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The Anxiety of Influence

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THE ANXIETY OF INFLUENCE

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THE ANXIETY OF INFLUENCE*

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I. THE RULES OF THE LEGAL PROFESSIONAL

Rules regulating the legal profession, whether found in lawyer ethics codes or in the substantive law of agency and fiduciary duty, are of two types. First are rules that forbid bad conduct. Let's call these the Bad Conduct Rules (BCRs), although the "badness" of the conduct they describe will vary. Incompetence,¹ certain uses or disclosures of a client's confidential information,² disloyalty,³ aiding client crimes or fraud,⁴ neglect of a client's matter,⁵ certain contact with another lawyer's client,⁶ and certain failures to inform a tribunal of information⁷ are examples of actions BCRs proscribe. These rules and laws describe acts we do not allow and which we may punish with civil or criminal liability, disqualification, loss of a fee, or professional discipline when they occur. Also, we do not balance the evils they forbid against other social values. When an accused client confesses to her lawyer, the lawyer will not be allowed to argue that his unauthorized disclosure of her confidences should be excused because it led to the conviction of a guilty person or exoneration of another person who was falsely accused.⁸ When a lawyer speaks to an opposing lawyer's client behind the opponent's back, we won't excuse the transgression even if the lawyer can prove that his act enabled him to obtain information that improved the justice of the ultimate resolution.⁹

Another category of rule might be called the Danger Zone Rules (DZR). These rules do not so much forbid bad conduct, but rather describe situations that could lead to bad conduct. Those situations comprise a danger zone that lawyers are forbidden to occupy, either at all or without a client's informed agreement. DZR are of two types. One type is matter-specific. It focuses on particular clients and matters or on particular kinds of transactions between lawyer and client. Let's call these Matter Danger Zone Rules (MDZR). Conflict rules and imputed conflict

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1. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1998) [hereinafter RULE].

2. See RULE 1.6.

3. See RULE 1.7 & cmt. 1; see also RULE 1.3 cmt. 1.

4. See RULE 1.2(d); RULE 3.3(a)(2); RULE 4.1(b).

5. See RULE 1.3 & cmt.

6. See RULE 4.2.

7. See RULE 3.3.

8. See, e.g., *In re Rhame*, 416 N.E.2d 823, 823 (Ind. 1981).

9. See RULE 4.3. The Rule, of course, has no such exception and no court has recognized one. Nor, for that matter, does it appear that anyone has ever argued for one. See, e.g., *Inorganic Coatings, Inc. v. Falberg*, 926 F. Supp. 517 (E.D. Pa. 1995) (disqualifying a plaintiff's lawyer after he accepted a telephone call from a represented defendant).

rules are in this category.¹⁰ A lawyer cannot (without informed consent) accept a subsequent representation adverse to a former client in a substantially related matter because a MDZR anticipates that the work may (though it may not) lead to abuse of the former client's confidential information.¹¹ Take two other examples: (1) Maybe a lawyer can fight effectively for a client who wants to change a local zoning ordinance, notwithstanding that success will reduce the value of the lawyer's home ten percent. But a MDZR won't allow it, at least not without informed consent, because maybe the lawyer can't.¹² (2) Maybe a lawyer can be objective and zealous in the representation of a client who has "paid" the lawyer with the rights to his story, but a MDZR won't allow it, not even with informed consent, because the lawyer's interest in exploiting the story may skew his professional judgment.¹³

It is true, of course, that some MDZRs describe conduct that may be independently harmful, in addition to creating a risk of violating a BCR. For example, a former client who is opposed by a law firm containing a lawyer who once represented the client on a substantially related matter, or who is opposed by that very lawyer, may fear the misuse of her confidential information whether or not confidential information is actually misused, a fact that the client may never be able to confirm.¹⁴ That fear can be seen as an independent harm.¹⁵ Less acute, but perhaps equally real, a general awareness that lawyers or their firms may accept substantially related adverse matters may be seen to undermine public confidence in the profession.¹⁶ That loss of confidence is also an independent harm because it will reduce the willingness of clients to speak candidly with their lawyers—a situation to be avoided. But even when we view a MDZR as forbidding conduct that is harmful—in itself, and not merely because it can lead to bad conduct—still, the conduct is usually harmful because of client or public apprehension. We credit this apprehension as reasonable for the same reason that we have the MDZRs in the first place—because it may lead to a breach of a BCR.

