers' pay may pull the rug from underneath the entire professional commitment to a reasonableness requirement on lawyers' fees by injecting into the professional calculus, if only as one relevant factor, the arguably unreasonable and excessive tint of corporate executive compensation.

Moreover, opening the door to insights from corporate executive compensation meant to inform and guide the reasonableness analysis of in-house lawyers' compensation may counterintuitively introduce more uncertainty than predictability. For example, one commentator notes, "[a]s part of the recruiting process, some corporate executives are offered . . . employment agreements that provide them with severance in the event of their termination without cause. . . . Is there any industry standard for the term of severance payments . . .

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<sup>164</sup> *Id.* at 52, 67–68. While the Court did acknowledge at least three categories of failure to act in good faith, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, and where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties, *id.* at 67, and noted that a plaintiff could rebut the Business Judgment Rule by showing that the board of directors acted in bad faith, *id.* at 52, it found that the Disney board did not violate its duty of good faith when it approved Mr. Ovitz's employment agreement, terminated Ovitz without cause, and approved the payment of his severance package. *Id.* at 52, 67–68. For a comprehensive overview of the case and of the duty of good faith, see Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 582 (2008); Jonathan Macey, *The Nature of Conflicts of Interest Within the Firm*, 31 J. CORP. L. 613, 631 (2006).

? . . . [T]here is no industry standard.”<sup>165</sup> If no industry standard exists in the corporate world for severance in the event of termination without cause, inserting this (non)standard to the assessment of in-house lawyers’ severance packages may cloud rather than clarify the analysis.

Nonetheless, in the context of in-house pay, “the fee customarily charged in the locality for similar legal services,”<sup>166</sup> ought to be interpreted to include the fee and salary customarily charged and commanded by comparable outside counsel and corporate executives who provide similar legal and nonlegal services.

Construing the reasonableness factors of Rule 1.5(a) sensibly, recognizing that the analysis ought to take into account the evolving practice realities of in-house lawyers to avoid imposing an impractical standard blind to the work, roles, and challenges faced by in-house counsel, is not tantamount to reducing the reasonableness requirement to no standard at all. To be sure, the point of the inquiry is not a sham meant to legitimize and justify any and all in-house pay, that is, to impose a reasonableness requirement on in-house lawyers only to then expand the definition of reasonableness to essentially allow any compensation package to withstand scrutiny. As we have seen, the same policy rationales that explain and account for the reasonableness constraint on the fees of outside counsel apply to in-house pay. Interpreting the meaning of reasonableness sensibly, with an eye toward the realities of in-house practice, does not erode the importance of subjecting in-house pay to an objective reasonableness standard, in stark contrast to the no-substantive-scrutiny approach generally taken by courts with regard to executive compensation.

The two-part in-house pay inquiry undertaken in Part I of this Article—exploring the applicability of the reasonableness requirement of Rule 1.5(a) to in-house salaries, bonuses and nonmonetary benefits, and examining the meaning of reasonableness—reveals profound insights regarding the transformation of law practice in the twenty-first century, the decline of the lawyer-professional and the rise of the lawyer-employee, as well as the lawyer-businessperson. These developments must be considered before the ABA rushes to address the regulatory ambiguity surrounding in-house pay.

## II. IN-HOUSE PAY AS THE OPENING SHOT IN THE CLASS WAR BETWEEN LAWYER-PROFESSIONALS AND LAWYER-EMPLOYEES

The conclusion that Rule 1.5(a)’s reasonableness requirement applies to in-house pay does not stand for the assertion, and should not be construed to mean, that all the rules of professional conduct apply to all lawyer-employees. Part I.A.’s conclusion cannot be generalized because it depends not only on the plain language of Rule 1.5(a) and its intent and rationales, but also, as we have seen, on the status of in-house lawyers as powerful lawyer-employees, their

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<sup>165</sup> John Okray & Diana Lai, *Hiring and Compensation Trends for In-House Counsel*, FED. LAW. 34, 35–36 (2014) (emphasis added).

<sup>166</sup> MODEL RULES OF PROF’L CONDUCT r. 1.5(a)(3) (AM. BAR ASS’N 2019).

role as professionals and fiduciaries, the identity of their clients, and the nature of the legal services they provide. This seemingly obvious caveat—statutory interpretation depends on language, intent, rationales and context—and its ostensibly obvious application—one should not assume automatically that all the rules of professional conduct apply to all lawyer-employees—nonetheless undermines two longstanding cornerstones of the legal profession. Acknowledging that different lawyers, such as lawyer-employees as opposed to lawyer-professionals, have different status, perform different tasks and roles, and offer different types of legal services to clients, undercuts the One Profession myth that the organized bar has long labored to cultivate and sustain.<sup>167</sup> It also questions the wisdom of the ABA's one-size-fits-all regulatory approach, pursuant to which one set of rules of professional conduct should apply to all lawyers.<sup>168</sup> Thus, the rise of in-house lawyers as part of a new class of lawyer-employees and the statutory interpretation inquiries that this new class of lawyers triggers under the Rules (such as the application of Rule 1.5(a) to in-house pay or Rule 5.6(a) to in-house noncompetes) reveal important questions about the future of the legal profession that the organized bar and all lawyers must begin to grapple with.

*A. The Past: The One Profession Myth and the Corresponding One-Size-Fits-All Regulatory Approach*

In the United States, the legal profession has long adhered to the idea of the one unified profession with the corresponding commitment of the Rules to regulate lawyers pursuant to a one-size-fits-all approach.<sup>169</sup> Historically, the underpinnings of this commitment were well grounded and documented. In its infancy, as lawyers were seeking recognition as a profession,<sup>170</sup> the notion of the One Profession was both necessary and accurate, indeed, through the nineteenth century the profession was largely homogenous, consisting predominantly of White-Anglo-Saxon-Protestant (WASP), middle- and upper-class men, engaged in general law practice centered upon litigation.<sup>171</sup> To be sure, this homogeneity was the product of explicit discrimination and the exclusion of minorities and women attorneys, but the profession was homogeneous nonetheless.<sup>172</sup> Thus, by the early twentieth century, the ABA Canons, codifying the

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<sup>167</sup> Wald, *Resizing the Rules of Professional Conduct*, *supra* note 61, at 231-5.

<sup>168</sup> *Id.*

<sup>169</sup> See *supra* text accompanying notes 60-63.

<sup>170</sup> RICHARD L. ABEL, *AMERICAN LAWYERS* 18-30 (1989) (exploring the profession's struggle to control the market for legal services) [hereinafter ABEL, *AMERICAN LAWYERS*].

<sup>171</sup> WAYNE K. HOBSON, *THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY 1890-1930* 114-15 (1986); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 255 (1950).

<sup>172</sup> JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 4 (1976); ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 44-47 (1964); Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 *STAN. L. REV.* 1803, 1813 (2008) [hereinafter Wald, *The Rise and Fall of the WASP*].

universal identity of the bar along the cornerstones of litigation as the paradigmatic law practice, the hired gun client-centered ideology, and lawyers as autonomous individual professionals, men, and WASP;<sup>173</sup> were historically accurate, reflective of the initial fears against immigrants, Catholics, and Jewish men (and later women and minorities), as well as against the rise of law firms, which threatened the then-dominant model of gentlemanly law practice.<sup>174</sup> In other words, deep into the twentieth century the One Profession approach was not a myth but rather a reality.

This professionalism project, aided by the organized bar's promulgation and enforcement of rules of professional conduct based on the Canons, was immensely successful in establishing lawyers as professionals. By the mid-1950s, attorneys' elite status as lawyer-professionals, individuals who exercise discretion and common wisdom on behalf of clients; benefit from professional prerogatives others do not possess and cannot offer to clients like confidentiality and the attorney-client privilege; entitled to handsome compensation for their services; and regarded as a social and cultural governing class, was never seriously challenged or threatened.<sup>175</sup> And, although the bar was unable to use its professional status to restrict access to its ranks and prevent newcomers from entering the profession,<sup>176</sup> it has used its newfound prestige and status to expand its influence, power, and monopoly during the New Deal era and the rise of the administrative state,<sup>177</sup> as well as to defeat attempts to curb its self-regulation and monopoly over the provision of legal services.<sup>178</sup>

Post-World War II, the twentieth century featured, *inter alia*, two interlocking trends: the immense growth in the size of the bar and its diversity, and increased stratification. As the number of lawyers grew exponentially to gradually include women lawyers as well as minorities,<sup>179</sup> and the practice of law broadened to include new areas of practice,<sup>180</sup> the profession has become in-

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<sup>173</sup> Wald, *Resizing the Rules of Professional Conduct*, *supra* note 61, at 245.

<sup>174</sup> ABEL, AMERICAN LAWYERS, *supra* note 170, at 6; AUERBACH, *supra* note 172, at 40; SMIGEL, *supra* note 172, at 44–47; Wald, *The Rise and Fall of the WASP*, *supra* note 172, at 1821.

<sup>175</sup> ABEL, AMERICAN LAWYERS, *supra* note 170, at 3; ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 283 (1993).

<sup>176</sup> AUERBACH, *supra* note 172, at 114; Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 656 (1981); *see also* ABEL, AMERICAN LAWYERS, *supra* note 170, at 6 (highlighting the Bar's use of other mechanisms to constrict membership).

<sup>177</sup> RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 164 (1995); Ronen Shamir, *Professionalism and Monopoly of Expertise: Lawyers and Administrative Law, 1933–1937*, 27 LAW & SOC'Y REV. 361, 391 (1993).

