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Learning the Law of Lawyering

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BOOK REVIEW

LEARNING THE LAW OF LAWYERING

RONALD D. ROTUNDA†

Modern Legal Ethics By Charles W. Wolfram.* St. Paul, Minn.: West Pub. Co. 1986. Student Ed., Pp. xxv, 1114. \$26.95; Practitioner's Ed., xxvii, 1363. \$48.95.

It is the unusual law student today who does not take a required course in Legal Ethics followed by a bar examination on that same subject. It was not always so. When I started teaching, my law school did not even offer the course, and the legal ethics casebooks focused on the intricacies of unauthorized practice. In those days, it was easy for law students to learn the Golden Rule: Thou shalt not lie, cheat, steal, . . . or advertize.

Times have changed. The emphasis on legal ethics began in 1974 as part of what Spiro Agnew referred to as our "post-Watergate morality." Some ridicule this movement for its false assumption that more study of ethics will make us more ethical, as though ethics can be taught only at mother's knee.¹ I recall a story I heard a long time ago. A third year law student married a senior in college. A year later, when both had graduated, they took a belated honeymoon in Scotland. There, at a picturesque country inn, the proprietress asked how long they had been married. "It's been a year," they said. "What! A year, and no wee little ones yet?" "Well," they responded, "we had to finish school." "You mean in America you have to go to school for that too?"

In America, we lawyers also go to school to study ethics. Those who think of ethics as intuition learned at their mothers' knees should read Professor Wolfram's new book, *Modern Legal Ethics*. In fact, a

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¹ See SPECIAL COMM. ON PROFESSIONALISM, ILLINOIS STATE BAR ASS'N, THE BAR, THE BENCH AND PROFESSIONALISM IN ILLINOIS 8 comm. comments (1987) ("Heard more than once was the opinion that one cannot teach another to be ethical.")

copy of this book should be in every law office and law library in the country.

Attorneys are often their own worst lawyers. They know the law affecting their clients because it is their business to know, but too frequently know little about the law affecting themselves. For example, many lawyers today are ignorant of recent developments regarding client trust funds, conflicts of interest, and attorney disqualification. The Administrator of the Illinois Attorney Registration and Disciplinary Commission once told me that a large percentage of lawyers pay the annual mandatory fee to support the Disciplinary Commission with checks drawn on client trust fund accounts. These attorneys apparently are unaware that they are improperly commingling their own money with client trust funds.²

Similarly, I have consulted with many lawyers who did not appreciate the distinction between a client's "confidences" and her "secrets,"³ and did not realize that they were not supposed to reveal either,⁴ subject to various exceptions, including those prosaic instances when "necessary to establish or collect his fee."⁵ I also recall a casual discussion in which one of my former academic colleagues, who practiced law on the side, was asked whether she bought malpractice insurance, and whether it was expensive to obtain for a part-time practitioner. She responded that she did not have to buy insurance, because her contract

² See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102(A) (1980); *id.* EC 9-5 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15(a) (1987); see also *Clark v. State Bar*, 39 Cal. 2d 161, 167-68, 246 P.2d 1,4 (1952) ("[C]ommingling is committed when a client's money is intermingled with that of his attorney and its separate identity lost so that it may be used for the attorney's personal expenses or subjected to claims of his creditors.").

³ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1980) ("'Confidence' refers to information protected by the attorney-client privilege . . . , and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."). The Model Rules do not distinguish between "confidences" and "secrets." Rather, they treat all information "relating to representation of a client" as confidential. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1987). The drafters intended to eliminate any need for the client to specify whether information may be disclosed, and to forbid the lawyer to speculate on whether the information might be embarrassing or detrimental if disclosed. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1987) (Model Code Comparison).

⁴ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)(1) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1987).

⁵ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1980); *accord* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1987) ("A lawyer may reveal such information [relating to the representation of a client] to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client. . . ."); see also *Nakasian v. Incontrade, Inc.*, 409 F. Supp. 1220, 1224 (S.D.N.Y. 1976) (allowing lawyer to recover fee by using confidential information to attach client's property).

with her clients required them to waive any malpractice claims against her. Her listeners nodded knowingly until I explained to her that her standard waiver violated state ethics rules, and could cause her to lose her license.⁶

One need not rely on anecdotal analysis. The few empirical studies show that lawyers often are unaware of even basic information about the law governing lawyers, such as the contours of the attorney-client privilege.⁷ While most new entrants to the legal profession must pass a professional responsibility examination, lawyers out of law school ten years or more, who draw a disproportionate number of malpractice suits,⁸ have been exempted. Many of these malpractice suits arise out of violations of professional ethics.⁹

Professor Wolfram has responded to these failings of the legal profession with a meticulously researched, carefully organized, and well written text which discusses and analyzes the many issues under the rubric of "Professional Responsibility." He proceeds on the basic assumptions that what we call "lawyer's ethics" can be taught and must

⁶ See ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY DR 6-102(a) (1987) ("A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice. . . ."); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-102(A) (1980) ("A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice."); cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (1987) ("A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement . . .").

