Professional Standards: What the Legal Profession Can Learn from Accounting Ethics

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Introduction

For over a century, the lawyer's role in society has been the subject of much debate. Beginning in the Revolutionary era, many people believed lawyers were uniquely qualified to be a group oriented toward the long-term, keeping the good of society in perspective.[1] Lawyers were a large percentage of statesmen during the American Revolution[2] and were prominent among the "intellectual elite," having many opportunities to speak to the public.[3] Perhaps a big reason for this was that a lawyer's training is particularly suited to "grapple with the questions which are presented in a democracy."[4] Another reason may be how lawyers viewed their colleagues. For example, lawyers often praised the "disinterestedness and devotion to professional craft and public service, often at considerable sacrifice to income" practiced by their predecessors.[5]

Over time, particularly during the twentieth century, the view on the character of lawyers changed to include significant criticism. The criticism often centered around lawyers' income-driven motives and their ties to businesses. Louis Brandeis, in his 1914 speech on "The Opportunity of the Law" remarked that "lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people."[6] Woodrow Wilson echoed this sentiment, stating:

> In gaining new functions, in being drawn into modern business instead of standing outside of it, in becoming identified with particular interests instead of holding aloof and impartially advising all interests, the lawyer has lost his old function, is looked askance at in politics, must disavow special engagements if he would have his counsel heeded in matters of common concern.[7]

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1. *See* Robert A. Ferguson, Law and Letters in American Culture 25 (1984).
2. *Id*. at 11.
3. *Id*. at 11, 68–71, 77–78.
4. Louis D. Brandeis, *The Opportunity in the Law*, *in* Business—A Profession 313, 315 (1931).
5. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. Rev. 1, 15–16 (citing Robert A. Ferguson, Law and Letters in American Culture 24–25, 72 (1984)); *see also, e.g.*, R. Kent Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic 30 (1985) (referencing Justice Story's eulogy of Chief Justice John Marshall).
6. Brandeis, *supra* note 4, at 321.
7. Woodrow Wilson, President of Princeton Univ., Annual Address before the Am. Bar Ass'n: The Lawyer and the Community (Aug. 31, 1910) (transcript available in the Harvard Law School Library).

In Brandeis' opinion, lawyers should hold "a position of independence, between the wealthy and the people, prepared to curb the excesses of either" rather than being beholden to corporate entities.[8] This ideal of the role of the attorney, called the "republican tradition,"[9] requires independence from dominant social forces for the attorney to maintain his allegiance to the interests of society.[10]

This Note begins by presenting different views of legal independence and addressing the classic "zealous advocate" role of the attorney, evaluating where conflicts occur between those ideas. Second, this Note addresses issues of independence faced by the business lawyer and how the more traditional view of the zealous advocate can be harmful in that context. Next, this Note compares the independence standards in the legal profession with those in the accounting profession as a number of attorneys practice in accounting firms and interact with these professional standards. Finally, this Note proposes possible solutions to the current issue of ambiguity surrounding legal independence including clarifying the ABA *Model Rules of Professional Conduct* as well as adopting stricter standards for business law advice mirroring standards already in place in the related accounting profession.

I. ISSUES WITH LEGAL INDEPENDENCE

A. WHAT IS LEGAL INDEPENDENCE?

There are several different ways to interpret the term "legal independence." One interpretation is "lawyers' collective . . . right to make and enforce the applicable standards of conduct."[11] Regulation of the legal profession by state bar associations and the judiciary keeps the legal profession from feeling the political pressures that would otherwise be apparent if the legal profession's standards were instead regulated by the government. This self-regulating characteristic is not wholly unique to the legal profession but is important to separate the legal profession from "government domination."[12] Former New York City bar president Evan Davis emphasized that the bar's independence from the political branches of government is critical and the judiciary's regulation of the bar in the United States is not problematic due to the inherent neutrality of the judiciary.[13]

Next, the legal profession is viewed as independent of other industries when it comes to partnerships and provision of legal services. Rule 5.4, appropriately

8. Brandeis, *supra* note 4, at 321.

9. Gordon, *supra* note 5, at 14.

10. *See* THE FEDERALIST NO. 35 (Alexander Hamilton).

11. Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 602 (2013).

12. MODEL RULES OF PROF'L CONDUCT pmbl. (2019) [hereinafter MODEL RULES].

13. *See* Green, *supra* note 11, at 606–07 (quoting Evan A. Davis, *The Meaning of Professional Independence*, 103 COLUM. L. REV. 1281, 1291 (2003)).

titled "Professional Independence of a Lawyer," prohibits a lawyer from sharing legal fees with nonlawyers (with certain exceptions), and prohibits lawyers from forming partnerships with nonlawyers if the partnership is engaged in providing legal services.[14] These restrictions insulate the legal profession from some potential conflicts that could arise if nonlawyers were involved as partners in firms providing legal services. It is important to avoid these conflicts because nonlawyers are not bound by the same ethical obligations to which lawyers are bound, impacting how they view client engagements. However, this rule only addresses the "cartel issue" rather than wrestling with the "subtleties of a duty that requires loyalty to clients and to substantive law."[15]

A third major interpretation of independence involves independence of a lawyer from her clients or independence from "the pressures or influences of others that might compromise lawyers' loyalty to clients."[16] This is the facet of legal independence on which this Note will focus. In this context, the lawyer's duty of independence is both a "duty to the legal system itself and to the substantive values that it incorporates."[17] Independent legal advice provided to business clients offers two benefits: First, legal advice that goes through an independent counsel's "self-critical evaluation" will likely be of a higher quality; and second, the lawyer who practices such discipline will have a "more satisfying and worthwhile professional life."[18] Acting independently also fosters trust in an attorney-client relationship. Trust is built when there is a "perception of shared norms of fair dealing, from patterns of prior fair practice, and from an expectation of future interactions."[19]

B. THE "ZEALOUS ADVOCATE"

The classic view of the lawyer's role is as the "zealous advocate." Model Rule 1.3 incorporates this idea in Comment 1, stating, "[a] lawyer must also act with commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf."[20] However, this ideal envisions the lawyer in a litigation setting where there are built-in checks on the boundaries of a zealous advocate's behavior such as an opposing attorney, a mandated discovery process, cross examination, and an impartial judge to addresses any disputed questions.[21] It is worth noting that none of these counter-balancing forces exist for business lawyers in the contexts of "law compliance, transaction planning, disclosure, or other

14. MODEL RULES R. 5.4.

15. William T. Allen, *Corporate Governance and a Business Lawyer's Duty of Independence*, 38 SUFFOLK U.L. REV. 1, 5 (2004).

16. Green, *supra* note 11, at 607–08.

17. Allen, *supra* note 15, at 3.

18. *Id*. at 12.

19. *Id*.

20. MODEL RULES R. 1.3 cmt. 1.

21. Allen, *supra* note 15, at 3.

advisory matters."[22] For example, a power imbalance between two parties in litigation may be equalized by an impartial judge and information inequities remedied by the mandated discovery process. In the transactional context, a power imbalance may result in unequal negotiations and information inequities may result in uninformed parties unknowingly agreeing to one-sided terms.

The zealous advocate label does not give an attorney carte blanche when representing clients. "Everyone concedes that even the most zealous advocate must remain within the framework of professional ethical rules and 'law.'"[23] Although this level of regulation is acknowledged, there still remains some uncertainty as to what "professional independence" means within the framework of the *Model Rules*. This is problematic because the zealous advocate must work within the confines of the *Model Rules*, including both their zeal in advocacy in acting with "reasonable diligence," as well as "exercis[ing] independent professional judgment."[24]

