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The Real and Imagined Beneficiaries of Legal Ethics

Adam Raviv*

Abstract

This Article proposes a new and comprehensive framework for understanding the professional standards that govern lawyers: that each rule of professional conduct has one, and only one, primary beneficiary. Moreover, the beneficiary of every rule falls into one of three categories: a lawyer's client, third parties, or the lawyer personally. Viewing the rules of professional conduct through a beneficiary prism illuminates when a lawyer's duty to a client can be—or must be—subordinated to other interests. Understanding who is supposed to benefit from a given rule is an essential tool in properly interpreting any professional standard. It is also indispensable in determining whether that rule fulfills its purpose in practice, or should be modified or eliminated. Applying a beneficiary framework reveals that some key professional standards—the rules on conflicts of interest, professional independence, and the unauthorized practice of law—do not actually benefit their intended beneficiaries and should be rethought.

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* Senior Ethics Counsel for Presidential Personnel, the White House. The views expressed in this Article are those of the author alone and do not necessarily reflect the views of the White House or the United States. The author thanks Mitt Regan for his close read and profound insights.

INTRODUCTION

Who do lawyers work for? It is a simple question with an extremely complex answer, in large part because lawyers wear numerous hats in our society, our justice system, our economy, and our government. Lawyers are client representatives, advisers, and advocates. They are officers of the court. They are employees of companies, law firms, and government agencies. They are prosecutors, defenders, regulators, and legislators. They are judges, administrators, mediators, arbitrators, and law clerks. When professionals serve so many functions, it is not surprising that the rules governing their behavior aim to further the interests of multiple constituencies.

This Article argues that to understand and apply any professional standard, we must first ask *cui bono*? Who benefits? Every standard that governs lawyers' conduct can be differentiated based not only on the behavior it governs, but also on whose interests the rule is intended to serve. When considering how to interpret a rule or a subsection of a rule, or whether to change or eliminate it, an effective way to zero in on the answer is to assess (1) who is supposed to benefit from the rule, and (2) whether that benefit is actually realized.

The obvious answer to the question of whose interests a lawyer is supposed to serve is the client. After all, lawyers are fiduciaries, and accordingly owe an "utmost" duty of loyalty and a duty of care to their clients.[1] In many respects, however, a lawyer's highest duty is not to his or her clients. To be sure, a lawyer's client is *often* the paramount beneficiary of the lawyer's ethical duties. But not always. Many standards of professional responsibility place the interests of third parties, or sometimes lawyers themselves, over the interests of clients. In various circumstances, a lawyer is ethically required, or at minimum allowed, to act against a client's interest. Indeed, a lawyer is sometimes entirely within her rights to favor her own interests above her client's.

Although the question of who benefits from a rule is often discussed when debating particular professional standards,[2] no scholarship to date has explicitly considered lawyers' professional duties as a whole within a beneficiary framework. This Article aims to provide the first comprehensive analysis of professional rules through this prism.

Part I of this Article considers the overall question of who benefits from a lawyer's ethical duties. It proposes a taxonomy of the rules of professional conduct—focusing on the ABA Model Rules—that categorizes every rule, or subsection of a

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1. *See, e.g.*, Burdett v. Miller, 957 F.2d 1375, 1381 (7th Cir. 1992).

2. *See, e.g.*, D.R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 15–26 (1998) (questioning whether clients benefit from confidentiality rules). *See Comments to Arizona Petition to Restyle and Amend Supreme Court Rule 31; Adopt New Rule 33.1; and Amend Rules 32, 41, 42 (Various ERs from 1.0 to 5.7), 46-51, 54-58, 60, and 75-76*, AZCOURTS.GOV, https://www.azcourts.gov/Rules-Forum/aft/1118/afpg/4 [https://perma.cc/Z26G-7VWM] (last visited Aug. 7, 2022) (citing various critiques of the restrictions on fee-sharing and nonlawyer ownership of law practices).

rule, according to which of three groups it is intended to benefit: clients, third parties, or lawyers. Part II applies this model to a representative sample of the rules of professional conduct. For each examined rule, Part II analyzes who is the intended beneficiary of that rule and its subsections. In some cases, the beneficiary of a particular rule is obvious, while in other cases it is less evident. Part III argues that three important rules—the rules on conflicts of interest, professional independence, and the unauthorized practice of law—do not actually serve the interests of their ostensible beneficiaries. Under such a circumstance, Part III argues that a rethinking of those rules is in order.

I. A LAWYER'S COMPETING CONSTITUENCIES

To whom (or what) do lawyers owe their highest duty? This Part first examines how different authorities have answered the question. Those answers are by no means consistent because not all professional standards that govern lawyers have the same beneficiaries. These beneficiaries can be broadly placed into three categories: clients, third parties, and lawyers themselves. This Part also compares lawyers' complex duties with the much simpler loyalties owed by some other professions.

A. A LAWYER'S HIGHEST DUTY IS TO CLIENTS, EXCEPT WHEN IT ISN'T

In the 1800s, Lord High Chancellor Brougham famously declared that a lawyer, "by the sacred duty which he owes his client, knows, in the discharge of that office but one person in the world—THAT CLIENT AND NONE OTHER."[3] Many courts agree. In 1891, the Maryland Court of Appeals asserted that "[a] lawyer is under the highest obligation to defend his client's interests and to secure him all his rights."[4] More recently, the Southern District of New York explained that "counsel's paramount obligation is to his client."[5] The New Jersey Supreme Court is similarly explicit: "The paramount obligation of every attorney is the duty of loyalty to his client."[6] So is a North Carolina district court: "The court surely agrees that an attorney's paramount obligation is to his client."[7] A Minnesota district court, striking down a federal bankruptcy statute that limited lawyers' ability to give certain advice to clients, reasoned that "[a] lawyer's highest duty is to the client, and the statute's forbidden advice may indeed be helpful to the client."[8]

Much scholarly commentary on the ethical duties of lawyers takes the same position that a lawyer's highest duty is to his client. Professor Daniel Markovits,

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3. SPEECHES OF HENRY LORD BROUGHAM 105 (1838), *quoted in* LORD MACMILLAN, LAW AND OTHER THINGS 195 (1938).

4. McGuire v. Rogers, 21 A. 723, 724 (Md. 1891).

5. *In re* September 11 Litigation, 236 F.R.D. 164, 173 (S.D.N.Y. 2006).

6. State v. Cottle, 946 A.2d 550, 558 (N.J. 2008).

7. Great-West Life & Annuity Ins. Co. v. Bullock, 202 F. Supp. 2d 461, 465 (E.D.N.C. 2002).

8. Milavetz, Gallop & Milavetz P.A. v. United States, 355 B.R. 758, 764 (D. Minn. 2006).

citing Lord Brougham, explains that "lawyers are partial; they prefer their clients' interests over the interests of others in ways that would ordinarily be immoral."[9] Charles Fried observes that "the professional's primary loyalty is to his client."[10] Fred Zacharias acknowledges that "different jurisdictions adopt a variety of constraints on lawyer behavior, but these are narrow and specific."[11] Otherwise, "[l]awyers' paramount duties are to their clients: attorneys must pursue client interests zealously, remain loyal at all times, and maintain client secrets."[12]

Practitioner guides reach similar conclusions. The American Jurisprudence treatise puts it bluntly: "An attorney's paramount duty is to his client."[13] The Trial Handbook for Arkansas Lawyers likewise states: "An attorney's paramount duty is to the client."[14] The Trial Practice Handbook for Louisiana goes even further, adopting this position not only descriptively but also prescriptively: "An attorney's paramount duty is, *and must be*, to his client."[15]

But other authorities have suggested that a lawyer's highest duty is not to his client, but rather to the public at large or to the justice system. The Seventh Circuit has declared: "While attorneys are advocates, they are also officers of the court. Their duty to their clients cannot override their duty to respect the system of justice, including court rules and orders."[16] A Minnesota district court went even further and placed the interests of the public above the interests of a lawyer's client:

> Attorneys are officers of the court and their *first duty* is to the administration of justice. Whenever an attorney's duties to his client conflict with those he owes to the public as an officer of the court, he must give precedence to his duty to the public. Any other view would run counter to a principled system of justice.[17]

The Second Circuit similarly concluded: "A trial counsel, however zealous in his client's behalf, has a *paramount obligation* to the due administration of justice."[18]

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9. Daniel Markovits, *Legal Ethics from The Lawyer's Point of View*, 15 YALE J.L. & HUMAN. 209, 213 (2003). Markovits explains, however, that not even all of Lord Brougham's contemporaries agreed with him and that Lord Broguam himself later characterized this statement as hyperbole. *Id.* at 213 n.6.

10. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1061 (1976).

11. Fred C. Zacharias, *Structuring The Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice*?, 44 VAND. L. REV. 45, 53 (1991).

12. *Id.* at 53.

13. 7 Am. Jur. 2d Attorneys at Law § 139 (citing Landry v. Base Camp Mgmt., LLC, 206 So.3d 921 (La. Ct. App. 1st Cir. 2016), *writ denied*, 2016-2105 La. 1/13/17, 2017 WL 375013 (La. 2017)).

14. 3 TRIAL HANDBOOK FOR ARKANSAS LAWYERS § 4:2 (2019–2020 ed.).

15. TRIAL HANDBOOK FOR LOUISIANA LAWYERS § 1:11 (3d ed.) (emphasis added).

16. Wagner v. Williford, 804 F.2d 1012, 1017–18 (7th Cir. 1986).

17. Van Berkel v. Fox Farm, 581 F. Supp. 1248, 1251 (D. Minn. 1984) (emphasis added).

18. United States v. Landes, 97 F.2d 378, 381 (2d Cir. 1938) (emphasis added). *See also* People v. Chong, 76 Cal. App. 4th 232, 243, 90 Cal.Rptr.2d 198, 206 (1999) (emphasis added).

Other authorities and commentators acknowledge that a lawyer's highest duty is not always to a client and that lawyers must weigh their clients' interests with other competing values. The preamble to the ABA *Model Rules* acknowledges the tensions among the different constituencies a lawyer serves:

> A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. . . . In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.[19]

Similarly, the Preamble refers to "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."[20] The Preamble to the ABA *Model Rules* thus implicitly acknowledges that a lawyer must represent clients *and* support the legal system *and* be a "public citizen" who safeguards the "quality of justice."[21]

Various legal scholars have also observed that a lawyer's sole responsibility is not to her client. Deborah Rhode, for example, summarized a lawyer's competing professional priorities as follows:

> [C]lient trust, autonomy, and confidentiality are entitled to weight, but they must be balanced against other equally important concerns. Lawyers also have responsibilities to prevent unnecessary harm to third parties, to promote a just and effective legal system, and to respect core values such as honesty, fairness, and good faith on which this system depends.[22]

Alec Whalen argues that even in an adversary system in which lawyers advocate zealously for their clients, "lawyers still have an ethical duty to refuse to help unscrupulous clients unless there is some other overriding good at stake. And even when their clients are pursuing morally permissible or even morally laudable ends, the permissibility and propriety of using ethically troubling means is limited."[23] Aziz Rana similarly argues that "embedded in the very nature of legal practice is an irreducible degree of discretion, in which lawyers face unavoidable conflicts about how to situate their clients' objectives within a host of competing social ends."[24]

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19. MODEL RULES OF PROF'L CONDUCT pmbl. ¶¶ 8–9 (2018) [hereinafter MODEL RULES].

20. *Id.* at ¶ 9. The ABA's egregiously clunky effort to avoid a split infinitive—"obligation zealously to protect"—will otherwise go unremarked.

21. *Id.* at pmbl. & scope ¶ 1.

22. Deborah L. Rhode, *Legal Ethics in An Adversary System: The Persistent Questions*, 34 HOFSTRA L. REV. 641, 644 (2006).

23. Alec Walen, *Criticizing the Obligatory Acts of Lawyers: A Response to Markovits's Legal Ethics from the Lawyer's Point of View*, 16 YALE J.L. & HUMAN. 1, 4 (2004).

24. Aziz Rana, *Statesman or Scribe? Legal Independence and the Problem of Democratic Citizenship*, 77 FORDHAM L. REV. 1665, 1669 (2009).

Carol R. Andrews, in her historical survey of litigation ethics, observes that in litigation advocacy in particular, certain objectives take precedence over a client's interests: "Over the centuries, the concept of litigation fairness has included different duties and standards of conduct, including reasonable behavior, truth, just cause, proper motive, and objective merit. When imposed, these duties have been paramount over any conflicting client duties."[25] She concludes that promoting a client's interests are not, and have never been, a lawyer's foremost duty in litigation: "Lawyers today, just as centuries ago, owe paramount duties to the court."[26]

Similarly, L. Ray Patterson remarks on a lawyer's conflicting duties to the client and to the court: "On the one hand, as the cases tell us, the lawyer's duty is to his client. . . . More frequently, however, the cases speak of the lawyer's duty to the court[.]"[27]

Finally, the California Supreme Court has identified the tension between serving a client's interests and limiting codes of behavior as a distinctive characteristic of law as a profession:

> Perhaps the defining feature of professionals as a class is the extent to which they embody a dual allegiance. On the one hand, an attorney's highest duty is to the welfare and interests of the client. This obligation is channeled, however, by a limiting and specifically professional qualification: attorneys are required to conduct themselves as such, meaning that they are bound at all events not to transgress a handful of professional ethical norms that distinguish their work from that of the nonattorney.[28]

These disparate views on whom a lawyer should serve do not necessarily reveal real normative disagreements about the role of a lawyer. Rather, this apparent tension arises because lawyers have numerous duties, and different duties serve different interests.

B. THE UNCONFLICTED ETHICS OF OTHER PROFESSIONALS

The complex framework of a lawyer's duties contrasts starkly with the ethical responsibilities of professions other than the law. While other professions also serve multiple beneficiaries, typically they prioritize those interests.

Take the medical profession. The American Medical Association's Code of Medical Ethics includes duties to a physician's colleagues,[29] to the public,[30] to

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25. Carol Rice Andrews, *Ethical Limits on Civil Litigation Advocacy: A Historical Perspective*, 63 CASE W. RES. L. REV. 381, 383 (2012).
26. *Id*. at 439.
27. L. Ray Patterson, *The Function of a Code Of Legal Ethics*, 35 U. MIAMI L. REV. 695, 711–12 (1981).
28. Gen. Dynamics Corp. v. Superior Court, 876 P.2d 487, 498 (Cal. 1994).
29. AMA PRINCIPLES OF MEDICAL ETHICS ¶ IV [hereinafter MEDICAL ETHICS].
30. *Id*. at ¶ V.

the law,[31] and to advance scientific knowledge and medical education.[32] But a doctor's utmost duty is to her patient: "A physician shall, while caring for a patient, regard responsibility to the patient as paramount."[33] This requirement is so powerful it can even require a doctor to break the law: "In exceptional circumstances of unjust laws, ethical responsibilities should supersede legal duties."[34]

The nursing profession provides similar guidance. The Code of Ethics for Nurses provides that "[t]he nurse's primary commitment is to the recipient of nursing and health care services—the patient—whether the recipient is an individual, a group, or a community."[35]

Other professions are similarly focused on a single primary beneficiary of their services. For the accounting profession, according to international standards, the overriding obligation is to act in the public interest: "A distinguishing mark of the accountancy profession is its acceptance of the responsibility to act in the public interest. Therefore, a professional accountant's responsibility is not exclusively to satisfy the needs of an individual client or employer."[36] The United States Supreme Court has reached the same conclusion:

> By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a public responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public.[37]

Similarly, Canon I of the National Society of Engineers' Code of Ethics provides that engineers shall "[h]old paramount the safety, health, and welfare of the public.

Thus, lawyers—at least in the United States—stand apart from other major professions in serving multiple beneficiaries, without necessarily prioritizing one above another.[38]

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31. *Id*. at ¶ III.
32. *Id*. at ¶ V.
33. *Id*. at ¶ VIII.
34. *Id*. at preface & pmbl.
35. Code of Ethics for Nurses with Interpretive Statements § 2.1.
36. IESBA Code of Ethics for Professional Accountants § 1001.
37. United States v. Arthur Young & Co., 465 U.S. 805, 817–81 (1984).
38. An exception is the psychology profession. The Preamble to the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct acknowledges that psychologists "perform many roles, such as researcher, educator, diagnostician, therapist, supervisor, consultant, administrator, social interventionist, and expert witness." APA, Ethical Principles of Psychologists and Code of Conduct pmbl, AM. PSYCHOL. ASS'N, at 3 (2017). The Code essentially advocates a utilitarian solution when professional obligations conflict with one another: "In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons, and the welfare of animal subjects of research. When conflicts occur among psychologists' obligations or concerns, they attempt to resolve these conflicts in a responsible fashion that avoids or minimizes harm." *Id*. General Principle A. Likewise, certified financial advisers are required both to "[p]lace the integrity of the investment profession and the interests of clients above their own personal interests," as well as to "[a]ct with integrity, competence,

C. THE THREE BENEFICIARIES OF A LAWYER'S SERVICES

While a lawyer's duties *as a whole* do not prioritize one interest above all others, each individual professional obligation of a lawyer can best be understood as doing just that. As the next Part will show, the rules that govern lawyers' conduct can be divided into three categories that are based upon the primary beneficiary of the rule. These three categories are:

1. Rules that benefit clients (whether current, former, or prospective).
2. Rules that benefit third parties (such as courts, the justice system generally, or individual non-clients).
3. Rules that benefit lawyers themselves.

