

1998

Ethical Issues Panel Symposium: The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions

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Recommended Citation

25 Fordham Urban Law Journal 371–387 (1998).

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legal services attorneys' job, though they certainly have a right, and perhaps an obligation, to do so. But beyond that, we need to speak as a policy matter against these restrictions. The organized bar needs to make a policy response to these restrictions.

RUSSELL G. PEARCE:

Thank you, Emily. Steve Ellmann.

STEPHEN ELLMANN:⁵⁷

Both of the people who have spoken so far have mentioned Model Rule 5.4(c). I would like to belabor this point. The 5.4(c) issue — whether the Legal Services Corporation restrictions constitute an unacceptable interference in lawyer-client relationships by a third-party footing the bill for the representation — goes unaddressed in the ABA's Formal Opinion 96-399.⁵⁸ That opinion responds to the LSC restrictions not by determining whether these restrictions themselves are unacceptable but rather by examining how lawyers can comply with these restrictions without violating *other* ethical commands. The Formal Opinion's focus is important, but we should not assume that the LSC's restrictions are compatible with lawyers' professional duties.

As you've all heard, Rule 5.4(c) says that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."⁵⁹ There is also another provision analogous to this one, Model Rule 1.8(f), which says that another person can compensate a lawyer for representing a client only if "(1) the client consents after consultation; [and] (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship."⁶⁰ These ideas are not new. On the contrary, Rule 5.4(c) is almost identical to DR 5-107(B) of the Model Code.⁶¹ Canon 35 of the

57. Professor of Law, New York Law School. I thank the Editors for the opportunity and time to revise these remarks, Nicole Krug for valuable research assistance, and Alan Houseman for the extensive information he provided on the LSC rules and the ABA's ethics opinion regarding them.

58. See Formal Op. 96-399, *supra* note 1.

59. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(c) (1997).

60. *Id.* at Rule 1.8(f)(1)-(2). In addition, client confidentiality must be preserved. See *id.* at Rule 1.8(f)(3).

61. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-107(B) (1983).

ABA Canons of Professional Ethics, the predecessor to the Model Code, was to quite similar effect.⁶²

Several older cases confirm the importance attached to the prohibition on interference with professional judgment. The establishment of public interest and legal services groups has not always met with universal acclaim, and in a number of cases state courts were called upon to hold that these entities were in fact unlawful. One theory advanced to demonstrate their unlawfulness was that these bodies, which were organized as not-for-profit corporations, were in breach of laws prohibiting the practice of law by corporations. The answer given in some of these cases was roughly this: that these groups were not in breach of these laws provided that they did not constrain the independent professional judgment of the individual lawyer on behalf of his or her clients.⁶³

This logic suggests that if those corporations had been constraining their lawyers' professional judgment, then they would have been in breach of prohibitions on corporate practice of law — and they would have had to go out of existence. Similarly, if a legal services organization complies with the new federal restrictions, and if in doing so it interferes with its lawyers' professional judgment, then the organization itself may be jeopardizing its right to exist in any state where such prohibitions still exist.⁶⁴ More important, these cases underline the importance of the principle that law-

62. The first paragraph of Canon 35 of the ABA CANONS OF PROFESSIONAL ETHICS (as amended through 1970) reads:

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries.

ABA CANONS OF PROFESSIONAL ETHICS Canon 35 (1970).

63. See *Azzarello v. Legal Aid Society*, 185 N.E.2d 566, 570 (Ohio Ct. App. 1962); *Touchy v. Houston Legal Foundation*, 432 S.W.2d 690, 695 (Tex. 1968). Cf. *Application of Community Action for Legal Services, Inc.*, 274 N.Y.S.2d 779, 787 (N.Y. App. Div. 1st Dept. 1966) (refusing to approve incorporation certificates for proposed legal services groups in part because "the lawyer operations would be subject ultimately to lay control"). Recently, the New Jersey Supreme Court has twice found that corporations delivering legal services were engaged in the practice of law, but allowed them to continue doing so in part because the lawyers in these organizations were exercising unfettered professional judgment. In *re 1115 Legal Service Care*, 541 A.2d 673 (N.J. 1988) (involving prepaid legal services); In the *Matter of Education Law Center, Inc.*, 429 A.2d 1051 (N.J. 1981) (involving public interest law).

64. New York, as it happens, no longer has such a prohibition on the corporate practice of law, and in an era of "professional corporations" probably few states do.

yers' judgment must not be constrained by third parties, even those who pay the bills.

Despite the existence of these cases, and despite the firm language of the ethics codes, it is not self-evident that they actually apply to the problem we are discussing today, and so I want to spend a little time examining whether, and why, Model Rule 5.4(c) (and DR 5-107(B)) do actually bear on this situation.

