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Transactions

The Tennessee Journal of Business Law

A publication of
The Clayton Center for Entrepreneurial Law
of
The University of Tennessee College of Law

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- Faculty Profile: Colleen Medill
- Commercial Law Class taught online
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  Multidisciplinary Practice: Commingling Accountants, Attorneys and Clients

  Transactions: Internet Jurisdiction and Forum Selection Clauses

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Student Editorial Board

Student Staff

Faculty

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Complimentary copies of *Transactions* are being distributed to introduce this new journal to the legal community and, in particular, to regional business practitioners.

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News & Publications

Professor Joan M. Heminway joins College of Law faculty

By Scott Dill

In the fall of 2000, **Professor Joan M. Heminway** joined the faculty of the College of Law. Professor Heminway blends a combination of her work experience and views on the study of law to create an effective and pleasant learning environment for her students.

Professor Heminway began her legal education with uncertainties similar to those of many current students. She was born in Mineola, New York, and attended Brown University as an undergraduate. She graduated from Brown with magna cum laude distinction in International Relations and History. Many of her friends and family urged her to obtain a law degree. Like many students, she decided to follow that advice and attend law school to "receive a broad-based, post-undergraduate training." Professor Heminway started at New York University School of Law without a clear vision of the type of law she wanted to practice. However, during her first year of law school, she began work as a corporate legal assistant for a firm in New York City. She was exposed to corporate law while preparing closing rooms and editing

Professor Joan Heminway brings 15 years of practical experience with the Skadden, Arps firm to the UT College of Law faculty.

corporate documents. She stated, "I developed a focus early on in law school. At the end of the first year, I knew I liked corporate law." During the summer after her second year in law school, Professor Heminway worked for Willkie, Farr & Gallagher, LLP, a New York

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Faculty Notes

Professor Amy Morris Hess was named a University Distinguished Service Professor of Law in the spring of 2000. In the summer of 2000, Professor Hess published a replacement volume dealing with the new prudent investor statutes in Bogert, The Law of Trusts and Trustees, a multi-volume treatise. She has been the successor author of the Bogert treatise since 1994, and has published pocket parts for all of the volumes every year. Several other replacement volumes are also in progress.

Professor Joan Heminway recently served as Program Chair for the inaugural Bench Meets Bar Program sponsored by the Business Law Section of the Boston Bar Association. The program, *Corporate Law 2000: Views from the Delaware Chancery Court*, focused on comparative corporate law principles and their impact on firm value, featuring both a key note address by Vice Chancellor Stephen P. Lamb of the Delaware Chancery Court and a panel discussion led by Professor Heminway.

Professor Thomas E. Plank's article *The Bankruptcy Trust as a Legal Person* was published at 35 Wake Forest L. Rev. 251 (2000). His article *The Creditor in Possession Under the Bankruptcy Code: History, Text, and Policy*, was published at 59 Md. L. Rev. 253 (2000). On July 31, 2000, Professor Plank gave a presenta-

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Heminway joins faculty

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law firm that specializes in corporate transactional and litigation work. Although she was unsure exactly what type of corporate work she wanted to pursue, Professor Heminway knew she had found her focus.

Professor Heminway graduated from law school and obtained invaluable experience that makes her a valuable asset to the College of Law. In 1985, she was admitted to the Massachusetts bar and began work as an associate for Skadden, Arps, Slate, Meagher & Flom, LLP in Boston. During her fifteen years with Skadden Arps, she specialized in securities law and mergers and acquisitions. For example, she represented America Online, Inc. in its acquisition of Netscape Corporation. Professor Heminway also represented NaviSite, Inc., an internet application service provider, in the initial public offering of its common stock. In addition, she represented Softkey International, Inc. in its acquisition of The Learning Company and numerous smaller corporations.

'As a goal-oriented person, I asked myself what else there was to the practice of law besides the thrill of the next deal.'

During her private practice, Professor Heminway provided humanitarian legal services to her surrounding community. For example, she was an Advisory Board Member to a community legal services and counseling center for five years. She was a guest lecturer for four years in a Continuing Legal Education program, teaching Human Resource professionals in a variety of companies. Professor Heminway received *pro bono* awards four separate times for her work with and in connection with political asylum applicants with the Political Asylum/Immigration Representation Project, Inc. Further, she served as Chair of the Boston Bar Association Corporate Law Committee. She presented at many Boston Bar Association events, acting as co-facilitator in a roundtable discussion regarding the materiality of merger discussions and negotiations, and serving as program chair and moderator for "Corporate Law 2000: Views from the Delaware Chancery Court," the first section-wide event of the Boston Bar Association Business Law Section.

After fifteen years of practicing law, Professor Heminway decided it was time for a change. "As a goal-oriented person, I asked myself what else there was to the practice of law besides the thrill of the next deal," she said. She reflected on her work with junior associates and her participation as a mentor in numerous projects and decided that there was a profession that would make her happier than private practice. She stated, "I enjoyed public speaking and my work in various mentor roles. These interests, together with my desire to pursue more writing, seemed to gel into a teaching position, where I could utilize the same skills that I developed over fifteen years." Professor Heminway immediately strengthened the transactional curriculum with her arrival at the University of Tennessee. She currently teaches Business Associations. This spring, she will teach Securities Regulation and Corporate Finance. She also hopes to teach a Mergers and Acquisitions course, as well as a module of representing enterprises, the capstone course of the Concentration in Business Transactions.

Professor Heminway desires to convey more than just legal information to her students. She wants her students to feel confident as lawyers. Her teaching focuses on planning and advising corporate clients because she believes in "not just thinking like a lawyer, but being a lawyer" in class. In addition, she emphasizes "energy, enthusiasm, and fun" in the classroom so students can effectively learn the material in a pleasant environment. Lastly, Professor Heminway issues various projects and assignments throughout the semester to help students become better writers.

'These interests, together with my desire to pursue more writing, seemed to gel into a teaching position, where I could utilize the same skills that I developed over fifteen years.'

Professor Heminway said she wants to "bring the kinds of skills and knowledge that [she] gained outside of the law school setting into the classroom." With her experience, interest in mentor roles, and style of teaching, her decision to come to the University of Tennessee strengthens a solid transactional department at the school. She is a welcome addition to the College of Law.

Faculty Notes

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tion to the Southeastern Conference of the Association of American Law Schools entitled *Bankruptcy, Federalism, and the New Common Law.*

Professor Don Leatherman's article *Current Developments for Consolidated Groups* was published in 15 Tax Strategies for Corporate Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations and Restructurings 2000 389 (Practicing Law Institute 2000), a multi-volume course handbook series. In October 2000, Professor Leatherman moderated a panel discussion concerning current developments for consolidated groups at the ABA tax section fall meeting; he also prepared the materials presented by the panel, which were distributed at the meeting. Professor Leatherman also presented a paper on disregarded entities at the Mid-America Tax Conference in St. Louis in November, 2000.

Professor Colleen Medill's article, *Stock Market Volatility and 401(k) Plans*, has been accepted for publication by the Michigan Journal of Law Reform. Her article, *Targeted Pension Reform*, will be published as the lead article in the fall 2000 issue of the Journal of Legislation. She has also been invited to participate in the Employee Benefit Research Institute Fellows Program. During the summer Prof. Medill spoke on ERISA issues of current interest at two conferences. She presented *Preventive Medicine for Employee Benefit Plans* at the Eighth Annual Meeting of the Tennessee Corporate Counsel Association. At the Annual Meeting of the Southeastern Association of Law Schools, Professor Medill was a member of the Tax Policy Panel and spoke on *The Budget Process, Pension Tax Policy Cycles, and Equitable Pension Reform.*

Professor Robert Lloyd taught an on-line commercial law class in the summer of 2000. See related article on page 6. The class was taught entirely by computer, using interactive tutorials and on-line chats as the teaching vehicles. This was the first time such a course was taught in an accredited law school. For more about Professor Lloyd's on-line class, see the article by David Coenen in this issue of Transactions. Another article about the class will appear in a forthcoming issue of the Journal of Legal Education.

Professor Gregory M. Stein spoke at the ABA Annual Meeting in New York on the topic *Is There Any Recourse Against Nonrecourse Financing? The Scope of the Borrower's Liability in a Nonrecourse Real Estate Loan.* His article on this topic also appeared in the course materials that accompanied the discussion. Professor Stein's article *Who Gets the Takings Claim? Changes in the Land Use Law, Pre-Enactment Owners, and Post-Enactment Buyers*, was published at 61 Ohio St. L. J. 89 (2000).

Professor Carl Pierce has been involved in the following activities: Speaker, *Corporate Counsel and Multi-Ethics: Multiple Roles, Multiple Lawyers Working in Firms and Teams, Multi-Jurisdictional Practice, and Multi-Disciplinary Practice*, 8th Annual Corporate Counsel Institute, Tennessee Chapter of the American Corporate Counsel Association and the Clayton Center for Entrepreneurial Law of the University of Tennessee College of Law, (Memphis, TN, May 4, 2000). Panelist, *Ethics Issues in the Representation of a Fiduciary*, 26th National Conference on Professional Responsibility, American Bar Association Center for Professional Responsibility (New Orleans, LA, June 1, 2000).

Faculty Profile: Professor Colleen Medill

By Cherie Light

What do you get when you cross the business concentration with the advocacy concentration? You get Colleen Medill, Associate Professor of Law at the University of Tennessee College of Law. Professor Medill graduated from the University of Kansas Law School in 1989. After graduation, she served as a law clerk to the Honorable Deanell Reece Tacha on the United States Tenth Circuit Court of Appeals. Following her clerkship, Professor Medill joined a large law firm in Kansas City, Missouri. Her practice focused on corporate transactions and litigation matters involving the Employee Retirement Income Security Act of 1974 (ERISA). She left private practice to join the faculty at the University of Tennessee College of Law in 1997.

Professor Medill chose to embark on her teaching career at Tennessee for two reasons. First, she was impressed by the collegiality of the faculty. Second, she was excited by the College of Law's business transactions concentration. Based on her experiences in private practice, Professor Medill believed that law schools generally do not provide students with skills-training for corporate transactional work. "Students at other law schools do not receive needed training skills. They learn how to do research and how to write argumentative briefs, but they do not learn how to do transactional planning and transactional drafting." Professor Medill believes it is very important for students to know how to strategically plan a transaction and how to implement the plan in writing.

Professor Medill teaches Property, Gratuitous Transfers, Wealth Transfer Tax, and Employee Benefits Law. Employee Benefits Law is a new course offering for the College of Law. The course covers the highly technical and specialized areas of law relating ERISA, the federal statute that governs the employer sponsored retirement and health care plans. Professor Medill approaches the topic as "what every general corporate lawyer or every general litigator needs to know about ERISA," and, by doing so, the course merges the focus of the business and advocacy concentrations.

The topics covered in Professor Medill's Employee Benefits Law course include taxation of qualified retirement plans, employer disclosure obligations and fiduciary duties, issues arising in corporate transactions, private litigation claims and remedies, and federal preemption of state law. Professor Medill uses her experience from private practice to formulate problems for the students. Some problems require the students to imagine themselves as an attorney representing a corporation and look at the situation from a planning perspective. In such problems the students must decide the best way to guide an employer to avoid potential litigation. Other problems provide a set of facts and ask the students to develop a litigation strategy from the perspective of either the employer or the employee. Professor Medill finds that the composition of her employee benefits class is roughly half business concentration students and half advocacy concentration students. "The two groups learn a lot from each other," states Professor Medill.

Professor Colleen Medill believes students should receive solid transactional training while in law school.

When she is not teaching, Professor Medill interacts with students by serving as the judicial clerkship advisor. She also serves on the Academic Standards and Curriculum Committee for the College of Law.

Students Go On-line For Commercial Law Class at the College of Law

By David E. Coenen

Students taking Commercial Law at the College of Law had the option of attending class in their underwear during the 2000 summer session. By pointing and clicking their way to the Commercial Law chat room via the Internet, students could stay at home and participate in discussions about the class material with Professor Robert Lloyd and the other students without worrying about what clothes to wear or whether to comb their hair. This two credit hour Commercial Law class was the first on-line course for the College of Law, and represents the first time such a course has been offered by an accredited law school.

"I think it was very successful," said Professor Lloyd, who designed the course. "We hope to be able to do it again in the future."

Five students enrolled in the course, which focused on the black letter law instead of case law and covered secured transactions, commercial paper, and sales. Course information was posted on the Internet by using the Blackboard CourseInfo system and sending e-mail messages to the students. A two hour final was held at the College of Law at the end of the summer session.

Kaye Ford, a second-year law student, said she took the course because it met her needs for the bar exam. She said students only had to purchase a statute book for the on-line course, rather than the usual casebook, which is required for the four-hour class. "It gave me a lot of information on secured transactions - a lot of useful information," Ford said. "I highly recommend it. It's very helpful the way it's set up."

The largest segment of the course, secured transactions, was taught with materials distributed by the Center for Computer-Assisted Legal Instruction (CALI). The primary CALI program used was "Teach Yourself the UCC" by Professor Lisa Lamkin Broome of the University of North Carolina at Chapel Hill. This program was supplemented by four shorter exercises: "UCC Article 9: Scope, Attachment, and Perfection," "UCC Article 9: Proceeds," and "UCC Article 9: Default," and "Understanding Fixtures: Section 9-313 of the Uniform Commercial Code," all authored by Professor Lloyd. The students purchased CALI compact disks to do the exercises, although they had the option of accessing the materials through CALI's web site or the College of Law's computer lab.

"It works really well, especially when you're teaching black letter law," Professor Lloyd said of the interactive computer exercises. Professor Lloyd, who has twice won the Donald Trautman Lesson Writing Competition sponsored by CALI, also developed interactive computer exercises to teach students commercial paper.

The interactive exercises were supplemented by two-hour on-line classes using the chat feature of the CourseInfo system. These classes were held every other week. During the on-line class, individual students were called on to post answers to portions of questions, which were posted a few days prior to the class. Other students were given the opportunity to disagree with the answer or add to the response. Professor Lloyd would answer students' questions during the sessions as well. The entire chat session, student questions, answers and Professor Lloyd's remarks could be downloaded and printed.

A number of students who were spending the summer in other cities wanted to enroll in the course, but Professor Lloyd limited the course to students residing in Knoxville over the summer so that he could hold physical classes or use the College of Law's computer lab in the event of technical difficulties. The class did not experience any major difficulties, so future on-line courses may allow enrollment by students who are traveling or clerking in other cities.

The number of students allowed to enroll in future on-line courses may be increased from the five that were allowed to enroll in the summer; however, the on-line chat feature of the classes would become unwieldy if there were too many students in the course. "It would work with a larger group, we'd just have to use a different format," Professor Lloyd explained. Some options for a larger group include dividing a large class into sections for on-line chats or using threaded discussion groups instead of real-time on-line chats.

Overall, the College of Law's first on-line course was a success, which could mean more on-line courses in the future. "Everything worked smoothly," Professor Lloyd said. "I got a lot of positive feedback."

Dean Thomas C. Galligan, Jr., said he was very excited about the on-line class and the opportunities technology brings to the College of Law. "We thought we'd try commercial law because some of our students want to take it for the bar or for background but don't want to take the four hour course," he said. "What's nice is that

it's interactive and they have to participate in the learning process."

Dean Galligan posted audio links of some of his lectures on the CourseInfo system for his Torts II class in the Spring Semester. Students could listen to Dean Galligan's 20-minute lectures on various topics as a supplement to his torts classes. "My view is that it's a question of teaching style. We all know what's best for us and for our students," he explained. Dean Galligan said he would leave it up to the professors to decide whether to hold on-line courses at the College of Law.

"As far as legal education across the board, we'll see more and more of this," Dean Galligan explained. "We'll see an increase in on-line courses at law schools."

Book Review: Bringing Your Law Firm into the Digital Age

By Jonathan Hensley

Jerry Lawson, The Internet Handbook for Lawyers (1999). Law Practice Management Section, American Bar Association. 447 pages. $49.95.

Jerry Lawson's The Complete Internet Handbook for Lawyers, should be added to that list of form books, statute books, case reporters, and legal reference works that are the essentials of any law firm library. Written both for Internet newcomers and experienced users, Lawson's guide explains the importance of the Internet as a research tool, marketing aid, and practice area. It also contains some thoughtful discussion of the implications of the Internet for the practice of law. The book is useful to any attorney looking to make the most of the Internet.

Lawson begins with a brief discussion of "Why the Internet Matters to Lawyers," and briefly explains some Internet basics for the uninitiated. He provides an introduction to e-mail, including some potential dangers lawyers and law firms should recognize when using e-mail.