⁷ See, e.g., Special Project, *The Attorney-Client Privilege in Multiple Party Situations*, 8 COLUM. J.L. & SOC. PROBS. 179, 180 (1972) (reporting that its "survey revealed a general lack of awareness among attorneys as to when the attorney-client privilege will apply to inter-attorney exchanges of information").

⁸ See COMMISSION ON PROFESSIONALISM, AM. BAR ASS'N, ". . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 24 n.* (1986), reprinted in 112 F.R.D. 243 (1987). See generally Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 LOY. U. CHI. L.J. 1149 (1987).

⁹ See, e.g., Gates, *The Newest Data on Lawyers' Malpractice Claims*, A.B.A. J., Apr. 1984, at 78, 80 (reporting that a significant proportion of malpractice claims arise from violations of professional responsibility, including 9.35% from failure to obtain a client's consent or to inform a client, 4.79% from failure to follow a client's instructions, and 3.39% from conflicts of interest).

In recent years, several major law firms have settled for substantial sums various malpractice claims based on ethical violations. New York's Rogers & Wells settled, for \$40 million, a case in which it continued to represent a client after it should have known that the client was perpetrating a fraud. See *After a \$40M Payment, It's Not Over Yet for Rogers & Wells*, Nat'l L.J., Apr. 14, 1986, at 1, col. 1. Chicago's Winston & Strawn settled, for approximately \$7.3 million, a lawsuit involving "reckless" advice it had given on securities law. See *Winston & Strawn to Pay \$7.3M in Pact*, Nat'l L.J., May 18, 1987, at 3, col. 1. Baltimore's Venable, Baetjer & Howard settled, for \$27 million, a lawsuit involving conflicts of interests. See *Venable Agrees to \$27M Accord*, Nat'l L.J., May 25, 1987, at 3, col. 1.

be learned, and that the ABA Model Code of Professional Responsibility, the newer Model Rules of Professional Conduct,¹⁰ and the Model Code of Judicial Conduct present complex rules, many of which cannot be known through some innate awareness. Anyone who reads Professor Wolfram's book will come to share his basic assumptions.

His book comes in two versions: the "Hornbook Series: Student Edition" and the "Hornbook Series: Practitioner's Edition." The two editions are identical for the first 953 pages, with extensive, and helpful, Westlaw references. The Practitioner's Edition has more extensive appendices and tables, is better bound, has thumb indices, and provides an additional chapter on "Judges and the Quality of Justice,"¹¹ the last of which alone justifies its considerable added expense. Few of us will be judges, but many of the issues that concern judges also concern the lawyers who practice before them, such as when a judge must disqualify herself;¹² when judges are immune from suit¹³ and when they may be disciplined;¹⁴ and when judges may receive gifts or loans.¹⁵ Lawyers, after all, cannot give to the judge what the judge may not receive.¹⁶

The title of Professor Wolfram's book, *Modern Legal Ethics*, is understated; his book's subject matter is broader and more thorough

¹⁰ As of this writing, 24 states and the District of Columbia have adopted the Model Code of Professional Responsibility, and 21 states have adopted the Model Rules of Professional Conduct. The states using the Model Code are: Alabama; Alaska; Colorado; Georgia; Hawaii; Illinois; Iowa; Kansas; Kentucky; Massachusetts; Michigan; Nebraska; New York; Ohio; Oklahoma; Pennsylvania (which also has rules of its own); Rhode Island; South Carolina; South Dakota; Tennessee; Texas; Utah; Vermont; and West Virginia. The states using the Model Rules are: Arizona; Arkansas; Connecticut; Delaware; Florida; Idaho; Indiana; Louisiana; Maryland; Minnesota; Mississippi; Missouri; Montana; Nevada; New Hampshire; New Jersey; New Mexico; North Dakota; Washington; Wisconsin; and Wyoming. California adheres to its own Rules of Professional Conduct, while Maine, North Carolina, Oregon and Virginia have hybrid codes. For a text of each jurisdiction's rules, see Nat'l Rep. on Legal Ethics & Prof. Responsibility (Univ. Publ. Am. 1987); for the latest amendments to each jurisdiction's rules, see Law. Man. on Prof. Conduct (ABA/BNA) at 01:3 (July 22, 1987). This list is subject to change: at least five of the states listed in the National Reporter on Legal Ethics and Professional Responsibility as having rules based on the Model Code are listed in the Lawyers' Manual on Professional Conduct as having recently amended their rules to conform with the Model Rules.