Another type of a Danger Zone Rule, the type I wish to discuss here, focuses on the lawyer's practice situation. Let's call this type a Practice Danger Zone Rule (PDZR). A PDZR says nothing about a particular matter that a lawyer may wish to accept, or about a particular kind of transaction between a lawyer and a client. A PDZR tells lawyers they may not practice in certain kinds of entities or alliances because of the danger that the practice situation itself will exert a baleful influence on the lawyer's conduct in matters that the lawyer would otherwise be fully free to accept in a more traditional practice situation. In other words, these are matters, we may presume, that are not forbidden to the lawyer

10. See RULES 1.7, 1.8, 1.9, and 1.10(a).

11. See RULE 1.9(a).

12. See RULE 1.7(b).

13. See RULE 1.8(d).

14. See *Tekni-Plex, Inc. v. Meyner & Landis*, 674 N.E.2d 663, 667 (N.Y. 1996).

15. See *id.*

16. This is one way to understand the prohibition against the appearance of impropriety. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980).

by a BCR or a MDZR.¹⁷ The PDZRs lock in without regard to the matters the lawyer may be asked to handle, and need not be known when the rules are violated. So, lawyers may not divide legal fees with a lay person, work at a for-profit entity that is not a law firm if it resells the lawyer's services to third parties, or admit nonlawyers as partners or shareholders of a law firm.¹⁸ Each of these three practice situations is said to create a danger irrespective of the matters on which the lawyer may work. What is that danger? It is nothing less than the bad influence by the lay participant.¹⁹ Or, more accurately, it is the *risk* of bad influence because, surely, not all lay persons will try to tempt a lawyer to act badly, and, if we are being honest about it, I think we must admit that the great majority will not. So let us say that these rules exist because of the anxiety of (lay) influence over the work that lawyers do for clients.

Anxiety is a legitimate starting point for rulemaking because it is often the product of experience and our understanding of human nature. Nevertheless, anxiety has its limits as a guide. It cannot tell us much about how to actually draft a rule. Reason and logic must perform that function. Here, reason and logic have presented us with several options. We could, for example, have attempted to articulate nuanced and precisely drawn rules to address our anxiety of influence. These rules might have categorically forbidden certain specific practice arrangements because they created a risk of misconduct that was simply too great to tolerate when measured against the benefits we might have expected the arrangements to offer. Elsewhere, suppressing our anxiety, we might have chosen cautionary language or required precautionary structures, in lieu of categorical prohibitions. As it happens, we have used both tools, opting for categorical prohibitions but with notable exceptions. The exceptions, however, are few. By and large, we have eschewed fine-tuning and have preferred broad and absolute prohibitions.

I identified three prohibitions in the PDZR category. Let's call them the "three *nos.*" They forbid a lawyer (1) to offer legal services to third persons through a nonlaw entity operating for-profit, (2) to permit nonlawyers to have equity (or even managerial) interests in a law firm, and (3) to share legal fees with a lay person. Preliminarily, let us recognize that each of these may not represent an equal threat to a lawyer's independence. Take the first two. Where a law firm has a smattering of accountants, lobbyists, economists, physicians, scientists, or engineers as equity participants, but whose owners are mostly lawyers, the risk that the non-lawyer minority will be able to induce its lawyer colleagues to behave badly is not as serious as the risk that may be perceived if a few lawyers are employed by a business that sells its services to third persons at a profit.²⁰ This is partly because, in the latter situation, the ratio of

17. See RULE 5.4 (restricting the ability of lawyers to share legal fees with nonlawyers or to practice law with nonlawyers); 5.5(b) (forbidding lawyers to aid the unauthorized practice of law).

18. See RULE 5.4.

19. This is usually expressed in the affirmative, as an effort to protect the lawyer's professional independence of judgment. See RULE 5.4 & cmt.