The only explicit reference to individual lawyers' independence in the *Model Rules* occurs in Rule 5.4, titled "Professional Independence of a Lawyer."[25] This rule has been described by some as a "fairly trivial rule"[26] designed more to prevent non-lawyers from influencing lawyers than to establish a clear-cut standard of how to apply independence in practice. Rule 2.1 states that a lawyer "may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[27] This sentiment, although clearly aspirational, certainly does not mandate consideration of moral, social, or other such factors. Rather than requiring tangible actions to maintain independence, Rule 2.1 gives permission to attorneys to consider moral factors while allowing them not to take said factors into consideration. Comment 2 to Rule 2.1 further provides that "[i]t is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice" because such considerations "impinge upon most legal questions and may decisively influence how the law will be applied."[28] This idea of incorporating non-legal considerations into the counsel which lawyers provide predates the *Model Rules*:

> [T]he lawyer . . . advances the honor of his profession and the best interest of his client when he renders service or gives advice tending to impress upon the client, his undertaking exact compliance with the strictest principles of moral law. He must also observe the statute law, though until a statute shall have

22. *Id.*

23. Gordon, *supra* note 5, at 10; *see also* Allen, *supra* note 15, at 14 ("[O]ur role as zealous advocates and loyal facilitators of legal transactions must be consistent with our role as independent professionals and moral actors dedicated to the achievement of the higher goals of the legal system.").

24. MODEL RULES R. 1.3; MODEL RULES R. 2.1.

25. MODEL RULES R. 5.4.

26. Green, *supra* note 11, at 615.

27. MODEL RULES R. 2.1.

28. MODEL RULES R. 2.1 cmt. 2.

> been construed and interpreted by competent adjudication, he is free and entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent.[29]

Rule 3.1 provides more structure in the litigation setting by prohibiting lawyers from bringing or defending a proceeding or issue "unless there is a basis in law and fact for doing so that is not frivolous . . . ."[30] The comments to Rule 3.1 expand slightly on this, stating that it is required that the lawyer be able to make "good faith arguments in support of their clients' positions."[31] However, the term "good faith" is not defined anywhere in Rule 3.1 or elsewhere in the *Model Rules*.

The uncertainty of what constitutes "good faith arguments" as well as when non-legal considerations should take priority leave the lawyer to fall back on the "zealous advocate" mentality. Though this may make sense in a litigation context, it may present different challenges for the business lawyer.

C. THE BUSINESS LAWYER

The business lawyer plays a fundamentally different role than the litigation attorney. Rather than representing a client against opposing counsel in an adversarial setting, the business lawyer seeks to provide advisory services such as facilitating transactions, obtaining financing, or counseling clients on corporate governance matters. These types of interactions often lead to business clients as "repeat players" in areas in which they have legal issues.[32] It is especially important in the business lawyer context to balance the role of "zealous advocate[] and facilitator[] of legal transactions" with the role as "independent professional[] . . . dedicated to the achievement of the higher goals of the legal system."[33]

"The zealous advocate can get in the way of a productive long-term relationship."[34] While a litigation attorney may be less concerned with the long-term nature of the client relationship, business lawyers often have longstanding client relationships where the attorney is consulted on several legal matters.[35] A client could use the same lawyer for an asset purchase, a financing deal, an acquisition of a competitor, or to assist with taking the company through an initial public offering. Having this kind of repetitive relationship with clients increases the importance of acting in accordance with a certain level of independence and ethics.

A major challenge that tends to be noticeable in the business lawyer context is what is referred to as the "counsel for the situation."[36] Louis Brandeis was a practitioner of this philosophy and was committed to furthering the position of the

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29. CANONS OF PROF'L ETHICS Canon 32 (1908).
30. MODEL RULES R. 3.1.
31. MODEL RULES R. 3.1 cmt. 2.
32. *See* Allen, *supra* note 15, at 12.
33. *Id*. at 14.
34. *Id*. at 12.
35. *See id*.
36. *Id*. at 14.

parties involved in the situation as well as the public good.[37] This balancing is the exact ideal to which all attorneys in the business world should aspire. As previously noted, this is much easier said than done and the current regulatory framework governing the legal profession does little to provide specific guidance in how to achieve this balance.