¹¹ See C. WOLFRAM, *MODERN LEGAL ETHICS* 954-1007 (Practitioner's ed. 1986) [subsequent references to Professor Wolfram's book will be to the Student Edition unless otherwise indicated].

¹² See *id.* § 17.5.5 (Practitioner's ed.).

¹³ See *id.* § 17.3.3 (Practitioner's ed.).

¹⁴ See *id.* §§ 17.4.1-17.4.3 (Practitioner's ed.).

¹⁵ See *id.* § 17.5.2, at 983-84 (Practitioner's ed.).

¹⁶ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-110(A) (1980); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5(a) (1987) (prohibiting lawyers from seeking to influence judges by illegal means); *id.* Rule 8.4(f) (1987) (prohibiting lawyers from knowingly assisting judges in conduct that violates rules of judicial conduct or other law).

than the title indicates. One might more properly title the book *The Legal Profession*, for, in addition to its careful study of the law governing the practice of law, the book offers a brief discussion of historical scholarship on the legal profession in this country,¹⁷ a comparison of American lawyers with lawyers in other countries,¹⁸ interesting demographic facts (there were more lawyers per capita in 1890 than in 1970; at current rates of enrollment, within a dozen years one-third of all lawyers will be women),¹⁹ and legal trivia. For example, we learn that "[t]he immediate stimulus for the 1924 judicial canons was . . . the revelation in the early 1920s that federal judge Kenesaw Mountain Landis was supplementing his \$7,500 judicial salary with \$42,500 received each year for serving as commissioner of major-league baseball."²⁰ Law and economics aficionados should note the relative worth of the professions.

Professor Wolfram also examines the origins of lawyer regulation, over which the courts exercise power as part of their inherent authority.²¹ He even explores the uncertain origins of the common practice of judges wearing robes—a practice that was abandoned in this country in the nineteenth century and did not resume in some states until the twentieth.²² This last bit of trivia reveals another aspect of Professor Wolfram's hornbook: it is thoroughly annotated.²³ The footnotes are often mini-bibliographies. Even the brief reference to the use of judicial robes contains four citations to secondary authority.

Book reviews are written in something like a sonata form. All reviews, no matter how critical, at some point find something to praise in the book, while laudatory reviews eventually must turn to the place where they mete out criticism. Reviewers feel, perhaps, that they must persuade the reader of their objectivity.

It is not easy to find something to criticize, because Professor

¹⁷ See C. WOLFRAM, *supra* note 11, § 1.3.

¹⁸ See *id.* § 1.2.

¹⁹ See *id.* § 1.4.

²⁰ *Id.* § 17.3.2, at 965 n.72 (Practitioner's ed.).

²¹ See *id.* § 2.2. Professor Wolfram argues that the doctrine of negative inherent powers, which allows the judicial branch of government to exclude the legislative branch from regulating lawyers' activities, is, in those cases that do not impinge directly on core functions of the judicial branch, an unwarranted usurpation of power by the courts. See *id.* § 2.2.3, at 28-31. *But see* Lehan, Book Review, FLA. BAR J., July-Aug. 1987, at 77, 77 ("It should be noted that [Wolfram's] arguments are contrary to the long established judicial position that legislative regulation of lawyers, who are officers of the courts, would seriously derogate the doctrine of separation of powers which is a fundamental strength of our democratic form of government.").

²² See C. WOLFRAM, *supra* note 11, § 17.1.1, at 954 n.1 (Practitioner's ed.).

²³ It is thoroughly annotated, but not completely so. I wish that Professor Wolfram would have cited more of my articles. But, alas, some things are not meant to be.

Wolfram generally brings to his subject thoroughness of research, a very readable style, and critical analysis. There are no fatal flaws. In a few cases I disagree with Professor Wolfram, but these disagreements are mostly differences in emphasis and approach. Yet it might prove useful to examine a few of these areas, if only to fulfill the sonata form of all book reviews.

