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## What We Talked About When We Talked About Ethics: A Critical View of the Model Rules

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The legal profession, or the part of it called organized, recently endured a six year debate over rules it would adopt to describe the professionally responsible conduct of its members.<sup>1</sup> After various drafts, some generally circulated,<sup>2</sup> others not, and with occasional key reversals between them,<sup>3</sup> the House of Delegates of the American Bar Association in August 1983 approved a new model ethics code, which it named the Model Rules of Professional Conduct (Rules).<sup>4</sup> Acronymically and in a few other ways it reverses its predecessor, the Model Code of Professional Responsibility (Code), which survived a scant thirteen and a half years.<sup>5</sup> By contrast, the Code's predecessor, the Canons of Professional Ethics, adopted in 1908, reigned (with amendments) for well more than half a century.<sup>6</sup> There is optimism that the Rules, grandchild of the line, will outlast its ancestors. What, in any event, would we name the fourth generation?

After the House of Delegates concluded its work, the debate moved to state and local forums.<sup>7</sup> As of the end of 1984, eighteen months after ABA approval, only two states had substituted the Rules for the Code, in either their model or a derivative form.<sup>8</sup> This contrasts with twenty-four state adoptions of the Code by early 1971 when it was about equally young.<sup>9</sup> Of course, the Code won easy passage in an age that held legal ethics, then renamed professional responsibility, to be a triple yawn topic. In law schools, it was sometimes said, the task of teaching it usually fell to the

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1. "The Commission on Evaluation of Professional Standards was appointed in the summer of 1977 by then ABA President William B. Spann, Jr. . . ." MODEL RULES OF PROFESSIONAL CONDUCT Chairman's Introduction, (Proposed Final Draft, May 30, 1981) [hereinafter cited as 1981 Draft.] The Model Rules were adopted by the ABA House of Delegates on August 2, 1983. Taylor, *Bar Group Adopts Model Ethics Code*, N.Y. Times, Aug. 3, 1983, at A1, col. 1.

2. The drafts that received wide circulation and which will be considered here are the MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft, Jan. 30, 1980) [hereinafter cited as 1980 Draft]; the 1981 Draft, *supra* note 1; and the MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft, June 30, 1982) [hereinafter cited as 1982 Draft].

3. See, e.g., *infra* notes 145, 152-54, 170, 183, 221, 222, 253-58, 280, 282 & 296 and accompanying text.

4. Taylor, *supra* note 1.

5. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1970); see also Frankel, Book Review, 43 U. CHI. L. REV. 874, 875 n.10 (1976).

6. CANONS OF PROFESSIONAL ETHICS (1908); see also Frankel, *supra* note 5, at 875 n.4.

7. The ABA proposes ethical rules and the states adopt them through whatever adoptive mechanisms they have. As a result, ethical rules for lawyers are not uniform throughout the nation. See Brakel & Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699, 699 (1975); Note, *Regulating Multistate Law Firms*, 32 STAN. L. REV. 1211, 1211-12 (1980). Courts have ruled that an ethics code does not have the binding force of a statute. *Rosen v. N.L.R.B.*, 735 F.2d 564 (D.C. Cir. 1984); *In re Estate of Weinstock*, 40 N.Y.2d 1, 351 N.E.2d 647, 386 N.Y.S.2d 1 (1976).

8. Only New Jersey and Arizona have so far substituted the Rules for the Code. [Current Reports] 1 LAW. MAN. ON PROF. CONDUCT (BNA) 334 (New Jersey adopted the Rules July 25, 1984); *id.* at 445 (Arizona adopted the Rules Oct. 3, 1984).

9. AMERICAN BAR ASSOCIATION, 96 ANNUAL REPORT 243 (1971).

dean because no one else would. Compared with the professional and even public contentiousness attending the adoption of the Rules,<sup>10</sup> the Code emerged in amiable obscurity.

One may mull, and some have,<sup>11</sup> over the ABA's motives for bearing the costs and burdens of producing an ethics code sufficiently general to win approval from its membership yet sufficiently demanding to win credibility beyond it. After all, neither the world nor the profession would come to naught if there were no document telling lawyers how to behave. Constraints imposed by civil and criminal law, the market, and the desire for good standing in one's community would remain. And let us not forget the resourcefulness of the common law. The Code, for example, said little useful about successive conflicts of interest, yet courts readily proceeded to define them and to fashion appropriate disqualification remedies.<sup>12</sup>

Absent a new Watergate or similar national scandal in which members of the bar reappear as lead villains, the subject of legal ethics has probably passed the peak of its popularity. For several reasons, however, it is not likely to recede to its former anonymity. First, there is now a sufficiently large constituency of "experts" in and out of the academy who make a living from the subject and who will demand time on professional and public agenda.<sup>13</sup> Second, lawyers have learned that ethical issues have strategic uses,<sup>14</sup> making their continued employment in litigation likely and currency in them of value. Third, as the number of American lawyers rises per capita,<sup>15</sup> the number of ethical violations should at least keep pace—or, with greater competition for clients, accelerate—providing more work for disciplinary committees and those who staff and appear before them. Fourth, the debate over the Rules spilled over into the national press.<sup>16</sup> Journalists better learned to cover the profession. A few do only that. They are likely to continue watching. Fifth, the ABA now requires as a condition of law school accreditation that a student's education include instruction in professional ethics.<sup>17</sup> Students, who once thought it enough to know not to steal, lie, or neglect client matters, are encountering nastier questions—if not their

10. The Model Rules became the focus of front page newspaper stories, *see, e.g.*, Taylor, *Lawyers Vote Against Disclosure of Fraudulent Activities by Clients*, N.Y. Times, Feb. 8, 1983, at A1, col. 2, and editorials, *see, e.g.*, *Whose Lawyer?*, Wall St. J., Aug. 15, 1983, at 16, col. 1; *see also* Taylor, *Ethics and the Law: A Case History*, N.Y. Times, Jan. 9, 1983, § 6 (Magazine), at 31. A number of law journals committed substantial space to articles discussing the content of drafts of the Model Rules. *See, e.g.*, Symposium, *Ethical Codes and the Legal Profession*, 59 TEX. L. REV. No. 4 (1981).

11. *See, e.g.*, Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981); Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, *id.* at 689.

12. *See, e.g.*, *Schiessle v. Stephens*, 717 F.2d 417 (7th Cir. 1983); *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746 (2d Cir. 1981).

13. In the last dozen years, substantially more law school faculty have begun to teach courses in the legal profession. In the academic year 1972, the Directory of Law Teachers, published by the Association of American Law Schools, contained barely more than four columns of names of teachers of professional responsibility. *See* A.A.L.S. DIRECTORY OF LAW TEACHERS 754-56 (1972). By contrast, the 1983-84 Directory contains about twice as many names. A.A.L.S. DIRECTORY OF LAW TEACHERS 853-57 (1983). Nonacademic interest in legal professional standards is revealed by the dramatic increase in the last dozen years in the number of malpractice actions. *See generally* R. MALLEEN & V. LEVIT, LEGAL MALPRACTICE 18-19 (2d ed. 1981).

14. *See, e.g.*, *Armstrong v. McAlpin*, 625 F.2d 433, 437 (2d Cir. 1980) (en banc), *vacated on other grounds*, 449 U.S. 1106 (1981); Gillers, *Great Expectations: Conceptions of Lawyers at the Angle of Entry*, 33 J. LEGAL EDUC. 662, 674-76 (1983).

15. *Id.* at 679 n.67.

16. *See supra* note 10.

17. APPROVAL OF LAW SCHOOLS: AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURE, STANDARD 302(a)(iv) (1983).

answers—like what to do when a client appears with murder weapon in hand,<sup>18</sup> or upon discovering that a corporate employer is set to market a dangerously defective consumer good.<sup>19</sup> The fact that the Multistate Bar Examination has separately graded ethical questions<sup>20</sup> should also encourage increased attention to legal ethics.

Still, even an ardent student of the behavior of lawyers must concede that these developments will not, absent scandal, place his or her subject on the front burners of professional or public discourse. Will it so much as find a warm place on the stove? Legal ethics is comparatively inconsequential to students and lawyers because (except for legal history and jurisprudence) it is perhaps the law school subject least useful to earning a living, and to earn a living is mostly why students study law.

So we find ourselves at the end of a period that has probably seen more intense and candid discussion of what it means to be an American lawyer, more attention paid to that role than ever before, and more than is likely to recur for a good while. For so homely a subject, it is an embarrassment of attention, passing though it may be. Before it passes further, we might profitably essay a telescopic interpretation of the text of the Rules in order to decipher (with apologies to Raymond Carver)<sup>21</sup> what it was we talked about when we talked about ethics. The moment is opportune. Because the matters addressed in and omitted from the Rules were debated by so many, so intensely, for so long,<sup>22</sup> the final document embodies a condensed, elliptical self-portrait of the American bar's influential constituencies. What does it show?

Close up, I will argue, little that is flattering. The bar has drafted a code that proves the wisdom of its own precept against client-lawyer conflicts.<sup>23</sup> The lawyers who approved<sup>24</sup> the Rules looked after their own. They have given us an astonishingly parochial, self-aggrandizing document, which favors lawyers over clients, other persons, and the administration of justice in almost every line, paragraph, and provision that permits significant choice. It is internally inconsistent to the bar's benefit.<sup>25</sup> It continues the practice of using the language of ethics to mask controls on the availability of legal services that in turn artificially inflate the cost of the services.<sup>26</sup> True, the Rules read better than the Code and fill some critical gaps.<sup>27</sup> Here and there, they require or forbid conduct for which they deserve commendation.<sup>28</sup> But the

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18. See, e.g., A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 374-85 (1984); Note, *Ethics, Law, and Loyalty: The Attorney's Duty to Turn Over Incriminating Physical Evidence*, 32 STAN. L. REV. 977 (1980).

19. See, e.g., T. MORGAN & R. ROTUNDA, PROFESSIONAL RESPONSIBILITY 35 (3d ed. 1984).

20. NATIONAL CONFERENCE OF BAR EXAMINERS, MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION (1984).

21. R. CARVER, WHAT WE TALK ABOUT WHEN WE TALK ABOUT LOVE (1981).

22. The 1982 Draft lists more than 100 organizations and individuals who responded to the 1981 Draft. 1982 Draft, *supra* note 2, app. D.

23. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983); see *infra* text accompanying notes 298-99.

24. This article discusses the Rules as adopted by the ABA House of Delegates. Its text in many ways differs from the various drafts. See *supra* note 3.

25. See *infra* text accompanying notes 277-85.

26. See *infra* text accompanying notes 249-85.

27. For example, Rules 5.1 and 5.2 address the responsibilities of supervisory and subordinate lawyers; Rule 3.8(e) describes the responsibilities of prosecutors for the extrajudicial statements of law enforcement officers; and Rule 2.2 addresses the circumstances under which a lawyer may serve as an intermediary. MODEL RULES OF PROFESSIONAL CONDUCT Rules 2.2, 3.8(e), 5.1 & 5.2 (1983).

28. Law firm partners, for example, are required to "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." *Id.* Rule 5.1(a) (1983).

big issues are almost consistently resolved in favor of lawyers. As finally adopted, the Rules seem guided by the view that what's good for lawyers is good for the public. Look at any part and that conclusion may not suggest itself; look at the whole and it is inescapable.

### SIX WAYS TO READ THE MODEL RULES

I here summarize and will then discuss six ways to read a legal ethics code, using the Rules as an example.

First, ascertain the extent to which the document traces the commands of civil or criminal law. The more it does so, I shall argue, the less it can be considered a code of ethics. Second, distinguish among the four constituencies whose interests the code might be expected to recognize. These are clients, individual lawyers, the profession as a whole, and others. By others I mean identifiable others, such as adversaries of clients, as well as the legal system or the administration of justice generally. Third, identify the interests of these constituencies. For example, clients have an interest in loyalty,<sup>29</sup> lawyers in professional independence,<sup>30</sup> and the legal system in preventing abuse of its institutions.<sup>31</sup> Fourth, determine whether a rule's concrete expression compromises legitimate interests of another constituency. A lawyer's duty to "keep a client reasonably informed about the status of a matter"<sup>32</sup> entails no such compromise because no person or group has a fair claim to have lawyers act otherwise. These rules present easy cases. By contrast, a rule may favor one group's interests over the legitimate interests of another constituency. A former client's interest that confidences not be used to his disadvantage<sup>33</sup> may be seen to clash with the interests of a lawyer who wants to represent an adversary of the former client but whose partner represented the former client in a prior firm affiliation. Must the former client take the risk that his former lawyer will leak damaging confidences to her new partner? Or must the new partner forego the representation?<sup>34</sup>

Fifth, in reading an ethics code we must differentiate even among those rules that favor the interests of one constituency over those of another. Some of these resolutions, I suggest, should be seen as thoughtful responses to hard issues, often with scant empirical information. While these rules are not beyond criticism, neither do they prove that lawyers place their interests ahead of those of clients. Rule 1.10(b), dealing with imputed disqualification from successive representations, is in this category.<sup>35</sup> Other resolutions, however, like the treatment of withdrawal in Rule

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29. See *infra* text accompanying notes 93-113.