Consider further the role of the "in-house" counsel which has changed over time. In a more traditional system, corporations typically sought legal advice from a senior adviser at a firm that brought significant institutional memory to the client engagement.[38] However, this role has been replaced in a more modern system by the inside general counsel who is a member of the management team and is therefore "typically less independent."[39] Though the general counsel is employed by the company, she still faces the same challenge as an external business lawyer when it comes to balancing the role as an advocate to the company with that of a loyal member of the legal profession.

II. COMPARING PROFESSIONAL STANDARDS ACROSS LAW AND ACCOUNTING

The legal and accounting professions are, in many ways, similar professions. Both are client-serving professions that play significant roles in facilitating business transactions. Additionally, both professions overlap in providing services in taxation.[40] "[T]he legal and accounting professions have many close ties to one another" such that "sixty-four percent of law firm leaders stated in a recent survey that the threat they are most concerned about is '[a]ccounting companies moving into the legal industry.'"[41] Not only do law firms view accounting companies as competition for business, accounting firms also compete for talent, as there are a large number of attorneys that work within accounting firms. In late 2018, one of the four largest accounting firms (known colloquially as the "Big Four" firms), KPMG, stated its goal to employ 3,000 lawyers within the "next few years."[42] As of November 2018, KPMG employed approximately 1,800 lawyers[43] and the

37. *Id.*

38. *Id.* at 8–9.

39. *Id.* at 9.

40. *See Tax Attorney vs. CPA: Why Not Hire A Two-In-One?*, AM. ACAD. ATTN'Y-CPAS, https://www.attorney-cpa.com/articles/tax-attorney-vs-cpa/ [https://perma.cc/B3HX-TW9Q].

41. Lawrence A. Wesco, *Ties That Do Not Bind: The Rules That Keep Lawyers and Accountants Separate*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 355, 355 (quoting NICHOLAS BRUCH, ALM INTELLIGENCE, ELEPHANTS IN THE ROOM PART I: THE BIG FOUR'S EXPANSION IN THE LEGAL SERVICES MARKET 18 (2017)); *see also* Jason Tashea, *Should BigLaw Firms Worry About Increasing Competition From the Big Four Accounting Firms?*, ABA J. (SEPT. 1, 2018, 1:00 AM), http://www.abajournal.com/magazine/article/law_firms_competition_accounting [https://perma.cc/ZSA7-XKUG].

42. Debra Cassens Weiss, *KPMG Aims to Employ 3,000 Lawyers Within the Next Few Years*, ABA J. (Nov. 27, 2018 7:00 AM) http://www.abajournal.com/news/article/kpmg_aims_to_employ_3000_lawyers_within_the_next_few_years [https://perma.cc/YT2K-Q55R].

43. *Id.*

other Big Four firms employ similar numbers of attorneys.[44]

The significant number of attorneys practicing in accounting firms illustrates the importance that accounting professional standards have on lawyers. Though accounting firms cannot currently practice law in the United States given statutory restrictions in place, the Big Four firms do have attorneys practicing local law in various countries worldwide.[45] The prohibition on fee sharing or partnering with non-lawyers provided in Model Rule 5.4 will keep accountants out of the U.S. legal industry for the time being.[46] Rule 5.4(a) prohibits lawyers from sharing legal fees with nonlawyers and Rule 5.4(b) prevents lawyers from forming partnerships with nonlawyers if any activities of the partnership consist of the practice of law.[47] Essentially this means that accounting firms, and therefore lawyers that work for accounting firms, cannot provide legal services to clients. An additional restriction, stating that audit firms cannot provide legal services to their audit clients adds a layer of protection.[48] However, this does not prevent accounting firms from competing for certain services, specifically tax planning.

