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ARTICLES

Broad Prohibition, Thin Rationale: The “Acquisition of an Interest and Financial Assistance in Litigation” Rules

JAMES E. MOLITERNO*

Black letter lawyer ethics law prohibits lawyers from acquiring an interest in the subject of litigation¹ and from providing most forms of financial assistance to litigation clients.² The received wisdom of the last two generations of lawyers says that these rules are well-rooted, uncontroversial, and beyond serious debate. In reality, the rationale for the rules is weak and the received wisdom is flawed and false. The recent Ethics 2000 Commission inspired amendments to the *Model*

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1. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(i) (the acquisition of interest rule was designated 1.8(j) from 1983 to 2002) [hereinafter MODEL RULES]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(A) [hereinafter MODEL CODE]; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 36(1) [hereinafter RESTATEMENT]. Model Rule 1.8(i) reads as follows:

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien granted by law to secure the lawyer's fees and expenses; and
- (2) contract with a client for a reasonable contingent fee in a civil case.

In substance, DR 5-103(A) reads identically.

2. MODEL RULES Rule 1.8(e); MODEL CODE DR 5-103(B); RESTATEMENT § 36(2). Model Rule 1.8(e) reads as follows:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

DR 5-103(B) reads as follows.

While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client except that . . . [a] lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

Rules make no substantive change in the acquisition rules,³ and the *Restatement of the Law Governing Lawyers (Restatement)* does not suggest a change.⁴ These rules are not only supported by conflict of interest rationales, but are also based in part on the champerty, barratry and maintenance laws that have in most places been abandoned, and on anti-competitive, client-getting concerns.

The rules themselves are anomalous. The normal waiver of conflicts notions fail to fit: clients would be presumably delighted to waive the "conflict" presented by the financial support of their lawyer. After all, to the extent these are conflict rules at all, the interests in conflict are not exclusively, nor perhaps even dominantly, between the lawyer and the client, but rather are between the lawyer's *and* client's joint interests and those of the system and of third parties who are the objects of the litigation being supported by the lawyer. But to the extent that they represent a conflict between the client's and lawyer's joint interests and those of third parties or the justice system, they are not conflicts rules at all, but rather are flawed maintenance, champerty and barratry rules that have little to distinguish their reach from routine parallel interests of lawyers and their clients. To the extent that they are really champerty and maintenance rules, they should be thought of in conjunction with other client-getting devices. In any event, the American Law Institute (ALI) *Restatement* uses a conflicts of interest standard that would not include these rules to the extent that they are based on champerty or maintenance: the ALI standard regards as a conflict only those impairments of professional judgment that adversely affect a client.⁵ To find a rationale for a rule that would restrict a lawyer's representation activities on the ground that third parties or the system might suffer, the *Restatement* reader must go elsewhere.⁶ They are really only conflict rules in the usual sense to the extent that the "invested" lawyer might subvert the case for his or her purposes rather than for the client's.⁷

The careful study of these rules could have a significant impact on the practice, especially class action, mass tort, consumer litigation, and personal injury practice. The analysis of these rules could also affect the analysis of the ancillary business rules and multidisciplinary practice issues because of the relationships between financial services businesses and lawyers should these rules be abolished. What should be the bar's reaction when the interests of lawyer and

3. MODEL RULES Rule 1.8(e), (i).

4. RESTATEMENT § 36(1), (2). Nonetheless, the *Restatement* Reporters preferred a relaxed set of acquisition of interest rules: "The Reporters support the minority position, but that position was not accepted by the Institute." RESTATEMENT § 36, Reporter's Note.

5. RESTATEMENT § 121.

6. See, e.g., RESTATEMENT §§ 34, 35, 36.

7. See *infra* section III.A. The *Restatement* drafters stated one of the rule's rationales as follows: "[Financial assistance is regulated] because a loan gives the lawyer the conflicting role of a creditor and could induce the lawyer to conduct litigation so as to protect the lawyer's interests rather than the client's." RESTATEMENT § 36 cmt. c; *Shea v. Va. State Bar*, 374 S.E.2d 63 (Va. 1988).

client are aligned in a way greater than that of client and lawyer? What happens when the lawyer has financial interests in the client's affairs that are greater than the interest in the lawyer's fee? Would a market for claims in which lawyers may participate as buyers be a good or bad thing?