20. This is a purpose we assume some critical number of lay people to have or we would not be having this discussion.

lawyers to lay persons is smaller, making it easier for the dominant group to abuse the lawyers. But this situation is not so simple. At one extreme, we might envision lay entrepreneurs who open a chain of legal clinics in corporate form, such as a "lay Jacoby & Meyers," if you will, where the lay interest is solely an investment interest and the lay investors themselves neither provide services to clients, nor even encounter the clients of the business. Of a different order, the threat of lay oppression should loom considerably smaller when a firm of one thousand accountants takes on one hundred lawyers, so it can provide blended accounting-law services to firm clients.

Pause here to acknowledge a remarkable fact. In a society that allows nonlawyers to occupy other positions demanding great probity, including positions of high fiduciary responsibility and public trust in government and in powerful financial institutions, suspicion of lay influence is a curious and perhaps even an impolite justification for a broad and nearly absolute prohibition. It becomes more than merely curious, however, when we acknowledge, as we must, that the prohibition can have a significant affect on the cost and availability of legal services and the efficiency with which they are distributed.

II. EXCEPTIONS TO ANXIETY

As it happens, and despite the several categorical prohibitions, anxiety over a lay person's interference with a lawyer's independence and judgment appears to disappear, or at least dramatically recede, in at least four circumstances. In each, the risk of lay influence is tolerated. The circumstances are telling.

First, Model Rule 5.4 itself, after stating its prohibition against sharing legal fees with a nonlawyer, creates an exception that allows "a lawyer or law firm [to] include non-lawyer employees in a compensation or retirement plan, even though the plan is based *in whole* or in part on a profit-sharing arrangement."²¹ Consider the implications of Model Rule 5.4. Non-lawyer employees of a law firm or all firm employees, for that matter, can now have the entirety of their compensation tied to the firm's profits, so long as the compensation is not tied to results in any particular matter.²² Perhaps this does not derogate very much from the postulate of separate spheres and perhaps it should not be seen to create a great risk of lay interference, although both propositions are debatable. Equally important, this exception gives law firms, as business enterprises, a valuable tool to use in configuring employee compensation schemes. So it is a salutary exception serving a benevolent purpose. For my purposes, however, the important fact is that we have an exception at all, one that is quite elastic.

Moving to my second exception, Model Rules 1.8(f) and 5.4(c) allow a lawyer to accept payment from one person to represent another so long as "there is no interference with the lawyer's independence of profes-

21. RULE 5.4(a)(3) (emphasis added).

22. See ABA Comm. on Ethics and Professional Responsibility, Formal Ops. 356 (1988) and 1440 (1979); see also N.Y.C. Bar Ass'n on Professional and Judicial Ethics, Op. 95-11 (1995); Va. State Bar Comm. on Legal Ethics, Op. 885 (1987).

sional judgment or with the client-lawyer relationship.”²³ In other words, we let the lawyer take the money and trust her not to let its source, which is generally lay, lead her astray. A caution is the substitute for an absolute prohibition.

My third exception is ABA Opinion 355, which goes through amusing gyrations to reach the conclusion, entirely beneficial though it may be, that a lawyer may accept referrals and fees from sponsors of for-profit legal service plans, whose “subscribers” then become the lawyer’s clients.²⁴ The lawyer is told to exercise “independent professional judgment,” protect the client’s confidences, and avoid conflicts of interest.²⁵ In the most creative part of its analysis, the Opinion concludes that although the lawyer and the plan sponsor each receive a portion of the “modest monthly charge” that “subscribers” pay the plan, this division is not the “fee sharing” that Rule 5.4 forbids. It is not fee sharing for two reasons. First, tracing the direction of money flow in this arrangement, the Opinion tells us that “the plan sponsor is compensating the lawyer; the lawyer is not compensating the plan.”²⁶ I hope we all recognize that distinction as the kind of formalism that ignores the policies that purportedly animate the rule against feesplitting. Second, we are reminded that a reason for the rule against feesharing is “to avoid the possibility of a non-lawyer being able to interfere with the exercise of a lawyer’s independent professional judgment in representing a client.”²⁷ That risk was not present in the situation before the ABA Committee, however, because the Opinion says that “the independence of the lawyer’s professional judgment and client confidentiality must be assured in accordance with [stated] guidelines.”²⁸ In other words, once again, the danger of lay influence that is elsewhere preclusive is here eliminated through the less drastic remedy of telling lawyers to avoid it.

