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Charles W. Wolfram
Cornell Law School, charlesw.wolfram@yahoo.com

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Parts and Wholes: The Integrity of the *Model Rules*

CHARLES W. WOLFRAM*

As important as is each of its parts, the 1983 *Model Rules of Professional Conduct*[1] was, of course, meant to function as a whole. At the very least, the parts were presumably intended to work well with one another, sketching a regulatory apparatus that would guide both lawyers subject to it and courts and regulators administering it in a coherent and consistent manner. To a large extent the *Model Rules* made significant headway in this respect, continuing the movement toward more explicit and articulated regulation of the profession begun by their predecessor, the *Model Code of Professional Responsibility*.[2]

Yet, the *Model Rules* have struggled toward perfection, rather than attaining it. In its shortcomings it simply shares features of other works of mere mortals. I explore here one of those areas of effort in which the *Model Rules* reflect defective drafting, that of presenting a regulatory text characterized by "integrity." I use that term in the sense of wholeness, of not being at war with oneself. I do not imply anything about intentional deviousness or the like, a wholly different sense in which "integrity" is also sometimes employed.[3] As will be seen, in several respects the *Model Rules* significantly lacks integrity with respect to common or at least predictable, if uncommon, situations. I do not refer here to points too shrouded in the mists of the future or too exotic to permit or warrant clear statement. Instead, I refer to the *Model Rules*' violation of what we might refer to as the integration principle—the common-sense requirement that each part of a prescriptive document interconnect well and clearly with every other. Pursuing the ideal of the integration principle, a drafter will attempt to avoid confusion by neither seeming to omit coverage of an important point

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* Charles Frank Reavis Sr. Professor, Cornell Law School.

1. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES].

2. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter MODEL CODE].

3. Certainly some violations of the integrity principle were purposefully accepted in drafting the *Model Rules*. This is evident, for example, in the case of the noisy-withdrawal Comment to Rule 1.6. As this example illustrates, ambiguity can result not from deviousness, but from the force of circumstances. In this instance the Kutak Commission's circumstances included a parliamentary situation (they were nearing the end of the project with a fractious and impatient ABA House of Delegates) and an impossible doctrinal bind caused by the House's action on the black-letter of Rule 1.6, *see infra* text accompanying notes 9-36. On the political situation in the ABA House of Delegates, see *infra* text accompanying notes 13-15.

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in apparently complementary provisions or perhaps worse, giving duplicate and potentially conflicting prescriptions for a common issue.

This canvas of the *Model Rules* under the lens of the integration principle is not, of course, intended to be exhaustive, although I hope to have captured the most important instances. I also wish not to be understood to insist that all of the issues I discuss here should have been detected and adequately dealt with before the *Rules* were locked into their present form in 1983. Neither the Kutak Commission, its reporter, nor the ABA House of Delegates had entire freedom and leisure to draft carefully and precisely. The inescapably untidy business of formulating standards through the political and bureaucratic sausage factory[4] that is the ABA[5] only makes one marvel to the contrary, that the document emerged in a form as nearly integral as it is. In a process such as the one that produced the *Model Rules*, only the reporters, active members of the drafting Kutak Commission, and perhaps a few critics would have been able to pay sufficient attention to the document as a whole to have noted integration problems in the document as it transmogrified into its final form. And, of course, paying attention and bringing noticed problems of incoherence to the attention of others does not always suffice to persuade others with other agendas to join forces to achieve appropriate language changes in a document caught up in what was essentially an unwieldy political-parliamentary process. Those seeking changes in drafts, such as those offering floor amendments in the ABA House of Delegates, typically insist on wording that responds to their own concerns, not the concern of achieving overall documentary integrity.[6] In any event, even in a more relaxed, less politicized atmosphere, it would have been nearly miraculous if the *Model Rules* had not emerged from even that idealized process without some defects of integrity that only experience in applying and studying them would bring clearly to view.

4. I refer here to Bismarck's well-known dictum that no one should know how either sausage or legislation comes to be made. Community Nutrition Inst. v. Block, 749 F.2d 50, 51 (D.C. Cir. 1984) (referring to then Judge Scalia's challenge to regulations permitting percentage of crushed animal bones in frankfurters).

5. Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989).

6. Throughout the drafting process, Professor Geoffrey C. Hazard, Jr., the chief reporter for the Kutak Commission, urged both the Commission members and others who suggested alterations in drafts to advance ideas and leave the wording of them to his own drafting efforts. Among other things, of course, Professor Hazard's objective was to achieve integrity in the document. Blame for the fact that the eventual document failed to achieve integrity can, of course, only partly be laid at Professor Hazard's doorstep.

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THE INTEGRATION PRINCIPLE

The integration principle makes only the modest claim on the authors of a prescriptive document such as the *Model Rules*, that it speak with one voice. The principle would require, for example, that if a lawyer should find an answer to a personal problem of professional conduct in Rule One of a unitary prescriptive document, he should find there one answer, not two. Or, having read Rule One in a good faith effort to understand and appreciate its boundaries, he should be able to make a decision about important future action, secure in the knowledge that there is no other rule, Rule Two, containing language that could fairly be read to give confusingly different guidance on the same problem.

The integration principle also provides guidance to courts and other tribunals, whose responsibility it is to interpret and enforce a prescriptive document, such as in the use of a lawyer code in lawyer discipline and, beyond that immediate range, to analogous application in other remedial realms such as legal malpractice litigation, lawyer-disqualification motion practice, and fee disputes. In such settings, tribunals normally are entitled to assume that the drafters of a prescriptive document have attempted to perform their work with the integration principle well in mind. Among other things, that assumption (and others about the regularity of the document) supplies moral support to the imposition of discipline on lawyers who are found to have violated the *Model Rules*. Disciplinary tribunals hope to be able to act with confidence that guidance provided by the text of the *Model Rules* was clear and thus that the respondent lawyer's violation of the rule in question was undertaken either with deliberate intent to violate it or reckless ignorance of what it fairly declares to those who consult it.

Tribunals should also be able to rely on the speak-with-one-voice character of the *Model Rules* in the work of interpreting them. If for example, a tribunal derives from the *Model Rules* the operating rule that side-switching in the same matter is a prohibited form of conflict of interest,[7] then (other things being equal) the tribunal should be entitled to assume that each instance in which the rule might apply would be an appropriate occasion for applying the rule.[8]

To an extent, of course, lawyers and tribunals will appreciate that the integration principle is a counsel of perfection, a desideratum that is hoped to be regularly, but not invariably, achieved. On a practical scale of the possible rather than the perfect, the *Model Rules* must be accounted better than middling on the integration principle. While offenses against the prin-

7. MODEL RULES Rule 1.9(a).

8. As will be seen, however, there is reason to think that side-switching may not always be prohibited. *See infra* text accompanying notes 53-67.

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ciple can be found in the *Model Rules*, the frequency and importance of offending provisions, while not trivial, are not alarming.

I will here identify several instances of non-integration in the *Model Rules*. For that reason, it might be well to also consider at the outset how a tribunal interpreting the *Model Rules* (or any other prescriptive text) should proceed once it has detected an instance in which two parts of the *Model Rules* speak differently to the same issue. Plainly, there can be no a priori rule, no presumption, no necessary direction that a tribunal should take in an instance of non-integration in order to effect a choice between the competing alternative readings or constructions. That is, there is no more reason to assume as a general matter that regulation should tighten than that it should loosen restraints on lawyer behavior. For example, there can also be no a priori rule of preference for prohibition over permission or the reverse. Instead, deriving a rule in the absence of a clearly stated choice must rest on such considerations as the underlying legal jurisprudence, the policy considerations open to the tribunal relevant to the substantive issue in question, and the consistency of one alternative or another with other portions of the document that do speak with clarity on analogous points. Fairness considerations may suggest that the ultimate choice of alternative interpretations in some such instances not prejudice the lawyer who is subject to possible discipline in the particular instance before the tribunal in which the question of non-integration first arises. But such fairness considerations only tell the tribunal to withhold discipline in the particular instance of a first-impression case, while perhaps announcing there is a choice of conflicting interpretations to govern discipline with respect to lawyer conduct that occurs in the future.[9]

In my canvass of the *Model Rules*, I portray instances involving the integration principle by hypothetical problems.

CONFIDENTIALITY AND NOISY WITHDRAWAL

Problem: Lawyer assisted Client in purchasing a commercial property. Under the terms of the sale, Client is to pay Seller for the property over an extended period. Seller's willingness to extend credit to Client obviously hinged on the contents of a financial statement that Client provided to Seller and on Lawyer's accompanying opinion letter in which Lawyer indicated that no liens had been placed on certain assets that Client listed

9. *E.g.*, *In re* Mitchell, 901 F.2d 1179, 1189 (3d Cir. 1990) (applying prospectively newly developed judicial interpretation of limits on what activities suspended lawyer could perform); Commonwealth v. Stenhach, 514 A.2d 114 (Pa. Super. 1986), *appeal denied*, 534 A.2d 769 (Pa. 1987) (reversing conviction of lawyers on charges of hindering prosecution and tampering with evidence in concealing gun stock, but suggesting that clarification in opinion would remove defense of uncertainty of law in future instances).

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in the statement as security. Shortly after the closing, Client informs Lawyer that the financial statement was materially false. Client attempts to rationalize this by means of an implausibly rosy account of how Client in any event will be able to finance the purchase from operating revenue generated by the property itself. Lawyer has good reason to believe that Client will shortly be unable to make scheduled payment and does not wish to become entangled in future litigation and charges of fraud on the part of Seller. Accordingly, Lawyer wishes, if permissible, either to inform Seller of Client's fraud or at least to remove any basis for a later claim by Seller that Lawyer was in some way complicated in Client's fraud.[10]

Perhaps the most notorious instance of textual dissonance in the *Model Rules*, illustrated by the problem, was intentional. That involves the tension between the seeming absolutism of Rule 1.6,[11] mandating a rule of confidentiality that is broad, flat-footed, stolid, and myth-like, and the "noisy withdrawal" exception crafted in its Comment.[12] The tale of how the dissonance came about has been often told.[13] The drafting of the *Model Rules* occurred at a time when lawyers were becoming alarmed and preoccupied with the risk of malpractice lawsuits. What often seemed to prevail in the ABA House of Delegates was rather thorough-going self-interest.[14]

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10. The problem is an altered recounting of the facts in Schatz v. Rosenberg, 943 F.2d 485, 495 (4th Cir. 1991) (holding that lawyers who drafted documents necessary for client to close deal after coming to know of material falsity of client's financial statements supplied to seller, merely served as "scriveners" and "papered the deal" and thus were not liable to injured seller under federal securities or state law theories), *cert. denied sub nom.* Schatz v. Weinberg & Green, 112 S. Ct. 1475 (1992). In this much discussed and much criticized decision, the pleading allegations in issue were that the lawyer had assisted the client in closing the fraudulent deal, not by providing an opinion letter, but by drafting the deal documents and performing other lawyerly tasks to accomplish the client's objectives. In an opinion perhaps distracted by working through several variations of federal securities law issues (all of which were decided against the plaintiff seller) the court also finds that local law (Maryland) would not have held the lawyer civilly liable, *id.* at 492-93, 495-98.

11. "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ." and except for other limited exceptions, none of which applies on the facts of the problem, MODEL RULES Rule 1.6(a).

12. MODEL RULES Rule 1.6 cmt., para. [15]. Here, and throughout, I employ the numbering system for the Comments to the *Model Rules* that are employed in all publications of them except the official publication of the ABA itself.

13. *E.g.*, Geoffrey C. Hazard, Jr. *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271, 298-304 (1984); 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING §§ 1.6:312-14 (2d ed. 1990 & Supp. 1992); Ronald D. Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 OR. L. REV. 455 (1984); Schneyer, *supra* note 5, at 719-20, 723-24; CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 670-72 (1986).

14. Schneyer, *supra* note 5, at 720. Motives, as in any multi-centered decision, seem to have been mixed. Some lawyers, primarily those engaged in litigation (and primarily in criminal-defense representations) spoke and acted not so much, or not only, in fear of malpractice liability, but as if they simply believed as an article of professional faith that client confidentiality was the highest of all imaginable values. Sometimes this belief was based on a preference for confidentiality; sometimes its basis was founded on a preference for client welfare, which a strict rule of confidentiality is more likely to

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On the broad issues raised by what became Rule 1.6, the ABA House of Delegates rejected the proposal of the Kutak Commission to adopt a limited confidentiality rule, allowing (but not requiring) a lawyer to give warning of a client's intended harm to persons threatened by financial ruin as well as grave personal harm.[15] The house was primarily moved by the plea that it was far more preferable to adopt an absolute confidentiality rule to protect client confidentiality. Not as a matter of sheer coincidence, such a sweeping rule would also permit lawyers to throw up an absolute doctrinal barrier against possible arguments in future malpractice litigation that lawyers who failed to exercise their discretion to disclose their clients' wrongdoing acted wrongfully. The argument would be, of course, that anything but silence would have subjected the lawyer to the risk of disbarment. The hoped-for doctrinal move would be that a lawyer professionally prohibited from disclosing even plainly outrageous behavior of a client could not be held liable to a third person for complying with professional mandates.

Yet, the rule of absolute confidentiality stated in Rule 1.6 was, and is, absurd. Even given the limited objective of protecting lawyers against liability, it is dysfunctional. Among other things, it would have required immobility on the part of a lawyer whose only escape from participation in a client's ongoing course of financial wrongdoing would consist of acting to remove the basis for any third person's reliance on the lawyer's work. Thus, on the facts of our problem, and if Rule 1.6 were viewed in isolation from its Comment, Lawyer would be required to remain both silent and (save for a possible, wordless withdrawal) inactive. In many jurisdictions, Lawyer would face a high likelihood of becoming a defendant (perhaps, given

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protect.

15. MODEL RULES Rule 1.6(b)(2) (Proposed Final Draft May 30, 1981). In a revised version of the proposed *Model Rules* circulated by Robert J. Kutak on June 16, 1982, the rule was re-designated as Rule 1.6(b)(1) with minor editorial changes. Thus, the version ultimately presented to the ABA by the Kutak Commission read as follows:

> "(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another . . . ."