Model Rule 5.4(c) says, again, that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."⁶⁵ This command clearly does not mean that if you are hired by lawyer *X* as her subordinate lawyer, lawyer *X* cannot tell you what to do in a case. Lawyer *X* can do this; subordinates not only should follow their lawyer-supervisors' directions, but they are even absolved of ethical violation where they "act[] in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."⁶⁶

Now it might be said that all the limits that the individual legal services lawyer is under are imposed by that lawyer's supervisors — other lawyers — and so it might be argued that no non-lawyer is regulating anybody's professional judgment. But this argument blinks reality. The supervisory lawyer in a legal services office is not the "employer or payer." Instead, that supervisor is also an employee of the entity, the not-for-profit corporation organized to provide legal services through these various employees, and the supervisor enforces the Legal Services Corporation restrictions because the entity decides that it will adhere to them. Of course this corporation is not a natural person, but it seems to me no stretch at all to understand the word "person" in Rule 5.4(c) to include artificial persons, such as legal services corporations. When the board of a legal services entity votes to continue to receive Legal Service Corporation funds and to adhere to the Legal Service Corporation's limits, then if those limits constitute restrictions on the lawyers' professional judgment on behalf of clients, the entity must be seen as the "person" that imposed them.⁶⁷

65. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(c) (1997).

66. *Id.* at Rule 5.2(b).

67. It might be argued that as long as the entity's decisions about legal services are made by lawyers — for example, as the members of the organization's governing board — these decisions do not constitute third-party *non-lawyer* intervention into attorney-client relationships. Some courts have insisted that all decisions about which cases to accept and how to handle them "must be made by lawyers, either employed

So are the LSC limits actually restrictions on a lawyer's professional judgment on behalf of clients? My answer is that some are not, but some are. As I understood Steven Shapiro did earlier today, I would differentiate between classes of restrictions. In particular, it seems to me that it is not a restriction on a lawyer's professional judgment in serving a client to restrict his or her choice of which clients to serve. The 5.4(c) problems only become acute when the restrictions deal not with who can be taken as a client, but what can be done on the client's behalf. When, however, the lawyer is told by the person who pays or employs her that she cannot use her independent professional judgment on a case that she is now handling, then 5.4(c) has been breached. Moreover, I would argue that the constraint on the lawyer's judgment need not be so intense as to make her work incompetent and a violation of Rule 1.1.⁶⁸ The lawyer may be doing the best she can, and her best may be competent — but if she has been forbidden to consider possibilities that she otherwise might have chosen, in the exercise of her independent professional judgment, then Rule 5.4(c), read according to its terms, has been violated. And surely it is clear that where a lawyer cannot challenge welfare reform policy, or cannot bring a class action, or cannot initiate legislative advocacy, or cannot seek attorneys' fees, her independent professional judgment has indeed been regulated.⁶⁹

by the organization or members of its board, who are fully cognizant of governing professional standards and who are responsible to this Court for maintenance of those standards." In the Matter of Education Law Center, Inc., 429 A.2d 1051, 1058 (N.J. 1981); see also Application of Community Action for Legal Services, Inc., 274 N.Y.S.2d 779, 787 (N.Y. App. Div. 1st Dept. 1966) (requiring that "the executive staff, and those with the responsibility to hire and discharge staff from the top to the lowest lay echelon must be lawyers"). But even if this logic supports characterizing the legal services agency boards' decisions as supervisory-lawyer decisions rather than third-party-payer interventions, the Rule 5.4(c) problem might not go away. We would then have to recognize that the Legal Services Corporation, or ultimately the United States government, are akin to third-party-payor "persons" who are intervening in the decisions of the legal services agency boards, as well as ultimately in the decisions of individual legal services lawyers.

68. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1997) ("A Lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). For a discussion of the circumstances in which limits on the lawyer's exercise of judgment would breach Rule 1.1, see *infra* note 91 and accompanying text.

69. Each of the limitations referred to in the text has in fact been imposed, albeit often with some qualifications. Alan Houseman details the restrictions imposed on lawyers who receive LSC funding in an extremely helpful article. See Alan W. Houseman, *Legal Representation and Advocacy Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 30 CLEARINGHOUSE REV. 932 (1997). He

If this reading of Rule 5.4(c) is correct, what follows is that the lawyers who endure such restrictions are in breach of 5.4(c). So, presumably, one would have to say that lawyers at entities that are imposing such restrictions on the lawyers had better leave those entities, because as long as they stay, they would appear to be in breach of 5.4(c).

Now, one could respond here, "Well, can't these unfortunate lawyers avoid being in breach of 5.4(c) by simply not taking any of the cases where their professional judgment might wind up getting restricted?" Through this strategy, the lawyers could avoid having restrictions on their handling of cases imposed on them by narrowing their caseload to those cases in which their employers have no intention of imposing any restrictions. I have to acknowledge that it is probably possible to view every restriction on what you can do for a client as simply a restriction on which clients you can take. That is, you can only take "clients for whom you won't do X, Y, and Z."