30. See *infra* text accompanying notes 174-92.

31. See *infra* text accompanying notes 193-216.

32. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(a) (1983).

33. *Id.* Rule 1.9(b).

34. The Model Rules require the new partner to forego the representation if the prior matter is the same or substantially related. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(b) (1983).

35. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(b) (1983). Dean Morgan's excellent interest analysis of the Code of Professional Responsibility, Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977), may be too critical on this point. Dean Morgan argues that when the Code imputes knowledge within a firm where a member of the firm represented the adversary of a current client in a former affiliation, "the Code has

1.16,<sup>36</sup> the absolute prohibition on lay ownership or control of law firms in Rule 5.4,<sup>37</sup> and the failure in Rule 1.5 to require written retainer agreements,<sup>38</sup> are indefensibly lawyer-centered in their adjustment of competing interests. These rules may be explained by the fact that they were drafted by the very group whose behavior they aim to control. Sixth, and finally, the whole of an ethics code should be held up to its promises, the heft of the thing measured against the advantages of self-regulation as the code itself describes them.

I will discuss the first and final ways of reading a code separately and the middle four together.

### ETHICS AND LAW

Some provisions of an ethics code duplicate civil or criminal law, such as the prohibition against assisting a client in "criminal or fraudulent" activity,<sup>39</sup> or the one against filing a frivolous claim,<sup>40</sup> or the command not to "unlawfully obstruct another party's access to evidence."<sup>41</sup> Requirements that a lawyer "act with reasonable diligence and promptness in representing a client,"<sup>42</sup> "provide competent representation,"<sup>43</sup> "keep a client reasonably informed about the status of a matter,"<sup>44</sup> and "not use a client's confidences to the client's disadvantage,"<sup>45</sup> largely restate what contract and agency law separately are likely to require.<sup>46</sup> There are other examples, often restating the law of agency or contract, tort, or criminal law.<sup>47</sup> They may not be exact replicas, and if at the margins their mandates are broader than the legal duties they echo, they may be said to contain a sliver of ethical content. But the differences are minimal. The debate over many of these provisions was not about their inclusion but their wording, and was often over nuance.<sup>48</sup>

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defined that course as 'ethical' which best insulates a lawyer from criticism." *Id.* at 730. But a code that chose the opposite position could be equally faulted as insensitive to client secrets so lawyers could keep business. A broad imputation of knowledge rule is not beyond criticism, but an inference of improper motive does not seem justified.

36. See *infra* text accompanying notes 174-81.

37. See *infra* text accompanying notes 250-66.

38. See *infra* text accompanying notes 182-89.

39. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983).

40. *Id.* Rule 3.1. Cf. FED. R. CIV. P. 11.

41. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(a).

42. *Id.* Rule 1.3.

43. *Id.* Rule 1.1.

44. *Id.* Rule 1.4(a).

45. *Id.* Rule 1.8(b).

46. See, e.g., *Smith v. Lewis*, 13 Cal.3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (competence and diligence); *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980) (competence and diligence); *Stewart v. Sbarro*, 142 N.J. Super. 581, 591, 362 A.2d 581, 587 (App. Div. 1976) (diligence); *Haller v. Wallis*, 89 Wash. 2d 539, 573 P.2d 1302 (1978) (duty to communicate); RESTATEMENT (SECOND) OF AGENCY §§ 395-96 (1957) (duty to keep confidences); *Spiegel, Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 67-68 (1979) (duty to communicate). Courts differ on whether the duties lie in contract, tort or both. See *Pelham v. Griesheimer*, 92 Ill. 2d 13, 440 N.E.2d 96 (1982).

47. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1983) (lawyer shall not knowingly "offer evidence that the lawyer knows to be false"); *id.* Rule 3.5(a) (lawyer shall not "seek to influence a judge . . . by means prohibited by law"); *id.* Rule 4.4 ("lawyer in representing a client shall not use means that . . . violate the legal rights of . . . a [third] person").

48. For example, Rule 1.2 in the 1980 draft said: "A lawyer shall attend promptly to matters undertaken for a client and give them adequate attention until completed or until the lawyer has properly withdrawn from representing the

One could count up the words or duties in the Rules in an effort to determine what proportion of either largely restates law, but an exact figure is not necessary. A substantial number of the Rules require that lawyers do what the law already requires lawyers do to avoid civil or criminal liability.<sup>49</sup> The fact that an ethical duty is also a legal one does not make it redundant. Placing an obligation in both categories may enhance compliance by providing a second, perhaps more influential sanction. But while it may not for compliance purposes be redundant to define some illegal or actionable conduct as unethical, the greater the portion of an ethical code that merely incorporates legal duties (especially ones, like those in penal laws, that already carry persuasive force), the less may the resulting document seek credibility as a profession's code of *ethics*. In unveiling such a code a profession presumably says more than that its members must refrain from certain conduct that will get them sued or jailed. It is this extralegal realm that defines ethics. As we will see below, when we take its measure alone the Rules shrink considerably.

### CONSTITUENCIES AND INTERESTS

The next distinctions I wish to make are among the constituencies whose interests a legal ethics code will likely recognize and the nature of those interests. As for the constituencies, the very idea of a lawyer's ethics code presupposes the existence of the professional, the client or prospective client, and the institutions of a legal system. There will often be other constituencies too, such as those with whom a client deals and those the client opposes. There is finally, but not necessarily, the profession itself, which may have its own goals to pursue. Let me summarize the interests of each constituency as these appear in the Rules and then expand on them.

Clients are viewed as having four overlapping interests. These are in controlling information that the lawyer learns as a result of the representation,<sup>50</sup> in the lawyer's loyalty,<sup>51</sup> in the lawyer's service,<sup>52</sup> and in what has come to be called autonomy,<sup>53</sup> which may be defined as the power to make decisions about events that have consequence for one's life.<sup>54</sup> Autonomy is not the exact converse of another newly popular ethical topic, paternalism,<sup>55</sup> which is sometimes present when one person impedes the autonomy of another by consciously making a decision for him without his

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client." 1980 Draft, *supra* note 2, Rule 1.2. As adopted, Rule 1.3 reads: "A lawyer shall act with reasonable diligence and promptness in representing a client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983). In the 1980 draft, Rule 3.1(a)(3) prohibited lawyers from offering evidence which the lawyer "is convinced beyond a reasonable doubt is false." 1980 Draft, *supra* note 2, Rule 3.1. As adopted, Rule 3.3(a)(4) forbids a lawyer to "offer evidence that the lawyer knows to be false." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1983).

49. See *infra* notes 137, 147-48, 156, 172, 195-200, 217-18, 230-31, 236 & 240 and accompanying text.

50. See *infra* text accompanying notes 78-85.

51. See *infra* text accompanying notes 93-113.

52. See *infra* text accompanying notes 89-92.

53. See *infra* text accompanying notes 114-36. Client autonomy issues may arise in two contexts, and it is important to distinguish between them. See *infra* text accompanying notes 114-16.

54. See Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307, 311-13 (1980); see also Jones v. Barnes, 103 S. Ct. 3308, 3314 (1983) (Blackmun, J. concurring); *id.* at 3316 (Brennan, J. dissenting).

55. See Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 458.

informed consent. It is possible to suffer a loss of autonomy without becoming the subject of paternalism.<sup>56</sup>

In the Rules, the interests of the lawyer are, first, in professional independence: to decline to render service to a client or prospective client, although the lawyer may legally and ethically do so,<sup>57</sup> and to be free to render legal services without external or client intrusion on the exercise of professional discretion.<sup>58</sup> Second, the Rules respect the lawyer's interest in his or her economic well-being.<sup>59</sup>

The interests of others are to limit what a lawyer may do to the advantage of a client or herself but to the detriment of other persons (including prospective clients)<sup>60</sup> or the justice system, and to impose on lawyers duties to others that may run counter to their clients' or their own interests.<sup>61</sup>

Finally come the interests of the enterprise, the profession itself, as distinguished from the interests of individual lawyers. The enterprise is concerned with structures for marketing legal services.<sup>62</sup> Rules that constrain the supply side benefit some (by definition dominant) factions within the profession while disadvantaging others. A code of ethics reconciles these intra-enterprise frictions. Past examples of these rules include prohibitions on legal advertising<sup>63</sup> and various forms of group practice,<sup>64</sup> and the enforcement of minimum fee schedules.<sup>65</sup> Each was defended as beneficial to clients<sup>66</sup> but each predictably inflated the cost of legal services.<sup>67</sup> Each also disadvantaged those lawyers whose professional goals would have benefited from advertising, group practice or lower fees.<sup>68</sup> The Rules forbid lay ownership or control of for-profit law firms,<sup>69</sup> as did the Code<sup>70</sup> and Canons,<sup>71</sup> and justifies the

56. An example of this kind of lost autonomy is when a person is denied the opportunity to make a decision, possibly because another fails to inform her that a decision has to be made, but no one makes the decision for her.

57. See *infra* text accompanying notes 174-81 & 192.

58. See *infra* text accompanying notes 118-19, 147-55.

59. See *infra* text accompanying notes 175-76, 182-87, 277-85.

60. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rules 7.1, 7.2 & 7.3 (1983) (advertising and solicitation).

61. See *infra* text accompanying notes 193-248.

62. See *infra* text accompanying notes 249-85.

63. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

64. *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); Note, *Group Legal Services and the Organized Bar*, 10 COLUM. J.L. & SOC. PROBS., 228, 234-46 (1974).

65. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

66. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368-79 (1977) (prohibitions on advertising); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 781 (1975) (minimum fee schedules); *United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217, 222-23 (1967) (collective efforts to secure low cost representation).

67. In *Goldfarb*, petitioners queried 36 attorneys about charges for a house closing. Nineteen attorneys responded. Each attorney wanted one percent of the purchase price, the amount prescribed by the minimum fee schedule. Several attorneys said they knew of no lawyer who would accept the matter for less than one percent. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 776 (1975). Minimum fee schedules were held anticompetitive under the antitrust laws. *Id.* at 793. Studies have shown that legal advertising reduces price without reducing quality. See, e.g., Muris & McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1979 AM. B. FOUND. RESEARCH J. 179. In *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 584-85 (1971), the Union plan succeeded in reducing counsel fees in damage actions from 40 or 50% of the recovery to 25%. See also Note, *supra* note 64, at 230.

68. Legal advertising, for example, has led to national legal clinics with substantial practices. *In re* Professional Ethics Advisory Comm. Opinion 475, 89 N.J. 74, 444 A.2d 1092, *appeal dismissed*, 459 U.S. 962 (1982) (Legal Clinic of Jacoby & Meyers has 75 offices nationwide, conducts over 500 client interviews daily, and accepts about 600 new matters weekly). Another national firm, Hyatt Legal Services, is among the ten largest law firms in the nation measured by number of lawyers. Lewin, *The New National Law Firms*, N.Y. Times, Oct. 4, 1984, at D1, col. 3.

69. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(a), (c) & (d) (1983).

70. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102(A), DR 3-103(A) & DR 5-107(C) (1981).

71. CANONS OF PROFESSIONAL ETHICS 33, 34 (1963).

exclusion as being in the interest of clients.<sup>72</sup> This explanation requires scrutiny to see whether the true beneficiary may again be the enterprise itself.<sup>73</sup>

Rules that recognize the interests of one group often have a converse effect on the interests of one or more other groups. For example, a rule that requires a lawyer to reveal information when that is "necessary to avoid assisting a criminal or fraudulent act by a client"<sup>74</sup> works to protect the victim of the crime or fraud although it may cause the client civil or criminal liability. On the other hand, if the lawyer's duty does not encompass confidential information,<sup>75</sup> the interests of the client are respected to the virtual exclusion of the victim's interests. Where a rule has inverse effects on the interests of two groups, one might see them as part of a dyad. A legal ethics code can operate only on lawyers.<sup>76</sup> Consequently, it must speak to transactions in which an attorney is a participant in her own right, or as the representative of a client. When neither is true, the code has no place; regulation is left to civil and criminal law. A code therefore can address three dyads directly (client-lawyer, lawyer-other, lawyer-profession), and one (client-other) indirectly.<sup>77</sup>

## THE INTERESTS OF CLIENTS IN THE CLIENT-LAWYER DYAD

### A. Analysis<sup>78</sup>

I discuss the four client interests first. The first is to control information. The Rules say a lawyer "shall not reveal information relating to representation of a client"<sup>79</sup> or use such information "to the disadvantage of" a client or former client.<sup>80</sup> The rules prohibiting the use of the client's information generally speak to situations when the information may hurt the client's interests. There is no express<sup>81</sup> prohibition against a lawyer using a client's information to the lawyer's advantage as long as the information is not revealed and the client is not disadvantaged. The way the Rules treat client information may be viewed as a special case of the client's interest in

72. "These limitations are to protect the lawyer's professional independence of judgment." MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 comment (1983).