The multidisciplinary capability of accounting firms makes them relevant to the discussion of legal professional standards. If clients view the accounting profession as having higher standards of professional conduct than the legal profession, clients could feel a greater degree of trust in the advice received from accounting firms than advice received from law firms. This could result in clients requesting more input from accounting firms on matters that could be addressed by either an accounting firm or a law firm (i.e., transaction structuring or tax planning advice). Because the largest accounting firms have a significant global presence,[49] clients may also see the benefit of having one firm (in this case, an accounting firm) handle issues spanning various jurisdictions.

Because of the relative importance of the accounting profession as it relates to the legal profession, it is important to examine some key standards governing accounting firms, including auditing independence standards and tax professional standards, particularly the Statements on Standards for Tax Services and Circular 230.

A. AUDITING INDEPENDENCE

The role of an auditor is to provide an objective third party opinion on the accuracy of a client's financial statements, resulting in more stringent audit

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44. *See* Wesco, *supra* note 41, at 356.

45. *See, e.g.*, Weiss, *supra* note 42 (observing that KPMG employs lawyers across 75 countries).

46. MODEL RULES R. 5.4.

47. MODEL RULES R. 5.4.

48. 15 U.S.C. § 78j-1(g) (2010).

49. *See Big 4 Accounting Firms*, ACCOUNTINGVERSE, https://www.accountingverse.com/articles/big-4-accounting-firms.html [https://perma.cc/4EGB-FY9U] (discussing the relative sizes of Big 4 accounting firms worldwide). Deloitte (the largest) employs approximately 312,000 employees across 150 countries while KPMG (the smallest) employs approximately 219,000 professionals in 154 countries. *Id.*

independence standards.[50] These opinions are relied upon by outside investors to make informed investing decisions, allowing companies to raise much needed capital to fund their business operations.[51] An auditor is expected to "be without bias with respect to the client since otherwise he would lack that impartiality necessary for the dependability of his findings, however excellent his technical proficiency may be."[52] After reviewing the client's financial statements and supporting information, auditors express their opinion on whether the financial statements are presented materially correct in accordance with Generally Accepted Accounting Principles ("GAAP").[53]

In order to maintain auditor independence, U.S. law prohibits accounting firms from providing certain services to its audit clients including but not limited to, "bookkeeping . . .; financial information systems design . . .; appraisal or valuation services . . .; [and] legal services . . . ."[54] This prevents auditors from auditing their own work, avoiding a significant conflict of interest. In a sense, these restrictions accomplish a similar goal to the conflicts of interest rules in the *Model Rules*, which seek to ensure attorneys are not in any way conflicted when they provide services to clients.[55]

Also noteworthy under this section is the mandatory rotation of audit partners, preventing a partner from remaining on the same audit engagement for more than five years.[56] This mandatory rotation aims to prevent the same partner from becoming too invested in the client, potentially resulting in a biased examination of the client's financial statements. Additionally, a partner with significant tenure on a client engagement may become too comfortable with the client and not exercise the appropriate level of skepticism when reviewing financial reporting.

As an additional safeguard to ensure independent review of public companies' financial statements, in Auditing Standard 7 the Public Company Accounting Oversight Board provides that an engagement quality review be performed over audit engagements, reviews of interim financials, and attestation engagements.[57]

Overall, audit independence standards are much more stringent than the current legal independence standards because auditors have significant restrictions on services they can provide to audit clients. However, this is intentional as

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50. *See* Steven B. Harris, Bd. Member, Pub. Co. Accounting Oversight Bd., Introductory Keynote Address to the International Corporate Governance Network (ICGN) Annual Conference (June 28, 2016) (transcript available with the ICGN).

51. *Id.*

52. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 1 § 220 (Am. Inst. of Certified Pub. Accountants 1972).

53. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 1 § 110 (Am. Inst. of Certified Pub. Accountants 1972).

54. 15 U.S.C. § 78j-1(g) (2010).

55. *See generally* MODEL RULES R. 1.7, R. 1.8.

56. 15 U.S.C. 78j-1(j).