Lawson then moves to the use of the Internet as a research tool. Most lawyers are familiar with LEXIS, Westlaw and other search engines, but even experienced web users can benefit from Lawson's tips. He provides some helpful tips on phrasing search requests and using search operators to search more efficiently. Lawson believes that Internet discussion groups, mailing lists, and newsgroups are overlooked by attorneys. Although they can be tools for procrastination, they can also mean efficient research when used properly. Lawson points out that for many legal questions, "there is probably at least one person in the world who (a) knows the answer, and (b) would be glad to tell you the answer at no charge, as long as there is little or no inconvenience or expense." These people can often be found on the Internet.

Lawson also discusses the role of the Internet in marketing, an area of increasing interest to firms of all sizes and in all practice areas. Lawson believes that law firm websites can only supplement, not replace, the traditional forms of initiating client contacts. However, websites are an excellent, and increasingly common, way of providing information to current and prospective clients. Lawson explains how to plan a website, the benefits a firm can realistically expect, and what to look for when choosing a web developer to build your site.

Part Four of the Handbook addresses ethics and security. Lawson reminds us that ethics rules apply on the Internet just as much as in the "real world." Lawson focuses on e-mail privacy, security, and computer viruses in particular. This is one of the book's most useful sections.

The Handbook turns to more advanced Internet tools in Part Five. Lawson discusses the uses and benefits of intranets (computer networks within a single organization that are not open to the public) versus extranets (computer networks linking single organizations), as well as interactive websites. Lawson also provides several useful appendices, covering such topics as web troubleshooting, website design, and an overview of the substantive law of the Internet.

If this book has any flaw, it's that it covers such a broad range of topics that it does not always go into as much detail as one would like. Nevertheless, the book is highly useful for lawyers who want to maximize the Internet's usefulness to their practice, and especially to those who are just beginning to use the Internet as a practice aid. It contains more than enough information to get started, and directs the reader to other resources, both print and web based, with more information. Finally, and appropriately, for a book on the Internet in the practice of law, the book is updated with "electronic pocket parts" found at www.lawyernetbook.com <http://www.lawyernetbook.com>

ABA Model Rule 2.2:

Once Applauded and Widely Adopted, Then Criticized, Ignored or Evaded, Now Sentenced to Death with Few Mourners, But Not in Tennessee

By Carl A. Pierce*

In 1983, the American Bar Association (ABA) promulgated its Model Rules of Professional Conduct (Model Rules). One of those Rules - Rule 2.2 (Intermediary) - had no counterpart in the Model Rules' predecessor, the ABA's Model Code of Professional Responsibility (Model Code). It was added to specify the professional responsibilities of the lawyer whom, as an intermediary between clients, "seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client." Since 1983, most states that have modeled their rules of professional conduct on the ABA Model Rules have adopted Rule 2.2 with occasional variations. Yet the Rule has seldom been applied in ethics opinions, disciplinary proceedings, or malpractice cases. It also has been subject to considerable criticism.

Now the ABA Commission on the Evaluation of the Rules of Professional Conduct (Ethics 2000 Commission) has recommended that Rule 2.2 be dropped from the ABA Model Rules. Meanwhile, in Tennessee, one of the few remaining states in which the rules of professional conduct are *not* modeled on the ABA Model Rules, the Supreme Court is considering a proposal from the Tennessee Bar Association (TBA) to adopt a new set of rules, most of which will track the ABA Model Rules, including a modified version of Rule 2.2. This article examines these divergent approaches to the regulation of the professional conduct of the lawyer who serves as an intermediary between clients.

I. Background

Individuals and firms regularly enter into contracts: employment contracts, contracts of sale, leases, licenses, and loans. They also form joint ventures, partnerships, other unincorporated entities, and corporations through which they will engage in a wide variety of business ventures. In time, one or more of the parties may desire a change in the legal structure. They may even decide that time has come to terminate their relationship. Individuals may also collaborate with respect to the gratuitous transfers of property.

Some individuals and firms will do all of this without the assistance of a lawyer. In some situations, on the other hand, each of the parties will have the assistance of their own lawyer at all stages of their business relationship - formation, performance or conduct. In yet other cases, only one of the parties will be represented by a lawyer. It is also possible that all the parties may choose to be represented by a single lawyer. This article focuses on this last situation. *The primary issue is whether there should be special rules of professional conduct to govern the situation in which a lawyer represents multiple clients who are doing business with each other - either in a single transaction or in connection with the formation and conduct of an ongoing business venture. If so, what should those rules be?*

Prior to the Model Rules, there were no special rules governing the representation of multiple clients in business transactions. The business lawyer was expected to comply with the ABA Model Code without regard to the nature of their practice, even though it was designed to regulate the conduct of lawyer-advocates representing opposing parties in lawsuits. The lawyer's responsibility was to be loyal to the client, to preserve inviolate the client's confidences and secrets, and to zealously, and competently pursue the client's interests. These rules based

* Associate Professor of Law, University of Tennessee College of Law. Professor Pierce is the Reporter of the Tennessee Bar Association Committee for the Study of Standards of Professional Conduct and one of the Reporters for the American Bar Association Commission on the Evaluation of the Model Rules of Professional Conduct (Ethics 2000 Commission). The opinions expressed in this article are those of author and do not represent the position of the Tennessee Bar Association, the ABA Ethics 2000 Commission, or any other body or entity.

upon the adversary system of justice did not translate well to a collaborative business setting.

This is not to say that parties to contracts and business ventures never end up suing each other. Nor are they above tough negotiations, disputes and hard feelings. But the paradigm is not the lawsuit or the dispute. Rather it is the disagreement the parties want to resolve, the problem they want to solve, or the common goal they want to accomplish. The only specifically pertinent reference to these circumstances in the Model Code was the statement in Ethical Consideration 5-15 that "there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation."

II. ABA Model Rule 2.2: Once Applauded and Widely Adopted, Then Criticized, Ignored or Evaded

One of the distinctive features of the1983 ABA Model Rules of Professional Conduct was the explicit recognition that lawyers play a variety of roles other than that of advocate in a lawsuit. These include the lawyer as a negotiator who "seeks a result advantageous to the client but consistent with requirements of honest dealing with others," the lawyer as an advisor who "provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications," the lawyer as an evaluator who examines a client's legal affairs and reports about them to others, and the lawyer as an intermediary between clients who "seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client."

Model Rule 2.2 addresses the lawyer as intermediary:

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

A. Initially Applauded

Rule 2.2 was adopted in recognition that lawyers play roles other than advocate, and that these other roles may necessitate either a modification of the generally applicable rules of professional conduct or, at least, a clarification of how they should be applied in a non-adversarial setting. This has been described as "a functional" rather than as an "abstract" approach to categorizing problems that arise in law practice and has been applauded as "particularly helpful."[1]

[1] Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 1.14 (3d ed. 2001).

B. Widely Adopted

Rule 2.2 has been adopted without modification by 25 jurisdictions. Another 12 jurisdictions have adopted the Rule with modifications, including that the client's consent be in writing, a prohibition against serving as an intermediary in divorce or child custody matters, a relaxation of the absolute prohibition against representation of any of the clients after withdrawal, and a requirement that a lawyer must comply with both Rule 2.2 and Rule 1.7 governing conflicts of interest. Massachusetts recently declined to adopt Rule 2.2, having concluded that a lawyer representing more than one client should be governed by the conflict of interest provisions.[2]

C. Then Criticized

Rule 2.2 has been criticized for its failure to clearly indicate what is meant by intermediation, its failure to clarify its relationship to Rule 1.7, its incomplete specification of the lawyer's duties when serving as an intermediary, and its unduly restrictive prohibition against a lawyer's continued representation of intermediation clients if any one of the clients withdraws from the intermediation.[3]

A basic criticism of Rule 2.2 is that it is difficult to know when it applies. The Rule itself does not define "intermediation." The Comments are not helpful because they assert both that the Rule does not apply when the lawyer serves as an arbitrator or mediator and that it may apply when the lawyer is "mediating a dispute between clients." The clear aim of the Rule is to regulate the joint representation of multiple clients in business transactions, as indicated by Comment [2]'s reference to the lawyer "seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example in organizing a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, [or] arranging a property distribution in settlement of an estate . . . ." Offsetting this emphasis on transactional practice, however, is the more global reference in Comment [2] to "mediating a dispute between clients." But Comment [4] admonishes that a lawyer cannot undertake common representation of clients who contemplate contentious negotiations. This uncertainty about the applicability of Rule 2.2 has been cited as a reason for dropping it from the Model Rules.

Another criticism of Rule 2.2 is its failure to specify how it relates to Rule 1.7, which addresses conflicts of interest. On the one hand, Rule 2.2(a)(1) can be seen as a specific application of Rule 1.7 in which it is assumed that a lawyer who serves as an intermediary will, by virtue of the role, either be representing clients whose interests are "directly adverse" to each other or will be providing a representation to each client that will be "materially limited" by the representation of the other clients. Similarly, Rules 2.2(a)(2) and (3) can be understood as a specific application of either Rule 1.7(a) that precludes a lawyer from undertaking a representation directly adverse to a client if the lawyer reasonably believes that doing so will "adversely affect the relationship with the client," or Rule 1.7(b) that precludes a lawyer from undertaking a representation that will be materially limited by the lawyer's representation of another client unless the lawyer reasonably believes that "the representation will not be adversely affected." On the other hand, Rule 2.2 can be read as preempting Rule 1.7 whenever a lawyer undertakes to act as an intermediary, rather than as an advocate or in some other representational capacity. Neither the Rules not the Comments offer guidance, leading to uncertainty about which Rule governs. It is not surprising, then, that the Ethics 2000 Commission concluded that the relationship between Rules 2.2 and 1.7 has not been well understood.

Another shortcoming of Rule 2.2 is its incomplete specification of the lawyer's duties when serving as an

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[2] "State Variations - Rule 2.2," Memorandum prepared for the Ethics 2000 Commission by the staff of American Bar Association Center for Professional Responsibility (copy on file with TRANSACTIONS and the author).

[3] The seminal criticism of Rule 2.2 is John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. Ill. L. Rev. 741, 771-778. For other commentary regarding Rule 2.2, *see* HAZARD & HODES, *supra* note 1, at §§ 24.1-24.8; CHARLES W. WOLFRAM, MODERN LEGAL ETHICS, §§ 8.7, 13.6 (1986) ; Robert R. Keatinge, *Professional Responsibility in the Selection and Organization of Business Entities*, ALI -ABA Course of Study, Q 287 ALI-ABA 1 (1999); Alysa Christmas Rollock, *Professional Responsibility and Organization of the Family Business: The Lawyer as Intermediary*, 73 Ind. L.J. 567 (1998); John A. Walton, *Lights Camera, Consultation: Intermediation Redefined for the Entertainment Industry*, 9 Geo. J. Legal Ethics 841 (1996); Bryan J. Pechersky, *Representing General Partnerships and Close Corporations: A Situational Analysis of Professional Responsibility*, 73 Tex. L. Rev. 919 (1995).

intermediary. It addresses the duty to consult with each client concerning the decisions to be made and the considerations relevant in making them. It does not, however, specify whether common consultation is required or whether the lawyer is permitted to consult separately with each of the clients. Nor does Comment [9] help to the lawyer to understand what is meant by the proposition that where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is separately represented. It is also odd that although Comment [7] says that a lawyer is required to be impartial as between commonly represented clients, paragraph (b) articulates no such duty. Finally, one of the biggest shortcomings is the failure of paragraph (b) to provide guidance as to what the lawyer must do in order to maintain what Comment [6] calls the "delicate balance" between the duty under both Rules 1.4 and 2.2(b) to keep the clients adequately informed and the duty under Rule 1.6 to maintain confidentiality of information relating to the representation. Is all information to be freely shared with both clients? Or must the lawyer treat information that could be disadvantageous to one of the clients as information fully protected by Rule 1.6 so that disclosure would not be permissible without the client's consent after consultation?

Other particular complaints about Rule 2.2 are that the prerequisites for service as intermediary are too stringent and paternalistic, that it provides no guidance about what the lawyer is to do if the clients reach an agreement that the lawyer thinks is unfair to one of the clients, and that paragraph (c)'s absolute prohibition against a lawyer who withdraws from the representation of one of the clients from continuing to represent the other clients is unnecessarily restrictive.

D. Ignored or Evaded

In spite of the shortcomings of Rule 2.2, the fact remains that lawyers are intermediating between clients and successfully doing so. Anecdotal evidence suggests that lawyers do not elect to serve as an intermediary within the meaning of Rule 2.2, but rather view themselves as simply "representing" multiple clients in accordance with Rule 1.7, the generally applicable rule governing conflicts of interest. Similarly, the Ethics 2000 Commission has noted that lawyers not wishing to be bound by special limitations in Rule 2.2, such as the flat prohibition on a lawyer continuing to represent one client and not the other if intermediation fails, even if neither client objects, "may choose to consider the representation as falling under Rule 1.7 rather than Rule 2.2, and there is nothing in the Rules themselves that clearly dictates a contrary result." Indeed, Rule 2.2's permissive formulation - "A lawyer may act as an intermediary between clients if. .." - suggests that the lawyer has a choice either to do so or, on the other hand, to "represent" the clients in conformity with Rule 1.7.

III. The Ethics 2000 Commission Proposal

The Ethics 2000 Commission has recommended that Rule 2.2 be dropped from the ABA Model Rules. As explained in the Reporter's Explanation of Changes, the Commission's recommendation is premised on the following points:

- The concept of "intermediation" as distinct from either "representation" or "mediation" has not been well understood.
- The relationship between Rule 2.2 and Rule 1.7 has not been well understood.
- There is less resistance to joint representation today than there was in 1983 when

Rule 2.2 was adopted, and thus, there is no longer any particular need to have a separate rule that specifically legitimates intermediation.

- Rule 2.2 "has not proved helpful in clarifying conflict-of-interest doctrine for lawyers."
- There is much in Rule 2.2 and its Comment that applies to all examples of joint representation and ought to appear in Rule 1.7.

The Commission proposes to incorporate parts of the Comment to Rule 2.2 into the Comment to Rule 1.7 (Current Conflicts of Interest). The Commission has also proposed some new commentary addressing the "common representation of two or more clients in matters not involving litigation." There is no reference to the

lawyer as an "intermediary between clients" or to an "intermediation."

Proposed Rule 1.7 provides that a lawyer shall not represent a client if the representation involves a conflict of interest, either because the representation of one client will be "directly adverse" to another client or because there is a "significant" risk that the representation of one or more clients will be "materially limited" by the lawyer's responsibilities to another client, unless "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client and each affected client gives informed consent, confirmed in writing." The practitioner must then look to the new Comments for guidance as to the proper application of Rule 1.7 to the representation of multiple clients in a transaction between them.

A. "Non-litigation Representation" Involving a Conflict of Interest

With the demise of Rule 2.2, the threshold question for the transactional practitioner will be whether the representation of one client is directly adverse to the other or whether there is a significant risk that representation of any of the clients will be materially limited by the representation of the others. Comment [7] indirectly suggests that representing a buyer and seller in a transaction between them would be a directly adverse representation. On the other hand, in its discussion of a materially limited representation, Comment [8] explains that "a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others." Presumably, this would not be deemed a directly adverse representation.

More generally, the Comment notes that "the mere possibility of subsequent harm does not itself require disclosure and consent," but that "the critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." As noted in Comment [26], other relevant factors to be considered in determining whether there is a significant potential for material limitation include "the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict." "The question," the Comment concludes, "is often one of proximity and degree." Comment [27] then provides as an example the lawyer who is called upon to prepare wills for several family members, such as husband and wife. The Comment warns that "depending on the circumstances, a conflict of interest may be present, as when one spouse owns significantly more property than the other or has children by a prior marriage."

B. Prohibited Non-Litigation Representation Involving a Conflict of Interest

If there is a conflict of interest, the lawyer is prohibited from undertaking the representation unless she "reasonably believes" that she will be able to provide "competent and diligent representation to each client."

1. No Representation of "Fundamentally Antagonistic" Parties

By way of guidance, Comment [28] provides that a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other. Similarly, Comment [29] warns that multiple representation is prohibited if there is too great a risk of failure, such as when "contentious litigation or negotiations" between the clients "are imminent or contemplated" or "the relationship between the parties has already assumed antagonism." Without saying so, these Comments appear to be derived from the requirement in Rule 2.2(a)(2) that the lawyer must reasonably believe that "the matter can be resolved on terms compatible with each of the client's best interests."

2. Representation Permitted if Clients Are "Generally Aligned in Interest"

On a positive note, Comment [28] declares that "common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them" and "[t]hus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property

distribution in settlement of an estate." More generally, Comment [28] notes that other relevant factors include "whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties."

3. The Risks of Common Representation

Comment [29] admonishes that lawyers "should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination." This is because "each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation." This probably was the most that could be said about the consequences of a failed common representation because Rule 1.7's requirement that the lawyer be able to competently and diligently represent each of the clients does not seem to call for consideration of what is likely to happen if the lawyer's competent and diligent efforts are unavailing.

