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COMMENT: MULTI-DISCIPLINARY PRACTICE AND CONFLICT OF INTEREST

Kevin C. McMunigal†

My comments as part of this panel focus on the attitude of proponents of multi-disciplinary practice toward conflict of interest. Before turning to that topic, I would like to offer a general observation about the debate on multi-disciplinary practice as well as a suggestion for improving the quality of that debate.

I. MULTI-DISCIPLINARY SERVICE VS. MULTI-DISCIPLINARY PARTNERSHIP

In much of what I read on the virtues and vices of multi-disciplinary practice, the competing sides seem to argue past one another and fail to join issue. Those in favor of multi-disciplinary practice focus on the benefits of multi-disciplinary *service*, the idea that clients often benefit when provided service that draws on the skills and learning not just of lawyers but of professionals in other fields ranging from family psychology to finance and accounting. They point out that client problems are often and increasingly multi-disciplinary, having non-legal as well as legal facets. These multi-faceted problems, it is argued, call for multi-disciplinary solutions.

This "holistic" view of client problems and the appropriate solutions to them seems irrefutable. Far from being unethical, one might well argue that the ethical mandate of competence[1] should require lawyers to draw on other disciplines if their clients' problems call for it.

How, though, should lawyers go about providing multi-disciplinary service? This strikes me as the key question in the multi-disciplinary practice debate. Those opposed to multi-disciplinary practice, as one might anticipate, do not seem to challenge the value of multi-disciplinary service. Rather, their critique focuses on one particular model for providing multi-disciplinary service—the multi-

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1 *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2000).

disciplinary *partnership*, in which professionals from various disciplines throw their lots together through the legal device of partnership, sharing both risks and rewards.

Lacking in much of what I read in the debate on multi-disciplinary practice is careful examination of the comparative advantages and disadvantages of different models for offering clients multi-disciplinary service. Partnership among lawyers and other professionals is one model. The "loose alliance" described by Professor Wolfram is another model. Professor Terry provides still other models. Each has its advantages and disadvantages. The pooling of risk inherent in the partnership model, for example, has the advantage of creating a benign incentive for the lawyer to carefully select and monitor her non-lawyer partners who provide service to her client. But the pooling of reward also inherent in partnership has the disadvantage of creating a perverse incentive for the lawyer to choose her non-lawyer partners to provide service to her client even if other non-lawyer professionals outside her partnership are more competent or less expensive than her non-lawyer partners, since the lawyer may share in the profits generated by her non-lawyer partners.

The debate on multi-disciplinary practice, in my view, would benefit if both the proponents and opponents of multi-disciplinary practice explored, compared, and evaluated the comparative advantages and disadvantages of the various models for delivering multi-disciplinary service. The opponents of multi-disciplinary practice focus their attention rather narrowly on the disadvantages of multi-disciplinary partnership. Their critique would be more informative and compelling if they conceded that multi-disciplinary partnership may have some advantages and then told us why on balance the vices and virtues of such partnerships are inferior to the comparative vices and virtues of other models for delivering multi-disciplinary service. The proponents of multi-disciplinary partnership would similarly help inform the multi-disciplinary practice debate if, rather than simply reiterating the attractiveness of multi-disciplinary service, they focused their attention on a comparative cost/benefit analysis of various models for providing such service.

II. CONFLICT OF INTEREST RULES AND MDPS

I preface my comments on multi-disciplinary practice and conflict of interest by setting Model Rule 5.4,[2] a focal point in that debate, in context by looking at how ethics rules in general and conflict of interest rules in particular deal with risk. Doing so helps us to un-

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[2] *Id.* at R. 5.4 (2000).

derstand and assess both Model Rule 5.4 and proposals by advocates of multi-disciplinary practice to abandon its restrictions.

A. Harm vs. Risk

Legal ethics rules often deploy dual strategies focused respectively on harm and risk in seeking to achieve a particular objective. Rules on solicitation, for example, seek to prevent lawyers in pursuit of new business from misleading, coercing, or invading the privacy of potential clients.[3] Model Rule 7.3(b)(2) reflects a harm strategy for advancing this objective, prohibiting a lawyer from engaging in solicitation of prospective clients that "involves coercion, duress, or harassment."[4] Simultaneously, Model Rule 7.3(a) supplements Rule 7.3(b)(2)'s harm strategy with a risk strategy. It sets forth a general ban on personal solicitation,[5] regardless of whether it involves the coercion, duress, or harassment sanctioned by Rule 7.3(b)(2).