73. See *infra* text accompanying notes 249-85.

74. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1(b) (1983).

75. Rule 4.1(b) does not apply if the information that would reveal the crime or fraud is within Rule 1.6, *id.*; see *infra* text accompanying note 220.

76. "The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies." MODEL RULES OF PROFESSIONAL CONDUCT Scope. "Obviously, the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers. . . ." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1981).

77. Insofar as the lawyer is the intermediary between the client and the other, a code may affect the interests of clients and others *vis-a-vis* each other by determining the scope of what a lawyer may and may not do *for* a client *to* the other. See *infra* text accompanying notes 193-221.

78. Because my discussion of this dyad is the longest, I have separated the analysis from the critique, which follows at text accompanying notes 137-73. Discussions of the other dyads combine analysis and critique.

79. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983).

80. *Id.* Rule 1.8(b) (current client); *id.* Rule 1.9(b) (former client).

81. Prohibition against the use of a client's information may be inferred from the general duty of loyalty, *id.* Rule 1.7, or from the lawyer's fiduciary status under law. Singleton v. Foreman, 435 F.2d 962, 970 (5th Cir. 1970). DR 4-101(B)(3), by contrast, expressly forbids a lawyer to use a client's information for her or another's advantage even without disclosure. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)(3) (1981).

loyalty.<sup>82</sup> The disadvantageous revelation of a principal's information is disloyal.<sup>83</sup> Successive representations are sometimes disallowed as disloyal because of the risk that a lawyer or firm will be tempted to use a former client's information to his disadvantage and in favor of a current client.<sup>84</sup> On the other hand, the fit is not exact because Rule 1.6 forbids revelation of information even if not disadvantageous.<sup>85</sup>

The Rules also envision loyalty<sup>86</sup> and service<sup>87</sup> to current clients and loyalty to former clients.<sup>88</sup> A lawyer betrays her retainer by inaction, by failing to serve the client's need.<sup>89</sup> But more, a lawyer must "act with reasonable diligence and promptness in representing a client."<sup>90</sup> In describing this duty, the Comment to Rule 1.3 says:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.<sup>91</sup>

Therefore, with the few exceptions discussed in the section on the client-other dyad,<sup>92</sup> lawyers are ethically free and often required to use any means allowed by law to achieve the client's goals. If the Rules have a dominant theme, it is that what the law giveth, the lawyers' code of ethics shall not take away.

A lawyer must also be loyal. Loyalty is said to be "an essential element in the lawyer's relationship to a client."<sup>93</sup> Defining disloyalty is simple. A lawyer is disloyal when she opposes the client's interests.<sup>94</sup> By contrast, some representations present only a *risk* of disloyalty, either because the lawyer will be tempted to abuse the confidences of a client or former client or because the lawyer has allegiance to the inconsistent interests of herself or others. The difficult task is to identify these risky cases and fashion appropriate safeguards. The Rules employ a miscellany of safeguards depending on the nature of the risk. Some representations are banned

82. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.8, 1.9 & 1.10 (1983).

83. RESTATEMENT (SECOND) OF AGENCY §§ 395-96 (1957).

84. See *Analytica, Inc. v. NP Research, Inc.*, 708 F.2d 1263, 1269 (7th Cir. 1983) (side switching "in a closely related . . . matter creates an unsavory appearance of conflict of interest").

85. Whereas DR 4-101(A) defined as "secret," information that would be "embarrassing" or "detrimental" to a client, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1981), Rule 1.6 prohibits the revelation of any information "relating to representation of a client" whether or not embarrassing or detrimental. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

86. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.8 (1983).

87. *Id.* Rules 1.1, 1.3.

88. *Id.* Rules 1.9, 1.10.

89. "Perhaps no professional shortcoming is more widely resented than procrastination." *Id.* Rule 1.3 comment.

90. *Id.* Rule 1.3.

91. *Id.* Rule 1.3 comment.

92. See *infra* text accompanying notes 193-221.

93. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983).

94. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1981). "As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client. . . . Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983). See also CANONS OF PROFESSIONAL ETHICS 15 (1963).

altogether;<sup>95</sup> at other times it is deemed enough to caution the lawyer to beware of and resist the risk.<sup>96</sup> When a ban is used, the client may<sup>97</sup> or may not<sup>98</sup> be able to waive the disqualification. The particular choice of safeguard appears to depend on whether the conflict is with a former or current client and whether the threat is to confidences or to loyalty.

Some successive representations are disallowed because of the risk that counsel will misuse the former client's confidences.<sup>99</sup> Others are disallowed, irrespective of a threat to confidences, because of the risk of disloyalty in the first matter if a lawyer knows he may eventually be hired to undo for a second client work performed for the first.<sup>100</sup> Whichever is the basis for a successive disqualification, it can always be waived by the former client.<sup>101</sup> Yet other successive representations are allowed even over the former client's objection, but with a caution to the lawyer to protect confidential information.<sup>102</sup>

By contrast, concurrent conflicts are either absolutely disallowed or disallowed subject to waiver. Rule 1.7 anticipates the possibility of a conflict between two clients, or between a client's interests and those of a lawyer or a third person to whom the lawyer has responsibility.<sup>103</sup> When a conflict is concurrent, the lawyer may be able to steer around it, act loyally, and protect confidences; the Rules give some room to try.<sup>104</sup> But the Rules presume a point<sup>105</sup> when the risk of disloyalty is too great and the representation is absolutely forbidden. Clients may not waive this type of conflict. What does the absolute disqualification protect? Not confidentiality. Clients may nullify that interest by waiver,<sup>106</sup> or by making the confidential information public. Rather, it protects loyalty. The Rules reflect the view that some conflicts may be so

95. Rule 1.7 employs a test of reasonableness. A lawyer may accept a representation adverse to a client, or accept a client despite responsibilities that may "materially limit" a representation, if he "reasonably believes" that he can do so without "adversely affect[ing]" his duties to the client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983). By contrast, other provisions absolutely forbid certain representations (or representations on certain terms). *See, e.g., id.* Rule 1.8(j) (lawyer may not acquire a proprietary interest in client's cause of action).

96. For example, a lawyer may accept a representation adverse to a former client so long as it is not on the same or substantially related matter, but the lawyer is cautioned not to use the former client's information to his or her disadvantage. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(b) & comment (1983).

97. *Id.* Rule 1.8(f), for example, permits a lawyer to accept compensation from a third person to represent a client if the client consents to the arrangement, "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship," and the client's information is protected.

98. A client may not waive the prohibition in Rule 1.8(j), forbidding a lawyer to acquire a proprietary interest in the client's cause, or the one in Rule 1.8(d), directing a lawyer not to acquire media rights in the client's story prior to the conclusion of the representation. *Id.* Rule 1.8(j), (d).

99. *Id.* Rule 1.10 comment.

100. *Trone v. Smith*, 621 F.2d 994, 998-99 (9th Cir. 1980): "[The] professional commitment is not furthered, but endangered, if the possibility exists that the lawyer will change sides later in a substantially related matter. . . . From this standpoint it matters not whether confidences were in fact imparted to the lawyer by the client." *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.9(a), 1.10 comment (1983) (recognizing a continuing duty of loyalty to former clients regardless of threat to information).

101. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.9, 1.10(d) (1983).

102. *See infra* text accompanying notes 167-73.

103. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).

104. The lawyer may proceed if she reasonably believes the representation will not be adversely affected. Client consent is also required. *Id.* Rule 1.7(a), (b).

105. The reasonableness test is objective. "'Reasonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer." *Id.* Terminology.

106. *Id.* Rules 1.6(a), 1.8(b).

intense that it is reasonable to expect a lawyer consciously to ignore a client's goals, or actually to work to impede them. This is a peril the Rules do not let clients run.

While Rule 1.7 states this position generally, Rules 1.5 and 1.8 give specific examples of representations that will not be allowed because the risk of disloyalty is too high. Prohibitions against contingent fees in divorce<sup>107</sup> and criminal cases<sup>108</sup> and against acquiring "literary or media rights" in the subject of the representation<sup>109</sup> anticipate that the lawyer may be tempted to urge a particular decision for personal enrichment and not because the client's interests are thereby best served.<sup>110</sup> Other examples in which the risk of disloyalty is held unacceptable, although there is not necessarily a threat to the revelation of confidences, are the prohibition against drawing "an instrument giving the lawyer . . . any substantial gift from a client"<sup>111</sup> and the prohibition against acquiring a "proprietary interest" in the client's cause of action.<sup>112</sup> Waiver is not allowed for these disqualifications.

Rule 1.8 stops short of banning other practices that pose threats to loyalty. For example, business deals between lawyer and client present the hazard of concurrent conflict and overreaching. The Rules allow these deals with several safeguards, including that they be "fair and reasonable to the client" and that they be "transmitted" to and accepted by the client "in writing."<sup>113</sup>

The fourth client interest honored by the Rules is in autonomy—the power to make decisions of consequence for one's life. The issue of client autonomy arises in two ways. One focuses on the extent, if any, to which an ethics code ought to restrict how a lawyer may legally serve a client in seeking to achieve the client's goals.<sup>114</sup> Opponents of restrictions argue that the fact that a person retains counsel ought not to confine his or her freedom to choose means or ends permitted by law.<sup>115</sup> Autonomy is also of concern within the professional relationship itself. To what extent should an ethics code permit an attorney to make decisions for a client, with or without consultation?<sup>116</sup> These two uses of autonomy should not be confused. Here we discuss the second; the first arises in the section on the client-other dyad.<sup>117</sup>

Most would agree that a client delegates to a lawyer the power to make certain decisions that otherwise belong to the client, including many tactical decisions and decisions to disclose information when that is "impliedly authorized in order to carry

107. *Id.* Rule 1.5(d)(1).

108. *Id.* Rule 1.5(d)(2).

109. *Id.* Rule 1.8(d).

110. For examples, see *infra* text accompanying notes 274–76. In criminal and matrimonial matters there are also said to be "public policy" reasons for prohibiting contingent fees. See, e.g., *Schoonover v. State*, 218 Kan. 377, 543 P.2d 881 (1975), *cert. denied*, 424 U.S. 944 (1976) (criminal); *Stepp, Groce, Pinales & Cosgrove v. Thompson*, 70 N.C. App. 174, 319 S.E.2d 315 (1984) (matrimonial).

111. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(c) (1983).

112. *Id.* Rule 1.8(j).

113. *Id.* Rule 1.8(a).

114. See generally *Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1071–76 (1976).

115. *Id.* at 1073–75.

116. See generally *Luban, supra* note 55; *Martyn, supra* note 54; *Spiegel, supra* note 46.

117. See *infra* text accompanying notes 193–221.

out the representation."<sup>118</sup> This delegation may be seen to honor the lawyer's professional independence.<sup>119</sup> All probably agree that a retainer alone does not imply delegation of other decisions: whether and on what terms to settle a civil suit, and whether to plead guilty, waive a jury, and testify in a criminal matter.<sup>120</sup> Rule 1.2 says that "decisions concerning the objectives of representation" are for the client, and directs the lawyer to "consult with the client about the means by which they are to be pursued."<sup>121</sup> Whether consultation on means is mandatory or only at the client's request is not clear,<sup>122</sup> but in either event the client gets consultation only, not control, with a few exceptions.<sup>123</sup> The Comment to Rule 1.2 acknowledges that "[a] clear distinction between objectives and means sometimes cannot be drawn."<sup>124</sup>

Autonomy concerns also figure in duties to provide information a client may need to make decisions in the client's domain. There is a duty to keep a client "reasonably informed about the status of a matter"<sup>125</sup> and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation,"<sup>126</sup> a duty to provide the client with information in the event of a fee division,<sup>127</sup> to put the terms of contingent fee agreements in writing,<sup>128</sup> and to communicate the "basis or rate of the fee . . . preferably in writing;"<sup>129</sup> and a duty of disclosure when lawyer and client enter a business transaction.<sup>130</sup> A number of rules permit conduct only if a client or former client consents after "consultation," a term that implies a duty in the lawyer to convey the information needed for judgment.<sup>131</sup> The Rules also require that as far as reasonably possible, a client under disability and without a guardian has the same autonomy as in a normal client-lawyer relationship.<sup>132</sup>

The interest in autonomy can be seen to subsume the client's interest in controlling information. Information that has not "become generally known" can be said to "belong" to the client in the sense that an attribute of personhood is the power to

118. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983).