Id. See also ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 48-49 (1987) regarding the February 1983 amendments on the floor of the ABA House of Delegates offered by the American College of Trial Lawyers, which produced the eventual wording of the confidentiality rule, principally dropping any reference to substantial injury to the financial interests or property of another. The February 1983 amendments also deleted a provision of the Kutak Commission proposals that would have permitted "disclosure 'to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used' . . . ," *id.* at 49 (quoting MODEL RULES Rule 1.6(b)(2) (Proposed Rule 1987)).

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the typical insolvency of unsuccessful con artists, the only defendant) in a lawsuit brought by the defrauded seller seeking compensation for ruinous losses.

In the end, the ABA House of Delegates, attempted to have it both ways. In an action taken at its final meeting on the *Model Rules* in August 1983, the ABA stuck with its rule that on the surface purports to mandate leak-proof secrecy. Such confidentiality was required in all cases except the ones that struck the ABA as most exigent—those cases involving a threat to an innocent person's life or health[16] or a controversy in which the lawyer's self-interest was at stake.[17] Those instances did not include ones in which the client threatened merely financial ruin to others. At the same time however, the ABA provided in the Comment to the rule a way out for an innocent lawyer in an otherwise intolerable situation. It did this through the notorious "noisy withdrawal" permission in paragraph fifteen of the Comment to Rule 1.6. After noting that a lawyer may withdraw from representing a client who will use the lawyer's services in materially furthering a course of criminal or fraudulent conduct, the Comment continues with the bland statement that "[n]either this Rule nor Rule 1.8(b)[18] nor Rule 1.16(d)[19] prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like."[20] With one sweep of the pen, the ABA's Comment seems to have swept in permission for a lawyer to do much that, at least on the surface, the rule would seem to have prohibited.

The claim has been made, most recently in a dissenting opinion in an ABA Formal Opinion,[21] that the noisy-withdrawal permission in the comment is in some way bogus.[22] But, as the majority of the ABA ethics com-

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16. MODEL RULES Rule 1.6(b)(1) ("A lawyer may reveal such information 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 . . . .").

17. MODEL RULES Rule 1.6(b)(2) ("A lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer 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.").

18. MODEL RULES Rule 1.8(b) (prohibiting a lawyer's "use" of confidential client information following the end of a representation).

19. MODEL RULES Rule 1.16(d) (requiring a lawyer to take "reasonably practicable" steps to protect a client's interests after withdrawal).

20. MODEL RULES Rule 1.6 cmt., para. [15].

21. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-366, at 20 (1992) (dissenting opinion) (stating that the majority's result "celebrat[es] the disingenuousness of the Comment—a Comment which, like all comments, the 'Scope' section of the Rules reminds us is 'intended as guides [sic] to interpretation, but the text of each Rule is authoritative' . . .") [hereinafter Formal Opinion 92-366].

22. The argument is that the rules-and-comment arrangement is hierarchical, so that any Comment

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mittee correctly recognized,[23] the dissonance between rule and Comment was clearly recognized[24] and accepted at the time of its enactment by the ABA in 1983 and thereafter, and the noisy-withdrawal permission was clearly intended to operate notwithstanding the apparent breadth of the rule.[25]

The violation of the integration principle reflected in Rule 1.6 and its Comment has been to date one of relatively minor impact. If the clash between rule and Comment is violent, it is also obvious. It is relatively clear from the text itself that the rule framers both wanted to keep the cake of apparently blanket confidentiality while eating at least its frosting in the instance of document withdrawal. From the point of view of fairness, probably few lawyers who read both rule and Comment, in the handful of jurisdictions that have copied the ABA on this point,[26] are misled about the permissibility of a noisy withdrawal.[27]

The problem of integrity is, instead, that of the ABA House of Delegates and of those very few states that have chosen to mimic Rule 1.6 and its noisy-withdrawal Comment.[28] Those bodies have been unable to come to grips with the conflicting urges both to proclaim absolute confidentiality

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in conflict with a rule is invalid. The "Scope" section of the *Model Rules* does say that the "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules," MODEL RULES Scope, para. [1]. The "Scope" goes on to say the following: "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative," *id.* para. [9].

23. Formal Opinion 92-366, at 9-11.

24. Dissonance is not accepted everywhere. For example, the Kansas Supreme Court adopted the Comments to the *Model Rules* only to the extent that they were not inconsistent with the *Rules* themselves or the statutory or case law of Kansas, Graham v. Wyeth Lab., 906 F.2d 1419, 1421 (10th Cir. 1990) (discussing Kan. S. Ct. R. 226, Prefatory Note).

25. In ABA Formal Opinion 92-366, the majority also notes a related problem of integration—that of reconciling potentially conflicting Comments concerning the competing primacy of confidentiality and avoidance of assisting client fraud, Formal Opinion 92-366, at 10 n.12. The Comment to Rule 1.2 states, in the context of discussing client fraud or other illegal or criminal activity, that "[t]he lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6," MODEL RULES Rule 1.2 cmt., para. [7]. On the other hand, the Comment to Rule 1.6 intimates that some kinds of client wrongdoing are an exception to the confidentiality requirements of Rule 1.6, MODEL RULES Rule 1.6 cmt., para. [10-11]. Formal Opinion 92-366 clearly opts for the latter interpretation, although a narrow version of it, Formal Opinion 92-366, at 10 n.12.

26. *See infra* note 28.

27. Professor Hazard has stated that "[t]he trouble with . . . Rule 1.6 and the Comment as adopted is that some fools may not understand that Rule 1.6 does not mean what it seems to mean," HAZARD, *supra* note 13, at 306.

28. Only five states (Alabama, Delaware, Kentucky, Missouri and Rhode Island) have followed the ABA lead, copying both Rule 1.6 (without any allowance for disclosure to prevent or rectify client financial harm) and the noisy-withdrawal Comment, *Ethics Update: Analysis of "Noisy Withdrawal" Comment Under ABA Model Rule of Professional Conduct 1.6*, 4 A.L.A.S. LOSS PREVENTION J. 14, 18 (1993) [hereinafter *Ethics Update: Analysis of "Noisy Withdrawal"*]. Three additional states (California, Louisiana and Montana) have no language permitting disclosure to prevent or rectify harm and no equivalent of the noisy-withdrawal Comment, *id.* at 19.

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and to deal with the possible consequences and obvious excesses of such claims. The drafting solution for the ABA, of course, was obvious, but was not adopted—to provide for noisy withdrawal in the text of Rule 1.6 itself.[29] A version of that common-sense approach was urged upon the ABA House of Delegates by its ethics committee in 1991.[30] But the ABA's governing body proved incapable of cleaning up its own mess, and it rejected

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29. For example, that sensible approach was taken in New York. A lawyer may reveal "[c]onfidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud," N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(5) (1988). A lawyer may also reveal "[t]he intention of a client to commit a crime and the information necessary to prevent the crime," N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1988). Note that the combined effect of the two New York provisions is to permit New York lawyers: (1) to reveal any information relating to representation of a client when necessary to prevent a client crime whether financial or otherwise; and (2) reveal any such information when making a "noisy withdrawal" whether for the purpose of self protection or to permit harmed third persons to detect and possibly to prosecute successfully the client's fraud.

30. In a proposal brought to the ABA House of Delegates in August, 1991, the ABA Ethics Committee proposed to amend the language of Rule 1.6 to permit, but not require, a lawyer to disclose a client's crime or fraud if the lawyer's services had been employed in perpetrating it, *ABA Rejects Ancillary Business, Inroads on Client Confidences*, 7 Laws. Man. on Prof. Conduct (ABA/BNA) 256, 258-59 (1991) [hereinafter *ABA Rejects Ancillary Business*]. The ABA Ethics Committee proposal would have renumbered the present subsection (2) of Rule 1.6(b) as subsection (3) and added a new subsection (2) permitting a lawyer to reveal information relating to representation of a client to the extent the lawyer reasonably believed necessary "to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used," *id.* at 258. The proposal was assailed on the ground that it would gravely threaten the trust needed between lawyer and client, *Ethics Proposals Draw Fire*, 1991 A.B.A. J. 34, 34 (quoting remarks of representative of Criminal Justice Section of ABA). Other opponents argued that it would invite suits against lawyers who might choose not to reveal client information, *ABA Rejects Ancillary Business* at 258. Others conjured up the image of lawyer as "Big Brother," *id.* at 259 (noting the trial lawyers' statement that the ethics committee proposal posed the choice implicit in the question, "Is the lawyer the policeman of the client's conduct or the repository of the client's confidences?"). The debate was essentially a reprise of the February 1983 debate on Rule 1.6, *see supra* note 13. None of the reports of the 1991 debate seems to reflect an awareness of the then existing state of the law in the great majority of the states, *see infra* note 31.

Although the defeated ethics committee proposal would have brought the ABA more into line with the great majority of states, it would have been anomalous in permitting disclosure only after the damage was done, and presumably mainly to protect the lawyer from liability, while continuing the ABA's apparent insistence on no disclosures that might be necessary to prevent harm, other than death or substantial physical injury, from occurring in the first place. In adopting their own variation on the *Model Rules* many states have retained DR 4-101(C)(3) from the *Model Code* which permits disclosure to prevent a client crime, including any financial crime. In that or a similar fashion, 41 states now permit or require a lawyer to reveal client information to prevent client wrongdoing, *see infra* note 31. Only South Dakota has a rectification provision without also providing a lawyer permission to prevent the harm, *Ethics Update: Analysis of "Noisy Withdrawal"*, *supra* note 28, at 18. The ABA Ethics Committee proposal would have made South Dakota's approach official ABA policy with, almost certainly, no perceptible effect on the position already taken in 41 of the states. At most, the ABA *Model Code* on client confidentiality provides an arguing point—a highly misleading one—concerning the state of regulation under the lawyer codes generally.

HeinOnline -- 6 Geo. J. Legal Ethics 869 1992-1993

the proposal.[31] That left the ABA ethics committee to write its recent Formal Opinion on the noisy-withdrawal problem in a less elegant and straightforward attempt to proclaim its proposed (and largely sensible) reading of the conflicting wording.[32]

When enacting local versions of Rule 1.6, the great majority of states have taken the much more sensible approach and have rejected the pretense of absolute confidentiality with respect to a client's substantial financial harm to third persons.[33] Indeed, because over forty jurisdictions explicitly provide for exceptions to the confidentiality rule to prevent and/or rectify client wrongdoing, in many situations disclosure of a client's wrongdoing may be mandatory by force of the adoption in those jurisdictions of Rule 4.1(b). That rule provides that a lawyer "shall not knowingly . . . fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."[34] Because the "unless" clause will be inapplicable in those numerous states, a lawyer there will be required to disclose material facts to third persons when necessary to avoid assisting a client's crime or fraud.[35]

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31. The vote in the ABA House of Delegates was 251 opposed to the amendment and 158 supporting it, *ABA Rejects Ancillary Business*, *supra* note 30, at 258. At the same sitting the ABA House of Delegates launched the short, unhappy existence of Rule 5.7 to eliminate "Ancillary Business" operations of law firms, again rejecting the somewhat more sensible, more permissive approach urged by its ethics committee, *id.* at 256-58. On Rule 5.7 and its quick but untidy demise, see *infra* note 135.

32. Although beyond the scope of the present discussion, Formal Opinion 92-366 should not be passed without mention of the key holding of the majority, that Rule 1.2(d) (prohibiting a lawyer from assisting a client in conduct that the lawyer knows is criminal or fraudulent) may in many circumstances *require* a lawyer to notify a third person, to whom financial loss is threatened by a client's fraud, of the lawyer's withdrawal of the lawyer's opinion or other work product, Formal Opinion 92-366, at 12. By virtue of the Formal Opinion, the position of the ABA establishment on fraud disclosure has come almost full circle. From the (falsely) apparent absolute secrecy rule of Rule 1.6, the ABA committee now proclaims a widely applicable mandatory disclosure rule.

33. By far, the overwhelming majority of the states that have adopted lawyer codes otherwise based on the *Model Rules* refused to adopt Rule 1.6 as recommended by the ABA House of Delegates. According to an authoritative state-by-state analysis, 41 of the 51 American jurisdictions (the 50 states and the District of Columbia) provide for some sort of pre-event revelation of a client's information in order to prevent a client's wrong "prevention" revelation, *Ethics Update: Analysis of "Noisy Withdrawal"*, *supra* note 28, at 18. Of the 41 "prevention" states, 16 states also provide for after-the-fact "rectification" notice. South Dakota alone permits revelation for rectification but not prevention, *id.* In total then, 17 states also provide for rectification revelation. Four of the prevention states (Florida, New Jersey, Virginia, and Wisconsin) make prevention mandatory in certain non-physical injury situations, *id.* Several other states make prevention mandatory in physical harm situations. For a reprinting of the ALAS tabulation, prepared by its loss prevention counsel, see THOMAS D. MORGAN & RONALD D. ROTUNDA, 1993 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 126-32 (1993).

34. MODEL RULES Rule 4.1(b). The rule has been adopted without substantial change in most of the approximately 40 states that have adopted the *Model Rules*, *Ethics Update: Analysis of "Noisy Withdrawal"*, *supra* note 28, at 19. On its potential sweep, *see supra* note 33.

35. Majority in Formal Opinion 92-366 reached the same result interpreting Rule 1.2(d). *See supra* note 32.

HeinOnline -- 6 Geo. J. Legal Ethics 870 1992-1993

The disreputable history of Rule 1.6 suggests several things about the integration principle. First, it demonstrates that it is a principle and not a rule. Violations (in the small handful of states that have followed the ABA's version of the rule) need not inevitably lead to incoherence or impasse, at least when, as here, the violation is both blatant and accompanied by strong circumstantial indication of how the resulting language impasse should be resolved. Second, and nonetheless, the episode rather badly compromises the utility of the *Model Rules* as a professional code. Together with other similar episodes in the adoption of the *Model Rules*, the Rule 1.6 donnybrook has caused the *Rules* to appear to many as a rather blatantly political instrument. For example, because the ABA *Model Rules* are often used in the nation's law schools as an exemplar of what the lawyer codes of the various jurisdictions might reflect (a hopelessly misleading misrepresentation in the case of Rule 1.6),[36] study of them can readily lead law students, future lawyers, into cynicism about the rules. If the ABA simply stumbled unknowingly into the impasse, as it probably did in most of the other instances to be noted here, clumsy textual incoherence would be regrettable, but at least it is a lesser evil than its alternative. Intentional incoherence of that sort suggests a kind of heavy-handed craftiness that is hardly to be admired.