4. Impartiality

In place of Rule 2.2(a)(3)'s requirement that an intermediary "reasonably believe . . . that the common representation can be undertaken impartially," Comment [29] states that "because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained." Given that the lawyer's standard role is that of a partisan advocate on behalf of each client, however, the lawyer's impartiality must be consistent with each client's interests as would be advanced by an advocate of the client's interests. In this regard, the new Comments to Rule 1.7 no longer mention the client's desire to accommodate the interests of the other client as a factor to be considered in determining the propriety of a joint representation. This would seem to be the key factor in reconciling the partisanship upon which Rule 1.7 is premised and the impartiality between clients contemplated by Rule 2.2.

5. Heightened Client Responsibility for Decisions

In place of the requirement is Rule 2.2(a)(2) that "the lawyer reasonably believe . . . that each client will be able to make adequately informed decisions in the matter," Comment [32] admonishes that "the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented." Thus, was a prerequisite to an intermediation under Rule 2.2 has been reduced to a factor to be discussed with the clients when seeking their informed consent to a representation affected by a conflict of interest.

6. Conflicts Arising from Different Roles Played for a Client

There is no counterpart in the Comments to Rule 1.7 to the requirement in Rule 2.2(a)(3) that the lawyer acting as an intermediary between clients "reasonably believe that the common representation can be undertaken ... without improper effect on other responsibilities the lawyer has to any of the clients." This is an interesting omission because Rule 1.7(a)(2)'s specification of a concurrent conflict of interest only includes cases in which there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. Rules 2.2 requires that the lawyer reasonably believe that there will be no conflict between the lawyer's responsibilities as an intermediary and as an advocate in other matters being handled for the same client. There is no such requirement in Rule 1.7. Dropping Rule 2.2 does not eliminate this problem, but Rule 1.7 and its Comments leaves lawyers without guidance about the resolution of conflicts of interest arising because a lawyer is playing different roles on behalf of the same client.

7. Confidentiality and Communication

Finally, proposed Comment [31] attempts to address the extent to which a common representation may be prohibited because of the lawyer's inability to reconcile the lawyer's duty of confidentiality to each client with the lawyer's duty to keep each client adequately informed about the intermediation. It provides that "continued common representation will almost certainly be inadequate if one client attempts to keep something in confidence between the lawyer and that client, which is not to be disclosed to the other client." The lawyer "should, at the

outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some material information should be kept from the other."

The lawyer is not, however, required to obtain each client's affirmative authorization to make such disclosures, but is only required to advise each client of the lawyer's intent to make such disclosures and presumably is permitted to undertake the common representation so long as the client does not prohibit disclosure. This clearly tilts the "delicate balance" between confidentiality and communication in favor of the duty to communicate. This tilt is confirmed by the further observation that "in limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential." The Comment notes that "a lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients."

B. Informed Consent

Whenever a lawyer would serve as an intermediary between clients, Rule 2.2 (a)(1) required that the lawyer consult with each client concerning the implications of the common representation, including the advantages and risks involved and the effect on the attorney-client privilege, and obtain each client's consent to the common representation. As indicated in the Model Rule terminology, consultation denotes "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." In the case of a common representation involving a conflict of interest in a non-litigation matter, on the other hand, proposed Rule 1.7 requires that the lawyer secure the client's "informed consent, confirmed in writing." Informed consent is defined in Proposed Rule 1.0 as " the agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." "Informed consent, confirmed in writing," denotes "informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent."

With respect to the substance of what the client must understand for her consent to a common representation to be informed, Comment [18] explains in general that "the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved." Comment [30] provides that the clients should be advised that the attorney-client privilege does *not* attach as between commonly represented clients and will not be available if the common representation fails and litigation ensues between the clients. Comment [32] also provides that the lawyer "should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented." It also specifies that "[a]ny limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation." Proposed Rule 1.2(c) requires that any limitation on the scope of a lawyer's representation of a client must be "reasonable under the circumstances" and that the client gives informed consent to the limited representation.

C. Duties Owed to Commonly Represented Clients During the Course of the Representation

There is no counterpart in Rule 1.7 to Rule 2.2(b) - the incomplete paragraph that attempts to identify the professional responsibilities of a lawyer who is acting as an intermediary between clients. Comment [28] alludes to the issue when it describes the lawyer for several joint venturers as seeking "to resolve potentially adverse interests by developing the parties' mutual interests." Comment [29] asserts that "the lawyer is required to be impartial between commonly represented clients." Comment [32] also suggests a limitation on the lawyer's role as an advisor to each client when it states, as did Comment [9] to Rule 2.2, that "the clients may be required to assume greater responsibility for decisions than when each client is separately represented." Comment [33] then provides that "[s]ubject to the above limitations, each client in the common representation has the right to "loyal and

diligent representation," as well as the protection of Rule 1.9 concerning former clients and the right to discharge the lawyer as stated in Rule 1.16.

D. Withdrawal and Duties to Former Commonly Represented Clients

Proposed Comment [21] provides that Alike any other client, a client who has given consent to a conflict may revoke the consent and terminate the lawyer's representation of that client at any time. Comment [33] also provides a cross-reference to a commonly represented client's right to discharge the lawyer as stated in Rule 1.16. This change does not alter the lawyer's duty to comply with the request of a commonly represented client to terminate the lawyer's representation of the client.

With respect to the lawyer's duties to the commonly represented clients after one of them has exercised her right to terminate the lawyer's representation, however, the Ethics 2000 Commission's proposal makes a world of difference. In place of the prohibition in Rule 2.2(c) against the lawyer continuing with the representation of any of the clients in the matter that was the subject of the intermediation, Comment [33] provides a cross-reference to Rule 1.9, which only applies when a lawyer undertakes to represent a client whose interests are "materially adverse" to the interests of a former client and always permits the former client to give informed consent to such an adverse representation. Were this relaxation not enough, Comment [21] also notes that "[w]hether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result." This Comment surely reflects an intention to relax the strict prohibition in Rule 2.2(c) against a lawyer continuing to represent some of the commonly represented clients after one of them has discharged the lawyer. On the other hand, Comment [29] sounds an alert that "[o]rdinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails."

E. An Assessment

Proposed Rule 1.7 treats intermediation - a distinctive and laudable non-partisan role played by many business lawyers - as nothing more than a representation "involving a conflict of interest." This is a considerable metamorphosis. While conceding that Rule 2.2 may not have been well understood, the question remains whether lawyers will find better guidance when they consult proposed Rule 1.7 to identify their professional responsibilities when asked to represent multiple clients in a non-litigation matter. The answer is unclear. One result of this change is that business lawyers may find less guidance about when they must secure their clients' informed consent to the "common representation." They may also find less precise guidance as to the circumstances in which a common representation in a non-litigation matter is prohibited. The result may be that prudent lawyers will exercise greater care with respect to disclosure and informed consent prior to undertaking the common representation of clients in business transactions. This could be a positive development, leading to an improvement in intermediation practice. On the other hand, it may retard the development of intermediation practice by requiring lawyers to use an adversarial model for the resolution of problems arising among clients who are not adversaries.

IV. Proposed Tennessee Rules of Professional Conduct, Rule 2.2

When the TBA Committee first looked at Rule 2.2, many members did not want to adopt it. Their reluctance was primarily due to their uncertainty about how Rule 2.2 related to Rule 1.7. Eventually, however, the Committee decided to retain Rule 2.2 and to clarify that the Rule governs the conduct of lawyers who would serve multiple clients in a special role - that of an intermediary - and is not simply a specific application of Rule 1.7. The Tennessee Proposed Rules also differentiate between the lawyer who acts as an intermediary between clients and the lawyer who acts as a dispute resolution neutral on behalf of persons with whom the lawyer does not establish an attorney-client relationship. The rules governing the lawyer who acts as a dispute resolution neutral are in a new Rule 2.4.

A. Serving Clients as an Intermediary.

The lynchpin of Proposed Tennessee Rule 2.2 is a new paragraph (a) that defines what it means to represent clients as an intermediary:

> [a] lawyer represents clients as an intermediary when the lawyer provides impartial legal advice and assistance to two or more clients who are engaged in a candid and non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them.

This remedies an oft-noted omission in ABA Model Rule 2.2. As emphasized in Comment [1] the hallmarks of an intermediation include the impartiality of the lawyer who serves as intermediary, the open, candid, and non-adversarial nature of the clients' pursuit of a common objective, and the limited subject matters in which a lawyer may serve multiple clients as an intermediary (*i.e.*, the adjustment of a consensual legal relationship among or between the clients). Comment [4] also explains that:

> as part of the work of an intermediary, the lawyer may seek to achieve the clients' common objective or to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative may be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complications, or even litigation. Given these and other relevant factors, each client may prefer to have one lawyer act as an intermediary for all rather than hiring a separate lawyer to serve as his or her partisan.

Comment [6] further explains that "forms of intermediation range from an informal 'facilitation' in which the lawyer's responsibilities are limited to presenting alternatives from which the clients will choose to a full-blown representation in which the lawyer provides all legal services needed in connection with the proposed transaction."

Intermediation as defined in Rule 2.2(a) does not, however, embrace the multiple representation of clients in connection with the gratuitous dispositions of property. A proposal to that effect was dropped in response to questions raised by estates and trust lawyers about the need for consultation and client consent in the typical representation in which the lawyer drafts wills for happily married spouses.

The purpose of Rule 2.2(a) is to tell lawyers the circumstances in which they must comply with Rule 2.2 because they have undertaken to serve clients, not as a partisan advocate or advisor, but rather as an intermediary. Comment [3] also specifically differentiates the intermediary role from the role of a dispute resolution neutral who, in compliance with Proposed Rule 2.4, "impartially assists two or more persons who are not clients of the lawyer to reach a resolution of disputes that have arisen between them." This distinction is underscored by the propositions in Comment [5] that "a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations, as is often the case when dissolution of a marriage is involved...."

B. Relationship Between Rule 2.2 and Rule 1.7

Comment [2] clarifies the relationship between Rule 2.2 and the conflict of interest principles in Rule 1.7. It provides that with respect to the clients being served as an intermediary, Rule 2.2, not Rule 1.7, applies. Rule 1.7 remains applicable, however, to protect other clients the lawyer may be representing or may wish to represent in other matters. For example, if the lawyer's representation of two clients as an intermediary in a matter will materially limit the lawyer's representation of another client as an advocate, the lawyer must afford that client the protections of Rule 1.7, while affording the clients the lawyer is serving as an intermediary the protections of Rule 2.2.

More generally, and consistent with the normal rules of statutory construction, the lawyer who serves clients as an intermediary must conform her conduct to Rule 2.2, and Rule 2.2 governs to the extent its provisions differ from other more generally applicable rules of professional conduct. To the extent that Rule 2.2 does not speak to an issue, the other rules of professional conduct are applicable.

C. Prerequisites for Serving as an Intermediary

Rule 2.2, paragraphs (b)(1) and (b)(2) specify the circumstances that must be present before the lawyer can seek the client's consent to the lawyer acting as an intermediary. Paragraph (b)(1) provides that as between the clients the lawyer will serve as intermediary the lawyer must reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter, that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful, and that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients. Aware of the criticism that such prerequisites have been criticized as unduly restrictive and paternalistic, the TBA Committee concluded that they provide a useful checklist that a lawyer will be able to use in most cases to confirm, both for the benefit of the lawyer and the would-be clients, that intermediation is appropriate.

Nor was the Committee troubled by the prospect that the stringency of the prerequisites might cause lawyers to shy away from an intermediation in cases in which it is questionable whether the lawyer could be impartial or that the intermediation would be successful. In the end, the Committee concluded that the five preconditions provide a useful framework within which lawyers and clients alike can agree that there are some circumstances in which that it is not only appropriate, but respectable and maybe even laudable, for a lawyer to serve as an intermediary between clients, and that there are other situations in which a lawyer should not be allowed to enter the lion's den.

Rule 2.2, paragraph (b)(2) has been added because Rule 1.7 is inapplicable to an intermediation. It tracks Rule 1.7 and requires that the "lawyer's representation of each of the clients, or the lawyer's relationship with each, will not be adversely affected by the lawyer's responsibilities to other clients or third persons, or by the lawyer's own interests."

If the intermediation is permitted by paragraphs (b)(1) and (2), paragraph (b)(3) then requires the lawyer "to consult with each client about the lawyer's responsibilities as an intermediary, the implications of the intermediation (including the advantages and risks involved and the effect on the attorney-client privilege and any other obligation of confidentiality the lawyer may have); any circumstances that will materially affect the lawyer's impartiality between the clients; and the lawyer's representation in another matter of a client whose interests are directly adverse to the interests of any one of the clients; and any interests of the lawyer, the lawyer's other clients, or third persons that will materially limit the lawyer's representation of one of the clients." As specified in Comment [9], the consultation must make clear that the lawyer's role "is not that of partisanship normally expected in other circumstances."

After such consultation, paragraph (b)(4) requires that each client consent in writing to the lawyer's representation. As provided in Proposed Rule 1.0(b), the requirement of a written consent may be satisfied by "an oral consent which the lawyer confirms in writing in a manner which can be reasonably understood by the client and which is promptly transmitted to the client."

Finally, paragraph (b)(4) establishes one other extremely important prerequisite for an intermediation - that each client being represented by the lawyer as intermediary authorize the lawyer to disclose to each of the other clients being represented in the matter any information relating to the representation the lawyer reasonably believes she is required by Rule 1.4 (Communication) or Rule 2.2(c)(3) (consultation to ensure informed decisions by clients) to share with the other clients. Candor must trump confidentiality to the extent the information is needed for informed decision-making. Comment [8] warns lawyers to the need to alert the clients to the implications of this waiver of confidentiality.

D. Duties While Representing Clients as an Intermediary

Rule 2.2, paragraph (c) identifies three special duties of the lawyer while acting as an intermediary between clients. It requires that the intermediary "consult with each client concerning the decisions to be made with respect to the intermediation and considerations relevant in making them, so that each client can make adequately informed decisions." Additionally, paragraph (c)(1) explicitly requires that the intermediary "shall act impartially to assist the clients in accomplishing their common objective."

Finally, paragraph (c)(2) clarifies how the confidentiality norms in Rule 1.6 apply when the lawyer acts as an intermediary under Rule 2.2. It specifies that, as between the clients, the lawyer must treat information relating to the intermediation as information protected by Rule 1.6 that the lawyer has been authorized by each client to disclose to the other clients to the extent the lawyer reasonably believes necessary for the lawyer to comply with Rules 1.4 and 2.2(c)(3). Otherwise, the lawyer must afford each of the clients the full protections of Rule 1.6.

E. Withdrawal from Service as an Intermediary

Like ABA Model Rule 2.2(c), Tennessee Proposed Rules 2.2(d)(1) and (3) require that the lawyer withdraw from service as an intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (b) are no longer satisfied. Paragraph (d)(2), however, more particularly requires withdrawal if any of the clients revokes the lawyer's authority to disclose to the other clients any information that the lawyer would be required by Rule 1.4 to reveal to them. If withdrawal is required by paragraph (d)(2), paragraph (e) requires that the lawyer shall so advise each client of the withdrawal, but shall do so without any further disclosure of information protected by Rule 1.6.

F. Duties to Clients Formerly Served as an Intermediary

Unlike ABA Model Rule 2.2(c), Tennessee Proposed Rule 2.2 does not expressly prohibit a lawyer who has withdrawn from an intermediation from continued representation of any of the clients in the matter. Because the Tennessee rule does not address this issue, the lawyer must afford all of the clients formerly served as an intermediary the protections of Rule 1.9, which generally prohibits the representation of a person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a former client, unless the client consents in writing after consultation. The two key differences between the ABA Model Rule 2.2(c) and Rule 1.9 are that Rule 1.9 will only be triggered if the continued representation will be materially adverse to the client who has withdrawn from the intermediation, and that client consent can cure the conflict.

V. At the Fork in the Road

The alternative proposals soon to be considered by the ABA House of Delegates and the Tennessee Supreme Court represent a fork in the road with respect to the regulation of the professional conduct of lawyers engaged in transactional practice. It is not the purpose of this article to argue for or against either proposal, but rather to make sure that lawyers know they have arrived at a fork in the regulatory road.

The roads on which the profession is currently traveling - ABA Model Rule 2.2 running parallel to ABA Model Rule 1.7 - can be characterized as poorly marked, containing potholes, and permitting unregulated access to Rule 1.7 for lawyers who don't like Rule 2.2. The Ethics 2000 Committee remedies the problem by eliminating Rule 2.2 and using some of its principles to repair Rule 1.7 and to prepare it for the additional transactional traffic that will be generated by the elimination of Rule 2.2. Some of the road signs in Rule 2.2, however, will be missing, including the road sign that flags intermediation as a distinctive nonpartisan role and directs the lawyer to special rules of the road tailored for that role. In the end, one cannot predict with certainty what problems transactional lawyers will confront as they intermediate in accordance with the new Rule 1.7. Undoubtedly, additional signs and repairs will be needed in the future.