57. AUDITING STANDARD NO. 7: ENGAGEMENT QUALITY REVIEW, § 1 (PUB. COMPANY ACCT. OVERSIGHT BOARD 2009).

lawyers are advocates for their clients whereas auditors are intended to be neutral third parties providing an expert opinion on the accuracy of the client's financial statements.

B. TAX PROFESSIONAL STANDARDS: STATEMENTS ON STANDARDS FOR TAX SERVICES AND CIRCULAR 230

1. STATEMENTS ON STANDARDS FOR TAX SERVICES

The Statements on Standards for Tax Services ("SSTS") are promulgated by the American Institute of Certified Public Accountants ("AICPA") to set practice standards for its members to aid their ethical responsibilities to the profession.[58] Similar to the *Model Rules* for the legal profession, the SSTS set out an overarching standard of what is expected when providing tax services. Given that accounting firms already employ several attorneys in their tax practices,[59] these attorneys are expected to follow these standards, making the SSTS a relevant comparison against the *Model Rules*.

Statement 1 of the SSTS provides that no member of the AICPA should recommend a tax return position unless the member has "a good-faith belief that the position has at least a realistic possibility of being sustained . . . if challenged."[60] Further, a member may recommend a tax return position if there is a "reasonable basis" for the position and they have advised the taxpayer to properly disclose the position.[61] A tax return position is any position reflected on a tax return that a member specifically advised on or concluded the position was appropriate given knowledge of all material facts.[62] Because annual tax returns require reporting any income events and various transactions, almost every position on which a person would seek tax advice is considered a "tax return position" in some year, even if reporting the event occurs in the future.

The interpretations of the SSTS provide further guidance on what is meant by "realistic possibility of success" and "reasonable basis." In the description of various reporting standards, realistic possibility of success is satisfied if there is "approximately a one-in-three likelihood ([thirty-three] percent) that the position will be upheld on its merits if it is challenged."[63] Reasonable basis means a position is "reasonably based on one or more authorities, taking into account the relevance and persuasiveness of those authorities."[64] This standard is viewed as lower than the realistic possibility of success standard but is "significantly higher

58. STATEMENTS ON STANDARDS FOR TAX SERVICES preface (AM. INST. OF CERTIFIED PUB. ACCOUNTANTS 2018) [hereinafter STATEMENTS ON STANDARDS FOR TAX SERVICES].

59. *See* Weiss, *supra* note 42.

60. STATEMENTS ON STANDARDS FOR TAX SERVICES No. 1, § 5a.

61. STATEMENTS ON STANDARDS FOR TAX SERVICES No. 1, § 5b.

62. STATEMENTS ON STANDARDS FOR TAX SERVICES No. 1, § 1a.

63. INTERPRETATIONS OF STATEMENTS ON STANDARDS FOR TAX SERVICES, NO 1, *TAX RETURN POSITIONS* preface (AM. INST. OF CERTIFIED PUB. ACCOUNTANTS 2018).

64. *Id.*

than not frivolous or not patently improper . . . [and] is not satisfied by a return position that is merely arguable or that is merely a colorable claim."[65] In practice, reasonable basis is viewed as "approximately a [twenty] percent likelihood that the position will be upheld on its merits if it is challenged."[66]

The SSTS interpretations provide much clearer guidance on acceptable thresholds of support needed in order for professionals to recommend a tax return position. Though it is still somewhat subjective as to what constitutes twenty percent or thirty-three percent certainty (it must mean in the judgment of the service provider), these two standards give professionals a more affirmative benchmark to use when determining whether they can give advice.

2. CIRCULAR 230

Circular 230 governs practice before the Internal Revenue Service ("IRS") including "recognition of attorneys, certified public accountants, enrolled agent . . . and other persons representing taxpayers before the Internal Revenue Service."[67] Any tax attorney, whether working at a law firm or an accounting firm, will follow the rules set forth in Circular 230, so comparing these rules to the *Model Rules* provides an additional point of reference.