I. THE ADVOCATE-WITNESS RULE

My first disagreements arise from Professor Wolfram's discussion of the advocate-witness rule. In general, this rule provides that a lawyer who serves as the client's advocate in court may not be a witness in the same proceeding.²⁴ Professor Wolfram discusses the history of this rule in the case law and ABA rules, starting with the 1908 Canons of Professional Ethics.²⁵ He correctly notes that the rule appears to be based on conflicting rationales. For example, one commonly-advanced purpose of the rule is to protect the advocate's client, because opposing counsel can more easily impeach a testifying advocate by pointing out to the jurors the advocate's evident bias.²⁶ If client protection is, indeed, the rationale for the rule, and the evil sought to be avoided is simply the vulnerability of the advocate's testimony, then client consent to the advocate's testimony should cure the problem. However, the rule does not allow for such client waiver.²⁷ Moreover, this purported rationale is inconsistent with another frequently cited rationale: that the opposing counsel will find it difficult to cross-examine and challenge ruthlessly the credibility of a fellow lawyer.²⁸

Professor Wolfram concludes that a "better rationale" is to be found in the fact that the advocate-witness "will naturally feel sympathy for his or her client."²⁹ Such emotional biases, as well as the financial incentives inherent in our adversary process and concerns with professional reputation, he reasons, "might cause a lawyer to slant testimony on the witness stand or to recite facts while commenting on the evidence."³⁰ His reference to "slanting" of testimony is not persuasive. After all, the advocate-witness rule is not an immunity from testifying, but merely precludes the lawyer from being the client's advocate

²⁴ See C. WOLFRAM, *supra* note 11, § 7.5.1.

²⁵ See *id.* § 7.5.2.

²⁶ See *id.* § 7.5.2, at 377.

²⁷ See *id.*

²⁸ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-9 (1980); C. WOLFRAM, *supra* note 11, § 7.5.2, at 377-78.

²⁹ C. WOLFRAM, *supra* note 11, § 7.5.2, at 378.

³⁰ *Id.*

in court during the time that she is also a witness. The disqualified lawyer may still represent the client, except in the particular litigation. The lawyer disqualified in the instant case will still testify and probably hopes to continue to represent the client. Thus, the motivation to slant testimony continues to exist. Defendants and plaintiffs have an even greater incentive to slant their testimony, yet we allow this testimony and leave questions of credibility to the jury.

A more persuasive rationale for the rule is that the fact finder is more likely to be confused if the same lawyer who argues the evidence takes the stand to testify as to what that evidence is. Perhaps Professor Wolfram had this rationale in mind when he stated that the testifying advocate might "recite facts while commenting on the evidence."³¹ On the other hand, all lawyers "recite facts" and "comment on the evidence" when summing up and arguing their case before the jury. There is nothing wrong with this. What damages the opposing party and confuses the jury is when the witness comments on the evidence, in effect arguing the case, while merely purporting to recite facts and give testimony. Client consent does not cure this problem, for its rationale lies in a systemic interest in ensuring fair results by not confusing the trier of fact.³²

If the basis of the advocate-witness rule is the possible confusion of the trier of fact when the advocate is also a witness, that rationale calls into question the rule imputing to the entire law firm the disqualification of the one lawyer subject to the advocate-witness rule. The Model Code requires automatic imputation,³³ while the Model Rules do not.³⁴ Professor Wolfram notes this significant change and suggests that it

³¹ *Id.*

³² See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C)(3) (1980) (a lawyer shall not assert personal knowledge of the facts in issue except when testifying); *id.* DR 7-106(C)(4) (a lawyer shall not assert a personal opinion); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(e) (1987) (a lawyer shall not assert personal knowledge of the facts in issue or state a personal opinion); *cf.* Daniel v. Penrod Drilling Co., 393 F. Supp. 1056, 1059, 1061 (E.D. La. 1975) ("While lawyers owe a duty to their clients, they owe a primary duty to the administration of justice. . . . [E]ven if the lawyer has no duty to disclose the whole truth, he does have a duty not to deceive the trier of fact, an obligation not to hide the real facts behind a facade.").

³³ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1980).

³⁴ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7(b) (1987) ("A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness [unless there is a conflict of interest]."). The Model Rules do disqualify associated lawyers under certain circumstances. *See id.* Rule 1.10(a) (1987) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would have been prohibited from doing so by rules 1.7, 1.8(c), 1.9 or 2.2."). Rule 1.10(a) is the general rule regarding imputation, but it specifically does not list Rule 3.7 ("Lawyer as Witness") as a cause for disqualification.

was a response to the criticism of the broad imputation rule,³⁵ but does not explain the nature and validity of this criticism, although he does illustrate some problems and court responses to them under the strict Model Code. Professor Wolfram perhaps should have added that the main rationale for the advocate-witness rule—the possibility of confusing the trier of fact—does not require imputation of the disqualification because there is no danger of such confusion when one lawyer is the advocate and another lawyer, even though from the same firm, is a witness.