Opinion 355 does have its limits though. It cautions:

To the extent that the participating lawyer or law firm’s practice is exclusively or predominantly dependent upon the plan, the issue of assuring the independence of the lawyer’s professional judgment becomes more serious. It is, of course, a question of fact as to whether the lawyer’s financial dependence upon the plan’s sponsor is so extensive that it affects the lawyer’s judgment.

The Opinion does not tell us how economically dependent on a legal services plan a lawyer may be and yet remain on the safe side of the line. That is “of course, a question of fact,” but in other contexts the degree of economic dependency can be as high as one hundred percent, yet tolerable. A lawyer may work on retainer solely for one client, although that client will then have significant power over the lawyer. True, here the lawyer is dependent on the client himself, not a lay intermediary, but if we are truly worried about the misdeeds that economic pressure can im-

23. RULE 1.8(f)(2); *see also* RULE 5.4(c).

24. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 355 (1987).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

pel a lawyer to commit, those should include acts that harm others at the client's instigation as well as those that harm the client at the instigation of third persons. Maybe we do not forbid lawyers to work on retainer for only one client because of the practical impossibility of drafting and enforcing a rule that forbids situations in which "the lawyer's financial dependence upon [a single client] is so extensive that it affects the lawyer's judgment."²⁹

Yet this is the very cautionary language of Opinion 355, so we must believe it can be enforced in the context of that opinion. In any event, a more compelling reason to reject a rule that forbids exclusive dependency is its facial inconsistency with the fourth, and perhaps largest, exception to the harms that the PDZRs apprehend from lay intrusion. Here the degree of economic dependency is always one hundred percent, yet the rules regulating the legal profession trust the lawyer to behave properly. I speak about lawyers employed by corporations. Rule 1.13 accepts the arrangement and trusts the lawyer not to allow the lay management to interfere with her professional judgment.³⁰ Moreover, the lawyer is charged to monitor lay management.³¹ The trust displayed by our tolerance for this arrangement should not be underestimated. It is lay management, after all, that controls the terms and conditions of the lawyer's job, such as money, title, benefits, company car, support staff, and corner office. This control is present whether or not the lawyer even has a job, and the allocation of interesting work. Despite all this, we let lawyers work as their client's employees while subject to the profound career-affecting power of lay intermediaries whose conduct we expect lawyers to oversee.

The *Restatement of Law Governing Lawyers* repeats the restrictions and exceptions in the *Model Rules*. Permitted are: Employment by non-law entities like corporations with cautions about professional independence;³² third-party fee payments so long as the "lawyer's loyalty to the client [is not] compromised by the person paying the fee;"³³ and law firm employee participation in firm retirement plans "based in whole or in part on a profit-sharing arrangement."³⁴ Forbidden are: Fee-splitting arrangements with nonlawyers;³⁵ non-lawyer equity or managerial authority in law firms;³⁶ and legal practice through a "business enterprise."³⁷ The *Restatement's* policy justification for these rules is, again, to protect the "professional independence of lawyers."³⁸ However, the *Restatement* acknowledges the costs of the rules the American Law Institute has chosen to restate. Perhaps with an eye to the future and to spark discussions like the one you are now reading, a comment says this about

29. *Id.*

30. *See* RULE 1.13(b),(c).

31. *See id.*

32. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 155 cmt. b (1996).

33. *Id.* at § 215.

34. *Id.* at § 11(3)(c).

35. *See id.* at § 11(3).

36. *See id.* at § 11(1).

37. *Id.* at § 11(2).