But I would resist the argument that lawyers can escape the 5.4(c) problem in this fashion. I do so for two reasons. First, and most fundamentally, lawyers can't altogether predict which cases will later call for them to exercise professional judgment that they're not allowed to exercise. As a result, it seems inevitable that they will sometimes find themselves actually representing clients for whom, absent the legal services funding rules, they might want to consider and then might choose to adopt one or more of the strategies that they are obliged not to choose.

Second, the range of cases in which these strategies might be worth professional consideration seems wide enough that lawyers who actually excluded all of them in advance would likely fall into other breaches of professional duty.⁷⁰ While these breaches might

writes that "[r]ecipients of LSC funds may not initiate legal representation or challenge laws . . . enacted as part of a reform of a federal or state welfare system," *id.* at 940, although this prohibition does not bar all challenges to welfare policies or prevent advocacy for individual claimants affected by welfare reform law provided the representation does not "challenge existing statutory law." *Id.* at 941. He also explains that "LSC-fund recipients may not initiate or participate in class action litigation." *Id.* at 942. There are also sharp, though not total, restrictions on legislative advocacy. *See id.* at 943-47. Finally, in many, though not all, cases "LSC-fund recipients may not claim or collect and retain attorney fees." *Id.* at 943 n.49. For the statutory basis of the new restrictions, see Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, § 504, 110 Stat. 1321; Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, § 502, 110 Stat. 3009.

70. It is somewhat unclear just how great the impact of these restrictions will be. The plaintiffs in a case challenging the restrictions have contended that "Legal Services lawyers representing indigent clients in over 600 class actions nationwide have

not themselves be potential grounds for discipline, they would be improper nonetheless, and the prospect of such problems weighs against accepting any "solution" to the 5.4(c) problem that generates these other difficulties. One such breach of duty would be a violation of the lawyers', or more precisely their employers', statutory obligation to work out priorities for service that respond to client need.⁷¹ In addition, I think that lawyers who so circumscribed their practice would be violating — or at least they would be in tension with — their and our duty under Rule 6.1 to make legal services available to those who really need them.⁷² Rule 6.1, to be sure, is not an enforceable command, but it remains a part of professional obligation.⁷³

been forced to resign as class counsel, or have been forced to assume 'non-adversary' monitoring status." Memorandum of Law in Support of Motion for Preliminary Injunction at 7, *Velazquez v. Legal Services Corporation*, No. 97 Civ. 00182 (FB) (E.D.N.Y. Jan. 27, 1997). In contrast, Alan Houseman believes that "over 90 percent of the work done in legal services in 1995 could continue, and over 95 percent of the cases brought to court in 1995 could be brought." Houseman, *supra* note 69, at 939 n.27. Houseman is an experienced observer, and his estimates may well be correct.

The remaining 5 to 10 percent, however, contain some very important work, as the *Velazquez* plaintiffs argue and as Houseman himself recognizes, Houseman, *supra* note 69, at 939 n.27. Moreover, although the new rules extensively restrict what LSC fund recipients can do even with non-LSC funds, there have been restrictions on the use of LSC funds for many years. See 42 U.S.C. §§ 2996f(a)(5), 2996f(b) (1997) (containing restrictions as amended in 1977). As a result, the baseline against which Houseman measures the impact of the new rules may itself be tainted by the impact of third-party-payor restrictions that might not stand scrutiny under Rule 5.4(c). Finally, once we recognize that Rule 5.4(c) is violated not only when lawyers are unable to undertake a particular course of action but also when they are precluded by a third-party payor from considering it in a case where such consideration would be appropriate, I suspect the percentage of affected cases will expand.

71. See 42 U.S.C. § 2996f(a)(2)(C) (1997). The United States Code requires the Legal Services Corporation to:

insure that . . . recipients . . . adopt procedures for determining and implementing priorities for the provision of such assistance, taking into account the relative needs of eligible clients for such assistance . . . , including particularly the needs for service on the part of significant segments of the population of eligible clients with special difficulties of access to legal services or special legal problems (including elderly and handicapped individuals).

Id.

72. "Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer." MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 cmt. (1997).

73. Rule 6.1 urges lawyers to "aspire to render at least (50) hours of pro bono publico legal services per year" and to "voluntarily contribute financial support for organizations that provide legal services to persons of limited means." *Id.* at Rule 6.1. The final section of the commentary accompanying Rule 6.1, however, tells us that "[t]he responsibility set forth in this Rule is not intended to be enforced through disciplinary process." *Id.* at Rule 6.1 cmt.

So I would reject the idea that one could get out of the 5.4(c) box by ruthlessly limiting one's case load. If what I have argued so far is right, then 5.4(c) and its counterpart provision in the Model Code are breached by the Legal Services Corporation restrictions and lawyers at entities that are applying those restrictions are in breach of these rules.

Moreover, it is a particularly striking feature of Rule 5.4(c) and DR 5-107(B) that neither of them contains language permitting a client to consent to a departure from its provisions. Clients, in other words, are not permitted to allow third parties to regulate their lawyer's professional judgment. Using the language of conflicts discussions, we might say that the Rules and Code view this kind of conflict as "unconsentable."