In a different section of his book, Professor Wolfram recommends that lawyers who conduct interviews with hostile or evasive prospective witnesses use an investigator who can be the witness without disqualifying the advocate.³⁶ However, the law firm's employee-investigator can have the same incentive as the lawyer to slant testimony. The investigator, like a law partner, can be compensated entirely by a profit-sharing arrangement.³⁷ In such cases both the investigator and the lawyer may have the same economic motivation to slant testimony. Yet even the Model Code, which provides for imputation of an advocate's disqualification to all other lawyers in the firm, does not require imputation of disqualification to a law firm's investigator. The clearest explanation is that there is no imputation in such cases because there is no likely confusion by the trier of fact.

If one fully explores the rationale for the advocate-witness rule, the change regarding imputation in the Model Rules is easy to understand because it makes good sense. The most logical rationale of the rule lies not in any "slanting" of testimony, but in confusion of the finder of fact. Thus, the change was not inserted to confuse the beleaguered law student, but is a logical outgrowth of the rationale behind the advocate-witness rule. Professor Wolfram's analysis of the rule would benefit from a discussion of this rationale.

II. FEE SPLITTING

At another point, Professor Wolfram discusses fee splitting, called a "fee referral" by its proponents and a "kickback" by its opponents. Lawyers in the same firm may split firm income in any manner they

³⁵ See C. WOLFRAM, *supra* note 11, § 7.5.2, at 384.

³⁶ See *id.* § 12.4.1. In any case, disqualification of an attorney under the advocate-witness rule may disqualify her firm only from the actual trial. See *Jones v. City of Chicago*, 610 F. Supp. 350, 363 (N.D. Ill. 1984).

³⁷ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102(A)(3) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(a)(3) (1987).

choose.³⁸ It is not unusual for a firm to have one or more "rainmakers" bringing in business while other lawyers do the actual legal work. The rainmaker's partnership draw is a function of how much business she brings in, not of her billable hours. No one ever tells the client how the firm will divide the fee between the rainmaker and others within the firm. Indeed, the firm need not secure consent from the client to allow others within the firm to perform the work and share client confidences.³⁹

However, if lawyers are not in the same firm, very different rules apply. Fee splitting or fee dividing occurs when a single bill to a client covers the fee of two or more lawyers in different firms.⁴⁰ The Model Code prohibits fee splitting unless the fee is divided "in proportion to the services performed *and* responsibility assumed" by each lawyer;⁴¹ in addition, the client must consent and the total fee must be reasonable.⁴² The Model Rules apply the same requirements, except that the division may be "in proportion to the services performed by each lawyer *or*, by written agreement with the client, each lawyer assumes joint responsibility for the representation."⁴³ In contrast, a lawyer's "responsibilities" under the Model Code require that the forwarding lawyer actually work on the case and not receive fees disproportionate to the work performed. Lawyers who violate this rule risk discipline and loss of their fees.⁴⁴

In spite of the Model Code's formal prohibition, fee splitting is common, especially in personal injury cases. Such splitting does not increase a client's fees, because the total fee, which is contingent, stays the

³⁸ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(A) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1987).

³⁹ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-2 (1980) ("Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (1987) ("Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.").

⁴⁰ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 comment (1987).

⁴¹ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(A)(2) (1980) (emphasis added).

⁴² See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(A) (1980).

⁴³ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e)(1) (1987) (emphasis added).

⁴⁴ See *United States v. Strawser*, 800 F.2d 704, 708 (7th Cir. 1986) (attorney ordered to disgorge excessive fees under the guidelines found in both Illinois Code of Professional Responsibility DR 2-106 and Model Code of Professional Responsibility DR 2-106), (*cert. denied*, 107 S. Ct. 1350 (1987)); *cf. In re Futuronics Corp.*, 655 F.2d 463, 468-71 (2d Cir. 1981) (law firm denied over one million dollars in fees under Bankruptcy Code for prohibited fee splitting arrangement and failure to comply with disclosure provisions for joint representation), (*cert. denied*, 455 U.S. 941 (1982)).

same. In a typical case, the client agrees to pay lawyer *A* one-third of the recovery. When lawyer *A* forwards the case to lawyer *B*, the client still pays only one-third of the recovery, but lawyer *B* pays to lawyer *A* a percentage of the fee, which is often one-third of lawyer *B*'s fee (i.e., one-third of one-third).

The client should benefit from fee splitting because it encourages lawyer *A* to shift the case to a more competent attorney, typically a trial specialist.⁴⁵ Lawyer *A* and the client share the goal of securing for the client the largest recovery possible. If the law does not allow lawyer *A* to refer the case—the present position of the Model Code—then the lawyer must perform the services herself. The fundamental danger of the Code's prohibition is not so much that lawyer *A* will fall below the minimum level of competence, but that she might settle too cheaply, which is hardly in the best interests of the client.