Model Rule 7.3(a)'s general anti-solicitation rule is warranted by a combination of two factors: significant risk and proof difficulties. The Comment to Rule 7.3, for example, speaks of "the *potential for abuse* inherent in direct in-person or live telephone solicitation of prospective clients."[6] Rule 7.3(a) creates an exception for those with whom the lawyer has a "family or prior professional relationship" and lawyers not motivated by pecuniary gain.[7] The Comment to Rule 7.3 again refers to risk in justifying these exceptions. "There is *far less likelihood* that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain."[8]

Personal solicitation gives rise to proof difficulties since it typically takes the form of unrecorded oral statements to which the only witnesses are the soliciting lawyer and the potential client. If the bar seeks to enforce Model Rule 7.3(b)(2)'s harm strategy by proving actual coercion, duress, or harassment, it bears the burden of proof. Often the best the bar can offer to meet this burden is the uncorrobo-

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[3] *See id.* at R. 7.3 (2000).

[4] *Id.* at R. 7.3(b)(2) ("A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited . . . if: . . . (2) the solicitation involves coercion, duress, or harassment.").

[5] *Id.* at R. 7.3(a) ("A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.").

[6] *Id.* at R. 7.3 cmt.2 (emphasis added).

[7] *Id.* at R. 7.3(a).

[8] *Id.* at R. 7.3 cmt.4 (emphasis added).

rated word of the person who was the target of the solicitation against the lawyer's word. Due to physical or emotional trauma, the prospective client in need of legal services may have difficulty remembering and recounting the lawyer's statements well enough to make an effective witness. Accordingly, it is often difficult for the bar effectively to monitor and enforce the line at which the risks posed by personal solicitation materialize into actual coercion, duress, or harassment. Such practical proof problems reduce the certainty of enforcement of Model Rule 7.3(b)(2)'s harm strategy and thus undermine its deterrent effect.

The Comment to Model Rule 7.3 emphasizes these proof difficulties by comparing in-person solicitation to advertisements and other communications permitted by Model Rule 7.2:

> The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person or live telephone conversations between a lawyer and a prospective client can be disputed and are not subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.[9]

Risk strategies such as Model Rule 7.3(a)'s general ban on personal solicitation seek to alleviate such proof problems by barring the lawyer from being in situations in which they arise. If the lawyer is prohibited from soliciting a potential client, then he will not have the opportunity to engage in "coercion, duress, or harassment" while soliciting that potential client.

Ambiguity about whether conflict of interest rules are based on a harm or a risk strategy has plagued attorney conflict of interest doctrine.[10] But the modern approach to conflicts distinguishes between harm and risk strategies and views conflict of interest as based on risk. The *Restatement of the Law Governing Lawyers*, for example, defines a conflict of interest as "a *substantial risk* that the lawyer's

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[9] *Id.* at R. 7.3 cmt.3.

[10] *See* Kevin C. McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823, 834-42 (1992) (describing three basic approaches reflected in rules governing lawyer conflict of interest as the (1) harm or resulting impairment approach; (2) risk avoidance approach; and (3) appearance of impropriety approach and noting the current failure to differentiate among these approaches).

representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person."[11]

As in the area of solicitation, the combination of risk and proof difficulties warrants the use of a risk strategy in dealing with conflict of interest. Attorney conflict of interest issues vary greatly in apparent form and arise in a wide variety of factual settings.[12] But the common feature they share is concern with the risks posed by perverse incentives that threaten fulfillment of a lawyer's obligations.[13] The decisions lawyers make on behalf of clients often require complex judgments involving many factors that cannot be measured with precision. The process by which lawyers resolve such questions is largely internal and thus not easily subject to proof by the bar or a client. Thus, just as with Rule 7.3(b)(2)'s rule against lawyers engaging in "coercion, duress, or harassment" of clients during solicitation, a harm strategy requiring the bar or clients to prove that a particular perverse incentive adversely affected the lawyer's representation of the client is hard to enforce and its deterrent effectiveness accordingly is lessened. The central thrust of conflict of interest doctrine is to anticipate and preempt such problems by barring the lawyer from putting herself in the risk situation.

B. Particular Risk Rules

In addition to general conflict of interest rules such as those mentioned above, attorney conflict of interest doctrine deploys other particular risk rules in certain contexts, again typically ones combining risk and proof difficulties. Model Rule 1.8(c), for example, bars a lawyer from preparing a will giving the lawyer "any substantial gift" from the client.[14] In this situation, the lawyer's economic self-interest and the possibility of an elderly or otherwise vulnerable client create a risk of undue influence, distorted advice, and fraud on the part of the lawyer. Any such malfeasance by the lawyer is often hard to prove at the time the instrument becomes effective because the testator is dead. Other witnesses to undue influence, distorted advice, or fraud by the lawyer will often be hard to find because lawyers typically confer

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[11] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 (2000) (emphasis added).