The rules in the first category set forth lawyers' duty to serve their clients and not to subordinate their clients' interests to others'. The rules in the second category limit how far lawyers may go to serve their clients, to safeguard the interests of non-clients. And rules in the third category allow lawyers to elevate their own personal interests above all others in particular circumstances.

The only exceptions to these categorizations are those rules that effectively refer back to the rest of the rules: for example, rules that require a lawyer to ensure that others comply with the rules of professional conduct[39] and procedural rules that determine *how* lawyers get disciplined.[40]

Every other substantive standard of professional conduct has one, and only one, primary beneficiary. Sometimes, different subsections of the same rule have different beneficiaries, and in those cases, it is appropriate to treat different parts of a single overall rule as separate rules for purposes of determining their beneficiaries. Moreover, a rule may have a secondary beneficiary.

Even though the rules of professional conduct can be understood as an ongoing effort to balance a lawyer's competing duties, an individual rule normally doesn't require a lawyer to balance different interests. For example, when a standard is written to benefit a lawyer's client, the lawyer is not required, or even permitted, to consider whether following that rule would be detrimental to the courts, to the public in general, or to the lawyer himself.[41]

Understanding who benefits from a particular rule also helps explain why different rules are enforced through different means. An attorney can face consequences for violating the rules in three primary ways: a professional disciplinary complaint, a malpractice claim, and a motion to disqualify the lawyer from a

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diligence, respect and in an ethical manner" with respect to all "participants in the global capital markets." Code of Ethics and Institutional Standards of Conduct, CFA INST. (2014).

39. *See, e.g.*, MODEL RULES R. 5.1–5.3, 8.4(a).

40. *See, e.g.*, *id.* at R. 8.5.

41. For a discussion of the tension between a lawyer's individual ethical responsibilities and the collective effects, see Andrew B. Ayers, *The Lawyer's Perspective: The Gap Between Individual Decisions and Collective Consequences in Legal Ethics*, 36 J. LEGAL PROF. 77 (2011).

litigation.[42] The *means* through which enforcement of a particular rule is sought is an effective signal of whose interests are at stake: typically, someone will formally allege a violation of the rule through a particular channel only if they have something to gain from doing so.

The remainder of this Article will apply a beneficiary framework to a sample of key professional standards. The goal is to demonstrate that this framework is coherent and useful both in applying the rules and in assessing their effectiveness.

II. WHO BENEFITS FROM THE RULES: A SELECTIVE RULE-BY-RULE EXAMINATION

This Part examines several of the standards of professional conduct to determine which constituencies they serve. For some rules, the beneficiary is obvious and uniform, while other rules need to be sliced and diced as different subsections of the rule have different beneficiaries. Although this examination does not look at all the rules of professional conduct—that would take a book, not an article—it aims at addressing a broad and diverse cross-section. Specifically, this Part examines the rules on (1) client confidentiality, (2) the scope of representation, (3) terminating representation, (4) advocacy, and (5) the rules that are discretionary rather than mandatory.

The specific language discussed will be that of the ABA *Model Rules*, which have been substantially adopted in every U.S. jurisdiction.[43] Many states have tailored variations on the rules, some of which are discussed below.

A. THE COMPETING BENEFICIARIES OF THE CONFIDENTIALITY RULE

The obligation to maintain client confidences is one of the most well-known and, to many, most fundamental responsibilities of any lawyer.[44] A Colorado court in 1889 described this duty elegantly:

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42. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS Foreword (2000) ("The remedy of malpractice liability and the remedy of disqualification are practically of greater importance in most law practice than is the risk of disciplinary proceedings."). To be sure, attorneys can face professional consequences for breaking the rules in other ways. For instance, even outside a motion to disqualify, a court has the inherent power to sanction a lawyer appearing before the court who violates the rules of practice. *See, e.g.*, *In re* Engle Cases, 283 F. Supp. 3d 1174, 1242 (M.D. Fla. 2017) (observing that "[a] court has the inherent authority to sanction lawyers when they violate a court's local rules or the rules regulating the bar" and penalizing lawyers for filing frivolous complaints in violation of Florida Rule 3.1).

43. The last state to adopt the *Model Rules* was California, which finally "bent the knee" in 2018. *See* State Bar of Calif., News Release, *New Rules of Professional Conduct Effective November 1* (Nov. 1, 2018), http://www.calbar.ca.gov/About-Us/News/News-Releases/new-rules-of-professional-conduct-effective-november-1 [https://perma.cc/2DQA-ZCRN].

44. *See, e.g.*, Nix v. Cox Enters., Inc., 545 S.E.2d 319, 322 (Ga. Ct. App. 2001) ("the sacrosanct attorney-client confidentiality . . . is the bedrock of the attorney's ethical duty to his client."); George v. Siemens Indus. Automation, Inc., 182 F.R.D. 134, 138 (D.N.J. 1998) ("The principles involved in both the ethical consideration of client confidentiality and the privilege between attorneys and clients are the two most fundamental tenets of the attorney-client relationship."); *In re* Ethics Advisory Panel Opinion No. 92–41–M.P., 627 A.2d 317, 318

> Now, it is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that that lawyer's tongue is tied from ever disclosing it; and any lawyer who proves false to such an obligation, and betrays or seeks to betray and information or any facts that he has attained while employed on the one side, is guilty of the grossest breach of trust.[45]

Although the most obvious beneficiaries of the confidentiality requirement are clients, the different parts of the rule—codified as Model Rule 1.6—have different beneficiaries, which in some cases are not clients.[46]

The operative part of the first section of Model Rule 1.6 provides: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."[47] The plain beneficiary of this rule is, of course, the lawyer's client: the client is able to share confidences with the lawyer, primarily to get legal advice relating to those confidences, without the fear that the lawyer will reveal that information to others.[48]

Moreover, the lawyer must maintain confidentiality even if others would benefit from a breach of those confidences. In an archetypal case, a lawyer who knows his client has committed a crime not only is not obliged to tell the police that his client is the guilty party; he is not *permitted* to blow the whistle without the client's consent. This is the rule even in the (likely) instance that others—the crime victim, the police, the courts, or the public at large—would benefit from the client being duly caught and punished. This is not a utilitarian consideration: even if the world as a whole would be better off if the lawyer fingered his client, the lawyer's duty is solely to the benefit of his client. As Professor Daniel Fischel explains:

> That clients benefit from confidentiality seems obvious. Indeed, the benefit to clients from higher quality legal advice facilitated by confidential communications is the stated justification for confidentiality rules. And the benefit is arguably greatest when confidentiality enables a client to prevent relevant but

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(R.I. 1993) (identifying "the lawyer's duty of confidentiality" as one of "the most fundamental ethical obligations of attorneys engaged in the practice of law"); Reardon v. Marlayne, Inc., 395 A.2d 255, 257 (N.J. Super. Ct. Law Div. 1978) ("The obligation of an attorney to preserve the confidences and secrets of a client stands as a bedrock principle of the Anglo-American legal system."); N.Y. City Bar Formal Op. 2002-1 (2002) (noting that an attorney's duty of confidentiality is "the bedrock of the adversary system" (citation omitted)); Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 1 (1998) ("Confidentiality is the bedrock principle of legal ethics.").

45. United States v. Costen, 38 F. 24, 24 (C.C.D. Colo. 1889).

46. The final subsection of Model Rule 1.6 is also for the benefit of clients: it requires lawyers to undertake reasonable safeguards to protect confidential information from inadvertent disclosure. MODEL RULES R. 1.6(c).

47. *Id*. at R. 1.6(a).

48. Dru Stevenson has argued that this benefit to clients in Rule 1.6 is largely redundant to other rules of professional conduct, a lawyer's fiduciary duty to a client, attorney-client privilege, and other evidentiary rules, rendering the confidentiality rule itself redundant. *See* Dru Stevenson, *Against Confidentiality*, 48 U.C. DAVIS L. REV. 337, 382–88 (2014).

> negative information from reaching a decisionmaker. Society may lose if its laws and regulations are violated, but the private benefit appears to be indisputable.[49]

Recognizing the potentially extreme implications of this duty of confidentiality, the drafters of Rule 1.6 included various exceptions where "[a] lawyer may reveal information relating to the representation of a client."[50] Each exception has a clear intended beneficiary:

- Subparts (b)(1) to (b)(3) of Rule 1.6 focus on third parties. They allow a lawyer to reveal client confidences to prevent substantial bodily or financial harm that is "reasonably certain" to happen.[51]
- Subpart (b)(4) allows a lawyer to reveal client confidences "to secure legal advice about the lawyer's compliance with these Rules."[52] The primary beneficiary of this provision is the lawyer herself. This exception allows a lawyer to take steps to protect herself against professional liability and discipline. Of course, depending on which particular rule of professional conduct the lawyer is getting advice on, the lawyer's client or third parties may be secondary beneficiaries of this provision.
- Subpart (b)(5) allows a lawyer to reveal client confidences to defend himself, or support his claims, in civil or criminal proceedings, including proceedings against the client.[53] The beneficiary of this provision is, again, the lawyer.
- Subpart (b)(6) allows lawyers to reveal client confidences where disclosure is necessary "to comply with other law or a court order."[54] Although at first blush the apparent primary beneficiary of this provision is third parties—namely courts or parties to proceedings who have an interest in the revelation of the confidences—in fact the primary beneficiary is, again, the lawyer himself. Absent this exception, a lawyer who is ordered by a court to reveal a client confidence would find himself in a bind: on the one hand, at risk of violating his duty of confidentiality, and on the other hand at risk of being held in contempt of court. Subpart (b)(6) allows the lawyer to avoid this dilemma.
- Subpart (b)(7) allows lawyers to reveal client confidences where necessary to avoid conflicts of interest due to lateral movement or changes in a partnership.[55] As this provision is essentially an offshoot of the conflict-of-interest rules, its primary beneficiaries are clients.[56]

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49. Fischel, *supra* note 44, at 15–16.
50. MODEL RULES R. 1.6(b).
51. *Id.* at R. 1.6(b)(1)–(3).
52. *Id.* at R. 1.6(b)(4).
53. *Id.* at R. 1.6(b)(5).
54. *Id.* at R. 1.6(b)(6).
55. *Id.* at R. 1.6(b)(7).
56. However, as discussed below, it is debatable whether the conflict-of-interest rules really do always benefit clients. *See infra* section III.A.

Accordingly, while the default rule that lawyers must maintain client confidences is for the benefit of clients, the permissive exceptions to the rule serve varying constituencies: in some cases clients, in some cases the lawyers themselves, and in some cases third parties.

Not every jurisdiction's confidentiality rule balances these interests in the same way. Some states' versions of Rule 1.6 provide even greater benefits to lawyers. For example, New York's Rule 1.6 allows a lawyer to reveal client confidences where the lawyer believes that doing so is reasonably necessary "to establish or collect a fee."[57]

By contrast, California's recently adopted version of Rule 1.6 includes only one exception: it allows a lawyer to reveal client confidences "to the extent that the lawyer reasonably believes the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual."[58] And even in such a limited case, before revealing the client's confidential discussion to anyone else, the lawyer must first take several steps if reasonably possible:

> (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act; or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
>
> (2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal [client confidences].[59]

Lawyers practicing in California do not have the right to reveal client confidences for purposes of, for example, defending themselves in litigation or disciplinary proceedings, or to prevent substantial pecuniary harm due to a client's wrongdoing, as is allowed under the *Model Rules*.[60] Accordingly, the drafters of California's Rule 1.6 reached a different calculus in balancing the client's interest in confidentiality with the other interests that justified revealing client confidences: only in the extreme and rare case where a lawyer needs to prevent severe physical harm or death may a lawyer depart from their obligation to maintain client confidentiality.

Daniel Fischel's deep examination of the benefits and drawbacks of attorney-client confidentiality highlights the challenges of determining who benefits from ethical rules. Fischel makes a counterintuitive claim that "clients are not the

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57. N.Y. RULES OF PROF'L CONDUCT R. 1.6(b)(5)(ii) [hereinafter NYRPC]. Arguably this provision has a counterpart in Model Rule 1.6's subsection allowing a lawyer to reveal client confidences "to establish a claim . . . on behalf of the lawyer in a controversy between the lawyer and the client." MODEL RULES R. 1.6(b)(5). *See also* D.C. RULES OF PROF'L CONDUCT R. 1.6(e)(5) [hereinafter D.C. RPC] (allowing a lawyer to reveal client confidences "to the minimum extent necessary in an action instituted by the lawyer to establish or collect the lawyer's fee").

58. CAL. RULES OF PROF'L CONDUCT R. 1.6(b) [CAL. RPC].

59. CAL. RPC R. 1.6(c).

60. MODEL RULES R. 1.6(b)(2), (5).

primary beneficiaries of confidentiality rules."[61] But this argument effectively amounts to the claim that society as a whole, rather than clients specifically, is harmed from many aspects of the confidentiality rule. For example, Fischel argues that "[l]itigation is a zero-sum game" and to the extent one side in litigation benefits from confidentiality, the other side suffers.[62] However, in such a case, an individual lawyer's *own* client benefits from confidentiality, even if the client on the other side, or the justice system generally, suffer.[63]

B. THE COMPETING BENEFICIARIES OF THE SCOPE OF REPRESENTATION RULE

Rule 1.2, regarding the scope of a lawyer's representation, also serves different constituencies in different subsections. Model Rule 1.2(a) provides that a lawyer must "abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4 [the rule regarding client communications], shall consult with the client as to the means by which they are to be pursued."[64] Rule 1.2(a) specifically requires lawyers to follow their clients' direction in civil and criminal cases.[65] This is plainly a client-benefiting rule, at least to the extent that

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61. Fischel, *supra* note 44, at 16.

62. *Id.* at 16–17.

63. Fischel similarly argues that "confidentiality rules victimize clients as a class" where, for example, confidentiality rules "prohibit[] disclosure to exonerate the falsely accused defendant or to locate the abducted child." *Id.* at 17. But again, this rationale conflates particular "clients" with society as a whole. So does Fischel's argument that "in the context of civil litigation . . ., there is no reason to believe that confidentiality rules increase the probability of winning because the benefit of confidentiality in any particular case is offset by the cost in another. Clients as a class gain nothing." *Id.* at 18.

Fischel also posits that in litigation, "confidentiality penalizes clients with nothing to hide." *Id.* This is because "an argument made by someone known to be an advocate is less credible than the same argument made by someone who is expressing his own beliefs after independent investigation," and clients with nothing to hide "would like their attorneys to communicate credibly that nothing is being hidden from the decision-maker—but confidentiality makes this impossible." *Id.* at 18. There is a simple solution for clients who are so confident that disclosure of unvarnished facts will vindicate them: they can instruct their lawyer to represent to the court that they have waived attorney-client confidentiality, that the court is free to ask the lawyer anything, and that no information or evidence will be withheld as confidential or privileged. In practice, it will be the rare litigant who is willing to take such a step, however much it might advance the litigant's credibility with the court.

Realizing this gap in his argument, Fischel argues that the "witness advocate rule" and the "antivouching rule" limit the ability of clients to leverage a confidentiality waiver effectively. *See id.* at 21 (citing ABA Model R. 3.7, 3.4(e)). However, these rules both address fairly narrow circumstances: the former in which the same individual lawyer serves as both trial counsel and trial witness; the latter in which a lawyer editorializes her "opinion" or purports to make factual representations while acting as an advocate. There are numerous other contexts in which a client is free to waive attorney-client confidentiality, including many in which a client could do so in order to enhance the credibility of her side. In any event, as discussed below, the witness advocate rule and the anti-vouching rule are both "others"-benefiting rules and so insofar as they limit the client benefits of Rule 1.6, that is a feature of these rules, not a bug.

64. . MODEL RULES R. 1.2(a).

65. *Id.*

we assume that requiring a lawyer to abide by a client's instruction is always in the client's interest.[66]

Sections (b) and (c) of Rule 1.2 are, by contrast, lawyer-benefiting. Both sections allow for limits as to the scope of the lawyer's relationship with the client. Section (b) provides that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."[67] This subsection gives a lawyer "cover" when representing unpopular or controversial clients. It effectively insulates the lawyer from broad identification with her client's interests and viewpoints other than the client's legal position.[68]

Section (c) allows a lawyer to "limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[69] This subsection enables a lawyer to avoid being an all-purpose legal adviser to a client if the lawyer does not want to (or cannot) be one. A lawyer whose engagement agreement with a client specifies, for example, that the representation will be limited to a commercial litigation will be able to defend himself if the client sues the lawyer for failing to give tax advice.

The first clause of section (d), by contrast, is primarily designed for the benefit of neither the client nor the lawyer, but rather third parties: the would-be victims of a client's criminal or fraudulent activity. It provides that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."[70] Lawyers themselves are secondary beneficiaries of the clause as it helps them avoid criminal and civil exposure for taking part in client wrongdoing.

While the first clause of Rule 1.2(d) is third-party-focused, the rest of it is client-focused. The second clause starkly limits the effect of the first clause, as it expressly allows a lawyer to "discuss the legal consequences of any proposed course of conduct with a client."[71] The commentary to the rule underscores this distinction:

> This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action

66. Many a lawyer has questioned whether a client's chosen course of action is the correct one.

67. MODEL RULES R. 1.2(b).

68. A secondary beneficiary of section (b) is clients. As the commentary to the rule explains: "Legal representation should not be denied to people . . . whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities." *Id.* at R. 1.2 cmt. 5. Accordingly, the thinking behind the rule is in part that lawyers will be more willing to represent divisive clients if they are not fully identified with those clients.

69. *Id.* at R. 1.2(c).

70. *Id.* at R. 1.2(d).