Alternatively, under the Model Code, a more risk-prone lawyer would refer the case, bargain for a prohibited contingent fee, and hope that she does not get caught. Both empirical and anecdotal evidence suggest that fee splitting is common, because lawyers find it useful, and that it is hidden, because of the ethical prohibition.⁴⁶ When such arrangements are made under the table, there is less protection for the client: the forwarding lawyer chooses the lawyer who will perform the work and assume responsibility for the case, but the forwarding lawyer assumes no personal responsibility for the results.

Professor Wolfram argues that both the Model Code and the Model Rules are flawed in that neither “provides clients with the information that they would desire in order to shop for a better division of fees and responsibilities among other lawyers.”⁴⁷ However, the client usually has little interest in shopping for a “better division of the fees.” The contingent fee remains the same however that fee is divided between two lawyers.

Now that the Model Rules have sparked a trend toward allowing referral fees, we might expect such fees to become open and above board. With the new legality of referral fees, we might expect competition to lower those fees to something less than a third of the full fee that the client has agreed to pay. In fact, rates appear to be dropping in

⁴⁵ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 comment (1987) (“A division of fee . . . most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist.”).

⁴⁶ See, e.g., *Moran v. Harris*, 131 Cal. App. 3d 913, 921-23, 182 Cal. Rptr. 519, 523-24 (1982) (holding that a fee splitting agreement was not contrary to public policy because “lawyers continue to routinely participate in fee splitting arrangements with the apparent approval of those institutions charged with regulating the profession”).

⁴⁷ C. WOLFRAM, *supra* note 11, § 9.2.4, at 511.

those states that have allowed the type of referral fees now authorized by the Model Rules. This reduction in referral fees appears to be occurring even though individual clients have no knowledge of the details of the division of their fees, and therefore cannot shop for a better fee division.⁴⁸

This lowering of referral fees is interesting, but does not directly affect or protect the client. The client's main interest is not the size of the referring fee due the forwarding lawyer; rather, it is that the lawyer chosen to handle the case be effective. The best way to protect the client and guarantee that the forwarding lawyer will choose a good lawyer is to make the forwarding lawyer responsible for the mistakes of the lawyer she selects. The Model Rules do just that.

The forwarding lawyer essentially is paid to perform only one service—the selection of the appropriate lawyer to whom the case will be forwarded. The Model Rules protect the client because they make the referring lawyer assume the malpractice liability of the lawyer to whom the case has been forwarded. They substantially restate the old ABA Canons of Professional Ethics on this point⁴⁹ by allowing fee referrals based on a division of service *or* responsibility.⁵⁰ In other words, if the forwarding attorney assumes the malpractice liability of the lawyer to whom the case is referred, the client agrees in writing to the transfer of the case, and the total fee is reasonable, then a referral fee is proper.⁵¹

The Model Rules, in effect, encourage forwarding,⁵² but, as the

⁴⁸ I base this conclusion on my personal observations and discussions with various lawyers; there is as yet no empirical study on this issue. Open and above board case forwarding should encourage the equivalent of cooperative lawyer advertising, in which one law firm develops and has aired the television advertisements, and then refers cases to other law firms who previously have agreed to take cases in return for a referral fee. The whole process is a very efficient way of bringing legal services to the injured consumer. For an example of such a cooperative, and the controversy surrounding it, see Frank, *An Eye on Ads: Co-op Plan Draws Fire*, A.B.A. J., June 1984, at 31.

⁴⁹ See ABA CANONS OF PROFESSIONAL ETHICS No. 37 (1937).

⁵⁰ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e)(1) (1987).

⁵¹ See *id.* Rule 1.5(e) (1987). Professor Wolfram notes that "joint responsibility" might be read as a euphemism for joint and several malpractice liability. See C. WOLFRAM, *supra* note 11, § 9.2.4, at 512 n.9. The comment to the Model Rules states that "[j]oint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 comment (1987). The comment does not purport to exhaust the obligations of Rule 1.5(e)(1). Rule 5.1 outlines the responsibilities of a partner, and thus governs when one is subject to discipline for the acts of another attorney, but does not decide when an attorney may also be civilly or criminally liable. See *id.* Rule 5.1 & comment (1987). Under ordinary tort principles, joint responsibility should entail malpractice liability.

⁵² See C. WOLFRAM, *supra* note 11, § 9.2.4, at 511 ("The availability of forwarding fees encourages a lawyer without particular competence in a specialized matter or with a temporary crush of other business in the office to forward a client's matter to a lawyer better equipped to handle it.").

price, require assumption of malpractice liability. Clients do not have "full information about . . . how their fees are being divided," as Professor Wolfram complains,⁵³ but neither do they know how much of the fee the rainmaker of a firm retains when she passes the case to another lawyer in the same firm. Similarly, law firms are not required to disclose the division of fees with former partners or associates⁵⁴ or non-lawyer employees⁵⁵ of the firm. The Model Rules protect the client from the rainmaker within the firm and the forwarder from another firm in the same manner: by forcing each to assume malpractice liability.