In his presentation, however, Professor Stephen Gillers rightly pointed out an important qualification of this proposition. Although clients cannot consent to third-party limitations on their lawyers once the representation is underway, they apparently *can* agree to such limitations at the onset of the matter.⁷⁴ In particular, the comment to Model Rule 1.2 declares that "[r]epresentation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage."⁷⁵ Assuming that clients may also agree, under Rule 1.2, to limitations on the means their lawyers will use — as the comment, though not the Rule, declares⁷⁶ — they presumably could agree at the onset to the kinds of limits required by the LSC, unless those limits are for some other reason not in "accord with the Rules of Professional Conduct and other law."⁷⁷

74. See *infra* pp. 388-92 (remarks of Stephen Gillers).

75. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. (1997).

76. The Rule says that "[a] lawyer may limit the objectives of the representation if the client consents after consultation." *Id.* at Rule 1.2(c). The relevant section of the Comment, however, is entitled "Services Limited in Objectives or Means." Perhaps this apparent inconsistency reflects the Rules' recognition that "[a] clear distinction between objectives and means sometimes cannot be drawn," *id.* at Rule 1.2 cmt., as well as a sense that limitations on objectives are actually greater potential intrusions on client choice than limitations on means.

77. The comment to Rule 1.2 directs that "[a]n agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law." *Id.*

Before we explore whether these limits are somehow beyond the scope of what clients could agree to under Rule 1.2 at the onset,⁷⁸ we must recognize that this solution does not offer an easy out for lawyers who now must limit the means they will utilize on cases that are already ongoing.⁷⁹ For these lawyers and clients, Rule 1.2 offers no solace unless, as Professor Gillers suggested, they can re-start their attorney-client relationships, include the new restrictions in the terms of the newly-begun relationships, and thus avoid ever having to impose these restrictions in an ongoing relationship. While this may well be the least untenable course of action available to lawyers in this difficult position, as Professor Gillers suggests, its fictional character seems clear. The relationship *is* ongoing, in all but name, and if Rule 5.4(c) really prohibits third-party intrusions on ongoing attorney-client relationships then we ought not to allow it to be circumvented in this way.

At least for the many current cases in which lawyers might have given real consideration to any of the steps now precluded by the LSC rules, accordingly, Rule 5.4(c) appears to constitute an unwaivable problem. The upshot of this analysis would be that lawyers complying with the LSC restrictions would be obliged to withdraw not only from those cases in which they would have had to use the now-barred approaches in order to provide competent representation, but also wherever they would have otherwise considered these approaches as among the options to be weighed and adopted, or rejected, in the exercise of independent professional judgment.⁸⁰

All of this, however, has assumed that the words of Rule 5.4(c) and DR 5-107(B) are as unqualified as they appear. In fact, however, it is clear that in at least three contexts third parties do exercise significant control over the steps that lawyers take on their

78. See *infra* text accompanying notes 89-100 (discussing the permissibility of the LSC restrictions under the *Restatement of the Law Governing Lawyers*) and *infra* note 91 (analyzing the application of Rule 1.2).

79. Scott Rosenberg of the Legal Aid Society of New York pointed out this problem in a question he posed during the panel discussion.

80. If Rule 5.4(c) is an absolute prohibition on third-party control of the lawyer's independent judgment, then the lawyer would be obliged to withdraw whenever such control would otherwise be felt, since withdrawal is ordinarily mandatory when "the representation will result in violation of the rules of professional conduct." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(1) (1997). Withdrawing from an ongoing case because of a third-party-payor's insistence, however, might itself constitute an impermissible acceptance of third-party control over the lawyer's rendition of legal services—so even withdrawal might not solve the 5.4(c) problem.

clients' behalf.⁸¹ The first of these is public interest litigation, in which, as is well known, advocacy organizations frequently determine that they will only press cases if the clients agree to seek particular objectives.⁸² The second is insurance defense. Here, by virtue of the insurance contract between the insurer and the insured, the insurer usually has the duty to provide a defense and at least considerable power to control it. The exact dimensions of this insurer power can be debated, but there seems to be no doubt that insurers routinely regulate at least some aspects of the decision-making of their insured's counsel.⁸³ The third, the most directly relevant here, is poverty law practice, in which budget limitations have generated caseloads that must require lawyers to make careful choices about what resources to expend on which cases.⁸⁴

Given these realities, it is difficult to read the words of Rule 5.4(c) and DR 5-107(B) as meaning exactly what they say. Such realities appear to have contributed to the decision of the drafters of the *Restatement of the Law Governing Lawyers* to make some inroads into what the Rules and Code seem to declare without qualification. In language not yet approved by the full American

81. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 215 cmt. & reporter's note (Proposed Final Draft No. 1 Mar. 29, 1996) [hereinafter RESTATEMENT].