[12] McMunigal, *supra* note 10, at 829.

[13] *Id.* at 831.

[14] MODEL RULES OF PROF'L CONDUCT R. 1.8(c) (2000) ("A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.").

privately with clients, and clients are often reluctant to share the details of their testamentary affairs with others.[15]

Model Rule 1.9(a), another particular conflict of interest rule, codifies what is often referred to as the "substantial relationship test." In similar fashion to Model Rule 7.3(a) and 1.8(c), it bars the lawyer from putting herself in a risky situation in which it is difficult for the bar to prove actual wrongdoing by the lawyer. The rules of confidentiality bar a lawyer from divulging a former client's confidential information. But 1.9(a) uses a risk strategy to supplement this harm rule with a conflict of interest rule prohibiting the lawyer from representing a client whose interests are adverse to a former client when the present and former representations are the same or substantially related[16] because such situations pose an unacceptably high *risk* of breach of confidentiality. As explained by Judge Posner in an often cited case:

> For rather obvious reasons a lawyer is prohibited from using confidential information that he has obtained from a client against that client on behalf of another one. But this prohibition has not seemed enough by itself to make clients feel secure about reposing confidences in lawyers, so a further prohibition has evolved: a lawyer may not represent an adversary of his former client if the subject matter of the two representations is "substantially related," which means: if the lawyer could have obtained confidential information in the first representation that would have been relevant in the second. It is irrelevant whether he actually obtained such information and used it against his former client . . . .[17]

Underlying the substantial relationship test one again finds the dual concerns of risk and practical proof difficulties. The coexistence of adverse interests between the former and present clients and a substantial relationship between the subject matter of the two representations creates an unacceptable risk that the lawyer will compromise his

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[15] *See* Krischbaum v. Dillon, 567 N.E.2d 1291, 1296 (Ohio 1991) (noting that attorney-client conversations related to wills and estate planning require the utmost privacy, because there the client reveals his innermost thoughts and feelings, which he may not wish to share with his spouse, children, and others).

[16] MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (2000) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.").

[17] Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1266 (7th Cir. 1983) (affirming the disqualification of a law firm from representing a plaintiff in a lawsuit in which the firm had previously represented the opposing party in a substantially related matter).

obligation to maintain as confidential information gained in the course of representing the former client. Since the lawyer's conversations with the present client are typically private as well as protected by both confidentiality and privilege, it is extremely difficult for the former client or the bar to monitor the lawyer and effectively enforce the confidentiality rule to make sure that the former client's confidential information is not in fact revealed to the present client or used against the former client.

C. Model Rule 5.4

How do risk rules governing solicitation, drafting wills, and relations with former clients relate to multi-disciplinary practice? What do the distinction between risk and harm strategies and the reasons for adopting risk strategies in legal ethics in general and in the area of conflict of interest in particular have to do with lawyers going into partnership with non-lawyers? My objective in describing some of the various risk strategies commonly used in legal ethics is to provide a perspective from which to understand and evaluate both Model Rule 5.4 and the proposals of the advocates of multi-disciplinary practice for abandoning its restrictions.

Model Rule 5.4 sets forth two particularized rules that reflect risk strategies similar to those underlying the ethical risk rules discussed above regarding solicitation, will drafting, and former clients. Model Rule 5.4 prohibits a lawyer from: (1) sharing legal fees with a nonlawyer or (2) forming a partnership with a nonlawyer.[18] The concerns here are typical of those which drive conflict of interest rules. Sharing fees and forming partnerships with non-lawyers create risk by exposing the lawyer to perverse incentives that threaten fulfillment of the lawyer's obligations to his client. Both the bar and clients will have difficulty proving if and when lawyers succumb to those incentives in ways that adversely affect representation of their clients.

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[18] MODEL RULES OF PROF'L CONDUCT R. 5.4 (2000). This section states:

(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.

Id. at R. 5.4 (emphasis added).

If we view Rule 5.4's prohibitions as based on a risk strategy, they are consistent in their theoretical stance with the many risk rules one finds throughout the field of legal ethics. Specifically, they are consistent with the central thrust of conflict of interest doctrine, which is to view harm strategies such as those proposed by the advocates of multi-disciplinary practice as insufficient to protect the client.