The Tennessee proposal, on the other hand, retains Rule 2.2, adds some needed road signs, restricts access to Rule 1.7 by intermediaries, and also tries to repair some of the potholes. The key feature is the big road sign that flags intermediation as a distinctive nonpartisan role and directs the lawyer to special rules of the road tailored for that role. Access to Rule 1.7 is limited, but parts of Rule 1.7 are incorporated into Rule 2.2. The most noticeable

epairs relate to impartiality, confidentiality, and the duty to clients formerly served as an intermediary. As is the ase with the ABA Ethics 2000 proposal, one cannot predict with certainty what problems transactional lawyers ill confront as they intermediate in accordance with the new Rule 2.2. Undoubtedly additional signs and repairs ill be needed in the future.

Hopefully, the road chosen will be the road that provides the best conditions for continued analysis and efinement of the professional responsibilities of the transactional lawyer who is asked to serve clients as an ntermediary rather than as an advocate.

MULTIDISCIPLINARY PRACTICE: COMMINGLING ACCOUNTANTS, ATTORNEYS AND CLIENTS

By Cheri Huffman-Jones, CPA, CMA*

I. INTRODUCTION

Accountants and lawyers are experimenting with ways legal and accounting services can be integrated to more efficiently serve clients who require both types of assistance. The legitimization of lawyer and non-lawyer partnerships in Europe has fueled the debate in the United States over whether the rules governing lawyers should be relaxed to allow lawyer and non-lawyer partnerships.[1] In August 1998, the American Bar Association (ABA) formed a commission to study the joint provision of services and to make recommendations about the advantages and effects of Multidisciplinary Practices (MDPs).[2] The resulting Commission on Multidisciplinary Practice ("Commission") defined an MDP as:

> [A] partnership, professional corporation, or other association or entity that includes lawyers and non-lawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal as well as legal services.[3]

The Commission thoroughly examined the MDP concept and recommended that the ABA revise the Model Rules of Professional Conduct (Model Rules) to include MDPs as an acceptable vehicle for the provision of legal services.[4]

The proposal prompted sharp division in the legal profession because the ABA would have to significantly modify the Model Rules in order to implement the Commission's recommendations. On July 11, 2000, the ABA's House of Delegates decisively passed a resolution that rejected the Commission's recommendations and continued the prohibition against MDPs.[5]

This decision continued the efforts of the American legal profession to oppose modification of the Model Rules to include MDPs as an acceptable method for the provision of legal services.[6] However, the ABA's stance on the MDP issue directly conflicts with the practice structures that other professionals, particularly accountants, advanced in an attempt to provide their clients with maximum accessibility and efficiency.

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[1] *See generally* Laural S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMPLE L. REV. 869 (2000) nn. 57-70 and accompanying text.

[2] *Commission on Multidisciplinary Practice* <www.abanet.org/cpr/multicom.html >(Oct. 5, 2000). This website provides a significant source of MDP information including the Commission's research, meeting reports, and recommendations.

[3] AMERICAN BAR ASSOC. COMM. ON MULTIDISCIPLINARY PRACTICE, *MDP Final Report*, 1999 [hereinafter *Final Report*]<www.abanet.org/crp/mdpreport.htmp>(Feb. 13, 2001). This report provides a summary of the Commission's MDP study and recommends MDPs as an option for the provision of legal services.

[4] *Id.*

[5] Wendy Davis, *ABA emphatically rejects MDPs*, NAT'L L.J., July 24, 2000, at A5.

[6] *Status of Multidisciplinary Practice Studies by State* <www.abanet.org/cpr/mdp-state_action.html>(Oct. 7, 2000). Most state bar associations continue to address the MDP issue. This website provides an update on the status of any individual states.

Accounting firms strongly support the development of MDPs, and many Certified Public Accountants (CPAs) believe that the legal profession maintains objections to MDPs primarily to block accounting firms from providing legal services to its clients.[7] However, the ABA's rejection of MDPs has not materially hampered the accounting profession. Accountants continue to diversify into the legal field with the expectation that the ABA will eventually reconsider and allow MDPs with respect to accounting and legal services.[8] In accordance with this expectation, accounting firms aggressively recruit and hire attorneys. In fact, accounting firms are the world's largest employers of lawyers.[9]

As a result of the ABA's refusal to modify the Model Rules to allow for MDPs, accountants and lawyers have responded to client demand and market expectations by exploring alternative structures for delivering integrated services. These alternatives provide as many of the benefits associated with an MDP as possible, while remaining in compliance with the rules governing the practices of accounting and law. The purpose of this article is not to reevaluate the MDP debate or to criticize the ABA position on this issue. Instead, this article intends to address the variety of ways in which law and accounting services are provided together.

Part I provides a basic outline of the Model Rules involved in the MDP debate as well as an explanation of the relevance of each rule to the joint provision of accounting and legal services. The Model Rules discussed in Part I must be honored as lawyers and accountants experiment with the provision of joint services. Part II discusses the methods available to incorporate accounting services into a law practice and how these methods are consistent with the provision of joint services. Alternatively, Part III provides options for including legal services in an accounting practice as well as an analysis of the ethical considerations involved. Part IV discusses strategic alliances between legal and accounting firms in an effort to identify the available benefits ordinarily associated with MDPs and compliance issues with the Model Rules.

II. CURRENT MODEL RULES

In a variety of ways, legal rules restrict lawyers' freedom to associate with non-lawyers for the purpose of delivering integrated services. The key restrictions on the provision of joint services involve firm structures and fee splitting, the unauthorized practice of law, law-related businesses, conflicts of interest, and confidentiality issues.

A. Firm Structure and Fee Splitting

The organizational structures outlined in the Model Rules for the provision of legal services do not provide for MDPs. Model Rule 5.4 prohibits the formation of partnerships[10] or other business associations[11] with non-

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[7] Geanne Rosenburg, *Accounting legal affiliates criticize ABA's proposal to restrict MDPs*, NAT'L L.J., July 31, 2000, at B6. This article provides an analysis of the accounting profession's reaction to the ABA's vote to reject MDPs.

[8] *MDPs: Will They Be Part of Your CPA Firm's Future?*, ACCT. OFF. MGMT. & ADMIN., Sept. 2000. This article focuses on the strategic alliances that CPA firms have formed with other professional and concludes with the proposition that lawyers will eventually follow.

[9] Daniel R. Fischel, *Multidisciplinary Practice*, 55 Bus. Law. 951, 952 (2000).

[10] MODEL RULES OF PROFESSIONAL CONDUCT RULE 5.4(b) (1999). Model Rule 5.4(b) states that "[a] lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law."

[11] MODEL RULES OF PROFESSIONAL CONDUCT RULE 5.4(d) (1999). Model Rule 5.4(d) provides:

> 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 non-lawyer 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 non-lawyer is a corporate director or officer thereof; or
> (3) a non-lawyer has the right to direct or control the professional judgment of a lawyer.

lawyers for the purpose of practicing law and denies non-lawyers the opportunity to reach partnership status in a law firm. Model Rule 5.4(b) also details the permissible investing and financing arrangements for a law firm and prohibits non-lawyers from obtaining ownership interests.

In addition, Model Rule 5.4(a) generally prohibits splitting legal fees with a non-lawyer. The limited exceptions detailed in the rule do not involve routine operating situations.[12] The rule basically prohibits basing a non-lawyer's compensation upon either a percentage of the firm's total receipts or a proportion of the fees remitted by a specific client. This provision of Rule 5.4 may severely limit the legal practitioner's ability to retain and compensate non-lawyer accounting professionals, including CPAs.

State bar associations continue to regulate the conduct of attorneys and retain the right to modify the ethical guidelines applicable to the practitioners in their respective jurisdictions. The District of Columbia (D.C.) remains the only jurisdiction that has modified the rules governing attorney conduct to allow for MDPs, subject to certain requirements.[13] The D.C. rule limits MDPs to organizations primarily involved with the practice of law. Essentially, an accountant who joins a legal firm would not violate the D.C. rule, but an attorney who joins an accounting firm would commit an infraction. The D.C. rule was drafted with joint financial and legal practices in mind as evidenced by the comment's specific reference to CPAs who work with tax lawyers.[14]

Although the D.C. rule has generated considerable controversy, most attorneys remain subject to the Model Rule provisions of Rule 5.4. The comment to the Model Rule states that the organizational and fee restrictions in the rule preserve the independence of an attorney's professional judgment.[15] Supporters of the rule maintain that the decisional hierarchy of a law firm must be structured so that a non-lawyer, who may be unaware of an attorney's ethical obligations, cannot influence a lawyer's professional decisions.[16] Otherwise, the non-lawyer might emphasize higher profits over client needs.

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[12] MODEL RULES OF PROFESSIONAL CONDUCT RULE 5.4(a) (1999). Model Rule 5.4(a) provides:

> A lawyer or law firm shall not share legal fees with a non-lawyer, 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 representatives of that lawyer the agreed upon purchase price; and
> (3) a lawyer or a law firm may include non-lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

[13] DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT RULE 5.4(b) (1999). The D.C. rules states:

> (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 non-lawyer 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;
> (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 non-lawyer participants to the same extent as if non-lawyer participants were lawyers under Rule 5.1;
> (4) The foregoing conditions are set forth in writing.

[14] DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT RULE 5.4 cmt. (1999).

[15] MODEL RULES OF PROFESSIONAL CONDUCT RULE 5.4 cmt. (1999).

[16] *Id.* This justification seems to have two underlying assumptions. First, a non-lawyer who managed an attorney would apparently be unable to comprehend or respect the ethical guidelines applicable to the practice of law. Second, an attorney in a practice managed by non-lawyers would almost certainly suspend consideration of the ethical rules.

B. Unauthorized Practice of Law Regulations

Non-lawyers also raise concerns about the unauthorized practice of law (UPL). Model Rule 5.5 prohibits the practice of law by a non-lawyer.[17] UPL restrictions recognize two exceptions: (1) the right to pro se representation and (2) the right of authorized professionals to represent clients before agency courts. For example, CPAs may practice before the Internal Revenue Service without committing a UPL violation.[18] However, non-lawyers may not engage in other activities that would normally constitute the practice of law.

UPL restrictions aim is to prevent unqualified individuals from providing erroneous legal advice to the public.[19] They also maintain the organized bar's monopoly on legal services by keeping CPAs and other professionals from drafting legal documents or providing legal advice at a similar or lower cost than attorneys. Although the definition of the practice of law varies by jurisdiction[20], UPL regulations effectively restrain accountants from providing most legal services. The ABA and the American Institute of Certified Public Accountants (AICPA) approved a statement in 1981 prohibiting accountants from drafting legal documents, but allowing them to offer "tax planning advice."[21]

C. Law-Related Businesses

The provision of law-related services may also be subject to the Model Rules under Rule 5.7. With two exceptions, this rule requires lawyers to provide law-related services in compliance with the Model Rules.[22] The first exception exempts from adherence law-related services that are sufficiently separate from the provision of legal services.[23] The second exception exempts the provision of law-related services when the services are provided by a separate legal entity and the lawyer takes adequate measures to ensure that the client knows that the services are not legal services and that the lawyer-client relationship does not apply.[24] The comments to Rule 5.7 note that a lawyer should make special efforts to ensure that the recipients of law-related services do not confuse law-related

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[17] Model Rules of Professional Conduct Rule 5.5 (1999). Model Rule 1.6(b) states that "[a] lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

[18] 31 C.F.R. §§ 10.0-10.3 (1998).

[19] *See generally Id.*

[20] Model Rules of Professional Conduct Rule 5.5 cmt. (1999).

[21] Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 Geo. J. Legal Ethics 217, 249.

[22] Model Rules of Professional Conduct Rule 5.7(a) (1999). Model Rule 5.7(a) provides:

> (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
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> (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
> (2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

[23] *Id.*

[24] *Id.*

services with legal services.[25] The Model Rules even recognize that legal and non-legal services may be inseparable in some cases.[26]

D. Conflict of Interest Requirements

In addition to the direct restrictions applicable to provision of joint services contained in the Model Rules, two other ethical constraints have a central role in the integration of legal and accounting services—conflicts of interest and client-lawyer confidentiality. Although they do not directly address non-lawyers, the Model Rules governing these two areas significantly impact the ability of lawyers and accountants to provide joint services due to the differences between the legal and accounting professions.

Conflict of interest regulations bind every practicing attorney. These rules attempt to proactively identify and avoid situations where the attorney owes a duty to two or more adverse parties. Model Rules 1.7, 1.8, 1.9, and 2.2 describe in excruciating detail the situations in which an attorney's loyalty could be compromised in either substance or appearance. Basically, an attorney is prohibited from representing a second client if the attorney already owes a duty to another client with an adverse interest. The conflict of interest regulations apply in all situations, even when the matter in question is unrelated to a previous representation.[27]

In the MDP environment, concerns revolve around imputed disqualification. Per Model Rule 1.10[28], when a conflict of interest disqualifies an attorney associated with a firm from representing a client, the firm's remaining lawyers are also disqualified. The accounting profession, however, does not subscribe to a similar rule.[29]

Critics of MDPs recite concerns regarding the conflict of interest difficulties that could arise if a firm provided both legal and auditing services to the same client. In that situation, an auditor's duty to provide an independent examination could be overshadowed by fear that a critical audit report would cause the client to remove both legal and auditing services from the firm.[30]

E. Confidentiality

Many of the most heated debates concerning the ethical conflicts between MDPs and the Model Rules focus on confidentiality requirements. Model Rule 1.6(a) contains the basic tenets of both the attorney-client privilege and client-lawyer confidentiality.[31] The rules concerning confidentiality generally forbid the disclosure of information related from a client to an attorney during the course of legal representation.[32] Respect for the confidentiality of communications between the lawyer and client assists in creating an environment where the client feels secure enough to provide the attorney with complete and accurate information, regardless of the potential embarrassment or legal significance.[33]

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[25] MODEL RULES OF PROFESSIONAL CONDUCT RULE 5.7 cmt. (1999).

[26] *Id.*

[27] *See* MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.7 (1999).

[28] MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.10(a) (1999). Model Rule 1.10(a) provides that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2."

[29] Fischel, *supra* note 9, at 965. Instead, the profession relies upon structural separation and Chinese walls to prevent adverse consequences from a conflict of interest. *See id.*

[30] Fischel, *supra* note 9, at 961.

[31] MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.6(a) (1999). Model Rule 1.6(a) states that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)."

[32] *Id.*

[33] MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.6 cmt.{4} (1999).

Model Rule 1.6 does not recognize a situation in which an attorney would be required to disclose client confidences or information.[34] Even the limited disclosures authorized by Model Rule 1.6(b) remain optional and left to the attorney's discretion.[35] Similarly, the American Institute of Certified Public Accountant's (AICPA) Code of Professional Conduct generally prohibits the disclosure of confidential client information without client consent.[36] In an audit situation, however, the rules governing accountants require the disclosure of financial misrepresentation, fraud, and other illegal acts. Thus, the difference in the disclosure standards adopted by the legal and accounting professions remains a potentially irreconcilable area.

Despite the different disclosure standards and other Model Rule restrictions against associations involving lawyers and non-lawyers, both law and accounting firms continue to experiment with different methods of joint practice in order to reap the benefits of MDPs without violating the existing disciplinary rules.

II. Incorporating Accounting Services Into a Law Firm

Law firms directly incorporate accounting services into their practices using three primary methods: (1) hiring an accountant, (2) owning an ancillary business that provides accounting services, and (3) investing in an accounting firm. Law firms also enter into strategic alliances with accounting firms using an organizational structure discussed in Part IV.

A. Law Firm Hires Accountant

Law firms routinely hire CPAs either intermittently or as full-time employees to assist with client engagements.[37] An accounting professional can assist an attorney by explaining complex financial issues or the tax ramifications of a particular legal strategy. With the increasing popularity of joint degrees, law firms enjoy the opportunity to obtain a dually licensed professional (e.g., CPA/JD).[38]

The Model Rules do not contain explicit prohibitions against a law firm hiring non-lawyer professionals. However, the prohibitions against fee splitting and non-lawyer partnership status may damage a law firm's ability to recruit and retain accounting professionals. According to the Model Rules, accountants employed by law firms must agree to work under the supervision of an attorney.[39]

In practice, law firms have developed compensation strategies that conform to the Model Rules in order to integrate accountants into the management hierarchy. For example, accountants may participate in the

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[34] Model Rules of Professional Conduct Rule 1.6(b) (1999). Model Rule 1.6(b) states:

> A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

[35] *Id.*

[36] American Inst. of Certified Public Accountants *Code of Professional Conduct*, [hereinafter AICPA Code] ET Section 301 (2000). The rule that "[a] member in public practice shall not disclose any confidential client information without the specific consent of the client." The rule then proceeds to list the limited exceptions to the general rule. These exceptions include audit findings, court issued summons and government requirements, peer review, or ethical investigations.