<sup>178</sup> *See* William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 282 (1998).

<sup>179</sup> *See* Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1079 (2011).

<sup>180</sup> Eli Wald, *Smart Growth: The Large Law Firm in the Twenty-First Century*, 80 FORDHAM L. REV. 2867, 2868 (2012); Eli Wald, *The Rise of the Jewish Law Firm or is the Jewish Law Firm Generic?*, 76 UMKC L. REV. 885, 910 (2008).

creasingly stratified, with BigLaw lawyers in the corporate hemisphere, mostly white men (although no longer exclusively WASP) rising to the top, and women, minorities, and others concentrated in the lower ranks of the corporate hemisphere and in the individual hemisphere.<sup>181</sup>

Lawyers' rules of professional conduct, first transitioning from the Canons into the Model Code and then to the Rules,<sup>182</sup> have by and large ignored these trends and adhered to a one-size-fits-all approach centered on the traditional cornerstones of the profession for three interrelated reasons.<sup>183</sup> First, this approach served the interests of the powerful elite atop the profession. A seemingly universal merit-based approach, shaped in the image of white WASP men, protected this constituency from threats from women lawyers and others, for example, by generating new professional ideologies such as hyper-competitiveness to legitimize and justify the status quo of the profession.<sup>184</sup>

Second, and ironically, the one-size-fits-all approach has served the interests of all lawyers, including women and minorities. While internally, within the profession, the universal approach held newcomers into the profession back; externally, vis-à-vis nonlawyer competitors, ranging from accounting firms and multidisciplinary providers earlier in the second half of the twentieth century, to nonlawyer legal providers and global providers later, the universal approach served to protect the interests of the entire profession from outside competition.<sup>185</sup> The One Profession, increasingly a myth given the immense size and diversity of the bar, nonetheless allowed all lawyers to claim professional status and exclude rising competitors. To that end, the Rules adhered to the one-size-fits-all approach, introducing patch after patch, mostly in response to the demise of litigation as the prominent embodiment of law practice.<sup>186</sup>

Third, alternatives to the universal approach have proven hard to come by. While exposing the litigation, hired gun, male WASP, and individualistic biases of the Rules was easy enough to do,<sup>187</sup> coming up with satisfactory alternatives has proven much harder, for both conceptual and practical reasons. Con-

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<sup>181</sup> HEINZ & LAUMANN, *supra* note 58, at 10–11; HEINZ ET AL., *supra* note 58, at 319; Jo Dixon & Carroll Seron, *Stratification in the Legal Profession: Sex, Sector, and Salary*, 29 LAW & SOC'Y REV. 381, 382 (1995); John Hagan, *The Gender Stratification of Income Inequality Among Lawyers*, 68 SOC. FORCES 835, 842 (1990).

<sup>182</sup> A.B.A., A CENTURY OF LEGAL ETHICS: TRIAL LAWYERS AND THE ABA CANONS OF PROFESSIONAL ETHICS xxxiv (Lawrence J. Fox et al. eds., 2009).

<sup>183</sup> Wald, *Resizing the Rules of Professional Conduct*, *supra* note 57, at 232–33.

<sup>184</sup> Eli Wald, *BigLaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509, 2517–18 (2015); Wald, *Glass Ceilings and Dead Ends*, *supra* note 133, at 2273.

<sup>185</sup> See David B. Wilkins, *Beyond "Bleached Out" Professionalism: Defining Professional Responsibility for Real Professionals*, in ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION, 207, 210 (Deborah L. Rhode ed., 2000).

<sup>186</sup> See generally *Most Recent Changes to the Model Rules*, AM. BAR ASS'N, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct) [<https://perma.cc/6RX5-PU2U>] (reviewing recent amendments to the Rules from 2002's "Ethics 2000" reform to 2018's changes to Chapter 7 on advertising and solicitation).

<sup>187</sup> See generally Wald, *Resizing the Rules of Professional Conduct*, *supra* note 61, at 245, 247, 251, 253.

ceptually, envisioning an alternative universal approach is not a straightforward proposition. Consider the male WASP bias of the Rules. On the one hand, revising the Rules to reduce their macho, aggressive, zealous, combative, twenty-four-seven impulses seems appealing enough.<sup>188</sup> Moreover, acknowledging the impact of facets of lawyers' increasingly diverse personal identities on their professional identities would be both warranted and desirable.<sup>189</sup> On the other hand, one would certainly be concerned about gender-specific references that would smack of a discriminatory "different rules for different lawyers" mindset and imply that gender might have something to do with one's professional abilities as a lawyer. Elsewhere, I advocated for an alternative universal approach, *univertext rules*, which take account of context without essentializing lawyers, but the political will to undertake and push for such a massive undertaking has not materialized.<sup>190</sup> Practically, some have called for supplementing the Rules with specific codes meant to address the unique features of particular practice areas, but concerns have risen about jurisdictional disputes between codes, enforceability, as well as the ability to regulate lawyers with diverse practices.<sup>191</sup>

The twenty-first century has complicated the picture even further. Inequality within the profession has never been greater with lawyers at the top taking advantage of structural changes in the practice of law after the Great Recession of 2008–2009, and of the emergence of new tracks and tiers of practice, to cement their elite position atop the profession.<sup>192</sup> At the same time, as David Wilkins has pointed out, several trends such as the growing use of technology and globalization suggest the erosion of the traditional divide between the corporate and individual hemispheres and a natural organic return to a state of One Profession.<sup>193</sup> This blurring of the divide between the traditional hemispheres and the possibility, inherent in it, of greater uniformity within the profession may serve to reduce the probability, not high to begin with, of generating the necessary political will within the profession to revise the Rules. Consequently, a

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<sup>188</sup> See generally Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) (explaining the gendering of lawyer behaviors).

<sup>189</sup> Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1587 (1993); Eli Wald, *Lawyers' Identity Capital*, 23 INT'L J. LEGAL PROF. 109, 125 (2016); see also Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 663 (1996); Martha Minow, *On Being a Religious Professional: The Religious Turn in Professional Ethics*, 150 U. PA. L. REV. 661, 687 (2001).

<sup>190</sup> Wald, *Resizing the Rules of Professional Conduct*, *supra* note 61, at 283.

<sup>191</sup> *Id.* at 241–42.

<sup>192</sup> Nicholas Bruch, *Law Firms Are More Profitable Than Ever. How are They Doing it?*, L. J. NEWSLS. (Nov. 2018), <http://www.lawjournalnewsletters.com/2018/11/01/law-firms-are-more-profitable-than-ever-how-are-they-doing-it/> [https://perma.cc/Y6AY-W88L]; see also Marc Galanter & William D. Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1882 (2008); William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the Am Law 200*, 84 N.C. L. REV. 1691, 1734–35 (2006) [hereinafter Henderson, *An Empirical Study*].

<sup>193</sup> See Wilkins, *Some Realism About Legal Realism*, *supra* note 59, at 34.

well-intending ABA finds it hard to amend the Rules beyond relatively noncontroversial changes such as addressing the threats of cybersecurity to the practice of law.<sup>194</sup>

*B. The Rise of a New Class of Lawyer-Employees*

Against this already complex background, the rise of a class of lawyer-employees, including in-house counsel, threatens and undermines the very premise of the One Profession myth and its regulatory one-size-fits-all counterpart by questioning, for the first time, the assumption of lawyers, *all* lawyers, as individual autonomous powerful professionals.

The new class of lawyer-employees consists of at least half a dozen constituents. In addition to in-house lawyers who are employees of their entity clients, the class includes associates at law firms. Associates have always been, technically, law firm employees, yet recent developments in the practice of law have eroded their status. Historically, law firms featured only two classes of lawyers, associates and partners, with a third class, of counsel, essentially designating retired partners.<sup>195</sup> The proliferation of tracks and classes of lawyers at law firms, and, in particular, the splitting of the partner track into equity and income tiers,<sup>196</sup> have meant not only the extension of the time law firm lawyers

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<sup>194</sup> See the recent amendment to Rule 1.6, adding a requirement to guard confidentiality against cybersecurity threats. MODEL RULES OF PROF'L CONDUCT r. 1.6(c) cmt. 18 (AM. BAR ASS'N 2019); Eli Wald, *Legal Ethics' Next Frontier: Lawyers and Cybersecurity*, 19 CHAP. L. REV. 501, 501–03 (2016). A notable exception has been the ABA's recent amendment of Rule 8.4(g) to deem as professional misconduct discriminatory conduct in the practice of law. See MODEL RULES OF PROF'L CONDUCT r. 8.4(g). Unsurprisingly, the amendment has been heavily criticized and has not been adopted by a majority of the states. See *Whether Adoption of ABA Rule 8.4(g) Constitutes a Violation of an Attorney's Rights*, KP-0123 Op. Att'y Gen. 3 (2016), <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf> [<https://perma.cc/X63X-U23B>]; Letter from Alan Wilson, Att'y Gen. of S.C., to Hon. John R. McCravy III, Rep., S.C. House of Reps. (May 1, 2016), <http://2hsvz0174ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C7801336400xD2C78.pdf>. [<https://perma.cc/55E8-YTJ8>]; Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241, 265 (2017); Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 198, 218 (2017); Ron Rotunda, *The ABA Overrules the First Amendment*, WALL ST. J. (Aug. 16, 2016), <http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418> [<https://perma.cc/NUR4-D3DW>]; Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities*, WASH. POST (Aug. 10, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities2/?utm\\_term=.5cdab79ac1bc](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities2/?utm_term=.5cdab79ac1bc) [<https://perma.cc/NP65-TD9W>]. *But see*, Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 76 (2018).