Under the Model Code, a lawyer and client could reach this result in a more roundabout manner. A lawyer legally could pay a referral fee if she "associates" with a lawyer from another firm.⁵⁶ If the two lawyers associate—i.e., the client consents and hires both lawyers—then the fee splitting rules are inapplicable, because the lawyers, in effect, share joint and several responsibility for that particular case.⁵⁷ The Model Rules cut through the technicalities and automatically im-

⁵³ *Id.*

⁵⁴ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(B) (1980). Although the Model Rules do not have "a precisely correlative provision," Wolfram notes that Model Rule 5.4(a)(3), which permits inclusion of "nonlawyer employees of a firm in profit-sharing compensation or retirement plans," should also be applicable to the firm's former lawyers. C. WOLFRAM, *supra* note 11, § 16.2.1, at 880 n.14. However, Model Rule 5.4(a)(3) probably cannot be read to permit the fee splitting, not-for-retirement separation agreements permitted by the Model Code. See *id.*

⁵⁵ Both the Model Code, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102(A)(3) (1980), and the Model Rules, see MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(a)(3) (1987), permit law firms to include nonlawyer employees in compensation and retirement plans based in whole or in part on profit-sharing arrangements.

⁵⁶ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(A) (1980). In fact, the Model Code requires a lawyer to associate herself in matters in which she is not competent. See *id.* DR 6-101(A) (1980); see also *id.* EC 6-3 (1980) ("A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter."); C. WOLFRAM, *supra* note 11, § 5.1, at 188 ("A lawyer is required by the Code . . . to decline a representation because of present incompetence only if the lawyer does not intend to associate a competent lawyer or to become competent by self-study."). The client consent referred to in EC 6-3 is implied by Canon 4, because the first lawyer may not reveal client confidences to the second lawyer, who is not in the same firm, without client consent. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(1) (1980); see also *id.* EC 4-2 (1980) ("[I]n the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter. . . ."); C. WOLFRAM *supra* note 11, § 5.1, at 188 n.23 ("EC 6-3 refers to obtaining the consent of the client to associate another lawyer.").

⁵⁷ See *Fontenot & Mitchell v. Rozas, Manuel, Fontenot & McGee*, 425 So. 2d 259, 261 (La. Ct. App. 1982); cf. *Krajewski v. Klawon*, 84 Mich. App. 532, 537, 270 N.W.2d 9, 11 (1978) ("DR 2-107 was formulated to prohibit brokering; to protect a client from clandestine payment and employment; to prevent aggrandizement of fees.").

pute malpractice liability to all parties in any arrangement equivalent to fee splitting.⁵⁸ The price of fee splitting is the assumption of joint and several liability for that particular case, which protects the client much more than the right to detailed information on the division of fees.

In short, Professor Wolfram may be too critical of the changes regarding referral fees. These changes serve to protect clients by "facilitat[ing] association of more than one lawyer in a matter in which neither alone could serve the client as well."⁵⁹ They also protect the client by requiring that all attorneys involved in a case assume joint responsibility for the entire representation.

III. RULE 11

The Model Code and the Model Rules forbid lawyers from filing frivolous motions⁶⁰ and improperly seeking to delay the resolution of litigation.⁶¹ In addition, the Federal Rules of Civil Procedure have been modified to authorize judges to impose sanctions directly on attorneys for pleadings that a judge determines were not "formed after reasonable inquiry," were not "well grounded in fact" or "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law," or were "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."⁶²

⁵⁸ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e)(1) (1987); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 comment (1987) ("Paragraph (e) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object.").

⁵⁹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 comment (1987).

⁶⁰ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-109(A) (1980); *id.* DR 2-110(B)(1); *id.* DR 7-102(A)(1); *id.* DR 7-102(A)(2); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1987).

⁶¹ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1987); *cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(3) (1980) (prohibiting lawyers from neglecting legal matters before them).

⁶² FED. R. CIV. P. 11; see also, FED. R. CIV. P. 26(g) (imposing similar requirements on discovery requests, responses, and objections); *cf.* 28 U.S.C. § 1927 (1982) (specifying that attorneys who "unreasonably and vexatiously" prolong proceedings may be required to pay "excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct"). See generally, T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 138-161 (4th ed. 1987) (making a broad examination of delaying tactics and frivolous litigation); Levinson, *Frivolous Cases: Do Lawyers Really Know Anything At All?*, 24 OSGOOD HALL L.J. 353 (1986) (examining the difficulty of categorizing legal arguments as frivolous).