119. "A lawyer has professional discretion in determining the means by which a matter should be pursued." *Id.* Rule 1.3 comment. *Cf.* *Jones v. Barnes*, 103 S. Ct. 3308, 3314 (1983) (criminal defendant's constitutional rights not violated when appointed counsel exercised his professional judgment to refuse client's request to raise particular nonfrivolous legal arguments in appellate brief).

120. On the client's authority in a criminal case, *Jones v. Barnes*, 103 S. Ct. 3308, 3312 (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983). On the client's authority to accept or decline a settlement offer, see *In re Rosenthal*, 90 N.J. 12, 446 A.2d 1198 (1982); *cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983) ("objectives of [the] representation" are for client to decide).

121. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983).

122. *Id.* Rule 1.2 comment states: "A client . . . has a right to consult with the lawyer about the means to be used in pursuing [the] objectives [of the representation.]" *Id.* Rule 1.4, requiring the lawyer to communicate with the client, would seem to suggest that consultation may be mandated even if the client does not request it.

123. *Id.* Rule 1.2 comment reserves for the client authority "regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected."

124. *Id.* Rule 1.2 comment.

125. *Id.* Rule 1.4(a).

126. *Id.* Rule 1.4(b).

127. *Id.* Rule 1.5(e).

128. *Id.* Rule 1.5(c).

129. *Id.* Rule 1.5(b).

130. *Id.* Rule 1.8(a).

131. *See, e.g., id.* Rules 1.7(a)(2), (b)(2), 1.8(g) & 1.9(a).

132. *Id.* Rule 1.14(a).

control dissemination of one's information, especially if it is "about" one's self.<sup>133</sup> Does the autonomy right also incorporate the loyalty and service interests? Disloyalty may make it harder or impossible to achieve a goal, as may any number of external events, but interference with a goal standing alone does not diminish autonomy. "Autonomy" is not synonymous with "range of options." It is the freedom to choose and to marshal one's resources in pursuit of a choice, not the right to prevail.<sup>134</sup> Does disloyalty impede autonomy? I think it does.

If I choose to buy a ticket for seat E3 at a production of *Hamlet* and a stranger before me in line buys it first, my options, not my autonomy, would have been limited. But if I had hired that person to buy me the ticket and she could then choose not to do so or to buy it for another or herself, my freedom to marshal my resources—specifically the resource of using an agent's services—would have been diminished by the threat of such conduct, whether or not disloyalty occurs on any particular occasion. If, in addition, my agent learned about the production of *Hamlet* or the benefits of seat E3 as a result of what I had told her, using this information to my disadvantage would be an infringement on my (autonomous) right to control the terms of its disclosure.

In this hypothetical, my perception of the risk of disloyalty and misuse of information might cause me to forego the option of using an agent to buy my ticket and, instead, get it myself. My goal may still be realized. My autonomy is curtailed to the minimal extent that I am unable to use a particular means to reach it. The curtailment is greater, however, when the agent is a lawyer and the goal requires a legal service. Since a client is often factually or legally powerless to perform such a service, the risk of disloyalty by the only available agency poses an especially serious threat to autonomy.<sup>135</sup> The Rules seek to counter that threat not only by forbidding disloyalty in fact but also by prohibiting representation in circumstances that pose an unacceptably high risk that it will occur.<sup>136</sup>

## B. Critique

Nearly all concessions to the client's interest in the client-lawyer dyad fall into the following categories: they require that the lawyer do what the law obliges; or state some duties in language so general that the hard questions are simply deferred; or are concrete and focused only in describing other duties that are in the interest of lawyers to have.

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133. Cf. Fried, *supra* note 114, at 1068: "Before there is morality there must be the person. We must attain and maintain in our morality a concept of personality such that it makes sense to posit choosing, valuing entities—free, moral beings." Confidentiality rules may also be defended empirically: they encourage clients to be forthcoming and so enable counsel to provide complete and accurate advice. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (1983).

134. Cf. Fried, *supra* note 114, at 1075; "There is no wrong if a venture fails for lack of talent or lack of money—no one's rights have been violated. But rights *are* violated if, through ignorance or misinformation about the law, an individual refrains from pursuing a wholly lawful purpose."

135. A client may be factually powerless because he or she is untrained and the matter is complex. Freedman, *Lawyer-Client Confidences and the Constitution*, 90 YALE L.J. 1486, 1494-95 (1981). Corporations and other legal entities may be legally unable to represent themselves. *See, e.g., Hillside Housing Corp. v. Eisenberger*, 173 Misc. 75, 16 N.Y.S.2d 142 (1939).

136. *See supra* text accompanying notes 95-113.

The service duties are a good example. Agency, tort, and contract law will already have accounted for most of these, such as the duties of competence, to act diligently, to keep the client informed, to respond to requests for information, and to refrain from using confidences to the disadvantage of a past or present client.<sup>137</sup> These duties, furthermore, are presented in language so broad they say nothing controvertible. They can embody most viewpoints, even conflicting ones. Invert them. Would their opposites find advocates? Who argues that a lawyer acts ethically if she fails to "provide . . . the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation"?<sup>138</sup> Or that an ethical lawyer can be one who does not act with "reasonable diligence and promptness in representing a client,"<sup>139</sup> or fails to "keep a client reasonably informed . . . [or] promptly comply with reasonable requests for information"?<sup>140</sup>

The confidentiality rules, to the extent they impose duties on lawyers that substantive law does not,<sup>141</sup> benefit the profession. An oath of silence, enforced by threat of discipline, makes lawyers more dependable servants.<sup>142</sup> Some individual lawyers may feel uneasy at the denial of permission to breach a confidence even upon discovering that a client has used their unwitting aid to work serious injustice on another,<sup>143</sup> but the Rules, like the Code,<sup>144</sup> do not allow for conscience, possibly because if any lawyer may reveal secrets, all may, and no lawyer could then be trusted. Though the confidentiality duty does not yield in the face of injustice to others,<sup>145</sup> it dissolves if there is peril to the professional or financial interests of the lawyer.<sup>146</sup>

137. See *supra* note 46 and accompanying text.

138. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983).

139. *Id.* Rule 1.3.

140. *Id.* Rule 1.4(a).

141. "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1981); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (1983). Much of the scope by which the ethical duty exceeds the privilege will be subsumed by the law of agency. See *supra* note 46.

142. Compare *United States v. Arthur Young & Co.*, 104 S. Ct. 1495, 1502-04 (1984) (unanimous Court declined to recognize "a work-product immunity for an independent auditor's tax accrual workpapers" in response to an Internal Revenue Service summons), with *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (unanimous Court recognizes attorney-client and work-product privileges in corporate counsel's interview notes with corporate employees). The accounting profession is aware of the competitive consequences of the *Arthur Young* decision. See *Lewin, Business and the Law: Accountants v. Lawyers*, N.Y. Times, Apr. 3, 1984 at D2, col. 1. See also *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 87, 306 (1984) (arguing that the law of privilege should be "recast . . . in terms of function").

143. Gillers, *supra* note 14, at 676-77.

144. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1981).

145. Rule 1.6(b) allows a lawyer to reveal client information only "to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1983). Earlier drafts of the confidentiality provision were more permissive and sometimes even insistent. Rule 1.7(b) of the 1980 draft, for example, would have made disclosure mandatory if the client were set on "committing an act that would result in death or serious bodily harm to another person." 1980 Draft, *supra* note 2, Rule-1.7(b). As late as the June 1982 draft a lawyer would have been permitted to reveal client information "to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result . . . in substantial injury to the financial interests or property of another," and also "to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used." 1982 Draft, *supra* note 2, Rule 1.6(b)(1), (2) (emphasis added). See also *infra* note 221.

146. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983), MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1981).

The client autonomy obligations similarly require that lawyers cede little. Duties to provide a client with information repeat common law rules,<sup>147</sup> as do the grants of client authority on settlement, guilty pleas, and whether to waive a jury or testify<sup>148</sup> at a criminal trial. The division in Rule 1.2(a) between objectives (for the client) and means (largely for the lawyer after consultation) is hardly self-defining. The Comment states the difficulty of “clear distinction”<sup>149</sup> and, except at the edges,<sup>150</sup> attempts none. In litigation, where the knottiest problems often arise, the Comment surrenders any position for ethics when it acknowledges that the “[l]aw defining the lawyer’s scope of authority . . . varies among jurisdictions.”<sup>151</sup> Notably, the provision in the January 1980 discussion draft directing lawyers to “accept a client’s decisions concerning the objectives of the representation and the means by which they are to be pursued”<sup>152</sup> was quickly scrapped. Another proposal, imposing on lawyers a duty to keep a client “informed about a matter by periodically advising the client of its status and progress,” and to “explain the significant legal and practical aspects of a matter and alternative courses of action to the extent reasonably necessary”<sup>153</sup> survived as far as the June 1982 revised proposed final draft,<sup>154</sup> where it was truncated into a rule that essentially requires only “reasonabl[e]” communication.<sup>155</sup>

Much of the loyalty duty also restates contract and agency law.<sup>156</sup> In one area it is broader. This is in the use of prophylactic rules to forbid representations (sometimes subject to informed waiver by the client) that pose an unacceptable risk that the lawyer will misuse confidences or be unable to pursue the client’s objectives. Rules 1.7, 1.8, 1.9 and 1.10 enumerate most of these prohibitions. Since prophylactic rules prevent a lawyer from accepting business she may want, we might expect them to be used seldomly, and only when the risk of disloyalty is very great or when the lawyers and clients whom the rule is likely to disappoint are small in number or short on influence. This is what the Rules seem to do. Several of the non-waivable disqualifications purport to protect, but also impede, less powerful clients—criminal defendants, tort plaintiffs—while other potential conflicts commonly arising in lawyer-client transactions are met with restrictions that are short of a total ban and rarely more confining than legal rules standing alone.

A criminal defendant, for example, may be forced to accept appointed counsel because he is denied the power to pay his preferred lawyer with the only “capital” available—the right to his story.<sup>157</sup> A tort plaintiff may not relieve the financial

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147. See *supra* notes 44–46 and accompanying text.

148. *Jones v. Barnes*, 103 S. Ct. 3308, 3312 (1983).

149. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 comment (1983).

150. See *supra* notes 120–23 and accompanying text.

151. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 comment (1983).

152. 1980 Draft, *supra* note 2, Rule 1.3.

153. 1981 Draft, *supra* note 1, Rule 1.4.

154. 1982 Draft, *supra* note 2, Rule 1.4.

155. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1983).

156. *Singleton v. Foreman*, 435 F.2d 962, 970 (5th Cir. 1970) (loyalty is an attribute of the attorney’s fiduciary duty).

157. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(d) (1983). *Contra Maxwell v. Superior Court*, 30 Cal.3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982).

pressures of a defendant's dilatory tactics either by accepting financial assistance from her lawyer or by selling him a proprietary interest in her claim.<sup>158</sup> By contrast, the Rules accept the risk of conflicts that reside in business deals between lawyer and client,<sup>159</sup> those that arise when a third person pays a lawyer to represent a client,<sup>160</sup> and some of those that occur when a client's interests are at odds with those of another client or the lawyer herself.<sup>161</sup> In these cases, the Rules permit the relationship and rely on cautions or restrictions, mainly borrowed from law. For example, the most significant limitation on client-lawyer business deals—that they be “fair and reasonable to the client”<sup>162</sup>—is one the courts separately impose.<sup>163</sup> The Rules add little.<sup>164</sup>

Consider, too, the issue of successive disqualification. To what extent should a representation be disallowed not because it is inherently disloyal but because of the risk that a lawyer will be tempted to use a former client's confidences against the client? The alternative to disqualification is to allow the representation but to caution the lawyer against misuse of confidences. The Rules employ both devices. A firm may not represent a client against a person if a lawyer in the firm previously represented the person in a prior affiliation and the two matters are the same or substantially related.<sup>165</sup> The representation is not permitted because it meets the test of double identity: there is identity between the first and second matters and there is identity between the former client and the adversary of the current one. The test of double identity provides a rough measure of the likely usefulness of the former client's confidences. The greater the usefulness, the greater the risk of breach. If the double identity test is met, the risk is considered high enough to require a prophylactic rule.<sup>166</sup>

When either identity is absent, however, a caution is deemed sufficient to protect the former client's confidences. A lawyer may represent a client on a matter that is the same or substantially related to one the lawyer handled for a former client, even though the lawyer may have useful information from the former matter, if the

158. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(e), (j) (1983).

159. *Id.* Rule 1.8(a).

160. *Id.* Rule 1.8(f). *See infra* text accompanying note 285.

161. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983). *See infra* text accompanying notes 283–84.

162. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(a)(1) (1983).

163. *Pollock v. Marshall*, 391 Mass. 543, 462 N.E.2d 312 (1984).