<sup>195</sup> See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 28–29 (1991).

<sup>196</sup> Bernard A. Burk, *What's New About the New Normal: The Evolving Market for New Lawyers in the 21st Century*, 41 FLA. ST. U. L. REV. 541, 588–89 (2014); Douglas R. Rich-



spend in statuses other than equity partner but the devaluation of the associate rank. An associate is no longer a member of the second-ranked class of lawyers at a law firm with two classes, she is at best a member of the third-ranked class, and at firms that have broken up their associate class into junior, middle, and senior tiers based on competencies and expectancies, even worse than that.<sup>197</sup>

While historically most associates did not make (equity) partner, making partner was the formal expectation and the official result of the tournament of lawyers for all associates, and law firms helped place the “losers”, those who did not make partner, in positions of relative high status and pay.<sup>198</sup> Increased mobility as the “new normal” reality at law firms has changed that expectation. When most associates expect to laterally move between law firms, do not expect to make partner or to reap professional rewards and status akin to making partner, and do not expect to display loyalty or receive the benefits of it from their law firms, their status as lawyer-employees as opposed to lawyer-professionals-in-the-making is amplified,<sup>199</sup> reflected, for example, in calls for them to unionize.<sup>200</sup>

Next, the class of lawyer-employees includes income (or salaried) partners, who, other than by empty title, share many employment features with associates. They are compensated by means of a salary rather than a share of the law firm’s profits, shoulder no risk of loss, and have no rights in management.<sup>201</sup> While recent scholarly attention has been focused on the status of income partners as employees for purposes of their ability to file Title VII anti-discrimination lawsuits,<sup>202</sup> these lawyer-employees are generally employees rather than partners in terms of their authority, discretion, and status within law firms.

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mond, *The Partnership Paradigm and Law Firm Non-Equity Partners*, 58 U. KAN. L. REV. 507, 509 (2010) [hereinafter Richmond, *The Partnership Paradigm*]; Joyce S. Sterling & Nancy Reichman, *Navigating the Gap: Reflections on 20 Years Researching Gender Disparities in the Legal Profession*, 8 FIU L. REV. 515, 522 (2013); Joan C. Williams & Veta Richardson, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, 62 HASTINGS L.J. 597, 616, 624 (2011).

<sup>197</sup> See Neil Hamilton, *Law Firm Competency Models & Student Professional Success: Building on a Foundation of Professional Formation/Professionalism*, 11 U. ST. THOMAS L.J. 6, 8–14 (2013).

<sup>198</sup> See, e.g., PAUL HOFFMAN, *LIONS IN THE STREET: THE INSIDE STORY OF THE GREAT WALL STREET LAW FIRMS* 159–61 (1973).

<sup>199</sup> David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1611, 1611 n.113, 1650 (1998).

<sup>200</sup> Melissa Mortazavi, *Lawyers, Not Widgets: Why Private-Sector Attorneys Must Unionize to Save the Legal Profession*, 96 MINN. L. REV. 1482, 1543 (2012).

<sup>201</sup> Richmond, *The Partnership Paradigm*, *supra* note 196, at 518; David B. Wilkins, *Partner, Shmartner! EEOC v. Sidley Austin Brown & Wood*, 120 HARV. L. REV. 1264, 1266 (2007) [hereinafter *Partner Shmartner*].

<sup>202</sup> Thomas F. Cochrane, *Partners Are Individuals: Applying Title VII to Female Partners in Large Law Firms*, 65 UCLA L. REV. 488, 495 (2018); see also Randall J. Gingiss, *Partners as Common Law Employees*, 28 IND. L. REV. 21, 22 (1994).

The lawyer-employee class also includes staff attorneys, lawyer-employees at law firms, who are not considered partnership-track material and have no meaningful possibility of promotion.<sup>203</sup> This category of “permanent associates” includes both experienced attorneys who have been taken off the partnership track,<sup>204</sup> and less experienced lawyers who are given low-grade assignments such as document review and due diligence tasks, and usually receive low hourly pay and few if any benefits.<sup>205</sup> Notably, as lawyer-employees, staff attorneys are far removed from the historical ideal of the lawyer-professional. Unlike associates and income partners who in meaningful ways are still powerful professionals, staff attorneys resemble more traditional weak-employees in orientation and status in the workplace.

Further along the lawyer-employee/lawyer-professional continuum are temporary and contract lawyers.<sup>206</sup> Indeed, temporary lawyers are often not employees at all but rather independent-contractors who possess little professional status. Often employed not by law firms but rather by placement agencies, temporary lawyers tend to assist law firms with short-term projects or surge in demand for low-grade tasks.

In the past few years, large law firms have begun employing temporary attorneys, at hourly rates with no benefits, to perform low-level legal tasks, such as large-scale document reviews and coding. The depressing reports, keyed in by temporary attorney bloggers, read more like an account of pre-*Lochner* era working conditions than a professional, autonomous work environment. The anonymous temporary attorney bloggers tell stories of spending long hours in front of computer screens reviewing and coding documents in dreddy basement workspaces with dead cockroaches on the floor, blocked exits, and overflowing bathrooms. Workers must obtain permission to use the bathroom and are not allowed to leave the premises to, for instance, walk outside to get a cup of coffee, unless it is during the forty-five minute lunch time allocation. Temporary attorneys do not do legal research, they do not go to court, and do not ever meet with clients. The attorneys who take these temporary jobs graduated from low-tier institutions and do not have the academic credentials to acquire jobs as associates at the large law firms.<sup>207</sup>

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<sup>203</sup> See Douglas R. Richmond, *The Contemporary Legal Environment and Employment Claims Against Law Firms*, 43 TEX. TECH L. REV. 471, 481–82 (2011).

<sup>204</sup> Gary Munneke, *Race to the Finish Line: Legal Education, Jobs and the Stuff Dreams Are Made of*, 84 N.Y. ST. B. ASS'N J. 10, 13 (2012).

<sup>205</sup> THOMAS S. CLAY & ERIC A. SEEGER, LAW FIRMS IN TRANSITION: AN ALTMAN WEIL FLASH SURVEY iii (2017); Jason G. Dykstra, *Beyond the “Practice Ready” Buzz: Sifting Through the Disruption of the Legal Industry to Divine the Skills Needed by New Attorneys*, 11 DREXEL L. REV. 149, 180–81 (2018).

<sup>206</sup> Thomas Ross, *Tomorrow, and Tomorrow, and Tomorrow: Ethics 20/20 Amidst a Changing Profession*, 47 AKRON L. REV. 51, 55 (2014) (describing BigLaw’s increased use of temporary and contract lawyers).

<sup>207</sup> Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1188–89 (2008) (citations omitted).

To be sure, the spread of such temporary or contingent employment is not unique to law or the legal profession.<sup>208</sup> Yet, within the legal profession, the rise of contract and temporary lawyering is significant because it reflects the erosion of professional status and rise of the lawyer-employee as an alternative model to the traditional lawyer-professional.<sup>209</sup> As noted by Lucille Jewel, “[w]ith temporary attorneys, large law firms appear to have created a new lawyer underclass that greatly conflicts with the idea that attorneys are members of a noble, autonomous profession.”<sup>210</sup>

Finally, the class of lawyer-employees and independent-contractors includes outsourced attorneys. This latter category often consists of foreign common law attorneys who work for either “affiliated” foreign law firms or U.S. firms or for foreign placement agencies and typically provide low-grade legal services off-site (and out-of-sight).<sup>211</sup>

There are many differences between the various constituents of the lawyer-employee class, especially between staff, temporary and outsourced lawyers on the one hand, and in-house, associate, and income partner lawyers on the other, but importantly they all share one key feature. As lawyer-employees, they are increasingly removed from the defining characteristic of lawyers, all lawyers, as individual autonomous independent powerful professionals.

A constitutive definitional cornerstone of the lawyer-professional has been that lawyers qua lawyers, at the core of what they do as lawyers, have the autonomy, power, and discretion to exercise independent, individualized professional judgment over the intellectual aspects of their jobs, that is, to exercise practical wisdom on behalf of clients.<sup>212</sup> In this sense, lawyers have long been powerful vis-à-vis their clients, deploying independent autonomous judgment over a sphere of knowledge and skill clients knew little about.<sup>213</sup> Such exercise of individual, autonomous independent discretion has resulted in the acquisition of status, *professional status*, which distinguished and defined the lawyer-professional as a unique service provider.<sup>214</sup>

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<sup>208</sup> Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 77 (1998).

<sup>209</sup> Leslie A. Gordon, *Overworked, Seeking Overtime: Contract Lawyers Push for Better Pay*, 103 A.B.A. J. 10, 10 (2017) (“Because they’re not employees, contract attorneys have no benefits or job security, are sometimes relegated to basement-style working conditions, and are typically unemployed between projects. While they perform tedious tasks such as coding documents, they acquire no new skills, have no opportunities for promotion and experience little intellectual stimulation. ‘The oligarchs are turning us—as they did to workers in the 19th-century steel and textile factories—into disposable human beings,’ Bufithis wrote on his site in March 2016.”); see also Deborah Jones Merritt, *What Happened to the Class of 2010? Empirical Evidence of Structural Change in the Legal Profession*, 2015 MICH. ST. L. REV. 1043, 1107 (2015).

<sup>210</sup> Jewel, *supra* note 207, at 1189.

<sup>211</sup> Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137, 2188–89 (2010).

<sup>212</sup> KRONMAN, *supra* note 175, at 130–33; Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

<sup>213</sup> Wasserstrom, *supra* note 84, at 16.