82. See NAACP v. Button, 371 U.S. 415, 419-21 (1963).

83. See ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES § 9.1(b) at 988 (Student Ed. 1988); Robert E. O'Malley, *Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed*, 66 TUL. L. REV. 511, 520-21 (1991); Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583, 1594-95 (1994).

One important limit on insurer control may arise where the insurer disputes whether the underlying lawsuit falls within the scope of the insurance policy. Keeton and Widiss comment:

Although this issue has not been considered by the courts of most states, the judicial decisions in several states (including California, Illinois, and New York) provide unqualified holdings on this question. The conclusion of the Illinois Supreme Court is very representative of these opinions: absent the acceptance by the insured of the defense rendered by insurer after a full disclosure of a conflict of interest or the waiver of the defense by the insurer, an insured "has the right to be defended in the personal injury case by an attorney of his own choice who shall have the right to control the conduct of the case."

KEETON & WIDISS, *supra*, § 7.6 at 853-55 (footnote omitted) (quoting Maryland Casualty v. Peppers, 355 N.E.2d 24, 31 (1976)).

84. Paul Tremblay has insightfully discussed this aspect of legal services work in Paul R. Tremblay, *Toward a Community - Based Ethics for Legal Services Practice*, 37 UCLA L. REV. 1101 (1990).

Law Institute, section 215(2) of the 1996 Proposed Final Draft provides that:

A lawyer's professional conduct on behalf of a client may be directed by someone other than the client when:

(a) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and

(b) the client consents to the direction under the limitations and conditions provided in § 202 [which deals with consent to conflicts of interest].⁸⁵

85. RESTATEMENT, *supra* note 81, at § 215(2). This section of the Restatement has proved quite controversial, primarily, it seems, because of its bearing on insurance defense. See Nancy J. Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. LEGAL ETHICS 541, 568-68 (1997); Thomas D. Morgan, *Conflicts of Interest in the Restatement: Comments on Professor Moore's Paper*, 10 GEO. J. LEGAL ETHICS 575, 577-78 (1997). As a result, section 215, although part of the 1996 "Proposed Final Draft No. 1," has not yet been approved by the ALI. Professor Morgan writes that: [w]hen the Reporters submitted a revision of section 215 that had been worked out in discussions with the critics, the process had become so confused that the whole question was sent back for further review and consultation with the Projects Advisers and others.

Id. at 578. For further detail on this controversy, see David R. Anderson, *Ten Years Later, the Restatement's Attempt to Define Defense Counsel's Role in the Tripartite Relationship Is Still a Work in Progress*, MEALEY'S LITIG. REP.: INS, Oct. 15, 1996, available in LEXIS.

The American Law Institute has just published a revised version of Section 215 and its accompanying commentary. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 215 (Proposed Final Draft No. 2 Apr. 6, 1998) (I am grateful to John Leubsdorf for providing me with a copy.). The revised draft does not change the text of Section 215 itself, but does extensively revise the accompanying commentary. Not surprisingly, most of the proposed changes appear to respond to the special problems posed by insurance defense. In aggregate, these changes may somewhat enhance the authority of insurers vis-à-vis their insureds, but this modification does not seem meant to apply generally in all third-party-payor contexts. Instead, the commentary now declares at one point:

Certain practices of designated insurance defense counsel have become customary and, in any event, involve primarily standardized protection afforded by a regulated entity in recurring situations. Thus a particular practice permissible for counsel representing an insured may not be permissible under this Section in non-insurance arrangements with significantly different characteristics.

Id., cmt. f.

In one respect, however, the revisions are more directly relevant to the issue I am exploring here. The commentary to section 215 now speaks more extensively to issues of legal services practice that it did before. At one point the commentary observes that "other law [besides the law of lawyering] may govern" attorney-client relationships in this context, *id.*, cmt. a — and thus may permit what the law of lawyering would forbid. A new, final comment, however, describes a range of "legal service and similarly funded representation[s]," and ends with the observation that:

Regardless of the method of appointment, the form of compensation or the nature of the paying organization (for example, whether governmental or

It could certainly be argued that under section 215(2) the entire third-party control problem disappears. The directions imposed by the legal services agencies could be defended as “reasonable in scope and character” in light of the obligations imposed on the agencies by Congress itself. Moreover, clients surely would consent, since they have little alternative, and such constrained choice might be acceptable. Section 202 of the Restatement, which defines the conditions for consent, requires that the consent be informed, and this means “that the client . . . [must] have reasonably adequate information about the material risks,”⁸⁶ but this requirement could be satisfied through careful counseling. Once this requirement is met, any conflict can be consented to unless the representation is prohibited by law, or would involve clients of the same lawyer making claims against each other in the same case, or where “in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.”⁸⁷ Finally, the Restatement would allow such consent to be given even after the lawyer-client relationship has begun, although it treats mid-stream adjustments more cautiously than agreements made at the start of the relationship.⁸⁸

The Restatement is not law, but it is certainly influential. Moreover, as I’ve already indicated, the Restatement’s denial of the absolute character of the prohibition on third-party interference with professional judgment is actually correct. This prohibition, though phrased in Rule 5.4(c) and DR 5-107(B) as if it were absolute, is already not so in fact. But if it is not absolute, that doesn’t mean that it is completely subject to invasion. Frankly, I am concerned that the Restatement’s authorization of third-party interference that is “reasonable in scope and character” may unwisely broaden the current departures from the rule prohibiting such interference into what would be, essentially, the elimination of the rule itself. But whether or not that is so, even the Restatement by no means authorizes any and all third-party control.

private or whether non-profit or for-profit), the lawyer’s representation of and relationship with the individual client must proceed as provided for in this Section [215].