THE CONFLICTS OF PART-TIME GOVERNMENT LAWYERS

> *Problem:*[37] Lawyer, as is the case in many small communities in sparsely-settled areas of the country,[38] conducts an active private practice while also serving as a part-time county attorney. Lawyer's governmental responsibilities include civil matters, but primarily involve prosecution of offenders. Lawyer is approached by Client, who wishes Lawyer to represent her in divorcing Client's Husband. Client accuses Husband of quite serious spousal abuse, of a kind that is routinely prosecuted as criminal in the state. Lawyer, acting in her role of part-time prosecutor, files criminal charges against Husband. A few days later, Lawyer files a civil complaint in Client's divorce action against Husband. Has Lawyer violated the *Model Rules*?

36. *See supra* text accompanying notes 33-35.

37. The facts are drawn from several decisions with similar facts. A recent leading case is West Virginia *ex rel.* Bailey v. Facemire, 413 S.E.2d 183 (W. Va. 1991) (requiring part-time prosecutor who identifies possible basis for prosecuting opposing party in representation of private client to withdraw from representing private client). *See also infra* notes 47-48.

38. The arrangement is entered in order to save money for the relevant governmental employer, who is thereby saved the additional cost of either a full-time lawyer who would presumably be underoccupied or of travel expenses for a lawyer with a wider geographical jurisdiction. Political considerations (the desire for local control over prosecuting functions) may also play a part. The arrangement is found in both rural communities and in bedroom suburbs of some large cities.

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For reasons that will shortly be explored, and that will be evident to most lawyers, Lawyer's representations in the situation portrayed in the problem involve a quite serious conflict of interest. Yet, here we encounter what I believe is a truly unintended hiatus in the explicit coverage of the *Model Rules*. (As will be seen below,[39] another serious problem of integration also afflicts the same rule).

The gap in coverage can readily be seen by reading the most relevant rule, Rule 1.11, with the facts of the problem in mind. Two parts of Rule 1.11 arguably apply. But close inspection of the language of each seems to indicate that Lawyer violated neither. The first part is Rule 1.11(a):

> (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.[40]

If one reads only the words and ignores their evident sense, Rule 1.11(a) seems to indicate that it is only applicable to a lawyer who *formerly* participated personally and substantially in a matter as a government lawyer.[41] One might conclude, therefore, that Lawyer in our problem has not violated Rule 1.11(a).

A similar conclusion is suggested by consideration of only the text of the second part of the rule. Rule 1.11(c) deals with the mirror-image version of the situation addressed in Rule 1.11(a), here the problem of the former private practitioner who is currently in government practice:

> (c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:
> (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment . . . .[42]

Again, if one reads the past tense ("participated") for all it is worth, the rule only prohibits a lawyer from participating in a representation of a current governmental client if the lawyer *formerly* represented a private-practice client in the matter. And again, it would appear that Lawyer is, for that same reason, free of its prohibition.

In sum, Rules 1.11(a) and 1.11(c) seem to be concerned only with *former* representations, not concurrent representations. Was that reading per-

39. *See infra* text accompanying notes 57-61.

40. MODEL RULES Rule 1.11(a).

41. That is suggested primarily by the use of the past tense in "participated" and by the reference in the title to Rule 1.11 itself to "*Successive* Government and Private Employment," MODEL RULES Rule 1.11 (emphasis supplied).

42. MODEL RULES Rule 1.11(c).

HeinOnline -- 6 Geo. J. Legal Ethics 872 1992-1993

haps intentional? Was Rule 1.11 carefully drafted to be limited to the two kinds of former-client representations that it explicitly addresses?

To understand why it is clear that no such careful design went into writing Rule 1.11, consider the obvious rationale of both sub-parts of the rule. Rule 1.11(a) and its *Model Code* counterpart[43] have been interpreted several times by the courts. As the Comment to Rule 1.11 itself makes clear,[44] a principal purpose behind the prohibition in Rule 1.11(a) is to guard against the clear possibility that a government lawyer who later represents a private-practice client in the same matter will have conducted the governmental representation with corrupt or suspect motivations or objectives or, while in government service, will have misused special governmental powers of fact-gathering to benefit the future private-practice client.[45] So also with respect to the Rule 1.11(c) prohibition; in its absence, a lawyer coming into government service might similarly confuse public and private interests and objectives.[46]

But those concerns underlying the prohibition of *serial* "revolving door" situations are, if anything, even more obviously implicated in the case of some kinds of *concurrent* governmental and private employment. That is true whether one considers serial conflicts running public-to-private or private-to-public. Every reason one can imagine for adopting either rule in the case of serial employment applies with at least equal, and often much enhanced, force in concurrent-employment situations such as the one in the problem.

In fact, the problem has created little actual disagreement in the reported decisions, which have uniformly condemned representations such as that in which Lawyer in the hypothetical problem was involved.[47] The anal-

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43. MODEL CODE DR 9-101(B). DR 9-101(B) differs from Rule 1.11(a) only in a respect that is irrelevant for present purposes (regarding the replacement of the *Code*'s "substantial responsibility" standard for determining what kind of government lawyering creates future disqualification with the Rule's "participated personally and substantially" standard). *See generally* WOLFRAM, *supra* note 13, § 8.10, at 469-71.

44. The Comment to Rule 1.11 states:

> Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service . . . .

MODEL RULES Rule 1.11 cmt., para. [3].

45. *See generally* WOLFRAM, *supra* note 13, § 8.9, at 448-56.

46. *See* MODEL RULES Rule 1.11 cmt., para. [3].

47. WOLFRAM, *supra* note 13, § 8.9.4, at 455; RESTATEMENT OF THE LAW GOVERNING LAWYERS § 216 cmt. f(ii) (Tent. Draft No. 4, 1991). *See also* Richard H. Underwood, *Part-Time Prosecutors and*

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ysis in the decided cases has typically been abrupt, simply noting the obvious conflict between the partisan representation of the private-practice client and the dispassionate and public-oriented representation in a possible prosecution.[48] One of the most extended analyses is found in the principal Supreme Court decision in the area—*Young v. United States ex rel. Voitton*.[49] The case involved a federal court prosecution for criminal contempt of a party who had allegedly violated the terms of an injunction against infringement of a trademark. The Court held that the lawyer for the trademark holder, the party who had obtained the injunction, was prohibited from serving as the prosecutor. Among other rationales, the Court prominently mentioned the several provisions of the ABA's *Code of Professional Responsibility* bearing on conflicts of interest.[50] The Court held that those factors and rules, among others, combined to require a "disinterested" prosecutor.[51] One case has gone further than *Voitton* and suggested that such simultaneous representation denies the due process rights of the criminal-case defendant.[52]

The courts' sensible resolution of the concurrent-representation problem by part-time government lawyers has not been aided by the *Model Rules*. The language of Rule 1.11 itself suggests, misleadingly as it turns out, that only former-representation problems (of both generic kinds) are covered. That reading, should any court be momentarily misled into entertaining it, is confirmed by a Comment to Rule 1.11, although both the germ of the integration problem, and a hint at how to resolve it, is also suggested by a modifying clause in the statement:

Conflicts of Interest: A Survey and some Proposals, 81 KY. L.J. 1, 71 (1992-93) ("'[I]t is axiomatic [that] a prosecutor should never try a defendant with whom he is embroiled in civil litigation.'" (quoting JOHN JAY DOUGLASS, ETHICS ISSUES IN PROSECUTION 130 (1988)). Professor Underwood's very useful article collects a large number of decisions and secondary authority in a wide variety of instances similar to the situation discussed here, *id.* at 71-89.

48. *See, e.g., In re* Pfeiffer, 27 B.R. 675 (Bankr. N.D. Ala. 1982) (precluding filing of criminal charges by prosecutor who has interest in civil litigation arising from same facts); Commonwealth v. Eskridge, 604 A.2d 700 (Pa. 1992) (preventing lawyer whose law partners were representing victim in case from serving as prosecutor against same defendant). *See also* WOLFRAM, *supra* note 13, § 8.9, at 455-56, and authorities cited.

49. 481 U.S. 787 (1987).

50. *Id.* at 803-05. Despite the fact that the *Model Rules* had been promulgated by the ABA four years previously, the Court referred only to the earlier *Model Code*, *id.* at 803-05. The apparent reason was that the regulations of the Justice Department had applied only the latter to federal prosecutors at the time, *id.* at 803.

51. *Id.* at 804.

52. Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967); *see also* Voitton, 481 U.S. at 814-15 (1987) (Blackmun, J. concurring) (stating that due process should preclude either federal or state government from appointing lawyer for interested private party as prosecutor in criminal-contempt cases). *But see* Dick v. Scroggy, 882 F.2d 192, 196-97 (6th Cir. 1989) (finding that due process rights of driver were not violated when state permitted prosecution of felony-assault charge by same lawyer who, as private practitioner, had represented accident victim in tort action against driver).

HeinOnline -- 6 Geo. J. Legal Ethics 874 1992-1993

> Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency *when doing so is permitted by Rule 1.7* and is not otherwise prohibited by law.[53]

Unless one fully appreciates the murkily expressed point of the italicized language, one might come away from the *Model Rules* with the erroneous conclusion that simultaneous representation in the kinds of representations involved in the problem under review complied with the rules. At least the italicized language, however, attempts to indicate that such a reading would be ill-advised. In order to see why this is so, one must first conduct a review of possible Rule 1.7 conflict-of-interest problems.

That indeed is what many courts have done—invoked Rule 1.7 to prohibit simultaneous representation, although rarely with discussion of how this might be consistent with Rule 1.11.[54] The difficulty in conducting such a review, however, is that a misguided court may be tempted to think that the kinds of problems addressed by Rule 1.11 in the serial-representation situation are not relevant to consider under Rule 1.7.[55] But, as indicated above,[56] there seems to be no reason of policy to differentiate between the situations.

While courts have reached the same result by sound intuition and analysis, a more sure-footed solution would secure this result by amending Rule 1.11 itself. The amendment could be relatively simple; it would perhaps most readily be done through the simple expedient of making the verbs in both Rules 1.11(a) and (c) read in both the present as well as the past tenses.

SCREENING AND ADVERSE-INTEREST CONFLICTS OF FORMER GOVERNMENT LAWYERS[57]

> *Problem*: Lawyer formerly worked in the Criminal Division of the United States Department of Justice, handling highly sensitive prosecutions of al-

53. MODEL RULES Rule 1.11 cmt., para. [8] (emphasis added).

54. An exceptional case is Davis v. Southern Bell Tel. & Tel. Co., No. 89-2839-CIV-NESBITT, slip op. (S.D. Fla. Jan. 14, 1993). The court refused to disqualify, although this was a case in which the governmental client was represented by both (a) lawyers who had private-practice, class action clients with parallel claims to those of the governmental client and (b) by virtue of a last-minute motion, lawyers for the state client itself were permitted to bring in the state as an additional class action representative. The court read Rule 1.11 literally as limited to successive representations, but then analyzed the claimed conflict under Rule 1.7, *id.* at 25-32. Both the former reporter for the Kutak Commission and the author of this article appeared as expert witnesses for the party claiming a conflict.

55. Such an attitude seems to underlie the court's narrow reading of the reach of Rule 1.7 in the *Davis* case.

56. *See supra* text accompanying notes 43-48.

57. *See generally* WOLFRAM, *supra* note 13, § 8.10, at 463-64.

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> leged organized crime figures. Lawyer has now left Justice and has joined Law Firm, which specializes in big-ticket criminal defense work. At the time Lawyer joined it, Law Firm was representing Defendant, who according to the Justice Department-drafted indictment, is a principal defendant in a Justice prosecution of several members of a New York City organized crime family. For years Lawyer had participated personally and substantially in gathering facts and constructing legal theories relevant to Defendant's prosecution. Among other things (to limit the problem to written documents), Lawyer extensively reviewed wire-tap transcripts, transcripts of secret grand jury testimony, reports of undercover agents of the Federal Bureau of Investigation, and the products of searches of the private residences and offices of other suspects conducted pursuant to search warrants. As provided in Rule 1.11(a), Law Firm promptly announces in a letter to the Justice Department that the firm has screened Lawyer from any participation in the Defendant matter and that Lawyer will be apportioned no part of the fee from it. Nonetheless, the Justice Department is outraged at Lawyer's choice of an employer, and it files a disciplinary complaint[58] with the disciplinary agency in the jurisdiction in which Lawyer now practices. Has Lawyer violated the *Model Rules*?

Law Firm and Lawyer presumably would defend the firm's representation of Defendant with the argument that their conduct was permitted by Rule 1.11(a).[59] They presumably would concede that, as already seen,[60] the rule clearly does prohibit Lawyer from personally representing Defendant in private practice. That follows because Lawyer, while in government service, participated personally and substantially in the matter, and the former governmental client has not consented. But, they would point out that Rule 1.11(a) also contains a provision for screening a former government lawyer, and Law Firm and Lawyer, as stated in the problem, have apparently complied with the requirements for screening.

The Justice Department presumably would argue that screening is not allowable in this situation. With respect to the permission for screening stated in Rule 1.11(a), the government might argue that this applies only

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58. My strong suspicion is that the Justice Department would promptly move to disqualify Lawyer and Law Firm, and I would predict an outcome on such a motion similar to that suggested later in the analysis in the text, *see infra* text accompanying notes 66-67. As anyone familiar with disqualification decisions knows well, the *Model Rules* are also employed vigorously (indeed, on many occasions and in many jurisdictions, much more vigorously) in disqualification motions. Nonetheless, the problem is limited to questions of professional discipline in order to keep the focus sharply upon the specifically intended use of the *Model Rules*, *cf.* MODEL RULES Scope, para. [6] ("Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. . . . [T]he purpose of the Rules can be subverted when they are invoked . . . as procedural weapons.").

59. I do not deal with the question whether continuing the representation would violate federal criminal law, including the federal conflict-of-interest statutes. The statutes, however, do not seem to deal directly with the problem as presented here, *see* 18 U.S.C. §§ 201-09 (1988 & Supp. III 1992).

60. *See supra* text accompanying notes 41-42.