<sup>214</sup> ABEL, AMERICAN LAWYERS, *supra* note 170, at 25–28 (emphasis added).

To be sure, the individual-autonomous-independent-powerful assumption is not and has long not been an absolute “set in stone” definition of all lawyers’ roles and practices. In the individual hemisphere there are certainly the Mutos of the world, immigration lawyers trying to balance an impossibly heavy case-load of clients they hardly know while being squeezed by so-called “travel agencies” who supply the clients and influence, if not dominate, the lawyers’ practice.<sup>215</sup> Yet paradigmatic solo and small-firm practitioners, notwithstanding the undeniable challenges inherent in their practice, have continued in a meaningful way to exercise power and status as professionals vis-à-vis their typically vulnerable clients, such as disenfranchised criminal defendants facing incarceration, immigrants facing deportation, and tenants facing eviction.<sup>216</sup>

Similarly, in the corporate hemisphere, large law firm partners have lost power and influence to in-house lawyers and their corporate clients, and exercise decreased professional autonomy within their own firms, which in turn exercise greater centralized control over decision-making.<sup>217</sup> Yet, BigLaw equity partners continue to benefit from elevated status within the profession and notwithstanding their relative loss of power and influence to in-house counsel, they benefit from top compensation and prestige.<sup>218</sup>

Some lawyer-employees, in contrast, fundamentally contradict inherent facets of the autonomous powerful professional assumption. Staff and contract lawyers, as we have seen, have very little, if any, autonomy as lawyers over the exercise of professional judgment and over questions of intellectual appeal that call for the use of practical wisdom. Performing low-grade tasks, they are hardly ever in a position to exercise meaningful professional judgment over questions of significance, and their work product is closely supervised by other lawyers, typically associates. These lawyer-employees are often weak in every aspect of their practice vis-à-vis other lawyers and clients. With regard to other lawyers, lawyer-employees practice in highly hierarchal environments: their work product is vertically scrutinized with no meaningful opportunities for growth and development in responsibilities, and they often receive little training and no mentorship. Furthermore, staff and contract lawyer-employees typically have very little to no contact with clients,<sup>219</sup> indeed, sometimes clients are

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<sup>215</sup> RICHARD L. ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* 165–68 (2008) (examining the conduct of Joseph Muto, an immigration law attorney who was disbarred for neglecting clients, assisting in the unauthorized practice of law by nonlawyers, and mismanaging his escrow account); Richard L. Abel, *Practicing Immigration Law in Filene’s Basement*, 84 N.C. L. REV. 1449, 1488 (2006); see, Leslie C. Levin, *Guardians at the Gate: The Backgrounds, Career Paths, and Professional Development of Private US Immigration Lawyers*, 34 LAW & SOC. INQUIRY 399, 403 (2009).

<sup>216</sup> WILKINS, *Everyday Practice is the Troubling Case*, *supra* note 56, at 68, 70–73.

<sup>217</sup> See, e.g., Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95, 104 (2008); Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957, 1958 (2006); Wilkins, *Team of Rivals?*, *supra* note 32, at 2071.

<sup>218</sup> Bruch, *supra* note 192.

<sup>219</sup> Jewel, *supra* note 207, at 1189.

unaware of the existence or role of some staff, temporary, and outsourced attorneys.<sup>220</sup> Lacking the core constitutive characteristics of professionalism, lawyer-employees as a class thus represent a challenge to the very traditional understanding of lawyers as professionals and the practice of law as a profession. Notably, this challenge is not only real, it is likely permanent: structural changes and the creation of new tracks within the profession suggest that lawyer-employees are here to stay.<sup>221</sup>

Interestingly, while the growing class of lawyer-employees threatens the professional status of the profession as a whole and raises intriguing questions about the regulation of lawyers, it has not yet affected the status of lawyer-employees externally vis-à-vis the public. To the extent that many in the public do not have an accurate appreciation of what it is that lawyers do and, in particular, of the differences, for example, between equity partners, income partners, associates, and staff attorneys at a law firm, they may continue to confer on all lawyers, including lawyer-employees, the elevated status of lawyer-professionals.<sup>222</sup> This phenomenon, described by Meir Dan-Cohan as acoustic separation,<sup>223</sup> may be temporary. Unlike some aspects of the law and of law practice that lay members of the public may be unable to observe, key features of the status of lawyer-employees, such as their relative low pay and lack of benefits and job insecurity will become, over time, visible.

It is somewhat ironic, and possibly quite misleading, that early scholarly reaction to the rise of lawyer-employees has focused on income partners and associates at BigLaw,<sup>224</sup> as well as on in-house lawyers as employees.<sup>225</sup> To be clear, the bifurcation of the traditional partner status into equity (read “real”) and income partners is a significant phenomenon with tangible consequences worthy of investigation.<sup>226</sup> Similarly, the work conditions of BigLaw associates deserve scrutiny.<sup>227</sup> Yet, income partners and BigLaw associates, the many challenges that face them notwithstanding, continue to benefit from relative elite status within the profession and certainly enjoy handsome pay.<sup>228</sup> More importantly, they continue to meet some aspects of the fundamental assumption

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<sup>220</sup> See, e.g., *Use of Temporary Lawyers and Other Professionals Not Admitted to Practice Law in Colorado (“Outsourcing”)*, 121 COLO. BAR ASS’N 4-439, 4-445 (2009).

<sup>221</sup> Merritt, *supra* note 209, at 1102.

<sup>222</sup> The public’s lack of knowledge about the practice of law, let alone cutting-edge development in it, is far from surprising. In fact, this inherent inability to understand what lawyers do is the very reason for the social bargain. See Arrow, *supra* note 77, at 951. Instead, public knowledge about the profession is often reduced to negative sentiments and lawyer jokes. See MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* 21 (2005).

<sup>223</sup> Meir Dan-Cohan, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630 (1984).

<sup>224</sup> Galanter & Henderson, *supra* note 192, at 1882–83; Henderson, *supra* note 192, at 1706–07.

<sup>225</sup> Wald, *In-House Myths*, *supra* note 136, at 411.

<sup>226</sup> Cochrane, *supra* note 202, at 509; Richmond, *The Partnership Paradigm*, *supra* note 196, at 509; Wilkins, *Partner, Shmartner*, *supra* note 201, at 1265–66.

<sup>227</sup> Mortazavi, *supra* note 200, at 1482–83.

<sup>228</sup> Henderson, *An Empirical Study*, *supra* note 192, at 1719.

of professionalism—they are autonomous, relatively powerful, professionals. Put differently, income partners and BigLaw associates do feature some characteristics of being employees, but they are, relatively speaking, powerful employees. Thinking of them as the paradigmatic face of the lawyer-employees class is thus misleading and risks diverting attention from the plight of weak lawyer-employees. Similarly, in-house lawyers, while certainly employees of their entity-clients in the conventional sense of an employer-employee relationship, are for the most part powerful employees who retain many of the traditional core aspects of lawyer-professionals, such that focusing on them as an exemplar of lawyer-employees may be distracting with regard to the challenges of weak lawyer-employees.

The rise of the lawyer-employee class raises at least two important questions about the future of the legal profession and its regulation. Can the profession responsibly and morally adhere to the myth of the One Profession in the face of practice realities that reveal the growing gap between lawyer-professionals and lawyer-employees? The question, to be sure, is anything but academic. Consider the implications for legal education. It is one thing to require a law degree that costs hundreds of thousands of dollars and takes seven years to pursue as a condition precedent for obtaining a license to practice law when “in America the law is King[.]”<sup>229</sup> and when most lawyers, at least over time, become members of the governing class,<sup>230</sup> a de facto aristocracy,<sup>231</sup> and highly compensated professionals.<sup>232</sup> It is altogether a different proposition when some lawyers are destined to become lawyer-employees, with low status, low pay, and job insecurity, not to mention crippling debt.<sup>233</sup>

Or consider the implications for the monopoly of the legal profession over the provision of legal services. Some attention has been given as of late to the question of whether some lawyers can opt out of the lawyer-professional identity for the purpose of rejecting certain professional obligations and with them

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<sup>229</sup> THOMAS PAINE, COMMON SENSE (1776), reprinted in SELECTED WRITINGS OF THOMAS PAINE 6, 31 (Ian Shapiro & Jane E. Calvert eds., 2014) (observing “that in America The Law Is King”).

<sup>230</sup> See Russell G. Pearce, *Lawyers as America’s Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer’s Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 383 (2001); see generally Robert W. Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies and Practices of New York City Lawyers, 1879–1910*, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 51–74 (Gerald W. Gawalt ed., 1984) (exploring the elevated role and status of lawyers in American society).

<sup>231</sup> ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 253–61 (Henry Reeve trans., Lawbook Exchange, Ltd. 2003) (discussing the status of lawyers as America’s aristocracy).

<sup>232</sup> Melanie Lockert, *Average Lawyer Salary: It’s Not What You Might Expect*, STUDENT LOAN PLANNER (Aug 30, 2019), <https://www.studentloanplanner.com/average-lawyer-salary-by-state> [<https://perma.cc/TN69-W38G>].