What the advocates of multi-disciplinary partnership propose is to abandon Rule 5.4's risk strategy in favor of a harm strategy of sanctioning individual lawyers who allow incentives arising from multi-disciplinary fee sharing and partnership to adversely affect their representation of clients. The idea of relying exclusively on harm rules runs counter to the use of risk strategies throughout the field of legal ethics and especially to the basic thrust of conflict of interest doctrine. In this sense, this proposal clearly is at odds with a basic value of the legal profession about risk-taking by lawyers embodied in its conflict of interest rules.

Critics may describe Model Rule 5.4 as paternalistic toward clients. Risk strategies by nature are paternalistic in the sense that they seek to safeguard clients in situations in which either the bar or the client would have difficulty enforcing some underlying harm rule. The argument that Model Rule 5.4 should be eliminated because it is paternalistic is not compelling. The same sort of paternalism is found in many ethics rules and underlies the entire field of conflict of interest. If the fact that Rule 5.4 is paternalistic is enough to invalidate Rule 5.4, why stop with Model Rule 5.4? The same logic would lead us to abandon each of the rules described above, such as Model Rule 7.3(a)'s ban on solicitation, 1.8(c), 1.9(a), and even the general prohibition on conflict of interest.

Critics may also describe Rule 5.4 as overbroad in preemptively restricting both lawyers who would in fact resist the temptation of whatever perverse incentives multi-disciplinary practice may create as well as those lawyers who would succumb. Again, the description is accurate but the mere fact that Model Rule 5.4 is overbroad is not a compelling argument for doing away with it. All risk strategies are overbroad. For example, the general ban on personal solicitation surely prevents some lawyers from personally soliciting potential clients who would not in fact engage in coercion, duress, or harassment. If over-inclusiveness is accepted as reason enough for invalidating a risk rule, it would invalidate all the risk rules mentioned above.

The essential question is whether the greater protection afforded clients by these rules justifies admittedly overbroad restrictions on ethical lawyers who do not mistreat their clients. A risk strategy places greater value on protection of clients than on lawyer freedom

to engage in certain behavior—whether it is forming partnerships with non-lawyers, soliciting potential clients, drafting wills that give the lawyer a gift, suing former clients, or putting herself in a position we define as a conflict of interest.

My objective here is not to defend Model Rule 5.4. Rather, my goal is to demonstrate that the strategy underlying Rule 5.4 is one commonly used in legal ethics. Advocates of multi-disciplinary partnership seem to fail to appreciate both the compelling reasons why risk strategies are adopted and the fact that legal ethics rules generally and conflict of interest rules in particular rely on such strategies. They seem either oblivious to or naïve, for example, about the practical proof difficulties of enforcing harm rules against lawyers.

Resolving the debate about multi-disciplinary partnership is well beyond the scope of my brief comments. I want to end by suggesting some ways in which I think advocates of multi-disciplinary partnership could reframe their arguments to make a more compelling case for abandoning Model Rule 5.4.

First, advocates might acknowledge the risks posed by multi-disciplinary partnership but argue that the magnitude of those risks is not great enough to warrant the risk strategy reflected in Rule 5.4.[19] Multi-disciplinary partnership increases the range of potentially perverse incentives to which the lawyer is exposed. And those incentives fall outside the routine experience of lawyers, making assessment of them by the bar difficult. Those risks, however, may not be any worse in kind or degree than other incentives we now allow lawyers to encounter without running afoul of conflict of interest rules.

Second, critics of Rule 5.4 could argue that whatever risks are posed by multi-disciplinary partnership are justified by the gains to clients resulting from multi-disciplinary partnership.[20] Contingent fees are often criticized, for example, because these fees create a risk that a lawyer will place her economic self-interest ahead of the interests of clients. Despite these risks, contingent fees are allowed primarily because there is a good reason for taking the risks they pose. Contingent fees promote access to counsel for many clients who otherwise would be unrepresented. Advocates of multi-disciplinary partnership may be able to make a convincing case that similarly the risks associated with multi-disciplinary partnership are justified by the benefits such partnerships produce.

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[19] *See* McMunigal, *supra* note 10, at 861-69 on the role of magnitude of risk in conflict of interest analysis.

[20] *See id.* at 869-71 on the role of justifiability in conflict of interest analysis.

CONCLUSION

Lawyers providing multi-disciplinary service to clients strikes me as both desirable and inevitable. Whether such multi-disciplinary service should be provided by means of multi-disciplinary partnership is a more difficult question. I suggested at the outset of my comments that rejection of Model Rule 5.4 and acceptance of multi-disciplinary partnership should turn on careful assessment of the advantages and disadvantages of multi-disciplinary partnership in comparison with other models for delivering multi-disciplinary service to clients. Such an assessment is impossible without recognition of and appreciation for the risk strategy which underlies conflict of interest prohibitions in general and Model Rule 5.4 in particular.