38. *Id.* at § 11 cmt. c.

the restrictions on lay participation in the delivery of legal services for profit:

Such restrictions, however, impose costs. One cost is that any kind of capital infusion that would entail granting an ownership or security interest in the law firm itself (as distinguished from its assets) to a non-lawyer investor is prohibited. Perhaps as much as any other constraint, such practical barriers to infusion of capital into law firms significantly limit the ability of law firms to attain what its lawyers may consider to be a more optimal size at which to provide higher-quality and lower-price services to clients. They may also deter law firms from more effectively competing with established law firms and with non-lawyer organizations, such as consulting companies, investment bankers, and accounting firms, to whom clients may turn for more cost-effective law-related services. Further, unlike other persons in many (but not all) occupations, lawyers are unable to realize the present economic value of their reputations, which otherwise could be obtained through sale to investors of stock or other ownership interest.³⁹

So we see that our anxiety of lay interference with a lawyer's professional judgment is tolerable under certain circumstances but categorically forbidden in others. Keep in mind that all we are talking about is the anxiety of interference, not the fact of it. No one argues that lawyers should permit outsiders, including other lawyers, to compromise their independent judgment. But discrepancy in our tolerance for the anxiety of influence is not necessarily indefensible. We may be willing to risk lay meddling in one situation but not another because either or both of the following are true: (1) The risk of lay interference appears less acute in one situation than the other; or (2) the social benefits of permitting a lawyer to participate in one situation are greater than the benefits of permitting the lawyer to participate in the other, making the risk acceptable.

We have a balancing test. In the balance goes the degree of danger. We can never measure the degree of danger with precision, of course. We can only intuit its presence based on reason and experience. Also in the balance are any benefits of permitting a particular arrangement notwithstanding a danger of lay interference. This ingredient is similarly unsuited to precise measurement, although perhaps empirical inquiries will be more informative. In any event, because dangers and benefits vary from situation to situation, we should expect that in some circumstances lay participation in the provision of legal services will be forbidden, while in other situations, it will be allowed with cautionary language. All we can expect is a rational and honest inquiry, one that is untainted by the self-interest of those who make the rules.

I want to stress this last point. If the legal profession is going to insist on having a major or even a controlling influence on the rules that govern it, and if the courts or legislatures are going to allow it to have that influence, both of which are true, then the profession has a moral obligation to the public. This obligation is equivalent to a lawyer's fiduciary

39. *Id.*

obligation to a client—to promote rules responsive to the public interest—which includes the legitimate interests of clients without regard to its members' self-interest. That responsibility has not always been honored.⁴⁰

Immediately, we notice three things about the rules against feesplitting, against letting nonlawyers have equity participation in law firms, and against letting lawyers work for business enterprises that practice law. First, they are categorical rules. They do not allow conduct while adding a caution. Instead, they forbid conduct entirely. Second, as far as I can discern, this categorical treatment is not the result of an inquiry in which the risk of lay interference with a lawyer's judgment has been assessed and then balanced against any benefit the arrangement might have produced. Third, and perhaps most telling, the arrangements that are categorically forbidden pose competitive threats to the profession. In other words, if allowed, the forbidden arrangements could turn out to cost lawyers money, or threaten expansions that can cost lawyers money, because they will invite competition by persons outside the profession.

By contrast, the situations in which the rules tolerate the danger of lay meddling (when our anxiety of influence is quelled) all carry certain benefits for lawyers generally. I recognize that the "three nos" might benefit some lawyers, were they allowed. However, by allowing nonlawyers to earn money in the law business, these arrangements pose a financial danger to the profession as a whole without offering a concomitant benefit, such as fees from third parties or jobs as corporation employees.

III. LAWYERS WORKING WITH OTHERS

Let us focus now on one arrangement in particular: permitting lawyers and nonlawyers to work together, as co-owners, of professional service entities that provide legal and other professional expertise to clients of the entities. I am confident that it would be possible to draft a rule to alter the categorical prohibition against such alliances without altering other rules that proscribe other alliances that are alleged to pose too great a threat of lay intervention. However, that proof must be deferred for other work. Since it has been much in the news lately,⁴¹ I focus instead on the alliances between lawyers and accountants, though I could equally well apply the remarks to alliances between lawyers and other professionals.