The modern rules are largely based on three doctrines with long history: champerty, maintenance, and barratry. Although historically more complicated, champerty is often defined as the acquisition of a share of another's claim.⁸ Maintenance is the supporting (maintaining) of a litigant that enables the litigant to carry on a claim.⁹ Barratry is incitement or encouragement of another to bring or continue a claim.¹⁰ To be tortious or criminal, all three, significantly, required an element of malice.¹¹ Thus, at common law, only malicious acquisition of claims, maintenance of litigants or litigation encouragement were unlawful.

It is commonly thought that the champerty restrictions are of very long-standing, and that they are deeply rooted in law and culture. And in some respects they are indeed well-rooted, having antecedents as far back as Roman and Greek law.¹² Surprisingly, though, these restrictions were never very broad or powerful until the first half of the 20th Century, and never more broad and powerful than they were in the last half of the 20th Century. Many late 19th and early 20th Century courts found their rationales wanting, and refused to enforce the restrictions.¹³ Not until the adoption of the 1969 *Model Code* did the restrictions leap in breadth and severity. At that time, they began being treated with an unwarranted reverence, as if the 1970's version of the restrictions had been firmly rooted since the Roman law and 12th Century English common law beginning notions of champerty. This reverence has produced many formalist, one-dimensional judicial applications of the rules¹⁴ that lacked interest or willingness to question the quality of the rationales underlying the rules. Had these courts examined the rationales closely, they would have found them wanting in many respects.

8. BLACK'S LAW DICTIONARY 292 (4th ed. 1968); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 489-90; Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty*, 71 CHI. KENT. L. REV. 625, 639 (1995); E. H. BODKIN, MAINTENANCE AND CHAMPERTY 39-40 (1935).

9. BLACK'S LAW DICTIONARY, *supra* note 8, at 1106; WOLFRAM, *supra* note 8, at 490; BODKIN, *supra* note 8, at 11-12.

10. BLACK'S LAW DICTIONARY, *supra* note 8, at 190; WOLFRAM, *supra* note 8, at 490; BODKIN, *supra* note 8, at 49.

11. WOLFRAM, *supra* note 8 at 490, n.46; *See generally*, Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48 (1934); BODKIN, *supra* note 8, at 5, 50.

12. Radin, *supra* note 11, at 48-54.

13. *See infra* text accompanying notes 72-98. *Stanton v. Embry*, 93 U.S. 548, 556 (1876) (stating that the lawfulness of contingent fees is "beyond legitimate controversy."); *Reece v. Kyle*, 31 N.E. 747 (Ohio 1892); *Johnson v. Great N. Ry. Co.*, 151 N.W. 125 (Minn. 1915).

14. *See infra* cases and discussion cited at note 147; WILLIAM SIMON, THE PRACTICE OF JUSTICE 9 (1998) (using the term "categorical" to describe judicial decision-making in the absence of discretion).

In this paper, I will examine the history of these rules, critique their rationales, and propose the abolition or substantial amendment of these rules.

I. HOW AND FROM WHERE DID THESE RULES EVOLVE?

Early on in Western legal history, it was believed that trials should be limited to the judge and the two parties. Anyone else who intruded “between the judge and the parties could only mean mischief.”¹⁵

There was an exception to this rule: parties were commonly supported by their friends, kinsmen or followers, their *secta*, or a person’s “back.”¹⁶ The *secta* would often help prepare legal arguments, or even speak on the litigant’s behalf.¹⁷ Our modern notions of a system of advocacy grew largely from this custom. Despite the acceptance, even expectation, that a party be supported by his *secta*, the basic notion that no one but the litigants should be involved in a trial was one that persisted throughout the history of European law, influencing later legal developments.

A person who appeared in court without a *secta* was at a considerable disadvantage, and because of the difference in sheer numbers and power between the *secta* of the powerful and of the poor, the poor could not often hope to prevail against a more powerful litigant.¹⁸ In the 6th century BC, public interest motivated Greek reforms made it possible for “kindly men to come to the assistance of such wretches as poor and friendless plaintiffs.”¹⁹ For the first time, intervention on behalf of another by someone other than a friend or kinsman was permitted.²⁰

This special power came to be abused in Athens as the instances permitting this intervention increased.²¹ The intervention, especially its abuse, came to be called “sycophancy”, and its practitioners “sychophants.”²² Because disinterestedness in a case one prosecuted came to be regarded as suspicious, sychophants often invented some imaginary private interest in the matter so as to appear to be a legitimate member of a litigant’s *secta* rather than a sychophant.²³ Sycophancy was also used as a method of political agitation, in which people formed political “clubs”²⁴ whose members supported each other in litigation which was deliber-

15. Radin, *supra* note 11, at 48.

16. *Id.*

17. *Id.* at 50. See generally ROBERT J. BONNER, LAWYERS AND LITIGANTS IN ANCIENT ATHENS 200-44 (1922).

