

ACCOUNTING FIRMS AND THE UNAUTHORIZED PRACTICE OF LAW: WHO IS THE BAR REALLY TRYING TO PROTECT?

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INTRODUCTION

From the Big Five¹ to the smallest companies, accounting firms are expanding into nontraditional businesses more than ever before.² As a result, accounting firms are increasingly “adding lawyers as employees who can contribute to the services that the firms provide their accounting or financial services clients.”³ Much of the new business accounting firms are undertaking is a natural extension of services already being offered.⁴ Tax practice is an obvious example of this extension.⁵

The growing concern among lawyers is that accountants are moving into their territory.⁶ Many lawyers feel, because of their size and reach, that if the Big Five expand into legal services, then they will immediately dominate the market.⁷ This has law firms worried because accounting firms already dominate business consulting services in the global marketplace.⁸ The problem, of course, is that

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1. See Kenneth Li, *Merger of Price Waterhouse, Coopers Firm Creates ‘Big 5,’* BUFF. NEWS, Sept. 19, 1997, at A12 (explaining that through mergers the Big Eight have been reduced to the Big Five); BLACK’S LAW DICTIONARY 163 (6th ed. 1990) (defining “Big Eight” to be the largest certified public accounting firms in the United States based on such factors as gross receipts, number of staff, etc.); Dennis Taylor, *Merged PriceWaterhouseCoopers Gains Dominance Among Venture Capital Firms*, BUS. J., Aug. 24, 1998, at 1 (listing the Big Five as: PriceWaterhouseCoopers L.L.P., Arthur Andersen L.L.P., KPMG Peat Marwick L.L.P., Deloitte & Touche L.L.P., and Ernst & Young L.L.P.).

2. See Robert W. Scott, *CPA Firms Are Not Just for Accounting Anymore*, ACCT. TODAY, Mar. 17, 1997, at 24 (reporting that accounting firms hold equity in subsidiaries and affiliates that have little to do with accounting).

3. *Unauthorized Practice: Professionals Eye Entry of Accounting Firms into What May Constitute Practice of Law*, 10 LAW. MAN. ON PROF. CONDUCT (ABA/BNA) 269, 269 (June 10, 1998) [hereinafter *Unauthorized Practice*]; see also Gina Binole, *Bean Counters Eyeing Attorneys’ Profits*, BUS. J. PORTLAND, Dec. 4, 1998, at 1 (reporting that the Big Five “are heavily recruiting law students and luring associates away from legal firms”); Rick Desloge, *Law Firms’ Competition Coming from Accountants*, NASHVILLE BUS. J., Feb. 26, 1999, at 34 (noting that “[t]he two professions already compete to hire top tax lawyers.”).

4. See Mark Henderson, *Accounting Firms Do Number on Lawyers*, SUNDAY STAR-TIMES, Nov. 1, 1998, at E8.

5. See *id.*

6. See Amanda Bishop, *Law Panel Probing Big Six Firms—Attorneys Ask if Accountants Are Practicing Law Without Authorization*, DALLAS BUS. J., June 5, 1998, at 1.

7. See generally Cindy Kirscher Goodman, *Line Between Accounting, Law Professions May Soon Blur*, KNIGHT-RIDDER TRIB. BUS. NEWS, Mar. 14, 1999.

8. See Michael Fitz-James, *Multidisciplinary Practice Evokes Multiple Fears*, FIN. POST,

lawyers employed by accounting firms cannot represent their clients in the role of attorneys because state laws prohibit, among other things, lawyers from sharing their fees with nonlawyers.⁹ As the accounting firms expand out of tax returns and into new areas of tax and business services, attorneys across the country are charging certified public accountants ("CPAs") with the unauthorized practice of law.¹⁰

In their defense, accounting firms contend that their attorneys are not practicing law.¹¹ This distinction, however, may be only a matter of semantics.¹² What many lawyers consider practicing law, accountants prefer to describe as "consulting."¹³ This highlights the fundamental difference between the two professions: accountants have a duty to be objective and publicly disclose financial statements; whereas, lawyers have an obligation to act as guardians of their clients' interests.¹⁴

Every state has laws that address many of these interrelated issues: "multidisciplinary partnerships,¹⁵ the unauthorized practice of law, the professional responsibility of a lawyer, conflicts [of interest], and fee splitting."¹⁶ However, due to a lack of case law in these areas, many of these issues have yet to be resolved.¹⁷ Indeed, where "consulting" ends and "practicing law" begins is a relatively undistinguished area.¹⁸

In any event, the rules that currently prevent lawyer-accountants from

Aug. 12, 1997, at 8.

9. For example, the Indiana law states: "A lawyer or law firm shall not share legal fees with a nonlawyer . . ." IND. R. PROFESSIONAL CONDUCT, Rule 5.4(a) (1996). See generally Elizabeth MacDonald, *Accounting Firms Hire Lawyers and Other Attorneys Cry Foul*, WALL ST. J., Aug. 22, 1997, at B8.

10. See Luisa Beltran, *Turf War Between Attorneys and Accountants Becomes Nasty. (Attorneys Filing Lawsuits Against Accountants for Unauthorized Practice of Law)*, ACCT. TODAY, Nov. 24, 1997, at 5.

11. See John Gibeaut, *As Accountants Edge into the Legal Market, Lawyers May Find Themselves Not Only Blindsided by the Assault but Also Limited by Professional Rules*, 84 A.B.A. 42, 44 (1998); see also Desloge, *supra* note 3, at 34 (reporting "CPAs insist they are not interested in practicing law.").

12. See Gibeaut, *supra* note 11, at 44.

13. *Id.*

14. See *id.* at 43.

15. A multidisciplinary partnership has been defined as "a business arrangement in which individuals with different professional qualifications practice together in partnership and combine their different skills in providing advice and counsel to the consumers of their services." Gordon W. Flynn & Susan V.R. Billington, *Multidisciplinary Practices*, 50 BENCHERS ADVISORY 1, 2 (June 1997).

16. David Rubenstein, *Big Six Poised to Enter Legal Market, Privilege, Professional Rules and Conflicts Are a Barrier*, MERRILL'S ILL. LEGAL TIMES, Oct. 1997, at 1 (col. 1).

17. See Larry Smith, *Attorneys v. CPAs . . . Texas Case Crystallizes Competitive Practice Issues for Major Firms*, 17 NO. 4 OF COUNS., Feb. 16, 1998, at 1, 8.

18. See Bishop, *supra* note 6, at 1.

practicing law could soon be rewritten.¹⁹ This trend has many in the legal profession worried. Some are concerned about professional identity and tradition.²⁰ Others are concerned “over the disparity between each profession’s concept of ethical duty, and the difficulty of reconciling the two standards under one roof.”²¹ Yet another concern is self-preservation,²² which is a reason why state bars across the country are closely monitoring these issues.²³

This Note examines the laws that prohibit an attorney employed in an accounting capacity from performing the same types of duties as an attorney employed in a legal capacity. Central to this examination are state laws governing the associations of lawyers with nonlawyers which restrict the types of activities that lawyers working for accounting firms may engage in.

This Note deals only with issues involving lawyers employed in an accounting capacity. While members of this group may hold CPA credentials as well, this article does not argue in favor of permitting nonlawyer CPAs to practice law, though some certainly support such a position.²⁴ Furthermore, this Note focuses primarily on the area of tax practice, though some have concerns that accounting firms are expanding into other areas of legal practice as well.²⁵

Part I will address the growing tension between law firms and accounting firms. Part II will examine what constitutes the unauthorized practice of law, including the various standards courts use to make this determination and how those standards have evolved. This part also will discuss why applying those standards to lawyer-accountants makes little sense given the historical desire of courts to protect the public from receiving inadequate advice.

Part III will focus primarily on the American Bar Association (“ABA”) Model Rules of Professional Conduct (“Model Rules”). In particular, this part will concentrate on those rules governing the professional independence of a lawyer²⁶ and those rules pertaining to the unauthorized practice of law.²⁷ Also,

19. See Binole, *supra* note 3, at 1; Gibeaut, *supra* note 11, at 47; David Segal, *Rivals Call Law Firms to Account; Tax Advisers Hope to Cross a Line and Compete for Legal Clients*, WASH. POST, Nov. 12, 1998, at F1.

20. See Geoffrey C. Hazard, *Accountants vs. Lawyers: Let’s Consider Facts*, NAT’L L.J., Nov. 9, 1998, at A21.

21. Bruce Balestier, *ABA Faces Arrival of Lawyer-Accountant Pairings*, N.Y.L.J., Nov. 19, 1998, at 5.

22. See generally Goodman, *supra* note 7.

23. See Binole, *supra* note 3, at 1.

24. See, e.g., Matthew A. Melone, *Income Tax Practice and Certified Public Accountants: The Case for a Status Based Exemption from State Unauthorized Practice of Law Rules*, 11 AKRON TAX J. 47 (1995) (arguing that lay CPAs possess the requisite proficiency to practice tax law).

25. See, e.g., Rubenstein, *supra* note 16, at 1 (noting that at least some believe that the expansion of accounting firms will continue until the Big Five dominate transactional business law globally).

26. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1995).

27. See *id.* at 5.5 (1983).

Part III will analyze the District of Columbia's version of these same rules²⁸ as representative of a more modern approach.

Part IV will critically examine the four parts of ABA Model Rule 5.4, which contain the largest obstacle for accounting firm lawyers to practice law. In addition, Part IV will evaluate the new accountant-client privilege, enacted as part of the recent Internal Revenue Service Restructuring Reform Act of 1998.²⁹ Finally, this Note will conclude that permitting lawyer-accountants to practice law would better serve the public interest and that with the ever expanding global economy, this controversial issue may ultimately be determined by the market.