<sup>233</sup> BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS ix (2012); Herwig Schlunk, *Mamas 2011: Is a Law Degree a Good Investment Today?*, 36 J. LEGAL PROF. 301, 303 (2012); see also Richard A. Matasar, *The Viability of the Law Degree: Cost, Value, and Intrinsic Worth*, 96 IOWA L. REV. 1579, 1579 (2011); Cynthia E. Nance, *The Value of a Law Degree*, 96 IOWA L. REV. 1629, 1630 (2011); Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249, 251–52 (2014).

corresponding professional prerogatives,<sup>234</sup> whereas other commentators have wondered about the ability of the legal profession to protect its turf against nonlawyer competitors and technology offering legal services.<sup>235</sup> The rise of the lawyer-employee class, however, presents a related yet distinctively different question: *must* the legal profession, responsibly and morally, cede ground and de-regulate at least low-grade tasks to allow for greater competition and address some of the reasons that have given rise to the new class of lawyer-employees?

With regard to regulation, can the ABA responsibly and morally adhere to the Rules' one-size-fits-all approach? In the words of the *Chism* court, lawyer-employees present a question "at the intersection of judicial power over the practice of law and legislative power over the conditions of employment."<sup>236</sup> Whereas the Rules purport to guide the conduct of lawyers and regulate it in the public interest and to the benefit of clients and the public, "the legislature has passed extensive legislation with the purpose of protecting employee wages . . . against any diminution or deduction . . . [and] to prevent abuses by employers . . . reflect[ing] the legislature's strong policy in favor of payment of wages to employees."<sup>237</sup> Insisting on a one-size-fits-all regulatory approach in the face of a rising class of lawyer-employees, and, specifically, subjecting lawyer-employees to the Rules, amounts to a decision to favor judicial power over legislative power when it comes to lawyer-employees' rights and obligations. This is not a decision that the ABA (and courts) necessarily have the power to make, and in any event, it is not a decision that the ABA (and courts) should make casually.

C. *In-House Pay, Lawyer-Employees, Lawyer-Professionals and the Future of the Legal Profession*

The regulation of in-house pay, viewed from the perspective of the growing divide between lawyer-professionals and lawyer-employees, provides a compelling example of the risks inherent in ignoring the sea change in the practice of law. Against this background, the construction of "fees" in Rule 1.5(a) to encompass in-house lawyers' salaries, bonuses and nonmonetary benefits takes on a whole new meaning, as it would open the door to allow courts and the Rules to have a say in the regulation of employee salaries. In this sense, the issue of in-house compensation is but a symptom of a seismic change effecting not only the Rules and regulation of lawyers but indeed the conception and meaning of lawyers as professionals and of the legal profession.

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<sup>234</sup> See Renee Newman Knake, *The Legal Monopoly*, 93 WASH. L. REV. 1293, 1336 (2018).

<sup>235</sup> John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041, 3041–42 (2014).

<sup>236</sup> *Chism v. Tri-State Constr., Inc.*, 374 P.3d 193, 214 (Wash. Ct. App. 2016).

<sup>237</sup> *Id.*

In-house pay is a real, timely question in need of addressing. Amending the Rules or interpreting them sensibly to subject in-house compensation to a reasonableness requirement as construed above is the right thing to do, as long as we avoid the folly of regulating powerful lawyer-employees as if they represent the typical lawyer-employees, setting a dangerous precedent for the regulation of weak lawyer-employees; understand the impact of regulating in-house lawyers on all lawyers; and begin to address the challenges facing weak lawyer-employees.

First, it is imperative to remember that in-house lawyers are powerful lawyer-employees, a subgroup of lawyer-employee that is the exception to the class in that it much resembles lawyer-professionals such as equity partners as opposed to traditional weak lawyer-employees. This quality of in-house lawyers both explains why it is appropriate to subject them to Rule 1.5(a)'s reasonableness requirement and why it may not be appropriate to subject other, weak, lawyer-employees to the Rule. This concern, to be sure, is far from academic. Consider the initial anecdotal evidence from the marketplace indicating that in-house legal departments are hiring contract lawyers.<sup>238</sup> If a new class of in-house contract lawyers emerges following the model of BigLaw contract lawyers, featuring low-level legal tasks, hourly rates, and no benefits,<sup>239</sup> then automatically subjecting these weak lawyer-employees to Rule 1.5(a)'s reasonableness would be inappropriate and undesirable. It will allow entity-clients to use 1.5(a)'s reasonableness requirement, meant to protect them as a shield against powerful abusive lawyer-professionals, as a sword against weak lawyer-employees, legitimizing what Lucille Jewel has called "*Lochner* era working conditions."<sup>240</sup> And it will indirectly allow courts, exercising power over the practice of law, to infringe on traditional "legislative power over the conditions of employment."<sup>241</sup>

Similarly, one should not infer from the regulation of in-house pay that all the rules of professional conduct should apply to all lawyer-employees. Consider Rule 1.10 and *Brown v. Florida Department of Highway Safety and Motor Vehicles*.<sup>242</sup> Rule 1.10(a) generally imputes a conflict of interest from one lawyer to another lawyer "associated in a firm," such that if one lawyer is tainted by a conflict of interest, all lawyers in the firms are disqualified by the same conflict.<sup>243</sup> *Brown* explored the novel question of whether conflicts of interest

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<sup>238</sup> See, e.g., Teresa Lo, *In-House Legal Departments Are Hiring Contract Attorneys, but Should You Temp?*, JD JOURNAL (Dec. 2, 2016), <https://www.jdjjournal.com/2016/12/02/in-house-legal-departments-are-hiring-contract-attorneys-but-should-you-temp> [<https://perma.cc/NQ9F-TUS6>].

<sup>239</sup> Jewel, *supra* note 207, at 1188.

<sup>240</sup> *Id.*

<sup>241</sup> *Chism*, 374 P.3d 193 at 214.

<sup>242</sup> See *Brown v. Dep't of Highway Safety and Motor Vehicles*, No. 4:09-cv-171-RS-CAS, 2012 WL 4758150, 1t \*1 (N.D. Fla. Oct. 5, 2012).

<sup>243</sup> MODEL RULES OF PROF'L CONDUCT r. 1.10(a) (AM. BAR ASS'N 2019) ("*While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so.*") (emphasis added).



can be imputed from a contract or outsourced attorney to the employing law firm. As an Assistant Attorney General for the Office of the Attorney General of the State of Florida (“OAG”), attorney Moore represented the Defendant, the Florida Department of Highway Safety and Motor Vehicles (“DHSMV”), in its case against Plaintiff, Ms. Brown. After leaving her employment at OAG, Ms. Moore took employment as a contract attorney with the very law firm that has been representing Plaintiff against DHSMV. Defendant promptly moved to disqualify Plaintiff’s counsel arguing that Ms. Moore’s conflict of interest should be imputed to the firm.<sup>244</sup> Notably, the court interpreted the term of *associated in a firm* in Rule 1.10 to mean that the lawyer in question must be a traditional associate rather than a contract attorney. Accordingly, the court held that conflicts of interest cannot be imputed from a contract attorney to a law firm.<sup>245</sup> Notably, several ethics opinions considering the imputation of a temporary contract lawyer’s conflicts to a hiring firm under versions of Rule 1.10 focused on the temporary lawyer’s access to the firm’s confidential client information,<sup>246</sup> yet even these opinions considered the status of the temporary lawyer as a relevant factor in deciding the imputation question.<sup>247</sup>

Second, even if one remains diligent not to construe the application of Rule 1.5(a)’s reasonableness requirement to in-house pay broadly to mean either that all lawyer-employees should be subject to a reasonableness constraint or that all the rules of professional conduct apply to all lawyer-employees, regulating in-house pay still has profound impact on the regulation of all lawyers.

Recall the proposed amendment to Rule 5.6(a), pursuant to which in-house lawyers may be a party to a reasonable noncompete provision as part of a stock grant or stock option agreement.<sup>248</sup> The amendment may be necessary to address the practice realities of in-house lawyers, nonetheless, it contradicts the one-size-fits-all commitment of the Rules in that it curve a special exception from the noncompete prohibition for in-house lawyers. To be sure, the Rules on

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<sup>244</sup> *Brown*, WL 4758150 at \*1.

<sup>245</sup> *Id.* at \*3. The court noted that: “The meaning of ‘associated’ is not completely clear. But one thing *is* clear: not every lawyer who is paid by a law firm to do work of a legal nature is ‘associated’ with the firm. Thus, for example, a firm can outsource research or other support services so long as the firm complies with any applicable requirements on billing and on disclosures to the client . . . . An attorney to whom work is outsourced—for example, an attorney who contracts to do research or draft pleadings from the attorney’s own premises on the attorney’s own schedule—ordinarily is not an associate. There was a time when relationships like this were rare. But that is no longer so.” *Id.* at \*2–\*3. (citations omitted).

<sup>246</sup> *See, e.g.*, Comm. on Prof’l Ethics, 715 N.Y. STATE BAR ASS’N 3-98 (1999); *Professional Responsibility for Temporary Contract Lawyers and the Firms that Hire Them*, 352 D.C. BAR (2010).

<sup>247</sup> For example, the DC Bar Committee held that “[t]he imputation of a temporary contract lawyer’s individual conflicts to a hiring firm under D.C. Rule 1.10 depends on the nature and extent of the lawyer’s relationship with the firm and the extent of the temporary lawyer’s access to the firm’s confidential client information.” *Professional Responsibility for Temporary Contract Lawyers and the Firms that Hire Them*, 352 D.C. BAR (2010) (emphasis added).

<sup>248</sup> *Supra* Section I.A.4.a.; *infra* Appendix A.

occasion treat different lawyers differently. For example, Rule 3.3 imposes special disclosure duties on trial attorneys and litigators,<sup>249</sup> and Rule 3.8 imposes special responsibilities on prosecutors.<sup>250</sup> Yet these rules are best understood not as curving exceptions for litigators and prosecutors but rather as addressing unique aspects of these lawyers' roles, that is, Rules 3.3 and 3.8 are simply inapplicable to other lawyers. In contrast, the proposed amendment to Rule 5.6(a) is of a different sort. It does not impose a professional duty on in-house lawyers, rather, it accommodates their practice realities and although this exception may be necessary to allow in-house lawyers to do their job, it nonetheless undercuts the Rules' one-size-fits-all commitment.