18. Radin, *supra* note 11, at 49.

19. *Id.*

20. *Id.*

21. JOHN OSCAR LOFBERG, SYCOPHANCY IN ATHENS 3-4, 7 (Arno Press 1979) (1917).

22. Radin, *supra* note 11, at 49-51. See also LOFBERG, *supra* note 21, at 46-47; BONNER, *supra* note 17, at 59-71.

23. Radin, *supra* note 11, at 50.

24. LOFBERG, *supra* note 21, at 59; BONNER, *supra* note 17, at 203-04.

ately fomented against political foes.²⁵ Athens not only allowed this form of intervention, but also allowed the acquisition of interest in the subject matter of litigation.²⁶

In Rome advocacy became a recognized profession²⁷ and yet the fiction of a sycophant's personal interest or connection with the litigant remained.²⁸ Fees could not be charged for this service.²⁹ The derision of "sycophancy" (known to the Romans as *calumnia*),³⁰ while it continued, was less pronounced than in Athens.³¹ In public cases, *calumnia* only applied to charges that were false. In the absence of state-supported prosecution machinery, the state relied on private citizens to prosecute wrongs.³² A successful prosecution meant that the case had merit, and therefore no charge of *calumnia* could be leveled at its prosecutor.

Rome, unlike Greece, did not allow the trafficking in claims by third parties, but in the second and third centuries, it became common that a claim might be sold or given to a powerful person, whose prosecution of the claim was more likely to succeed.³³

Christianity's influence on the Roman Empire changed the view of *calumnia* to an extent. The Christian attitude was that litigation, even of legitimate, sound claims, was itself something to be discouraged.³⁴ Bringing litigation, even successful litigation, was viewed suspiciously, and hired advocates, men who professed special skill in legal matters, were regarded as dangerous because of their ability to skillfully manipulate legal procedures.³⁵

Medieval Europe's trials by ordeal or battle produced a justifiable fear and trepidation about being a litigant.³⁶ With the exception of the despised practice of a litigant who was incompetent to stand battle selecting a representative, or a champion,³⁷ intervention of any kind was not looked upon kindly.

As the legal system became more complicated in the fourteenth and fifteenth centuries, expertise in the legal process became more valuable, more feared, and more suspect. This need for legal expertise was filled by attorneys and the *narratores* and their apprentices, the later barristers.³⁸

25. Radin, *supra* note 11, at 51. See also GEORGE MILLER CALHOUN, *ATHENIAN CLUBS IN POLITICS AND LITIGATION* 40-80 (1913).

26. Radin, *supra* note 11, at 51; LOFBERG, *supra* note 21, at 47.

27. Radin, *supra* note 11, at 52.

28. *Id.*

29. *Id.* at 53; BONNER, *supra* note 17, at 206-08.

30. Radin, *supra* note 11, at 52.

31. *Id.*

32. *Id.* at 56.

33. *Id.* at 54.

34. *Id.* at 56.

35. Radin, *supra* note 11, at 56.

36. *Id.* at 58.

37. *Id.* at 58-59.

38. *Id.* at 59.

That these persons were looked upon with suspicion was, of course, not only to the ancient dread and distrust of all legal experts, but also the ancient feeling against representation generally, and to a constantly growing feeling that the machinery of justice, just because it was complicated, was easily perverted. But their presence was likewise resented because they encouraged resort to the law and such resort among Christians ought to be discouraged.³⁹

As in Roman law, unsuccessful plaintiffs were presumptively guilty of *calumnia*, but because the attorney's early common law royal writ justified his appearance, he was protected from being thought of as a calumniator merely by being an attorney.⁴⁰ Similarly, the *narratores* were exempted. Attorneys and *narratores* were simply the instruments through which calumniators operated.⁴¹

Buying interests in litigation, like litigation itself, was also strongly discouraged in medieval Europe, and it is from this practice that the term "champerty" arose.⁴²