I. TENSION BETWEEN LAWYERS AND ACCOUNTANTS

Led by a global push from the Big Five, accounting firms are expanding their practices into what some would consider the legal market.³⁰ Indeed, some in the legal profession insist that in many cases their accounting firm counterparts are already practicing law.³¹ On the other hand, accounting firm attorneys prefer to call the services they provide "consulting."³² Consulting can cover most "aspects of the litigation process—from initiating a claim to negotiating a settlement."³³

Whether described as legal services or consulting services, "the upshot is the same: at least some of the work that might have been characterized as legal in former days is siphoned off to accountants and other professionals³⁴ who define the scope of their services more broadly."³⁵ This distinction between legal services and consulting services is important because lawyers in U.S. accounting firms typically cannot provide services beyond consultation.³⁶ Every jurisdiction,

28. See D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1998).

29. 26 U.S.C. § 7525 (1998).

30. See Andrew Willis, *Bean Counters Buying Lawyers—A Bad Idea*, THE GLOBE & MAIL, Aug. 5, 1998, at B10.

31. See Binole, *supra* note 3, at 1.

32. The services accounting firms are now providing have gone beyond traditional expert witness activities to include fraud and forensic matters, environmental expertise, contracts, mergers and acquisitions, appraisals, financial planning, litigation support, alternative dispute resolution, and international tax practice. See Gibeaut, *supra* note 11, at 42; Lori Tripoli, *Brink of Change . . . Major Accounting Firms Struggle to Redefine Litigation Support*, 16 NO. 20 OF COUNS., Nov. 3, 1997, at 14.

33. Binole, *supra* note 3, at 1; Gibeaut, *supra* note 11, at 44.

34. Other professionals include "[s]maller firms, insurance companies, investment advisers and banks [that] are moving beyond their traditional lines of business, blurring distinctions among different disciplines." Segal, *supra* note 19, at F1.

35. *Unauthorized Practice*, *supra* note 3, at 269 (quoting Professor Gary A. Munneke).

36. See *id.*; see also Goodman, *supra* note 7 (reporting that under current U.S. law, lawyer-accountants are not "allowed to offer anything beyond a straightforward consultation, such as tips on how to save on taxes"); *Lawyers Sue Big Six Firm over Legal Practice*, THE ACCT., Oct. 1997, at 5 (noting "the ability of Big [Five] attorneys to represent clients in the [United States] is tightly regulated.").

other than the District of Columbia,³⁷ has adopted a version of the Model Rules, which prohibits lawyers from sharing profits with nonlawyers³⁸ or aiding nonlawyers in performing activities that constitute the practice of law.³⁹

As with any rule, the Model Rules' deterrent value is inevitably dependent upon their interpretation.⁴⁰ Unfortunately, there is no settled definition of "practice of law." Indeed, this has been a source of debate for decades, if not centuries.⁴¹ However, in general, the practice of law can be illustrated by two situations: where the business holds the lawyer out as a lawyer, or where the business provides services that, if performed by an attorney, would constitute the practice of law.⁴² Furthermore, a lawyer violates this general prohibition "by entering a partnership or other business relationship with a nonlawyer in which any of the activities of the relationship constitute the practice of law."⁴³

Those opposed to Big Five⁴⁴ expansion argue that those accounting firms have essentially expanded the meaning of "litigation support" far beyond what the legal community previously accepted.⁴⁵ Specifically, the legal community confines its support to the Big Five's economic analysis and document analysis.⁴⁶ Proponents of Big Five expansion rebut: "The real issue causing the war between lawyers and accountants may be the flight of attorneys to the Big [Five]."⁴⁷ There may be some truth to this allegation.⁴⁸ Higher salaries, less

37. See D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1998).

38. See *id.*

39. See generally *Lawyers' Aiding Unauthorized Practice*, LAW. MAN. ON PROF. CONDUCT (ABA/BNA) 21:8201.

40. See J. Lee McNeely, *Protecting the Profession and the Public*, 42 RES GESTAE 5 (1999).

41. See *id.* ("The question of what constitutes the 'unauthorized practice of law' is as old as the legal profession itself. I imagine that no sooner did the first lawyer hang out his shingle, but that an imposter, in some form or another, opened shop nearby.").

42. See *Partnership with Non-lawyers*, LAW. MAN. ON PROF. CONDUCT (ABA/BNA) 91:401, 91:401.

43. *Lawyers' Aiding Unauthorized Practice*, *supra* note 39, at 21:820; see also ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 cmt. (1983) ("In general, the Rules are violated when a business that is not a law firm holds the lawyer out in his or her capacity as a lawyer, or when the lawyer's services for outside clients include activities that, when performed by a lawyer, constitute the practice of law.").

44. Note that in this context the Big Five are intended to be representative of the accounting profession as a whole, at least to the extent those organizations engage in tax services. "Big Five" is used deliberately, as this is where much of the legal community's disdain is directed. However, "even small CPA firms would benefit from changes that would allow accountants and lawyers to practice together. [For example], the Big Five accounting firms could lose their referrals from law firms, which could benefit local [accounting] firms. . . ." Goodman, *supra* note 7.

45. Tripoli, *supra* note 32, at 14.

46. See *id.*

47. Beltran, *supra* note 10, at 5.

48. See Lisa Brennan, *Past Is Firms' Prologue—It Doesn't Always Work That Way, but Gurus See More of '99 Trends*, NAT'L L.J., Mar. 22, 1999, at A1 (writing that "many top U.S. law

pressure to develop clients, and the opportunity to specialize in a unique aspect of tax law prompts many attorneys to leave their law firms.⁴⁹

More to the point, many view the legal profession's resistance to permitting lawyer-accountants from performing what have traditionally been regarded as legal tasks as economic protectionism.⁵⁰ "At stake is a hefty portion of the roughly \$100 billion-a-year market for legal advice," which, until recently, law firms have monopolized.⁵¹ Of course, the world's largest employers of attorneys are no longer law firms. For example, Ernst & Young employs approximately 3300 tax attorneys worldwide and about 850 in the United States.⁵² By comparison, Baker & McKenzie, this country's largest traditional law firm, employs about 2400 lawyers, of which only a portion practice tax law.⁵³ Perhaps more daunting for the legal community is the fact that the Big Five "are well-armed, with billions of dollars in revenues that make even the largest law firms appear as specks in the marketplace."⁵⁴

Regardless of each side's underlying motives, resolution of these issues ultimately turns on ethical considerations. In particular, lawyers must limit their associations with nonlawyers due to the ABA Model Rules of Professional Conduct.⁵⁵ In general, sound policy underlies these provisions. "[T]he public is entitled to receive legal services from individuals of competence who bring an undivided loyalty to the personal relationship between lawyer and client."⁵⁶ Unfortunately, this policy is used to justify the prohibition on nonlawyer activities that constitute the practice of law being extended to lawyer activities that aid such practice.⁵⁷

There is, however, growing pressure on the ABA to revise its rules.⁵⁸ Lawyers and accountants have already "joined forces in many firms whose members hold both law and accounting degrees."⁵⁹ Indeed, "with more lawyers joining the ranks of accountants, the bar is becoming a more varied constituency with contradictory interests."⁶⁰ Furthermore, it is unlikely that the public will forever tolerate the bar's monopoly on legal services and its power to define the

firms have lost tax . . . lawyers to accounting firms.").

49. *See id.*

50. *See* Desloge, *supra* note 3, at 34.

51. Segal, *supra* note 19, at F1.

52. *See* Goodman, *supra* note 7.

53. *See id.*; Baker & McKenzie (visited Mar. 31, 2000) <<http://www.bakerinfo.com>>.

54. Gibeaut, *supra* note 11, at 43.

55. *See* Gianluca Morello, Note, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multidiscipline Practices Should Be Permitted in the United States*, 21 FORDHAM INT'L L.J. 190, 194-95 (1997).

56. *Lawyers' Aiding Unauthorized Practice*, *supra* note 39, at 21:8202.

57. *See id.*

58. *See* Segal, *supra* note 19, at F1.

59. Patricia Manson, *ABA Panel Set to Examine Ancillary Business Practices*, CHI. DAILY L. BULL., Oct. 13, 1998, at 1.

60. Segal, *supra* note 19, at F1.

“practice of law.”⁶¹

II. DEFINING PRACTICE OF LAW

A lawyer practicing in any jurisdiction, with the exception of the District of Columbia,⁶² may not form or join a partnership, professional corporation or association, or general business corporation with a nonlawyer if any of the organization's activities include the practice of law.⁶³ Every jurisdiction in the United States has, through case law, statutes, court rules, or some combination of the three, determined what constitutes the practice of law.⁶⁴ “Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer.”⁶⁵ However, whether a particular activity falls within the general definition of “practice of law” is frequently a question of considerable debate.⁶⁶ This is particularly true in the field of taxation where questions of law and accounting are often intermingled to the point that it becomes unclear “where the functions of one profession end and those of the other begin.”⁶⁷

Accounting firms would like “to define the practice of law as narrowly as possible—essentially that it consists of arguing a client's case in court.”⁶⁸ The wide array of services provided by accounting firms would fall outside this definition. Those opposed to accounting expansion would like to have the practice of law broadly defined as, for instance, “legal activities in many nonlitigious fields which entail specialized knowledge and ability.”⁶⁹ As a result, arriving at an appropriate definition of practice of law has proven considerably difficult for the courts. Nevertheless, formulating a reasonably circumscribed definition will dictate the nature of activities the lawyer-accountant is legally

61. See 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 813 (2d ed. 1990 & Supp. 1998).

62. See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 cmt. (1983) (noting the District of Columbia's version of Model Rule 5.4 “permits the establishment of partnerships between lawyers and nonlawyers, if the sole purpose of the partnership is to provide legal services and the nonlawyer partners agree to conform to the requirements of the rules governing the activities of lawyers”).