71. *Id.*

> that is criminal or fraudulent of itself make a lawyer a party to the course of action.[72]

This review of the scope of representation rule helps illustrate the competing interests and values that the drafters of the rule had to weigh. Balancing the need to serve clients with the need for lawyers to limit their representation and with the need to protect third parties resulted in a rule whose different subsections serve very different constituencies.

C. THE COMPETING BENEFICIARIES OF THE RULE ON TERMINATING REPRESENTATION

Rule 1.16 governs the termination of a client representation. Each subsection of the rule has a different beneficiary.

Section (a) of the rule specifies circumstances where a lawyer must decline or terminate a representation. The primary beneficiary of Rule 1.16(a) is the lawyer's client. Or, more precisely, the beneficiary of the rule is the client where it involves terminating a representation, and a prospective client where it involves declining a representation:

- Specifically, subsection (a)(1) of Rule 1.16 requires a lawyer to decline or terminate a client engagement if "the representation will result in violation of the rules of professional conduct or other law."[73] This rule, like several others, is facially a rule of "scope" as it effectively refers to the rest of the rules and other law. So, whoever is the beneficiary of the referred-to rule or law that prohibits representation is the effective beneficiary of this provision. In practice, that beneficiary will most often be the lawyer's client. The overwhelmingly most common reason why a lawyer must decline or terminate a representation is because it is compelled by the conflict-of-interest rules, which as discussed below are ostensibly client-focused.[74]
- Subsection (a)(2) of the rule provides that a lawyer shall not represent a client or shall terminate an engagement if "the lawyer's physical or mental

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72. *Id.* at R. 1.2 cmt. 9. Unlike the exceptions to attorney-client confidentiality in Rule 1.6, the first clause of Rule 1.2(d) is mandatory rather than discretionary. There is a stark contrast between a lawyer's ability to *reveal* a client's plan to commit a crime or fraud, and a lawyer's ability to *advise* a client to commit a crime or fraud. But while a lawyer may not say to a client, "I think you should commit X crime," a lawyer *can* say: "Here is what is likely to happen to you if you commit X crime." That can include the lawyer's assessment of the likelihood—or lack thereof—that the client will get caught, prosecuted, and convicted. And it can also include an objective assessment of the upside consequences to the client of committing the crime. Though the lawyer may not outright advise the client to commit the wrongful act, the lawyer is fully permitted to advise on the negatives *and positives* of doing so. So, while the commentary to Rule 1.2 says that "[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity," as a practical matter that distinction is a very thin one.

73. *Id.* at R. 1.16(a)(1).

74. *See infra* section III.A. In other cases, not involving a conflict of interest, the beneficiary may be different. For example, "[a] lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal . . . ." MODEL RULES R. 1.16 cmt. 2. In such a case, the beneficiary is whichever third parties are meant to be protected by the law that the client wants the lawyer to violate.

condition materially impairs the lawyer's ability to represent the client."[75] This is plainly a client-focused standard, as it protects clients from lawyers who are unable to fulfill their professional duties due to personal limitations.

- Subsection (a)(3) provides the common-sense requirement that a lawyer must terminate a representation where "the lawyer is discharged."[76] Again, this is a client-focused rule: when the client fires the lawyer, the lawyer cannot continue to purport to represent the client against the client's will.

Section (b) of Rule 1.16 lists various circumstances where a lawyer is permitted to withdraw from representing a client. These provisions primarily benefit lawyers. Specifically:

- Subsection (1) of Rule 1.16(b) benefits lawyers. It allows a lawyer to withdraw from a representation whenever "withdrawal can be accomplished without material adverse effect on the interests of the client."[77] This rule accordingly provides flexibility to lawyers to end a representation without the client's consent, so long as the client does not experience a "material adverse effect" as a result.[78]
- Subsection (2) and (3) benefit lawyers, though on their face they might appear primarily to benefit third parties. They respectively allow a lawyer to withdraw from a representation if "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent," or if "the client has used the lawyer's services to perpetrate a crime or fraud."[79] Like the rules allowing a lawyer to disclose client confidences to the extent necessary to prevent bodily or pecuniary harm,[80] or the law prohibiting a lawyer from advising or assisting a client in a crime,[81] these rules appear designed to protect third parties from the criminal acts of a lawyer's client. A client whose lawyer threatens to quit the representation may be deterred from committing the crime or fraud that the client is contemplating. However, that benefit is merely derivative of the lawyer's right to resign from a representation if she is unhappy with the use her client is making of her professional services. These provisions reduce the lawyer's legal or reputational exposure for the client's crimes—which may or may not have the incidental third-party benefit of preventing those crimes in the first place.
- Subsection (4) benefits the lawyer. It allows a lawyer to withdraw from a representation if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental

75. MODEL RULES R. 1.16(a)(2).
76. *Id.* at R. 1.16(a)(3).
77. *Id.* at R. 1.16(b)(1).
78. *Id.*
79. *Id.* at R. 1.16(b)(2)–(3).
80. *Id.* at R. 1.6(b)(1)–(3).
81. *Id.* at R. 1.2(d).

disagreement."[82] This provision, like Rule 1.2(b),[83] helps a lawyer avoid being identified with client action that the lawyer personally objects to, even if that action is not illegal. Like subsections (2) and (3), this provision may also secondarily benefit third parties to the extent the behavior in question harms others, and the lawyer's threat to quit the representation deters the client from that behavior.

- Subsections (5) and (6) also benefit the lawyer. These provisions allow the lawyer to withdraw if "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services" or if "the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client."[84] In short, if the representation becomes too challenging because the client fails to meet its own obligations—financial or otherwise—the lawyer may end the relationship.[85]
- Subsection (7) is a catchall term that allows a lawyer to withdraw from the representation if "other good cause for withdrawal exists."[86] This is again a lawyer-benefiting provision as it creates flexibility for a lawyer to stop representing a client for reasons not specified elsewhere in the rule.

Finally, section (c) of Rule 1.16 benefits third parties—specifically, the courts and other fora in which a lawyer represents a client. The rule provides that "[a] lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation."[87] And this section (c) overrides sections (a) and (b) of the rule as it provides: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."[88] Thus, when Rule 1.16(c) comes into play, the interests of the court are supreme: even if the client wants to terminate the lawyer, or even if the lawyer had proper grounds to end the representation, the representation may only end if the court permits it.

D. THE COMPETING BENEFICIARIES OF THE RULES ON ADVOCACY

Various commentators have struggled with the distinction between a lawyer's duty to promote a client's interests and the lawyer's duty to the court.[89] That distinction plays out in the so-called "advocate" rules, which place a lawyer's duty

82. *Id.* at R. 1.16(b)(4).

83. *See supra* section II.B.

84. MODEL RULES R. 1.16(b)(5)–(6).

85. *See also id.* at R. 1.16 cmt. 8 ("A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.").

86. *Id.* at R. 1.16(b)(7).

87. *Id.* at R. 1.16(c).

88. *Id.*

89. *See generally e.g.*, Bruce A. Green, *Candor in Criminal Advocacy*, 44 HOFSTRA L. REV. 1105 (2016); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice*?, 44 VAND. L. REV. 45 (1991); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

to a client below the duty to the justice system. Although some of these rules—codified as Model Rules 3.1 through 3.9—nominally promote the interests of the justice system, in practice the primary beneficiary of many of these rules is a lawyer's litigation opponent.

Model Rule 3.1 prohibits a lawyer from pursuing a claim "unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[90] The commentary to the rule explains that the rule is meant to override a lawyer's general duty to pursue his client's interests: "The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure."[91] Although this language suggests the lawyer has two coextensive duties, one to the client and the other not to abuse the system, the structure of the comment suggests that the latter duty overrides the former: if pursuit of a claim would "abuse legal procedure," the lawyer is not permitted to do so even if it would be in the client's interest.[92]

Rule 3.1 does, however, contain a client-benefiting clause and a corresponding comment, at least with respect to criminal defense representations or other proceedings where the client is facing incarceration. The second sentence of Rule 3.1 provides: "A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established."[93]

Comment 3 to Model Rule 3.1 goes even further and appears to create a limited carveout from the prohibition on frivolous claims, in a way that benefits clients: "The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule."[94] So, if asserting a particular contention in a criminal case is necessary to provide a defendant with constitutionally adequate assistance of counsel, the lawyer may apparently make that contention even if it is without basis in law or fact or an abuse of process.

Rule 3.2 similarly acknowledges a lawyer's duty to a client while implicitly subordinating the client's interests to that of the court system. The rule provides in its entirety: "A lawyer shall make reasonable efforts to expedite litigation

90. MODEL RULES R. 3.1.

91. *Id.* at R. 3.1 cmt. 1.

92. *Id.*

93. *Id.* at R. 3.1. According to Simon's Commentary on the New York Rules, this second sentence does not allow lawyers to assert frivolous positions in criminal cases—it is not a carveout from the first sentence. Rather, "[c]riminal defense lawyers are prohibited, like all other lawyers, from filing frivolous motions, taking frivolous positions, or engaging in other frivolous conduct. The second sentence of Rule 3.1(a) means only that holding the prosecution to its burden of proving every element of its case is never frivolous." ROY D. SIMON JR., SIMON'S NY RULES OF PROF. CONDUCT ANN. § 3.1:4 (2021).

94. MODEL RULES R. 3.1 cmt. 3.

consistent with the interests of the client."[95] To the extent the rule suggests any tension between the duty to expedite litigation and the duty to further the client's interests, the commentary resolves that tension in favor of the former: "Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose."[96] Moreover, the commentary even pooh-poohs the very idea that a client might benefit from unreasonably delaying litigation by eliding the distinction between a client's *interest* and client's *legitimate interest*: "Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client."[97]

Rule 3.3, "Candor Toward the Tribunal," is perhaps the clearest example of a rule placing a lawyer's duty to the court above the lawyer's duty to a client. Part (a) of the rule prohibits a lawyer from "knowingly" making false statements of law and fact to a tribunal; from failing to disclose controlling legal authority that is "directly adverse" to the client's position; and from offering false evidence.[98] Part (b) lays out a lawyer's duty if she knows that someone "intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding."[99] This can include, for example, destruction of evidence, witness intimidation, or jury tampering. In such a case, the lawyer is required to take "reasonable remedial measures, including, if necessary, disclosure to the tribunal."[100] And part (c) of the rule makes clear that the lawyer's duty under this rule overrides any contrary duty to the client: it says that the responsibilities laid out in the rule "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 [the confidentiality rule]."[101] The commentary to Rule 3.3 makes plain its prioritization of interests: "A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal."[102]

Rule 3.4 is, in a way, even more radical than the previously discussed advocacy rules because on its face it imposes a duty not to the court itself, but rather a duty to the lawyer's litigation adversary. The rule, titled "Fairness to Opposing Party

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95. *Id*. at R. 3.2.

96. *Id*. at R. 3.2 cmt. 1.

97. *Id*.

98. *Id*. at R. 3.3(a). One part of Rule 3.3(a), discussed *infra*, gives the lawyer *discretion* to refuse to present evidence that the lawyer "reasonably believes is false." *Id*. at R. 3.3(a)(3).

99. MODEL RULES R. 3.3(b).

100. *Id*. *See also id*. at R. 3.3 cmt. 12:

> Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so.

101. *Id*. at R. 3.3(c).

102. *Id*. at R. 3.3 cmt. 2.

& Counsel," prohibits a variety of behaviors that would place an opponent at an unfair disadvantage: for example, by depriving them of access to evidence, witness tampering, falsifying evidence, or failing to abide by court rules.[103] The nominal beneficiary of this rule, as the commentary to the rule explains, is the integrity of the judicial system itself: "The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like."[104] However, these constraints create clear and concrete benefits for a lawyer's litigation opponents.

Rules 3.5 through 3.7 are also focused on the judicial system. Rule 3.5 prohibits improper *ex parte* interactions with judges or jurors or disruptions of a tribunal.[105] Rule 3.6 restricts improper publicity about a case.[106] Rule 3.7, the lawyer-as-witness rule, restricts the ability of a lawyer who is a witness in a trial from also serving as trial counsel.[107] All of these rules require lawyers to refrain from taking actions that may otherwise benefit their clients: for example, drumming up favorable publicity to influence the jury pool, giving a lawyer's testimony undue weight, or influencing a judge through one-on-one communications. Again, though these rules are intended to safeguard the judicial system, in practice the beneficiaries are a lawyer's litigation opponents.

Rule 3.8 imposes various special responsibilities on prosecutors to defendants. All of these requirements ultimately benefit criminal defendants, and many have constitutional components—for example, the *Brady*-derived requirement that the prosecutor "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense,"[108] or that "[w]hen a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction."[109]

Finally, Rule 3.9 extends several of the "advocate" rules to appearances "before a legislative body or administrative agency in a nonadjudicative proceeding."[110] This is a rule that refers back to several other rules, thus benefiting the same parties as those rules do.

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103. *Id.* at R. 3.4.

104. *Id.* at R. 3.4 cmt. 1. Moreover, the commentary includes some client-benefiting carveouts, including allowing for lawyers to compensate witnesses and allowing lawyers to "advise" a client's employees not to give information to another party. *Id.* at R. 3.4 cmt. 3–4.

105. *Id.* at R. 3.5.

106. *Id.* at R. 3.6.

107. *Id.* at R. 3.7.

108. *Id.* at R. 3.8(d).

109. *Id.* at R. 3.8(h).

110. *Id.* at R. 3.9.

E. DISCRETIONARY RULES: ALWAYS FOR THE BENEFIT OF LAWYERS

Some professional standards are mandatory while others give lawyers discretion over when to prioritize one beneficiary over another. The Preamble to the *Model Rules* acknowledges this: "Within the framework of these Rules . . . many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules."[111] The Preamble also explains more specifically that some rules, "generally cast in the term 'may,' are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion."[112]

By contrast, other rules are mandatory: they prescribe when a lawyer must place certain interests above others. Professors Fred Zacharias and Bruce Green lay out this distinction:

> [T]he ethics codes perform most of the hard work of identifying the duties to the court that supersede clients' wishes and interests. Many of these professional obligations are relatively clear and categorical. . . . Such rules eliminate the need for lawyers to intuit the content of the relevant normative standards from their professional role.
>
> But not all ethics rules are transparent, and some do not provide any explicit criteria for resolving ethically problematic situations in which the interests of the public and clients are in tension. Instead, lawyers are charged with deciding for themselves how to balance the competing interests, based on considerations that are not specified in the rules.[113]

As this section explains, the discretionary language of many of the rules—the "may" language—primarily benefits not clients or third parties, but lawyers themselves.

One key discretionary rule is the exceptions to client confidentiality in Rule 1.6(b): a lawyer *may* reveal confidences in the circumstances listed in this section, but a lawyer is never *obliged* to do so.[114] Accordingly, when it is in the interest of a lawyer or client *not* to breach client confidentiality, the lawyer may elect not to do so even if permitted.

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111. *Id*. at pmbl. ¶ 9.

112. *Id*. at scope ¶ 14.

113. Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 51–52 (2005) [hereinafter *Reconceptualizing Advocacy Ethics*]. *See also* Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1327–50 (1995) (discussing scenarios where a lawyer has the ethical discretion to take one course or another).

114. *See supra* section II.A. *See generally* Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006).

In particular, consider an instance where Rule 1.6(b)(1) applies: the lawyer has an opportunity to reveal client confidences "to prevent reasonably certain death or substantial bodily harm."[115] Specifically, imagine that a lawyer's client is a company that manufactures engines for helicopters. The company's engineers have discovered a flaw in the engine's rotor system. The company is considering whether to include a particular safety feature that will reduce the number of crashes caused by this design flaw. Inclusion of the safety feature is not expressly required by law or regulation. The costs and tradeoffs of the safety feature are considerable; in addition to the safety feature itself making the manufacture of the engine costlier, it also will degrade the performance of the engine. The company projects that because of the reduced performance and increased cost, the company will attract less demand for its engines if it includes the safety feature. The company's in-house experts also project how many additional helicopter accidents—and resulting deaths—will result from the omission of the safety feature.

The company's lawyer is privy to the company's internal analysis and has also advised the company about its exposure to lawsuits that are likely to arise from crashes. The company's executives, informed of the risks, ultimately decide that they are unwilling to bear the considerable added costs and reduced customer demand resulting from including the safety feature in the engines. Even accounting for the lawsuits, which will be largely defended and settled by the company's insurer, the company's economic position will be stronger if it does not include the safety feature in its engines. So it does not.

Although the lawyer doesn't know exactly who will die, or when, the lawyer knows, from the company's own analysis, that serious deaths and injury are probable because of the company's decision. Model Rule 1.6(b)(1) allows—but does not require—the lawyer to blow the whistle and inform the public, or appropriate regulatory authorities, that the company has made a design decision that is likely to cost lives.[116]

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115. MODEL RULES R. 1.16(b)(1).

116. Notably, an earlier version of this exception applied only in instances of "imminent death or bodily harm." That version of the rule arguably would not have encompassed a hypothetical case like this one, where the lawyer knows that accidents are likely but not necessarily "imminent." *See* James M. McCauley, *Corporate Responsibility and the Regulation of Corporate Lawyers*, 3 RICH. J. GLOB. L. & BUS. 15, 28 (2003). The commentary to the current version of Model Rule 1.6 explains that harm is "reasonably certain to occur" under the Rule "if it will be suffered imminently *or* if there is a present and substantial threat that a person will suffer such harm *at a later date* if the lawyer fails to take action necessary to eliminate the threat." MODEL RULES R. 1.6 cmt. 6 (emphasis added). Simon's commentary on the New York Rules takes a cautious approach to the scope of the "death or bodily harm" exception: "May a lawyer for a factory owner disclose that the owner has accidentally discharged dangerous levels of arsenic into the local water supply? May a lawyer for a car company disclose an engineering weakness that may eventually kill or cripple someone? Yes and no . . . . attorneys should not rush to judgment when faced with confidential information about a dangerous situation. New York has a strong tradition of a nearly sacred duty of confidentiality, and the new exception for reasonably certain death or substantial bodily harm should be used with caution." SIMON'S N.Y. RULES OF PROF. CONDUCT § 1.6:56 (2019).