Id., cmt. g. This declaration strongly supports the conclusion that the LSC restrictions, if they *are* inconsistent with Section 215, are inconsistent with the law of lawyering, and can be validated, if at all, only by reference to other law that displaces the rules of the Restatement.

86. *Id.* at § 202(1).

87. *Id.* at § 202(2).

88. *See id.* at § 29A & cmt. e.

On the contrary, it seems to me that it is quite appropriate to maintain that the third-party limits created by the LSC restrictions are not "reasonable in scope and character."⁸⁹ First, restrictions in other contexts, such as insurance defense or budget-conscious legal services practice, are at least to some extent arrived at on a case-by-case basis, reflecting professional judgment and sometimes client input in the particular case.⁹⁰ Here, by contrast, the restrictions imposed are uniform and across-the-board, and hence less likely to be reasonable in the circumstances of individual cases. Moreover, these restrictions block lawyers from even considering the prohibited steps in particular cases, and this across-the-board restriction on professional judgment undercuts lawyer representation in any case where competent practice would require *consideration* of these steps.⁹¹

89. It may be that much of the original force behind the organized bar's opposition to third-party regulation came from lawyers' self-interested resistance to discount legal services that might have been made possible through such mechanisms as legal services insurance. This might go far to explain why Canon 35 of the old Canons of Professional Ethics, quoted in note 62, *supra*, explicitly exempts "[c]haritable societies rendering aid to the indigents" from its prohibition on third-party "intermediaries." The resistance to discount legal services has now largely been overridden, and in my opinion rightly so. See, e.g., *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967). Nevertheless, as I seek to show in the text, there remain cogent reasons for taking the limit on third-party intervention seriously.

90. So, for example, the RESTATEMENT offers the example of an insurance lawyer who:

believes that doubling the number of depositions taken, at a cost of \$5,000, would somewhat increase Policyholder's chances of prevailing and Lawyer so informs Insurer and Policyholder. If the insurance contract confers authority on Insurer to make such decisions about expense of defense, and Lawyer reasonably believes that the additional depositions can be foregone without violating the standard of care owed by Lawyer to Policyholder . . . , Lawyer may comply with Insurer's direction that taking depositions would not be worth the cost.

RESTATEMENT, *supra* note 81, at § 215 cmt. f.

91. "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 cmt. (1997). Thus restrictions preventing lawyers from making a proper analysis of a case and the options for pursuing it at least jeopardize competence even where the result of such an analysis might be to reject the very steps the lawyer is now prohibited from considering. Under Rule 1.2, therefore, it would appear that a lawyer should not be able to ask a client to agree in advance to the lawyer's not even considering an approach to the case unless a competent lawyer would not feel such consideration was called for. There may be many cases where options can be so confidently ruled out at the start, but there are likely to be others where they cannot be—and in these cases, as well as in those where analysis would ultimately indicate that the excluded options actually should be utilized, Rule 1.2 agreements to limit representation would seem to be questionable.

Second, what appear to be the paradigm cases of acceptable third-party intervention today all embody at least a substantial commonality of interest between the third party and the lawyer's actual client. The insurer and insured have contracted together, and typically share an interest in winning the case — and where their interests diverge, as in cases where the insurer maintains that the claim doesn't fall within the policy coverage, additional safeguards may be imposed to protect the insured.⁹² Similarly, the legal services agency ordinarily can be expected to desire the same success that the legal services client seeks.⁹³ So, too, in public interest law practice, where the advocacy organization funding the case undoubtedly does have a political agenda, the client may well share it.⁹⁴ Even so, there surely are examples, in each of these contexts, where client and third-party interests diverge, and it is because of this potential that there is reason for concern about third-party control even in these settings.

But the restrictions imposed now on LSC grant recipients are being imposed by the federal government, and the United States is likely to be the *adversary* in many of the cases whose handling it is now regulating, and the funder and ally of the adversaries (state and local governments) in many others.⁹⁵ Efforts by the United States to free its own attorneys of ordinarily-applicable ethical restrictions are currently controversial.⁹⁶ Surely it is at least as prob-

92. See *supra* note 83.

93. As in the insurance context, however, this identity of interest is not absolute. Paul Tremblay discusses the problem of "reconciling the interests, needs, and desires of individuals with those of the community of clients that the organization serves." See Tremblay, *supra* note 84, at 1124-29.