63. See *Partnership with Non-Lawyers*, *supra* note 42, at 91:401.

64. See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1983).

65. HAZARD & HODES, *supra* note 61, at 1142. “The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client. . . .” *Id.*

66. See *Agran v. Shapiro*, 273 P.2d 619, 623 (Cal. App. Dep't Super. Ct. 1954).

67. *Id.*

68. *Unauthorized Practice*, *supra* note 3, at 270.

69. *In re New Jersey Soc'y of Certified Pub. Accountants*, 507 A.2d 711, 714 (N.J. 1986) (quoting *New Jersey State Bar Ass'n v. Northern New Jersey Mort. Assocs.*, 161 A.2d 257, 261 (N.J. 1960)).

permitted to perform. Accordingly, the resolution of this debate is critical.⁷⁰

Courts have utilized several different approaches in their attempt to define the practice of law. Some commentators have suggested that courts adopt a comprehensive list of the various activities that would amount to the practice of law in that jurisdiction. Courts, however, have typically rejected attempting to precisely define, on an itemized basis, what constitutes the practice of law. For example, in 1991, the South Carolina Bar submitted to the state Supreme Court a set of proposed rules that attempted to “define and delineate the practice of law.”⁷¹ Although the South Carolina Supreme Court commended the committee for its “Herculean efforts to define the practice of law,” it did not adopt the proposed rules.⁷² The court reasoned that “it is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules.”⁷³ The court felt it should withhold such a determination for an actual case or controversy.⁷⁴

In addition, the court took the opportunity to clarify certain practices that, at least in South Carolina, do not constitute the unauthorized practice of law.⁷⁵ It held that “CPAs do not engage in the unauthorized practice of law when they render professional assistance . . . that is within their professional expertise and qualifications.”⁷⁶ The court stated such practice “will best serve to both protect and promote the public interest.”⁷⁷

This illustrates that, despite rejecting a rigid approach in defining practice of law, courts have attempted to formulate tests to reach the same results.⁷⁸ In the area of income taxation, the courts tend to define the practice of law using two

70. “Lawyers who violate these rules could potentially face sanctions for the unauthorized practice of law.” Segal, *supra* note 19, at F1.

71. *In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar*, 422 S.E.2d 123, 124 (S.C. 1992).

72. *Id.*

73. *Id.*

74. *See id.*

75. *See id.* at 124-25.

76. *Id.* at 125.

77. *Id.*

78. *See, e.g., In re Robinson*, 162 B.R. 319, 324 (Bankr. D. Kan. 1993) (defining practice of law as “the rendition of services requiring the knowledge and application of legal principles and technique to serve the interests of another with his consent”) (quoting *State v. Shumacher*, 519 P.2d 1116 (Kan. 1974)); *Kentucky State Bar Ass’n v. Bailey*, 409 S.W.2d 530, 531 (Ky. Ct. App. 1966) (“The practice of law’ is any service rendered involving legal knowledge or legal advice, whether of representation, counsel, or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services” (quoting RCA 3.020)); *Campaign for Ratepayers’ Rights*, 634 A.2d 1345, 1350-51 (N.H. 1993) (holding that whether an act constitutes the unauthorized practice of law is to be determined from the nature, character, and quality of the act). *But see In Re New Jersey Soc’y of Certified Pub. Accountants*, 507 A.2d 711, 714 (N.J. 1986) (indicating that the practice of law often “encompasses ‘legal activities in many non-litigious fields,’” but is not subject to precise definition (quoting *New Jersey State Bar Ass’n v. New Jersey Mort. Assocs.*, 161 A.2d 257, 261 (1960))).

tests: one based on the nature of the service rendered⁷⁹ and the other based on the difficulty of the service rendered.⁸⁰

A. Nature of Services Rendered Test

The courts' first attempts to define practice of law resulted in the development of the nature of services rendered test. One commentator described this test as a "pragmatic response to the reality that many fields of endeavor involve, to varying degrees, the application of legal principles to particular factual circumstances."⁸¹ However, using this test to produce meaningful decisions has proven considerably difficult for courts. The leading case applying this test to tax practice is *In re New York County Lawyers Association*⁸² referred to as the *Bercu* case.⁸³

In *Bercu*, the New York County Lawyers Association contended that Bernard Bercu, a certified public accountant, had engaged in the unlawful practice of law by giving tax advice to clients.⁸⁴ Bercu contended that the advice given "lay with the proper scope of the accounting profession and, therefore, did not constitute the unlawful practice of law."⁸⁵

Bercu rendered the services in question after the president of the Croft Steel Company ("Croft") had consulted him.⁸⁶ The City of New York had tax claims against Croft for three separate years, and Croft wished to deduct the payment of these taxes as a business expense during the current year rather than attributing them to the years in which the claims accrued.⁸⁷ Bercu conducted research on the issue and found a Treasury Department decision that, in his view, supported the position Croft wished to take.⁸⁸ Bercu reported his findings to Croft, expressed his opinion as to the deductibility of the prior state taxes as business expenses under the Internal Revenue Code, and offered his assistance in concluding the tax claim settlement with the city in conformity with his findings.⁸⁹

Bercu admitted that he often performed this type of work and gave advice of

79. In the present context the term "nature of services rendered" refers to whether the services in question are inherently legal or accounting services. Some courts have referred to this as the "incidental services test", though the application remains the same. See, e.g., *Gardner v. Conway*, 48 N.W.2d 788 (Minn. 1951).

80. See Melone, *supra* note 24, at 59.

81. *Id.* at 60.

82. 78 N.Y.S.2d 209 (N.Y. App. Div. 1948), *aff'd sub nom. In re Bercu*, 87 N.E.2d 451 (N.Y. 1949).

83. See Melone, *supra* note 24, at 60.

84. See *In re New York County Lawyers Ass'n*, 78 N.Y.S.2d at 211.

85. *Id.*

86. See *id.* at 213.

87. See *id.*

88. See *id.* at 213-14.

89. See *In re Bercu*, 87 N.E.2d 451, 452 (N.Y. 1949).

the same character.⁹⁰ The New York County Lawyers Association sought to enjoin Bercu from pursuing these types of activities, claiming that Bercu “was dealing with complex questions of law, on which the numerous decisions were far from clear.”⁹¹ They contended that Bercu had overstepped his boundaries and had entered “into a field of law and fine legal distinctions far removed from the practice of accountancy.”⁹²

The court in *Bercu* declined to discuss the adequacy or accuracy of the advice given by Bercu, stating instead, “The decision must rest on the *nature of the services rendered* and on whether they were inherently legal or accounting services.”⁹³ The court recognized that in the area of taxation the professions of law and accounting overlap and that an accountant must understand tax law and a lawyer must understand accounting.⁹⁴ Despite this common ground the court declared, “[S]ome line of demarcation must be observed.”⁹⁵

In an attempt to draw an objective line, the court ruled that giving legal advice unconnected with accounting work constitutes the practice of law.⁹⁶ However, the court also declared, “This does not mean, of course, that many or most questions which may arise in preparing a tax return may not be answered by an accountant handling such work.”⁹⁷ The court’s reasoning reflected the belief that while an accountant must be cognizant of the tax law, the application of such legal knowledge in accounting work “is only incidental to the accounting functions.”⁹⁸ In other words, under the reasoning of the court in *Bercu*, an accountant can “advise on a tax issue if it arose during the preparation of the [tax] return but not if the identical issue was the subject of a separate engagement.”⁹⁹

It is important to note that Bercu was not a member of the bar and possessed no formal legal education. Nevertheless, this case has implications for the lawyer-accountant. *Bercu* appears to stand for the proposition that no one may render tax advice unconnected with the preparation of a tax return unless that individual is a member of the bar employed in a legal capacity.

However, this makes little sense in cases where an accounting firm employs a lawyer. The court in *Bercu* seemed concerned that permitting an accountant to render legal advice could result in inadequate advice being given. This concern is obviated when the accountant giving the advice is also an attorney. Thus, where an accounting firm employs an attorney, applying the nature of the services rendered test seems inappropriate as a means of protecting the public

90. *See id.*

91. *In re New York County Lawyers Ass’n*, 78 N.Y.S.2d at 211, 215.

92. *Id.* at 215.

93. *Id.* (emphasis added).

94. *See id.* at 216.

95. *Id.*

96. *See id.* at 219.

97. *Id.*

98. *Id.* at 216.

99. Melone, *supra* note 24, at 62.

from receiving poor advice.

B. Difficulty with the Nature of Services Rendered Test

The major problem courts face regarding the nature of the services rendered test is its potential to produce absurd results. For example, suppose that in two otherwise identical cases Defendant A renders legal advice connected with a tax return, and Defendant B renders the exact same advice, but such advice is unconnected with the preparation of a tax return. Presumably, under the nature of the services rendered test Defendant B would have engaged in the unauthorized practice of law while Defendant A would not have.

In order to address these inconsistencies, the courts have revised the original test to focus on the difficulty of the services rendered as opposed to the nature of those services.¹⁰⁰ Two leading cases, both of which rejected the former test, applied this modified approach.