In this circumstance, the lawyer may decide whose interest to serve: the client's or the public's. Either decision is permitted by the rules. However, this is not a 50/50 call: the overwhelming majority of lawyers in this situation will choose *not* to expose their client to public opprobrium and legal scrutiny by revealing their client's confidences.[117] Deciding otherwise would be the last thing the lawyer ever does as counsel for the helicopter engine manufacturer—and, likely, for any other corporate client. Rare is the lawyer who pivots so dramatically from corporate representative to corporate whistleblower. As Fred Zacharias argues:

> The professional codes . . . afford lawyers significant discretion in accepting clients, giving advice, and selecting litigation tactics. Yet lawyers often do not even consider exercising their discretion . . . . [U]nthinking client orientation fills lawyers' pocketbooks. Blind adherence to a due process model allows lawyers to accept and prosecute most cases without qualm, resulting in increased legal work and higher fees. A strict policy of client orientation enables lawyers to satisfy their employers.[118]

Ultimately, the permissive language in Rule 1.6(b) benefits neither the client nor third parties. Rather, the beneficiary of that language is the lawyer personally. By granting the lawyer autonomy over whether to inform the public of the coming helicopter accidents, the lawyer is freed up to weigh her own priorities—whether economic, moral, or otherwise—in determining which road to take.[119]

By no means is there unanimous agreement that all the exceptions in Rule 1.6 (b) should be discretionary. At least one state makes certain exceptions mandatory. Texas's version of Rule 1.6 provides: "When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer *shall* reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act."[120] So the drafters of the Texas rule decided that the interests of third parties are so powerful when this exception applies that lawyers should have no choice in the matter.

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117. *See, e.g.*, REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY, 59 BUS. LAW. 145, 174 (2003) [hereinafter ABA REPORT] (citing testimony of Patricia Lee Refo on behalf of the ABA Section of Litigation 11 (2002)).

118. *Reconceptualizing Advocacy Ethics*, *supra* note 113, at 1326. Zacharias and Green also argue that the ethical rules should be changed to provide lawyers further guidance on when a lawyer should exercise his or her discretion to subordinate client interests where appropriate. *See id.* at 1353–54 ("One of the defects in the prevailing regulation is that, although it allows lawyers to take a moral stand, it also allows lawyers to abdicate their discretion.").

119. The commentary to Model Rule 1.6 provides that in determining whether to make a permitted disclosure of client confidences, "the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question." MODEL RULES R. 1.6 cmt. 17.

120. TEX. DISCIPLINARY R. PROF'L CONDUCT R. 1.05(e) (emphasis added).

Also of note, in 2003, in the wake of the Enron scandal, the passage of the Sarbanes-Oxley Act, and other developments, the ABA constituted a Task Force on Corporate Responsibility and proposed amending Model Rule 1.6.[121] The Task Force's Preliminary Report proposed *requiring* lawyers to disclose client confidences "in order to prevent client conduct known to the lawyer to involve a crime, including violations of federal securities laws and regulations, in furtherance of which the client has used or is using the lawyer's services, and which is reasonably certain to result in substantial injury to the financial interests or property of another."[122] By the Task Force's own account, the proposal "engendered strong criticism" and was ultimately abandoned.[123] Additional exceptions to Rule 1.6(b) were later added, but the permissive language in the rule did not change.

Another discretionary rule also shows how such rules benefit lawyers by allowing them to pick and choose whether to present evidence that may be false. Part of Model Rule 3.3, the "Candor to the Tribunal" rule, provides: "A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."[124] This clause follows the more general prohibition on offering "evidence that the lawyer knows to be false."[125]

There is a clear distinction in Rule 3.3: if the lawyer *knows* that the evidence is false, the lawyer *must not* present it to the court. But if the lawyer *reasonably believes* that the evidence is false, without knowing it for a fact, then the lawyer has the discretion whether to offer it or not.[126] This distinction shows how narrow the mandatory language in Rule 3.3(a)(3) is: so long as the lawyer retains a shred of doubt as to the falsity of the evidence, the lawyer is free to present it, or not.[127] In deciding whether to do so, the lawyer may perform his own personal balancing test and consider various factors: loyalty to the client, a moral or professional hesitation to present dubious evidence to a court, the lawyer's desire to desire to protect his credibility in future matters, and his desire to win the case in order to

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121. ABA REPORT, *supra* note 117. The SEC's efforts to use regulations issued pursuant to Sarbanes-Oxley to require lawyers to disclose corporate wrongdoing was met with rancorous opposition by the corporate legal community. *See, e.g.*, Thomas G. Bost, *Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality*, 19 GEO. J. LEGAL ETHICS 1089 (2006); William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453 (2006); Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725 (2004); Lawrence J. Fox, *The Fallout from Enron: Media Frenzy and Misguided Notions of Public Relations Are No Reason to Abandon Our Commitment to Our Clients*, 2003 U. ILL. L. REV. 1243 (2003); Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236 (2003).

122. *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, 58 BUS. LAW. 189, 206 (2002).

123. ABA REPORT, *supra* note 117, at 173 n.94.

124. MODEL RULES R. 3.3(a)(3).

125. *Id.*

126. 126. *Id.*

127. 127. *Id.*

attract future clients. In fact, as discussed above, the commentary to the rule says that "a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client."[128] Thus, the rule puts its thumb on the scale in favor of the client's interest, while giving the lawyer ultimate discretion whether to present the evidence or not.

* * * * *

The preceding discussion has applied the beneficiary framework to existing rules to help assess who is intended to benefit from particular rules. It shows that every rule, or subsection of a rule, is drafted and should be read to serve the interests of a particular beneficiary: whether the client, a third party, or the lawyer. Part III will consider whether the intended beneficiaries of some rules actually benefit from them.

III. DO RULES ALWAYS SERVE THEIR INTENDED BENEFICIARIES?

In some cases, the ostensible beneficiary of a professional rule is not, in practice, its primary beneficiary—and, on balance, may not benefit from the rule at all. This Part examines three examples of such rules, selected because they each raise questions about whether they really serve their alleged purpose: the rule on current client conflicts of interest; the professional independence rule; and the ethical rule on the unauthorized practice of law. All three rules supposedly benefit clients. None of them actually does so.

When a rule does not serve its intended purpose and is recognized by critics as failing to do so, it calls into question why the rule still exists in its current form. With respect to the three rules examined in this Part, one—the current client conflict of interest rule—likely survives because of historical inertia coming from a time when law practice was very different from today's massive law firms and even more massive institutional clients.[129] The "professional independence" rule and the unauthorized practice rule likely survive for even more disturbing reasons: while of questionable value to clients, they serve the economic interests of another powerful constituency whose members want to limit competition.[130] That constituency is, of course, lawyers themselves.

A. THE CONFLICT-OF-INTEREST RULES DO NOT BENEFIT CLIENTS

The conflict-of-interest rules—codified as Model Rules 1.7 through 1.10—are notionally the classic example of a lawyer's highest obligation being to a client. A lawyer's duty of loyalty to a client is often treated almost synonymously with a lawyer's duty to avoid conflicts of interest. The Supreme Court has explained that "the duty of loyalty, perhaps the most basic of counsel's duties," is breached

128. *Id*. at R. 3.3 cmt. 8.
129. *See infra* section III.A.
130. *See infra* sections III.B–C.

when "counsel is burdened by an actual conflict of interest."[131] As mentioned in Part I, the New Jersey Supreme Court has gone even further and called the duty of loyalty "[t]he paramount obligation of every attorney."[132] A district court in Oregon, quoting an ABA publication, similarly stated: "Loyalty to the client's interest is the highest duty of a lawyer."[133] This section will show that the duty of loyalty, as embodied in the conflict of interest rules, does not always help clients, and in some cases runs directly counter to clients' interests.

1. THE CONFLICT RULE AND ITS ALLEGED BENEFICIARIES

The current client conflict of interest rule is, unsurprisingly, intended to benefit clients. Model Rule 1.7(a) provides that a lawyer "shall not represent a client if the representation involves a concurrent conflict of interest."[134] The start of the official commentary to Rule 1.7 offers the principle behind it: "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."[135] The commentary explains that when a lawyer is adverse to his own client in a matter, "[t]he client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively."[136]

Rule 1.10 extends the conflict-based disqualifications of Rule 1.7 to a lawyer's entire firm. With narrow exceptions, if a single lawyer at a firm is conflicted out of a particular representation, then so is every other lawyer at that firm.[137] According to the commentary, the rationale for the imputation rule is that a client who hires a firm is represented by the firm as a whole: "a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated."[138] Rule 1.10 applies regardless of the size or geographic reach of the firm.

Importantly, a lawyer's duty of loyalty under the rules exists largely independently of the lawyer's duty of confidentiality. Even if a conflicted representation poses no risk that there will be a breach of a client's confidentiality, or any other disadvantage to a client, a representation will still be prohibited if it creates a conflict under the rules. For example, a screening arrangement that prevents individually disqualified lawyers from working on a matter and prevents sharing of

131. Strickland v. Washington, 466 U.S. 668, 692 (1984).

132. State v. Cottle, 946 A.2d 550, 558 (N.J. 2008).

133. United States v. Oregon State Med. Soc., 95 F. Supp. 103, 112 (D. Or. 1950).

134. MODEL RULES R. 1.7(a).

135. *Id.* at R. 1.7 cmt. 1.

136. *Id.* at R. 1.7 cmt. 6.

137. The key exceptions are (1) when the conflict is "based on a personal interest of the disqualified lawyer" rather than on the representation of another client, or (2) when the imputed conflict arises from a lawyer's lateral move from one firm to another firm. *Id.* at R. 1.10(a)(1)–(2).

138. *Id.* at R. 1.10 cmt. 2.

confidential client information does *not* normally resolve a current client conflict under Rule 1.7 or a former-client conflict under Rule 1.9.

2. THE ACTUAL BENEFICIARY OF THE CONFLICT RULE: STRATEGIC LITIGANTS

Notwithstanding its stated rationale, the current client conflict of interest rule does not, in many cases, actually benefit clients. For every client who benefits from avoiding a conflicted representation, another client or potential client is injured to an equal if not greater degree. This result is particularly evident when a lawyer is disqualified from representing a client due to another client's objection.

Other than rare conflicts involving a personal interest of the lawyer or a duty to a non-client,[139] conflicts of interest always involve two clients: either two current clients of the lawyer,[140] or a current client and a former client.[141] However, the rules don't weigh the relative interests of the two clients in considering whether a conflict should prevent a representation. Rather, it is a categorical determination: if there is a conflict within the meaning of the rules, then the representation is prohibited even if the representation's benefit to one client greatly outweighs any detriment to the other client—or even if there is no detrimental effect at all.[142]

One striking characteristic of the conflict-of-interest rules is the context in which they are enforced. The vast majority of motions to disqualify counsel are based on alleged conflicts of interest. According to a study of federal disqualification motions from 2003 through 2012, nearly half of all such motions—46.4%—alleged "former client" conflicts under Model Rule 1.9 or its equivalent.[143] Namely, the alleged conflict in those cases arose because a former client of the lawyer was now representing an opposing party in the same or a substantially related matter.[144] Just under a quarter of disqualification motions were based on "current client" conflicts under Rule 1.7, in which a lawyer is allegedly acting directly adverse to their own current client.[145] Moreover, a quarter of disqualification motions derived not from a conflict involving a single lawyer, but rather

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139. *See id.* at R. 1.7(a)(2) (noting conflict if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer").

140. *See id.* at R. 1.7.

141. *See id.* at R. 1.9.

142. At the same time, courts applying Rule 1.7 have not automatically disqualified counsel whenever a conflict is identified. *See, e.g.*, Elonex I.P. Holdings v. Apple Computer, 142 F. Supp. 2d 579, 583 (D. Del. 2001) ("Although disqualification is ordinarily the result of a finding that an ethical rule has been violated, disqualification is never automatic.").

143. *Federal Disqualification Motions Over the Past Decade*, DQED, https://lawyerdisqualification.files.wordpress.com/2014/10/dqed_disqualification-charts.pdf [https://perma.cc/6CVV-MYAB] (last visited Apr. 1, 2022).

144. MODEL RULES R. 1.9.

145. *Federal Disqualification Motions Over the Past Decade*, *supra* note 143.

from that one lawyer's conflicts being imputed to her entire firm.[146] By contrast, only a small minority—about 4%—of *malpractice* claims against attorneys are based on alleged conflicts of interest.[147] Whereas parties frequently invoke the conflict rules to remove opposing counsel from a matter, rarely does a client identify a conflict that actually causes an identifiable injury sufficient to justify a civil claim against the lawyer.

Similarly, although there are not nationwide statistics on complaints filed with disciplinary authorities, individual state studies show that conflicts of interest are rarely the reason for such grievances. For example, a 2009 study of complaints filed with the State Bar of Texas found that the most common type of complaint against lawyers—and the most common reason why attorneys are disciplined—was neglect of a matter, in violation of Texas's equivalent of ABA's competence rule, Model Rule 1.1.[148] The second most common type of disciplinary complaint is based on the failure to communicate with a client, in violation of Texas's equivalent of ABA's communication rule, Model Rule 1.4.[149] Conflicts of interest were just one of more than two dozen other rules mentioned in the study as forming the grounds for complaints.[150]

The gap between the proportion of disqualification motions based on conflicts of interest and the proportion of malpractice claims and disciplinary complaints based on conflicts of interest is telling. For a set of rules that is meant to embody a lawyer's highest duty and to benefit clients, few malpractice or disciplinary complaints are premised on them. This disconnect suggests that conflict-based motions to disqualify are often strategic rather than real indications that a lawyer's conflicted representation is actually harming the affected client.[151] After all, if a client moves to disqualify a lawyer from a case but does not also file a

146. *Id*. *See also* MODEL RULES R. 1.10. A healthy proportion—again, nearly a quarter—of disqualification motions were based on the "lawyer as witness" rule, which prohibits a lawyer who is a necessary witness in a case from also serving as trial counsel.

147. ROBERT ANTHONY GOTTFRIED & JESSICA R. MACGREGOR, ABA PROFILE OF LEGAL MALPRACTICE CLAIMS 2016-2019, at 18.

148. Betty Blackwell, Ethics in Client Relations, State Bar of Texas 35th Annual Advanced Criminal Law Course, ch. 33 at 1 (July 20–23, 2009), *available at* http://www.texasbarcle.com/Materials/Events/8208/111351_01.pdf [https://perma.cc/PN9M-W552] (last visited Apr. 12, 2022). Rule 1.1 provides that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Texas Rule 1.01 is more elaborate and includes both a "competence" section and a separate "neglect" section.

149. Blackwell, *supra* note 148, at 6. The Texas communication rule is Rule 1.03.

150. *See id.*

151. To be sure, courts are aware of the possibility of strategic disqualifications and consider, among other factors, "the hardship which disqualification would impose on the parties and the entire judicial process." Spencer v. Goodyear Tire & Rubber Co., No. 09-2001-KHV (D. Kan. Jan. 4, 2010), at 5. But courts "resolve doubts in favor of Disqualification," *id*., and as discussed below, will disqualify conflicted counsel even where the actual injury to the party seeing disqualification is dubious.

malpractice claim against the lawyer, this suggests that the client suffered no real injury from the lawyer's alleged violation.[152]

The frequency of conflict-based disqualification efforts is ironic because such disqualifications *injure* at least as many clients as they benefit. While conflict of interest rules may be intended to benefit clients, every disqualification motion also burdens a current client of the lawyer who is the subject of the motion. Nearly all disqualification motions effectively pit one client against another. Since no client moves to disqualify their own lawyer from a case (they can just fire the lawyer instead), virtually all such motions are brought by opposing parties or, less commonly, intervening parties. When the motion is successful, it deprives a client of her chosen counsel and forces her to find a new lawyer or go unrepresented. And even when disqualification is unsuccessful,[153] the motion adds costs and delay to the proceeding.

An illustrative example of the "conflicting" effects of the conflict rule is the case of Sheppard Mullin Richter & Hampton, LLP and two former clients it likely regretted taking on. In 2006, J-M Manufacturing Company, a pipe manufacturer, was sued in a *qui tam* action in federal court in California. Several years into the litigation J-M retained Sheppard Mullin to replace another firm that had been defending the company. When Sheppard Mullin was retained, the firm's internal conflicts check revealed that one of the intervenor-plaintiffs in the *qui tam* case, the South Tahoe Public Utility District, was a firm client in unrelated employment law matters. Sheppard Mullin's engagement agreements with both J-M and South Tahoe included conflict waivers.[154]

After Sheppard Mullin had been defending J-M for about a year in the *qui tam* case, South Tahoe's lawyers wrote to Sheppard Mullin asking why South Tahoe had not been informed of the firm's adverse representation of J-M. South Tahoe then moved to disqualify Sheppard Mullin from the litigation. The district court granted the motion and disqualified the firm in July 2010, notwithstanding the conflict waiver South Tahoe had signed.[155] Sheppard Mullin was now out of the case. By that point, it had billed some 10,000 hours of work to J-M in the matter. During the same period, the firm had billed about 12 hours to South Tahoe.[156]

Exactly what client interest was served by disqualifying Sheppard Mullin from the *qui tam* litigation? To be sure, under the *Model Rules*, assuming the conflict waiver was inapplicable, the firm's appearance for J-M in a litigation with South

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152. Of course, it is unknown how many parties who move to disqualify counsel receive any kind of monetary recovery from that counsel, whether through judgment or settlement. Moreover, in some cases, a successful motion to disqualify, or a successful threat to do so, will obviate the need for a malpractice action against the allegedly offending lawyer.