Finally, addressing the practice realities of powerful lawyer-employees, such as in-house lawyers and BigLaw associates, risks obscuring and ignoring the needs and practice realities of weak lawyer-employees. Consider the salaries of law firm associates or the profits of equity partners. While the fees a law firm charges each one of its clients must be reasonable per Rule 1.5(a), neither associate salaries nor partner profits—although both are indirectly a product of such fees—are subject to the reasonableness requirement of the Rule. As we have seen, Rule 1.5(a) and Section 34 aim to regulate client payment for legal services, which explain both why associate and partner pay should not be and have not been subject to a reasonableness requirements. Clients do not pay the salaries of associates or the profits of partners, law firms do. As long as the underlying fees each client pays are reasonable, the question of how to compensate associates and partners is conceptually a secondary inquiry that has nothing to do with clients.

Nothing is wrong with this line of reasoning, except that in dealing with lawyer-professionals (equity partners) and once again with relatively powerful lawyer-employees (BigLaw associates) it obscures an important question regarding weak lawyer-employees: should the Rules address the practice realities of contract, staff and temporary lawyers? Although addressing this issue falls outside the scope of this Article, there is no denying that the question is real and is made more pressing by addressing the needs and practice realities of powerful lawyer-employees, in-house attorneys.

The principal rule amendment proposed in this Article—subjecting in-house pay to Rule 1.5(a)'s reasonableness requirement—addresses a timely issue of practical import while punting on the broader challenge of the future regulation of different classes of lawyers by crafting rules that adhere to the one-size-fits-all approach of the ABA. In particular, the proposed changes are drafted to apply to powerful lawyer-employees, in-house lawyers, while not affecting the status of weak lawyer-employees, such as contract and temporary attorneys, and the Article explicitly cautions against future mechanical application of other Rules to weak lawyer-employees. Yet such punting, which takes for granted the one-size-fits-all regulatory approach, is admittedly a short-term

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<sup>249</sup> MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2019).

<sup>250</sup> *Id.* r. 3.8.

fix. The ABA must undertake a thoughtful study of the future of attorney regulation, coming to terms with the rise of a new class of lawyer-employees and the possibility of the demise of the idea of the One Profession.

### III. IN-HOUSE PAY AS THE FAULT LINE BETWEEN LAWYER-PROFESSIONALS AND LAWYER-BUSINESSPERSONS

Analysis of the reasonableness of in-house pay reveals the multifaceted nature of in-house lawyers' roles and tasks. In addition to traditional legal functions, in-house lawyers perform many administrative, business and managerial tasks, and invest ample soft hours building their human capital within the entity-client.<sup>251</sup> The non-legal aspects of in-house lawyers' work impact not only the understanding of in-house pay, but also shed a light on the regulation of all lawyers and the future of law practice.

#### *A. The Traditional Business-Professionalism Dichotomy*

For over a century now, the business-professionalism debate has been raging among lawyers and critics, centered on the question of whether the practice of law has become a business as opposed to a profession.<sup>252</sup> Traditionally phrased in terms of a decline of professionalism or a paradigm shift from professionalism to a business model, commentators often assume a golden era of professionalism that has eroded, replaced by business ethos.<sup>253</sup> Yet the practice of law has always been a business, at least in the sense that most lawyers, in whatever real or imagined revered past, have practiced law for pay representing clients' private interests. Rather than binary opposites, law has always been a complex tapestry, in some ways a business that has long aspired and proclaimed to be a profession, a mosaic in which business and professionalism are but two facets of a practice in which claims of a decline mean a gradual move toward business and away from professionalism.<sup>254</sup>

Specifically, some have argued that a modern, new breed of lawyer-businesspersons increasingly understand their roles as client-centered service providers who zealously pursue clients' private interests subject only to the law.<sup>255</sup> Whereas in the past lawyer-professionals were willing to subject their own self-interest to the interests of their clients, and were committed to advis-

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<sup>251</sup> *Supra* Section I.B.

<sup>252</sup> See JULIUS H. COHEN, *THE LAW: BUSINESS OR PROFESSION?* xiv (1916); Louis D. Brandeis, Address Before the Harvard Ethical Society: The Opportunity in the Law (May 4, 1905), in 39 AM. L. REV. 31, 555 (1905).

<sup>253</sup> Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1230 (1995).

<sup>254</sup> See *id.* at 1269–70.

<sup>255</sup> The classic account of this “Standard Conception” is William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 41–42. Simon later dubbed this account the “Dominant View.” WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 8 (1998).

ing clients to pursue their interests consistent with public interest, or, at least, not strongly inconsistent with it, that paradigm of law practice has eroded. Lawyer-businesspersons abandon any allegiance to the public interest and the public good as officers of the legal system and as public citizens, unless the public interest is defined as nothing more than an aggregate of the private interests of clients.<sup>256</sup>

Critics of this new breed of lawyers split into two camps. Some argue that professionalism itself is a myth, a mystique, an impossibility fabricated by lawyers (and other professionals) to justify and legitimize their status, monopoly over the provision of legal services, and noncompetitive fees. Uniting scholars from the right and the left, the critique asserts that lawyers who advocate for private interests for pay have no reason and will not advocate for any public interest inconsistent with their paying clients' private interests and their own self-interest in keeping their paying clients happy.<sup>257</sup> The lawyer-professional was, to these critics, more a rhetorical tool than an actual commitment, and, to the extent that it did, at one point in time, reflect the actual beliefs and commitments of some lawyers, it has since fallen out of favor. Moreover, even if lawyers did wish, inexplicably, to advocate for a public interest different than their own self-interest or their clients' private interests, their public advocacy will be undesirable turning them into lawyer-philosophers, or worse, unelected lawyer-kings dominating the public discourse and interest.<sup>258</sup> For these critics, the only appropriate remedy for the decline of the lawyer-professional is the de-professionalization and de-mystification of the legal profession, openly admitting that the practice of law is little more than a service industry and opening it up to competition by nonlawyers as legal service providers.<sup>259</sup>

Other critics take a more sympathetic approach to professionalism, documenting that some lawyers, both prominent leaders of the bar and ordinary members, used to and still do regularly act as lawyer-professionals.<sup>260</sup> Socialized into the practice of law understood to be a profession, some lawyers manifested professionalism both by regularly moving back and forth between private and public practices,<sup>261</sup> and by trying to persuade and influence their clients to pursue their private interests consistent with the public interest or, at

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<sup>256</sup> See Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 GEO. J. LEGAL ETHICS 601, 647 (2016) [hereinafter Wald & Pearce, *Being Good Lawyers*].

<sup>257</sup> LARSON, *supra* note 77, at 226. Compare RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 191 (1999), with ABEL, AMERICAN LAWYERS, *supra* note 170, at 18.

<sup>258</sup> Wald & Pearce, *Being Good Lawyers*, *supra* note 256, at 628.

<sup>259</sup> POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY, *supra* note 257, at 197.

<sup>260</sup> See, e.g., Robert W. Gordon, *Lawyers as the 'American Aristocracy'*, 20 STAN. LAW. 2, 4 (1985) [hereinafter Gordon, *Lawyers as the American Aristocracy*]; Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1176 (2009).

<sup>261</sup> Gordon, *Lawyers as the American Aristocracy*, *supra* note 260, at 6.

least, not inconsistent with the public good.<sup>262</sup> Understanding their role to be that of a governing class, mitigating the interests of private clients and of the public, such lawyers routinely acted as professionals by subjecting their own interests to those of their clients and by attempting to inform and shape their clients' interests in the public spirit.<sup>263</sup> According to commentators of this persuasion, the problem with the legal profession is not that professionalism itself is essentially a sham or a myth.<sup>264</sup> Rather, a complex interplay of economic, political, ideological, and cultural forces has gradually turned lawyers (and their clients) away from the vision of the lawyer-professional and toward the business pulse of the continuum, in which law is a business and lawyers serve the private interests of clients and little (or nothing) more.<sup>265</sup>

For these critics, the move forward consists of a multipronged, time-consuming professionalism reform agenda. It includes a redemption project, reinventing professionalism to develop an account of it that lawyers can and should believe in, identifying a role for lawyers as advocates of the public good.<sup>266</sup> It also includes an account of how such a reimagined conception of professionalism can and ought to be adopted and championed by legal institutions, from law schools to law firms and bar associations, all engaged in efforts to socialize and internalize professionalism as an integral constitutive part of the practice of law.<sup>267</sup> Finally, it includes an effort to explain how this account of professionalism may survive inhospitable dominant economic, political, ideological, and cultural forces within and outside of the legal profession, accepted by clients and the public at large.<sup>268</sup>

#### B. *In-House Pay and the Rise of a New Conception of Lawyer-Businesspersons*

Enter in-house practice. As in-house counsel grew in influence and prestige and their roles expanded and matured, the scholarship about in-house counsel began to gain steam.<sup>269</sup> An understandable tendency among scholars has been

<sup>262</sup> SMIGEL, *supra* note 172, at 342; *see also* 1 PHILIP C. JESSUP, ELIHU ROOT 133 (1938) (describing Mr. Root's belief that it was a lawyer's role to tell clients when appropriate that "they are damned fools and should stop.").