In *Gardner v. Conway*,¹⁰¹ Conway, a public accountant and former deputy collector of internal revenue, prepared income tax returns and gave related professional advice to clients. In this particular case, the advice consisted of determining for the taxpayer whether he had attained lawful marriage status with a woman to whom he had never been ceremonially married, and whether this taxpayer and his so-called common-law wife should file a joint or separate tax return.¹⁰² In addition, Conway advised the couple on their partnership status in a business operation, and advised them on certain tax deductions.¹⁰³ Deeming this to be the unauthorized practice of law, a group of lawyers brought an action against Conway to have him perpetually enjoined from engaging in the practice of law.¹⁰⁴ Conway “defended [himself] upon the ground that, while the preparation of the tax return involved the determination of legal questions, this did not constitute the practice of law because the resolving of such questions was merely incidental to the preparation of the return.”¹⁰⁵

Recognizing that “[t]he line between what is and what is not the practice of law cannot be drawn with precision,”¹⁰⁶ the court reasoned “that the distinction . . . may be determined only from a consideration of the nature of the acts of service performed in each case.”¹⁰⁷ This decision appeared to mirror the nature of the services rendered test, which the court previously had rejected.¹⁰⁸

100. See *Agran v. Shapiro*, 273 P.2d 619 (Cal. App. Dep’t Super. Ct. 1954); *Gardner v. Conway*, 48 N.W.2d 788 (Minn. 1951) (rejecting the nature of services rendered test).

101. 48 N.W.2d at 791.

102. See *id.* at 798.

103. See *id.*

104. See *id.* at 791.

105. *Agran*, 273 P.2d at 625 (quoting *Gardner*).

106. *Gardner*, 48 N.W.2d at 794 (quoting *Cowern v. Nelson*, 290 N.W. 795, 797 (Minn. 1940)).

107. *Id.* at 796.

108. See *id.*

However, the court elaborated that the difficulty in applying the existing test arises only when the services in question are “incidental to the performance of other services of a nonlegal character,” such as accounting.¹⁰⁹ When services are not incidental to tax return preparation, the test becomes whether the legal questions at issue are difficult or doubtful to such a degree that “to safeguard the public, [they] demand the application of a trained legal mind.”¹¹⁰

The court decided against Conway noting that “[a]lthough the preparation of the income tax return was not itself the practice of law, [Conway had], incidental to such preparation, resolved certain difficult legal questions which, taken as a whole, constituted the practice of law.”¹¹¹ The court concluded that “[w]hen an accountant . . . is faced with difficult or doubtful questions of the interpretation or application of statutes, administrative regulations and rulings, court decisions, or general law, it is his duty to leave the determination of such questions to a lawyer.”¹¹²

In *Agran v. Shapiro*,¹¹³ Agran, a CPA, was retained as an accountant and auditor for Motor Sales of California, Inc. He was also hired to prepare the owners’ individual income tax returns. When problems arose regarding classification of a net operating loss, Agran met with the appropriate treasury agents to resolve the matter.¹¹⁴ In support of his position, Agran testified that he spent five days doing legal research, read more than 100 legal opinions, reports, and decisions on the law involved, and cited several of these cases in his meetings with Treasury Department officials.¹¹⁵

In determining what constitutes the practice of law, the court rejected the test formulated by the court in *Bercu*.¹¹⁶ In *Agran*, the court found that legal service activities that are incidental to one’s regular course of business is not determinative.¹¹⁷ Under the *Agran* court’s approach, one “is practicing law if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind.”¹¹⁸ Whether something is a difficult or doubtful question is to be measured by the understanding “possessed by a reasonably intelligent layman who is reasonably familiar with similar transactions.”¹¹⁹

The court ruled that Agran’s preparation of the income tax returns in question did not amount to the practice of law.¹²⁰ According to the court, any

109. *Id.*

110. *Id.*

111. *Id.* at 798.

112. *Id.* at 797.

113. 273 P.2d 619, 620-22 (Cal. App. Dep’t Super. Ct. 1954).

114. *See id.* at 622.

115. *See id.*

116. *See id.* at 625.

117. *See id.*

118. *Id.* at 626 (quoting *Gardner v. Conway*, 48 N.W.2d 788, 796 (Minn. 1951)).

119. *Id.*

120. *See id.* at 623.

“layman without legal or accounting training might have prepared them in the first instance.”¹²¹ As to the determination of the net operating loss, however, the court reached the conclusion that it was purely a question of law.¹²² To support its position, the court suggested that Agran himself fully appreciated this, as he “detailed at length the extensive research of the legal authorities which he was required to make in order to support his position.”¹²³ Thus, the court concluded that the services rendered by Agran, other than those relating to the preparation of the income tax returns, constituted the practice of law.¹²⁴

Like the court in *Bercu*, the courts in both *Agran* and *Gardner* were primarily concerned with protecting the public welfare.¹²⁵ However, as in *Bercu*, this paternalism by the court would be misplaced in situations where a lawyer-accountant is rendering legal advice. Indeed, the court in *Gardner* recognized that the concern of permitting incompetent services is removed when members of the bar practice law.¹²⁶ Therefore, while the “difficulty of services rendered” test provides a means for defining practice of law, its application to lawyer-accountants would be meaningless, as it would proscribe the rendering of services by qualified individuals.

C. Inconsistent Results

As might be expected, in applying the nature of services rendered test and the difficulty of services rendered test, courts have reached results that are difficult to reconcile. This is especially true in cases involving lawyer-accountants. For example, in *Zelkin v. Caruso Discount Corp.*,¹²⁷ a case involving a lawyer-accountant, the court’s ruling was in direct conflict with the outcomes of *Bercu*, *Gardner*, and *Agran*.

In *Zelkin*, the Caruso Corporation (“Caruso”) employed Zelkin to represent them in negotiations with the Treasury Department in connection with a large deficiency assessment of income taxes. Caruso subsequently sought to avoid paying Zelkin’s fee on the ground that Zelkin performed only legal services and

121. *Id.*

122. *See id.* at 623-24.

123. *Id.* at 624.

124. *See id.* at 627.

125. *See Agran*, 273 P.2d at 625 (quoting the court in *Gardner* and stating that the interest of the public is the controlling determinant); *Gardner v. Conway*, 48 N.W.2d 788, 795 (Minn. 1951) (indicating that “protection of the public is of vital importance”); *see also* Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1192 (Fla. 1978) (averring “[i]n determining whether a particular act constitutes the practice of law, our primary goal is the protection of the public.”).

126. The court stated, “The law practice franchise or privilege is based upon the threefold requirements of Ability, character, and Responsible supervision. The public welfare is safeguarded not merely by limiting law practice to individuals who are possessed of the requisite ability and character, but also by the further requirement that such practitioners shall thenceforth *be officers of the court* and subject to its supervision.” *Gardner*, 48 N.W.2d at 795 (emphasis added).

127. 9 Cal. Rptr. 220 (Cal. Dist. Ct. App. 1960).

no accounting services.¹²⁸ Caruso reasoned that as the services were entirely of a legal nature, its contract with Zelkin was illegal, thus, Zelkin was not entitled to payment.¹²⁹

Zelkin had conducted research at two separate law libraries and met with Treasury Department agents on several occasions on Caruso's behalf.¹³⁰ Zelkin testified, however, that his research was limited to determining the accounting methods used by other companies that had dealt with similar tax issues.¹³¹ Zelkin further contended that he had not reviewed any cases to determine the applicable law, and indeed, was disinterested in the results of the cases he did review when searching for the proper accounting method to apply to Caruso's situation.¹³²

Caruso argued that *Agran* was controlling and required a finding that Zelkin had engaged in the unauthorized practice of law.¹³³ The court, however, stated that *Agran* was distinguishable because in that case the accountant had reviewed over 100 cases on the issues of law involved whereas in this case Zelkin did not read any law or cite any cases.¹³⁴ The court further stated that it was possible for Zelkin to have negotiated with Treasury Department agents without making reference to any legal issues, and, as such, his actions did not constitute the unauthorized practice of law.¹³⁵

In ruling for Zelkin, the court did not strictly apply either of the traditional tests. Initially the court seemed to apply the nature of services rendered test. Based on Zelkin's testimony that he had not performed any legal research, the court determined that those services could not be the practice of law. However, the court then looked to Zelkin's objective and seemingly reached the conclusion that services are not the practice of law if the goal sought in performing those services could be attained through some other not facially legal method.

While the ruling in *Zelkin* would appear to be a victory for lawyer-accountants, it is in direct conflict with the rulings of *Bercu*, *Gardner*, and *Agran*, as well as other case law.¹³⁶ Some observers suggest that courts are willing to

128. See *id.* at 223.

129. See *id.*

130. See *id.* at 222-23.

131. See *id.* at 223.

132. See *id.*

133. See *id.* at 224.

134. See *id.*

135. See *id.*

136. At least three major decisions have held that when faced with interpretation or application of tax statutes, administrative regulations and rulings, court decisions, or general law, it is an accountant's duty to leave such questions to a lawyer. See *Agran v. Shapiro*, 273 P.2d 619 (Cal. App. Dep't Super. Ct. 1954); *Joffe v. Wilson*, 407 N.E.2d 342 (Mass. 1980); *Gardner v. Conway*, 48 N.W.2d 788 (Minn. 1951). In addition, several courts have reached the conclusion that activities designed to secure tax reductions or refunds for others may constitute the unauthorized practice of law. See *Weber v. Garza*, 570 F.2d 511 (5th Cir. 1978); *In re Moran*, 317 So. 2d 754 (Fla. 1975); *Kentucky State Bar Assoc. v. Bailey*, 409 S.W.2d 530 (Ky. 1966).