153. More than seventy percent of disqualification motions are denied. *Federal Disqualification Motions Over the Past Decade*, *supra* note 143.

154. Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., 6 Cal. 5th 59, 68–70 (Cal. 2018).

155. Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., Case No. EDCV 06-550GW, No. 452 (C.D. Cal. July 7, 2011). *See also Sheppard*, 6 Cal. 5th at 70.

156. *Sheppard*, 6 Cal. 5th at 70.

Tahoe on the other side of the "v" plainly was a conflict of interest.[157] There is no wiggle room in the rules for *de minimis* conflicts: under Model Rule 1.7, a lawyer cannot represent a client in a matter that is adverse to another client absent the consent of both clients.[158] And under Rule 1.10, a conflict of one lawyer was imputed to the entire firm.[159] Because one Sheppard Mullin lawyer was sporadically advising South Tahoe in employment law matters, every one of the firm's 700-plus lawyers was disqualified from defending J-M Manufacturing in the *qui tam* litigation.

Do the conflict rules make sense in a case like this? If the rule is designed to benefit clients, did a client properly benefit from the disqualification of Sheppard Mullin? And in particular, was that benefit to a client legitimately worth protecting, and did it outweigh any burdens on *other* clients?

Sheppard Mullin's representation of J-M in the *qui tam* litigation did not concretely disadvantage its other client, South Tahoe, in any way. There was no evidence that the firm had leveraged—or even that it possessed—any confidential information about South Tahoe that could help J-M in the *qui tam* litigation. Different lawyers at Sheppard Mullin, which was one of the larger firms in America,[160] had worked for the two clients, in totally unrelated matters. The only way South Tahoe "benefited" from disqualifying Sheppard Mullin was by gaining a strategic litigation advantage in requiring its opponent's counsel to withdraw. And the corresponding cost to Sheppard Mullin's other client, J-M manufacturing, was immense: the disqualification of its counsel no doubt caused a major disruption to its defense. Any experienced litigator knows that in a complex litigation that has been ongoing for years, transitioning from one law firm to another is a heavy burden.

Nor would there have been any appreciable benefit to South Tahoe had Sheppard Mullin declined to represent J-M in the first place due to its work for South Tahoe. J-M would simply have found other counsel; plenty of comparable firms would have been willing and able to defend the company.

Accordingly, any "duty of loyalty" that Sheppard Mullin as a firm owed to South Tahoe to not represent J-M Manufacturing was highly abstract. South Tahoe gained nothing from preventing the firm's lawyers from representing an opposing party in a case unrelated to work that a firm lawyer did for South Tahoe.

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157. The disqualification was initially decided not under a version of the ABA Model Rules, but rather under California's former Rules of Professional Conduct, which were based on the old ABA Model Code. The California Supreme Court's decision suggested in a footnote that its result would be the same under the state's new set of Model Rules-based rules. *Id.* at 85 n.7.

158. MODEL RULES R. 1.7(a)(1).

159. *Id.* at R. 1.10.

160. *See, e.g.*, Press Release, *Sheppard Mullin Expands Corporate Practice in Los Angeles*, BUSINESSWIRE (Feb. 23, 2021) ("Sheppard Mullin is a full-service Global 100 firm with more than 950 attorneys in 15 offices located in the United States, Europe and Asia."), https://www.businesswire.com/news/home/20210223005941/en/Sheppard-Mullin-Expands-Corporate-Practice-in-Los-Angeles [https://perma.cc/YN8X-JJ2R] (last visited Apr. 12, 2022).

Moreover, in an era of large law firms and even larger institutional clients, the notion that major companies will feel personally betrayed when they see their own law firm acting adversely to them is less than compelling. In particular, the imputation of a single lawyer's conflicts to the lawyer's entire firm, including colleagues who have never represented, met, or even heard of that lawyer's client, is questionable.

Cases like Sheppard Mullin's suggest there is something to be said for relaxing the ways in which Rules 1.7 and 1.10 interact so as to bar an entire firm from being adverse to any client of any lawyer in the firm. If the purpose of the conflict-of-interest rules is to prevent *tangible* harm to clients caused by a lawyer's duties to another client, then there are dramatically less restrictive ways to do it.

One solution is to import the language of Rule 1.9, the former client conflict rule, to Rule 1.7. Rule 1.9 only restricts a lawyer from being adverse to a former client "in the same or a substantially related matter" as the lawyer's former representation.[161] In fact, the Texas bar has adopted this exact rule. Texas's counterpart to Model Rule 1.7 only applies if the representation "involves a *substantially related* matter in which that person's interests are materially and directly adverse to the interests of another client."[162] To the author's knowledge, there is no evidence that Texas lawyers are less loyal than their counterparts elsewhere, as would be expected if Model Rule 1.7's strict requirements really did promote loyalty.

A less radical solution would be to allow screening to limit the imputation of conflicts within a firm. If an individually conflicted lawyer is properly walled off from participating in or sharing information with colleagues about the matter, that lawyer's personal client cannot credibly claim that the firm's representation of an adverse client materially disadvantages the client. Already, the *Model Rules* allow for screening to address conflicts in certain circumstances. For example, where a lawyer moves from one firm to another, his individual conflicts from clients he served at his old firm are not imputed to the rest of the new firm, so long as "the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom."[163] Similarly, the conflicts of former government lawyers who move to private employment (or employment by a different government agency) are not imputed to their new colleagues so long as the former government lawyer is properly screened and shares in no fees from the conflicting matters.[164] A nearly identical rule also applies for former judges and other neutrals.[165]

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161. MODEL RULES R. 1.9(a).

162. TEX. DISCIPLINARY R. PROF'L CONDUCT R. 1.06(b)(1) (emphasis added).

163. MODEL RULES R. 1.10(a)(2)(i). The former client must also be notified of the screen. *Id.* at R. 1.10(a)(2)(i)–(ii).

164. *Id.* at R. 1.11(b)(1). Again, the lawyer's former agency must be notified of the screen. *Id.* at R. 1.11(b)(1)–(2).

165. *Id.* at R. 1.12(c).

At any rate, the current client conflict of interest rules as currently written, on balance, substantially burden clients while doing little to promote true personal loyalty to clients. Revising the rules to focus on actual injury to clients—as opposed to nebulous, and perhaps feigned, feelings of personal betrayal—would be advisable.

B. THE "PROFESSIONAL INDEPENDENCE" RULE HURTS CLIENTS

Model Rule 5.4 is titled "Professional Independence of a Lawyer." As this section will discuss, although Rule 5.4 is supposed to benefit clients, there is great reason to believe it does the opposite.

The text and official commentary to the "professional independence" rule do not propound general principles about the need for a lawyer to think and act autonomously. Indeed, a separate rule does have such language: it provides that "a lawyer shall exercise independent professional judgment and render candid advice."[166]

Rule 5.4, by contrast, is focused entirely on the economics of legal practice—and, in particular, on ensuring that those economics flow solely to lawyers.[167] All of its provisions limit the ability of nonlawyers to have a financial stake in a lawyer's paid representations. Specifically, Rule 5.4 prohibits or heavily restricts (1) fee-sharing between a lawyer and nonlawyer, (2) a lawyer from partnering with a nonlawyer, (3) referral fees, and (4) law practices with nonlawyer shareholders or managers.[168]

The effect of Rule 5.4 is to confine law to a single business model: one in which the sole owners of a practice are lawyers who work for the firm. A nonlawyer—whether a firm employee or not—may not hold an equity stake in the practice. As a result, law firms cannot accept outside equity investment, whether through venture capital, private equity, or public share offerings; for the most part, their only source of capital beyond the financial contributions of the law partners themselves is bank lines of credit. In the United States, there are no large companies in which the practice of law is but one line of business. There are also virtually no multidisciplinary firms that offer both legal representation and other professional services such as accounting, financial advice, or public relations.

Because of Rule 5.4, it is little exaggeration to say the structure of the law business is frozen in time, with law firms operating as the same kind of partnerships

166. *Id.* at R. 2.1.

167. *Id.* at R. 5.4.

168. The only U.S. jurisdiction that permits a law firm to include nonlawyer partners or managers is the District of Columbia, under very limited circumstances. D.C. RPC 5.4. In practice the number of D.C. law firms that include nonlawyer partners under this rule is limited, in part because such firms cannot include lawyers who practice in jurisdictions that do not have similar rules. *See, e.g.*, Model Rules Comm. on Ethics & Prof'l Resp., Formal Op. 91-360 (1991) (ruling that lawyer in Model Rules jurisdiction cannot partner with nonlawyer based in Washington, D.C.).

that were in business a century ago.[169] This is the case even as many law firms are dramatically larger and more globalized than they ever were before, with complex client demands and technology opening the door for very different ways to practice law efficiently and effectively.

Why, then, does Rule 5.4 still exist? Who does it help?

1. THE PROFESSIONAL INDEPENDENCE RULE'S ALLEGED BENEFICIARY: CLIENTS

The ostensible primary beneficiary of Rule 5.4 is clients. Although the official commentary to Rule 5.4 does not explain whom the rule is supposed to benefit and simply reiterates that the rule is designed "to protect the lawyer's professional independence of judgment,"[170] numerous courts have described the rule as one that protects clients. For example, the Seventh Circuit has explained that "[t]he partnership rule limitation promotes the independence of lawyers by preventing non-lawyers from controlling how lawyers practice law. The regulation attempts to minimize the number of situations in which lawyers will be motivated by economic incentives rather than by their client's best interests."[171] Or, in rejecting a highly publicized First Amendment challenge by the law firm Jacoby & Meyers to Rule 5.4, the Southern District of New York quoted the Seventh Circuit's rationale for Rule 5.4 in holding that "the New York laws 'promote [] the independence of lawyers by preventing non-lawyers from controlling how lawyers practice law' and by, among other things, 'attempt[ing] to minimize the number of situations in which lawyers will be motivated by economic incentives rather than by their client's best interests.'"[172] Numerous other courts have reached similar conclusions.[173]

Commentators and authorities similarly argue that Rule 5.4 safeguards clients against having nonlawyers influence lawyers.[174] A 2010 opinion by the Los Angeles County Bar Association, considering the version of the rule then in effect in California, explained that "[t]he rationale behind this Rule and its intended

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169. An arguable exception is that many law firms are now organized as limited liability partnerships, a legal form that largely did not exist before the 1990s. *See* Uniform Partnership Act, Art. 9 (1997).

170. MODEL RULES R. 5.4 cmt. 1.

171. Lawline v. Am. Bar Ass'n, 956 F.2d 1378, 1385 (7th Cir. 1992).

172. Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third and Fourth Department, 118 F. Supp. 3d 554, 574 (S.D.N.Y. 2015) (quoting Lawline v. Am. Bar Ass'n, 956 F.2d 1378, 1385 (7th Cir. 1992)).

173. *See generally e.g.*, Chandra v. Chandra, 53 N.E.3d 186, 197 (Ill. App. Ct. 2016); Rich v. Simoni, 772 S.E.2d 327, 333 (W. Va. 2015); Gafcon, Inc. v. Ponsor & Associates, 98 Cal. App. 4th 1388, 1418 (Cal. Ct. App. 2002); Trotter v. Nelson, 684 N.E.2d 1150, 1154 (Ind. 1997) ("Rule 5.4(a) prohibits an attorney from sharing legal fees with a nonlawyer. . . . [F]ee-splitting with a nonlawyer is disfavored because of its potential affect [*sic*] on the client-attorney relationship."); State Bar of Tex. v. Faubion, 821 S.W.2d 203, 207 (Tex. App. 1991); O'Hara v. Ahlgren, Blumenfeld & Kempster, 537 N.E.2d 730, 735 (Ill. 1989); *In re* Weinroth, 495 A.2d 417, 421 (N.J. 1985); Gassman v. State Bar of Cal., 18 Cal. 3d 125, 132 (Cal. 1976) (noting that a lawyer's "participation in an illegal fee-splitting arrangement . . . posed serious danger to the best interests of his clients, and warrants discipline in and of itself. Prohibited fee-splitting between lawyer and layman . . . poses the possibility of control by the lay person, interested in his own profit rather than the client's fate." (citation omitted)).

174. *See, e.g.*, John Gibeaut, *MDP Debate Still Alive*, 85 ABA J. 84, 84 (1999).

application are, primarily, to protect the integrity of the attorney-client relationship, to prevent control over the services rendered by attorneys from being shifted to lay persons, and to ensure that the best interests of the client remain paramount."[175] Professor Bruce Green, in his extended consideration of the meaning of "attorney independence," argues that in certain contexts, "'professional independence' implies independence from the pressures and influences of others who might compromise lawyers' loyalty to clients. That is the principal sense in which it is used in Rule 5.4 of the Model Rules."[176]

2. THE PROFESSIONAL INDEPENDENCE RULE'S ACTUAL BENEFICIARY: LAWYERS

Notwithstanding all of these client-focused explanations, critics of Rule 5.4 argue that this rule has lasted so long not because it benefits clients, but rather because it benefits lawyers in private practice. And that benefit is a purely economic one: it keeps potential competitors out of the marketplace for legal services. Professor Louise Lark Hill, examining the history and rationales behind the rule against nonlawyer ownership of law practices, puts it plainly: "The ultimate question is whether lawyers in the United States are seeking to protect the clients or themselves. This author takes the position that it is the latter."[177] James Jones and Bayless Manning similarly argue: "by arbitrarily permitting certain types of affiliations between lawyers and nonlawyers while condemning others, the current Rule 5.4 creates the strong impression that its primary purpose is not the preservation of independent judgment but rather the selfish protection of lawyers' economic interests."[178] And even Justice Gorsuch has taken this view:

> The profession has generally insulated the legal industry from market competition. Only lawyers may own or invest in law firms. This restriction on capital investment reduces the number of market participants, which in turn prevents competition from reducing costs. At your local superstore you may be able to find tax-preparation services or an eye doctor, but you will find no help there for even the simplest legal chore. . . . [T]hese longstanding practices protect the entrenched interests of the legal profession at the expense of the clients we are meant to serve.[179]

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175. L.A. Bar Ass'n, Formal Op. 510, at 4–5 (2003).

176. Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 608 (2013). *See also id.* at 613 ("'Professional independence' also refers to individual lawyers' independence from third parties who might cause lawyers to compromise their professional duties to the client or, to a lesser extent, the public.").

177. Louise Lark Hill, *The Preclusion of Nonlawyer Ownership of Law Firms: Protecting the Interest of Clients or Protecting the Interest of Lawyers*?, 42 CAP. U. L. REV. 907, 908 (2014).

178. James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159, 1205 (2000).

179. Rebecca L. Kourlis & Neil M. Gorsuch, *Legal Advice is Often Unaffordable. Here's How More People Can Get Help: Kourlis and Gorsuch*, USA TODAY (Sept. 17, 2020), https://www.usatoday.com/story/opinion/2020/09/17/lawyers-expensive-competition-innovation-increase-access-gorsuch-column/5817467002/ [https://perma.cc/5V49-Q3UB].

These critics make a persuasive case that business reasons—not client protection—are what keep Rule 5.4 alive.

a. A Short History of the Professional Independence Rule

The history of Rule 5.4 also calls into question the real reason for its existence.[180] Rule 5.4 traces its ancestry to the old *Canons of Professional Ethics*, which were amended in 1928 to prohibit a lawyer from entering into a partnership with a nonlawyer or sharing fees with a nonlawyer.[181] The same year, another *Canon* amendment allowed lawyers to be employed in-house and provide legal services to their employers.[182]

Accordingly, the 1928 *Canon* amendments established a major loophole in the professional independence rule that has only grown in magnitude in the ensuing century: where a lawyer's sole client is also his employer, it is perfectly permissible for that lawyer to answer to nonlawyers. Such an arrangement, according to the *Model Rules*, is not a threat to the lawyer's professional independence—even where the lawyer reports to, and gets his paycheck from, nonlawyers who can terminate the lawyer's employment if they are unhappy with his advice or professional judgment. In fact, the *Model Rules* expressly codify this permission; not only do they allow a lawyer to work as in-house counsel, they allow the lawyer to do so even if he is not admitted to practice law in the state where he works.[183] But it is a very different story when a lawyer serves *outside* clients: that type of lawyer is prohibited from partnering or sharing fees with a nonlawyer because it would supposedly threaten the lawyer's ability to think and act independently. This puzzling disconnect has survived and thrived ever since. As the prohibition on nonlawyer partners and fee sharing has endured, the in-house counsel population has exploded.[184]

The current form of Model Rule 5.4, along with the rest of the *Model Rules*, derives from the work of the so-called Kutak Commission, which the ABA organized in the late 1970s to update the *Model Code of Professional Responsibility*.[185] The *Model Code*, like the 1928 *Canon* amendments, prohibited

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180. For a history of Rule 5.4, see generally Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115 (2000).

181. CANONS OF PROF'L ETHICS Canons 33–34 (1928), reprinted in ABA Opinions of the Committee on Professional Ethics 139, 148 (1967).