It is quite clear that law firms and accounting firms can collaborate on a single matter for a common client. As the *Restatement* says, the rule does not "prohibit a law firm from cooperation with a legally separate partnership or other organization of nonlawyers in providing multi-

40. See Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985).

41. See, e.g., John Gibeaut & James Podgers, *Feeling the Squeeze: Commission Appointed to Assess Threat from Accountants*, A.B.A. J., Oct. 1998, at 88; David Segal, *Rivals Call Law Firms to Account, Tax Advisors Hope To Cross a Line and Compete for Legal Clients*, WASH. POST, Nov. 12, 1998, at F1.

disciplinary services to clients.”⁴² Law and accounting firms must bill separately for their work, though their charges can appear in a single statement. That is true, according to lawyer ethics rules, even if each of the two firms work for a contingent fee that will be paid from the same recovery.⁴³ While a lawyer must always exercise independent professional judgment on behalf of a client, the arrangement is legal and ethical even if the accounting firm is large and the source of a great deal of a law firm’s business, and the law firm is small and eager to remain the beneficiary of future referrals.

What if one of those accountants crosses the street and goes to work at the law firm, while serving the same clients in the same way? That’s fine so long as the accountant receives a salary that is not directly dependent on the law firm’s fees in any particular matter.⁴⁴ The salary can even be large. The problem arises, and the line is crossed, only if the accountant becomes a partner or shareholder in the law firm, even if the ratio of lawyer to accountant is one hundred to one or greater. The risk of lay oppression or the anxiety of influence, until now fully contained, becomes not merely heightened but unmanageable and impermissible.⁴⁵

42. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 11 cmt. f.

43. Bar opinions recognizing that it is not unethical for a lawyer to work on a matter with a nonlawyer or entity that is not a law firm, even where the nonlawyer or entity is receiving a contingent fee, so long as that fee does not come from the lawyer’s fee, include: ABA Comm. on Ethics and Professional Responsibility, Formal Ops. 354 (1987) and 1445 (1985); N.Y. Bar Ass’n, Comm. on Professional Ethics, Ops. 705 (1998) and 572 (1985) (collecting authorities); Board of Professional Responsibility of the Supreme Court of Tenn., Op. 85-F-101 (1985); S.C. Bar, Op. 91-32 (1992); D.C. Bar Comm. on Legal Ethics, Op. 233 (1993) (supporting the proposition, even though the D.C. version of Rule 5.4 differs from the *Model Rules*). See also *Blumenberg v. Neubecker*, 191 N.E.2d 269 (N.Y. 1963) (upholding an arrangement whereby a lawyer and an accountant were both retained for contingency fees through a single agreement).

44. See RULE 5.4(d). We have seen that the accountant’s entire income can depend on an interest in the firm’s profits. See RULE 5.4(a)(3).

45. I want to say a marginal word about privilege, confidentiality, and conflict of interest. Under traditional rules, information the client provides to the accountant or the lawyer to enable the lawyer to provide the client with legal services would ordinarily be privileged. See *United States v. Kovel*, 296 F.2d 918, 931 (2d Cir. 1961) (finding that attorney-client privilege applies where an attorney consulted with an accountant for purposes of providing legal advice to a client or where a client consults with an attorney with an accountant present); see also *In re Grand Jury Proceedings Under Seal*, 947 F.2d 1188, 1191 (4th Cir. 1991) (following *Kovel*’s lead and noting that attorney-client privilege protects communication between the client and accountant to enable the accountant to assist client in employing a lawyer and when communication occurred immediately prior to meeting with the lawyer). So long as communications between lawyer and client, or between either and the accountant, are for the purpose of giving legal advice within the meaning of the *Kovel* doctrine, the fact that the lawyer works under the auspices of an entity that is not a traditional law firm should not affect privilege. Lawyers employed at corporations or public interest organizations enjoy privilege. Analytically, the prerequisites for the existence of the privilege do not depend on the status of the lawyer’s employer. See, e.g., *Rossi v. Blue Cross & Blue Shield*, 540 N.E.2d 703 (N.Y. 1989) (recognizing privilege for in-house lawyers).

Conflict and confidentiality issues will arise in a multidisciplinary firm that provides legal services. Although this is not the place to delve into those issues, my view is, first, that a legal services client of a lawyer who works under the auspices of an entity that is not a law firm, or in a law firm that has non-lawyer partners, must, absent informed consent, receive the full panoply of protections the conflict rules afford clients of lawyers in traditional practices. Second, such a lawyer should have all of the same duties of confidentiality that a client has a right to expect from a lawyer working at a traditional law firm.