The English knew another form of *calumnia*, called maintenance, or "the support given by a feudal magnate to his retainers in all their suits, without any reference to justification."⁴³ Both the Star Chamber Act of 1487 and the Statute of Liveries of 1504 were specifically directed against this practice.⁴⁴ Maintenance was an implement of private wars over the accumulation of land and power. The support for litigants in this context was support by the powerful of those owing allegiance to the supporter. By this means, the feudal supporter could acquire interests in land through the litigation of his minions and supporters. The movement against maintenance was, therefore, part of the conflict between the Crown and feudal lords, and indeed, feudalism itself.⁴⁵ The offense of barratry in England meant the habitual provision of maintenance.⁴⁶ However, with all three of these offenses, champerty, maintenance and barratry, lawyers were not the barrators, maintainors, or champertors.⁴⁷ Lawyers were again simply the instruments by which those offenses were perpetrated. Further, none of the offenses existed without the element of malice by the offender against the practice's victim.⁴⁸

Despite these no longer relevant historical origins, they have remained offenses and become more focused on lawyer conduct. Eventually, the offenses

39. *Id.*

40. Radin, *supra* note 11, at 60.

41. *Id.* at 65.

42. The term originally came from the name of a little used estate in land that had attributes analogous to those of acquiring a share of a claim. *Id.* at 61.

43. *Id.* at 64.

44. *Id.* at 64; BODKIN, *supra* note 8, at 3-4.

45. Radin, *supra* note 11, at 64.

46. *Id.* at 64-65.

47. *Id.* at 65.

48. *In re Gilman's Administratrix*, 167 N.E. 437, 439 (N.Y. 1929) (citing 1 Hawkins, Pleas of the Crown, ch. 27(6), § 26, p. 460); WOLFRAM, *supra* note 8 at 490, n.46; BODKIN, *supra* note 8, at 5, 50.

found a new rationale in the “fundamental distrust of legal procedure and of lawyers . . . [and they] became almost specialized as a lawyer’s transgression.”⁴⁹

United States courts correctly declared that maintenance and champerty were prohibited in England because of its special circumstances and history and had no real rationale or policy support in the different circumstances pertaining in the United States.⁵⁰

But the lawyers have moved from the position of being the occasional and more or less casual instruments of maintainers into the front line of this form of offending. This is probably the inevitable result of the change by which lawyers instead of being a small number of highly privileged technicians, not really in competition with each other because all were assured of a living, became an enormously large group constituting a recognized calling and competing desperately for an amount of legal business which could not possibly provide for all of them. The old and ingrained popular resentment against lawyers gained a new rationalization. It seemed likely that active competitors for legal business would seek every possible means not only of preempting what was open to all, but of multiplying it.⁵¹

The new rationale was more an anti-client-getting and internal-to-the-legal-profession anti-competitive rationale. Meanwhile, other means of controlling abuse of the legal system with unfounded claims developed,⁵² obviating the abuse-of-system-prevention need for the law of maintenance, champerty and barratry.⁵³

A particular form of “maintenance by champerty,” the contingent fee, arose in the United States. It seemed unfair in the context of the spirit and culture of the United States that an impecunious claimant might have to forgo an otherwise good claim.⁵⁴ Moral questionability of the sort of speculation involved in the contingent fee never held the same weight in the United States as it had previously in Europe. Contingent fees became fairly common. The growth in contingent fees coincided with a time of rapid change in both transportation and manufacturing production, and the associated slower development of actions for

49. Radin, *supra* note 11, at 66. BODKIN, *supra* note 8, at 60-91.

50. Radin, *supra* note 11, at 68-70, and n.82. See, e.g., Reece, 31 N.E. at 749.

51. Radin, *supra* note 11, at 68.

52. On the tort of malicious prosecution, see generally RESTATEMENT (SECOND) OF TORTS § 674; W. L. PROSSER & W. P. KEETON, THE LAW OF TORTS 890-91 (1984); Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Perspective*, 88 YALE L.J. 1218 (1978). On frivolous claims law, see Fed. R. Civ. P. 11; James V. Ward IV, *Rule 11 and Factually Frivolous Claims—The Goal of Cost Minimization and the Client’s Duty to Investigate*, 44 VAND. L. REV. 1165 (1991); Byron C. Keating, *Toward a Balanced Approach to Frivolous Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067 (1994). On sanctions against lawyers who abuse process, see David W. Pollak, Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Civil Process*, 44 U. CHIC. L. REV. 619 (1977).