182. CANONS OF PROF'L ETHICS Canon 35 (1928).

183. *See* MODEL RULES R. 5.5(d).

184. By 2005, there were nearly 75,000 in-house counsel in America employed by private industry. Clara N. Carson, *The Lawyer Statistical Report: The U.S. Legal Profession in 2005*, AM. BAR FOUND. at 5 (2005), http://www.americanbarfoundation.org/uploads/cms/documents/2005_lawyer_statistical_report.pdf [https://perma.cc/4XAN-RLHJ]. *See also* Geoffrey C. Hazard, Jr., *Lawyers and Accountants Must Make It Work*, NAT'L L.J., Jan. 11, 1999, at A28 ("How is it that a lawyer whose entire income is dispensed by nonlawyers can be an honorable member of the bar, but a lawyer who derives income with an accountant or MBA is beyond the pale?").

185. *See generally The Kutak Commission*, KUTAK ROCK LLP, https://www.kutakrock.com/general-content/the-kutak-commission [https://perma.cc/A524-9XAM] (last visited Mar. 4, 2022).

a lawyer from partnering with a nonlawyer "if any of the activities of the partnership consist of the practice of law."[186] The Kutak Commission's initial draft proposal for Rule 5.4 would have moved away from this restriction and allowed a lawyer to work for "an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer," so long as "there is no interference with the lawyer's independence of professional judgment or with the client lawyer relationship."[187] However, the ABA's House of Delegates rejected this proposal and replaced it with a flat ban on nonlawyer ownership of law practices.[188]

In opposing the Commission's proposed rule, one speaker appealed to the naked economic interest of the lawyers that his fellow delegates represented: "You each have a constituency. How will you explain to the sole practitioner who finds himself with competition with Sears why you voted for this? How will you explain to the man in the mid-size firm who is being put out of business by the big eight [accounting] firm?"[189] Accordingly, as Professor Geoffrey Hazard and coauthors argue, Rule 5.4 as passed was "translated into economic and turf protectionism."[190]

The decades since the enactment of Model Rule 5.4 have seen numerous efforts to liberalize the restrictions on nonlawyer ownership of law practices, most of which ended in failure:

- In the late 1990s, the ABA formed the Commission on Multidisciplinary Practice to explore the possibility of allowing firms that both practice law and provide other professional services.[191] After holding multiple sets of hearings, the Commission recommended the "relaxation of the prohibitions against sharing legal fees and forming a partnership or other association with a nonlawyer when one of the activities is the practice of law."[192] The response of the ABA House of Delegates was swift and resounding: in

186. MODEL CODE OF PROF'L RESPONSIBILITY DR 3-103.

187. ABA, Proposed Final Draft of the Model Rules of Professional Conduct Rule 5.4 (May 30, 1981).

188. GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING 48-7 (4th ed. 2018-2 Supplement).

189. Unedited Transcript of ABA House of Delegates Session 48-49 (Feb. 8, 1983). *See also* Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 595–96, 616–17 (1989) (discussing these competitive arguments against nonlawyer ownership of law practices).

190. HAZARD, HODES & JARVIS, *supra* note 188, at 48-7. *See also* Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 410 (1988) ("The fear of Sears–the idea that a nationwide corporation might start offering legal services in its department stores next to the insurance kiosk or, even worse, in the aisle between the shoes and the sporting goods–proved to be powerful indeed.").

191. *See generally* Laurel S. Terry, *The Work of the ABA Commission on Multidisciplinary Practice*, *in* MULTIDISCIPLINARY PRACTICES AND PARTNERSHIPS: LAWYERS, CONSULTANTS AND CLIENTS (S.J. McGarry ed.), *available at* http://www.personal.psu.edu/faculty/l/s/lst3/McGarry%20Mutlidisciplinary%20Ch2.PDF [https://perma.cc/2APL-8FXA] (last visited Mar. 4, 2022); John H. Matheson & Edward S. Adams, *Not "if" but "how": Reflecting on the ABA Commission's Recommendations on Multidisciplinary Practice*, 84 MINN. L. REV. 1269 (2000).

192. ABA Commission on Multidisciplinary Practice, Reporter's Notes (1999).

August 1999 it passed, by a vote of 304–98, a resolution that "the American Bar Association make no change, addition or amendment to the *Model Rules of Professional Conduct* which permits a lawyer to offer legal services through a multidisciplinary practice unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients."[193] The following year the House of Delegates once again overwhelmingly rejected any change to its ban on multidisciplinary practices and nonlawyer ownership of law practices and voted to disband the Commission.[194]

- A decade later, in 2009, the ABA's Commission on Ethics 20/20 began to consider the possibility of "alternative business structures."[195] The Commission eventually produced a draft resolution that proposed amending Model Rule 5.4 to allow for nonlawyer ownership of a law practice along the lines of—but even more limited than—that allowed in the District of Columbia.[196] Ultimately, even this relatively modest reform was too much for the relevant constituencies, as the Commission concluded that after "extensive outreach, research, consultation, and the response of the profession, there does not appear to be a sufficient basis for recommending a change to the ABA policy on nonlawyer ownership of law firms."[197] The Commission concluded "that the case had not been made for proceeding even with a form of nonlawyer ownership that is more limited than the D.C. model."[198]
- In February 2020, the ABA's Center on Innovation issued a proposed resolution that, to foster enhanced access, "encourage[d] U.S. jurisdictions to consider regulatory innovations, . . . such as . . . the reexamination of Rule 5.4."[199] But during the debate on the resolution in the ABA House of Delegates, the President of the New York State Bar Association, speaking for the New York delegation, argued that "the prohibition against

193. Terry, *supra* note 191, at 2–4.

194. *Id.* at 2–7.

195. ABA Comm'n on Ethics 20/20, Preliminary Issues Outline 6 (Nov. 19, 2009).

196. ABA Comm'n on Ethics 20/20, *Discussion Draft for Comment: Alternative Law Practice Structures* 1, ABA (Dec. 2, 2011), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.pdf [https://perma.cc/4NDY-Z5SM]. *See also* MODEL RULES R. 5.4 (discussing D.C. Rule 5.4). Specifically, the ABA Commission's proposal would allow for nonlawyers to hold a minority equity interest in a firm that solely practiced law, if those professionals assisted the firms' lawyers in their law practice. ABA Comm'n on Ethics 20/20, *Discussion Draft for Comment: Alternative Law Practice Structures,* at 9.

197. Joan C. Rogers, *Ethics 20/20 Ditches Idea of Recommending Option for Nonlawyer Owners in Law Firms*, 28 ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT 250, 251 (2012).

198. *Id.*

199. ABA CENTER ON INNOVATION, DRAFT RESOLUTION AND REPORT, ABA (Feb. 2020), https://www.documentcloud.org/documents/6566366-Center-for-Innovation-Filed-Resolution.html [https://perma.cc/WTM5-ZAM2] (last visited Apr. 12, 2022). The accompanying report argued that "[m]odifying Rule 5.4 in ways that do not sacrifice client and consumer protection and that permit other professionals to participate more fully in the development of impactful solutions is another tool that can be available for those who wish to use it." *Id.* at 6.

> nonlawyer ownership of law firms … is something akin to theology."[200] Following this intense opposition, the ABA House of Delegates passed a watered-down version of the resolution and accompanying report which included a provision that "nothing in this Resolution should be construed as recommending any changes to any of the ABA *Model Rules of Professional Conduct*, including Rule 5.4, as they relate to nonlawyer ownership of law firms, the unauthorized practice of law, or any other subject."[201]

As of this writing, multiple U.S. jurisdictions—with varying degrees of alacrity—have begun to consider liberalizing or even eliminating Rule 5.4.[202] Among these states is California, whose state bar commissioned a Task Force on Access Through Innovation of Legal Services that was "charged with identifying possible regulatory changes to enhance the delivery of, and access to, legal services through the use of technology, including artificial intelligence and online legal service delivery models."[203] The vast majority of practitioners who commented on the California reform proposals opposed them, notionally citing to client protection or ethical concerns.[204] However, many of the negative commenters clearly had economic competition in mind. For example, a letter to the California Task

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200. Remarks of Hank Greenberg, *ABA Midyear Meeting*, ABA (Feb. 17, 2020), https://www.americanbar.org/news/abanews/aba-news-archives/2020/02/midyear-meeting-2020-house-of-delegates-adopt-policy-to-expand-/ [https://perma.cc/44YV-LGAF].

201. *ABA Resolution 115 - Encouraging Regulatory Innovation*, ABA, https://www.americanbar.org/groups/centers_commissions/center-for-innovation/Resolution115/ [https://perma.cc/7UGR-UQJH] (last visited Mar 4. 2022).

202. *See, e.g.*, *Task Force on Access Through Innovation of Legal Services*, STATE BAR OF CAL., http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Task-Force-on-Access-Through-Innovation-of-Legal-Services [https://perma.cc/PC2D-GF5E] (last visited Mar. 4, 2022); *Arizona Task Force on Delivery of Legal Services, Report and Recommendations*, AZ SUP. CT. (Oct. 4, 2019), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/november2019/arizona-supreme-court-task-force-on-delivery-of-legal-services-final-report-2019-october.pdf [https://perma.cc/2KL9-BFFR]; Utah Work Group on Regulatory Reform, *Narrowing the Access-to-Justice Gap by Reimagining Regulation App'x B*, UTAH BAR (Aug. 2019), https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf [https://perma.cc/57QM-AJVQ]; *CBA/CBF Task Force on the Sustainable Practice of Law & Innovation*, CHICAGO BAR FOUND., https://chicagobarfoundation.org/advocacy/issues/sustainable-practice-innovation/ [https://perma.cc/R4KD-893L]; *D.C. Bar Global Legal Practice Committee Seeks Public Comment on Rule of Professional Conduct 5.4*, DC BAR (Feb. 27, 2020), https://www.dcbar.org/about-the-bar/news/DC-Bar-Global-Legal-Practice-Committee-Seeks-Public-Comment-on-Rule-of-Professional-Conduct-5-4.cfm [https://perma.cc/6K58-C4GJ].

203. *Task Force on Access Through Innovation of Legal Services*, STATE BAR OF CAL., http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Task-Force-on-Access-Through-Innovation-of-Legal-Services [https://perma.cc/PC2D-GF5E] (last visited Apr. 12, 2022).

204. With respect to a more modest change that would make the California rule similar to D.C. Rule 5.4, a total of 253 commenters opposed it, with 45 in favor. For a more radical proposal to allow nonlawyer ownership of a law practice or fee sharing, the tally was 127 commenters against 32 in favor. *Access Through Innovation of Legal Services Proposed Regulatory Reform Options – Public Comment Form Results* (Oct. 17, 2019), https://www.dropbox.com/sh/baciiaec6ecvva5/AADsmBn8-1rtkFuq_Xu8kPJwa/Public%20Comments%20Received?dl=0&preview=__Public+Comment+Position+Table+(10-22-19).docx&subfolder_nav_tracking=1&utm_campaign=thelawfirmdisrupted&utm_content=20190905&utm_medium=enl&utm_source=email&utm_term=tal [https://perma.cc/QC65-LXAD].

Force by ten major national law firms cautioned that "large accounting firms have long coveted the legal fees that lawyers in California and elsewhere receive for serving their best clients."[205] Other comments included:

- "[T]he majority of the … Task Force proposals will simply allow large businesses, hedge funds, franchisors, and insurance companies to undermine small existing law firms and the historic structure of the contingency fee practice … . If the proposed rules come into effect, we will see larger businesses and hedge funds buying law firms and making changes to the way those firms practice."[206]
- "I oppose [the proposal] in conjunction with the other proposed changes to turn the practice of law into a 'legal marketplace' to be leveraged by venture capitalists."[207]
- "I envision the entire bodily injury legal landscape will be taken over by large corporations and Wall Street types who will control legal advertising with 'big money.' … I provide good paying jobs for seven individuals and their families, including health insurance benefits. If the present recommendations are approved, I see these jobs going away. … . The proposed corporate takeover will wipe out small, loyal businesses and their employees like ours and several others throughout the state."[208]
- "This will lead to large companies coming in, dominating the marketing space, and then 'selling' clients to lawyers. Marketing in the legal field is already difficult enough and connecting the clients with the actual best lawyers is already a difficult enough problem."[209]

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205. Morrison & Foerster LLP *et al*., Comment to *3.2 – Amend the Fee Sharing Rule to Permit Fee Sharing with a Client's Informed Consent* (Sept. 23, 2019), https://www.dropbox.com/sh/baciiaec6ecvva5/AACGkxaV4Br9PT0zZfXETz5Ma/Public%20Comments%20Received/%5B3.1%5D%20RUL/Morrison%20Foerster%20LLP%20%28Hendricks%29-1188c-RUL%20%5B3.1%5D.pdf?dl=0 [https://perma.cc/QTD4-JHC9].

206. Consumer Attorneys of California, Comment to *3.2 – Amend the Fee Sharing Rule to Permit Fee Sharing with a Client's Informed Consent*, at 1–2, https://www.dropbox.com/sh/baciiaec6ecvva5/AABVP3h3DZCz2nycuO05o7MNa/Public%20Comments%20Received/%5B3.2%5D%20RUL?dl=0&preview=Consumer+Attorneys+of+California+(Serna)-1097n-RUL+%5B3.2%5D.pdf&subfolder_nav_tracking=1 [https://perma.cc/BF69-SGTF] (last visited Mar. 4, 2022). *See also* Comment of Teresa Li, Comment to *3.2 – Amend the Fee Sharing Rule to Permit Fee Sharing with a Client's Informed Consent*, https://www.dropbox.com/sh/baciiaec6ecvva5/AABVP3h3DZCz2nycuO05o7MNa/Public%20Comments%20Received/%5B3.2%5D%20RUL?dl=0&preview=Li+Teresa-543f-RUL+%5B3.2%5D.pdf&subfolder_nav_tracking=1 [https://perma.cc/47QH-H4ZE] (last visited Apr. 5, 2022) ("[T]he proposals will simply allow large businesses, hedge funds, franchisors, and holding companies seeking to undermine small existing law firms and the historic structure of contingency fee practices.").

207. Robert Stempler, Comment to *3.2 – Amend the Fee Sharing Rule to Permit Fee Sharing with a Client's Informed Consent*, https://www.dropbox.com/sh/baciiaec6ecvva5/AABVP3h3DZCz2nycuO05o7MNa/Public%20Comments%20Received/%5B3.2%5D%20RUL?dl=0&preview=Stempler+Robert-811n-RUL+%5B3.2%5D.pdf&subfolder_nav_tracking=1 [https://perma.cc/T3AQ-VL8P] (last visited Mar. 4, 2022).

208. Donald Murphy, Comment to *3.2 – Amend the Fee Sharing Rule to Permit Fee Sharing with a Client's Informed Consent*, https://www.dropbox.com/sh/baciiaec6ecvva5/AABVP3h3DZCz2nycuO05o7MNa/Public%20Comments%20Received/%5B3.2%5D%20RUL?dl=0&preview=Murphy+Donald-1212l-RUL+%5B3.2%5D.pdf&subfolder_nav_tracking=1 [https://perma.cc/CQ4D-NT2B] (last visited Apr. 5, 2022).

209. John Hinman, Comment to *3.2 – Amend the Fee Sharing Rule to Permit Fee Sharing with a Client's Informed Consent*, https://www.dropbox.com/sh/baciiaec6ecvva5/AABVP3h3DZCz2nycuO05o7MNa/Public

- "Many people have current student loans because they endeavored to become a practicing attorney and to be compensated as an attorney. Allowing fee sharing to people who are not licensed renders the hard work and debt accumulated by many attorneys pointless."[210]
- "NO. GO TO LAW SCHOOL, SIT AND PASS THE BAR TO GET A CUT OF THE FEE."[211]
- Finally, one other commentator made a factually incorrect analogy: "Do non doctors own hospitals? Surgery centers? NO, why because it will harm the patient."[212]

Finally, in 2020, the Supreme Courts of two other states—Arizona and Utah—bucked the trend and more aggressively embraced allowing nonlawyer ownership of firms. Both states initiated pilot programs that reformed or eliminated their versions of Rule 5.4 and allowed nonlawyer-owned firms to apply for the right to practice law.[213] Arizona did so *despite* public comments from lawyers who, like their neighbors in California, overwhelmingly opposed the changes.[214]

b. Critiques of the Professional Independence Rule

The legal community's overwhelming opposition to reform of Rule 5.4 flies in the face of critical scrutiny of the rule, and in particular of the restriction on non

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%20Comments%20Received/%5B3.2%5D%20RUL?dl=0&preview=Hinman+John-1204m-RUL+%5B3.2%5D.pdf&subfolder_nav_tracking=1 [https://perma.cc/3KJY-ECSF] (last visited Apr. 5, 2022).

210. Byron Abron, Comment to *3.2 – Amend the Fee Sharing Rule to Permit Fee Sharing with a Client's Informed Consent*, https://www.dropbox.com/sh/baciiaec6ecvva5/AABVP3h3DZCz2nycuO05o7MNa/Public%20Comments%20Received/%5B3.2%5D%20RUL?dl=0&preview=Abron+Byron-920-RUL+%5B3.2%5D.pdf&subfolder_nav_tracking=1 [https://perma.cc/G6KH-S54C] (last visited Apr. 5, 2022).