This position cannot be defended, nor has anyone made much effort to defend it, at least not when the ratio of lawyer to accountant is in the range of one hundred to one.⁴⁶ Rather, the case against allowing lawyers and accountants to join in partnership is generally couched as a “flood-gates” argument. For example, Lawrence Fox testified before the ABA Commission on Multidisciplinary Practice that allowing lawyers and accountants to work together in multidisciplinary firms “will destroy the legal profession’s ‘core values.’”⁴⁷ One wonders how he can know. A few years earlier, Mr. Fox was similarly pessimistic about the future of the profession if law firms were permitted to operate businesses that offered clients and others ancillary legal services, as Rule 5.7, with cautions, now allows. Fox wrote then:

[T]he ancillary business movement introduces non-lawyers into positions of influence and control of the profession. All the safeguards one can imagine do not overcome the reality that those who come to prominence and success in the operations of the ancillary business will end up with real power in the governance of the overall enterprise.⁴⁸

All lawyers make floodgate arguments. “If you change the rule to allow this behavior (or to forbid it), the next thing that will happen is . . .” I do not take the time to rebut a floodgates argument here, except to say that I am confident that any adjustment in the rule that now forbids lawyer-accountant alliances or alliances between lawyers and other professionals could be drafted in a way that would *not* open the floodgates, but rather contain them. Language is both flexible and precise enough to accomplish that goal.

I do, however, want to raise one modest variation on the floodgates argument. If the rule were changed to let accountants have equity interests in law firms, where the balance of power would favor lawyers, should the rule also be changed to let lawyers work at accounting firms, whether as employees or co-owners, if their work included the rendition of legal services to clients of the accounting firm? In other words, assume the one hundred to one ratio were inverted, one hundred accountants to one lawyer. Thus, is the risk of oppression great enough to suppress the arrangement whatever its benefit? No one can claim that the risks are the same whether the ratio is one hundred to one or one to one hundred. But is it great enough when the lawyer stands alone to ban the

46. The District of Columbia is the only American jurisdiction that permits nonlawyers to share legal fees with lawyers. The entity providing legal services must have law practice “as its sole purpose;” both lawyers and nonlawyers must “abide by” the Rules of Professional Conduct; the lawyers must be responsible for the “non-lawyer participants to the same extent as if non-lawyer participants were lawyers under Rule 5.1;” and these “conditions [must be] set forth in writing.” D.C. RULE 5.4(b). The two aspects of this provision worth noting are that it does not require that lawyers have voting control over the entity, but that it does require that the entity’s sole purpose be the provision of legal services to clients. This latter requirement makes it unlikely that nonlawyers would outnumber lawyers as owners or managers of the entity.

47. Direction of Legal Profession is Debated at Multidisciplinary Practice Panel Hearings, in *LAWYER’S MANUAL ON PROFESSIONAL CONDUCT* 45 (ABA/BNA eds., 1999).

48. Lawrence Fox, *Restraint Is Good In Trade*, NAT’L L.J., Apr. 29, 1991, at 17. This prediction has not come true.

arrangement entirely, no matter what the benefit and with no empirical support? My position is that it is not great enough. I offer six arguments to that effect.

IV. WHY THE PROHIBITION IS WRONG

First, the arrangement is analogous to the situation in which a lawyer employed by a corporation is directed by the employer's lay officers. The parallels are strong. In both situations, the nonlawyer and the lawyer have duties to the same client. The corporate officer has fiduciary obligations to the entity client as does the corporate lawyer.⁴⁹ Similarly, the accountant is responsible to the same client as the lawyer and may have professional and fiduciary duties to it.⁵⁰ The ratio of lawyer to lay person can be the same in either situation. *Pari passu*, should we not assume that the danger to the client is appreciably no different in one instance than the other?

My second argument in favor of letting lawyers and other professionals, here accountants, associate in one entity to deliver blended services is the fact that the accountants are not simply treating legal services as a product they purchase wholesale and sell retail. They are not mere traders or passive investors. Rather, the accountants are separately delivering services to firm clients—their firm's clients—whose custom they will wish to retain. The accountants are professionally and personally invested in the enterprise. This reduces the risk that they will betray a client or cause the lawyer to do so.