<sup>263</sup> Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 AM. J. LEGAL HIST. 1, 24 (2005).

<sup>264</sup> POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY, *supra* note 257, at 186.

<sup>265</sup> Wald & Pearce, *Being Good Lawyers*, *supra* note 256, at 611–12.

<sup>266</sup> *See* Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 230–31 (Robert L. Nelson et al. eds., 1992).

<sup>267</sup> Eli Wald & Russell G. Pearce, *Making Good Lawyers*, 9 U. ST. THOMAS L.J. 403, 429–30 (2011).

<sup>268</sup> Russell G. Pearce & Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1, 39 (2011).

<sup>269</sup> *Supra* text accompanying notes 34–40.

to impose and apply the traditional business-professionalism dichotomy to in-house lawyers.<sup>270</sup> For those calling for de-professionalization, in-house practice constitutes a stark example of the fallacy of the lawyer-professional ideal: in-house lawyers serve the private interests of the entity-client and only those interests. To expect them to pursue any other interests, let alone some abstract and often poorly articulated version of the public good, is to misunderstand what in-house lawyers, and indeed, what all lawyers do, and to fall victim to the mystique of professionalism. In-house lawyers cannot, do not, and should not pursue any interest other than those of the entity-client subject only to the law. They are, and they reveal, the true face of all members of the bar as lawyer-businesspersons.<sup>271</sup>

For those who believe in the possibility of the revival of the lawyer-professional, in-house counsel represent a tough challenge. Embedded within their clients and lacking independence, in-house lawyers may find it incredibly hard to practice as lawyer-professionals, even if a viable, credible account of professionalism were to emerge. Thus, attempts by leading in-house counsel to portray themselves as the new lawyer-statespersons who act as the moral conscience of the entity-client are not outright rejected but are taken with a grain of salt.<sup>272</sup>

The in-house pay analysis reveals, however, a new perspective. It shows that in-house practice does not fit into the “de-professionalize” or the “redemption” paradigms. Rather, it exposes a new friction or a new fault line in the business-profession dichotomy. Within the confines of the traditional business-profession debate, it has always been understood and assumed that the practice of law as such had real, well-defined content such that the disagreement was not whether the practice of law existed but rather whether it was (more of) a profession or a business.

To be sure, the assumption of law practice as a real meaningful concept was neither jurisprudentially naïve nor simplistic. Assuming law has discernable identifiable qualities, to allow one to debate whether it is a profession or a business, does not entail a retreat to Formalism. Post Realism, hardly any lawyer reasonably believes law is an independent, self-contained body of esoteric knowledge.<sup>273</sup> Of course law is more than a body of statutes, case law and doc-

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<sup>270</sup> See, e.g., Hazard, *supra* note 37, at 1015.

<sup>271</sup> Compare Lawrence A. Hamermesh, *Who Let You into the House?*, 2012 WIS. L. REV. 359, 361 (2012), with Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 414 (2008), and Sung Hui Kim, *Inside Lawyers: Friends or Gatekeepers?*, 84 FORDHAM L. REV. 1867, 1870 (2016), and Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73, 77 (2010); Sung Hui Kim, *Naked Self-Interest? Why the Legal Profession Resists Gatekeeping*, 63 FLA. L. REV. 129, 135 (2011), and Kim, *The Banality of Fraud*, *supra* note 26, at 1001.

<sup>272</sup> See Robert W. Gordon, *The Return of the Lawyer-Statesman?*, 69 STAN. L. REV. 1731, 1736, 1750 (2017); see also Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 6 (1988).

<sup>273</sup> See, e.g., JOSEPH H. BEALE, SELECTIONS FROM A TREATISE ON THE CONFLICT OF LAWS §§ 3.2, 3.4, 4.12 (1935); CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF

trine. It is also what the judge (and legislator, and lawyer, and client) had for breakfast, shaped and informed by, while shaping and informing, politics and culture, intersecting with bodies of knowledge as diverse as economics (of the client, of the lawyer and at large), history, sociology, anthropology, and psychology, not to mention literature, feminism, race relations, and queer studies.<sup>274</sup>

At the same time, however, law was assumed to have a core, an essence, which was unique and discernable.<sup>275</sup> Karl Llewellyn has taught us all that to be an effective lawyer one has to be interdisciplinary.<sup>276</sup> For example, to understand the client's objectives a lawyer has to be a part-time economist and psychologist, and to effectively serve the client's interests one has to understand jury selection processes and states of mind, be mindful of judges' moods, and master public relations and the manipulation of the court of public opinion.<sup>277</sup> But, importantly, all of these bodies of knowledge and expertise were at the service of a legal core. When representing a client in litigation, a lawyer practiced "law" when she drafted a complaint (or an answer), filed various additional pleadings, negotiated a settlement in the shadow of trial, prepared for trial and litigated it. When representing a client in a transaction, a lawyer practiced "law" when she converted term sheets into legal documents, translated business risks into legal risks, negotiated the various aspects of the deal, and helped close it. In this sense, assuming the existence of the practice of law, assuming that there was a "there" there,<sup>278</sup> was not naïve. Rather, it assumed the existence of a legal core, which was the practice of law, even as it was inherently interwoven into other bodies of peripheral knowledge.

Similarly, the assumption of law in the business-profession debate was not simplistic, acknowledging the many business facets of law practice above and beyond the important observation that most lawyers run a business in the sense that they charge fees for the services they provide and in that they pay their employees, for office space and for expenses related to the practice of law with the intent to make a profit. Consider a BigLaw partner engaged in non-billable business-development (Biz-Dev) activities. Biz-Dev has become a meaningful aspect of BigLaw partners' professional lives, an integral and significant part of

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CONTRACTS WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES, Preface (Little, Brown, & Co. 2d ed., 1879); MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 657–58 (Guenther Roth & Claus Wittich eds., 1968).

<sup>274</sup> AMERICAN LEGAL REALISM, 232–34 (William W. Fisher III et al. eds., 1993); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY*, 9–31 (1992).

<sup>275</sup> See, e.g., Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 628 (1984).

<sup>276</sup> K. N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 128–29 (1951).

<sup>277</sup> *Id.*

<sup>278</sup> GERTRUDE STEIN, *EVERYBODY'S AUTOBIOGRAPHY*, 298 (Exact Change 1937) (discussing the notion of an inherent constitutive meaning, a "there" there, in a place, a concept, or a phenomenon).

what they, or at least, what successful equity partners do.<sup>279</sup> As important as Biz-Dev is, however, it is adjunct to and in the service of the practice of law as a distinct core separate from business. Biz-Dev is pursued not as an end-on-to-itself but to allow the partner to then practice law. Indeed, even relationship rain-making partners who engage near-exclusively in Biz-Dev and hardly practice law (increasingly a rarity in a world in which powerful general counsel refuse to pay for associates' time and expect the partners to actually do the work, that is, practice law),<sup>280</sup> do so to identify and generate work for their team members who will mine the relationships for legal billable work.<sup>281</sup> In other words, to belittle the importance and relevance of Biz-Dev to the practice of BigLaw's equity partners is to misunderstand their practice of law, at the same time as Biz-Dev is fundamentally secondary to and in the service of a core of law practice.

In-house practice and in-house pay challenge the core of law practice. Some in-house lawyers, namely powerful general counsel who often also serve as chief legal officers or who are otherwise members of the entity-client's management team, do not practice law as the core of what they do. Rather, at the core of what they do is business management and leadership, informed by their knowledge and mastery of the law. No doubt, at times these general counsel act as "cops," primarily acting as lawyers for the entity in the traditional legal sense.<sup>282</sup> Fundamentally, however, at other, perhaps most times, acting as "counsel" and as "business leaders," these general counsel are practicing business, not law.<sup>283</sup> They are not lawyer-professionals but rather lawyer-businesspersons, and in acting as lawyer-businesspersons they threaten, move away from, and change the meaning of the core of law in the "practice of law" not only for themselves but for all lawyers in the legal profession.

One may retort that general counsel as lawyer-businesspersons do not challenge the meaning of the practice of law any more than a near-exclusively relational equity partner at BigLaw does. The argument might proceed as follows: most lawyers (and nonlawyers) at BigLaw practice law and support it, and the

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<sup>279</sup> Dona DeZube, *Law Partnership What Does It Mean, and How Do You Get There?*, MONSTER, <https://www.monster.com/career-advice/article/law-partnership> [<https://perma.cc/C4HS-22X7>] (last visited Nov. 25, 2019).

<sup>280</sup> Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, *supra* note 32, at 2081–82.

<sup>281</sup> Milton C. Regan, Jr. & Lisa H. Rohrer, *Money and Meaning: The Moral Economy of Law Firm Compensation*, 10 UNIV. ST. THOMAS L.J. 74, 89 (2012); Steve Fretzin, *Ten Rainmaking Tips for Finders, Minders and Grinders*, NAT'L L. REV. (Dec. 17, 2015), <https://www.natlawreview.com/article/ten-rainmaking-tips-finders-minders-and-grinders> [<https://perma.cc/NDV9-SYT4>].

<sup>282</sup> Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457, 463 (2000); *see also* RICHARD MOORHEAD ET AL, IN-HOUSE LAWYERS' ETHICS – INSTITUTIONAL LOGICS, LEGAL RISK AND THE TOURNAMENT OF INFLUENCE, 78, 151–52 (2019) (discussing how saying "no" is an essential attribute of general counsel and that general counsel routinely acts as a "gatekeeper" in restricting both unlawful and unethical behaviors).