164. The Rules require the client to consent “in writing.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(a)(3) (1983). They also require that the client have “a reasonable opportunity to seek the advice of independent counsel.” *Id.* Rule 1.8(a)(2). But since there is no requirement that the lawyer advise the client to seek that advice, this provision is apparently satisfied if some period of time elapses between proposition and consummation of the business deal.

165. If the lawyer previously represented the client while a member of the firm, the firm and the lawyer are disqualified from the second representation because of the firm's surviving loyalty to the former client, regardless of threat to confidences. If the lawyer represented the client in a prior firm affiliation, the new firm has no surviving duty of loyalty, though the lawyer does. *Id.* Rules 1.9(a), 1.10(a) & 1.10 comment. The new firm will then be disqualified only if the lawyer has client information protected by Rules 1.6 and 1.9(b), which Rule 1.10(b) rebuttably presumes he does. *See id.* Rules 1.6, 1.9(b) & 1.10(b). Here, I am concerned with disqualification from successive representations because of the risk to client information. That issue is presented in the Rules independently of the duty of surviving loyalty only when a firm lawyer previously represented the former client in a different affiliation. *See id.* Rule 1.10 comment.

166. *Id.* Rules 1.10(b), 1.10 comment.

second representation is not adverse to the former client.<sup>167</sup> The caution against disadvantageous use of the former client's information<sup>168</sup> is relied on to meet that risk. Conversely, a second representation may proceed against a former client on a matter that is unrelated to the first representation although confidences from it may be relevant to the later matter.<sup>169</sup> Again, the caution suffices. Of course, depending on the facts, the temptation to use a former client's confidences may be very great in either of the situations in which the test of double identity is not satisfied, greater even than in some situations in which it is. Nevertheless, the ABA chose a formulaic test for disqualification over one that would require assessment of the degree of risk present in each case,<sup>170</sup> and which would likely have led to more disqualifications. This choice is consistent with other provisions of the Rules that prefer a caution to a ban when it benefits lawyers to do so and accept a ban in lieu of a caution when it does not.<sup>171</sup> To the extent the Rules require disqualification, they pick a test no broader than the one most courts already use in deciding these motions in litigation.<sup>172</sup> The Rules break no ground. This is not to say that the chosen test is wrong. It has the advantages of greater predictability and of less interference with a potential client's choice of counsel.<sup>173</sup> But in assessing the ethical domain defined by the Rules it is important to remember that the bar adopted the standard that courts now employ and might well have continued to use anyway. The bar's choice results in minimal interference with a lawyer's availability to clients who might wish to retain her.

We thus see in the span of the loyalty duty, as with the duties of service, confidentiality and autonomy, that with few exceptions the Rules embrace the client's interests when it is painless, even beneficial, for lawyers to do so. They are notably less magnanimous when the price is the lawyer's to pay, as I discuss in the next section.

#### THE INTERESTS OF LAWYERS IN THE CLIENT-LAWYER DYAD: ANALYSIS AND CRITIQUE

The previous discussion addressed duties of lawyers to clients by virtue of the professional relationship. The Rules also speak to the interests of lawyers as professionals and entrepreneurs, both within and outside the client-lawyer dyad. Here I write about lawyers' interests within it. As we saw, duties springing from the client's

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167. *Id.* Rule 1.9(a). *Contra* Kevlik v. Goldstein, 724 F.2d 844, 851 (1st Cir. 1984) (on motion of plaintiffs, law firm disqualified from representing defendant in civil rights case where it had previously counseled a different prospective plaintiff in the case).

168. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(b) (1983).

169. *Id.* Rule 1.9(a) & comment; *see also* Government of India v. Cook Indus., Inc., 569 F.2d 737 (2d Cir. 1978).

170. For example, Rule 1.10(b) in the 1981 draft of the Rules, provided:

When lawyers terminate an association in a firm, none of them, nor any other lawyer with whom any of them subsequently become associated, shall undertake or continue representation *that involves a material risk of revealing information* relating to representation of a client in violation of Rule 1.6, or of making use of information to the disadvantage of a former client in violation of Rule 1.9.

1981 Draft, *supra* note 1, Rule 1.10(b) (emphasis added).

171. *See, e.g., infra* text accompanying notes 249-85.

172. *See, e.g.,* Trone v. Smith, 621 F.2d 994 (9th Cir. 1980).

173. *See* Government of India v. Cook Indus., Inc., 569 F.2d 737, 739-40 (2d Cir. 1978).

interests in service, autonomy and loyalty may circumscribe a lawyer's wish to accept particular representations or wholly to control the pace and course of a matter. These duties purport to protect the client from getting less than he paid for, in the form of lack of service or antagonism to his interests, and from getting more than he wants, in the form of the lawyer excluding him from participation in the representation. Elsewhere the Rules emphasize the professional and financial interests of the lawyer, sometimes to the great disadvantage of the client.

Noteworthy is the rule allowing a lawyer to withdraw from a representation if "withdrawal can be accomplished without material adverse effect on the interests of the client."<sup>174</sup> It does not matter that the client objects to withdrawal. "Material adverse effect" is not defined; the rule does not say whether it refers only to financial and legal "interests." Even if there will be a "material adverse effect," withdrawal is still allowed if "the representation will result in an unreasonable financial burden on the lawyer."<sup>175</sup> In other words, it is ethical for a lawyer to break a contract with a client, though the client will suffer, if the lawyer reasonably concludes it was a bad deal, or has become a bad deal because his or her practice has since improved. The Code and Canons contained no such provision.<sup>176</sup> A lawyer may also withdraw, despite the adverse effect on a client's interests, if the client wishes to pursue an "objective" which, though legal, "the lawyer considers repugnant or imprudent."<sup>177</sup> Another rule, drawn from the Code but broader,<sup>178</sup> permits a lawyer to reveal client confidences in a fee dispute (of any size), or if the lawyer is charged with wrongdoing.<sup>179</sup> A final rule responsive to professional independence gives lawyers authority to "refuse to offer evidence that the lawyer reasonably believes is false,"<sup>180</sup> even though a reasonable person could conclude the evidence is truthful and the client wants the tribunal to consider it. In this group of provisions the Rules place the lawyer's professional independence and financial advantage above all of the client's interests: in confidentiality, in service, in loyalty, and in autonomy. The fact that the lawyer may ethically withdraw despite an "adverse effect" on a client's interests if she considers one of the client's objectives "imprudent"<sup>181</sup> is an especially striking compromise of client autonomy.

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174. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1983).

175. *Id.* Rule 1.16(b)(5).

176. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (1981); CANONS OF PROFESSIONAL ETHICS 44 (1963).

177. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(3) (1983).

178. *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1981) (lawyer may reveal confidences or secrets if "necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct").

179. Rule 1.6(b)(2) permits revelation of client information to establish a claim or defense . . . in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983). For this exception to apply, the charge or claim against the lawyer does not have to be made by the client, nor need there be an actual proceeding pending. *Id.* Rule 1.6 comment.

180. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(c) (1983). *Cf.* *Jones v. Barnes*, 103 S. Ct. 3308 (1983) (client's constitutional rights not violated when appointed counsel strategically chose not to raise nonfrivolous appellate arguments requested by client).

181. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(3) (1983).

An obligation that is not imposed may tell as much about the bar's view of its ethics as one that is, especially when the former is consciously deleted. Rule 1.5 directs that "the basis or rate of the fee . . . be communicated to the client, *preferably* in writing. . . ." <sup>182</sup> Three public drafts of the Rules mandated written fee agreements with minor exception. <sup>183</sup> The last minute switch capitulated to the profession's interests at the expense of those of clients. Lawyers may now be conveniently vague about fees at the outset and avoid getting locked into a formula that could turn out less remunerative than a different one. <sup>184</sup> In the event of a fee dispute, a lawyer is in a much superior position to establish his claim. He can use client confidences to do so. <sup>185</sup> He has the resources to litigate at nominal cost. He need not worry about disciplinary intervention. <sup>186</sup> He may have the leverage of retaining and charging liens. <sup>187</sup>

By contrast, a written statement of the "basis or rate of the fee" protects the client against a subsequent "misunderstanding," honest or otherwise. <sup>188</sup> It focuses attention on the matter of fees and may lead to further questions, negotiation, or comparison shopping. One is hard pressed to think how a client could possibly be disserved by a written fee agreement. With a commendable absence of hypocrisy, the Rules do not contend otherwise.

Weaker clients, those especially in need of a code's protection, are most harmed by the absence of a writing requirement. Entity clients often have house counsel who are as knowledgeable on the subject of fees as the lawyers they retain. Worldly and educated clients will likely have experience with professional services or the confidence and presence of mind to pursue detailed explanations. It is the unworldly, less educated and inexperienced client who is most likely to suffer the consequences of a later misunderstanding. In the calculus of this issue, the arguments are all on one side and that side lost before the House of Delegates.

Further recognition of the lawyer's professional independence is not particularly at the client's expense. In advising a client a lawyer "may refer . . . to . . . moral, economic, social and political factors, that may be relevant to the client's situation." <sup>189</sup> This superfluous authority is so timidly suggested ("may refer") that any tentative hint of the importance of these "factors" is dispelled, especially since

182. *Id.* Rule 1.5(b). There is an exception when the lawyer has "regularly represented the client."

183. 1982 Draft, *supra* note 2, Rule 1.5(b); 1981 Draft, *supra* note 1, Rule 1.5(b); 1980 Draft, *supra* note 2, Rule 1.6(b).

184. For example, a flat fee may be more or less favorable to a lawyer than an hourly rate, depending on how long it takes to achieve a client's goal.

185. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983).

186. While it is unethical to charge an unreasonable fee, *id.* Rule 1.5(a), it is not unethical to have a fee dispute with a client.

187. *See, e.g.,* IOWA CODE ANN. § 610.18 (West 1975) (recognizing both charging and retaining liens). A retaining lien entitles a lawyer to retain papers and property of a client in the lawyer's possession until she has been paid or a court orders the lawyer to release them. A charging lien gives an attorney a legally enforceable interest against the property she may have helped the client obtain through judgment or settlement. *See generally* S. GILLERS, THE RIGHTS OF LAWYERS AND CLIENTS 126-30 (1979).

188. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 comment (1983).

189. *Id.* Rule 2.1.

the client can insist on technical legal advice only.<sup>190</sup> It is also said, again gratuitously, that a “lawyer’s representation of a client . . . does not constitute an endorsement of the client’s political, economic, social or moral views or activities,”<sup>191</sup> and that a “lawyer may limit the objectives of the representation if the client consents after consultation.”<sup>192</sup>

THE INTEREST OF OTHERS IN THE CLIENT-OTHER DYAD:  
ANALYSIS AND CRITIQUE<sup>193</sup>

As long as a lawyer has not withdrawn, she must be prepared to pursue a client’s objectives by all available, permissible means, although the means are largely for her to select.<sup>194</sup> This expectation of service and loyalty, discussed above, describes the client’s representational interests in the client-other dyad as recognized by the Rules.

The Rules also contain provisions that purport, in the interest of others, to *restrict* what a lawyer may do for a client. Many of these duplicate law; some use words like “unlawfully,” thereby assuring that their prohibitions will not extend beyond the legal mandate. For example, a lawyer may not “seek to influence a judge . . . by means prohibited by law”<sup>195</sup> or seek to “communicate ex parte with [a juror] except as permitted by law.”<sup>196</sup> “In representing a client,” it is said, “a lawyer shall not use . . . methods of obtaining evidence that violate the legal rights of [a third person].”<sup>197</sup> And a lawyer may not “falsify evidence,”<sup>198</sup> “offer an inducement to a witness that is prohibited by law,”<sup>199</sup> “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document. . . .”<sup>200</sup>

There is also a crazy quilt of ethical obligations, most of which are not legally mandated, that aims to protect others or the institutions of justice, at times to the disadvantage of clients. A lawyer may have a duty or the authority to provide information to another despite the effect on a client. For example, an entity lawyer must “explain the identity of the client when it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”<sup>201</sup> This obligation serves the interest of the nonclient constituents (directors, officers, stockholders) by cautioning against damaging revelations, but potentially hurts the client by cutting off receipt of helpful information. A lawyer must also explain her

190. *Id.* Rule 2.1 comment.

191. *Id.* Rule 1.2(b).

192. *Id.* Rule 1.2(c).

193. A legal ethics code bears on the client-other relationship because the presence of a “client” presupposes representation and thus also presupposes a lawyer whose behavior can be limited. The code cannot speak to the conduct of the client or other directly. *See supra* notes 76–77 and accompanying text.

194. *See supra* text accompanying notes 89–92.

195. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5(a) (1983).

196. *Id.* Rule 3.5(b).

197. *Id.* Rule 4.4.

198. *Id.* Rule 3.4(b).