211. Anonymous Comment #148, Comment to *3.2 – Amend the Fee Sharing Rule to Permit Fee Sharing with a Client's Informed Consent*, https://www.dropbox.com/sh/baciiaec6ecvva5/AABVP3h3DZCz2nycuO05o7MNa/Public%20Comments%20Received/%5B3.2%5D%20RUL?dl=0&preview=Anonymous-148-RUL+%5B3.2%5D.pdf&subfolder_nav_tracking=1 [https://perma.cc/5BAA-XBVN] (last visited Apr. 5, 2022).

212. This assertion would come as a surprise to the many nondoctors who own publicly traded shares in the Fortune 500 companies HCA Healthcare, Tenet Healthcare Corporation, Community Health Systems, Inc., or Universal Health Services, Inc. Raffi K. Kevorkian, Comment to *3.2 – Amend the Fee Sharing Rule to Permit Fee Sharing with a Client's Informed Consent*, https://www.dropbox.com/sh/baciiaec6ecvva5/AABVP3h3DZCz2nycuO05o7MNa/Public%20Comments%20Received/%5B3.2%5D%20RUL?dl=0&preview=Kevorkian+Raffi-507a-RUL+%5B3.2%5D.pdf&subfolder_nav_tracking=1 [https://perma.cc/X2ZB-BHVY] (last visited Apr. 5, 2022).

213. *See* Utah Sup. Ct. Standing Order No. 15 (amended); *In re* Restyle and Amend Rule 31; Adopt New Rule 33.1; Amend Rules 32, 41, 42 (Various Ers From 1.0 To 5.7), 46-51, 54-58, 60 And 75-76, No. R-20-0034 (Az. Aug. 27, 2020). *See also* Daniel J. Siegel, *Playing in the Regulatory Sandbox: A Survey of Developments*, LAW PRAC. (July 1, 2021); *Authorized Entities*, UTAH OFF. LEGAL SERV. INNOVATION, https://utahinnovationoffice.org/authorized-entities/ [https://perma.cc/G3X9-N3BX] (last visited Apr. 5, 2022) (listing entities authorized to practice law under Utah's pilot program).

214. *See Comments to Arizona Petition to Restyle and Amend Supreme Court Rule 31; Adopt New Rule 33.1; and Amend Rules 32, 41, 42*, *supra* note 2.

lawyer equity ownership of a law practice.[215] Critics argue that the rule reduces the public's access to affordable representation. For example, the California Task Force's creation followed a commissioned report by Professor William Henderson,[216] who observed that with respect to the relatively low-stakes matters that most individual consumers of legal services need help with, the rule against non-lawyer ownership of law practices poses a significant economic barrier.[217]

Henderson also argued that regulatory actions against certain major alternative legal service providers "are premised on harm to clients that flows from lack of lawyer independence (Rule 5.4) [and other bar rules]. But . . . there is very serious consumer harm occurring because ordinary citizens increasingly cannot afford traditional legal services."[218] Professor Gillian Hadfield similarly argues that restrictions on nonlawyer ownership of law practices hurt the very potential clients the law profession is supposed to serve: "[T]oday the doctrine stands only in the way of any sensible solution to a problem of the profession's making: the indefensibly high cost of delivering legal help to ordinary people as they navigate the law-thick world we have assembled."[219] Hadfield likewise recognizes that

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215. For scholarly critiques of Rule 5.4, see generally, e.g., Green, *supra* note 174; Hill, *supra* note 177; Clifford Winston & Quentin Karpilow, *Should the US Eliminate Entry Barriers to the Practice of Law? Perspectives Shaped by Industry Deregulation*, AM. ECON. REV.: PAPERS & PROC., 106(5): 171–176 (2016); Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43 (2014); Renee N. Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1 (2012); Ted Schneyer, *"Professionalism" As Pathology: The ABA's Latest Policy Debate On Nonlawyer Ownership Of Law Practice Entities*, 40 FORDHAM URB. L.J. 75 (2012); Thomas D. Morgan, *Should the Public Be Able to Buy Stock in Law Firms?*, 11 ENGAGE 111 (2010); Matthew W. Bish, *Revising Model Rule 5.4: Adopting a Regulatory Scheme that Permits Nonlawyer Ownership and Management of Law Firms*, 48 WASHBURN L.J. 669 (2009); Daniel R. Fischel, *Multidisciplinary Practice*, 55 BUS. LAW. 951 (2000); Bradley G. Johnson, Note, *Ready or Not, Here They Come: Why the ABA Should Amend the Model Rules to Accommodate Multidisciplinary Practices*, 57 WASH. & LEE L. REV. 951, 962 (2000); James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159 (2000); James W. Jones, *Focusing The MDP Debate: Historical and Practical Perspectives*, 72 TEMP. L. REV. 989 (1999); Edward S. Adams & John H. Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CAL. L. REV. 1 (1998).

216. Memorandum from R. Difuntorum to Cal. Bar Board of Trustees (July 19, 2018), http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf [https://perma.cc/YC5B-SBDC].

217. WILLIAM D. HENDERSON, LEGAL MARKET LANDSCAPE REPORT, STATE BAR OF CAL. 14–15 (2018), http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf [https://perma.cc/5X2U-TKR4].

218. Henderson also argued that loosening the restrictions on nonlawyer ownership of firms would be good for large institutional clients as it would enable lawyers to work more efficiently with other service professionals:

> Rule 5.4's ban on nonlawyer ownership remains a major roadblock to solving, or mitigating, the lagging legal productivity problem . . . . To foster innovation, the ideal would be to have lawyers and allied professionals working together as co-equals *within the same legal service organization*. . . . Rule 5.4 is actually hindering the creation of solutions most needed by large organizational clients.

Id. at 26.

219. Hadfield, *supra* note 215, at 50.

reform of the rule against nonlawyer ownership would face stiff opposition within the profession:

> Expanding the accessibility and reducing the cost of legal assistance will . . . require sea changes in our approach to the economics of legal work. As a profession, American lawyers fought to close the loop on self-governance . . . . With their success came an especially heavy obligation, to step outside of the narrow frame of the economics of their existing law practices and into the broader frame of the economics of the legal industry.[220]

Notably, the prohibition on nonlawyer ownership of law practices that prevails in the United States is not universal in other legal systems, including English-speaking common law systems. For example, in recent years the United Kingdom and Australia have allowed nonlawyer ownership of legal practices, including even publicly traded law firms.[221] There is no evidence that this regulatory change has led to diminution of attorneys' independence to the detriment of clients.[222]

To be sure, not everyone who has examined the issue has concluded that clients would benefit from relaxing the restriction on nonlawyer ownership of law firms.[223] Rather, any consideration of whether it should be changed should examine whether the rule, as currently written and implemented, serves the interests of its ostensible primary beneficiaries. Insofar as the beneficiaries of the rule are supposed to be clients, their interests should be paramount in decisions on whether to amend the rule.

C. THE INTERSTATE PROTECTIONISM OF THE UNAUTHORIZED PRACTICE RULE

The rules of professional conduct prohibit a lawyer from practicing law in a jurisdiction where the lawyer is not licensed or otherwise permitted to practice. Specifically, Model Rule 5.5(a) provides that "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so."[224] Part (b) of the rule prohibits a lawyer who is not admitted in a jurisdiction from "establish[ing] an office or other systematic

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220. *Id*. at 49.

221. *See generally, e.g*., Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism*, 29 GEO. J. LEGAL ETHICS 1 (2014); HENDERSON, *supra* note 217, at 26–27; Judith A. McMorrow, *UK Alternative Business Structures for Legal Practice: Emerging Models and Lessons for the US*, 47 GEO. J. INT'L L. 665 (2016).

222. *See, e.g*., CHI. BAR ASS'N/CHI. BAR FED'N TASK FORCE ON THE SUSTAINABLE PRAC. OF LAW & INNOVATION, TASK FORCE REPORT 99 (2020), https://chicagobarfoundation.org/pdf/advocacy/task-force-report.pdf [https://perma.cc/CR4K-YVSC] ("[I]n jurisdictions outside of the U.S. where ownership restrictions have been lifted (notably the United Kingdom and Australia), they have not seen a significant increase in lawyer discipline issues with respect to lawyers sharing fees with people who are not lawyers.").

223. In addition to the various commenters to the California Task Force proposals cited above, see also Robinson, *supra* note 221, at 61–62.

224. MODEL RULES R. 5.5(a).

and continuous presence in this jurisdiction for the practice of law" or "hold[ing] out to the public or otherwise represent[ing] that the lawyer is admitted to practice law in this jurisdiction."[225]

Separate and apart from professional conduct rules, the unauthorized practice of law is also prohibited by statute in nearly every jurisdiction in America.[226] It is a criminal offense in many places.[227] This uniform standard raises the question why drafters of the rules of professional conduct needed to include a rule specifically prohibiting unauthorized practice, especially when there is a separate rule that generically restricts "criminal acts" by lawyers.[228]

The rules of professional conduct only restrict behavior by *lawyers*. A layperson who has never been admitted to practice law anywhere is not subject to Rule 5.5 and by definition, cannot violate the rule. Accordingly, Model Rule 5.5 only restricts lawyers who are admitted in one jurisdiction but practice in another jurisdiction. As Professor Stephen Gillers puts it: "Looked at one way, as courts sometimes have, traveling lawyers are not lawyers when they cross a state or a national border."[229]

1. THE UNAUTHORIZED PRACTICE RULE'S ALLEGED BENEFICIARIES: CLIENTS AND THE GENERAL PUBLIC

The official commentary to Model Rule 5.5, unlike that of many other rules, does not say what the purpose of the rule is or provide any clarity as to its intended beneficiary. The commentary begins by simply stating: "A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice."[230] To the extent this sentence advances a principle, it is a circular and banal one: a lawyer cannot practice in a jurisdiction where the lawyer is not authorized to practice. Although the official commentary to the rule is among the longest of any *Model Rules*, none of the rest of the commentary answers the simple question why the rule exists.

The closest Rule 5.5's commentary comes to even hinting at an intended beneficiary of the rule is a comment that deals with the temporary practice exception: "There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under

225. *Id.* at R. 5.5(b).

226. *See generally Appendix A: State Definitions of the Practice of Law*, ABA, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/model_def_statutes.authcheckdam.pdf [https://perma.cc/3WEV-955F] (last visited Feb. 27, 2022) (citing and quoting various states' unauthorized practice of law statutes).

227. *See, e.g.*, Cal. Bus. & Professions Code § 6125 (West 2019); N.Y. Judiciary Law § 478 (McKinney 2013); Texas Penal Code § 38.123 (1993).

228. MODEL RULES R. 8.4(b).

229. Stephen Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953, 958 (2012).

230. MODEL RULES R. 5.5 cmt. 1.

circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts."[231] This language implies, without saying outright, that the general rule against practice by unlicensed attorneys is intended to protect some combination of "clients, the public or the courts."

But really, who benefits from the restrictions in Rule 5.5? If an attorney who has lawfully practiced in Hoboken, New Jersey for twenty years wants to try his luck across the Hudson and open an office in Manhattan, who is protected by Rule 5.5's prohibition on his doing so? The answer is surely not clients. If clients are interested in procuring an experienced lawyer's services and are aware of the lawyer's qualifications, the unauthorized practice rule only stands in the way of their ability to hire the counsel of their choice. Such a restriction would be justified only if (1) clients are *unequipped* to determine whether the retention of a particular lawyer poses risks to them, and (2) the lawyer's admission to practice in a specific jurisdiction indicates that that lawyer is more suitable than lawyers who are not so admitted. As this section will demonstrate, both assumptions are fallacious.

Lawyers' attempts to limit competition from outside their respective states have a long and sordid history. Indeed, in the past, states have even restricted out-of-state *residents* from joining the bar—policies only thwarted by constitutional challenges.[232]

As with the conflict-of-interest rules, attorneys have been professionally disciplined for violating Rule 5.5 even where there was no evidence that their activities harmed—or even misled—clients. In 2005, the Wisconsin Supreme Court publicly reprimanded a locally admitted lawyer for impermissibly practicing law for a client in Colorado, even though "[t]here is no evidence the client suffered any harm as a result of [the attorney's] actions and (2) the lawyer had notified the client at the outset of the representation that "he was not licensed to practice in Colorado."[233] Or, in a case so notorious it led to a legislative response, in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, the California Supreme Court found that members of a New York-based firm had engaged in the unauthorized practice of law by handling a pre-arbitration dispute in California.[234] The Court found that it made no difference whether the client knew that the firm was not licensed to practice in California.[235] Nor did it make any

231. *Id.* at R. 5.5 cmt. 5.

232. *See, e.g.*, Virginia v. Friedman, 487 U.S. 59, 59 (1988); New Hampshire v. Piper, 470 U.S. 274, 288–89 (1985); Keenan v. Bd. of Law Exam'rs, 317 F. Supp. 1350, 1351 (E.D.N.C. 1970). *See also* Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-State Lawyers*, 18 GEO. J. LEGAL ETHICS 135, 151–174 (2004) (arguing that requiring qualified out-of-state lawyers to (re)take written examinations to be admitted in a new state is, in fact, unconstitutional under the Article IV and Fourteenth Amendment Privileges and Immunities Clause as well as the Dormant Commerce Clause).

233. *In re* Bolte, 699 N.W.2d 914, 922 (Wis. 2005).

234. Birbrower v. Super. Ct., 17 Cal. 4th 119 (Cal. 1998). The most significant consequence for the firm was that it could not recover any fees for the work it performed in California. *Id.* at 137.

235. *Id.* at 136.

difference whether the lawyers were, in fact, capable of handling the work: "Whether an attorney is duly admitted in another state and is, in fact, competent to practice in California is irrelevant."[236]

The conventional explanation for why a lawyer licensed in one state should not be permitted to pull up stakes and open an office in a new state is that the lawyer is not qualified to advise clients on the law of the new state.[237] As the Court explained in *Birbrower*, "other states' laws may differ substantially from California law. Competence in one jurisdiction does not necessarily guarantee competence in another."[238] For several reasons, this is not a compelling reason to deny qualified lawyers the right to practice in a new jurisdiction.

First, a lawyer's admission to practice in a state says very little about whether they know the law of the state. The only time that most lawyers are ever required to amass broad-based knowledge of the law of a single state is before their legal careers even begin: while studying for the bar exam. It is the rare lawyer who retains most of the state-specific law he studied for even five months—let alone five years—after taking the bar exam.[239]

Nor do a state bar's requirements of continuing legal education (CLE) affect a lawyer's specialized competence to practice in the state. CLE requirements, imposed in many states, allow lawyers broad flexibility to take courses on a wide range of subjects.[240] There is normally no requirement that a lawyer take *any* CLE courses that focus on the particular law of the state where he is admitted. And this is, of course, setting aside the fact that many lawyers treat CLE as a professional inconvenience and spend much of their class time staring at their phones.[241]

Second, and conversely, it is simply false to say that a lawyer who is not admitted to practice in a state is not likely to be sufficiently knowledgeable about the law of that state.[242] Most lawyers learn through experience, not by sitting for a

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236. *Id*. at 132. The following year, the California rules were amended to allow out-of-state attorneys to act as arbitration counsel in the state. *See* CAL. RULES OF COURT, R. 9.43.

237. *See, e.g*., Ranta v. McCarney 391 N.W.2d 161, 163 (N.D.1986) (whether an out-of-state lawyer is competent to practice in the state is "a factor which is irrelevant"); Servidone Const. Corp. v. St. Paul Fire & Marine Ins. Co., 911 F. Supp. 560, 568 (N.D.N.Y. 1995) ("like any other layman who may have a specialized area of competence," a lawyer admitted outside the state "may not give legal advice based upon his knowledge of that particular subject"); Spivak v. Sachs, 16 N.Y.2d 163, 168 (1965) ("The [unauthorized practice] statute aims to protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions.").

238. *Birbrower*, 17 Cal. 4th at 132.

239. The author speaks from experience.

240. For example, New York requires admitted lawyers to take 24 CLE credits every two years. Four of those credits must focus on Ethics and Professionalism, and one credit must focus on Diversity, Inclusion, and Elimination of Bias. There is no requirement that any of the credits focus on New York law in particular. *See* N.Y. State Unified Ct. System, *FAQs for Experienced Attorneys*, NY COURTS.GOV, https://ww2.nycourts.gov/attorneys/cle/attorney_faqs.shtml#s1_q2 [https://perma.cc/38XL-HPCR] (last visited Apr. 6, 2022).

241. *See supra* note 239.

242. *See* James W. Jones, Anthony E. Davis, Simon Chester & Caroline Hart, *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?*, 30 GEO. J. LEGAL ETHICS 125, 142 (2017) (explaining the failure of local admission to serve as an effective proxy for a lawyer's competence).

particular state's bar exam. To serve a client, a lawyer must often bone up on the law of a state where the lawyer is not admitted to practice. Junior associates at law firms, through their research on client matters, frequently become experts in an area of law for a state where they have never set foot, let alone been admitted to practice.[243]

Third, insofar as the rule against unauthorized practice is designed to avoid giving clients the wrong impression about a lawyer's expertise or authorization to practice, there are other and better ways to accomplish this goal. Indeed, Rule 5.5 (b) prohibits a lawyer from "hold[ing] out to the public or otherwise represent [ing] that the lawyer is admitted to practice law in this jurisdiction."[244] If a lawyer with an office in Manhattan does not claim to be admitted to practice in New York courts, and does not advertise himself as such, then the risk to clients should be minimal.