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to those conflict situations that are unique to Rule 1.11—so called congruent-interest conflicts, in which the former government employer and the private-practice client have interests that are in agreement rather than adverse, as under Rule 1.9. In effect, the Justice Department would argue that former government lawyers are subject to two different rules depending on the nature of the "conflict": (1) congruent-interest conflicts (alone) are covered by Rule 1.11(a), with its recognition of screening; but (2) adverse-interest conflicts are covered by Rule 1.9, which does not recognize screening.

But what is the government's argument? One of the much discussed and quite dramatic differences between the *Model Rules*' treatment of former clients generally (Rule 1.9) and former *government* clients particularly (Rule 1.11(a)) is that the former does not duplicate the permission for screening-with-notice provided in the latter.[61] Should it then be concluded that Rule 1.9, refusing to recognize screening,[62] should apply to the facts in the problem? Or, to the contrary and as Law Firm and Lawyer contend, should it be concluded that the stricter, no-screening standard of Rule 1.9 is inapplicable and that only Rule 1.11(a), recognizing screening, applies?

The *Model Rules* themselves are surprisingly opaque on this fundamental point. Their silence is all the more surprising because the problem of overlap was apparently recognized early in the drafting work of the Kutak Commission. A suppressed "legal background note" in an earlier draft suggested that former government lawyers would remain subject to the other conflict of interest rules to the extent they were stricter.[63] Of course, the fact that the note was eliminated could be read with roughly equal force to

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61. MODEL RULES Rule 1.9; MODEL RULES Rule 1.11(a). The prohibition in Rule 1.11(b) against the subsequent, private practice use of confidential government information raises a different integration principle problem not raised by the problem in the text. The text of the rule contains no exception for consent of the former government client. On the other hand, Rule 1.6(a) should be read to authorize the lawyer to proceed following the former government client's consent. WOLFRAM, *supra* note 13, § 8.10, at 464.

62. The great majority of jurisdictions do not allow for screening as a general matter for former clients (adverse representation) conflicts of interest. Again, the loss prevention counsel of the Attorney's Liability Assurance Society (ALAS) has tabulated the law in 51 American jurisdictions on the screening issue, MORGAN & ROTUNDA, *supra* note 33, at 138-42. As of 1993, ALAS's figures indicated that with respect to the movement of a conflict-ridden lawyer from one firm to another in private practice, "[t]he obvious lesson that emerges from the chart is that the overwhelming majority of jurisdictions (44 out of 51) *do not* recognize screening of a tainted lawyer as a cure for imputed disqualification of the entire firm," *id.* at 138 (emphasis in original). The tabulation did not separately cover federal courts. Although limited to the "migratory lawyer" situation, the ALAS study would perforce indicate that cures of the former client conflicts of the stay-at-home lawyers within the *same* firm would have even less of a chance of recognition in most states.

63. MODEL RULES Rule 1.9 Legal Background Note (Proposed Final Draft 1981) (stating that Rule 1.9 prohibits former government lawyer from attacking validity of legislative or administrative rule if the lawyer participated in the drafting while in government service).

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imply that Rule 1.11 should be understood to preempt the stricter Rule 1.9 to the extent they overlap.[64] On the other hand, and hinting very strongly in the opposite direction, the surviving text of Rule 1.9 contains a Comment stating that a lawyer who had prosecuted a person "could not properly represent the accused in a subsequent civil action against the government concerning the same transaction."[65] And the Comments to Rule 1.11 themselves hint that overlap may be the norm, with the stricter rule governing.[66] However, they do so in a way that is readily distinguishable from the situation in the problem, dealing as the Comments do with movement from private practice to government service, for which (unlike Rule 1.11(a)) no screening is provided in the text of Rule 1.11(c)(1).

Surprisingly, the cases involving former government lawyers decided since 1983 have not recognized the point. The cases all seem to assume that screening is equally available for adverse-representation conflicts with the former government employer, despite any risk of confidentiality breach due to the powerful incentives to cheat in some cases. Implicitly, the cases to date indicate that Rule 1.11(a) is the exclusive rule, anything in the Comment to Rule 1.9 to the contrary notwithstanding. In addition to ignoring the weight of textual support for a contrary result, the cases also seem wrong as a matter of policy. The permission for screening in Rule 1.11(a) is founded on the notion that its otherwise strict prohibition against both congruent and adverse conflicts would deter lawyers from entering public service for fear that their chance to pursue a private career later would be unduly circumscribed.[67] The question posed by the present discussion is

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64. Equally delphic was a former statement in the present first paragraph of the Comment to Rule 1.11 stating that Rule 1.11 "goes beyond the prohibition against representing clients with adverse interests stated in Rules 1.9 and 1.10," MODEL RULES Rule 1.11 cmt., para. [1] (Proposed Final Draft 1982). It is entirely unclear whether "going beyond" means adding additional requirements that supplement Rules 1.9 and Rule 1.10 or contrarily, supplanting those rules with special and sometimes more relaxed requirements. Perforce, elimination of the delphic language from the final text of the Comment to Rule 1.11 tells us nothing sensible.

65. MODEL RULES Rule 1.9 cmt., para. [1]. The Comment would, of course, apply equally to representing the accused in a subsequent stage of the same criminal matter in which the lawyer personally and substantially participated while in government employment.

66. The Comment to Rule 1.11 states:

> A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the *Rules of Professional Conduct*, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest.

MODEL RULES Rule 1.11 cmt., para.[2].

67. *E.g.*, MODEL RULES Rule 1.11 cmt., para. [3] ("[T]he rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to

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whether pursuit of that objective requires that screening be allowed in all possible circumstances or only in the circumstance of conflict-definition that is unique to former government service, which is a congruent-interest conflict. Imposing the normal limitations of Rule 1.9 would leave a former government client protected only to the same extent as would be a former non-governmental client such as a corporation in whose office of general counsel a lawyer in private practice formerly worked. As a matter of policy, it is unclear why lawyers might need more encouragement to work for governmental employers than for non-governmental employers. Whether courts would accept that mid-point resolution of the problem of overlap remains to be seen.

Rule 1.11(a) contains another curiosity, although it is probably either a confusing extension of terminology or a lapse in thought, rather than a violation of the integration principle. Its prohibition against subsequent private practice representations contains an exception if "the appropriate government agency consents after consultation."[68] By the terminological definitions supplied in the *Model Rules* themselves, "consultation" is "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."[69] While that definition is sensible in the case of a present client, it seems peculiar in the context in which it must operate under Rule 1.11(a). The government, which by hypothesis is not the lawyer's current client but instead his adversary, will almost certainly be represented by its own counsel in most imaginable situations covered by the Rule. The former lawyer's communication would hardly be the sort of confidential and elaborate discussion contemplated in the typical consent situation, such as when a present client's consent to a conflict is sought. Indeed, because of the clear requirements of Rule 4.2, direct contact of any kind with the former client, now represented by new counsel, is forbidden. In context, the consultation requirement here probably means little more than notice of the successive representation plus accurately and completely supplying whatever information the former government client reasonably seeks in order to make its counseled decision[70]

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prevent the disqualification rules from imposing too severe a deterrent against entering public service.") The interest stated in the Comment of protecting the ability of government agencies to attract able lawyers is almost certainly pretextual. Government agencies could, of course, protect that interest through their own programs of consent and waiver. The elimination in Rule 1.11 of the government's veto over screening, which was recognized in the ABA's earlier position in Formal Opinion 342 (1975), indicates that, in fact, the rule was designed to override the prevailing governmental resistance to softer conflict rules, *see* ABA Comm. on Ethics and Professional Responsibility Formal and Informal Opinions 110, 121 (1985).

68. MODEL RULES Rule 1.11(a).

69. MODEL RULES Terminology, para. [2].

70. Presumably, the counseled decision in the case of federal agencies would often include the advice

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whether to consent.[71]

RULE 2.2 VERSUS RULE 1.7: MEDIATION VERSUS CONFLICTED MEDDLING

Problem:[72] Lawyer is asked by three individuals—Tom, Dick, and Harry—to provide legal services to them in setting up a business corporation and guiding both the entity itself and each of them personally as the enterprise is launched and grows. Tom is a young and ambitious person of ideas whose technical knowledge and skills will be used to generate products. Tom has no assets; his contributions to the business will be solely his full time and his ideas. Dick is the vice-president for marketing of a related, but non-competing, company whose chief contribution will be providing planning and ideas about marketing and customer leads; he will also search for additional financing as needed. Dick will make only a modest contribution of time and capital of his own to the enterprise. Harry is a wealthy, semi-retired individual whose chief contribution will be most of the large infusion of cash needed for the enterprise. Harry, at least at the birth of the enterprise, contemplates a largely passive role. The three approach Lawyer together and, to all appearances, seem to be completely in agreement on their working relationship and general objectives for the corporation and its business. May lawyer represent each of the individuals and the corporation itself with respect to legal issues that might arise?

In a debate reaching back at least as far as the nomination of Louis D. Brandeis as Justice of the Supreme Court in 1916,[73] three generations of lawyers have argued over whether it should be permissible for the same lawyer to represent simultaneously two or more clients with conflicting interests in the same matter. Representative, but perhaps not exhaustive,[74] are situations such as that posed by the problem. As the problem plainly illustrates, client congeniality and cooperativeness at the outset (each of the

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that consent would be unavailing because the applicable federal conflict of interest statute (a criminal statute, at that) does not provide for agency consent to certain kinds of conflicts, 18 U.S.C. §§ 201-09 (1988).

71. WOLFRAM, *supra* note 13, § 8.10.3(6), at 476 n.63 (describing the fact that it is unclear why Rule 1.11(a) requires "consultation" rather than mere "notice").

72. Stanley A. Kaplan, *Legal Ethics Forum: Representation of Multiple Clients*, 62 A.B.A. J. 533, 648 (1976). The problem will be included in the mediation section of the conflict of interest chapter in the forthcoming book, GEOFFREY C. HAZARD, JR., ET AL., THE LAW AND ETHICS OF LAWYERING (2d ed. 1993).

73. A recent article has admirably canvassed the array of issues involved in lawyer intermediation, John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741 (1992). For a discussion of the Brandeis nomination, see *id.* at 742 n.1.

74. The problem in the text involves (a) planning and related counseling services on the part of the lawyer in (b) a transaction yet to take place. Whether Rule 2.2 is limited to that general setting or extends to more contentious or retrospective intermediation is unclear from the rule, *see infra* text accompanying notes 76, 90-93.

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three heartily likes, respects, and trusts the others) and broad agreement on general goals (quick success in the enterprise, but with stated willingness to work toward long-term growth) can mask impressive economic and similar divergences of interest. An older investor with substantial assets is very differently situated from an asset-poor entrepreneur with bold (risky) and potentially valuable new ideas and the rest of a lifetime to realize concrete gains. An established executive with customer connections that could be immediately tapped is in a strong bargaining position vis-a-vis both of the other partners. Also, each of the three will probably have very different tax planning reasons for setting up the corporation. What do the *Model Rules* say about the situation?

In fact, the *Model Rules* speak to the problem with two voices, each of different tenor and range. If one looks first at Rule 1.7, the basic rule addressed to simultaneous representation conflicts of interest, there are significant reasons to conclude that the situation suggests a present conflict of interest and that Lawyer can proceed only with the informed consent of each of the affected parties.[75] But what is one to make of Rule 2.2—the rule on the lawyer functioning as "intermediary"?[76] Was it meant, on at least some occasions, to supply a different answer from that which can be

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75. MODEL RULES Rule 1.7. Prospectively, there can be little doubt that an alert lawyer in such a situation will have flushed out the conflict issue at the very outset and decided either to represent only one of the partners (or perhaps the eventual corporation) or to represent all, but only after the appropriate consultations and consents. The difference between Rules 1.7 and 2.2 becomes critical if the lawyer is not so alert or if, for example, the joint-representation arrangement founders and a question arises whether the lawyer can continue representing fewer than all the co-clients against the now-more-sharply-etched differing interests of other former co-clients. Arguably, the two rules produce different answers, *see infra* text accompanying notes 84-85.

76. Rule 2.2 is surprisingly silent in defining what it is talking about. Nowhere in the text of the Rule is the function or role of "intermediary" defined, except that much of the text indicates that the role has much to do with functioning on behalf of more than one client, MODEL RULES Rule 2.2.

The Comment to Rule 2.2 provide meager guidance. Paragraph [1] begins with the statement that "[a] lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests." In effect, the Comments begin by treating the problem definitionally as one of conflicts.

The most explicit descriptions are found in paragraphs [3] and [5] of the Comment to Rule 2.2:

> [3] A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests.
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> . . . .
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> [5] The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible.

HeinOnline -- 6 Geo. J. Legal Ethics 881 1992-1993

extracted from Rule 1.7? If different, are we meant to find different answers in Rule 2.2 on every issue it addresses?[77] If different answers were intended, then it becomes critical to know the means by which we are to sort out Rule 1.7 situations from those governed by Rule 2.2; but do the rules provide such a means? Take the problem situation, or variations on it: Under which rule should they be decided?

Suppose, to the contrary, that the searching lawyer first encounters Rule 2.2 but quails (as well one might) at the thought of undertaking the apparently more difficult and confining role portrayed in Rule 2.2. Is there, then, no help that a lawyer can lend to the potential co-clients? Could the lawyer, perhaps, avoid those apparent strictures by simply treating the situation as one in which (1) the lawyer will provide routine (non-"intermediation"?) legal services under Rule 2.2 or (2) informed client consent to conflicts of interest as assessed only under Rule 1.7 and not under Rule 2.2? Although such a self-selection switch between the rules is intuitively unappealing,[78] the reporter for the *Model Rules* suggests just such an ap-

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77. Without elaborating all of the possible differences, Rule 2.2 seems to speak with at least greater clarity and precision about such matters as the following: A) The nature of the lawyer's required consultation with each client, MODEL RULES Rule 2.2(a)(1); B) The specific need for consultation concerning the effect of co-client representation upon the attorney-client privilege, *id.*; MODEL RULES Rule 2.2 cmt., para. [6], [7]; C) The definition of what under Rule 1.7 is referred to as the consentability of the conflict of interest, in terms of the lawyer's reasonable belief that resolution of the matter can be reached on terms compatible with the "clients' best interests" and with "little risk of material prejudice to the interest of any of the clients" if intermediation fails, MODEL RULES Rule 2.2(a)(2); D) The statement of required mid-stream consultation with the clients about decisions they need to make and considerations relevant in making them, MODEL RULES Rule 2.2(a)(3); E) The statement of a rule of mandatory withdrawal from the representation of all of the co-clients at the contemplated or premature termination of the intermediation, MODEL RULES Rule 2.2(c).