show more deference to lawyer-accountants than to lay CPAs.¹³⁷ This may be due to the difficulty in separating these evolving professions.¹³⁸ Alternatively, it may stem from the fact that traditional concerns over competence of advice are absent from such cases. The Texas Supreme Court recently had the opportunity to explore these issues. Members of both industries closely watched this Texas case for its potential to limit, or permit, the types of services that accounting firms perform.¹³⁹

*C. Texas v. Arthur Andersen*¹⁴⁰

In 1997, accounting giant Arthur Andersen faced legal action in Texas after it was accused of the unauthorized practice of law.¹⁴¹ On June 26, 1997, a complaint against Arthur Andersen was filed with the Unauthorized Practice of Law Committee of the Texas Supreme Court.¹⁴² Some Texas lawyers contended that the accountants were encroaching on their turf in violation of Texas state law.¹⁴³ The complaint charged that Arthur Andersen “engaged in the unauthorized practice of law by offering ‘attorney only’ services and filing petitions in the Tax Court.”¹⁴⁴ Indeed, it may have been “Arthur Andersen’s habit of filing petitions in Tax Court that initially attracted the attention of the organized bar.”¹⁴⁵

The “attorney only” services complained of reportedly involved Arthur Andersen engaging in “estate planning, as well as drafting corporate and partnership documents, compensation agreements, stock option agreements, and severance agreements.”¹⁴⁶ Longstanding Texas law states that “accountants are not allowed to offer any kind of legal services, including tax law.”¹⁴⁷ However, Texas officials acknowledged the issues involving taxes were not clear because accountants must apply tax law to prepare tax returns.¹⁴⁸ In fact, a marked lack

137. See Segal, *supra* note 19, at F01.

138. See *id.*; see also Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1191-92 (Fla. 1978) (contending that “any attempt to formulate a lasting, all encompassing definition of ‘practice of law’ is doomed to failure ‘for the reason that under our system of jurisprudence such practice must necessarily change with the everchanging business and social order.’” (quoting State Bar of Michigan v. Cramer, 249 N.W.2d 1, 7 (Mich. 1976))).

139. See Gibeaut, *supra* note 11, at 46.

140. 674 S.W.2d 923 (Tex. 1984).

141. See James Boxell, *Arthur Andersen in Texas Held to Account for Practicing Law*, THE LAWYER, Oct. 14, 1997, at 5; Lisa Brennan, *Angry Tax Lawyers—Bar: “Bean Counters Are Doing Our Work,”* NAT’L L.J., Oct. 13, 1997, at A5; Smith, *supra* note 17, at 8.

142. See Smith, *supra* note 17, at 6.

143. See Boxell, *supra* note 141, at 5.

144. Beltran, *supra* note 10, at 5.

145. Smith, *supra* note 17, at 6.

146. *Id.*

147. Boxell, *supra* note 141, at 5.

148. See Elizabeth MacDonald, *Texas Probes Andersen, Deloitte on Charges of Practicing*

of precedent exists in this area.¹⁴⁹

Following an eleven-month investigation, the case was resolved in Arthur Andersen's favor.¹⁵⁰ Apparently, the complaint's allegations did not amount to the practice of law in the eyes of the Texas Supreme Court. In fact, the Unauthorized Practice of Law Committee of the Texas Supreme Court dismissed the case in a scant four-line letter, after only an hour of questioning.¹⁵¹ The difficulty in establishing a bright line separating the two professions¹⁵² may be one reason "that state courts—the ultimate arbiters of bar associations—apparently [are not] eager to punish those accused of violating rules against lawyer-accountant commingling."¹⁵³

In any event, "the issue of whether . . . 'consulting' amounts to the practice of law [has not] been resolved."¹⁵⁴ As such, in terms of defining practice of law none of the existing case law provides much guidance for the lawyer-accountant. Always paramount to each court's decision is the desire "to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe."¹⁵⁵ Yet, in terms of receiving complete tax advice, it does not seem that a client could do better than to enlist the services of one whom is both an attorney and an accountant. Indeed, no court has curtailed the services of a lawyer-accountant under the guise of protecting the public from shoddy advice. Instead, as the need for protecting the public dissipates, courts have cited other policy reasons for limiting the services a lawyer-accountant may perform.¹⁵⁶ Namely, courts purport to be protecting the public from the inevitable evils that would result if scrupulous lawyers were controlled in the attorney-client relationship by unethical laypersons.

Law, WALL ST. J., May 28, 1998, at B15.

149. See Smith, *supra* note 17, at 8.

150. See *Andersen Cleared in Landmark Legal Services Case*, INT'L ACCT. BULL., Aug. 13, 1998, at 1; Arthur S. Hayes, *Accountants vs. Lawyers—Bean Counters Win*, NAT'L L.J., Aug. 10, 1998, at A4; Tom Herman, *A Special Summary and Forecast of Federal and State Tax Developments*, WALL ST. J., July 29, 1998, at A1; Jim Kelly, *'Legal Practice' Charges Fail*, FIN. TIMES, Aug. 7, 1998, at 4.

151. See Hayes, *supra* note 150, at A4; *Andersen Cleared in Landmark Legal Services Case*, *supra* note 150, at 1.

152. See *Gardner v. Conway*, 48 N.W.2d 788, 796 (Minn. 1951) (noting that there exists a clear overlap of law and accounting in the field of income taxation).

153. Segal, *supra* note 19, at F1.

154. Gibeaut, *supra* note 11, at 44.

155. *Florida Bar v. Brumbaugh*, 355 So. 2d 1186, 1189 (Fla. 1978) (quoting *State v. Sperry*, 140 So. 2d 587, 595 (Fla. 1962)).

156. See, e.g., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 cmt. (1983) (claiming that courts are "protecting the integrity of the judicial system and providing a means for regulation of the profession").

III. ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 5.4

A. Overview

Many lawyers maintain that limiting the services a lawyer-accountant can provide is in the public's best interest.¹⁵⁷ They point out that lawyers are members of a regulated profession while accountants are not committed to court-approved standards of ethical and professional conduct.¹⁵⁸ This in turn feeds the concern that "a lawyer's professional judgment should not be influenced by nonlawyers who are not subject to bar standards of competence and integrity."¹⁵⁹

Rule 5.4 of the ABA Model Rules of Professional Conduct¹⁶⁰ undertakes "to ensure that the lawyer will abide by the client's decisions concerning the objectives of representation and will serve the interests of the client and not those

157. *See id.*

158. *See id.*

159. *Lawyers' Aiding Unauthorized Practice*, *supra* note 39, at 21:8202.

160. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1990) provides:

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
 - (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
 - (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and
 - (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.
- (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
 - (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
 - (2) a nonlawyer is a corporate director or officer thereof; or
 - (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Id.

of a third party.”¹⁶¹ It is but one of several rules designed to ensure that a lawyer represents the client’s interests free of interference from, or obligations to, a nonlawyer who stands outside the lawyer-client relationship.¹⁶² Rule 5.4(a) “prohibits the sharing of legal fees with a nonlawyer.”¹⁶³ Part (b) “prohibits the formation of a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.”¹⁶⁴ Part (c) “states that a lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional [judgment] in rendering such legal services.”¹⁶⁵ Finally, Rule 5.4(d) “prohibit[s] a lawyer from joining a non-lawyer in a professional corporation or association to practice law ‘for a profit.’”¹⁶⁶

The purpose of the Model Rule 5.4 provisions is to safeguard the professional independence of a lawyer and guard against problems that could arise when nonlawyers assume positions of authority over lawyers.¹⁶⁷ In particular, Model Rule 5.4 seeks to prevent lay persons from interfering with a lawyer’s practice.¹⁶⁸ Some believe that a lawyer’s independent professional judgment can be impaired when a layman influences or controls the legal process.¹⁶⁹ After all, nonlawyers, “by definition, are not subject to the same ethical mandates regarding independence, conflicts of interest, confidentiality, fees and the other important provisions of the profession’s code of conduct.”¹⁷⁰

B. History of Model Rule 5.4

An examination of the history of Model Rule 5.4 indicates that the ABA’s disapproval of fee sharing in lawyer-nonlawyer relationships “has been tied to the desire to prevent lay influence of a lawyer’s professional judgment.”¹⁷¹ “The ABA’s formal prohibitions against lawyer-nonlawyer partnership[s] date back to 1928, when Canon 33 was added to the Canons of Ethics.”¹⁷² Canon 33 provided that “[p]artnerships between lawyers and members of other professions

161. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-355 (1987).

162. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983) (client controls representation); *id.* Rule 1.7(b) (1987) (lawyer shall not represent client if representation is limited by lawyer’s responsibilities to third party); *id.* Rule 1.8(f) (restricting lawyer’s acceptance of compensation from third party); *id.* Rule 2.1 (1983) (lawyer shall exercise independent professional judgment).

163. *Lawyers’ Aiding Unauthorized Practice*, *supra* note 39, at 21:8201.

164. *Id.*

165. *Id.*

166. *Partnership with Non-lawyers*, *supra* note 42, at 91:409.

167. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-392 (1995).