Rule 11 is one response to the "litigation explosion," the existence of which is a matter of some dispute. See, e.g., Galanter, *Reading the Landscape of Disputes: What*

Professor Wolfram discusses these issues briefly;⁶³ in his next edition I hope that he expands his analysis. In what he has written he may not have focused sufficiently on the problems that may be inherently associated with vigorous enforcement of Rule 11 and other rules like it.

I have discussed the problems posed by Rule 11 elsewhere.⁶⁴ To restate my argument, while frivolous motions and unjustified delays cannot be tolerated, it appears that Rule 11 actually aggravates those problems.⁶⁵ Not only does it heighten tension and increase the number of motions and appeals in litigation, but it tends to be enforced arbitrarily, because judges differ on what constitutes a frivolous motion.⁶⁶ For example, an empirical study sponsored by the Federal Judicial Center⁶⁷ presented adaptations of actual Rule 11 cases to the federal district court judges that it surveyed.⁶⁸ In no case did the judges unanimously agree that there was a Rule 11 violation.⁶⁹ In only three of the ten cases did more than 75% of the judges agree that there was a violation.⁷⁰ Furthermore, Rule 11 has tended to operate against plaintiffs.⁷¹

A better system might have judges report lawyers who abuse the system to the appropriate disciplinary board.⁷² While some judges are responding to the problem of delay and backlog in the courts by resorting to fact pleading, which tends to reduce litigation to the detriment of plaintiffs,⁷³ a more suitable program to reduce delay might have judges simply decide motions more quickly and refuse to grant continuances unless the moving party has a good reason.⁷⁴ I hope the next edition of

We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4 (1983) (challenging the empirical and conceptual bases of the "litigation explosion").

⁶³ See C. WOLFRAM, *supra* note 11, § 11.2.

⁶⁴ See Rotunda, *supra* note 8, at 1165-67, 1169.

⁶⁵ See *id.* at 1166.

⁶⁶ See *id.* at 1166-67; see also Levinson, *supra* note 62 (examining the difficulty of categorizing legal arguments as frivolous).

⁶⁷ See S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS (1987).

⁶⁸ See *id.* at 12.

⁶⁹ See *id.* at 17 table 3.

⁷⁰ See *id.*

⁷¹ See Rotunda, *supra* note 8, at 1166.

⁷² See CODE OF JUDICIAL CONDUCT Canon 3B(3) (1972) ("A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.").

⁷³ See Rotunda, *supra* note 8, at 1169.

⁷⁴ See Rotunda, *Law, Lawyers, and Managers*, in THE ETHICS OF CORPORATE CONDUCT 127, 144 (C. Walton ed. 1977) (describing how the Southern District of New York reduced delay in criminal cases by converting from a central to an individual calendar system, so that judges could no longer avoid deciding motions by continuing them until another judge assumed the rotating obligation to hear all criminal pretrial motions).

Professor Wolfram's work will discuss this issue more critically and in greater depth.

My disagreements with Professor Wolfram regarding the advocate-witness rule, the referral fee question, and expectations regarding Rule 11 should be put in proper perspective. His excellent book is a significant achievement and a delight to read.⁷⁵ It should prove very valuable to the student, the practitioner, and the scholar. Both the student hornbook and the practitioner's edition provide for pocket parts, and I hope that Professor Wolfram uses them to keep his book up to date. His book is a major contribution to the literature, and frequent pocket part additions would make his work even more valuable.

⁷⁵ The book appears to have been carefully proofread, but still contains a few typographical errors. For example, in the index under "Expert Witness," see C. WOLFRAM, *supra* note 11, at 1097; *id.* at 1345 (Practitioner's ed.), we are told to "See also Malpractice." But there is no heading entitled "Malpractice," although there is a heading entitled "Legal Malpractice." Yet we should not criticize such typographical errors in a new book, because a certain number are inevitable. As Judge Henry de Bracton pleaded over 700 years ago, "I ask the reader, if he finds in this work anything superfluous or erroneous, to correct and amend it, or pass it over with eyes half closed, for to keep all in mind and err in nothing is divine rather than human." 2 H. DE BRACON, BRACON ON THE LAWS AND CUSTOMS OF ENGLAND 20 (S. Thorne trans. 1968) (circ. 1250).

Professor Wolfram's book is divided into sections, with frequent cross-references. Unfortunately, the section numbers are difficult to see, because they are printed near the spine of the book rather than in the upper right corner of the odd-numbered pages. I hope the next edition will change this position.

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