53. STORY ON CONTRACTS § 711 (1954); Reece, 31 N.E. at 749.

54. Radin, *supra* note 11, at 70.

negligence.⁵⁵ The organized bar condemned the practice. But the condemnation was suspect because the bar's official utterances emanated from its more successful members who represented litigants of means who not only had little occasion to enter into contingent fee contracts but were the frequent defendants in actions brought by injured plaintiffs in need of the contingent fee arrangements.⁵⁶ Their condemnation was ultimately unsuccessful, however, as the codes of legal ethics were compelled by the implications of common law courts to recognize and officially tolerate an already established type of fee arrangement.⁵⁷

In most respects, the organized bar of the late 19th and early 20th Centuries followed⁵⁸ the ethics guidance of two 19th Century American writers: David Hoffman⁵⁹ and George Sharswood.⁶⁰ Hoffman distinguished between providing financial assistance, which he pledged to provide, and acquiring an interest in a client's claim, of which he disapproved: "[T]he object of my resolution . . . is against purchasing, in whole or in part, my client's rights, after the relation of client and counsel, in respect to it, has been . . . established."⁶¹ "Should [my client's] wants be pressing, it will be an act of humanity to relieve them myself, if I am able . . . But in no case will I permit . . . my benevolence . . . to seduce me into any participation of his *pending* claim. . . ."⁶²

Sharswood, by contrast, though he recognizes the unmistakably lawful status of contingent fees, is staunchly anti-contingent fee and groups acquisition of interest and financial assistance with contingent fees, sounding disapproval of them all, yet recognizing that the English champerty laws are largely not in effect in the United States. He recognizes that his objections are not legal objections but rather moral ones.⁶³ Sharswood encourages lawyers to refrain from engaging in legal contingent fee arrangements and rather to set a fee or accept the favor of the impecunious client after the conclusion of the matter, taking into account the success of the matter and the client's new-found ability to pay.⁶⁴

Such advice harkens back to traditions of the early English bar of accepting

55. *Id.* at 71. *Stanton*, 93 U.S. 548.

56. Radin, *supra* note 11, at 71. *In re Sizer*, 267 S.W. 922 (Mo. 1924); *Johnson*, 151 N.W. 125; JEROLD S. AUERBACH, *UNEQUAL JUSTICE* 41-50, 130 (1976).

57. ABA CANONS OF PROFESSIONAL ETHICS, Canon 12, 13 (1908) [hereinafter 1908 CANONS].

58. The 1908 ABA Canons, the first national effort to articulate lawyer ethics standards, were nearly verbatim from the Alabama Code of Ethics, which was in turn drawn largely from Sharswood and somewhat from Hoffman's writings. See generally James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 789-90 (1997); Am. Bar Ass'n Comm. on Code of Prof'l Ethics, Final Report, 33 ABA REP. 567, 569 (1908) ("The foundation of the draft for canon of ethics, herewith submitted, is the code adopted by the Alabama State Bar Association in 1887 . . .").

59. DAVID HOFFMAN, *Fifty Resolutions on Professional Deportment*, in A COURSE OF LEGAL STUDY (2nd ed. 1836).

60. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (T. & J.W. Johnson & Co. 1860).

61. HOFFMAN, *supra* note 59, Res. XXIV at 761-62.

62. *Id.*

63. See SHARSWOOD, *supra* note 60, at 153-65.

64. See *id.*

only gratuities for services rendered.⁶⁵ Such traditions had nearly faded by Sharswood's time in England, had never much pertained in the United States, and were no more than memories by the time the Alabama Bar and later the American Bar Association (ABA) largely copied Sharswood's ideas in the first adopted professional bar codes. The Alabama Code, first among the state codes and the one upon which, except for advertising and solicitation provisions, the 1908 ABA *Canons of Ethics* (1908 *Canons*) would be based, says little about either acquisition of interest or financial assistance. The closest provision is focused more on conflict of interest and the fear that lawyers might take advantage of clients in negotiating over the purchase of claims: "Attorneys ought scrupulously to refrain from bargaining about the subject matter of the litigation, so long as the relation of attorney and client continue."⁶⁶ At the time, this advantage-taking concern was central to the rationale for champerty restrictions.⁶⁷

The 1908 *Canons* originally said simply, "[t]he lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."⁶⁸ But the *Canons* were not explicit regarding loans.⁶⁹ As such, they went further than either Hoffman or the Alabama Code in disapproving of acquisition of interests and financial assistance, picking up more on Sharswood's moral-rather-than-legal-based disapproval. Even then, the *Canons'* disapproval and prohibition did not go nearly as far as the bar's 1960's⁷⁰ and 1980's⁷¹ pronouncements.