94. For the Supreme Court's perception of identity of interests between the NAACP and black litigants challenging school segregation, see *NAACP v. Button*, 371 U.S. 415, 443 (1963); for a much more skeptical appraisal, see Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

95. In particular, in the words of the *Velazquez* plaintiffs:

To make matters worse, these restrictions were enacted by the same Congress that engineered the most fundamental restructuring of welfare in its 60-year history, leaving 50 states to overhaul their welfare programs in the coming months, without the input of Legal Services lawyers representing indigent clients, leaving many poor people at the mercy of potentially unconstitutional, illegal and unwise regulations.

Memorandum of Law in Support of Motion for Preliminary Injunction at 8, *Velazquez v. Legal Services Corporation*, No. 97 Civ. 00182 (FB) (E.D.N.Y. Jan. 27, 1997).

96. See Mark Curriden, *Is DOJ Above the Rules? The Department's Bid to Exempt Lawyers from Contact Rule Is Blasted by States' Chief Justices*, ABA J., Nov. 1997, at 26.

lematic for the government to impose new restrictions on the practice of the attorneys for its opponents.

No doubt some defenders of these rules would maintain that they are being instituted in order to protect legal services clients from the interfering political agendas of their lawyers and those lawyers' employers. Clearly, one client's (or politician's) interference may be another's vindication. Moreover, there is no doubt that the poverty and disadvantage that legal services clients endure can make them more vulnerable to lawyers' exploitation. But I find it implausible to think that legal services lawyers, bound by professional duty and likely political orientation to serve poor clients, would be more likely to distort their clients' needs than would legislators who have no ethical obligation to put these citizens (and non-citizens) first — to say nothing of those legislators' politics.⁹⁷

Moreover, and more fundamentally, it seems to me that the preservation of an independent bar is threatened when the professional judgment of particular groups of unpopular lawyers — such as those representing the poor — is subjected to restrictions imposed as a result of political decisions by the state. It is especially troubling to see such restrictions imposed in the face of the long-standing, and far from adequately implemented, duty of all lawyers to ensure that even those without funds still have access to the legal system.⁹⁸ And it is difficult indeed to see the current restrictions as protecting the interests of legal services clients as those clients would define them, since one effect of these restrictions is to block lawyers from challenging policies that many or most of these clients surely see as harmful to them.⁹⁹

Even if these restrictions were "reasonable in scope and character," they would not be valid under the Restatement unless they were also validly consented to. The Restatement commentary indicates that valid consent must also be voluntary consent. In particular,

the lawyer must show that the client was not pressured to accede in order to avoid the problems of changing counsel, alienating

97. For examples of the explicitly political flavor of congressional opposition to the work of the Legal Services Corporation, see *Varshavsky v. Perales*, No. 40767/91, slip op. at 15 & n.2 (N.Y. Sup. Ct. Dec. 24, 1996). Among the comments quoted here is the observation by Representative Dornan that "[i]t's time to defund the left . . .," Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1997, 142 CONG. REC. H8149-04, at *185 (1997).

98. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1997); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1983).

99. See *supra* notes 69, 94.

the lawyer, missing a deadline or losing a significant opportunity in the matter, or because a new lawyer would have to repeat significant work for which the client owed or had paid the first lawyer.¹⁰⁰

While this observation addresses mid-stream agreements, and does not focus on the situation of legal services clients who face the prospect of having no lawyer at all, rather than just of having problems in finding another, there is very good reason to question the voluntariness of the consent that legal services clients would give. These clients, or would-be clients, not only have little hope of finding other counsel, but they also frequently have acute legal needs. When the only possible source of aid in dealing with those needs comes complete with burdensome restrictions, consent to those restrictions hardly seems fully voluntary.

I've arrived at the conclusions that at least a substantial number of legal services lawyers are in breach of their ethical obligations by virtue of staying at jobs with LSC-funded entities, and that perhaps a number of those entities are in breach of their statutory program obligations as well — none of which is any good for the clients of legal services at all. It is not my object to close down legal services offices, or to force the employees of those offices to abandon their valuable work or face bar discipline.¹⁰¹

What I do hope is that this set of propositions is of value in the effort to overturn these restrictions. The demonstration that a longstanding, and still important, principle of legal ethics is being breached or at least compromised may help to persuade

100. RESTATEMENT, *supra* note 81, at § 29A cmt. e.

101. Professor Vanessa Merton asked during the panel discussion whether my arguments would oblige other lawyers to report their legal services colleagues to the bar for violation of the ethics codes. My answer then, and now, is “no”: however persuasive the arguments I advance here, I do not think lawyers could currently be said to “know” that practice under the LSC restrictions constitutes a violation of the rules. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1997) (imposing reporting obligation on lawyers “having knowledge” of certain violations); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1995) (imposing reporting obligation on lawyers “possessing unprivileged knowledge” of violations). Nor do I believe that such violations, if we “knew” of them, would “raise[] a substantial question as to [the violating] lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” as Rule 8.3(a) also requires. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1997). Finally, I should add that since the meaning of Rule 5.4(c) is surely “arguable,” legal services lawyers who carry on their work “in accordance with a supervisory lawyer’s reasonable resolution” of the Rule 5.4(c) problem would be protected from discipline under Rule 5.2(b), *id.* at Rule 5.2(b) — even if the supervisors are ultimately mistaken in denying that they, and their subordinates, are being subjected to a 5.4(c) violation.