Fourth, the qualifications and knowledge a lawyer must possess to be licensed in one state are increasingly uniform throughout the country. The base qualifications for a new lawyer to be admitted in a state are the same nearly everywhere in America, namely (1) graduation from an ABA-accredited law school, (2) passage of the state bar exam, and (3) completion of the character and fitness investigation.[245] Moreover, uniformity increasingly pervades among state bar exams. Forty-nine of fifty states now administer the Multistate Bar Examination as one day of their overall bar exam.[246] In addition, as of January 2021, thirty-seven states, plus the District of Columbia and the U.S. Virgin Islands, had adopted the Uniform Bar Examination.[247] So the notion that lawyers who pass one state's bar

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243. Again, the author speaks from experience.

244. MODEL RULES R. 5.5(b)(2).

245. To be sure, there are a few notable exceptions. For example, California allows graduates of law schools that are not accredited by the ABA, but are accredited by the California State Bar's Committee of Bar Examiners, to sit for the California bar exam and be admitted to practice in the state. State Bar of Cal., *Law Schools*, STATE BAR OF CAL., https://www.calbar.ca.gov/Admissions/Law-School-Regulation/Law-Schools [https://perma.cc/VG2C-B5P4] (last visited Apr. 6, 2022). Four states allow students to take the bar exam without attending law school at all, through "apprenticeship" in a law office. *See* Cal. Bar R. 4.29; Vt. Sup. Ct. R. 7; Va. Bd. of Bar Exam'rs L. Reader Program R. (c); Wash. Ct. APR 6. And, alone among the states, Wisconsin grants "diploma privilege" to graduates of the state's two law schools, allowing them admission to the state bar without taking the bar exam. Wis. SCR 40.03. However, during, the COVID-19 epidemic in 2020, several states temporarily allowed emergency diploma privilege for recent law graduates when bar exams were canceled. *See, e.g.*, Karen Sloan, *Push for Diploma Privilege in New York Intensifies as September Exam Looms*, LAW.COM (July 13, 2020), https://www.law.com/2020/07/13/push-for-diploma-privilege-in-new-york-intensifies-as-september-exam-looms/ [https://perma.cc/4QSV-C6VG].

246. National Conference of Bar Examiners, *Jurisdictions Administering the MBE*, NCBE, http://www.ncbex.org/exams/mbe/ [https://perma.cc/PAT6-2Y7C] (last visited Apr. 6, 2022). The only U.S. jurisdictions that do not require the MBE are Louisiana and Puerto Rico.

247. National Conference of Bar Examiners & ABA, *Comprehensive Guide to Bar Admission Requirements 2021*, at 19–20, ABA [hereinafter Comprehensive Guide], https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2021-comp-guide.pdf [https://perma.cc/A6UW-SPCA] (last visited Apr. 6, 2022) . Fifteen of these jurisdictions' exams include a local component in addition to the UBE. *Id*.

exam have vastly different legal knowledge from lawyers in another state has less and less force.

Fifth, and perhaps most importantly, there is another rule of professional conduct that addresses the competence concern head-on. In fact, it is the *first* rule of professional conduct: Model Rule 1.1 requires every lawyer to "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[248] This rule allows lawyers to take on client representations only when they have the knowledge and skill to do so. The commentary to Rule 1.1 elaborates on this requirement, listing various factors that determine whether "a lawyer employs the requisite knowledge and skill in a particular matter," including "the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question."[249]

Even if Rule 5.5 did not exist, lawyers would still be ethically required to represent clients competently and knowledgably. If they failed to do so, they could be sued for malpractice and professionally disciplined. Whether a lawyer happens to have gone through the bar admission process in the state where the client or the lawyer is located, as opposed to another state, says virtually nothing about the lawyer's qualification to take on a representation.

2. THE UNAUTHORIZED PRACTICE RULE'S ACTUAL BENEFICIARY: LOCAL LAWYERS

Few lawyers would disagree that out-of-state lawyers are often entirely qualified to practice law in states where they are not admitted, which raises the troubling question of why the rules continue to prohibit it. The likely reason is both obvious and unflattering: members of the local bar are not worried about bad lawyers moving into their jurisdiction; they are worried about *good* lawyers moving in. As one critic put it: "Historically, the sad if hardly surprising fact has been that the organized bar's resistance to new modes of practice, though often clothed in the high-minded rhetoric of protecting the ethical standards and independent judgment of the legal profession, has been to a considerable extent motivated by far less elevated desires to protect the incomes of lawyers from economic competition or their status from erosion by groups perceived as interlopers."[250] Or

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248. MODEL RULES R. 1.1.

249. *Id*. at R. 1.1 cmt. 1.

250. Letter from Robert W. Gordon, Professor, Yale Law School, to Sherwin P. Simmons, Chair, ABA Comm'n on Multidisciplinary Prac. (May 21, 1999). *See also* 2 GEOFFREY C. HAZARD, HODES & JARVIS, THE LAW OF LAWYERING § 46.3, at 46-9 (3d ed. Supp. 2010):

> If the UPL rules are intended to protect clients, clients should have some say as to how much protection they want. And if the rules are designed in part to protect lawyers from competition, then lawyers should not be allowed unilaterally to determine the extent of their own protection.

another: "The reasons given for the restrictions are probably largely pious eyewash. The real motivation, one strongly suspects, has to do with cutting down on the economic threat posed for in-state lawyers—those who make the in-state rules on legal practice—by competition with out-of-state lawyers."[251]

Tellingly, a high proportion of formal complaints about the unauthorized practice of law are filed not by dissatisfied clients but rather by *other lawyers*. An empirical study found that in most jurisdictions surveyed, less than half of unauthorized practice complaints came from consumers or clients, and "[m]ost of the remainder came from attorneys."[252] Moreover, when surveyed authorities were asked to identify an actual "serious injury" resulting from unauthorized practice, most could not, and of those who did, "almost all singled out" the particular practice of immigration fraud, in which "an undocumented immigrant paid substantial sums and 'got nothing done.'"[253]

The protectionist motivation behind unauthorized practice rules is also evident in the difficulty that even highly accomplished lawyers find in getting admitted to practice in a new state. At minimum, experienced lawyers who seek admission to practice in a new state must "waive in" through admission by motion. For example, New York allows admission on motion for lawyers admitted in another jurisdiction who (among other requirements) have practiced law in that jurisdiction for five of the past seven years.[254] The waive-in process takes at least several months and requires the applicant to submit a comprehensive application and a convoluted array of materials which themselves take considerable effort to obtain.[255] During that interim period, the lawyer is not permitted to practice independently in the state.

At the other extreme, as of this writing a total of nine states do not allow admission on motion at all—meaning that anyone who wants to practice law in the state must take and pass the state's bar exam, regardless of their credentials and accomplishments.[256] This unbending requirement has led to some absurd cases. For example, in 2005, the former dean of Stanford Law School, a prominent

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251. Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 679 (1995). *See also id.* at 681:

> Many speculate that the strict stance taken by those states is perhaps motivated by the concern of lawyers who already practice there. Concern revolves around the perceived threats of the Snowbelt lawyers who retire to balmier climates and increase competition for local law businesses with the unfair economic cushion of Social Security and other retirement capital.

252. Deborah L. Rhode & Lucy B. Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2591–92 (2014).

253. *Id.* at 2595.

254. N.Y. Ct. App. R. § 520.10(a)(2).

255. *Id.* at § 520.10(b).

256. The nine states are California, Delaware, Florida, Hawaii, Louisiana, Maryland, Nevada, Rhode Island, and South Carolina. Among these states, California, Maryland, and Rhode Island allow lawyers with a minimum level of practice experience to take a modified version of the regular state exam. Cal. B. R. 4.3(C); MODEL RULES 19–212–213; R.I. Sup Ct. Art. II, R. 2.

constitutional scholar who had recently joined a major law firm as a name partner and was already admitted to practice in two other states, took—and failed—the California bar exam.[257]

Tellingly, the states most hostile to out-of-state lawyers make liberal exceptions for certain types of lawyers who are unlikely to compete with the local bar for paying clients:[258]

- California, Delaware, Florida, Hawaii, Maryland, Nevada, Rhode Island, and South Carolina allow legal aid or pro bono lawyers to practice in the state without being admitted to practice locally.[259]
- In-house counsel may practice in California, Delaware, Louisiana, Maryland, Rhode Island, and South Carolina without admission.
- Government lawyers may practice in Delaware, Nevada, and Rhode Island without admission.[260]
- Law school faculty may practice without admission in Hawaii, Nevada, Rhode Island, and South Carolina.[261]

Most of these exceptions only make sense in a context of economic protectionism.[262] After all, legal aid and pro bono clients are, if anything, the *most* vulnerable to unscrupulous or incompetent lawyers. Indigent clients not only tend to be less educated and legally sophisticated than clients who can afford to pay a lawyer, but also are the least able to find alternative counsel if they are unhappy with their current representation.

Likewise, a government lawyer not only occupies an important position of public trust, but is also likely to hold a job that requires considerable expertise in an area of state law. If local bar admission were really a proxy for competence generally and particularly for deep knowledge of a particular state's law, bar admission would be essential for state government lawyers.

And law professors, charged with educating the next generation of attorneys, should, if anything, be the most competent lawyers in the room. Again, not every state agrees: many allow law professors to teach without a license, even clinical

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257. James Bandler & Nathan Koppel, *Raising the Bar: Even Top Lawyers Fail California Exam*, WALL ST. J. (Dec. 5, 2005), https://www.wsj.com/articles/SB113374619258513723 [https://perma.cc/CEB5-CDC8].

258. *See generally* Comprehensive Guide, *supra* note 247, at 49; Cal. R. of Ct. 9.45–9.46; Haw. Sup. Ct. R. 1.8, 1.16; La. Sup. Ct. R. XVII(14); MODEL RULES R. 5.5(d)(1); MODEL RULES R. 5.5 cmt. 17; Nev. Sup. Ct. R. 49, 72; R.I. Sup. Ct. R. 2, 9; S.C. Sup. Ct. R. 402(j), 405, 414, 415. Many other states also offer these exceptions.

259. Comprehensive Guide, *supra* note 247, at 49.

260. *Id.*

261. *Id.*

262. *See also* Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-State Lawyers*, 18 GEO. J. LEGAL ETHICS 135, 149 (2004) ("If jurisdictions had significant concerns about lawyer competence, these exceptions would make little sense. Law professors, legal service attorneys, and in-house counsel from other jurisdictions are no more likely to be familiar with local law than other out-of-state attorneys who seek admission in the state.").

law professors who actually supervise local litigation, often for indigent clients.[263]

Lawyers' response to proposed reforms provides further evidence that the protection of lawyers, not the protection of clients, is the motivating factor behind the resistance to change. Take Florida as an example, which historically has been very hostile to allowing out-of-state practitioners to move to the state.[264] In June 2015, the president of the Florida Bar recommended that the state change its rules to allow admission by motion of experienced lawyers.[265] The recommendation followed a Bar subcommittee report that "determined that erecting barriers to cross-border practice was no longer practical in today's mobile society and that increased competition was not a principled reason for continuing such barriers."[266]

Florida lawyers reacted to the proposed change in its admission requirements with overwhelming opposition. In an open hearing on the proposal, twenty-four speakers addressed the question, and twenty-two of them opposed the change.[267] Though some opponents gave lip service to the need to protect clients from lawyers unversed in local law, more self-interested motives were impossible to avoid. According to one report, a county bar president argued that "Florida had unique laws that all lawyers should know about before they be allowed to practice in the state."[268] Another bar leader could not avoid characterizing competition from new lawyers as an "invasion": "What reciprocity does is allow lawyers from other states who are not specialists to come in and begin to invade our practices such that what we [will] have is lawyers who are jacks of all trade and masters of none coming into our state and working on cases."[269] Another opponent argued: "What is so hard to ask of out of state lawyers before they're given the privilege of a Florida law license to take a test and show that they have studied a few things

263. The only exception to the admission requirement that typically operates in a for-profit environment is in-house counsel, but even this exception is telling. Local companies are themselves important and vocal constituencies of a state's legal system. And private-practice lawyers who vocally oppose making it easier for local legal departments to operate will not endear themselves to an important potential client base.

264. RICHARD L. ABEL, AMERICAN LAWYERS 117 (1989) ("Florida explicitly sought to discourage retiring out-of-state lawyers from launching a new practice in the Sunshine State.").

265. *See, e.g.*, Jacob Gershman, *Florida Attorneys Assail Plan to Relax Bar Admission Rules*, WALL ST. J. L. BLOG (Aug. 3, 2015), https://blogs.wsj.com/law/2015/08/03/florida-attorneys-assail-plan-to-relax-bar-admission-rules/ [https://perma.cc/VM4V-CS9V].

266. Mark Killian, *Open Hearing Will Explore Reciprocity*, FLA. BAR NEWS (Sept. 1, 2015), https://www.floridabar.org/the-florida-bar-news/open-hearing-will-explore-reciprocity/ [https://perma.cc/QJ2Q-LDU5].

267. Gary Blankenship, *Admission by Motion Gets Chilly Reception at Tampa Open Hearing*, FLA. BAR NEWS (Oct. 15, 2015), https://www.floridabar.org/the-florida-bar-news/admission-by-motion-gets-chilly-reception-at-tampa-open-hearing/ [https://perma.cc/G6YQ-TC7K].

268. Victor Li, *Attorneys Clash as Florida Considers Allowing Admission on Motion for Out-of-State Lawyers*, ABA J. (Sept. 21, 2015), https://www.abajournal.com/news/article/attorneys_clash_as_florida_considers_allowing_admission_on_motion [https://perma.cc/Q2PX-3XDN].

269. Blankenship, *supra* note 267.

about Florida law?"[270] Another opponent in an interview warned that "[i]nstead of 75,000 practicing lawyers … Florida would have 150,000 in five years."[271] Out of about 1,358 Florida lawyers who submitted email comments to the Bar on the proposed changes, 1,173 were opposed.[272] The Florida Bar's Board of Governors heard its constituents loud and clear. The Board voted 48–0 against the proposal to allow admission by motion.[273]

In an age of virtual practice, mass communications, and rapid transit, where lawyers' practice specialty is easily translatable across state borders and where the qualifications to become admitted to practice have become more and more uniform, the rationale for strict state-by-state admission requirements becomes less and less compelling. Critics of the current system have argued for various reforms to address this issue.[274] But a start would be the elimination of Rule 5.5, which does not help clients, does not ensure competent representation, and serves as an artificial barrier to professional competition.

CONCLUSION: WHY DOES IT MATTER?

In an era where the legal profession's morality[275] and proper place in our democracy[276] have been called into question, ascertaining exactly what purpose the profession's standards serve is essential. Whether a client, a lawyer, or a third party is the intended beneficiary of a particular professional standard is not simply an intellectual exercise. It has important implications for understanding the purpose of the profession because it helps answer the key question of who lawyers are supposed to serve and under what circumstances. And it provides us broadly with a more accurate comprehension of a lawyer as someone who must navigate multiple and sometimes competing obligations.

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270. Jacob Gershman, *Florida Bar Rejects Controversial Plan to Entice Out-of-State Lawyers*, FLA. BAR NEWS (Oct. 16, 2015), https://www.wsj.com/articles/BL-LB-52368 [https://perma.cc/2UZM-H8KT].

271. Sun Sentinel Editorial Board, *Florida Bar's Admission Rule Deserves Re-Do*, S. FLA. SUN SENTINEL, (Aug. 14, 2015), https://www.sun-sentinel.com/opinion/editorials/fl-editorial-lawyers-jv0817-20150814-story.html [https://perma.cc/4XTA-KAK5].

272. Julie Kay, *Reciprocity Voted Down by Florida Bar Board of Governors*, DAILY BUS. REV. (Oct. 16, 2015), https://www.law.com/dailybusinessreview/almID/1202740007771/Reciprocity-Voted-Down-by-Florida-Bar-Board-of-Governors/?slreturn=20220204165438 [https://perma.cc/U3BN-W5QN].

273. *Id.*; Gershman, *supra* note 270.

274. *See, e.g.*, Gillers, *supra* note 229, at 999–1003 (arguing for creating a single, nationwide bar exam, allowing lawyers to relocate to other states without taking a new bar exam, and allowing any qualified lawyer to practice virtually in any other jurisdiction); Jones, Davis, Chester & Hart, *supra* note 242, at 189–193 (arguing for federal legislation allowing any lawyer qualified in any U.S. jurisdiction to practice federal law anywhere in the country).

275. *See, e.g.*, Debra Cassens Weiss, *The Legal Field Attracts Psychopaths, Author Says; Not That There Is Anything Wrong with That*, ABA J. (Nov. 13, 2012) https://www.abajournal.com/news/article/the_legal_field_attracts_psychopaths_author_says_not_that_there_is_anything [https://perma.cc/YD2S-FE57].

276. Sherrilyn A. Ifill, *Lawyers Enabled Trump's Worst Abuses*, N.Y. TIMES (Feb. 12, 2021), https://www.nytimes.com/2021/02/12/opinion/politics/trump-lawyers.html [https://perma.cc/7J2A-RX3U].

Knowing who a lawyer is supposed to be serving when they follow a rule gives us insight into how to interpret and apply that rule. If we begin every inquiry with the initial question—who is this rule meant to benefit?—that will be immensely informative in understanding how to apply it. If a lawyer is considering multiple interpretations of the rule, then considering who benefits from a given application will help the lawyer decide which course of action to take.

And finally, a rule that does not benefit its supposed beneficiary should be changed. If a rule was originally meant to benefit one type of person, but in practice benefits someone else, or no one at all, it is not properly serving its intended purpose. If it is not, then the rule should be amended or eliminated. The current client conflict of interest rule, the professional independence rule, and the rule on unauthorized practice are all examples of candidates for reform under this analysis.