[37] *See generally Lawyers in CPAs' Clothing*, J. Acct., Oct. 1992.

[38] *See generally Id.*

[39] Model Rules of Professional Conduct Rule 5.3 cmt.[1] (1999). A supervising attorney is responsible for ensuring that non-lawyer assistants act in accordance with the ethical rules applicable to attorneys. The comment to the rule specifically mentions "secretaries, investigators, law student interns, and paraprofessionals." The inclusion of other professionals, such as accountants or engineers, into the personnel of a law firm is not specifically included in the areas addressed by the comment.

management of the law firm as long as they do not vote and may also be compensated with annually adjusted salaries. A compensation system, which coincidentally, parallels that of junior partners whom are compensated on a fee-splitting basis.[40]

B. Law Firm Owns an Ancillary Business Providing Accounting Services

A second method that law firms use to provide accounting services to their clients involves wholly-owned accounting subsidiaries.[41] The Model Rules allow law firms to own separate businesses that provide "law related services"--defined as "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer."[42] These ancillary businesses are not required to conform to the Model Rules if they meet either of the two exemption criteria discussed earlier. First, services are exempt if "distinct from the lawyer's provision of legal services to clients."[43] Second, a lawyer can form a separate legal entity and "take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist."[44] Examples of law-related businesses set forth in the comment to Rule 5.7 include financial planning, accounting, and tax preparation.[45]

A recent survey of the largest law firms in the United States found that a significant number of firms created ancillary businesses to provide their clients with a variety of non-legal services, including financial and accounting assistance.[46] For example, the law firm of Howrey, Simon, Arnold & White (Howrey Simon) offers consulting services through three ancillary businesses: Capital Accounting, Capital Economics, and Capital Environmental.[47] The Capital Accounting affiliate offers corporate clients expert accounting and financial services in a variety of areas including antitrust damage claims, reparations related to intellectual property transgressions, investigative accounting services, government contract cost and damage calculations, and international trade consultations.[48] The CPAs and financial advisors employed as litigation strategy consultants offer advice related to the provision and preparation of external expert testimony as well as their own expert testimony.[49] Howrey Simon clients may integrate these services with the firm's legal representation. The services are also offered on a contract basis to other law firms, corporate legal departments, and commercial clients.[50]

Other law firms developed strategies that parallel those of Howrey Simon. For example, Duane, Morris & Heckacher, a 400-lawyer firm based in Philadelphia, supports Corporate Accounting Services, an accounting and

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[40] *See CPA Firms Beware: Lawyers Are Now Diversifying, Too*, ACCOUNTING OFF. MGMT. & ADMIN. REP., Oct. 2000 (detailing the methods law firms have used to include engineers in the personnel structure of the firms).

[41] *Id.* (noting that over 10% of the 200 largest law firms in the United States operate one or more ancillary businesses).

[42] MODEL RULES OF PROFESSIONAL CONDUCT RULE 5.7(b) (1999).

[43] MODEL RULES OF PROFESSIONAL CONDUCT RULE 5.7(a)(1) (1999).

[44] MODEL RULES OF PROFESSIONAL CONDUCT RULE 5.7(a)(2) (1999).

[45] MODEL RULES OF PROFESSIONAL CONDUCT RULE 5.7 cmt.[9] (1999).

[46] Michael D. Goldhaber, *As ABA debates, MDPs are spreading*, NAT'L L. J., July 10, 2000, at A1. The firms with ancillary accounting businesses listed in the survey included well-known firms such as Choate, Hall & Stewart (forming Choate Investment Advisors), Holland & Knight L.L.P. (forming Holland & Knight Investigative Services) and Howrey Simon Arnold and White (forming a Capital Accounting subsidiary).

[47] *Consulting Services* <www.howrey.com/index.html> (Sept. 29, 2000).

[48] *Capital Accounting Overview* <www.howrey.com/index.html> (Sept. 29, 2000).

[49] *Id.*

[50] *Id.*

bookkeeping subsidiary that does not provide audit services.[51] In addition, Holland & Knight, a law firm based in Tampa that employs more than 1000 attorneys, owns H & K Holdings. This subsidiary acts as a holding company for Holland & Knights' numerous non-legal ventures, including H & K International Solutions, which provides "privatization legal services" in cooperation with the Big Five accounting firms.[52]

Law firms expanding into the accounting market rarely meet the criteria required to offer clients auditing-type services. The AICPA, which acts as an ethical regulatory body for accountants, does not prohibit fee splitting. However, the ethical rules promulgated in the Code of Professional Conduct require that accountants own a majority of any entity that offers financial statement certifications and attestations.[53] In addition, AICPA members are responsible for ensuring that non-CPA owners abide by the AICPA Code of Professional Conduct.[54]

C. Law Firm In Which Accounting Firm Has Financial Interest

The most progressive situation involving accounting and legal firms takes place when a law firm becomes financially linked to an accounting firm. The law firm of McKee, Nelson, Ernst & Young LLP in Washington D.C provides the first and most prominent U.S. illustrations of this arrangement. In 1999, the accounting firm of Ernst & Young enticed attorneys William McKee and William Nelson away from the law firm of King & Spalding to start a new firm--McKee, Nelson, Ernst & Young.[55] Ernst & Young's action was in response to requests from foreign affiliates for U.S. legal services.[56]

Ernst & Young provided the new legal firm with a well-known name, start-up funding, and access to Ernst & Young's clients, marketing strategies, technology, international presence, and goodwill.[57] The firms still remain independently chartered organizations with separate offices, billing, and filing systems.[58] In order to minimize conflict of interest concerns, Ernest & Young's audit clients are not admitted as clients of the law firm.[59] Additionally, although the McKee, Nelson, Ernst & Young firm may eventually expand to offer a full range of legal services, it currently only provides tax-related representation.[60]

Ernst & Young's outside counsel, a former chair of D.C.'s unauthorized practice of law committee, advised the accounting firm that the arrangement complied with all relevant ethical standards.[61] If the ABA later modifies the Model Rules to incorporate MDPs, the law firm of McKee Nelson Ernst & Young stands poised to convert easily into an MPD structure.

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[51] *See CPA Firms Beware, supra* note 40

[52] *See Id.*

[53] *See* AICPA Code, *supra* note 36, at Appendix B – Council Resolution Concerning Rule 505 – Form of Organization and Name.

[54] *Id.*

[55] Siobhan Roth, *How Ernst & Young Gave Birth To A Law Firm*, RECORDER, Nov. 11, 1999, at 3.

[56] Geanne Rosenberg, *Ernst & Young first to take MDP plunge; will it stand up over time?*, NAT'L L. J.., June 26, 2000 at B9.

[57] *Id.*

[58] *See E & Y Forms Ground-breaking Alliance with US Law Firm*, INT'L ACCT BULL., November 17, 1999 [hereinafter *Ground-breaking Alliance*]. Ernst & Young also provided a lease for both temporary and permanent office space, and "general building and administrative services, such as reception, janitorial and physical amenities, for which the firm will pay market rates."

[59] *Ground-breaking Alliance, supra* note 58.

[60] *Id.*

[61] Mark Hansen, *All Aboard for MDP Train: But accounting giant's financing of D.C. law firm could still derail* 86, A.B.A. J. (2000).

III. INCORPORATING LEGAL SERVICES INTO AN ACCOUNTING FIRM

Accounting firms utilize two primary methods to integrate a legal element into their services. In the United States, accounting firms routinely employ attorneys. Outside the United States, accounting firms developed legal subsidiaries. Accounting firms also developed strategic alliances with law firms in a manner that will be further explored in Part IV.

A. Accounting Firm Hires a Lawyer

The most direct and most popular method of providing legal services within the accounting setting entails the employment of an attorney by a CPA firm. The fact that accounting firms employ more lawyers worldwide than law firms evidences the popularity of this method.[62] Accounting firms offer attorneys increased salaries, less emphasis on acquiring new clients, and the ability to develop an extremely marketable specialty in tax law.[63]

Since the Model Rules forbid attorneys employed by accounting firms from the practice of law, the assignments that attorneys complete must be categorized as consulting, tax accounting, or some similar euphemism that differentiates these labors from the practice of law. Otherwise, the accounting firms would run afoul of state UPL statutes. The consulting or business planning services performed by attorneys include many tasks historically considered as the practice of law.[64] Most accounting firms take a conservative stance and refrain from employing attorneys to draft legal instruments or engage in litigation.[65] However, some accounting firms advocate a broad definition of consulting services, which includes most components of litigation such as initiating claims and negotiating settlements.[66]

The legal profession is largely unwilling to prosecute unauthorized practice of law claims against attorneys employed by accounting firms. [67] In practice, charges lodged against such employed lawyers are generally unsuccessful.[68] For example, in 1997, Arthur Andersen, LLC defeated judgment of an UPL complaint filed by the Texas Unauthorized Practice of Law Committee.[69]

State courts may be reluctant to aggressively enforce UPL provisions against accounting firms due to the difficulty of drawing a bright-line rule to differentiate the practice of law from other services.[70] In the post-World

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[62] Elijah D. Farrell, *Accounting Firms and the Unauthorized Practice of Law: Who Is the Bar Really Trying to Protect?*, 33 IND. L. REV. 599, 604(2000). Ernst & Young employees about 850 tax attorneys in the United States and approximately 3300 worldwide. In contrast, Baker & McKenzie, the largest traditional law firm in the United States, employees around 2400 lawyers, only some of which practice tax law.

[63] *Id.*

[64] Geoffrey C. Hazard, *The Ethical Traps of Accounting Firm Lawyers*, NAT'L L. J., Oct. 19, 1998, at A27 (noting that clients seem to prefer receiving tax services in an accounting environment due to reduced fees, less technical language, quicker results, and a more user-friendly environment).

[65] Gary A. Munneke, *A Nightmare on Main Street (Part MXL): Freddie Joins an Accounting Firm*, 20 PACE L. REV. 1, 7 (1999).

[66] Farrell, *supra* note 62, at 602.

[67] Munneke, *supra* note 65, at 11. However, the decision not to prosecute accounting firms for unauthorized practice of law violations is not universal. The opposing view was illustrated by a resolution introduced into the ABA House of Delegates by Delegate Jay Foonberg. If passed, this resolution would have required the ABA to devote 1 percent of the income received from member dues to the legal prosecution of accounting firms for the unauthorized practice of law. This proposal was later withdrawn.

[68] *Id.*

[69] *Id.* at 15. *See also* Farrell, *supra* note 62, at 613. In addition to performing "attorney only" services, Arthur Andersen employees had been filing petitions in the Tax Court.

War II era, the two professions drafted compacts that detailed the areas limited to each of the respective professions.[71] However, these agreements fell out of favor by the late 1970s.[72]

In 1991, the South Carolina Bar requested that the state supreme court approve a set of proposed rules. The rules listed the activities that constitute the practice of law in South Carolina. The court denied the proposal by noting that it would be unwise to define the practice of law by a set of rules.[73] The Model Rules mirror this more ambiguous approach in that the ABA declined to conclusively define the practice of law.[74] Another reason states might refrain from specifically detailing the practice of law versus the practice of accounting or other professional services is to avoid antitrust violations.[75] For example, it would probably constitute a prohibited restraint of trade if the law and accounting professions were to respectively divide the tax profession.[76]

Since a conclusive definition of the practice of law is not immediately foreseeable, lawyers employed by accounting firms will continue to operate in an uncertain environment. However, these concerns should be minimized for three reasons. First, the IRS supports the accounting firms' broader definition of consulting.[77] Second, professional-service clients seem to be creating a market demand for access to legal services through accounting firms.[78] Finally, the organized bar continues to spend time and resources debating the acceptability of MDP. Without a strong consensus within the profession, aggressive moves against the attorneys employed by accounting firms would only further divide members of the bar.

B. Accounting Firms Develop Legal Subsidiaries

Due to the ethical restrictions detailed in Part I, accounting firms remain prohibited from investing in law firms or developing legal subsidiaries within the United States. However, international accounting firms have acquired majority ownership interests in law firms in Europe, Australia, and Canada.[79]

III. Strategic Alliances

One of the most recent efforts to provide professional-service clients with integrated legal and non-legal services involves the formation of strategic alliances between law and accounting firms. In these alliances, an accounting firm and a law firm form a reciprocal agreement to refer clients to each other. These arrangements are usually deemed nonexclusive in order to avoid the potential impairment of the attorney's independent judgment. The referrals involved in strategic alliances do not involve referral fees or sharing client fees.

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[70] 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. *See also Gardner v. Conway*, 48 N.W.2d 788, 796 (Minn. 1951) (noting that the practices of accounting and law overlap in the field of income taxation).

[71] Munneke, *supra* note 65, at 3.

[72] *Id.*

[73] Farrell, *supra* note 62, at 606. *See also In re* Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 422 S.E.2d 123 (S.C. 1992).

[74] Model Rules of Professional Conduct Rule 5.5 cmt. [1] (1999).

[75] Gary A. Munneke, *Lawyers, Accountants, and the Battle to Own Professional Services*, 20 Pace L. Rev. 73, 80 (1999). *See also* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1, 15 (1981) (noting that bar associations have tended to avoid actions that conveyed the impression of a monopoly on legal services).

[76] *Id.*

[77] Munneke, *supra* note 75.

[78] *Id.*

[79] Munneke, *supra* note 46, at 7.

When a law firm forms a strategic alliance with a large accounting firm, the move attracts considerable media attention and analysis. The international law firm of Morrison & Foerster, based in San Francisco, and the Chicago boutique of Horwood, Marcus & Berk formed a strategic alliance with KPMG.[80] Under the alliance, in addition to referrals, the organizations share tax-consulting resources.[81] KPMG also formed a similar alliance with SALTNET, a group of state and local tax attorneys.[82]

Although strategic alliances involving large firms garner most media attention and professional scrutiny, regional legal and accounting firms are also entering into similar agreements. For example, in the last six months, two legal firms approached Gary S. Shamis, a partner in the Cleveland accounting firm of Satlz, Shamis & Goldbarg, about the possibility of forming a strategic alliance.[83] Smaller firms may be reluctant to publicize strategic alliances due to concerns about possible UPL violations.[84]

Dually licensed professionals also utilize strategic alliance methods to provide clients with both legal and accounting services without conflicting with the ethical rules. Some professionals who hold both CPA and attorney licensure operate two firms, often housed within the same building. Under this system, clients may use the services of "John Doe, CPA" and "Doe Law Firm." Using the legal separateness of the entities causes minimal practical effects on the client. As long as each firm maintains separate records that conform to the requirements of the respective professions, the practitioner has not violated the ethical codes of either profession.[85]

Generally, a law firm cannot offer the experience requirements necessary for an accountant to obtain CPA licensure. However, the law firm may be able to loan accounting staff to the CPA firm for a sufficient period of time to meet the experience requirements. When there is slow down in the need for accounting services at the law firm but the demand remains high for accounting at the accounting firm, the accountants are actually employed by the accounting firm. In addition to providing the experience requirements for CPA licensure, this move enables law firms to minimize the personnel costs associated with retaining accountants on staff, and also allows accounting firms additional personnel during peak periods without hiring full-time staff.[86]

Another interesting derivation of the traditional strategic alliance involves accounting firms who hire attorneys as part-time employees. The accounting firms then assist the attorneys in establishing law firms as a separate legal entity, even though the law firms are commonly housed inside the accounting firms' offices. When the attorneys complete work that does not constitute the practice of law, such as estate planning, they act as employees of the accounting firm and are compensated as such. When the attorneys need to perform tasks commonly considered the practice of law, such as drafting legal documents, they theoretically change employers and act as self-employed attorneys practicing within their own law firm. Since the law firm division and the accounting division maintain separate billing records and charge each other the market value for professional services and office overhead, the arrangement does not compromise the ethical rules applicable to attorneys. This arrangement, however, does illustrate a de facto MDP.[87]

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[80] Jack Baker, et al., *Multidisciplinary Practice: Big Changes Brewing for the Accounting Profession*, 70 CPA J. 14, 14 (2000).

[81] Brenda Sandburg, *MoFo Allies With Accounting Giant*, N.Y. L. J., Aug. 9, 1999, at 2.

[82] Baker, *supra* note 80.

[83] *Id.* Mr. Shamus is also the chair of the AICPA Management of Accounting Practice Committee.

[84] *Id.*

[85] Hazard, *supra* note 64, at A27.

[86] *See generally* Trepeck, *supra* note 37.

[87] *MDPs Now?*, J. OF ACCT., Feb. 2000 (providing a detailed analysis of the entire arrangement detailed in this paragraph).

IV. Conclusion

In most cases, attorneys and accountants can utilize thorough planning to structure the integrated provision of services without running afoul of the ethical rules governing their respective professions.[88] As law firms endeavor to provide clients with broader financial services, accounting firms continue to expand into the legal marketplace. Several of these arrangements create organizations that appear almost identical in substance to MDPs. De facto MDPs satisfy the technicalities included in the Model Rules, even if they violate the intent of the ABA.[89] As the MDP debate continues and accountants and attorneys strive to provide integrated services, we should not ignore the strong resemblance between the structures currently used in practice and the prohibited form of organization—the MDP.