lawmakers, including those who rule on issues of ethics as well as those who draft statutes, to reject these restrictions. This recognition may also help to demonstrate the unconstitutionality of these restrictions, by buttressing the proposition that the LSC requirements undercut fundamental aspects of the notion of access to law. Finally, these propositions may help to increase the force of arguments, based on legal ethics, that aim to persuade the rest of the bar and the judiciary to shoulder an obligation to establish settings within which lawyers for the poor can practice as they should.¹⁰²

Finally, I cannot resist making an argument derived from what I have learned in another part of my academic life, in studying South African law and especially South African law of the days of apartheid. Sadly, this experience is not irrelevant to thinking about ways of challenging and limiting unjust laws in this country. One of the leading anti-apartheid legal scholars of the 1980s, the late Etienne Mureinik, articulated the idea that legislators should be held to their stated promises.¹⁰³ They should be imputed with, and bound by, an interpretive presumption of integrity. Interestingly, even the massively unjust legislation of the old South Africa did not rule out discerning certain benign legislative promises by which to temper injustice. In the United States, happily, our statutes probably contain many more such affirmations.

As Emily Sack indicated, one such promise — a promise repeated in numerous places in the Legal Services statutes — is that there shall be no interference with independent professional judgment on the part of legal services lawyers.¹⁰⁴ If that language is held to mean what it says, as a matter of integrity, and if these restrictions read without qualification constitute such interference for the reasons I've argued, then it would follow that the statutory provisions imposing these restrictions have to be quite brutally re-

102. The ABA Commission on Ethics and Professional Responsibility declared in Formal Op. 96-399, *supra* note 1, that:

Legal services organizations not funded by the Legal Services Corporation must be supported where they exist, and established where they do not. Our courts must stand ready to assign substitute counsel to the thousands of indigent clients who may find themselves without a lawyer. And lawyers throughout the nation must be prepared to give meaning to the principles of Model Rule 6.1 and perform extraordinary pro bono service

103. As he wrote, "if there is a discrepancy between our protestations and our actions, others have a right to bridge the discrepancy and hold us to what we affirm." Etienne Mureinik, *Pursuing Principle: The Appellate Division and Review Under the State of Emergency*, 5 S. AFR. J. HUM. RTS. 60, 67 (1989).

104. See 42 U.S.C. §§ 2996(5), 2996(6), 2996e(b)(3), 2996f(a)(1) & 2996f(a)(10) (1997).

interpreted so as to make an exception for those instances of conduct otherwise violating the statute which are necessitated by fidelity to the lawyers' ethical obligations. Much as a prominent South African statute ousting the courts' jurisdiction to review detentions without trial was interpreted to oust the courts' authority only when the detentions in fact complied with the statute,¹⁰⁵ so we might call for reading the Legal Services Corporation restrictions to constrain lawyers' judgment only in those cases where obedience to those restrictions does not actually constrain the professional assessments and decisions which they would otherwise make. I cannot say I am optimistic that this argument will be accepted, but I can say that if accepted it would vindicate the principle of equal access to justice, and free lawyers of restraints in the practice of poverty law that compromise principles long embodied in the codes of legal ethics.

RUSSELL G. PEARCE:

I will take thirty seconds on the remedies issues, because Steve Ellmann's talk suggested it, and some of you may not be familiar with the disciplinary system and what would happen, for example, if the ABA Ethics Opinion had said that it would be unethical for lawyers to work for entities that accepted the restrictions and what would happen if a disciplinary committee accepted that understanding of the law.

The remedy, if the restrictions are "unethical," is to censure, suspend, or disbar lawyers who work for legal services offices that take funds under those circumstances. I mention that, in part, because I understand that the question of remedy influenced the ABA in drafting its Opinion, correctly or not, and also just to underscore what Steve Ellmann said on the issue of there's another remedy, something I certainly had not thought of, that there's also the question, under Rule 5.4 and the related issue of unauthorized practice, whether legal services offices themselves are engaged in unauthorized practice, and would then have to be disbanded or would then be acting unlawfully, if we accepted this interpretation.

Let me turn to Steve Gillers. I already see hands. We'll open it to comments from the floor as soon as we finish the panel.

105. *Minister of Law and Order and Others v. Hurley and Another*, 1986 (3) SA 549 (A). I discuss this case in STEPHEN ELLMANN, *IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY* 28-29, 53-56 (1992).