168. See *id.*

169. See *id.*

170. *Id.*

171. *Id.*

172. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 n.1 (1991).

or non-professional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law."¹⁷³

In addition to Canon 33, Canon 34 prohibited lawyers from splitting fees with nonlawyers.¹⁷⁴ It provided: "No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."¹⁷⁵ Finally, Canon 35 warned against lawyers being influenced by lay individuals.¹⁷⁶ Canon 35 stated in part, "The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer."¹⁷⁷

The Model Code of Professional Responsibility¹⁷⁸ ("Model Code") replaced the Canons of Ethics in 1969.¹⁷⁹ Essentially, the Model Code built upon the Canons of Ethics, with many of the original provisions reappearing in the new Model Code. In particular, DR 3-103, DR 3-102, and DR 5-107 carried over the provisions, with minor adjustments, of Canons 33, 34, and 35 respectively.¹⁸⁰

In 1983 the ABA Model Rules of Professional Conduct ("Model Rules") revamped the Model Code.¹⁸¹ "The Model Rules were the product of almost five years of work by the Special Committee on Evaluation of Professional Standards, more commonly known as the Kutak Commission. . . ."¹⁸² The ABA House of Delegates appointed the Kutak Commission to recommend revisions to the 1969 Model Code of Professional Responsibility.¹⁸³

In 1976, the Kutak Commission proposed a version of Model Rule 5.4 that was intended "to prevent the dangers inherent in fee [splitting] without prohibiting fee sharing altogether."¹⁸⁴ As proposed, Model Rule 5.4 allowed lawyers "to share fees with nonlawyers . . . so long as the nonlawyers agreed not to influence the lawyer's independent professional judgment and to abide by the rules of legal ethics regarding confidentiality, solicitation, and legal fees."¹⁸⁵ Proposed Model Rule 5.4 stated:

173. ABA Comm. on Professional Ethics, Formal Op. 297 (1961).

174. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 n.1 (1991).

175. ABA Comm. on Professional Ethics, Formal Op. 297 (1961).

176. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 n.1 (1991).

177. ABA Comm. on Professional Ethics, Formal Op. 297 (1961).

178. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).

179. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 n.1 (1991).

180. See *id.*

181. See *id.*

182. Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 384 (1988).

183. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-392 (1995).

184. *Id.*

185. *Id.*

A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if: (a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; (b) information relating to representation of a client is protected as required by [the applicable rules on confidentiality of information]; (c) the organization does not engage in advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so . . . ; and (d) the arrangement does not result in charging a fee that violates [the applicable rules concerning fees].¹⁸⁶

"The Comment and Notes accompanying the Proposed [] Draft of the Kutak Commission's [Model] Rule 5.4 outlined the primary purpose for eliminating the traditional bans against sharing fees and forming partnerships with nonlawyers: the practice of law had changed and the rules should address the specific issues raised by the changes."¹⁸⁷ Accordingly, the proposed version of Model Rule 5.4 "permitted all forms of law practice, and all financial arrangements for providing legal services, so long as all participating lawyers met their professional responsibilities under the other professional conduct rules."¹⁸⁸ It seems the Kutak Commission intended Model Rule 5.4 to encourage the development of alternative methods of providing legal services.¹⁸⁹ However, it was probably this invitation to develop new legal services that led to the rule being rejected by the ABA.¹⁹⁰

In 1983, the ABA House of Delegates rejected the proposed rule, opting instead for an absolute ban on fee sharing.¹⁹¹ Thus, the ABA adopted the current version of Rule 5.4 of the Model Rules of Professional Conduct.¹⁹² Entitled "Professional Independence of a Lawyer," Model Rule 5.4 incorporates the traditional restrictions against lawyer-nonlawyer associations.¹⁹³

Rule 5.4(a) continued the Model Code's prohibition against lawyer-nonlawyer fee splitting.¹⁹⁴ Taken directly from DR 3-102, Model Rule 5.4(a) "assumes that all fee splitting with nonlawyers *is* the unauthorized practice of

186. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (Revised Final Draft 1982).

187. Gilbert & Lempert, *supra* note 182, at 386.

188. HAZARD & HODES, *supra* note 61, at 796.

189. See Gilbert & Lempert, *supra* note 182, at 386 (citing the Kutak Commission).

190. See *id.* at 388.

191. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-392 (1995).

192. See *Lawline v. American Bar Ass'n*, 956 F.2d 1378, 1382 (7th Cir. 1992); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 (1991).

193. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 n.1 (1991).

194. See *id.*

law, except [under a few] narrow exceptions.”¹⁹⁵ Model Rule 5.4(b) basically reproduced DR 3-103(A)’s prohibition of lawyer partnerships with nonlawyers.¹⁹⁶ It prohibits a lawyer from sharing profits and losses of a law practice with a nonlawyer, even where the lawyer retains control over all the legal aspects of the business.¹⁹⁷ Almost identical to DR5-107(C),¹⁹⁸ Model Rule 5.4(d) addresses the concern that an attorney’s professional judgment could be compromised as a result of business relationships with nonlawyers.¹⁹⁹

Taken together, the provisions of Rule 5.4 of the ABA’s Model Rules of Professional Conduct serve as the primary bar to lawyers employed by accounting firms performing the same types of duties as their counterparts employed by law firms. Under Model Rule 5.4, “a corporation cannot hire one or more lawyers, pay them salaries, make their services available [] to others, and directly receive the fees for the lawyers’ work.”²⁰⁰ Indeed, it was this precise scenario that led the ABA House of Delegates to adopt the current version Model Rule 5.4.²⁰¹ Virtually every state has followed suit and adopted similar or identical provisions. This, with the exception of the District of Columbia, every American jurisdiction has strict regulations, which prevent lawyers from sharing fees with nonlawyers, and essentially foreclose such arrangements.²⁰²

C. District of Columbia Model Rule 5.4

The District of Columbia (“D.C.”) is the only jurisdiction in the United States that does not bar lawyers from sharing their fees with nonlawyers.²⁰³ “The policy promoted by D.C. Rule 5.4(b) is to provide the public with the opportunity of obtaining a broad range of professional services from a single source, while not limiting nonlawyer professionals to employee status.”²⁰⁴ Comment 7 to D.C.

195. HAZARD & HODES, *supra* note 61, at 799.

196. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 n.1 (1991).

197. See HAZARD & HODES, *supra* note 61, at 799.

198. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 n.1 (1991).

199. See HAZARD & HODES, *supra* note 61, at 799-800.

200. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-392 (1995).

201. See *id.*

202. See Balestier, *supra* note 21, at 5 (col. 2).

203. See Manson, *supra* note 59, at 1.

204. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-360 (1991). The text of D.C. Rule 5.4(b) is as follows:

- (b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:
 - (1) The partnership or organization has as its sole purpose providing legal services to clients;

Rule 5.4(b) explains:

[T]he purpose of liberalizing the rules regarding the possession of a financial interest or the exercise of management authority by a nonlawyer is to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. For example, the Rule permits . . . certified public accountants to work in conjunction with tax lawyers or others who use accountants' services in performing legal services In [such a situation], the professionals may be given financial interests or managerial responsibility, so long as all of the requirements of paragraph (c) are met.²⁰⁵

D.C.'s version of Model Rule 5.4 is substantially similar to the ABA's version, except for one major difference. D.C. Rule 5.4 permits accountant-lawyer partnerships.²⁰⁶ Rather than proscribing all forms of lawyer-nonlawyer partnerships, D.C. Rule 5.4 contains provisions designed to address the concerns that arise from such pairings. For example, paragraph (c) to D.C. Rule 5.4 provides, "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."²⁰⁷ It is unfortunate that the ABA does not advocate permitting lawyers themselves to make such judgment calls.

IV. FALLACIES IN THE ABA'S POSITION

There is a spectrum of possibilities along which lawyer-nonlawyer ventures could fall.²⁰⁸ At one end of this spectrum is the ABA's position—the Model Rules.²⁰⁹ The ABA's view represents the complete prohibition of any nonlawyer position of authority or financial interest in a business that includes lawyers.²¹⁰ The opposite end of the spectrum would advocate a complete removal of all

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- (2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;
 - (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;
 - (4) The foregoing conditions are set forth in writing.

D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4(b) (1998).

205. *Id.* Rule 5.4, cmt. 7.

206. *See id.* Rule 5.4(b).

207. *Id.* Rule 5.4(c).

208. *See* Gilbert & Lempert, *supra* note 182, at 409.

209. *See id.*

210. *See id.*

restrictions on lawyer-nonlawyer relationships.²¹¹ Between these extremes is a full gamut of possible lawyer-nonlawyer combinations. The D.C. approach, for instance, falls somewhere between these extremes.²¹²

Whether to permit lawyer-nonlawyer ventures is not a simple question.²¹³ On one hand, “the public is entitled to receive legal services from individuals of competence who bring an undivided loyalty to the personal relationship between lawyer and client.”²¹⁴ On the other hand, D.C. Rule 5.4 rejects the “absolute prohibition against lawyers and nonlawyers joining together to provide collaborative services, but continues to impose traditional ethical requirements with respect to the organization thus created.”²¹⁵ Certainly the dangers inherent in permitting lawyer-accountants to practice law do not justify an absolute ban. However, in its current state, Model Rule 5.4 effectively prevents the development of a lawyer-accountant partnership that works to meet the needs of clients.

A. A Critical Look at Model Rule 5.4

Model Rule 5.4(a) deals with the sharing of legal fees with nonlawyers. Two general arguments are advanced to support this provision. The first of these arguments is that the prohibition of virtually all fee sharing arrangements ensures that the total fees paid by the client are not unreasonably high.²¹⁶ Many lawyers strenuously argue that permitting an accounting firm to set a lawyer’s fees at whatever rate it chooses runs the risk of such fees becoming unreasonable.²¹⁷ After all, “[f]or-profit corporations, by definition, are motivated by anticipated profits and are concerned with the ‘bottom line.’”²¹⁸

This argument is flawed in at least two respects: it suggests both that currently legal fees are not excessive and that an accounting firm would not be forced to offer competitive prices for the legal services it provided. Certainly many clients of law firms would argue that the fees they currently pay are excessive.²¹⁹ Moreover, to suggest that an accounting firm could violate basic laws of economics and charge rates that are out of proportion with its law firm competitors is ludicrous.