On the other hand, correlative—if more general—rules on each of the above points can be found in other parts of the *Model Rules*: MODEL RULES Rule 1.4 (providing for consultation generally, including Rule 1.4(b) on mandatory mid-stream consultation); MODEL RULES Rule 1.7(a)(1) and (b)(1) (stating a standard of "reasonable belief" of lawyer as occasion when lawyer can seek consent to conflict); and MODEL RULES Rule 1.7 cmt., para. [5] (articulating a "disinterested lawyer" test, apparently for determining reasonableness of seeking consent under "reasonable belief" rubric). The one respect in which Rule 2.2 states a rule without a stated equivalent in Rule 1.7 (or Rule 1.16 on withdrawal) is its provision for mandatory withdrawal in cases of failed mediation, *but see* MODEL RULES Rule 1.7 cmt., para. [2] ("Where more than one client is involved and the lawyer withdraws because a conflict arises after representation [begins], whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. *See also* Rule 2.2(c)."). Suffice it to say for present purposes that not all failed joint representations under Rule 1.7 have been found to require complete withdrawal, *see generally* WOLFRAM, *supra* note 13, § 7.1.7, at 330-31; *id.* § 7.2.4, at 348-49, 358. *See also infra* text accompanying notes 84-85.

78. This approach is inconsistent with the Comment to Rule 2.2. There is no indication in Rule 2.2 that it applies only on election by the lawyer. Indeed, the first two paragraphs of the Comment indicate rather clearly that Rule 2.2 will apply even if the lawyer and clients involved are unclear about what they are doing, MODEL RULES Rule 2.2 cmt., para. [1], [2]. The concept of intermediation can apply implicitly, based only on the fact of co-representation. In other words, Rule 2.2 applies as a default rule, rather than as one that can be invoked or denied application by force of unilateral pre-selection by

HeinOnline -- 6 Geo. J. Legal Ethics 882 1992-1993

proach.[79] Yet, even if a lawyer theoretically could play dial-a-rule with professional requirements, one must still determine whether there is really a difference between the rules. Does Rule 1.7 indeed require less of Lawyer in our problem than would be required if Lawyer proceeded under Rule 2.2?[80]

Again, there is little internal evidence in the *Model Rules* to aid in determining whether the rules in question have a hierarchical order—and, if so, which rule prevails—or, instead, whether they are intended to operate only in a complementary fashion. There is absolutely no textual guidance on that precise point in Rule 2.2 or its Comment. If one carefully tracks through each of the stated requirements and permissions in Rule 2.2 and its Comment, it will be seen that each is entirely consistent with, and thus can readily be regarded as complementary to, the requirements and permissions of other rules, primarily Rule 1.7.[81]

The only significantly debatable possibility of dissonance is the requirement in Rule 2.2(c), which states that if the lawyer is required to withdraw from the joint representation, "[u]pon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation."[82] No such explicit rule can be found clearly stated in any of the basic conflict rules.[83] But, is this rule any different than the

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the lawyer, MODEL RULES Rule 2.2.

79. HAZARD & HODES, *supra* note 13, at § 2.2:103 (stating that intermediation rules "sound so many warnings and urge so much caution as to reveal a distinctly grudging attitude towards mediation as such. The rules are so confining that prudent lawyers often will not undertake this role, but will treat the representation as one involving a 'consented conflict' under Rule 1.7(b) instead."). Note that the authors imply that Rule 2.2 is stricter in application than other rules.

80. Stephen Ellmann, *Client Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1114 n.30 (1992) (discussing HAZARD & HODES, *supra* note 13, at § 2.2:103) states: "That lawyers prefer to act under Model Rule 1.7(b) is ironic, for although this Rule's provisions for dealing with 'consented conflicts' are much more laconic than Rule 2.2's, the more elaborately stated safeguards of Rule 2.2 might all be seen as implicit in Rule 1.7(b) as well." I agree with Professor Ellmann's reading of Rule 2.2.

81. Other rules, such as Rule 1.4 on dividing decision-making responsibility between lawyer and client, are also implicated by Rule 2.2, MODEL RULES Rule 2.2 cmt., para. [6], [9]. Moreover, Rule 2.2 implicates the confidentiality requirements of Rule 1.6, *id.* cmt., para. [6]. Furthermore, the client's right to loyalty and diligent representation are invoked by Rule 2.2, *id.* cmt., para. [10] ("Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.").

82. MODEL RULES Rule 2.2(c).

83. Again, the way in which the second sentence was added to Rule 2.2(c) is tantalizing, but in the end uninformative. The language was not in the proposal brought to the ABA in 1983 by the Kutak Commission, but was added by an amendment proposed by the New York State Bar Association and not opposed by the Commission, ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 111-12 (1987). The Commission's proposal would have had the last sentence read, "Upon withdrawal, the lawyer shall not continue to represent any of the clients *unless doing so is clearly compatible with the lawyer's responsibilities to the other*

HeinOnline -- 6 Geo. J. Legal Ethics 883 1992-1993

rule that would apply under Rule 1.9 (with respect to former clients) and Rule 1.7 (concurrent representation conflicts) following lawyer withdrawal from a joint representation? The decisions[84] and commentators[85] are divided, although the great weight of authority requires withdrawal. Those decisions are sound. Moreover, they find some textual support in the *Model Rules* themselves. On the ground of confidentiality alone, a lawyer who had formerly represented a present adversary in the same matter would be uniquely situated to gain all sorts of insights and information that the remaining client would either not know or be unable to appreciate or communicate effectively to new counsel. On the ground of loyalty, permitting the common lawyer to continue with less than all co-clients once adversity arises puts the lawyer in a position to "tip" the representation in favor of the client who survives to be represented by the lawyer, including in ways that would be undetectable either by the former co-client while the representation continued or by new counsel and the tribunal in an after-the-fact attempt to reconstruct what might have occurred otherwise. Thus, the preferred and majority position under Rules 1.7 and 1.9 agrees with the requirement of Rule 2.2(c) that the lawyer-intermediator must withdraw

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client or clients," *id.* (emphasis added). The italicized words were removed by the New York Amendment and replaced by the words "in the matter that was the subject of the intermediation" that appear in the final version. It is not at all clear whether the change was thought to amount to a change in substance, *see id.*

84. WOLFRAM, *supra* note 13, § 7.4 at 373-74. Typical of the decisions permitting the common lawyer to continue to represent one co-client adverse to the interests of one or more former co-clients in the same or a substantially related matter are older opinions from California, *e.g.*, Petty v. Super. Ct., 253 P.2d 28, 33-34 (Cal. Ct. App. 1953); Croce v. Super. Ct., 68 P.2d 369 (Cal. App. 1937). *But see* Goldstein v. Lees, 120 Cal. Rptr. 253, 255 (Cal. Ct. App. 1975). Among the cases in other jurisdictions agreeing with *Goldstein* and prohibiting the later adverse representation in the absence of consent see, for example, United States v. Moscony, 927 F.2d 742, 750 (3d Cir. 1991) (holding that lawyer who represented both employer and employees early in investigation and took statements from employees was properly disqualified from continuing to represent employer at trial after employees had discharged lawyer and agreed to testify at trial against employer, where employees otherwise could have been cross examined based on information that lawyer gained during their representation), *cert. denied*, 111 S. Ct. 2812 (1991); Brennan's Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 171-72 (5th Cir. 1979); Cord v. Smith, 338 F.2d 516 (9th Cir. 1964), *opinion clarified*, 370 F.2d 418 (9th Cir. 1966); E.F. Hutton & Co. v. Brown, 305 F. Supp. 371 (S.D. Tex. 1969); *In re* Evans, 556 P.2d 792, 795-97 (Ariz. 1976).

85. *Compare* WOLFRAM, *supra* note 13, § 7.4 at 373-74 (taking position urged in text) *with* HAZARD & HODES, *supra* note 13, § 1.6:116, at 156.6-157 (1992 Supp.) (suggesting that absence of confidentiality among co-clients during course of relationship removes confidentiality protection, although reference intended is perhaps to confidentiality during course of ongoing relationship). Surprisingly, commentators Hazard and Hodes cite *Brennan's*, 590 F.2d at 171-72, in support of the proposition that there is no expectation of confidentiality in a co-client representation. But *Brennan's* is the leading case requiring disqualification of the lawyer who formerly co-represents the co-clients. Perhaps the reference intended is to the portion of the *Brennan's* opinion that refused to disqualify another lawyer who had associated with the disqualified lawyer to assist him in the later, conflicting representation, Brennan's, 590 F.2d at 173-74. But that lawyer, of course, never co-represented the clients and the court's treatment of him, to say the least, is irrelevant to the present issue.

HeinOnline -- 6 Geo. J. Legal Ethics 884 1992-1993

from representing any of the former co-clients when their interests significantly diverge from those of one or more other co-clients. That position is supported by a Comment to Rule 1.7, which specifically refers to Rule 2.2(c) (together with Rule 1.9) for direction on the question "whether the lawyer may continue to represent any of the clients . . . [w]here more than one client is involved and the lawyer withdraws because a conflict arises after representation" begins.[86]

In summary, as a matter of preferred interpretation, there is nothing in the language, structure, or apparent policy bases of Rule 2.2 or any of the other rules in question to suggest primacy of any of those rules. That strongly suggests that the rules should be regarded as complementary. Complementary treatment would not render Rule 2.2 useless; instead it would provide useful guidance on a particular *kind* of concurrent representation problem area, intermediation, that otherwise is only very generally and implicitly covered by Rule 1.7. Particularly given the breadth of definition of intermediation implied in the Comments to Rule 2.2 (covering arguably all areas of negotiations and transactions and many areas of nonlitigation dispute resolution),[87] complementary treatment might indeed be necessary to save Rule 1.7[88] from becoming, de facto, merely a rule about conflicts in litigation.[89]

In fact, Rule 2.2—despite its potential breadth of application—has been of surprisingly little influence in the decisions. That is perhaps as it should be because, if pushed very far, it is now apparent that the concept of intermediation could have made a near hopeless muddle of concurrent representation conflicts of interest. There is some indication that some of those

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86. MODEL RULES Rule 1.7 cmt., para. [2].

87. Supporting the notion that Rules 2.2 and 1.7 are coterminous is the first sentence of the Comment to Rule 2.2. It states: "A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests," MODEL RULES Rule 2.2 cmt., para [1]. Supporting the notion that "intermediation" is, in some way, not necessarily one that a lawyer or a lawyer and clients elect into is the next sentence: "A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyers' role where each party is not separately represented, it is important that the lawyer make clear the relationship," *id.* cmt., para. [2].

A further comment describes broadly, but only as an example, various transactional settings in which mediation may be desirable, *id.* cmt., para. [3]. The comment goes on to describe the lawyer's role in the following obscure way: "The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests, *id.*; *see also supra* note 76.

88. Some such salvation for Rule 1.7 might otherwise be necessary in view of the *ejusdem generis* rule of construction, under which a regulation that deals specifically with a situation controls over one that is more general.

89. The statement in the text is based on the fact that the word "mediation" and much of the Comment to Rule 2.2 seems to contemplate transactional settings. On the other hand, nothing in the text of the rule or its Comment states that it would be inapplicable to a lawyer who represented coparties in litigation. Thus, there may be no escape from the conclusion that Rule 2.2 is precisely coterminous with Rule 1.7.

sponsoring the rule might have thought of it as the way to resuscitate Justice Brandeis's conception of the "lawyer for the situation"—a kind of freelance advisor who would function more as a diplomat than as a legal consultant.[90] But, as now written, Rule 2.2 is hedged with several cautionary and discouraging requirements that seem hostile to such a free-form conception. Alternatively, and as suggested by its placement in the brief "Counselor" series of three rules,[91] Rule 2.2 could be viewed as simply an embellishment, perhaps an over-embellishment, of the point that the other "function" rules somewhat more confidently accomplish, that of providing specific and discrete regulation for a particular lawyer function. However, the role described for intermediation in the Comments to Rule 2.2 is so broad and diffuse that it is not clear what role the lawyer is to perform or, indeed, whether the role in some of its manifestations is even a distinctly "lawyer" function at all.[92] In fact, a reading of Rule 2.2 indicates that mediation is not so much an entirely separate lawyerly role as it is the performance of one of several roles—advising, drafting, counseling—under a potential conflict of interests.[93]

RULE 1.7(A) VERSUS RULE 1.7(B)

One of the strangest and potentially most troubling sources of integration-related confusion in the *Model Rules* has in fact not given rise to significant difficulty in the reported decisions, although lawyers on occasion have wrestled energetically with the issue in their offices. The particular problem inheres in the undefined interrelationship between the two definitions of concurrent interest conflicts in Rule 1.7(a) and Rule 1.7(b).[94] The elements of the two types of conflicts listed in the rule can be briefly de-

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90. Professor Hazard, the drafter of the *Model Rules* was, at least at one time, rather enthusiastic about the concept of the "lawyer for the situation," GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 80 (1978) ("[H]aving a 'lawyer for the situation' is usually cheaper, quicker, and less acrimonious than defining the problem in such a way that each party has to have separate counsel."). *See generally* Dzienkowski, *supra* note 73, at 744 n.11.

91. MODEL RULES Rule 2.1 (referring to "advisor"); MODEL RULES Rule 2.2 (referring to "intermediary"); MODEL RULES Rule 2.3 (referring to "evaluation"—which turns out to consist primarily of opinion-letter writing).

92. Among its other shortcomings, the choice of the term "intermediary" in Rule 2.2 to describe the broad function of the lawyer was hardly inspired. A well-established, and comparatively at least, much more well understood function of a lawyer is to serve as a formal mediator. The Comment to Rule 2.2 states that the rule does not apply to a lawyer who is functioning "as arbitrator or *mediator* between or among parties who are not clients of the lawyer," MODEL RULES Rule 2.2 cmt., para [2] (emphasis added). The obvious implication is that a lawyer *would* be serving as a "mediator" if all participants, or some of them, were clients. Yet, the term "intermediary" seems to connote more, without giving any indication of what. To know that some intermediaries are mediators while some are not is only to be confused at both the linguistic and conceptual levels.