Many of the rules in Circular 230 are reminiscent of those in the *Model Rules*. For example, section 10.29 prohibits conflicts of interest where the practitioner would be "directly adverse to another client" or where representation would be "materially limited" by responsibilities owed to other clients.[68]

Overall, the duties set forth by Circular 230 are similar to several of the *Model Rules*. Given that these rules are already applicable to attorneys, this is not surprising. Though Circular 230 is worth comparing to the *Model Rules*, it doesn't add clarity to many of the standards that would be most applicable in the business lawyer context.

III. POSSIBLE SOLUTIONS

This Note proposes two main solutions to the current uncertainty surrounding legal independence standards. First, the *Model Rules* could be expanded to add clarity to how lawyers should act under ambiguous circumstances by providing examples of when other considerations, such as the moral and social factors mentioned in Rule 2.1, should be taken into account. Second, the *Model Rules* could adopt a stricter standard for business lawyers that is more stringent than the "zealous advocate" role, which is best suited for the litigation context.

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65. *Id.*
66. *Id.*
67. 31 C.F.R. § 10.0(a) (2019).
68. 31 C.F.R. § 10.29(a) (2019).

A. CLARIFY THE *MODEL RULES*

The *Model Rules* as they stand do provide some guidance with respect to boundaries on a lawyer's ability to advise a client. However, Rule 2.1 does not provide any specific guidelines or requirements, but rather gives empty permission to lawyers to weigh other considerations such as "moral, economic, social and political factors, that may be relevant to the client's situation."[69]

In order to provide better guidance for lawyers, the *Model Rules* could be expanded by adding additional comments to existing rules to clarify how business lawyers should conduct themselves in the course of advising clients. For example, comments to Rule 2.1 give permission to consider other factors aside from the law. However, the comments could be expanded to clarify that these factors should play a role in the transactional space when it comes to limiting the boundaries of a lawyer's advice.

The challenge with this solution is practicality. Ideally, the additional comments would be drafted with enough precision to add clarity to how lawyers should behave, yet enough freedom so the guidance isn't overly burdensome. With too much detail, lawyers may become hesitant to provide advice to clients without consideration of moral, social, or political factors, potentially leading to inefficient advice. Left unaltered, Rule 2.1 does little to instruct lawyers on when other considerations should take precedence over strict interpretation of the law.

This solution's main advantage is maintaining the existing framework of the *Model Rules*. Utilizing the existing professional standards, business lawyers could be instructed to consider moral factors when representing clients. This is not to suggest lawyers should not attempt to accomplish their client's goals. Rather, moral considerations should be a part of the calculus. For example, a lawyer could recognize a significant power disparity when negotiating terms with other counsel and choose to not press for every advantage available. Likewise, when advising a client on legality of a transaction, a lawyer can present the client with the appropriate legal advice, but also note that whether a transaction is technically legal is a different analysis than whether the optics of entering a transaction that is "shady" are good.

B. STRICTER STANDARD FOR BUSINESS LAWYERS THAN "ZEALOUS ADVOCATE"

Another alternative would be to create a new rule that adopts a stricter standard for business lawyers. The most feasible standard is that already adopted in the tax profession of requiring transaction advice to meet the realistic possibility or reasonable basis standards. A second option is adopting the partner rotation idea from audit independence standards, tailored to the legal industry. Finally, a third option is to require review and sign-off by an independent partner at the firm on

69. MODEL RULES R. 2.1.

significant transactions of the client. Some potential solutions that could strengthen the independence standard for business lawyers are as follows:

First, the baseline standard for providing advice on business transactions could be better defined to mirror the thresholds defined in the SSTS—reasonable basis and realistic possibility. This solution provides definite clarity by establishing thresholds that must be reached in the practitioner's judgment in order to ethically give advice. This could be viewed as raising the base standard, as the *Model Rules* currently only specify "good faith argument" as the appropriate base.[70] It is unclear what level of confidence this might translate to, but it could potentially be more akin to a "colorable claim" standard which is not sufficient to meet the reasonable basis threshold. Another benefit of this solution is that many lawyers already operate in the tax space and may follow the SSTS as a matter of form, particularly if they work within an accounting firm.[71] This option simply expands the coverage of these standards to business transactions in general rather than limiting them to tax services alone.