First, the prudent client will always check the competitor’s rates. If

211. *See id.*

212. *See id.*

213. *See id.*

214. *Lawyers’ Aiding Unauthorized Practice*, *supra* note 39, at 21:8202.

215. D.C. RULES OF PROFESSIONAL CONDUCT Rule 5.4, cmt. 4 (1998).

216. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1519 (1986).

217. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-392 (1995).

218. *Id.*

219. *See* Amy Stevens, *The Business of Law, Lawyers and Clients*, WALL ST. J., Sept. 16, 1994, at B5 (reporting on a survey where 59% of respondents described lawyers as greedy and 63% felt they make too much money).

accounting firms were typically charging rates well in excess of legal firms for identical services, it is reasonable to conclude that accounting firms would lose business to the cheaper, yet equally as competent, law firms. Secondly, permitting accounting firms to offer legal services would likely increase efficiency by enabling the organization to address both legal and extralegal issues concurrently.²²⁰ Proponents have long believed that such a relationship would “foster competition, resulting in lower prices and more services.”²²¹ As such, it would be preferable for a client to be able to receive both legal and accounting services from one provider.

The second argument in favor of Model Rule 5.4(a)—avoiding the possibility of nonlawyer interference with the exercise of a lawyer’s independent professional judgment²²²—has some merit. This serves to protect clients by increasing the likelihood that they will receive competent legal services.²²³ However, the sweep of the rule is too broad as it bans “innovative forms of practice even in situations where the risk that a client will be exposed to professional incompetence is negligible.”²²⁴ Again, a business arrangement made up of both lawyers and nonlawyers would benefit consumers by reducing costs and creating new services.²²⁵ A more direct approach could be employed by Model Rule 5.4(a).²²⁶ The provision could be drafted so that the establishment of fee arrangements with nonlawyers would be permissible if there is no

220. See Edward Brodsky, *Accountants and the Practice of Law*, N.Y. L.J., Aug. 12, 1998, at 3. Furthermore, “[a]ccountants say they can deliver cheaper services more efficiently than law firms” in the first place. Gibeaut, *supra* note 11, at 44.

221. Brodsky, *supra* note 220, at 3.

222. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1519 (1986).

223. See HAZARD & HODES, *supra* note 61, at 801.

224. *Id.*

Literally applied, the rule against “sharing” of legal fees would prohibit a lawyer from remitting a fee award he received under a fee-shifting statute to an organization that had paid his salary But such a restriction bears no relation to the purposes of the rule against fee-sharing, which are to prevent the unauthorized practice of law, to prevent lay interference with a lawyer’s professional judgment, and to prevent exploitation of lawyers.

Id. at n.2 (citing the holding of *American Civil Liberties Union v. Miller*, 803 S.W.2d 592, 592 n.2 (Mo. 1991)).

225. See Patricia Manson, *Panel Looks at Recipes for Practice in the Future*, CHI. DAILY L. BULL., Nov. 17, 1998, at 1 (writing that often times “[a] lawyer working with other professionals can provide better services to a business client in an age in which there no longer are ‘pure’ legal problems.”).

226. Indeed, the exceptions contained in the current version of Model Rule 5.4(a) point to its irrationality. For example, “[i]t makes little sense to permit nonlawyers to participate in a lawyer’s profit-sharing plan under [Model] Rule 5.4(a)(3), if forming a partnership between lawyers and nonlawyers is prohibited under [Model Rule] 5.4(b).” HAZARD & HODES, *supra* note 61, at 801-02.

interference with the lawyer's professional judgment and the amount of the fee is reasonable.

Model Rule 5.4(b) forbids lawyer-nonlawyer partnerships if any of the activities of the partnership consist of the practice of law.²²⁷ This rule "seeks to prevent the practice of law by lay persons."²²⁸ Under Model Rule 5.4(b) a lawyer is held to aid unauthorized practice by providing legal services when, for example, a nonlawyer-employer decides whether or not to litigate on behalf of a client.²²⁹ This suggests that a lay employer would base the decision to litigate on the depth of the client's pockets rather than the merits of the case.²³⁰ However, there is no reason to assume that the lawyer could be forced to comply with such decisions.

In any event, the proscription established by Rule 5.4(b) "applies not only if a lay person attempts to participate in a traditional law firm, but also where *any* of the activities of the partnership consist of the practice of law."²³¹ Again, the policy concern is that "a lawyer's professional judgment should not be influenced by nonlawyers who are not subject to bar standards of competence and integrity."²³² However, like Model Rule 5.4(a), Model Rule 5.4(b) "establishes a flat ban where less [restrictive] means would suffice."²³³

Model Rule 5.4(c) deals with the valid concern "that a lawyer's relationship to third parties may interfere with the independence of his legal advice."²³⁴ However, this concern is already generally addressed in Model Rule 1.7(b),²³⁵

227. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(b) (1990); see also *supra* note 151 and accompanying text.

228. HAZARD & HODES, *supra* note 61, at 804.1.

229. See, e.g., *Kentucky Bar Ass'n v. Tiller*, 641 S.W.2d 421 (Ky. 1982).

230. Of course, no attorney would tailor his or her representation to the finances of the employer. For example, no attorney has ever unnecessarily drawn out the litigation/settlement process merely because he or she represented, say, an insurance company.

231. HAZARD & HODES, *supra* note 61, at 804.1.

232. *Lawyers' Aiding Unauthorized Practice*, *supra* note 39, at 21:8202.

233. HAZARD & HODES, *supra* note 61, at 804.1.

234. *Id.* at 807.

235. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1987).

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Id.

and is more specifically addressed in Model Rule 1.8(f),²³⁶ dealing with situations in which a third party pays a client's bill.²³⁷ In truth, there is probably little harm in this redundancy, and indeed, this provision should alleviate some of the concerns that its two preceding provisions are purportedly designed to address.

Model Rule 5.4(d) "is designed to prevent business relationships with nonlawyers from compromising a lawyer's independence of thought and action."²³⁸ The general rule is that a lawyer may practice with, or in the form of, a professional corporation if the arrangement is consistent with the lawyer's ethical responsibilities and complies with other law. However, Model Rule 5.4(d) prohibits nonlawyer ownership or management of a for-profit professional corporation or association.²³⁹ The fallacy inherent in Rule 5.4(d) is that "if a nonlawyer owns an interest in, or is an officer of a legal organization, the lawyer's position *must* be compromised."²⁴⁰ However, in truth, this provision is not ultimately responsible for the prohibition on accounting firms employing attorneys to practice law.

At the heart of Model Rule 5.4 is the protection of the client. However, "[i]f the unauthorized practice rules are truly intended to protect clients, clients should have some say as to how much protection they want. If the rules are partly designed to protect lawyers, then lawyers should not be allowed to determine the degree of their own protection."²⁴¹ "Times are changing and people's requirements for legal services are evolving."²⁴² Indeed, "[c]orporate clients, far from worrying about ethical potholes, are delighted that they can finally find tax

236. See *id.* Rule 1.8(f) (1987).

- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
 - (1) the client consents after consultation;
 - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
 - (3) information relating to representation of a client is protected as required by Rule 1.6.

Id.

237. See HAZARD & HODES, *supra* note 61, at 807.

238. *Id.* at 808.1.

239. See, e.g., Florida Bar v. Hunt, 429 So. 2d 1201 (Fla. 1983) (disbarring a lawyer for designating nonlawyers as corporate officers and directors of professional association); Florida Bar v. Budish, 421 So. 2d 501 (Fla. 1982) (disciplining a lawyer for employing nonlawyer as president of legal clinic); Florida Bar v. Shapiro, 413 So. 2d 1184 (Fla. 1982) (disciplining a lawyer for electing a nonlawyer as secretary of law clinic). See also Gilbert & Lempert, *supra* note 182, at 409 (suggesting that "[i]t was the specter of nonlawyer investment in law firms that sent the ABA House of Delegates running to the far end of the spectrum, an absolute ban.").

240. HAZARD & HODES, *supra* note 61, at 808.1.

241. *Id.* at 813.

242. Manson, *supra* note 225, at 1 (quoting Colin Garrett, Letter to ABA (Aug. 23, 1998)).

and legal advice from a unified team.”²⁴³ As the market for legal services grows, attorneys are finding it increasingly difficult to justify the legal monopoly they currently enjoy by arguing Model Rule 5.4 protectionism. These attorneys are now invoking additional policy arguments in the hope of retaining their exclusive possession of the legal market.

B. Accountant Client Privilege

Perhaps the bar’s best “consumer-oriented argument” is that while accountants may charge less and work faster, they cannot offer broad-ranging confidentiality to their clients or the protections those duties are designed to guarantee.²⁴⁴ However, rather than celebrate the victory of the client, “many lawyers reacted with dismay . . . as a provision recognizing an accountant-client privilege in tax matters became law as part of a bill overhauling the Internal Revenue Service.”²⁴⁵ Many attorneys viewed the recognition of the accountant-client privilege as the beginning of a slippery slope that ultimately could threaten their virtual monopoly on providing legal services.²⁴⁶ Indeed, the ABA opposed extension of the privilege, and many lawyers, particularly those practicing tax law, viewed it as the latest encroachment by nonlawyers into activities that they have traditionally handled.²⁴⁷

On July 22, 1998 President Clinton signed into law the Internal Revenue Service (“IRS”) Restructuring and Reform Act of 1998.²⁴⁸ The bill “is intended to make the IRS operate more efficiently [while providing Americans with] greater protection against potential government abuse.”²⁴⁹ Among other provisions, the bill created a limited confidentiality privilege for communications between taxpayers and “federally authorized tax practitioners”²⁵⁰ concerning tax advice. This is known as the new accountant–client privilege.