To be sure, at the turn of the 20th Century there was much agitation by the dominant elements of the organized bar against provision of financial assistance to clients in litigation. The courts of the time were not persuaded by their arguments, at least when the financial assistance was not provided in order to solicit the client's business. Courts did not regard such financial assistance as being against public policy and failed to see the apocalyptic consequences outlined by the prosecutors.⁷² *Reece v. Kyle* is a classic example.⁷³ In *Reece*, lawyer and client entered a contract, alleged to be champertous, by which the

65. See *Reece*, 31 N.E. at 750.

66. ALA. CODE OF ETHICS 38 (1887).

67. F. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 38 (1964); HOFFMAN, *supra* note 59, Res. XXIV at 760; *Arden v. Patterson*, 5 Johns Ch 44 (N.Y. Ch. 1821) (primary reason for prohibiting lawyers from buying clients' claims is to keep savvy lawyers from taking advantage of clients regarding the value of the claim).

68. 1908 CANONS Canon 10.

69. 1908 CANONS Canon 42 comes closest to such a restriction.

70. See MODEL CODE DR 5-103(A), (B) (1969).

71. See MODEL RULES Rule 1.8(e), (j) (1969).

72. Some leaders of the bar went to extraordinary lengths to pursue ethics charges against offenders. See, e.g., *Sizer*, 267 S.W. 922 (conglomeration of railroads, utilities and their lawyers hired investigator to pursue charges against plaintiffs' lawyers for providing financial assistance to clients); *Chicago Bar Ass'n v. McCallum*, 173 N.E. 827 (Ill. 1930) (railroad lawyers hired agent to pose as worker, fake an accident and serious injuries, retain target personal injury lawyers, and defraud court in effort to entrap target personal injury lawyers into engaging in financial assistance violations); *Johnson*, 151 N.W. 125 (railroad defended action for fee by plaintiff's lawyer on grounds that lawyer was engaged in champerty and maintenance).

73. 31 N.E. at 747.

lawyer agreed to “purchase” a one-half interest in client’s claim in exchange for the lawyer’s services to collect a judgment. At the time of the challenged contract, the lawyer’s fee for obtaining the judgment was unsatisfied. Lawyer and client agreed that lawyer would pursue the judgment in exchange for a one half interest in the judgment itself. Resembling a contingent fee, but cast as an assignment of the one-half interest in the claim, lawyer and client became “joint owners of the claim.”⁷⁴ The court determined that there was no fraud, no over reaching, no bad faith.⁷⁵ The court defined maintenance and champerty to require “officious intermeddling,”⁷⁶ and outlined the history of the doctrines (“common then for nobles or other powerful men to take transfers of pretended rights in action . . . and prosecute them, to the great oppression of the weak”⁷⁷) in a way no later court, armed with the language of Model Rule 1.8(e) or DR 5-103(B) needs to do. The court noted that historically, weak legal processes (juries were typically composed of the nobles’ dependants) allowed these false claims to be pursued with success. “But as methods of judicial procedure improved, and a firmer and purer administration of justice was attained, . . . the mischiefs complained of became less apparent and the enforcement of such statutes [prohibiting maintenance and champerty] became of less and less importance.”⁷⁸

It would not be wise to carry rules adopted originally for the purpose of preventing the powerful from oppressing the weak, by groundless suits in the courts, to the extent of hindering the weak in efforts to avail themselves of lawful remedies against the powerful, now that the conditions making the ancient rules necessary have substantially disappeared, and new conditions, arisen, by reason of which it has become the interest of the powerful to embarrass and hinder the dependant and weak from obtaining speedy justice in the courts.⁷⁹ . . . That contracts similar to the one at bar were regarded dangerous three or four hundred years ago is not a powerful reason for so regarding them now . . .⁸⁰

The *Reece* court cited a 1791 case⁸¹ criticizing the administration of the maintenance doctrine in England: “That such doctrine, repugnant to every honest feeling of the human heart, should soon be laid aside, must be expected. . . . We may venture to say that the maxim was a bad one, and that it proceeded on a foundation which fails.”⁸²

Even then, the *Reece* court said, with the adoption subsequent to the

74. *Id.* at 748.