Second, legal independence standards could require that the partners assigned to transactional client matters rotate after a specified period. There are, admittedly, challenges with this proposal. Audit engagements are cyclical—public companies are required to annually file audited financial statements with the SEC[72] and audit partners rotate off the engagement after five years.[73] In contrast, business lawyers do not necessarily have such routine and longstanding relationships with all clients. Some clients may only require assistance with a specific transaction (e.g., if a company requires representation when entering a transaction to be acquired) while other clients may utilize the same firm in various matters over several years. An adjustment to the *Model Rules* could take this into account and use a shorter time period for a partner's length of service on a client engagement before requiring a change in counsel. This would allow a fresh set of eyes to lead the engagement after each change. The obvious downside is the loss of institutional memory from partners rolling off the engagement, but the upside of high quality, ethical advice should outweigh it in the long run.

Third, a requirement could be implemented requiring an independent partner's approval on any transaction advice that involved transactions of a certain level of significance or materiality to the client. If all advice required review by a second partner at the firm, it would grind transaction advising to a halt. As previously discussed, Auditing Standard 7 provides that an engagement quality review be performed over audit engagements, reviews of interim financials, and certain attestation engagements.[74] Adopting this standard would provide an additional

70. MODEL RULES R. 3.1.

71. *See* STATEMENTS ON STANDARDS FOR TAX SERVICES No. 1.

72. 17 C.F.R. § 210.3-01(a) (2019).

73. 15 U.S.C. 78j-1(j) (2010).

74. AUDITING STANDARD NO. 7: ENGAGEMENT QUALITY REVIEW, § 1 (PUB. COMPANY ACCT. OVERSIGHT BOARD 2009).

level of confidence that significant matters have been appropriately vetted and meet the requisite standard, even if that remains the ill-defined "good faith argument" standard. This solution likely would not be sufficient on its own as it does not provide any guidance to a lawyer in a general counsel position who does not have an independent partner to provide such a sign off. However, outside counsel could serve this independent partner function, thus alleviating this challenge.

CONCLUSION

The role of the lawyer in society has been scrutinized by many over time. Some contend that the role of lawyers is to serve the long-term wellbeing of society. To this end, lawyers have received much criticism about how the profit motivation has led to compromises in professional independence. Lawyers may hide behind the label of "zealous advocate," justifying behavior that could be seen as questionably unethical or lacking in independence. These critiques are most applicable to business lawyers who operate without the checks in place in the adversarial litigation system. Without mandated discovery processes or an impartial fact finder such as a jury or judge, business lawyers are left uninhibited to compete against each other to further their clients', and perhaps their own, best interests. This could come at the expense of broader societal goals and could even result in questionable transactions.

In order to maintain the appropriate level of professional independence and ethics for business lawyers, change is needed to the *Model Rules*, as they currently do not directly address how lawyers should behave differently in the transaction setting versus the litigation setting.

This Note proposes two overarching solutions to this challenge. First, the *Model Rules* could be clarified via additional comments in order to provide guidance as to when a lawyer should consider other factors aside from strict legal interpretation. This keeps the existing framework intact while adding necessary guidelines to assist practitioners.

The second solution is to adopt a new standard for business lawyers that is stricter than the "zealous advocate" currently noted in Rule 1.3. This standard could look to the accounting profession for inspiration and could take one of a few different forms: adopting the reasonable basis and realistic possibility standards set forth in the SSTS; mandating partner rotation on client engagements after a specified period of time; or requiring sign off on material issues from an independent partner. Each of these has their own advantages, but the option that creates the greatest clarity is adopting the reasonable basis and realistic possibility standards from the SSTS.