“Previously, accountants [had] only received a privilege protection if they

243. Segal, *supra* note 19, at F7.

244. See Gibeaut, *supra* note 11, at 47; see also Desloge, *supra* note 3, at 26 (paraphrasing Thomas Walsh as saying that “clients need to understand [the] fundamental differences between the two professions’ approach to business. The relationship with a lawyer is confidential, and [as such] the lawyer has limited obligations to disclose information [while] [a]ccountants are more bent toward disclosure because they have an obligation to all shareholders.”).

245. Balestier, *supra* note 21, at 5 (col. 2).

246. See *id.*

247. See generally *Unauthorized Practice: ABA President Creates Commission to Review Multidisciplinary Practice Issues*, 15 LAW. MAN. ON PROF. CONDUCT (ABA/BNA) 390, 390-91 (Aug. 19, 1998).

248. See Michael Arbogast, *New Legislation May Reform IRS*, FLA. TODAY, Oct. 18, 1998, at 03E.

249. Elizabeth MacDonald, *IRS Bill Gives Accountants New Privileges*, WALL ST. J., June 26, 1998, at A4.

250. See I.R.S. Treasury Department Circular No. 230 (Rev. 7-94) (defining “practitioner” as: (a) Attorney; (b) Certified Public Accountant; (c) Enrolled Agents; or (d) Enrolled Actuaries).

worked as an agent of the client's attorney."²⁵¹ If an accountant was retained directly, communications were not confidential.²⁵² Thus, prior to the IRS Restructuring and Reform Act of 1998, attorneys were the only representatives who could shield tax-preparation advice from the IRS.²⁵³ Now, the consulting relationship between taxpayers and accountants is more like the relationship between taxpayers and their attorneys.

The IRS Restructuring and Reform Act of 1998 does not "represent a complete victory for accountants."²⁵⁴ For example, the new confidentiality privilege is not as broad as the attorney-client privilege.²⁵⁵ In particular, the privilege only applies to "IRS civil cases and not criminal cases or state tax matters."²⁵⁶ Nevertheless, the new provision will provide accountants an opportunity to make inroads into tax practice.²⁵⁷ Furthermore, the legal community's disdain indicates that perhaps the legal profession has some further motivation for maintaining their current monopoly on providing legal services.

C. *Morality v. Money*

Many in the legal profession maintain that they are protecting clients rather than turf.²⁵⁸ These attorneys contend that their monopoly on legal services is necessary because competition would inevitably degrade the standards of ethical behavior.²⁵⁹ While this is indeed a valid concern, it makes little sense to assume that a lawyer will ignore ethical mandates simply because he or she is employed by an accounting firm. An attorney does not cease to comprehend professional ethics the moment he or she decides not to work for a traditional law firm. Additionally, the conclusion that lay employers will attempt to assert undue influence on their attorney-employees does not necessarily flow from this asserted premise. In other words, it is erroneous to conclude that merely because an accountant herself is not subject to bar standards she will not respect that attorneys performing legal work are. Certainly a manager at an accounting firm recognizes that lawyers are subject to obligations and constraints that other business professionals are not.²⁶⁰

251. Anna Snider, *Lawyers Wary of Accountant-Client Privilege*, N.Y. L.J., July 17, 1998, at 1.

252. *See id.*

253. *See* MacDonald, *supra* note 249, at A4.

254. *Id.*

255. *See id.*; *see also* Arbogast, *supra* note 248, at 03E; Lisa Stein, *Accountants Get Privilege in Tax Bill*, NAT'L L.J., July 6, 1998, at B1.

256. MacDonald, *supra* note 249, at A4.

257. *See id.* (reporting that new IRS bill gives "accountants a powerful marketing tool in their battle to win tax clients away from attorneys"); Snider, *supra* note 251, at 1.

258. *See* Segal, *supra* note 19, at F01.

259. *See id.*

260. *See* Gilbert & Lempert, *supra* note 182, at 406.

[I]f lay owners or managers understand the ethical obligations imposed upon attorneys

This is not intended to suggest that no lawyer-accountant would ever feel pressure to refer business to his or her nonlawyer partners, even though outside professionals might be better suited for a client's needs. Nor should this be interpreted to imply that no manager will ever attempt to compel an attorney to engage in a course of action that benefits the company rather than the client. Rather, this is intended to demonstrate that branding all laypersons as unscrupulous is a gross overgeneralization. Such an argument implies that all lawyers are honest, and everyone else is not. The simple fact is that not all lawyers are honest, while plenty of laypersons are. Despite this, current law discounts the notion that many laypersons can understand and do respect a lawyer's ethical obligations.

Thus, while the legal profession's concerns are legitimate, its approach is infelicitous. This suggests that perhaps ulterior motives underlie the legal community's prohibition on lawyer-accountant partnerships, namely economic protectionism.²⁶¹ Such a self-serving interest is disreputable for a profession that insists on its adherence to ethical standards. Furthermore, economic protectionism has no place in today's global marketplace.

"In our law-dominated society, almost every significant financial decision has at least some legal element to it"²⁶² Clearly, it makes little sense to confine the rendering of legal services to law firm attorneys. Lawyer-accountants are just as qualified as their law firm counterparts and are likely to have superior resources at their disposal. Accordingly, consumers should be permitted to decide the matter for themselves, based on who can provide the best services for the most reasonable price.²⁶³

In fact, resolution of the current dissonance may be "driven less by lawyers' own notions of ethical propriety than by the demands of clients in the modern

and appreciate that policies or practices impinging upon these obligations are improper, why should lay persons be completely banned from owning or managing a legal enterprise? Surely, persons other than lawyers can understand that lawyers have obligations and constraints placed upon them that are not placed on other businessmen and professionals.

Id.

261. See *Florida Bar v. Brumbaugh*, 355 So. 2d 1186, 1194 (Fla. 1978) (Karl, J., concurring) (stating that a small number of "attorneys who advocate a broad definition of the practice [of law] coupled with severe penalties for those who encroach are motivated by economic self-interest."); HAZARD & HODES, *supra* note 61, at 799 (writing that the broad language of Model Rule 5.4, where narrow language would have sufficed, suggests economic protectionism was the actual rationale); Desloge, *supra* note 3, at 26 (reporting that "attempts to keep accountants from taking on legal work are viewed as [economic] protectionism").

262. HAZARD & HODES, *supra* note 61, at 814.

263. Of course, there are additional considerations as well. Nevertheless, for tax services, clients are likely to opt for accounting firms. See Geoffrey C. Hazard, *The Ethical Traps of Accounting Firm Lawyers*, NAT'L L.J., Oct. 19, 1998, at A27 (writing that "accountants have more acceptable fee schedules, avoid legalese, do the work promptly, and are otherwise more user-friendly").

global marketplace.”²⁶⁴ Many clients who engage accounting firms also engage law firms.²⁶⁵ The client should be able to decide whether it is in his or her best interest to receive both types of services from the same provider. Why impose on the public outdated ideals of protectionism that it no longer needs or wants? Public interest may demand that legal services should be provided by those best qualified to do so, but it should be of little importance whence those legal service originate. Said one commentator, “I doubt whether it is really relevant to the client in most cases whether the lawyer is employed by Cravath, Swaine & Moore in N.Y.C., by Schmucker & Schmucker in Hicksville, by Arthur Andersen in Chicago or by Wal-Mart.”²⁶⁶ Indeed, consumers may never perceive lawyer-accountants as practicing law.²⁶⁷

CONCLUSION

Due to lack of case law, it is unclear whether the current version of Model Rule 5.4 prevents lawyers who work for accounting firms from performing so-called consulting services.²⁶⁸ On the one hand, the restrictions in the Model Rules concerning lawyer-accountant partnerships have survived “despite several years of discussions by state bar committees concerning multiprofessional offices.”²⁶⁹ On the other hand, it seems likely that courts are willing to accept accounting firms’ definition of consulting for two reasons: the IRS has given its blessing and clients seem to prefer it.²⁷⁰ Changes are likely to continue as clients demand more services from their accountants.²⁷¹ Indeed, the Big Five are already

264. Balestier, *supra* note 21, at 5; *see also* Karen Lawrence, *Crossing Professional Borders*, PITTSBURGH BUS. TIMES & J., Nov. 2, 1998, at 1 (reporting that clients are the driving force behind law firm and accounting firm competition); Segal, *supra* note 19, at F1 (reporting that experts believe the market could decide the issue on its own).

265. *See* Henderson, *supra* note 4, at E8 (reporting on a survey showing that 60% of 350 law firm client surveyed also engaged accounting firms).

266. Manson, *supra* note 225, at 1 (quoting Colin Garrett).

267. *See* Desloge, *supra* note 3, at 34 (quoting Art Bowman and pointing out that lawyer-accountants “won’t be chasing ambulances”).

268. *See* Gibeaut, *supra* note 11, at 44.

269. Morello, *supra* note 55, at 195.

270. *See* Hazard, *supra* note 263, at A27; *see also* Balestier, *supra* note 21, at 5 (noting in addition that these issues “are compounded by the sheer difficulty in attempting to define the practice of law in an age where many disciplines are called into play on various parts of a project”).

271. *See* Desloge, *supra* note 3, at 34.

informally considered the world's largest law firms.²⁷² Accordingly, the legal community should stop hiding behind its pretentious veil of ethics and start looking for ways to compete.

272. See Binole, *supra* note 3, at 4; Segal, *supra* note 19, at F1; see also Goodman, *supra* note 7 (reporting that there is a movement to rewrite the laws that prohibit law firms from mingling their business with accounting and consulting firms).