199. *Id.*

200. *Id.* Rule 3.4(a).

201. *Id.* Rule 1.13(d).

role to an unsuspecting, unrepresented person with whom she is dealing on behalf of a client.<sup>202</sup> A lawyer must take remedial measures, possibly including revelation of client information, if he has offered an adjudicative, administrative, or legislative tribunal evidence he later learns is false.<sup>203</sup> A lawyer must sometimes reveal legal authority contrary to a client's position.<sup>204</sup> A lawyer must reveal even adverse relevant facts in an *ex parte* proceeding.<sup>205</sup> When a client retains a lawyer to undertake an evaluation for use by a third person, the lawyer may have to reveal adverse client information.<sup>206</sup> A lawyer must sometimes report ethical violations of another lawyer,<sup>207</sup> or disclose a material fact when failure to do so means the lawyer will have aided a client's crime or fraud.<sup>208</sup> A lawyer is permitted to reveal confidential information when the client plans a "criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."<sup>209</sup>

There are also obligations imposed in the interest of others that do not require the revelation of information—some even call for silence—and which may likewise work to a particular client's disadvantage. These include restrictions on speaking to the press about adjudicative proceedings,<sup>210</sup> the advocate-witness rule,<sup>211</sup> the prohibition against making a material false statement of law or fact to a person or tribunal,<sup>212</sup> the duty not to communicate with another lawyer's client or the client's agents,<sup>213</sup> the duty not to ask potential witnesses to refrain from voluntarily offering to give evidence,<sup>214</sup> the prohibition against assertion of frivolous claims or defenses,<sup>215</sup> and the duty to refrain from using embarrassing, dilatory, or burdensome tactics in representing a client.<sup>216</sup>

What can we make of these provisions? Let us subtract those that cover the same ground as law or court rule, such as the prohibitions against asserting frivolous claims or defenses<sup>217</sup> and against using dilatory tactics.<sup>218</sup> Let us also eliminate duties to which the client consents, such as the duty to reveal adverse information if the lawyer is retained to give an evaluation to a third person.<sup>219</sup> We can also ignore directives that dissolve in their own provisos. The duties to report another lawyer's misconduct and to disclose a material fact if failure to do so is necessary to avoid assisting a

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202. *Id.* Rule 4.3.

203. *Id.* Rules 3.3(a)(4), 3.9.

204. *Id.* Rule 3.3(a)(3).

205. *Id.* Rule 3.3(d).

206. *Id.* Rule 2.3.

207. *Id.* Rule 8.3(a).

208. *Id.* Rule 4.1(b).

209. *Id.* Rule 1.6(b)(1).

210. *Id.* Rule 3.6.

211. *Id.* Rule 3.7.

212. *Id.* Rules 3.3(a)(1), 4.1(a).

213. *Id.* Rule 4.2.

214. *Id.* Rule 3.4(f).

215. *Id.* Rule 3.1.

216. *Id.* Rule 4.4.

217. *See, e.g.,* FED. R. CIV. P. 11.

218. *Id.*

219. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.3(a)(2) (1983).

client's crime or fraud disappear if compliance requires the revelation of client confidences, as it virtually always will.<sup>220</sup>

How can we describe the remainder? I suggest this way: they are duties imposed in the interest of safeguarding the boundaries of adversary justice. The obligation to reveal one's representational status, to avoid and possibly even correct material falsity, to be complete in *ex parte* proceedings, the advocate-witness rule, the duty not to take one's case to the media, not to communicate with another lawyer's client and not to ask potential witnesses to refuse to volunteer testimony all protect the dominant jurisprudential model for dispute resolution and interest reconciliation by forbidding behavior that seeks to skirt its principles. These principles define a world in which each party is protected by counsel and in which disputes will be concluded and interests reconciled without knowing falsity and within the context of the formal (court, agency) or informal (negotiation) institutions that the justice system provides and lawyers dominate. "We place almost no ethical limits on what we may legally do to win your objectives," lawyers are saying, "so long as you play on our court."<sup>221</sup>

#### THE INTEREST OF OTHERS IN THE LAWYER-OTHER DYAD: ANALYSIS AND CRITIQUE

When a lawyer is not acting for a client, the Rules impose even fewer duties on him or her in the interests of others, including potential clients and the institutions of the legal system. Most of these forbid rather than require conduct. There is no duty to provide free or low-cost legal services for underrepresented interests,<sup>222</sup> no duty to work to improve legal institutions or the law,<sup>223</sup> and no duty to contribute financially toward either goal.<sup>224</sup> Lawyers are directed to accept court appointments,<sup>225</sup> but even this direction is qualified if the representation will impose an "unreasonable financial

220. *Id.* Rules 4.1(b), 8.3(c). The lawyer need not report or disclose if he or she knows of the conduct as a result of information protected by Rule 1.6. Since that rule protects all information "relating to the representation [of a client], whatever its source," *id.* Rule 1.6 comment, it is difficult to conceive of a situation in which a lawyer will be compelled to reveal client frauds or crimes and relatively few in which a lawyer will be required to report misconduct by another attorney.

221. *Id.* Rule 1.6(b)(1), which permits lawyers to reveal information about a client "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm," is an exception to this description. But not by much. It is appreciably narrower than DR 4-101(C)(3), which it replaces and which permits a lawyer to reveal a client's "intention . . . to commit a crime and the information necessary to prevent the crime." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-104(C)(3) (1981). And it is substantially narrower than equivalent provisions in public drafts of the Rules. *See supra* note 145. The death or "substantial" bodily harm contemplated by Rule 1.6 as adopted must be imminent before the lawyer may reveal the information. The unexplained use of the word "imminent," added on the floor of the House of Delegates at its February, 1983 meeting, *Text of Revised Model Rules of Professional Conduct*, Legal Times, Feb. 14, 1983, at 21, col. 2, suggests the influence of the products liability defense bar. In short, this weak grant of authority is so circumscribed as to threaten almost no one while avoiding the public relations crisis that would likely have ensued on its omission.

222. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983), which states that a lawyer "should render public interest legal service," according to the comment "is not intended to be enforced through disciplinary process." 1980 Draft, *supra* note 2, Rule 8.1 provided: "A lawyer shall render unpaid public interest legal service" (emphasis added).

223. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983) includes "service in activities for improving the law" as an example of the manner in which a lawyer may fulfill its nonmandatory directive.

224. Rule 6.1 includes "financial support for organizations that provide legal services to a person of limited means" as an example of the manner in which a lawyer may fulfill its nonmandatory directive. *Id.*

225. *Id.* Rule 6.2.

burden on the lawyer''<sup>226</sup> or if ''the client or cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.''<sup>227</sup> Obviously, too, a lawyer may not accept an assignment she is incompetent to handle.<sup>228</sup> For example, securities lawyers can properly decline landlord-tenant and homicide cases.

The Rules restrict the ways in which a lawyer may advertise for or solicit clients.<sup>229</sup> Much of the content of these provisions is dictated by the first amendment.<sup>230</sup> Other provisions, like the prohibition against ''false or misleading communication,'' may also be addressed by civil law.<sup>231</sup> Nevertheless, some of what the Rules forbid lawyers to do in this area may be considered pure ethics: for example, the prohibitions against telephone or in-person solicitation<sup>232</sup> and against listing a ''specialty.''<sup>233</sup>

The Rules impose duties on supervisory and subordinate lawyers.<sup>234</sup> These can be seen to further the interests of others generally, or the justice system, without reference to a particular client or matter. But the obligations here are thinner than might first appear. A supervisory lawyer is responsible for another lawyer's conduct if he orders or ratifies it, or sometimes if he fails to mitigate or avoid it.<sup>235</sup> These rules incorporate traditional principles of vicarious or accessorial responsibility.<sup>236</sup> On the other hand, partners and supervisory lawyers are obliged to institute ''measures'' or ''make reasonable efforts to ensure'' that colleagues and subordinates behave professionally.<sup>237</sup> These are preventative obligations, which the law might not otherwise impose.<sup>238</sup>

The rule on subordinate lawyers contains even less. It rejects a ''following orders'' defense to a charge of unprofessional conduct.<sup>239</sup> The law would not likely recognize one anyway.<sup>240</sup> It provides a complete defense, however, if the subordinate acted ''in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.''<sup>241</sup> If the resolution was indeed ''reasonable,'' and the question ''arguable,'' it is hard to imagine how even the supervisor would be

226. *Id.* Rule 6.2(b).

227. *Id.* Rule 6.2(c).

228. *Id.* Rule 1.1.

229. *Id.* Rules 7.1, 7.2 & 7.3.

230. *See, e.g., In re R.M.J.*, 455 U.S. 191 (1982); *In re Primus*, 436 U.S. 412 (1978).

231. *Cf. In re R.M.J.*, 455 U.S. 191, 200 (1982) (states may regulate legal advertising to prevent deception); *Guenard v. Burke*, 387 Mass. 802, 443 N.E.2d 892 (1982) (''Unfair Trade Practices'' statute applied in client's action against lawyer).

232. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983).

233. *Id.* Rule 7.4.

234. *Id.* Rules 5.1, 5.2.

235. *Id.* Rule 5.1(c).

236. *See, e.g., In re Gladstone*, 16 A.D.2d 512, 229 N.Y.S.2d 663 (1st Dept. 1962).

237. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1(a), (b) (1983).

238. *But cf. In re Fata*, 22 A.D.2d 116, 254 N.Y.S.2d 289 (1st Dept. 1964), *cert. denied*, 382 U.S. 917 (1965) (lawyer may be subject to discipline for failure to supervise violations of partners or associates when he should reasonably have suspected their misconduct).

239. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2(a) (1983).

240. *See, e.g., In re Knight*, 129 Vt. 428, 281 A.2d 46 (1971) (''following orders'' defense rejected but sanction mitigated where associate in a divorce case helped partner entrap a husband with a prostitute).

241. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2(b) (1983).

culpable. The Rules are inclined to defer to a lawyer's reasonable resolution of hard questions,<sup>242</sup> and simple ones are unlikely to admit of more than one solution.

Finally, I place in this category two prohibitions on representations by former government lawyers. Without government consent a lawyer may not "represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee."<sup>243</sup> Furthermore, a lawyer who formerly worked for the government may not represent a client against a person about whom the lawyer gained "confidential government information" if the "matter" is one "in which the information could be used to the material disadvantage of that person."<sup>244</sup> The lawyer is absolutely disqualified.<sup>245</sup> The protected others here are the government and the private party. The government cannot consent to the representation and the subject of the information apparently cannot waive the disqualification, although the subject could publicly disclose the information, and thereby remove the confidentiality.<sup>246</sup> A firm with which a disqualified former government lawyer is affiliated may represent the client so long as the lawyer is screened.<sup>247</sup>

Why an ethics code should address these issues is unclear. The government, unlike all other employers of lawyers, is capable of legislating to protect itself and those who deal with or are investigated by it. It has been speculated that these disqualification provisions protect lawyers who have not (or not recently) worked for the government by neutralizing competition from those who have,<sup>248</sup> but this explanation is too harsh. When the rule was passed, a lawyer who voted for it could not know whether she or a future partner or associate might later be in a position to wish it had not been. I see the rule as a defensible attempt to protect others from a misuse of information or experience in a way the law could but may not.

#### THE INTERESTS OF THE PROFESSION IN THE PROFESSION-LAWYER (AND -CLIENT) DYAD: ANALYSIS AND CRITIQUE

I have added the profession itself as a fourth player concealed in the text of the Rules. By the profession I do not mean individual lawyers or even groups of lawyers, but the enterprise as a whole, the professional equivalent of the body politic. One may ask whether the profession has interests separate from those of the three other constituencies. If it does, one may also ask what business it has advancing these interests through rules of ethics. The bar, to be sure, would claim that a rule like 5.4,

242. 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 that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation.

MODEL RULES OF PROFESSIONAL CONDUCT Scope (1983).

243. *Id.* Rule 1.11(a).

244. *Id.* Rule 1.11(b).

245. *Id.*

246. "Confidential government information" is defined as information that "is not otherwise available to the public." *Id.* Rule 1.11(e).

247. *Id.* Rule 1.11(a), (b).

248. *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1432-33 (1981).

which prohibits lay ownership or control of law firms, is in fact meant to protect clients. I do not find that justification credible. Rule 5.4 must be counted as serving the interests of some critical mass of lawyers, numerous and powerful enough to force a change in late drafts of the Rules. The contention that in truth Rule 5.4 protects clients from lawyers who would otherwise invite lay investment or management is at least as and possibly more speculative than the proposition that the rule actually hurts clients. It also gives striking advantages to the profession generally, while hurting some lawyers in particular. Finally, the risks it purports to avoid are readily run in circumstances where it benefits the profession to do so.