93. WOLFRAM, *supra* note 13, § 13.6, at 728.

94. Rules 1.7(a) and (b) state:

HeinOnline -- 6 Geo. J. Legal Ethics 886 1992-1993

scribed.[95] Rule 1.7(a) takes the perspective of an additional representation—as of a new client when the lawyer already represents another client in the matter—and considers the impact of the new representation upon *the lawyer's relationship* with the other client. If that relationship would be adversely affected by the additional representation, then a conflict exists. Rule 1.7(b) takes a different perspective—that of the additional client—and considers whether *the lawyer's representation* of the additional client would be materially limited by the lawyer's other responsibilities or interests.

Elaboration of the operation of the two rules is not the present point. Instead, I pose only the simple question—which, quite surprisingly, nothing in the Rule 1.7 directly answers—whether the two are meant to sustain a conjunctive or a disjunctive relationship. For example, if a lawyer conscientiously applies Rule 1.7(a) to an arguable conflict and concludes accurately that no conflict exists, must the lawyer also perform a conflict analysis under Rule 1.7(b)? Unlike many of the other integration problems canvassed here, the Comments to Rule 1.7 provide fairly clear direction that the two parts of the rule are to be applied cumulatively or conjunctively.[96] In short, a lawyer must comply with both subparts of the rule.

The same two rules are also at odds on an explicit textual point. Rule 1.7(a) provides that an adverse relationship conflict can be cured only with

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> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
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> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES Rule 1.7(a), (b).

95. *See generally* WOLFRAM, *supra* note 13, § 7.3.1, at 350. On the details of the operation of the concurrent-conflicts rules, see generally ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 109-23 (2d ed. 1992); HAZARD & HODES, *supra* note 13, at §§ 1.7:104-108, 1.7:200, 1.7:300. In WOLFRAM, *supra* note 13, the general types of concurrent-representation conflicts are considered at 350-58. The specifics of 13 specialized areas of conflict are considered at chapter eight.

96. MODEL RULES Rule 1.7 cmt., para. [4] ("Loyalty to a client is *also* [presumably in addition to the kind of loyalty impairment involved in Rule 1.7(a)] impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations." (emphasis added)).

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informed consent of "each client."[97] Inexplicably, however, Rule 1.7(b) requires in the case of an adverse representation conflict only that "the client"[98] consent after consultation. Again, courts and most lawyers have sensibly understood the requirement of client consent in Rule 1.7(b) as if it read "client or clients."[99]

CORPORATE LAWYERS AND CONFIDENTIALITY

A relatively easy case for integration, which does not require extended treatment, is that between Rule 1.13 and other rules governing lawyers who advise non-organizational clients. The point deserves mention only because a notoriously unsympathetic reader of the *Rules*, Professor Monroe H. Freedman, has reported his discovery that Rule 1.13, regulating lawyers representing organizational clients, is considerably more lax than several rules regulating lawyers who represent non-organizational clients.[100] To the extent it is more lax (and it may be, if read with a jaundiced eye and in isolation), Rule 1.13 does no harm because its Comment makes it entirely clear that the rule is to be read as complementary to the other rules.[101]

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97. MODEL RULES Rule 1.7(a).

98. MODEL RULES Rule 1.7(b). At that, it is not clear from Rule 1.7(b) which client of the two needs to consent. From the text of the rule, it appears that the client referred to is the additional client whose representation the lawyer is contemplating, *see supra* note 94. Of course, an alert lawyer who considers Rule 1.7(b) before undertaking to represent any client (in a proposed multiple-client representation) will have no way of knowing which client (if not all of them) must provide consent.

99. Reference to "the client" in the singular probably was meant to reflect the fact that in some Rule 1.7(b) conflicts there will be only one client involved—as where the lawyer's conflict is produced by the lawyer's self-interest. Reference to "the clients" might have obscured that point. But reference to "the client or clients" readily overcomes any interpretative problem.

100. Professor Freedman's position was most recently ventilated in an article carried in the *American Lawyer* string of legal newspapers, in which he attacked the assertedly pro-corporate position of the ABA, Monroe H. Freedman, *Corporate Bar Protects Its Own*, LEGAL TIMES, June 15, 1992, at 20. On his assertion that Rule 1.13 constitutes a safe harbor for corporations and their lawyers, see the reply of Robert E. O'Malley, *Wrongdoing Corporate Clients Enjoy No Preference in Legal-Ethics Code*, LEGAL TIMES, July 13, 1992, at 22. In fact, Professor Freedman was recycling a position he had taken earlier, but which had not at first gained a response, MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 201-05 (1990) [hereinafter UNDERSTANDING LAWYERS ETHICS] ("Special Protection for Corporate Clients and Their Lawyers Under MR 1.13"). Professor Freedman's discovery of a safe harbor in the text of Rule 1.13 results from an extraordinarily forced reading of it, *see infra* note 101.

At least one other observer of the *Model Rules* has apparently agreed with Professor Freedman, L. Ray Patterson, *An Inquiry into the Nature of Legal Ethics: The Relevance and Role of the Client*, 1 GEO. J. LEGAL ETHICS 43, 79 (1987) (stating that Rule 1.13 "permits the lawyer to make intra-corporate revelation of wrongdoing on the part of corporate officials, but precludes extra-corporate revelation absolutely, *thus providing special protection to corporate officials who engage in wrongdoing.*" (emphasis in original)).

101. The Comment to Rule 1.13 states:

> [6] The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibilities under Rules 1.6, 1.8, and 1.16, 3.3 or 4.1. If the lawyer's

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The most substantial problem of integration relates to the subparts of Rule 1.13 itself. Rule 1.13(a) begins with the universally embraced "entity" concept of corporate representation: a lawyer for a corporation or similar entity represents the entity and not any "constituent" of the organization.[102] But this concept seems to have been forgotten when drafting one portion of Rule 1.13(b). In general, Rule 1.13(b) does consistently require that a lawyer proceed "as is reasonably necessary in the best interest of the organization" when the lawyer "knows" that an officer or other constituent of the organization contemplates activity that violates the law and is likely to result in substantial injury to the organization.[103]

But in describing what action a lawyer might consider taking to arrest illegality by the constituents of organizational clients, Rule 1.13 goes on to warn the lawyer that "[a]ny measures taken shall be designed to minimize . . . the risk of revealing information relating to the representation to persons outside the organization."[104] In some (perhaps many) instances, how-

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services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

MODEL RULES Rule 1.13 cmt., para. [6]. While the Comment is limited to Rule 1.13(b), it seems equally applicable to other subparts of the rule, most obviously to Rule 1.11(c).

Professor Freedman attempts to dispose of the language of the Comment, which is obviously fatal to his thesis, by arguing that the Comment is invalid because it is in conflict with the text of Rule 1.13 itself, UNDERSTANDING LAWYERS' ETHICS, *supra* note 100, at 204. If, instead, one reads the Comment as explanatory of Rule 1.13 and reads the Rule as thus explained, both Professor Freedman's extravagant reading of Rule 1.13 and his vitiating reading of the Comment are negated.

102. MODEL RULES Rule 1.13(a).

103. MODEL RULES Rule 1.13(b). Rule 1.13(b) also fits only clumsily with Rule 1.1, which requires that a lawyer provide "competent" representation to a client, MODEL RULES Rule 1.1. Rule 1.13(b)'s requirement that the lawyer "know" of a constituent's threat to the organizational client might be read to suggest that a lawyer who recklessly avoids knowledge of such a threat is subject to no threat of discipline. Here again, Rules 1.13(b) and 1.1 should be read as complementary to each other so that the lawyer in question would be subject to discipline under Rule 1.1.

104. MODEL RULES Rule 1.13(b). An earlier Kutak proposal would have permitted the lawyer to take further remedial action "including disclosure of client confidences to the extent necessary," MODEL RULES Rule 1.13(c) (Discussion Draft Jan. 30, 1980). The permission was modified but, nonetheless, survived intact (albeit altered and watered down) in the next several drafts, *id.* (Working Draft Nov. 22, 1980); MODEL RULES Rule 1.13 (Proposed Final Draft May 30, 1981). That was the version presented to the ABA House of Delegates in February 1983, ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 88-89 (1987). On the floor of the House, however, an amendment offered by the American College of Trial Lawyers was adopted, replacing the Kutak Commission language with the language that now appears in Rule 1.13(c). On the ABA politicking, see Schneyer, *supra* note 5, at 720-21. On the amendment process, see Stephen Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure*, 1 GEO. J. LEGAL ETHICS 289, 291-94 (1987). Professor Gillers did not indicate whether he concluded that Rule 1.13 trumped other provisions of the *Model Rules*, although the tenor of his article suggests that conclusion.

Elimination of the earlier language and the insertion of the apparently more restrictive language quoted in the text either supports Professor Freedman's thesis that Rule 1.13 is a corporate safe harbor, or points up the necessity of reading vague language in Rule 1.13, such as the referenced language in

HeinOnline -- 6 Geo. J. Legal Ethics 889 1992-1993

ever, minimizing public disclosure would clearly be dysfunctional to the representation and accordingly inappropriate. Suppose, for example, that Lawyer represents a publicly held Corporation and discovers that President is raiding its treasury, blatantly stealing funds of Corporation. When confronted by Lawyer, President tells Lawyer to get back to her desk and mind her own business. President also tells Lawyer that he is about to wire the stolen funds out of the country, making future efforts to recover them extremely difficult, if not impossible. Lawyer realizes that the most efficient and quickest method of stopping President's scheme is to notify the FBI, several banks, and federal banking regulators. Lawyer does so, the theft is detected, the funds recovered, President is sent to prison, and Corporation survives the threat through Lawyer's vigilance. Why, if Corporation is the client, does Rule 1.13(b) seem to assume that divulgence of information relating to Lawyer's representation of Corporation to persons outside the organization is a "risk" that the corporation's lawyer should "minimize?" Even if the national media carry the story of President's depredations, Lawyer well might have acted for the clear benefit of Corporation.

The reason why Lawyer has acted properly has to do with what a lawyer legitimately may do to aid a client, such as a corporation. With respect to all kinds of representations, even the otherwise ironclad Rule 1.6(a), on the confidentiality of information relating to representation of a client, states the explicit exception for "disclosures that are impliedly authorized in order to carry out the representation."[105] Even if the formal terms of Lawyer's retention did not specify stopping thefts by chief executive officers, it seems evident that Lawyer acted within the letter and spirit of both Rule 1.6 and Rule 1.13(a) by disclosing President's plot.[106] Clearly, Lawyer acted competently as required by Rule 1.1.[107] Lawyer did act contrary to the interests of President, who was clearly harmed by the disclosure. But Corporation, not President, was Lawyer's client.

Within the structure of the confidentiality and entity representation rules, the troublesome "risk" language of Rule 1.13(b) should be read as if

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Rule 1.13(b), in light of other provisions of the *Model Rules* specifically directed toward disclosure, UNDERSTANDING LAWYERS' ETHICS, *supra* note 100, at 201-05. As will be seen, Rule 1.6(a) does permit a lawyer to make disclosure when impliedly authorized to carry out the representation of the entity client, *see infra* text accompanying note 106.

105. MODEL RULES Rule 1.6(a).

106. Federal Deposit Ins. Corp. v. O'Melveny & Myers, 969 F.2d 744 (9th Cir. 1992) (recognizing duty of lawyer to protect corporate client from harm threatened by fraud of insiders). The Comment to Rule 1.13 recognizes the general point made in the text, but only partially and generally, MODEL RULES Rule 1.13 cmt., para. [3] (stating that in view of fact that constituents of corporation are not clients of corporation's lawyer, "[t]he lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.").

107. MODEL RULES Rule 1.1.

HeinOnline -- 6 Geo. J. Legal Ethics 890 1992-1993

it fully recognized the entity representation principle of Rule 1.13(a) itself. In other words, that language should be understood as limited to situations in which disclosure outside the corporation would *not* serve to carry out the representation. That the lawyer's disclosure will concern an important constituent of the corporate client, perhaps harming the interests of that person very materially, is not determinative—and indeed may be the entire and proper point of making disclosure. In addition, disclosure is authorized notwithstanding that a constituent normally authorized to direct and limit the scope of the lawyer's representation has directed the lawyer not to make effective public disclosure. When it is evident to the lawyer that the constituent issues the direction as part of a scheme to harm the corporation in violation of the law, the lawyer is not bound by the limitation and is free to act accordingly. If, for example, President learns that Lawyer is aware of his intended theft and specifically directs Lawyer not to tell anyone about it, Lawyer remains free, in the highly unusual circumstances here, to ignore the directive and take effective steps, including public disclosure, to carry out the representation of the lawyer's corporate client.

CONSENT-PLUS OR CONSENT-ONLY RULES FOR CONFLICTS

> *Problem*: Lawyer formerly represented Inventor in obtaining a patent after a long and costly patent-interference proceeding in the Patent and Trademark Office. Lawyer's Firm is now approached by Corporation, which seeks Firm's help in attacking the validity of Inventor's patent. Wisely or not, Inventor is prepared to consent. May Firm represent Corporation? May Lawyer do so?

The issue of integration here results from the failure of the *Model Rules* to speak coherently on the subject of consent to conflicts of interest. The problem portrays a situation in which the former client's consent to the subsequent, adverse representation, which otherwise is plainly prohibited by Rule 1.9 on former client conflicts, is rather patently unwise. One may well wonder whether, whatever the words used, Lawyer has insufficiently conveyed what Lawyer or Firm intend to do or the risk that their representation of Corporation poses to Inventor's patent interest, achieved at great cost to Inventor and now, perhaps, to be entirely set aside. If Corporation had asked Lawyer to represent it in attacking Inventor's patent application at the same time that Lawyer attempted to represent Inventor in obtaining the patent, Rule 1.7, sensibly enough, would preclude Lawyer from seeking Inventor's consent to such a horrendously conflicted set of representations. Even with a theoretically complete consultation, and assuming all that one must about Inventor's mental and emotional capacity to consent, Rule 1.7,

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nonetheless, imposes a non-consentable conflict requirement.[108] Consent alone is not enough; the conflicting representation must pass muster under some sort of standard of reasonability.