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[88] Gary A. Munneke, *Dances with Non-lawyers: A New Perspective on Law Firm Diversification*, 61 Fordham L. Rev. 559, 567 (1997).

[89] J. Acct, *supra* note 87.

Transactions: Internet Jurisdiction and Forum Selection Clauses

By Aaron S. Guin*

From its inception as a channel of communication, and more recently as a commercial tool, the Internet has created obstacles with respect to legal notions of jurisdiction. Many courts have struggled with the jurisdictional aspect of the Internet. The current trend is to evaluate Internet jurisdiction based on a minimum contacts test. In order to limit its vulnerability to being summoned into inconvenient forums, an Internet business can incorporate forum selection clauses into its Internet transactions or contracts. When carefully drafted, a forum selection clause provides the procedural safeguard that protects the company from being hauled into a foreign jurisdiction for a cause of action arising out of the transaction.

I. Foundations of Personal Jurisdiction

Establishing personal jurisdiction over a nonresident defendant is reasonable when the defendant's presence is amenable to the court's jurisdiction and proper process is served.[1] A court has personal jurisdiction over a defendant when the long arm statute of the forum state[2] so provides, and when the application of that statute does not offend the Due Process Clause of the Constitution,[3] based upon the degree and nature of contacts that the foreign defendant has established with the forum state.[4]

The nature of the Internet has posed difficult questions in determining the degree and nature of contacts between those who provide and maintain Internet web pages and those who visit Internet sites.[5] The prevailing method for examining personal jurisdiction over foreign Internet website providers is a two-step process. The first step is to determine the site's degree of interactivity. The second step is to determine whether that interactivity is sufficient to establish the requisite minimum contacts to exercise personal jurisdiction over foreign defendants.

The United States Supreme Court has determined that personal jurisdiction over a non-resident defendant is only valid when that defendant has made an affirmative effort to avail itself of the privileges and benefits

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[1] DeMelo v. Toche Marine, Inc., 711 F.2d 1260, 1264 (5th Cir. 1983).

[2] Tenn. Code Ann. § 20-2-214 provides the following relevant language in its long-arm statute:

(a) Persons who are nonresidents of Tennessee and residents of Tennessee who are outside the state and cannot be personally served with process within the state are subject to the jurisdiction of the courts of this state as to any action or claim for relief arising from:
  (1) The transaction of any business within the state;
  (2) Any tortious act or omission within this state; . . .
  (5) Entering into a contract for services to be rendered or for materials to be furnished in this state;
  (6) Any basis not inconsistent with the constitution of this state or the United States...
(b) "Person," as used herein, includes corporations and all other entities which would be subject to service of process if present in this state.

[3] Mid City Bowling Lanes & Sports Palace, Inc. v. Ivercrest, Inc., 35 F. Supp. 2d 507 (E.D. La. 1999).

[4] *Id.* at 509.

[5] "Individuals sign onto the internet and surf through 'cyberspace,' often without an awareness or realization that they have legally traveled outside of their home . . . . Simply stated, courts will struggle with novel cyberspace jurisdictional issues because cyberspace communications turn the notion of territorial sovereignty on its head." Richard S. Zembek, Comment, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 Alb. L. J. Sci. & Tech. 339, 343, 348 (1996).

provided by the forum state. In commercial transactions, the Court has indicated that merely placing an item into the stream of commerce is an insufficient basis for establishing personal jurisdiction. The Court has required "something more" to exercise personal jurisdiction over a nonresident defendant, but has failed to specify what elements are necessary to qualify as "something more."[6] Therefore, deciding whether personal jurisdiction is properly exercised over a nonresident defendant requires that a court determine whether: (1) the nonresident defendant purposely availed himself of the jurisdiction of the forum state by establishing minimum contacts, (2) the nature and extent of those contacts allow for general or specific jurisdiction to be applied, and (3) the exercise of personal jurisdiction over the nonresident defendant comports with the essence of constitutional due process by not "offending traditional notions of fair play and substantial justice."[7]

II. Application to Internet Jurisdiction: The Cases Collected

A. In Connecticut – Mere Posting Was Enough

In Inset Systems, Inc. v. Instruction Set, Inc., a Connecticut plaintiff sought damages for trademark infringement because a Massachusetts defendant had established an Internet web page under the domain name "INSET.COM."[8] The United States District Court for the District of Connecticut held that the nonresident defendant purposefully availed himself of the jurisdiction of that court (and that of any other forum) by posting the business's toll-free telephone number on its website.[9] The Inset court rationalized the exercise of jurisdiction based on the notion that:

> [t]he Internet as well as toll-free numbers are designed to communicate with people and their businesses in every state . . . . Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. [The defendant] has therefore, purposefully availed itself of the privilege of doing business within Connecticut.[10]

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[6] *See* International Shoe Co. v. Washington, 326 U.S. 310, 316(1945)(the exercise of personal jurisdiction over a nonresident defendant is proper when that defendant has established "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.")(quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); Hanson v. Denckla, 357 U.S. 235, 253 (1958)([t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295-98 (1980)(while a state could exercise personal jurisdiction over a nonresident defendant who intentionally directed its activities toward that forum, mere forseeability that a product placed into the stream of commerce will enter the forum state is insufficient for personal jurisdiction); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)("'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts."); Helicopteros Nacionales v. Hall, 466 U.S. 408, 414 (1983)(specific jurisdiction is properly exercised when the claims asserted by a plaintiff arise directly from minimum contacts established by the foreign defendant with the forum state; the test for general jurisdiction is more rigorous than minimum contacts because such contacts must be of a "continuous and systematic" nature); Asahi Metal Industry Co., Ltd. v. Superior Court., 480 U.S. 102, 113 (1987)("A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution . . . and the shared interest of the several States in furthering fundamental substantive social policies.").

[7] Wilson v. Belin, 20 F.3d 644, 647 (5th Cir. 1994)(quoting Asahi Metal Indus., 480 U.S. at 113).

[8] *Id.* at 163. For an understanding of the importance of domain names, *see* MTV Networks, A Division of Viacom International, Inc. v. Curry, 867 F. Supp. 202 (S.D. N.Y. 1994):

> Internet domain names are similar to telephone number mnemonics, but they are of greater importance, since there is no satisfactory Internet equivalent to a telephone company white pages or directory assistance, and domain names can often be guessed. A domain name mirroring a corporate name may be valuable corporate asset, as it facilitates communication with a customer base.

Id. at 203-04 n. 2.

[9] 937 F. Supp. 161, 165 (D. Conn. 1996).

By finding that although no transaction took place over the Internet, the mere posting of a toll-free number on an Internet site constituted purposeful availment, the court stretched the understanding of purposeful availment to its extreme conclusion. The court concluded that the application of personal jurisdiction over the nonresident defendant was reasonable.[11]

B. But in New York it takes Targeted Activity

In the case of Bensusan Restaurant Corp. v. King, the United States District Court for the Southern District of New York examined the effect that a passive Internet web site had on personal jurisdiction.[12] Bensusan Restaurant Corporation ("Bensusan"), the operator of the New York jazz club, "The Blue Note," brought suit against Richard King for trademark infringement based on King's Internet web site advertising his own club of the same name located in Missouri.[13] The New York District Court dismissed the plaintiff's claims that the use of the plaintiff's trademark had an adverse effect on the New York club, noting that affidavits submitted by King indicated "that 99% of his patronage and revenue is derived from local residents . . . and that most of the few out-of-state customers have either an existing or prior connection to the area . . . ."[14] King's web site contained posted information regarding upcoming shows at the Missouri "Blue Note," a local phone number for ordering show tickets at the Missouri club, a disclaimer informing viewers that the Missouri "Blue Note" was not to be confused with the New York "Blue Note," and also a "hyperlink"[15] to Bensusan's New York "Blue Note" web site.[16] In its analysis of minimum contacts established by King's Internet site, the court held that "[t]he mere fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in New York."[17] The Bensusan court chose to rely on the rationale in World-Wide Volkswagen Corp., holding that, "[c]reating a [web] site, like placing a product in the stream of commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state."[18]

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[10] Inset, 937 F. Supp. at 165.

[11] *See Id.* at 165. The rationalization employed in *Inset*, while outside the scope of the *Zippo* test, has also been utilized by other courts. *See* Heroes, Inc. v. Heroes Foundation, 958 F. Supp. 1, 5 (D.C. 1996) (Internet site containing e-mail address and toll-free phone number is sufficient to warrant personal jurisdiction over nonresident defendant); *See also* Hasbro, Inc. v. Clue Computing, Inc., 994 F. Supp. 34 (D. Mass. 1997) (holding that posting of physical address, phone number, and e-mail address on Internet site, as well as a "hyperlink" to send instant e-mail to the defendant is sufficient to reasonably exercise jurisdiction nonresident defendant); Quality Solutions, Inc. v. Zupanc, 993 F. Supp. 621 (N.D. Ohio 1997) (Trademark infringement case holding that nonresident defendants' advertisement in international trade journal and maintenance of Internet site "represent deliberate attempts to solicit business" in forum state's market. *Id.* at 623).

[12] 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd* 126 F.3d 25 (2d Cir. 1997).

[13] *See* Bensusan, 937 F. Supp. at 297.

[14] *Id.* at 300.

[15] Hyperlinks are

> "highlighted text or images that, when selected by the user, permit him to view another, related Web document.' . . . With these links 'a user can move seamlessly between documents, regardless of their location; when a user viewing the document located on one server selects a link to a document located elsewhere, the browser will automatically contact the second server and display the document."

Id. at 298 n. 2 (citations omitted).

[16] *See* Bensusan, 937 F. Supp. at 297-98.

[17] *Id.* at 299.

[18] *Id.* at 301.

C. In the Sixth Circuit, Two Acts are "Purposeful Direction"

In Compuserve, Inc. v. Patterson, the United States Court of Appeals for the Sixth Circuit examined an Ohio federal district court's jurisdiction over a Texas resident on issues of trademark infringement and unfair business practices conducted over the Internet.[19] Compuserve sought a declaratory judgment that it was neither involved in unfair competition nor infringing on the trademark of one of its network subscribers, Patterson.[20] Relying on the concept of "purposeful availment" established in Burger King,[21] the Sixth Circuit found Patterson's contacts with Ohio via the Internet sufficient to reasonably subject Patterson to jurisdiction in Ohio.[22] Had Patterson merely either entered into a contract with Compuserve or placed his software into the "stream of commerce," the court would not have found personal jurisdiction over Patterson in Ohio. However, the court held that the two acts together, along with the considerations of the nature of the business dealings over the Internet with Compuserve, indicated that Patterson had directed his business toward an Ohio corporation.[23] The court also rejected Patterson's argument that, because the business dealings took place over the Internet, he had no actual, tangible contacts with Ohio.[24]

D. The Effects Test

A more recent development in Internet jurisdiction cases, however, is the application of the "effects test,"[25] first put forth in Calder v. Jones.[26] The "effects test" has provided insight into determining what constitutes the "something more" required to exercise jurisdiction over providers of passive web sites that contain advertisements.[27] In Panavision International, L.P. v. Toeppen, the United States District Court for the Central District of California applied the "effects test"[28] to exercise jurisdiction over the nonresident defendant for

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[19] 89 F.3d 1257 (6th Cir. 1996).

[20] Compuserve, 89 F.3d at 1259-60.

[21] 471 U.S. 462 (1985). "Thus where the defendant 'deliberately' has engaged in significant activities within a State, or has created 'continuing obligations' between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Id.* at 475-76 (citations omitted).

[22] 89 F.3d at 1263-67.

[23] *Id.* at 1265.

[24] *Id.* at 1264-65.

[25] Michael J. Dunne & Anna L. Musacchio, *Jurisdiction over the Internet*, 54 Bus. Law. 385, 396 (1998).

[26] 465 U.S. 783 (1984). *Calder* held that the defendants were subject to personal jurisdiction in California because defamatory statements they wrote in a magazine article, directed toward the California plaintiff, were thereby intentionally directed toward the forum state of California because,

> they knew that the brunt of [the] injury would be felt by respondent in the State in which she lives and works . . . . An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.

Id. at 789-90.

[27] Dunne & Musacchio, *supra* note 25, at 396.

[28] The *Panavision* court defined the effects test in the following manner: "[J]urisdiction 'can be predicated on (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state.'" 938 F. Supp. 616, 621 (C.D. Cal. 1996)(quoting Core-Vent Corp., v. Nobel Industries *AB*, 11 F.3d 1482, 1486 (9th Cir. 1993).

"cybersquatting."[29] The Panavision court rationalized that, because the defendant's actions were directed toward the plaintiff, and thus toward the plaintiff's forum state, the exercise of personal jurisdiction over the defendant was reasonable.[30] Thus, in determining the nature of Internet contacts, courts may classify web sites as commercial, passive, or interactive, but may also ascertain the intent of the web page provider in its assessment of reasonable exercise of personal jurisdiction.

E. Move Over International Shoe Boxes: The "Zippo" Interactivity Spectrum

The case of Zippo Mfg. Co. v. Zippo Dot Com, Inc. remains the most insightful examination of the changing face of the Federal Rules of Civil Procedure as affected by issues of Internet jurisdiction.[31] The Zippo court classified Internet web sites based on a sliding scale of "interactivity," consisting of primarily three groups: commercial, interactive, and passive.[32] The court used this scale to determine whether there was valid personal jurisdiction, and whether such jurisdiction was general or specific. Commercial Internet web sites are those where contracts and agreements are formed between web site providers and consumers wishing to buy products or services from the provider via the website.[33] The Zippo court held that, in circumstances where web page providers entered into contracts with customers over the Internet, such providers would be subject to personal jurisdiction in forum states where the customers reside.[34]

At the opposite end of the scale from commercial cites are passive web sites where providers merely "post" information on the Internet site, and there is no occasion for viewers to interact with a web page provider over the Internet.[35] In these cases, the provider of a passive web page would not be subject to a state's long-arm statute simply because a resident of that jurisdiction viewed information on that web site.[36]

Finally, located between the two extremes are interactive websites—where "the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[37] Internet sites that might be considered interactive would include sites where customers enter into dialogues with the commercial web page provider via e-mail and therein simply discuss the market or even potential business transactions.

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[29] "Cybersquatters are 'individuals that attempt to profit from the Internet by reserving and later reselling or licensing domain names back to the companies that spent millions of dollars developing the goodwill of the trademark.'" Hearst Corp. v. Goldberger, No. 96 Civ. 3620, 1997 WL 97097, at *18 (S.D.N.Y. Feb. 26, 1997) (quoting Intermatic Inc. v. Toeppen, No. 96 Civ. 1982, 1996 WL716892 at *6 (N.D. Ill. Nov. 26, 1996).

[30] Panavision, 938 F. Supp. at 622. Although the court makes the distinction that Toeppen was not "'doing business' in California via the Internet," the rationale of the effects test in *Panavision* has also been used in other cases. *Id.* *See* EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd., 947 F. Supp. 413 (D. Ariz. 1996). *But see* Conseco, Inc. v. Hickerson, 698 N.E. 2d 816 (Ind. Ct. App. 1998)(refusing to apply the effects test to a corporation, reasoning that it "does not apply with the same force to a corporation as it does to an individual because a corporation's harm is generally not located in a particular geographic location as an individual's harm would be." *Id.* at 819).

[31] 952 F. Supp. 1119 (W.D. Pa. 1997).

[32] Zippo, 952 F. Supp. at 1124.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

F. Zippo's Followers

Applying the three-group "interactivity" guidelines of Zippo, the United States District Court for the Eastern District of Louisiana held in Mid City Bowling Lanes & Sports Palace, Inc. v. Ivercrest, Inc. that jurisdiction may not be exercised over a nonresident defendant for simply creating a "passive," and merely informational, web site on the Internet. The court further held that, although the web site was accessible to viewers across the globe, the advertising of bowling lanes on the Internet was intended to promote an activity local in nature.[38] Although Ivercrest's web site provided a local phone number so that patrons could obtain information regarding its bowling activities, it is readily clear that the Mid City court would reject the Inset rationale that solely posting a phone number (even a toll-free number) on a web site, without more, would justly the exercise of personal jurisdiction over a nonresident defendant.[39] Mid City held that although Ivercrest was a company with an interest in advertising its business (albeit in Chicago), it had not directed its efforts toward Louisiana.[40]

Like most cases, Mid City follows the "interactivity" rationale of Zippo, determining whether the Ivercrest Internet site was commercial, interactive, or merely passive in character. Mid City limits its holding to only those Internet sites that would be classified as "passive" under the guidelines established in Zippo, and does not expound further on Internet jurisdictional issues. The Mid City court determined that because Ivercrest was not selling anything over its web site, and because there was no possible way for viewers of the Ivercrest web site to have direct contact with Ivercrest (unless the viewer initiated contact by calling Ivercrest at the listed Chicago telephone number), jurisdiction could not be exercised over Ivercrest.[41]

By limiting the reach of personal jurisdiction over nonresident providers of Internet web pages to commercial and highly interactive sites, courts like the Mid City court, accommodate and encourage the open and expressive nature of the Internet.[42] In using these tests, courts have attempted to define Internet "minimum contacts" by determining the purpose and nature of the web site.