Rule 5.4(a), (b) and (d) forbids a lawyer to "form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law," forbids a lawyer "to share legal fees with a nonlawyer," and says that

[a] lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if . . . a nonlawyer owns any interest therein . . . ; a nonlawyer is a corporate director or officer thereof; or . . . a nonlawyer has the right to direct or control the professional judgment of a lawyer.<sup>249</sup>

In sole justification, the Comment states that these "limitations are to protect the lawyer's professional independence of judgment."<sup>250</sup> The limitations have a good pedigree. They are taken directly from the Code of Professional Responsibility<sup>251</sup> and can be traced to the Canons of Professional Ethics.<sup>252</sup>

Rejecting this history, the January 1980 discussion draft of the Rules expressly allowed nonlawyers to hold financial interests and managerial authority in law firms.<sup>253</sup> So did both the May 1981 proposed final draft<sup>254</sup> and the June 1982 revised proposed final draft.<sup>255</sup> The last, like its predecessors, did impose limits. It conditioned lay ownership and authority on, first, the absence of "interference with the lawyer's independence of professional judgment or with the client-lawyer relationship,"<sup>256</sup> second, the protection of client confidences,<sup>257</sup> and third, firm compliance with advertising and solicitation rules and with rules regulating legal fees.<sup>258</sup> The ABA House of Delegates, deeming these conditions inadequate, scrapped the proposed rule at its February 1983 meeting,<sup>259</sup> and substituted the Code's total prohibition on lay ownership or control of firms.<sup>260</sup> The prohibition is

249. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(d)(1), (2) & (3) (1983).

250. *Id.* Rule 5.4 comment.

251. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102(A), DR 3-103(A) & DR 5-107(C) (1981).

252. CANONS OF PROFESSIONAL ETHICS 33, 34 (1963).

253. 1980 Draft, *supra* note 2, Rule 7.5.

254. 1981 Draft, *supra* note 1, Rule 5.4.

255. 1982 Draft, *supra* note 2, Rule 5.4.

256. *Id.* Rule 5.4(a).

257. *Id.* Rule 5.4(b).

258. *Id.* Rule 5.4(c).

259. *Text of Revised Model Rules of Professional Conduct*, Legal Times, Feb. 14, 1983, at 23, col. 3.

260. *Id.* Nonprofit entities are excluded from the ban in apparent recognition of the constitutional protection afforded by such cases as *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971). *Cf. In re Primus*, 436 U.S. 412, 414 (1978) (despite state interest in avoiding conflict of interest and other evils, antisolicitation rules cannot constitutionally be applied to a lawyer "who, seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses . . . that free legal assistance is available from a nonprofit

absolute. The purportedly protected client cannot waive it. It is inconsequential that a firm has proposed procedures to prevent lay interference with the professional relationship and to assure that no lay owner or manager behaves as lawyers may not.

The Rules, in short, keep the law business all in the family. They allow only lawyers to buy and resell the services of lawyers, only lawyers to earn a profit from investment in the law industry, and only lawyers to compete for high management positions in for-profit law firms.

But some lawyers benefit and others lose, which is why the rule must be seen as serving the interests of ABA control groups and not lawyers generally. A firm that wants to accept lay investment and predicts it can without ignoring its duties to keep confidences and exercise independent professional judgment may not do so, no matter how persuasive a case it can make in support of its prediction. The result is to exclude a major source of capital for new firms.<sup>261</sup> Established firms, with accumulated capital and clientele, are protected from the rapid growth of new competitors that private investment might encourage.

Salaried lawyers, often younger ones, constitute another group who lose by virtue of rules like 5.4. Because only other lawyers may hire them to provide legal services to third persons for a profit, the number of these jobs will be limited by the number of lawyers willing to create them. If the ban on lay participation were lifted, the number of these jobs likely would expand. Legal time can be a remunerative product bought wholesale and sold retail. Law firm partners know the benefits of large associate-partner ratios. The associate's billing less her salary and overhead is profit for the partnership. Lay investors might find the potential return equally attractive.

Finally, clients lose. Rule 5.4 suppresses competition on the supply side. The fewer the consumer alternatives, the more lawyer-employers can charge for their employees' time. In addition to the predicatable downward pressure on fees that would accompany increased competition, lay investors might be willing to accept a lower return on their money. The rule of thumb has been that a law firm associate's time should be billed at a rate that nets a profit of one-third after deduction of salary and overhead.<sup>262</sup> That's a pretty good margin, one other investors might be willing to undersell.

The American legal profession has had a sad history of adopting ethical rules that have enriched its pocketbook but which it sought to justify as protecting clients. This was true with rules against advertising, rules imposing minimum fee schedules,

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organization" with which the lawyer is affiliated). Nevertheless, it is as easy as in the for-profit setting to conjecture a clash between the goals of a nonprofit entity's clients and lay authority's perception of the entity's best interests. See, e.g., *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 231-32 (1967) (Harlan, J., dissenting).

261. Hardest hit (and perhaps most threatening) may be legal clinics in need of capital to establish a strong retail presence. For two efforts to hinder one of them, see *In re Professional Ethics Advisory Comm. Opinion 475*, 89 N.J. 74, 444 A.2d 1092, appeal dismissed, 459 U.S. 962 (1982); *New York Criminal and Civil Courts Bar Ass'n v. Jacoby*, 61 N.Y.2d 130, 460 N.E.2d 1325, 472 N.Y.S.2d 890 (1984). It is noteworthy that only lay equity investment is proscribed. Loans are allowed. Yet a substantial lay creditor may be able to impose its will on a lawyer's practice as effectively as could a lay shareholder and certainly more effectively than, say, an investor with a fraction of 1% of the shares of a publicly traded national legal clinic. There is no explanation for this discrepancy.

262. See generally M. ALTMAN & R. WEIL, *HOW TO MANAGE YOUR LAW OFFICE*, chs. 4-5 (1984); Altman & Weil, Inc., *Survey of Law Office Economics*, 25 *LAW OFFICE ECONOMICS AND MANAGEMENT* 326 (1984).

and rules making it difficult or impossible to erect insurance schemes and engage in collective efforts to secure legal services at reduced costs. The profession has had to retreat each time, under pressure from the Supreme Court and the public.<sup>263</sup> It now says, in the conclusory words of the Rules, that Rule 5.4 is necessary to “protect the lawyer’s professional independence of judgment.”<sup>264</sup> The Code and Canons were hardly more forthcoming in defense.<sup>265</sup> I suggest that this explanation is transparent and that few believe it.

Why should lay ownership or managerial authority pose the threat of interference with a lawyer’s professional judgment? Presumably because the lay owner or manager’s interest in the bottom line may conflict with a client’s best interests. Lawyers who employ lawyers also are interested in the bottom line, of course, but unlike nonlawyers they are subject to the profession’s ethical code. The remedy envisioned in three drafts of the Rules—permitting lay ownership but making it unethical for the lawyer employee to let lay authority interfere with the professional relationship<sup>266</sup>—is rejected, apparently as inadequate.

This justification for Rule 5.4 makes two assumptions: first, that lay authority, in pursuit of profit, will be tempted (and apparently more greatly tempted than lawyers) to interfere with the professional relationships of their employees; and second, that these efforts and the prospect that they will succeed are so likely that only a prophylactic rule will suffice. Both assumptions ring hollow. With regard to the first, I agree that the desire for profit often clashes with the duty to serve. But what reason is there to believe that lay owners of law firms are less able than lawyers to meet their commitments, as they routinely do in many other sensitive positions in society? The Rules give none. The contention that lawyers are at least bound by an ethical code that places service above profit is hard to take seriously when the same code violates that very priority in permitting lawyers to withdraw despite “material adverse effect on the interests of the client . . . [if the] representation will result in an unreasonable financial burden on the lawyer.”<sup>267</sup> The remaining sanction, a breach of contract or other civil claim, is one to which lawyers and others are both subject. The first assumption, I suggest, collapses into speculation and not a little duplicity.

So does the second—that a ban on lay ownership or control is the only way to meet the risk first assumed, presumably because that risk is very great and because lawyers will succumb to the anticipated intervention of lay persons upon whom they are financially dependent. The credibility of this assumption can be tested by comparing how the Rules treat other representations in which there is a danger to the lawyer’s professional independence, either through lay intrusion or because of the lawyer’s financial interests. In these situations, when do the Rules opt for prophylaxis? When do they employ lesser measures? What does the pattern of choice reveal? What can it tell us about the prohibitions in Rule 5.4?

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263. See *supra* notes 63–68 and accompanying text.

264. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.15, 5.4 comment (1983).

265. MODEL CODE OF PROFESSIONAL RESPONSIBILITY ECs 5–21 to 5–24 (1979); CANONS OF PROFESSIONAL ETHICS 33 (1963).

266. See *supra* text accompanying notes 253–58.

267. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(5) (1983).

Rules 1.5 and 1.8 identify several representations in which the risk of conflict is deemed sufficiently high to require that they be proscribed. Lawyers are forbidden to draft instruments in which they or certain relatives receive substantial gifts,<sup>268</sup> to accept contingent fees in domestic relations and criminal matters,<sup>269</sup> to make agreements giving them literary or media rights prior to the conclusion of a representation,<sup>270</sup> and to acquire a proprietary interest in a client's cause of action.<sup>271</sup> None of these exclusions can be waived. Whatever their merits, each differs from Rule 5.4's exclusions in both cause and effect.

As for effect, Rules 1.5 and 1.8 forbid a lawyer to do certain things within a retainer or to accept certain kinds of retainers. Only the particular lawyer-client relationship is circumscribed. There will generally be ready alternatives to the forbidden representation or prohibited agreement.<sup>272</sup> These rules, furthermore, entail no special benefit to or burden on the bar. By contrast, Rule 5.4 speaks to the overall machinery for buying and selling legal services. Its broad structural exclusions are anticompetitive to the bar's advantage.<sup>273</sup> It is total, suffering no alternatives for nonlawyers wishing to invest in or manage a legal enterprise.

A rule with such pervasive effects might be tolerable if the cause for its concern were apparent or demonstrable, but it is not. Here too we benefit by comparison with the conflicts described in Rules 1.5 and 1.8. A lawyer who represents a client in a criminal or matrimonial matter and whose fee depends on an acquittal or divorce may find it hard to counsel her client to accept a favorable plea bargain<sup>274</sup> or agree to a reconciliation.<sup>275</sup> We can see the direct and contrary pulls on the lawyer's judgment. Similarly, a lawyer with media rights in a criminal defendant's story may have a financial interest in a full trial with attendant publicity (and even in a guilty verdict), whereas the client might better be advised to plead to a lesser offense.<sup>276</sup> Again we anticipate that the lawyer may find it hard to recommend a result in the client's best interests but disappointing to the lawyer. These conflicts are stark, clearly drawn, almost palpable. The implicit predictions of Rule 5.4—that lay owners will find interference irresistible and the employed lawyer will find resistance impossible, so that only prohibition will suffice to protect the client's interests—are by comparison

268. *Id.* Rule 1.8(c).

269. *Id.* Rule 1.5(d).

270. *Id.* Rule 1.8(d).

271. *Id.* Rule 1.8(j).

272. For example, in domestic relations cases, the lawyer may seek a fee from the other spouse. *Stepp, Groce, Pinales & Cosgrove v. Thompson*, 70 N.C. App. 174, 319 S.E.2d 315 (1984). In criminal matters, the client, if indigent, will qualify for free counsel. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Where a client wants to give her lawyer a gift, the client will be able to use the services of a lawyer from a different firm.

273. See *supra* text accompanying notes 259–62.

274. See, e.g., *United States ex rel. Simon v. Murphy*, 349 F. Supp. 818, 823–24 (E.D. Pa. 1972). Contingent fees in criminal cases are also broadly said to be against "public policy." See, e.g., EC 2–20 (contingent fees in criminal cases against public policy "largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fee"). See also *supra* note 110.

275. The prohibition on contingent fees in divorce cases is said to rest on the public policy favoring reconciliation. "Sound public policy demands that, when differences arise between parties to a marriage, no obstacle shall be placed in the way of their reconciliation." *Baskerville v. Baskerville*, 246 Minn. 496, 504, 75 N.W.2d 762, 768 (1956).

276. *Maxwell v. Superior Court*, 30 Cal.3d 606, 629, 639 P.2d 248, 262, 180 Cal. Rptr. 177, 191 (1982) (Richardson, J., dissenting); Note, *Maxwell v. Superior Court: Buying Counsel of Choice or Ineffective Assistance?*, 71 CALIF. L. REV. 1348, 1351 (1983).

attenuated, speculative, and problematic. While the circumstances addressed by Rules 1.5 and 1.8 are discrete and limited, Rule 5.4 embodies a generalization that is blanket and unrefined, and one that conveys an astonishing lack of confidence in the scruples of its subjects.