My third argument is that the joint arrangement is intuitively beneficial. It gives clients a choice between receiving a mixture of services from one entity or purchasing the constituent services from each of several entities. Often, clients who will choose to use a multidisciplinary firm rather than separate firms will be sophisticated clients who know how to shop for professional advice.

Fourth, the lawyer who works with other professionals in this way continues to be bound by the ethical obligations of his or her licensing jurisdiction. A novel practice environment does not eliminate that constraint. A fifth and related argument, which will sometimes be true, is that the other professionals will, like the lawyer, enjoy a state-granted license or credential that misconduct will jeopardize.⁵¹

Finally, we do have experience with this sort of arrangement if in a somewhat different context. Supreme Court decisions have forced states to permit lawyers to work for nonprofit (or public interest) organizations

49. See RESTATEMENT (SECOND) OF AGENCY §1 (1958).

50. See, e.g., *Claire Murray, Inc. v. Reed*, 656 A.2d 822 (N.H. 1995); *Gemstar Ltd. v. Ernst & Young*, 917 P.2d 222 (Ariz. 1996). Even if the business is structured as a professional corporation or other limited liability entity, so that accountants will not, merely by virtue of their ownership interest, be liable for breach of a lawyer's fiduciary duty to a client, accountants and others will remain liable to clients for their own misconduct. See, e.g., N.Y. Bus. Corp. Ann. §1505(a) (West 1986).

51. Written testimony of Professor Linda Galler before ABA Commission on Multidisciplinary Practice (Nov. 13, 1998) ("Each of the fifty states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands, has enacted accountancy laws governing the licensing of professional accountants.").

that are not traditional law firms, where the employed lawyers are under the control of lay officers and boards, yet represent third parties, not the organization itself.⁵² Other Supreme Court decisions permit lawyers to work for union members under plans that envision an intermediary role for the union between lawyer and client.⁵³ For example, the union may be the employer of the lawyer⁵⁴ or it may have negotiated lower rates for its members in exchange for a promise of referral.⁵⁵ Despite fears,⁵⁶ neither arrangement has proved unacceptable. We expect and trust that the lay participants will respect the lawyer's professional obligations. Similarly, ABA Opinion 355 itself permits lawyers to represent "subscribers" of for-profit legal service plans, although a lay influence (the plan sponsor) is an intermediary in the delivery of the legal service and the source of much, most, or perhaps even all of the lawyer's income.

These arguments are based on analogy or on judgment and experience. They cannot, of course, prove a particular level of risk with mathematical certainty. That's impossible. But I suggest that they are strong arguments, indeed that they are irrefutable for the particular situation under discussion. Of two possible opposing arguments, one is unacceptable and the other is wrong. The unacceptable argument is that the change would reduce the amount of money from the sale of legal services that stays within the profession. I assume it might, although there may be some compensating benefits even to the wealth of lawyers. Still, it is true that nonlawyers would be earning money from the work of lawyers or, more accurately, from entities that sell the services of both lawyers and nonlawyers. But this is not a consideration worthy of the bar. Acquiring fees cannot be the basis for an ethical rule.

The second argument against multidisciplinary firms is that even if a change to the extent described would produce no harm, or at least no harm that we do not risk in other situations, a rule change will permit no stopping place. Once we let lay people participate as owners or managers of for-profit entities that provide legal services to third persons in one situation, the argument runs, we will have to allow it in all situations. We will, for example, see lay investors starting law firms. Shares of American law firms will trade over the counter. This is the floodgates argument, no longer the anxiety of influence, but the nightmare of influence. This is not the place, as I have said, to draft the language of the rule that should gently wake us from the nightmare, but I have no doubt that a rule can be written that will enable courts and the bar to make the necessary distinctions. The burden on the profession now is to begin to make them.

52. See *NAACP v. Button*, 371 U.S. 415, 441 (1963).

53. See, e.g., *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 586 (1971).

54. See *United Mine Workers, District 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967).

55. See *United Transp.*, 401 U.S. at 586.

56. See *id.* (Harlan, J., concurring in part, dissenting in part).