III. Do the Current Standards Lack the Necessary "Something More"? General vs. Specific Jurisdiction Analysis

The difficulty with some Internet jurisdiction cases is their evaluation of defendants' contacts under the doctrine of general jurisdiction. The rule established in Helicopteros Nacionales[43] requires that when the claims asserted are not related to the contacts established with the forum state, "continuous and systematic" contacts must be established to exercise personal jurisdiction over a nonresident defendant. Unfortunately, courts may have a tendency to automatically assume that all Internet contacts are "continuous and systematic," simply because Internet sites are available in every jurisdiction, 24 hours a day, every day of the year.[44] With respect to the

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[38] 35 F. Supp. 2d at 510.

[39] *Id.* at 512.

[40] *Id.* at 510.

[41] *Id.* at 512.

[42] The United States District Court for the Southern District of New York noted in Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc. that the defendant could not:

> be prohibited from operating its Internet site merely because the site is accessible from within one country in which its product is banned. To hold otherwise 'would be tantamount to a declaration that this Court, and every other court throughout the world, may assert jurisdiction over all information providers on the global World Wide Web.' Such a holding would have a devastating impact on those who use this global service. The Internet deserves special protection as a place where public discourse may be conducted without regard to nationality, religion, sex, age, or to monitors of community standards of decency.

939 F. Supp. 1032, 1039-40 (S.D.N.Y. 1996).

[43] Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 415, 416 (1983).

Internet, this application of jurisdiction ignores the "something more" required under the Supreme Court's modern analysis. The more appropriate way to evaluate Internet jurisdiction is to simply limit the court's examination to the principles of specific jurisdiction.[45]

Analysis under specific jurisdiction accommodates the myriad of possible claims that may arise under Internet law, while still giving consideration to the special nature of the Internet. A website provider of Internet gambling provides an excellent example.[46] Although the Internet contacts established by the gambling site are continuously available to residents of any state with access to the Internet, the assumption that these contacts are sufficient to establish general jurisdiction over the nonresident defendant takes for granted the continuously interconnected nature of the Internet. Instead, courts should assume that all web page providers intend to establish contacts with every forum by establishing Internet sites. However, the courts should limit jurisdictional claims to those of specific jurisdiction — requiring that the cause of action originate from contacts established with the forum by the Internet site. Only then may a court properly evaluate whether an Internet web site's "level of interactivity" is sufficient to subject a foreign website provider to jurisdiction in the plaintiff's forum state.

III. The Effect of Forum Selection Clauses on Internet Jurisdiction

The above analysis would prove effective in almost every situation where a claim arises from the Internet contacts of a defendant in the plaintiff's forum state. The use of forum selection clauses, however, returns the analysis to more traditional models of evaluating jurisdiction. The Supreme Court case Carnival Cruise Lines, Inc. v. Shute[47] is the central case for the validity of forum selection clauses against the claims of an aggrieved contracting party. In Carnival, the Shutes sued in the United States District Court for the Western District of Washington for injury resulting from the alleged negligence of Carnival while the Shutes were vacationing on a Carnival cruise ship.[48] The tickets for the Shutes' cruise were purchased through a Washington travel agent, but a forum selection clause printed on the tickets exclusively limited jurisdiction for all claims to courts located in the state of Florida.[49]

On appeal from the Court of Appeals for the Ninth Circuit, the Supreme Court held that the acceptance of the travel tickets[50] was an acceptance of the provisions of the forum selection clause. Therefore, jurisdiction in

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[44] Where a defendant is generally present in the forum, the defendant is subject to personal jurisdiction in the forum's courts for any cause of action that arises anywhere in the world. Personal jurisdiction will attach even if a defendant's contacts with the forum are not directly related to the cause of action. Due to this all-encompassing jurisdictional power, a court's exercise of personal jurisdiction over a generally present user would always comport with due process limitations, even in cyber-actions. Zembek, *supra* note 5, at 349.

[45] Richard Zembek supports this opinion, arguing that specific jurisdiction is the appropriate route to take when analyzing jurisdiction in what he calls "cyber-actions." Zembek notes that, as compared to general jurisdiction, "[s]pecific jurisdiction . . . is a fact-specific inquiry as to whether a forum's assertion of personal jurisdiction over a non-resident defendant, under the particular facts of a given case, comports with due process." *Id.* at 349. An application of specific jurisdiction therefore provides an adequate means of analysis of Internet contacts with the forum state.

[46] For a look into an actual case dealing with personal jurisdiction over a provider of Internet gambling, see Minnesota v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431 (Minn. Dist. Ct. Dec. 11, 1996). *See also* Seth Gorman & Antony Loo, *Blackjack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 Loy. L.A. Ent. L.J. 667 (1996)(Discussing the basic jurisdiction and law enforcement problems associated with Internet gambling, yet suggesting possible solutions). Gorman & Loo, however, disagree with the proposition that specific jurisdiction is the proper means of Internet jurisdictional analysis, arguing instead that general jurisdiction is the proper method so that Internet gambling site providers will be liable in all instances where a claim arises. *Id.* at 709.

[47] 499 U.S. 585 (1991).

[48] 499 U.S. at 588.

[49] *Id.* at 587-88.

Carnival was limited exclusively to courts in the state of Florida.[51] The Court's decision in Carnival rejected the Ninth Circuit's "determination that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining."[52] However, the Court held that "forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness."[53]

The Court considered several factors in determining that the forum selection clause was to be upheld: (1) whether the clause deterred parties from bringing legitimate claims, (2) whether "accession to the forum clause [was obtained] by fraud or overreaching," and (3) whether adequate notice of the forum selection clause was provided to the contracting party.[54] In the absence of these factors, forum selection clauses are deemed to be reasonable and, therefore, valid approaches for a party to limit its exposure to litigation in undesirable forums.

Forum selection clauses are not applicable in all situations, however. When causes of action are the result of a party's action made outside of the contract, forum selection clauses are likely to be ineffective and inapplicable.[55] For example, many Internet jurisdiction cases are based on copyright or trademark infringement where the parties have not contracted for the use of the copyrighted work or trademark. Forum selection clauses in these cases are non-existent and would have no effect upon the forum chosen. In these situations, courts should apply modern Internet jurisdictional analysis to determine whether a website provider could be hauled into that forum as a defendant.

Internet website providers who allow web users to enter contracts via their website must take reasonable precautions to ensure that the forum selection clause effectively limits the forums in which a claim may be brought. In Loudon Plastics, Inc. v. Brenner Tool & Die, Inc.,[56] the plaintiff was successful in defeating the defendant's motion to dismiss for lack of personal jurisdiction and improper venue; however, the court noted that the plaintiff's forum selection clause was "permissive, not mandatory."[57] According to the Loudon court, "[a]n exclusive or mandatory forum selection clause revokes jurisdiction from all forums except those specifically identified in the clause, and must be enforced . . . . An exclusive clause is created by the addition of any language clearly narrowing jurisdiction and venue exclusively to the identified forum."[58] Thus, when a website provider is attempting to limit the jurisdiction in which it may be brought into court. The forum selection clause should not be permissive and it should contain language limiting jurisdiction to an exclusive and specific forum. It may be particularly helpful to provide that where federal subject matter jurisdiction is not available, a specific state forum shall serve as the exclusive jurisdiction for the hearing of all claims under the contract.

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[50] On the face of each ticket was the language, "TERMS AND CONDITIONS OF PASSAGE CONTRACT TICKET . . . 3. (a) The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket." *Id.* at 587.

[51] *Id.* at 596.

[52] *Id.* at 593.

[53] *Id.* at 595.

[54] *Id.*

[55] *Cf.*, Graves, et al. v. Pikulski, et al., No. 99cv-04296-JLF, 2000 U.S. Dist. LEXIS 14406, at *12 (S.D. Ill. Aug. 30, 2000).

[56] 74 F. Supp. 2d 182 (N.D.N.Y. 1999).

[57] Loudon, 74 F. Supp. at 185. The forum selection clause at issue in *Loudon* was located on the reverse side of a written contract stating: "Any action brought hereunder may be brought or transferred to the County of Albany." *Id.*

[58] *Id.*

The following forum selection clause was effective in supporting a defendant's motion for transfer to a proper venue:[59]

> Governing Law. Registrant agrees that this Registration Agreement shall be governed in all respects by and construed in accordance with the laws of the Commonwealth of Virginia, United States of America. By submitting this Registration Agreement, Registrant consents to the exclusive jurisdiction and venue of the United States District Court for the Eastern District of Virginia, Alexandria Division. If there is no jurisdiction in the United States District Court for the Eastern District of Virginia, Alexandria Division, then jurisdiction shall be in the Circuit Court of Fairfax County, Fairfax, Virginia.[60]

Similarly, in Caspi v. The Microsoft Network, L.L.C.,[61] the Superior Court of New Jersey, Appellate Division, upheld a forum selection clause included in an online contract. The plaintiffs brought suit against The Microsoft Network ("MSN") and Microsoft Corporation "for various theories including breach of contract, common law fraud, and consumer fraud in the way Microsoft had 'rolled over' MSN membership into more expensive plans . . . charg[ing] them increased membership fees attributable to a change in service plans."[62] The Caspi court refused to apply separate standards for written and Internet contracts, stating that "[t]he scenario presented here is different because of the medium used, electronic versus printed, but, in any sense that matters, there is no significant distinction . . . . The plaintiffs in this case were free to scroll through the various computer screens that presented the terms of their contracts before clicking their agreement."[63]

After first considering New Jersey law, the court held that it would "decline to enforce a [forum selection] clause only if it fits into one of three exceptions to the general rule that forum selection clauses are "prima facie valid and enforceable."[64] "First, the clause is a result of fraud or [overbearing] bargaining power; second, enforcement would violate the strong public policy of New Jersey; and third, enforcement would seriously inconvenience trial."[65]

The court found that, based on New Jersey law, forum selection clauses are not, as a general matter, contrary to public policy.[66] The court also determined that the plaintiffs, attempting to be certified as a class,[67] include MSN members from many different locations, and therefore the forum in Washington was not any more of an inconvenience to the plaintiffs' class than New Jersey.[68]

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[59] Killgallen d/b/a LJK Software, Inc. v. Network Solutions, Inc., 99 F. Supp. 2d 125 (D. Mass. 2000).

[60] *Id.* at 127.

[61] No. A-2182-97T5, 1999 N.J. Super. LEXIS 118 (N.J. Super. July 2, 1999).

[62] Caspi, 1999 N.J. Super LEXIS 254, at *3. Microsoft's alleged action is referred to as "'unilateral negative option billing,' a practice condemned by the attorneys general of twenty-one states, including New Jersey's, with regard to a Microsoft competitor, America Online, Inc." *Id.*

[63] *Id.* at *11-12.

[64] *Id.* at *5 (citing McNeil v. Zoref, 297 N.J. Super. 213, 687 A.2d 1052 (App. Div. 1997)).

[65] *Id.*

[66] *Id.* at *8.

[67] *Id.* at *3. "The four named plaintiffs are members of [the Microsoft Network Internet service]. Two reside in New Jersey; the others in Ohio and New York. Purporting to represent a nationwide class of 1.5 million similarly aggrieved MSN members, plaintiffs, in May 1997, moved for multi-state class action certification." *Id.*

Relying on the Supreme Court's decision in Carnival, the court also failed to recognize oppressive bargaining power on the side of MSN, noting that:

> a corporate vendor's inclusion of a forum selection clause in a consumer contract does not in itself constitute overweening[69] [sic] bargaining power. In order to invalidate a forum selection clause, something more than merely size difference must be shown. A court's focus must be whether such an imbalance in size resulted in an inequality of bargaining power that was unfairly exploited by the more powerful party.[70]

The court recognized that with the many Internet service providers available to consumers, the plaintiffs "were given ample opportunity to affirmatively assent to the forum selection clause . . . [and] 'retained the option of rejecting the contract with impunity.'"[71]

Finally, the Caspi court examined whether the plaintiffs were given adequate notice of the forum selection clause in the electronic contract. The court held that although the forum selection clause was located in the final paragraph of the contract and was presented in lower case typeface like most of the other contract provisions:

> [t]o conclude that plaintiffs are not bound by that clause would be equivalent to holding that they were bound by no other clause either, since all provisions were identically presented. Plaintiffs must be taken to have known that they were entering into a contract; and no good purpose, consonant with the dictates of reasonable reliability in commerce would be served by permitting them to disavow particular provisions or the contracts as a whole.[72]

Thus, forum selection clauses will be upheld as valid whenever the maker of the clause makes the provision clear that jurisdiction in claims arising out of the contract will be limited to the exclusive jurisdiction provided in the forum selection clause. Without thoughtful drafting, ineffective forum selection clauses place Internet transactions at the mercy of still-developing Internet jurisdiction case law. In such situations where forum selection clauses are ineffective or non-existent, courts will likely return to an analysis similar to that in Zippo, limiting jurisdiction only to those situations where Internet web sites provide for the formation of contracts and/or significant commercial interaction between the consumer and the Internet business.

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[68] *Id.* at *8-9.

[69] The court uses the term "overweening" apparently as a synonym for oppressively burdensome.

[70] Caspi, 1999 N.J. Super LEXIS 254, at *6-7 (citations omitted).

[71] *Id.* at 7-8 (citing Carnival, *supra*, at 595).

[72] *Id.*

Synopses

Debtor-Creditor

Transfers of Marital Property Under a Separation Agreement Are Not Immune From Avoidance, *In re Fordu*, 201 F.3d 693 (6th Cir. 1999).

By Jennifer Pierson

In the case of *In re Fordu*, the Sixth Circuit Court of Appeals held that a bankruptcy trustee may seek avoidance of certain transfers of marital property by a debtor to his former wife under a separation agreement determined to be fair, just, and equitable by the state domestic relations court.

After filing a petition to dissolve their marriage, Mr. and Mrs. Fordu executed a settlement agreement that conveyed the marital residence and all future rights in certain lottery proceeds to Mrs. Fordu. In return, Mrs. Fordu waived any claim to alimony or interest in Mr. Fordu's upcoming restaurant venture. The state domestic relations court entered an agreed dissolution decree that incorporated the separation agreement and found it to be fair and equitable. Two years after the dissolution was decreed, Mr. Fordu filed Chapter 7 bankruptcy. The trustee for the bankruptcy court sought to avoid the transfers as fraudulent or preferential transfers under state law.

The bankruptcy court held that the lottery proceeds were the separate property of Mrs. Fordu, not marital property. Therefore, Debtor held no interest in the proceeds that the Trustee could acquire. The court also held that Trustee was precluded from litigating the issue of whether the challenged transfers were made in exchange for reasonably equivalent value because the domestic relations court deemed the separation agreement to be a fair and equitable settlement.

The Bankruptcy Appellate Panel (BAP) reversed. The BAP held that Mr. Fordu had an interest in the lottery proceeds at the time of the transfer because property acquired during a marriage is marital property. The BAP also determined that the separation agreement did not preclude the Trustee from litigating the issue of whether the challenged transfers were made in exchange for reasonably equivalent value.

On appeal, the court of appeals affirmed and found that the dissolution decree was consensual. The issues it addressed had not been actually litigated and were not entitled to preclusive effect. Further, the Trustee, for claim preclusion purposes, was not in privity with the Debtor, Mr. Fordu. Finally, even if the issue had been litigated, a determination that the value was fair and just in a divorce proceeding is not the same as a finding of reasonably equivalent value in a bankruptcy proceeding.

This case shows that, when property acquired during marriage is transferred during dissolution proceedings, those proceedings do not necessarily prevent a bankruptcy trustee of one of the divorcing parties from attempting to avoid and recover the transfers. Attorneys assisting in the agreed transfer of marital assets should advise their clients to include details showing reasonably equivalent value on both sides of an exchange. This may not bar future attempts to void the transfer, but it may assist in defending the transfer. Attorneys for potential debtors should warn the clients of the potential that a trustee may scrutinize and challenge any recent property transfers upon filing.

Employment

Assignment of Employment Contracts Does Not Constitute Modification, *Managed Health Care Assocs. v. Kethan*, 209 F.3d 923 (6th Cir. 2000).

By Kirk Moore

The United States Court of Appeals for the Sixth Circuit held that an assignment of an employment contract by the employer does not modify the terms of an employment contract. The assignment, the court stated, constitutes "a separate agreement between the assignor and assignee which merely transfers the assignor's contract rights, leaving them in full force and effect as to the party changed."