Elsewhere the Rules are conveniently less cynical. They do not forbid lawyers to work for lawyers because the wish to please may cause submission to unethical demands. Instead, the Rules tell subordinates that following orders and personal interest are not defenses to misconduct.<sup>277</sup> Why an employed lawyer so cautioned should find it more difficult to resist a lay authority than to resist a superior lawyer is unexplained. Lawyers are also permitted to work for contingent fees, although these retainers are laden with potential conflicts between a client's interests and her counsel's finances.<sup>278</sup> And, as we have seen, lawyers may enter business deals with clients though such transactions quintessentially pit personal profit against professional duty.<sup>279</sup>

Three further provisions of the Rules, on which I especially want to dwell, similarly anticipate a risk of intrusion on a lawyer's duty to a client but unlike Rule 5.4, eschew prophylaxis in favor of lesser measures. Rule 1.13 recognizes that the client of a lawyer for an entity is the entity, not those who manage or control it.<sup>280</sup> How then do the Rules meet the risk that lay managers of the client may interfere with the lawyer's duty to it? Since management's object of concern and the client are the same—the entity—the parallel with Rule 5.4 where entity and client differ is not exact. But it is also true, as Rule 1.13 envisions, that those in control of an entity may act to betray it to their own advantage.<sup>281</sup> Stealing comes to mind as one possibility. Using corporate opportunities for personal benefit is another. Or company officers may choose not to recall a defective product or correct an erroneous prospectus because revelation of the defect or error will subject them to civil or criminal liability or to loss of their jobs. In any event, a lawyer for an entity may learn that management is acting in a manner inconsistent with the entity's interests and in pursuit of its own. Though the Rules contemplate this possibility, they do not forbid lawyers to

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277. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2(a) (1983).

278. *Id.* Rule 1.5(c). Consider a lawyer working on a one-third contingency where the client's chances of establishing liability are excellent and where the probable maximum recovery is \$300,000. The defendant offers to settle for \$210,000 after the lawyer has spent 100 hours on the matter, so acceptance of the settlement will net her an hourly rate of \$700. Preparation for trial will require an additional 200 hours of work but at most yield only another \$30,000 in fee (or \$150 hourly for the extra time). The lawyer has other cases to which she would like to turn and which, if settled, will be more remunerative than the time spent trying the current matter. The client asks the lawyer's advice on whether to accept the settlement. Can she ethically respond? If so, does she have to reveal her interest? There are many variations on this hypothetical.

279. See *supra* note 164 and text accompanying notes 159 & 163–64.

280. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(a) (1983). The House of Delegates attempted to avoid even this reality at its February, 1983 meeting. Rule 1.13(a) of the 1982 Draft read: "A lawyer employed or retained to represent an organization represents the organization as distinct from the directors, officers, employees, members, shareholders or other constituents." See 1982 Draft, *supra* note 2, Rule 1.13(a). The House of Delegates changed this to read: "A lawyer employed or retained by an organization represents the organization, including its directors, officers, employees, members, shareholders or other constituents, as a group, except where the interests of any one or more of the group may be adverse to the organization's interests." *Text of Revised Model Rules of Professional Conduct, Legal Times*, Feb. 14, 1983, at 22, col. 1. The compromise finally adopted as Rule 1.13(a) states: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituencies." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(a) (1983).

281. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(b), (c) (1983).

work for corporations or other entities in order to avoid the risks that lay managers, who are responsible for the lawyer's job and salary, may order her to ignore her duty to the client and that the employed lawyer will be unable to say no. That certainly would be an overreaction. But do the Rules then permit the lawyer to rescue the client from the wrongs of its servants? Quite the contrary. The lay managers are assured that the attorney will keep silent—must keep silent—even if it means certain harm to the client.<sup>282</sup> Where in Rule 1.13 is the great solicitude for clients that Rule 5.4 urges in justifying a total ban on lay ownership or management of law firms? Rule 1.13 not only accepts the risk of lay interference and professional submission, it protects the wrongdoer when his deed is discovered.

Rules 1.7 and 1.8(f) also accept the risk of lay interference or personal conflict, while cautioning the lawyer to resist both. Rule 1.7(a) says that a lawyer may represent a client even if the representation “will be directly adverse to another client,” as long as the lawyer “reasonably believes the representation will not adversely affect the relationship with the other client” and “each client consents after consultation.”<sup>283</sup> Similarly, Rule 1.7(b) allows a lawyer to represent a client even though the representation “may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests” as long as “the lawyer reasonably believes the representation will not be adversely affected,” and “the client consents after consultation.”<sup>284</sup> Here we see a rule of reason that up to a point trusts lawyers to avoid conflicts between clients on the one hand, and other clients, third persons or themselves on the other, despite a risk that a particular representation will “be adversely affected” or “materially limited,” as long as the client consents after consultation. Rule 5.4 envisions no opportunity for client consent. The risk it meets is deemed too great for a similar rule of reason. As with Rule 1.13, the more generous scope of Rule 1.7 allows lawyers to keep cases and clients, not lose them.

And so, finally, does Rule 1.8(f), which likewise tolerates a risk of lay interference in a lawyer-client relationship, relying on lawyers to spurn any such effort. Rule 1.8(f) allows a lawyer to be paid by one person to represent another as long as the first person does not direct or regulate the lawyer’s professional judgment in rendering legal services to the second.<sup>285</sup> When the lay person is just paying the lawyer’s bill, thereby providing the retainer, and not selling the lawyer’s time, thereby competing with the profession, the danger of interference is met with a caution.

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282. The lawyer's only option is to withdraw. *Id.* Rule 1.13(c). Drafts of the Model Rules would have given the lawyer the option to reveal organizational information to outside authorities in order to save it from illegal conduct of its constituents “likely to result in substantial injury to the organization.” 1981 Draft, *supra* note 1, Rule 1.13(c).

283. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1983).

284. *Id.* Rule 1.7(b).

285. See Rule 5.4(c), to the same effect; see also *Wood v. Georgia*, 450 U.S. 261 (1981), for a case whose facts reveal how a client’s interests may conflict with the interests of the person who pays the legal fee.

## THE GHOST OF CLARENCE DARROW

The Preamble to the Rules explains the public's interest in self-regulation:

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. . . . Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.<sup>286</sup>

The logic of these sentences is in several regards doubtful. We recoil from a phrase like "government domination," of whomever it may be, because of the historical baggage with which those words travel. But is the risk of government domination of the legal profession appreciably reduced if the bar gets to write its own ethics code? Courts, legislatures, and agencies are not thereby foreclosed from adding another layer of control through legislation,<sup>287</sup> administrative regulation,<sup>288</sup> or court rule.<sup>289</sup> It may be that a bar "not dependent on government for the right to practice"<sup>290</sup> will be more willing to challenge the government's "abuse of legal authority,"<sup>291</sup> but self-regulation does not carry that assurance. The state's monopoly on "the right to practice"<sup>292</sup> is quite complete regardless of the identity of the ethics code's author. Legislatures and courts decide who may be admitted to the bar,<sup>293</sup> and courts decide who will leave.<sup>294</sup> Limitations on their powers are found in federal and

286. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983).

287. *See, e.g.*, 18 U.S.C. § 207 (1982) (concerning disqualification of former officers and employees and partners of current officers and employees of the Executive branch or independent agency of the Federal government); N.Y. Jud. Law § 90 (McKinney 1983) (admission to and removal from practice by appellate division).

288. *See, e.g.*, 17 C.F.R. § 201.2(e) (Rule 2(e)) (appearance and practice before the Securities and Exchange Commission); *see also* *Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir. 1979) (legality of Rule 2(e)).

289. *See, e.g.*, *Gair v. Peck*, 6 N.Y.2d 97, 160 N.E.2d 43, 188 N.Y.S.2d 491 (1959), *appeal dismissed and cert. denied*, 361 U.S. 374 (1960) (upholding authority of intermediate appellate state court to adopt a court rule establishing maximum contingent fees in personal injury actions). The fact that even the Model Rules have no force until adopted by appropriate state governmental bodies further supports this point. States are free to change the Rules before adoption. New Jersey, for example, acting through its supreme court, has done this. [Current Reports] 1 LAW. MAN. ON PROF. CONDUCT (BNA) 382 (1984).

290. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983).

291. *Id.*

292. *Id.*

293. *See, e.g.*, *Hoover v. Ronwin*, 104 S. Ct. 1989 (1984) (antitrust challenge to method of determining minimum passing score on bar examination rejected on ground that conduct was state action exempt from antitrust regulation); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971) (upholding New York's statutorily required character inquiry); *In re Beasley*, 243 Ga. 134, 252 S.E.2d 615 (1979) (applicant denied bar admission because he ignored state court orders to pay child support).

294. *See, e.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (upholding Ohio disbarment order where lawyer violated antisolicitation rules of state ethics code). *See generally* LAW. MAN. ON PROF. CONDUCT (BNA) § 201:101-109 (1984) (inherent judicial authority to admit and discipline lawyers).

state constitutions, not in the Rules.<sup>295</sup> Furthermore, threatening a lawyer's right to practice is not the only—and would be a clumsy—way to discourage activism. A hostile government has many weapons—search warrants, tax audits, indictments, investigations, newsleaks and bureaucratic obstructionism come to mind—that can damage a lawyer's practice while leaving his license intact.

But even assuming a straight line between self-regulation and protection of liberty, there are other flaws in the Preamble's reasoning. Why, for example, should the supposed connection mean that lawyers get to decide *all* issues in the Rules, including whether fee agreements ought to be written, whether a lay person may invest in a law firm, whether a lawyer must keep silent after discovering that a client has used her unwitting aid to defraud another, and whether a lawyer should have a duty to preserve relevant physical evidence for which process will likely, but has not yet, issued?<sup>296</sup> There is scant causal relationship between the profession's assumption of power to resolve these and numerous other ethical issues and its willingness to confront "abuse of legal authority."<sup>297</sup> Because some lawyers risk recrimination by challenging this kind of abuse, it does not follow that the bar, most of whose members do no such work, must be put in control of the many commonplace incidents of practice.

Even if the logic of the Preamble were unimpeachable, its promise of a "special . . . responsibility"<sup>298</sup> goes unkept in the text it introduces. The rules there set out are *not* "conceived in the public interests" and *do* further the "parochial [and] self-interested concerns of the bar." The adoption of the Rules exemplify the dangers of a kind of conflict they themselves would forbid in a professional relationship. Rule 1.7(b) would not allow a lawyer to accept a representation that contained an attorney-client conflict as strong as the conflict between the profession and the "public interest" that the profession has promised to recognize in exchange for the "relative autonomy" to write its own code of ethics. It would rather anticipate that the public interest would be "adversely affect[ed]" by the interests of the bar. Correctly, as it has transpired, for the Rules impose few significant duties on lawyers, whether running to clients, other persons or the system of justice, not already present in law; require that lawyers yield little in favor of other interests; and define obligations and create authority, beyond those recognized by law, mainly when it benefits lawyers to have them.

There are principled justifications for some of this. Emphasis on duty to clients despite harm to others has been defended on two theories: zealous advocacy of a client's interests multiplied across all representations will yield the most justice of which our democratic institutions are capable; and anything less deprives persons of

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295. *In re Primus*, 436 U.S. 412 (1978) (reversing state discipline where conduct found protected by the first amendment); *In re Ruffalo*, 390 U.S. 544 (1968) (due process requirements at disciplinary hearings).

296. Compare 1981 Draft, *supra* note 1, Rule 3.4(a) (forbidding a lawyer to "alter, destroy or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending proceeding or one that is reasonably foreseeable") with Rule 3.4(a) as adopted (forbidding a lawyer to "unlawfully alter, destroy or conceal a document or other material having potential evidentiary value") (emphasis added). MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(a) (1983).

297. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983).

298. *Id.*

the full autonomy the law allows. These independent but compatible theories have been the subjects of recent discussion.<sup>299</sup> Whatever their merits, they do not account for and even contradict other choices in the Rules. They do not, for example, explain the authority given lawyers to abandon clients when it is financially unreasonable for the lawyer to continue, or when the client's objectives are viewed as "imprudent." They do not explain the nearly total absence of duty to others when a lawyer is not acting in a representative capacity. They do not explain the decision to eliminate the requirement of a written fee agreement, or the decision to forbid lay investment in or management of for-profit law firms. Indeed, the many lawyer-centered provisions of the Rules that are not supported by and may even contravene these theories cast doubts on attempts to explain the whole of the document by reference to them. Its sole rationalizing principle seems to be that when the law allows a choice, competing claims should be resolved in the way that most benefits the profession. Lawyers, promising to protect the public interest, have instead used self-regulation to protect themselves.

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299. See, e.g., S. LANDSMAN, *THE ADVERSARY SYSTEM* 44-51 (1984); Fried, *supra* note 114.