But that does not necessarily preclude Lawyer from representing Corporation on the facts of the problem. Importantly, Rule 1.7 does not apply, because the problem involves a former client conflict, which is determined under Rule 1.9. Moreover, and vital for our purposes, Rule 1.9(a), by recognizing that client consent cures former client conflict purposes, does not impose an additional requirement of reasonability.[109] Lawyer then may apparently represent Corporation in attacking the very patent that Inventor had retained Lawyer to obtain.

Suppose, sensibly enough, that Lawyer felt that, whatever Inventor was prepared to do, Lawyer would feel foolish representing Corporation. Moved that far by instincts of decency, Lawyer is nonetheless prepared to countenance having Firm represent Corporation so long as Lawyer has nothing to do with the representation (screening) and so long as Inventor consents. Again, Inventor, boundlessly accommodating, consents after consultation. Can Firm provide representation?

Incongruously, the literal answer of the *Model Rules* appears to be negative. Rule 1.10(c), attempting to deal with all forms of imputed disqualification imposed by Rule 1.10,[110] converges all under one consent rule: "[a] disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7."[111] The latter rule, it will be recalled,[112] is a consent-plus rule.

The collection of consent rules of general application has it half right and half quite wrong. The difference between Rule 1.7 (with its consent-plus rule) and Rule 1.9 (requiring consent-only) is not itself incoherent. It makes sense to say that a reasonable person standard controls whether a client effectively consents to a concurrent-representation conflict (Rule 1.7), while allowing lawyers to remove the barrier of former-client conflicts with a consent-only rule (Rule 1.9(a)). In the former case, by hypothesis,

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108. Rule 1.7 in fact contains two non-consentability rules, each differently worded to match the two types of concurrent-representation conflicts covered by the rule. Rule 1.7(a)(1) requires that the lawyer "reasonably believe[] the representation will not adversely affect the [lawyer's] relationship with the other client;" Rule 1.7(b)(1) requires that the lawyer "reasonably believe[] the representation will not be adversely affected" by the lawyers other responsibilities or interests, MODEL RULES Rule 1.7; *see generally* WOLFRAM, *supra* note 13, §§ 7.2.2-7.2.3 (discussing consentable conflicts).

109. MODEL RULES Rule 1.9(a) (describing exception to former-client conflict prohibition in which, for instance, "the former client consents after consultation").

110. Rule 1.10, of course, applies its imputed-disqualification rule to former-client conflicts: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule [1.9]. . . ," MODEL RULES Rule 1.10(a).

111. MODEL RULES Rule 1.10(c).

112. *See supra* text accompanying note 99.

HeinOnline -- 6 Geo. J. Legal Ethics 892 1992-1993

the client will be, more or less, under the influence of the relationship that subsists at the time the client decides whether or not to consent. But in the former-client context, again by hypothesis, the client is no longer beholden to the lawyer for ongoing legal services.

What *is* incoherent is treating consent to representation by the personally tainted lawyer under the consent-only rule (Rule 1.9(a)) while treating consent of the tainted lawyer's firm under the consent-plus rule (Rule 1.10(c)), which the *Model Rules* seems to require. If anything, representation by the conflicted lawyer's firm is more reasonable, and thus should normally be regarded as more consentable, than consent to the conflicted lawyer's own representation of an adversary. Here again, the good sense of tribunals applying the *Model Rules* should save clients, and the legal profession, from what must have been unintended restriction. The "plus" part of a consent-plus rule seems not to have been applied in any decision interpreting Rule 1.10(c) with respect to a former client conflict.[113] Rising above the mere literal language of Rule 1.10(c), courts have instinctively perceived the nonsensical result that the words alone would seem to impose.

CLIENT CONSENT

Under the *Model Rules*, as under the 1969 *Model Code*, client consent can cure many of what would otherwise be obstacles to lawyer representation or other activities (such as business dealings with a client[114]). Consent comes in a variety of forms in the *Model Rules*. Some variations require only consent, although consent is always linked in the *Model Rules* with the concept of adequacy of "consultation"—the *Model Rules*' somewhat clumsy replacement for the traditional concept of "informed" consent.[115] Some variations of consent require "consent-plus" or, as I will call it here,

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113. A review of the cases annotated in the recently updated *Annotated Model Code* and the ABA/BNA *Lawyers' Manual* reveals no case imposing a "consent-plus" requirement in Rule 1.10(c) imputed-disqualification situations. ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 189-90 (2d ed. 1992) [hereinafter ANN. MODEL RULES]; Laws. Man. on Prof. Conduct (ABA/BNA) 51:2001-2017 (1993). Also, a search on Westlaw for decisions discussing the point and referring to either the original 1983 text in Rule 10(d) or the amended 1987 text in Rule 10(c) indicated that the research of these publications was sound. On the other hand, no case that I have unearthed has forthrightly held that "consent plus" is *not* required under Rule 1.10(c), and the matter thus remains somewhat in doubt.

114. MODEL RULES Rule 1.8(a)(3) (stating that a lawyer may enter into fair and reasonable business transaction with client if client is given reasonable opportunity to consult independent adviser and "the client consents in writing").

115. The point of the *Model Rules*' departure from traditional vocabulary was the wish to capture the idea that the client's necessary level of information could come from persons or sources other than the lawyer in question. But "consultation" makes the point, if it makes it at all, even more obscurely than the traditional vocabulary of "informed consent."

HeinOnline -- 6 Geo. J. Legal Ethics 893 1992-1993

two-factor consent: (1) active client expression of agreement to the lawyer's course of action after consultation, plus (2) a disinterested assessment of the reasonableness of the lawyer proceeding even given the client's informed agreement.[116] More subtly, it is also now becoming apparent that certain "sophisticated" clients can give consent with much less lawyer effort at informing and in much more dubious circumstances (at least as far as independently assessing the reasonableness of proceeding).[117]

One might imagine a complaint, then, that "consent" as employed in the *Model Rules* lacks the necessary coherence required by the integration principle. With such a criticism, however, I would not agree. That would be to insist that "consent" mean the same thing every time it is employed in the *Model Rules*. It does not mean that and should not be forced to do so. Words can only be asked to do so much. The situations in which a client may consent are much too varied, situationally complicated, and riven with too many different regulatory objectives to warrant insisting that "consent" mean the same thing in each instance. Yet, it would hardly do to resort to some sort of elegant variation on the word in order to mark in each instance that lawyers and others who read the *Model Rules* should use care to place each word into the context of its meaning as reflected in the evident meaning of other words surrounding it. On the whole, courts seem to appreciate this point full well, and a rich and, on the whole, quite sound body of law is developing on the meaning of consent in the several contexts in which it is used in the *Model Rules*.

Instead, my complaint concerning integrity with respect to client consent has to do with specific instances in which client consent either is or is not permitted by the *Model Rules*, as well as specific instances in which two-factor consent (agreement plus reasonableness) either is or is not required in addition to client agreement. I will pursue several of these discrete problems in turn.

RULE 3.7: CLIENT CONSENT AND THE ADVOCATE WITNESS

Problem: Lawyer accompanied Client when Client turned herself in to the police as a suspect in an attempted murder investigation. The police, and

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116. Regarding active client agreement following an appropriate consultation see, for example, ANN. MODEL RULES, *supra* note 113, at 124, 125-27; HAZARD & HODES, *supra* note 13, § 1.7:305, at 250.3-250.4; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 202 cmt. g(ii) (Tentative Draft No.4 1991); WOLFRAM, *supra* note 13, § 7.2.4 at 343-48. Regarding the requirement of objectionable reasonableness see, for example, ANN. MODEL RULES, *supra* note 113, at 124-25; HAZARD & HODES, supra note 13, § 1.7:206; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 202 cmt. g; WOLFRAM, *supra* note 13, § 7.2.2-2.3, at 339-43.

117. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 202 (Tentative Draft No. 4 1991).

HeinOnline -- 6 Geo. J. Legal Ethics 894 1992-1993

> Lawyer, escorted Client to a hospital room where Victim, under circumstances that will be hotly disputed in the future, eventually made an identification of Client as the perpetrator. Lawyer will be a necessary witness in Client's subsequent trial for attempted murder because Lawyer (alone) made detailed notes of the interview and has a detailed personal memory of the event.[118] Because of his role as future witness, Lawyer may not represent Client.[119] May *other* lawyers in Lawyer's firm defend Client? Is Client's consent to same-firm representation required in all of the imaginable variations on the problem, or only in some?

Perhaps one of the least understood requirements of the *Model Rules* is found in the distinction sought to be drawn in Rule 3.7(b) between instances in which other lawyers in a firm may represent a client despite the fact that a firm lawyer is a necessary witness in a case and those instances in which such same-firm representation is not permissible. The problem here is not so much one of non-integration as one of probably unwise reliance upon sheer cross-reference instead of attempting in a more explicit formulation the rule that the rule framers had in mind. Beyond that, however, lurks an imbedded problem of non-integration. Revealing the imbedded integration problem requires some background.

Rule 3.7 on the advocate-witness problem is a rule about two kinds of disqualification. First, Rule 3.7(a) speaks of the *personal disqualification* of a lawyer who is a "necessary witness" in a "trial" involving a client of the lawyer.[120] Second, Rule 3.7(b) then speaks of the *imputed disqualification* of other lawyers in the firm of the personally disqualified lawyer.[121] This second part of the rule has imbedded in it two problems of integration. One is a problem of obscure reference. The other, more deeply imbedded problem, is one of apparent inconsistency.

Those problems of integration can be best appreciated if it is first recalled that Rule 3.7 is also a rule about two different kinds of advocate-witness problems. First is the much more common problem of the lawyer who seeks both to serve as trial advocate for a client and, during the same trial, to give testimony *favorable to the lawyer's client*. The first sort of advocate-witness problem is resolved in Rule 3.7 through providing for only per-

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118. This fact would be true, for example, if neither Victim nor the police were available to testify at Client's trial. On the problems of determining whether a lawyer is a "necessary witness" within the meaning of Rule 3.7, see ANN. MODEL RULES, *supra* note 113, at 390-91; Laws. Man. on Prof. Conduct (ABA/BNA) 61:506-07 (1993); HAZARD & HODES, *supra* note 13, § 3.7:201; WOLFRAM, *supra* note 13, § 7.5.2, at 381-83.

119. MODEL RULES Rule 1.7.

120. MODEL RULES Rule 3.7(a). The matter of defining each of the quoted elements is one of some complexity, but for reasons that need not detain us. On the general subject, see authorities cited *supra* note 118.

121. MODEL RULES Rule 3.7(b).

HeinOnline -- 6 Geo. J. Legal Ethics 895 1992-1993

sonal disqualification of the advocate-witness, while permitting other lawyers in the advocate's firm to represent the client.[122] In other words, when a lawyer is a "necessary witness" and will give testimony favorable to the lawyer's client, the lawyer is personally disqualified as advocate (a disqualification for which no exception for client consent is provided) *and* any other lawyer in the lawyer's firm may represent the client, and this may be done without informing the client or obtaining consent.

Second, however, there is a much less common variation on the advocate-witness problem. Its resolution lurks in Rule 3.7, but only in a quite obscure fashion. This form of the problem occurs when a lawyer intends to be an advocate at the trial but will give testimony *adverse to the lawyer's client*. Obscurity in the rule stems from the decision to state the limitation on imputed disqualification in Rule 3.7(b) by means of incorporation-by-reference of two conflict of interest rules, Rules 1.7 and 1.9. Most students and practitioners with whom I have discussed the matter are unable to understand very promptly what problem is being hinted at by the otherwise unexplained cross-reference. The point that this part of Rule 3.7(b) seeks to make is both relatively simple and could have been expressed in a much more straightforward way: same-firm lawyers may represent the client (despite the personal disqualification of the advocate-witness) unless the problem that required the firm's lawyer to stand aside as advocate also involves testimony against the interests of a present client (Rule 1.7) or a former client (Rule 1.9). The conflict is readily identified. If Lawyer will testify—contrary, let us imagine, to Client's own intended testimony about the hospital-room identification—that Victim immediately and definitely identified Client, then Lawyer has a Rule 1.7 conflict as well as a Rule 3.7 problem. (A Rule 1.9 conflict would be created if, somewhat exotically and in different circumstances, Lawyer's testimony would entail disclosing Rule 1.6 information about another, former client.[123]) Lawyer's interest in telling

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122. *Id.*; *id.* cmt., para. [4]. The Comment states quite delphically, "The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem," *id.* cmt., para. [4]. The sentence, I am confident, stands for the stated proposition, but it does so only quite obscurely for two reasons. First, nothing in the preceding (or following) portion of the paragraph gives any clue to what "this aspect of the problem" might be. (The evident reference is to the client-favoring aspect of the advocate-witness problem.) Second, the reference to Rule 1.10 is confusing, since that rule on its face is not applicable to Rule 3.7. The clearer reference would have been to the limited rule of imputed disqualification stated in the "unless" clause of Rule 3.7(b) itself. Neither interpretative difficulty in the Comment seems to have caused erroneous decisions by courts, but neither has aided clarity.

123. The exotic nature of the reference to Rule 1.9 is seen when it is recalled that the personal disqualification of the advocate-witness is produced because the lawyer, if not barred by the rule, would both advocate and testify for a *present* client. (Otherwise, there would be no advocate-witness problem). The reference to Rule 1.9 then must assume that there will be some instances in which the advocate-witness' testimony would entail disclosure of presumably non-privileged information about and adverse to the interests of *another* and *former* client. This would occur, for example, if a lawyer

HeinOnline -- 6 Geo. J. Legal Ethics 896 1992-1993

the truth is in conflict with Client's interest in being acquitted. That does not necessarily mean that Lawyer's colleagues may not defend Client. It does mean that Client must be adequately consulted and give consent, and the situation must be one in which consent is objectively reasonable.[124] For present purposes, the important point is that whether or not same-firm lawyers may represent the client is governed by a consent-plus rule: the client must consent only after consultation *and* the consent must be objectively reasonable.