The main issue before the Sixth Circuit was whether or not the assignment of Kethan's employment contract by MedEcon to Managed Healthcare Associates (MHA) constituted a modification, and, in turn, a nullification, of the terms of the contract when the contract provided that "no waiver, alteration, or modification of any of the provisions of this Agreement shall be valid unless in writing and signed by both of the parties hereto," and Kethan did not "sign off," or agree in writing to the assignment. Kethan claimed that the assignment of his employment contract itself would essentially modify its terms, and that any modification would have to be ap-

proved by him and MHA in writing before they would become valid, as stated in his employment contract. The Sixth Circuit, however, reasoned that Kethan's contractual rights and duties, as an employee, did not change. The only change occurred with respect to the "entity now entitled to enforce the terms and conditions that Kethan had previously agreed to when he entered into his employment agreement." The court concluded that an assignment to MHA would not modify the contract, and thus, would not require an agreement in writing by the parties to agree to the assignment. The Sixth Circuit went on to further state that, "assignments and modifications [of contracts] are completely different concepts, and that assignability is not impacted by 'boilerplate' modification provisions [in the contract]."

As the case illustrates, the mere fact that a business, corporation, or any other entity, for that matter, is acquired or sold, does not serve as a modification, or legally affect or alter the terms of an existing employee's employment contract. It follows that a contract that is either silent or contains "boilerplate" language as to assignability will be considered valid, unchanged, and fully enforceable against the employee.

Estate Planning

Disclaiming After the Transfer, *Hull v. Johnson*, No. W1999-02011-COA-R3-CV; 1999 Tenn. App. LEXIS 856; 1999 WL 1336086 (Tenn. Ct. App. 1999).

By Stephen R. Johnson

Is a partial disclaimer of funds timely filed when the disclaimer is made *after* a transfer of those funds? Can a surviving spouse validly disclaim property she and her husband held in a bank account as tenants by the entirety after the husband's death? The Tennessee Court of Appeals answered both questions in the negative.

Before his death, William T. Hull and his wife Sarah consulted with an attorney in preparing an estate plan. Their attorney prepared a plan providing that if Mr. Hull died first, his last will and testament would leave the maximum credit shelter amount of $600,000.00 in equal shares to three daughters by a prior marriage. When Mr. Hull passed away in August of 1994, Sarah Hull served as executrix. Since the estate account held insufficient funds to make the complete $600,000.00 cash bequest to Mr. Hull's daughters, Sarah Hull transferred $200,000.00 from an account she had held with her husband as "joint tenants with right of survivorship" to the estate account in November of 1994. Almost six months later, in May of 1995, Mrs. Hull filed a partial disclaimer renouncing and refusing to accept any interest in most of the transferred amount.

The Tennessee Department of Revenue challenged the partial disclaimer. Mrs. Hull paid an assessed gift tax amount determined by the state and subsequently filed a complaint for a refund plus any accrued interest. After a bench trial, the chancellor found that Mrs. Hull did not file an effective partial disclaimer because she transferred the funds prior to the expiration of the period in which she was permitted to disclaim. Mrs. Hull appealed the chancellor's decision, raising for review the issues of (1) whether she filed a timely and effective partial disclaimer of funds, and (2) whether she could disclaim funds on deposit in a joint bank account held with her husband which had a right of survivorship upon the husband's death.

Disclaimers are governed by Tenn. Code Ann. § 31-1-103 (Supp. 1998). The statute states that any "assignment, conveyance, encumbrance, pledge, or transfer of property or an interest therein or any contract therefor" made before the end of the nine-month disclaimer period, pursuant to Tenn. Code Ann. § 31-1-103(b)(2), bars the right to disclaim the property. Tenn. Code Ann. § 31-1-103(d)(1) (Supp. 1998). The appellate court held that because Mrs. Hull transferred the $200,000.00 nearly six months prior to filing the partial disclaimer, she is barred from any right to disclaim the property under this statute. This resolved the first issue in favor of the state.

Pursuant to Tenn. Code Ann. § 31-1-103(a) (Supp. 1998), a person may disclaim all or part of their interest in property if they receive property as a gift from a decedent's estate upon the exercise of a power of appointment, as the result of another person's disclaimer, under any other type of gratuitous transfer, as a designated beneficiary on a pay-on-death account or similar deferred compensation agreement, or as a fiduciary holding powers as a fiduciary. The appellate court found that Mrs. Hull and her husband owned the joint account as tenants by the entirety. This status did not satisfy any of the statutory criteria because Mrs. Hull was in possession of the funds from the account's inception and did not receive any new or additional interest in the joint account when her husband died. Thus, she was not a recipient of property and was not qualified to disclaim, and the state prevailed on the second issue as well.

The Hull family's predicament should serve as a warning for estate planners not only to ascertain the value of

a client's assets, but also to understand the ownership nature and use of those holdings. In hindsight, if the account at issue had been changed to one held solely by Mr. Hull, and then had that account been devised to Mrs. Hull in Mr. Hull's will, then Mrs. Hull could have effectively filed a disclaimer. Alternatively, instead of changing the ownership of the account, adequate funds to cover any expected shortfall in Mr. Hull's estate could have been withdrawn from the joint account before his death and deposited in a separate account, of which he was the sole owner. An investigation of not only the value of a client's assets but also the ownership and nature of those assets might alert a careful estate planner to any funds shortage while also providing that planner with several alternatives as a solution to this problem.

Real Estate

Doctrine of Merger in Deeds of Conveyance Will Not Protect Fraud, *Continental Land Company, Inc. v. Investment Properties Company*, No. M1998-00431-COA-R3-CV, (Dec. 10, 1999); 1999 Tenn. App. LEXIS 810; 1999 WL 1129025 (Tenn. Ct. App. 1999).

By Jeremy Cherry

The Court of Appeals of Tennessee held that the doctrine of merger will not resolve discrepancies between an executory contract for the sale of real property and the subsequent transfer deed where the differences in the deed result from the fraudulent behavior of one of the parties to the transaction. In a transaction for the sale of real property, the doctrine of merger provides that the terms set forth in the deed of conveyance govern the transaction, notwithstanding the existence of a prior executory sales agreement between the parties. The application of this doctrine was at issue, in this case, where one of the parties to the transaction deliberately prepared the deed to convey less property than was originally promised in the sales contract and used his superior knowledge and experience to conceal the discrepancies from the unsuspecting purchaser.

In *Continental Land*, Mr. Joseph Godochik, a real estate investor and owner of Continental Land Company, entered into a sales agreement for the purchase of a sizable tract of land with Investment Properties Company. Mr. Robert Brown, a partner in Investment Properties and a licensed attorney whose practice was almost exclusively in real estate, drafted the contract to reflect the parties' negotiated terms. A few days prior to the closing date, agents of both parties met in Mr. Brown's office for a pre-closing conference to review the deed and other documents involved in the sale. Although Mr. Brown drafted and signed the deed, he did not explain the description contained in the deed or review the documents with the agents. The agents, who were not attorneys and were inexperienced at reading deeds, had trouble following the description and comparing it to the plat given them by Mr. Brown. Furthermore, Mr. Brown did not indicate to the agents, who were under the assumption that the deed conformed to the sales contract, that some of the provisions in the deed were inconsistent with the terms of the contract. As a result of these deliberate changes, which were inconspicuously placed in the description, the property conveyed in the transaction was less than was originally promised in the sales agreement, and the property was substantially less accessible, making development plans more difficult and expensive.

The court of appeals concluded that the law in Tennessee is that an executory contract for the purchase of real estate merges into the deed, which, subsequently, becomes the final contract governing the transaction, except in cases of fraud or mutual mistake. The court found no mutual mistake in light of Mr. Brown's concession that he intentionally drafted the deed to convey less property than agreed to in the sales contract and the fact that he, not his unsuspecting agent, signed the deed. Therefore, the only issue left before the court was whether Mr. Brown's conduct amounted to fraud.

Under Tennessee law, a claim for fraud may involve an affirmative misrepresentation of material facts, or as in this case, may arise from the concealment of material facts. To constitute concealment there must not only be a failure to disclose known facts, but there must also be evidence of a trick or contrivance or a legal duty to disclose. The court found that Mr. Brown failed to disclose the material fact that the deed did not conform to the contract and further found that he exploited his position as the only real estate lawyer in the transaction to "conceal" the inconsistent provisions in the description of the deed so that lay persons, like the agents, could not easily find them, thus amounting to a trick or contrivance.

In addition, fraud by concealment may be found if one fails to perform a duty to disclose a material fact and such duty arises: (1) through a fiduciary relationship between the parties; (2) where a party has expressly reposed trust and confidence in the other; or (3) from an implied duty of good faith. The court found that Mr.

Brown undertook the responsibility of preparing the deed knowing that all parties to the transaction had placed their expressed "trust" and "confidence" in his expertise as an experienced real estate lawyer. Therefore, by failing to disclose the discrepancies in the deed, he violated a duty of reasonable care, expected of all attorneys, to communicate any information that would help guide parties in such a transaction. Furthermore, the court found that because the inconspicuous changes Mr. Brown made could not have been discovered by lay persons through the exercise of ordinary diligence, his failure to disclose the discrepancies between the deed and the contract violated the implied duty of good faith. Consequently, for all of these reasons, the appellate court affirmed the decision of the lower court.

As *Continental Land* illustrates, courts will not allow even well-accepted legal doctrines to operate in a substantially inequitable nature. In this case, the court emphasized the fact that Mr. Brown deliberately exploited his position of expertise as the sole real estate attorney in the transaction to draft the deed so that the discrepancies would be unintelligible to the non-attorney agents. Consequently, when an attorney is a party to a real estate transaction in which his expertise is relied upon by inexperienced, non-attorney parties, he or she would be well advised to disclose fully all relevant facts to the transaction. The holding in *Continental Land*, however, is fact-specific and thus, is unlikely to have any far-reaching limiting effects on the doctrine of merger.

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Encumbrance vested in Third Party**,** *Minton v. Long*, 19 S.W.3d 231 (Tenn. Ct. App. M.D. 1999).

By Ethan Underwood

In Tennessee, where an easement contains a subordination, the foreclosure or sale of a later recorded mortgage terminates any encumbrances on the property, including the prior-recorded easement. In addition, Tennessee now allows grantors of encumbrances to vest rights in third parties, if they so demonstrate their intent.

In Tennessee, an easement created after an estate is mortgaged terminates if the estate is sold or the mortgage is foreclosed. However, in *Minton*, the easement was made *before* the servient estate was mortgaged. To resolve the matter, the Court of Appeals looked to a factually similar case, *Dover Mobile Estates v. Fiber From Products, Inc.*, which states that "[a] lease which is subordinate to [a mortgage] is extinguished by the foreclosure sale." 270 Cal. Rptr. 183, 185 (1990). "Absent such an adjustment, priorities will be governed by the recording acts and related common law principles." *Id.*

The subordinating provision in the original easement at issue stated that "all parking and access rights granted shall . . . be subordinate to any existing first mortgage(s) on either or both properties affected . . . whether such mortgage(s) now exist or may be hereafter imposed . . . ." In light of this provision, the Court of Appeals reversed the trial court, holding that the Parking and Access Easement terminated upon foreclosure of the later mortgage.

Although the common law rule is that "a reservation or exception in a deed cannot create rights in strangers to an instrument," the Court of Appeals refused to apply the common law rule and determined that "a grantor may, without words of grant, vest rights in a third party stranger to [a] deed." *Id.* at 239. The court stated that the rule's intent to create uniformity in deeds of conveyance no longer served the public interest. Where the public interest is not served by common law doctrines, Tennessee courts may be willing to abandon them.

Tax

Parent Corporation's Stock Dividends From Subsidiary Not Subject to Tennessee's Excise Tax on Corporate Business Earnings, *Berry v. Huddleston*, No. 01A01-9809-CH-00487, (Oct. 28, 1999); 1999 Tenn. App. LEXIS 738; 1999 WL 976528 (Tenn. Ct. App. 1999).

By Joseph B. Freedle

The Tennessee Court of Appeals held that Tennessee's excise tax on corporate business earnings does not apply to stock dividends paid to a parent corporation by a subsidiary engaged in a related business when the parent held a 20 percent interest in, and shared directors and officers with, the subsidiary. Tennessee levies an excise tax on the business earnings of corporations for the privilege of doing business in Tennessee. When a corporation does business in many different states and countries, the State of Tennessee may only tax the business earnings of that corporation that can be attributed to the business it does within this State. The Supreme Court allows the States to tax a corporation's business earnings based on an apportionable share of the multi-state business conducted in that State, this is known as the unitary business principle.

The court identified three alternative tests to determine the existence of a unitary business. The first test is the "three unities" test, which focuses on the unity of

ownership, operation (purchasing, advertising, accounting, and management), and centralized executive force. The second test requires the court to examine the record for evidence of functional integration, centralization of management, and economies of scale. The third test, called the "dependency and contribution" test, examines whether the business components under consideration contribute to each other and the operation as a whole. Given the facts of the case, the court could not find that a unitary business existed using any of these three tests.

In determining whether the dividends were income from an operational investment, the Court asked two questions: (1) whether the capital transaction added value to the interstate business as a whole as well as to the value of that part of the business in Tennessee; and (2) whether the realization of that capital bore such a functional or operational relationship to the taxpayer's business and minimum connection to Tennessee as to make taxation of that asset constitutionally proper. The court found Tennessee parent corporation's stock holdings in its out of state subsidiaries, in which it now held but a minority interest, did not relate to its business in Tennessee despite the similarities of their businesses (domestic and foreign yellow page listing sales.) Thus, the court concluded that the dividends were in no way connected with the State of Tennessee and ordered a refund of the excise tax.

As *Berry* illustrates, evidence of a unitary business or operational asset will not result merely from a similarity in the businesses of a parent and its subsidiary. *Berry* does state that in order for dividend payments to be subject to apportionment for excise tax purposes outside the context of a unitary business, the dividend must represent an operational asset of the taxpayer by adding value to the portion of the taxpayer's business that is actually carried on in the taxing jurisdiction. Because the court found neither a unitary business or an operational asset in *Berry*, it is unclear exactly where a court will set the bar for taxation in subsequent cases.

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Application of Internal Revenue Code § 1341 to Fraudulently Received Funds, *Culley v. United States*, 222 F.3d 1331 (Fed. Cir. 2000).

By Ryan Stinnett

Under the "claim of right" doctrine, a taxpayer who "receives income under a claim of right and without restriction as to its disposition" must include the amount as gross income for the year in which it was received. If the taxpayer later determines that the funds must be repaid, § 1341 of the Internal Revenue Code allows certain taxpayers to reduce tax liability in the year funds are repaid by an amount equal to the income tax already paid in the year when the funds were originally received. In *Culley v. United States*, 2000 U.S. App. LEXIS 19981 (Fed. Cir. 2000), the Federal Circuit concluded that a taxpayer did not receive income under a "claim of right" when he received the income through fraud. Thus, he could not take advantage of § 1341 when he repaid the fraudulently received amount.

The taxpayer had argued that restitution payments he made in 1991 related to income he had reported and paid taxes on in 1988, and that § 1341 therefore applied to allow him a deduction of the restitution payment. As a result, he asserted that he could reduce the tax he owed in 1991 by the decrease in tax liability in 1988 that would have resulted if three million dollars in restitution payments had been excluded from his 1988 income. He, therefore, demanded a refund in this amount from the service.

Section 1341 applies to the repayment of an amount included in gross income in an earlier year if, among other conditions, it appeared that the taxpayer had an unrestricted right to the funds in the earlier year. The taxpayer asserted that it appeared to AT&T and Princeton that Thrust had an unrestricted right to the funds at issue because neither party placed any restrictions on the money paid to Thrust. The Federal Circuit held that this argument does not fit within a proper § 1341 analysis, because that section is applied by focusing on the taxpayer, not a third party. Thus, for § 1341 to apply, it must appear *to the taxpayer* that he has a legitimate "right" to the income when received.

The Federal Circuit agreed with the Government's argument that when funds were knowingly received through fraudulent acts, a reasonable taxpayer would not believe that he had a legitimate, unrestricted claim on the funds. "A taxpayer's illicit hope that his intentional wrongdoing will go undetected cannot create the appearance of an unrestricted right." Therefore, the *Culley* court denied the benefits of § 1341 to the taxpayer.

Culley specifically affirms that a taxpayer may not successfully assert the appearance of a "right" to income for purposes of § 1341 when that income resulted from intentionally fraudulent acts by the taxpayer. More gen-

erally for the transactional attorney, *Culley* demonstrates the general need to advise clients on the potentially devastating affects of fraudulent dealings with customers and parties to business transactions even though this may mean walking a fine line in terms of client relations. Transactional attorneys should remain aware that taxpayers will not be allowed to reap a benefit of the IRC if the taxpayer qualifies for the benefit solely by means of fraud or other illegal activity.

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