<sup>283</sup> *See, e.g.*, HEINEMAN, *supra* note 134, at 32, 36–39.



very Biz-Dev activities of relational equity partners are geared toward generating legal work for others engaged in the practice of law. Similarly, even if powerful general counsel do not primarily practice law, their business practice depends on and is adjacent to the work of all lawyers in the in-house legal department and outside of it throughout the entity-client, who do practice law in the more traditional, core, sense.

On closer reflection, however, this argument fails. General counsel's role as lawyer-businesspersons is not secondary to, or in the service of, the work of lawyers in and outside of the in-house department. Quite the contrary, general counsel's work is in the service of the business management of the entity-client. It does not depend on the work of lawyers in the in-house legal department in the symbiotic manner in which Biz-Dev depends on lawyers to mine the legal work. Rather, the entire orientation of general counsel's work is business, not law, with a typical promotion being an advancement into the C-Suite for a nonlegal position.<sup>284</sup>

In-house pay captures this challenge to the core of law practice. Suppose the Rules were amended (or interpreted) to impose a reasonableness requirement on in-house pay. Could entity-clients bypass the requirement by bifurcating a general counsel's compensation package, paying a reasonable pay for legal services rendered, and an "unreasonable" pay or, at least, a second payment not subject to a reasonableness requirement, for business services rendered? Relatedly, to bypass the prohibition in the Rules against noncompetes, can entity-clients grant their in-house lawyers stock and stock options subject to a non-compete provision for their business, as opposed to legal, services?<sup>285</sup>

The Rules answer these questions with an impassioned "no." Rule 5.7(b) states that "[t]he term 'law-related services' denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer,"<sup>286</sup> a definition that perfectly describes the business work of in-house counsel. Rule 5.7(a)(1) then states in relevant part that "[a] lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided [] by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients."<sup>287</sup> Accordingly, in-house practice is subject to the Rules, including Rules 1.5(a) and 5.6(a), because pursuant to Rule 5.7 the business practice of in-house lawyers is inseparable from their practice of law, even if it dominates and undercuts the core practice of "law" in its traditional sense.

The Rules' statutory answer is echoed by leading elite general counsel. Ben Heineman and Norman Veasey, for example, insist that law practice and legal

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<sup>284</sup> Wald, *In-House Myths*, *supra* note 136, at 433, 453.

<sup>285</sup> *Supra* Section I.A.4.a.

<sup>286</sup> MODEL RULES OF PROF'L CONDUCT r. 5.7(b) (AM. BAR ASS'N 2019).

<sup>287</sup> *Id.* at r. 5.7(a).

identity are inherent to the ability of in-house lawyers to act as guardians and the conscience of their entity-clients. Divorcing the legal from the non-legal aspects of what in-house lawyers do would pull the rug from under the ability of these lawyers to perform their jobs well.<sup>288</sup>

The Rules' clear-cut stance, however, does little more than reveal the profession's anxiety over the potential sea of change it is facing. The profession, or at least, its elite leaders, would like to adhere to the old ideal of the lawyer-professional and reject its threatening and unknown counterpart, the lawyer-businessperson. The lawyer-businessperson, by practicing law and business as equal parts or worse, by subjecting law to business, undermines the core of law as a distinctive practice. As such, the practice of law by lawyer-businesspersons opens the door to the discussion the profession has long been able to avoid about what is, and is not, the practice of law for purposes of the regulation of law, legal providers, and the monopoly over the provision of legal services.<sup>289</sup>

In the short run, the Rules can be amended or interpreted to impose a reasonableness requirement on in-house pay,<sup>290</sup> and Rule 5.7(a)(1) can continue to provide that in-house practice is either the practice of law or a mix of law and "law-related services," subject to the Rules.<sup>291</sup> In the long run, however, the profession will be foolish to ignore and deny the fundamental questions and challenges raised by in-house practice and in-house pay. In-house lawyers are lawyer-employees, not lawyer-professionals, and regulation of their roles requires coming to terms with the rise of the lawyer-employee as a challenge to the centuries-old dominant paradigm of the lawyer-professional. Some in-house lawyers are also lawyer-businesspersons, not lawyer-professionals, and their practice and applicable rules of conduct must reflect a reckoning with the challenges posed by the lawyer-businessperson to the lawyer-professional ideal.

#### CONCLUSION

The regulation of in-house pay, namely, whether in-house salaries, bonuses, stock grants, stock options, and nonmonetary benefits are subject to a reasonableness requirement, and if so, what reasonableness means in this context, presents complex questions of statutory interpretation. Answering these questions requires exploring the plain language meaning of various statutory provisions, as well as examining their various policy rationales and objectives. As it turns out, however, the best interpretation of the Rules, pursuant to which in-house pay must be reasonable, is but the tip of an iceberg. The questions sur-

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<sup>288</sup> HEINEMAN, *supra* note 134, at 56–61; VEASEY & DI GUGLIELMO, *supra* note 134, at 8–9.

<sup>289</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14, cmt. a (AM. LAW INST. 2000).

<sup>290</sup> Notably, the compelling justifications for subjecting in-house pay to Rule 1.5(a)'s reasonableness requirement are client protection, as well as the professionalism and fiduciary rationales, see *supra* Section I.A.2.c-d. Yet, to the extent that some in-house lawyers increasingly act as lawyer-businesspersons rather than as lawyer-professionals and as fiduciaries, the persuasiveness of the latter rationales diminishes. See *supra* Section I.A.2.

<sup>291</sup> MODEL RULES OF PROF'L CONDUCT r. 5.7(b) (AM. BAR ASS'N 2019).

rounding in-house pay reveal and demonstrate fundamental changes in the practice of law: the decline of the lawyer-professional paradigm and the rise of two distinct but sometimes intersecting alternatives, the lawyer-employee and the lawyer-businessperson. These new paradigms require a close examination of not only particular rules of professional conduct and the entire regulatory approach to the practice of law and the provision of legal services, but also of the role of lawyers and the meaning of law. This is an important and timely undertaking, in which this Article constitutes but the first step.

Moreover, the decline of the lawyer-professional and the rise of the lawyer-employee and the lawyer-businessperson have important consequences outside of the law, far beyond understanding changes to the historical roles of lawyer-professionals as representatives of clients, officers of the legal system and public citizens.<sup>292</sup> Consider this opening shot: U.S. corporate law has long regulated executive compensation as a matter of the duty of care subject to the presumption of the Business Judgment Rule of corporate agents.<sup>293</sup> Executive compensation is immune from substantive judicial scrutiny as long as the decision-makers who set the compensation have done so on an informed basis, leading courts to defer to their business judgment and expertise.<sup>294</sup> If, however, in-house pay is subject to a reasonableness requirement, and if, as explained in this Article, the rationale for imposing such a requirement is in part a fiduciary duty owed by in-house lawyers as fiduciaries to their entity-clients to abstain from “taking undue advantage” of the entity-clients “in direct dealings between them,”<sup>295</sup> then the regulation of in-house pay and of in-house lawyers as fiduciaries suggests a new way to think about executive compensation and the regulation of corporate agents more broadly. Perhaps U.S. corporate law has been wrong to focus on those who *make executive compensation decisions* and whether they were informed in making their decisions, and instead ought to focus, learning from in-house lawyers and the regulation of in-house pay, on those who *receive executive compensation*. If in-house pay is subject to an objective and substantive reasonableness requirement because the lawyers who receive it are fiduciaries of entity-clients who cannot receive unreasonable pay, could not executive compensation be subject to an objective and substantive reasonableness requirement because the executives who receive it (as opposed to those who make the decisions about it) are fiduciaries of entities who cannot receive unreasonable pay?

The legal profession must promptly begin an earnest and meaningful conversation about the rise of a class of lawyer-employees within its midst and the rise of a lawyer-businessperson paradigm alongside its traditional lawyer-

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<sup>292</sup> MODEL RULES OF PROF'L CONDUCT, Preamble, cmt. 1 (stating “[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”).

<sup>293</sup> *Supra* text accompanying notes 158–64.

<sup>294</sup> *Supra* text accompanying notes 158–64.

<sup>295</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43, cmt. e (AM. LAW INST. 2011); *see also supra* Section I.A.2.d.

professional ideal. Nonlawyers should pay close attention and participate in this conversation not only as clients and as potential competitors, but as stakeholders and parties in a broader exchange about the meaning of fiduciary duties and their interaction with market controls.

APPENDIX A—PROPOSED AMENDMENTS TO THE ABA MODEL RULES OF  
PROFESSIONAL CONDUCT

The proposed revisions to the Rules are italicized.

In-house pay as “fee”: Rule 1.5 (a) and the Comment to Rule 1.5, or a new subsection in Rule 1.0(x).

1.5(a) “A lawyer shall not make an agreement for, charge, or collect an unreasonable fee *or compensation* or an unreasonable amount for expenses.”

[1] “Paragraph (a) requires that lawyers charge fees *and forms of compensation* that are reasonable under the circumstances. *The reasonableness requirement applies to the compensation of in-house lawyers.*”

In the alternative, the ABA can leave Rule 1.5(a) and comment 1 intact and add to its terminology section, Rule 1.0, a new definition as follows:

1.0(x) “*Fee*” denotes the payment for legal services provided by a lawyer to a client, including payment by an organizational client to its in-house counsel in the form of salaries, bonuses, or nonmonetary benefits.

Noncompete and stocks grants and options: Rule 5.6(a).

5.6 A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement *or an agreement concerning the grant of stock grants or stock options to in-house counsel as part of a compensation agreement subject to a reasonable noncompete provision.*

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