Now consider a variation on the problem, a variation in which we encounter the different problem of inconsistency. Suppose that Lawyer's testimony will be entirely favorable to Client, and thus that imputed disqualification under Rule 3.7(b) does not apply. According to Rule 3.7(a), client consent need not be obtained.[125] For example, if Lawyer's testimony will be entirely favorable to Client (for example, exactly corroborating Client's own testimony about deficiencies in Victim's identification), then Client need not be consulted about anything and need not consent to any conflict. Yet, of course, a conflict remains. When Lawyer testifies in behalf of Client, the prosecutor may attempt to impugn Lawyer's testimony because of claimed bias—not only the bias that can be claimed to inhere in the fact that Lawyer represented Client at the time of the alleged identification, but the different bias that might be claimed from the fact that Lawyer's own partners are now representing Client. Doubtless, many clients would consent to such risks, preferring to retain the assistance of lawyers of known ability and known dedication to the client's interest while risking whatever credibility disadvantage that representation might cause to the lawyer's favorable testimony. But some well-counseled clients might not. The question of integrative logic, nonetheless, asks: Why does not Rule 3.7(a) also require client consultation and consent as does Rule 3.7(b)?

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switched sides in the same matter and then announced an intention to testify against the former client about matters learned of outside client-lawyer communications. While such conflicts have occasionally been hinted at by case law, for example, Garlow v. Zakaib, 413 S.E.2d 112, 117-18 (W. Va. 1992) (suggesting that such a situation may be shown by a more complete factual hearing on remand), they are exceedingly rare. In all events, the advocate-witness basis for disqualification in such a case would seem to be merely duplicative of the more obvious former-client basis for objection. All things considered, the apparent concern about this subtle and highly unusual variation on the advocate-witness problem would have been better left to be worked out by courts without specific wording to lend them imperfect guidance.

124. The limits of consentability may be difficult to determine. Much will depend on the importance of the issue to the client's case, the nature of the testimony that the client and the client's lawyer or former lawyer will give, and the necessity of implicating or revealing client confidential information in the course of giving the lawyer's testimony. There will plainly be some instances in which the clash between the testimony of the two witnesses will be too dramatically great to warrant having the lawyer's partners and associates defending the client.

125. MODEL RULES Rule 3.7(a).

HeinOnline -- 6 Geo. J. Legal Ethics 897 1992-1993

TRUTH IN ADMINISTRATIVE PRACTICE

Problem: In a turn on the well-known and recent Kaye-Scholer case,[126] suppose that Lawyer is practicing before Administrative Agency, seeking a license on behalf of Client. The procedure requires that Client file an application containing certain information. That will be followed by a period of Agency staff requests for further information, perhaps some negotiation between Lawyer and Agency staff, and an eventual ruling on the license application. There are no opposing parties (intervenors or the like). At an early stage in the license application, Lawyer, on Client's behalf, submits a lengthy statement to Agency containing certain factual statements about the nature of Client's business practices and based on information Client supplied to Lawyer. Later, however, and before Agency acts on the application, Lawyer obtains information on the basis of which Lawyer now knows that some material statements Lawyer made on behalf of Client were false. Is Lawyer required to take corrective action? Instead, may Lawyer, for example, simply resign from representing Client?

Those who followed the debates over the *Model Rules* will remember distinctly that no single issue received as much attention during the four year evolution of the *Rules* as did the issue of client confidentiality. What emerged was a Janus-faced rule: virtually complete confidentiality was mandated[127] save in one instance, that of false testimony in court.[128] In any instance of the former kind, the eventually adopted Rule 1.6 gives client confidentiality almost totem-like sacred qualities. A lawyer may reveal con-

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126. The Kaye-Scholer case is the most well-known case that has ever been decided. This "case" consists of little more than an agency complaint, press releases, and the elaborate professional and media commentary that followed. The case-in-chief was promptly settled and official proceedings discontinued. Neither an administrative agency nor any other tribunal ever issued a ruling in this matter, which has the force of precedent. The proceedings were initiated by a document with the eighteenth century title, *Notice of Charges and of Hearing for Cease and Desist Orders to Direct Restitution and Other Appropriate Relief; Notice of Intention to Remove and Prohibit from Participation in the Conduct of the Affairs of Insured Depositary Institutions; and Notice of Intention to Debar from Practice Before the Office of Thrift Supervision*, *In re* Fishbein, No. OTS AP-92-19 (U.S. Dept. of Treasury, Office of Thrift Supervision, Mar. 1, 1992). The notice of charges was accompanied by a document with a different docket number that came to be known by lawyers as the Kaye-Scholer "freeze order," *In re* Fishbein, No. OTS AP-92-20 (U.S. Dept. of Treasury, Office of Thrift Supervision, Mar. 1, 1992) (order to cease and desist for affirmative relief from Kaye, Scholer, Fierman, Hays & Handler). The case was settled 10 days later.

For background on the Kaye-Scholer case, see Steve France, *Just Deserts: Don't Cry for Kaye, Scholer*, LEGAL TIMES, Apr. 6, 1992, at 28; Linda Himmelstein, *How Thrift Agency Brought Kaye, Scholer to Its Knees*, LEGAL TIMES, Mar. 9, 1992, at 1; Stephen Labaton, *U.S. Moves to Freeze Assets of Law Firm for S. & L. Role*, N.Y. TIMES, Mar. 3, 1992, at A1; Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75 (1993); Amy Stevens and Paulette Thomas, *Legal Crisis: How a Big Law Firm Was Brought to Knees by Zealous Regulators*, WALL ST. J., Mar. 13, 1992, at A1.

127. MODEL RULES Rule 1.6.

128. MODEL RULES Rule 3.3(a)(4).

HeinOnline -- 6 Geo. J. Legal Ethics 898 1992-1993

fidential information about a client only when reasonably necessary to prevent death or bodily injury that is both "imminent" and threatened by the client's own criminal act.[129] Tribunals,[130] however, are owed a much different and more exacting duty. The commonly debated illustration of this part of the *Model Rules* approach is client perjury. In such instances, it is clear that the lawyer's obligation of candor to the tribunal takes precedence over client confidentiality. Under Rule 3.3, a lawyer "shall take reasonable remedial measures" if the lawyer "has offered material evidence and comes to know of its falsity."[131] The Comment to the rule makes it clear that reasonable remedial measures may require disclosure even of a client's own perjury to a tribunal when the client refuses to recant.[132] If Lawyer in the above problem had presented Client's testimony before a court and later came to know of its falsity, Rule 3.3(a)(4) requires that lawyer take reasonable remedial measures, including, if necessary, disclosure of Client's false statements. All of the ABA debates over the *Model Rules*, and most of the subsequent commentary, securely place the focus of concern on the situation of client testimony that occurs before courts. The most dramatic and hotly contested of those settings is the person accused of crime. Often the discussions are carried on under an assumption that outside of court one necessarily reverts to the client-uber-alles requirements of Rule 1.6.

But is that accurate? Consider, in the context of the above problem, the delphic message of Rule 3.9:

> A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of rule 3.3(a) through (c), 3.4(a) through (c), and 3.5.[133]

Rule 3.9 thus incorporates by reference and mandates, among others, the reasonable-remedial-measures requirement of Rule 3.3(a)(4) with respect to representations of a client "before . . . an administrative tribunal in a nonadjudicative proceeding."[134] But what are such proceedings? Do they include proceedings such as the license application in our problem? The "Terminology" section at the beginning of the *Model Rules* defines none of

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129. MODEL RULES Rule 1.6.

130. "Tribunal" is the term used in Rule 3.3 to define the protected agencies toward which lawyers owe the heightened degree of protection, MODEL RULES Rule 3.3.

131. MODEL RULES Rule 3.3(a)(4).

132. *Id.* cmt., para. [11].

133. MODEL RULES Rule 3.9.

134. *Id.* Rule 3.9 seems to make hash of the principal defense of Kaye-Scholer—that the firm was representing Lincoln Savings as "litigation counsel" and thus was immune from otherwise applicable rules of candor. Many of the charges against the law firm involved the making of false statements in behalf of Lincoln Savings or failing to correct false statements already made. It is difficult to see how placing the forensic context squarely within the realm of Rule 3.3(a)(4) helps the firm's defense.

HeinOnline -- 6 Geo. J. Legal Ethics 899 1992-1993

the terms, and Rule 3.9 and its Comment provide no clear additional guidance.[135] "Tribunal" is often used in the sense of courts and similar bodies, but the quoted phrase in Rule 3.9 rather plainly has in view a much broader concept in referring to a "nonadjudicative" proceeding. Accordingly, a rather convincing case can be made for the proposition that Rule 3.9 seems to require Lawyer in the above problem to inform Administrative Agency of Client's false statements, even where doing so will involve revealing information otherwise protected under Rule 1.6.

Yet, in the uproar of discussion over the Kaye-Scholer charges, many professional commentators have confidently asserted that a lawyer is under an obligation to protect a client's confidential information from revelation to an administrative agency. It is possible, of course, that the assertions are being made without reading Rule 3.9 or attempting to come to grips with its apparent and derivative meaning. Another possibility is that the blasé cross-references in Rule 3.9 provide insufficient integration of the rule of Rule 3.3(a)(4). The most likely suspect, however, can be traced to another source: the indeterminacy of the reference in Rule 3.9 to the proceedings in which the litigation-centered rules, including Rule 3.3(a)(4), apply and those in which the background rules, including the restrictions of Rule 1.6, apply.

CONCLUSION

Due to a variety of causes, the *Model Rules*—as enacted, amended, and existing today—plainly could profit from integrative clarification in several respects. Perceiving those problem areas is hardly clairvoyant and the fact that they exist is hardly an indictment of the *Model Rules*. Although I studied the *Model Rules* with great care in each of its emerging iterations and as finally enacted, it has only been the leisure of a ten year opportunity to study them and to observe them in operation that most of the problems identified here have come to view. For the most part, in addition, the problems identified have not (yet) created real difficulties in interpreting

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135. The Comment to Rule 3.9 does refer to "representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity," MODEL RULES Rule 3.9 cmt., para. [1]. One seeking to read Rule 3.9 narrowly might seize on the reference to "rule-making or policy-making" but the "such as" introduction to the list plainly indicates non-exhaustiveness. Moreover, there is no apparent principled basis on which one could argue convincingly that the duties imposed by Rule 3.9 should be limited to rule-making and similar proceedings, to the exclusion, for example, of license-application proceedings. To posit, for example, that rule-making will invariably affect the public interest more pervasively than license application would be clumsy at best and often quite perverse. Whether to amend a minor section of a municipal code will often be of interest only to the applicant, the only person subject to it. Whether to license an atomic power plant or a toxic-waste disposal site, by contrast, will almost always be a decision of the highest importance.

HeinOnline -- 6 Geo. J. Legal Ethics 900 1992-1993

and applying the *Model Rules*. Nonetheless, an ounce of prevention (more than the mite of advice in one scholar's contribution to this Symposium) seems advisable. What, then, to do?

Because the ABA House of Delegates has become in some ways as logjammed as Congress, one should not expect that the business of tidying the Rules will inevitably enjoy the dire urgency necessary to attract attention in that body. To the contrary, the ABA House of Delegates, in the decade since 1983, has shown little skill in dealing with the *Model Rules*. Compounding the difficulties encountered in achieving initial coherence in the *Rules*, the House of Delegates has subjected it to subsequent amendments that have not always lent the document overall clarity, soundness, and integrity.[136]

The states have been, if modestly, laboratories of experimentation, much more interesting in the articulation of standards on many issues than the ABA. Some states have shown both a measure of independence and creativity in doing their own tinkering in adopting and modifying their version of the *Model Rules*. That tinkering has produced, in some instances, a set of national norms entirely different from those first pressed upon the profession by the ABA.[137] Realistically, then, one would expect movement toward improving lawyer regulation to start there, although the ABA is not

136. Indeed, the history of amendments to both the *Model Rules* and their predecessor, the *Model Code*, shows distressingly similar patterns. While the initial document indicates at least reportorial effort to achieve coherence and restraint, subsequent amendments have sometimes shown little regard for the integrity of the document as a whole. Some amendments to the *Model Rules* have been plainly ill-advised. Many have tended to be terribly long-winded.

The most notorious instance to date was the ABA's ill-fated amendment in 1991 that added to the *Model Rules* a preposterously draconian and elaborate Rule 5.7 that would have outlawed "ancillary business" arrangements in law firms, such as are allowed in the District of Columbia, MORGAN & ROTUNDA, *supra* note 33, at 85-91. The rule would also have prohibited a small-town lawyer from selling life insurance from the lawyer's (single) law office. The outcry from the countryside and solo practitioners of America, groups very under-represented in the ABA governing body, was sufficiently vocal that the ABA House of Delegates, by a vote of 190 to 183, rescinded Rule 5.7 the next year, 61 U.S.L.W. 2093 (Aug. 18, 1992); *see also* MORGAN & ROTUNDA, *supra* note 33, at 83. In the embarrassing interval, no state adopted Rule 5.7, and it seems unlikely that any such draconian rule will reappear from the ABA again. See the insightful review in Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 FORDHAM L. REVIEW 559 (1992).

Although perhaps somewhat more well-advised, the ABA's trial balloon of adding Rule 1.17, on the sale of a law practice, to the *Model Rules* has met with little interest in the states. Plainly ill-advised was the ABA's move of what now appears as ABA Rules 1.9(b) & (c) from their former position as Rule 1.10(b) (as originally enacted), Laws. Man. on Prof. Conduct (ABA/BNA) 51:203 (1992). The rule on the out-migrating lawyer, which relates to both former-client representation and imputed disqualification, could have resided in either place. The main effect of the amendment was to make the *Model Rules* confusingly different in two places from the earlier version, which was adopted in several states before the ABA tinkering.

137. The most obvious example is the overwhelming rejection in almost all jurisdictions of the ABA's initial and present position on extreme client confidentiality in the face of intended client financial harm, *see supra* text accompanying notes 33-35.

HeinOnline -- 6 Geo. J. Legal Ethics 901 1992-1993

by any means out of the question. An effort to detect and correct serious wrinkles in the *Model Rules* may also produce more comprehensive reform beyond this one possible collection of points of further departure from the ABA model. I hope, at the least, that this exercise may serve to bring ambiguities to the surface and offer useful interpretative suggestions to courts, disciplinary agencies, and lawyers who must ferret meaning from the *Model Rules* in the first instance and in the final analysis.

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