75. *Id.*

76. *Id.*

77. *Id.* at 749.

78. *Reece*, 31 N.E. at 749.

79. *Id.* at 751.

80. *Id.* at 750.

81. *Master v. Miller*, 4 Term R. 340, 341 (1791).

82. *Reece*, 31 N.E. at 751.

maintenance statutes of various litigation controls such as “the statute of frauds, the extension of the action for malicious prosecution, and that for awarding costs against unsuccessful parties, [all of which] have contributed materially to the discouragement of groundless and vexatious litigation” the need for the law of maintenance or champerty had been diminished to the point at which Story said that the doctrine is “ ‘to be now confined to cases where a stranger, having no interest in the suit, *for the purpose of stirring up litigation and strife* (emphasis added) encourages others to bring actions and make defenses *they have no right to make* (emphasis added).’ ”⁸³ Ohio then had a statute making it criminal to stir up controversy for the purpose of injuring the defendant. The statute also created liability for the injured party.⁸⁴

The *Reece* court also considered that early English lawyers were incapacitated from making a contract for fees at the time of the doctrine’s rise. Clients could offer the lawyer a gratuity. That obviously made for greater suspicion of a lawyer taking an interest in a claim or being paid by contingent fee.⁸⁵ No such notion ever pertained in the United States.

Finally, the court discussed the poor fit between the common law doctrines and property rights, noting that the client could plainly have assigned his rights in the judgment to the lawyer (or anyone) in exchange for other consideration.⁸⁶

At the time of the *Reece* decision, courts were careful to restrain contracts that evinced a “gambling spirit,”⁸⁷ a factor which has modestly continued to animate a few states’ champerty restrictions.⁸⁸

In another example, the Minnesota Supreme Court held that although good taste may be desirable, in the absence of a statute, it could not rule solicitation against public policy.⁸⁹ As well, the court could not find “any sound reason” to consider as against public policy “the practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of the case and while he is unable to earn anything. [Such a practice] may, in a sense, tend to foment litigation by preventing a settlement from necessity It is not against public policy for an attorney to loan his client money to enable him to carry on the suit.”⁹⁰

In *Johnson v. Great Northern Railway Company*, a lawyer represented a personal injury client.⁹¹ Defendant railroad approached the client without notice

83. *Id.* at 749, citing STORY ON CONTRACTS § 711.

84. *Id.* at 751.

85. *Id.* at 750.

86. *Id.*

87. *Reece*, 31 N.E. at 751.

88. *See, e.g.,* Wilson v. Harris, 688 So. 2d 265, 268-69 (Ala. Civ. App. 1996); Tosi v. Jones, 685 N.E.2d 580, 583 (Ohio Ct. App. 1996).

89. *Johnson*, 151 N.W. at 127.

90. *Id.*

91. *Id.* at 126.

to the plaintiff's lawyer and negotiated a settlement.⁹² Plaintiff's lawyer then sought enforcement of his fee contract against defendant railroad.

The railroad defended on the ground that plaintiff's lawyer was engaged in the "business and conspiracy of unlawfully stirring up strife and contention and vexatious and speculative litigation between defendant and persons having personal injury claims against this defendant"⁹³ The court disagreed with the railroad's position, finding no policy reason to support a ban on financial assistance.

In *People v. McCallum*, the Illinois Supreme Court stated its approval of financial assistance in clear, resounding rationales nearing praise, similar to those supporting contingency fees.⁹⁴ In *McCallum*, the railroad defendant hired an agent to pose as worker, fake an accident and serious injuries, retain McCallum, and defraud the court in an effort to entrap McCallum into engaging in solicitation and financial assistance violations.⁹⁵ After reviewing the underlying facts and concluding that the charges were largely unsustainable against McCallum, the court rendered its view of financial assistance:

The evidence shows that at various times the McCallums have advanced living expenses to needy clients who had claims for personal injuries against railroad companies where respondent had a fee contract, which was a lien upon any damages which might be recovered upon the injury. In most such cases the clients were unable to work, had no money or property, and their only asset was the claim for damages against the railroad, upon which respondent had a lien. We know of no law which makes it more unethical, under such circumstances, to advance living and medical expenses to the client, and so prevent his becoming a public charge, than it would be, if the client's only asset were a piece of real estate, to advance him, on a mortgage thereon, money for such expense. It is not uncommon for attorneys to commence actions for poor people and make advances of money necessary to the prosecution of the suit upon the credit of the cause. Thus a man in indigent circumstances is enabled to obtain justice in a case where without such aid he would be unable to enforce a just claim. . . . The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of the case and while he is unable to earn anything may in a sense tend to foment litigation by preventing an unjust settlement from necessity, but we are aware of no authority holding that is against public policy or of any sound reason why it should be so considered.⁹⁶

The same financial assistance accepted in *Reece*, *Johnson* and *McCallum* today

92. Interestingly, no mention is made of the railroad lawyer's inappropriate contact with the plaintiff.

93. *Johnson*, 151 N.W. at 126.

94. *McCallum*, 173 N.E. at 831.

95. *Id.* at 828.

96. *Id.* at 831.

would violate Model Rule 1.8(e), most likely receiving a highly formalistic application, perhaps with comment about the long historical foundation for the rule.⁹⁷

While courts were accepting of financial assistance, New York City Bar Opinions⁹⁸ and later an ABA ethics opinion⁹⁹ were not, especially when financial assistance raised implications of client-getting. In Opinion 20, for example, the inquiring lawyer asks regarding his client, an injured, out-of-work seaman with a meritorious claim,

Would it be improper for me as his attorney to advance him a little money to keep him from actual physical suffering pending his trial. . . [i]f he is permitted to starve, his physical suffering will be such that he will be compelled to accept a very small and inadequate [settlement] offer that [the defendant] has made. I consider that the amount they have offered him is about one-twentieth of what a jury would award my client.

The New York Bar Committee responded in the negative, objecting that the assistance would give the lawyer an “undue personal interest” in the claim.¹⁰⁰

In Opinion 391, the Committee takes a client-getting focus rather than a conflict of interest one, suggesting that an occasional loan may be permissible, as long as the practice does not become known, inducing clients to seek the lawyer’s services based on his willingness to provide financial assistance.¹⁰¹

Eventually, the ABA entered its bar opinion into the mix. In ABA Opinion 288, the Committee on Professional Ethics and Grievances asserted a broader prohibition: “Payments, pending trial in personal injury cases, by an attorney to or for the benefit of his injured client, for any purpose other than to cover expenses of litigation, subject to reimbursement, are improper.”¹⁰² And regarding financial assistance: “if publicized, constitutes a holding out by the lawyer of an improper inducement to clients to employ him. . . .”¹⁰³ The ABA thus relied on not only the client-getting rationale but also the conflict rationale in prohibiting financial assistance whether the practice produced client-getting or not.

97. See, e.g., *Comm. on Prof’l Ethics & Conduct of Iowa State Bar Ass’n v. Bitter*, 279 N.W.2d 521, 522-23 (Iowa 1979); *Fla. Bar v. Hastings*, 523 So. 2d 571, 572 (Fla. 1988); *Attorney Grievance Comm’n of Md. v. Kandel*, 563 A.2d 387, 387-88, 390 (Md. 1989); *Office of Disc. Counsel v. Williams*, 553 N.E. 2d 1082, 1082-83 (Ohio 1990) (buying claims case); *People v. Hellewell*, 811 P.2d 386, 387 (Colo. 1991); *In re Arensberg*, 159 A.D.2d 797, 797 (N.Y. 1990); *In re Skevin*, 517 A.2d 852, 854-55 (N.J. 1986); *In re Berlant*, 328 A.2d 471, 476 (Pa. 1974); *In re Pusser*, 254 S.E.2d 926, 926 (S.C. 1979) (loan for food and Christmas); *In re Mountain*, 721 P.2d 264, 268 (prenatal expenses); *Shea*, 374 S.E.2d at 64-65; *Miss. Bar v. Attorney HH*, 671 So. 2d 1293, 1295-98 (Miss. 1996); *Fla. Bar v. Taylor*, 648 So. 2d 1190, 1191-92 (Fla. 1990) (used clothes case).

98. See *New York City Bar Ass’n Comm. on Prof’l & Judicial Ethics*, Op. 781 (1953), 779 (1953), 391 (1936), 319 (1934), 20 (1925).

99. *ABA Comm. on Prof’l Ethics*, Formal Op. 288 (1954) [hereinafter *ABA Formal Op. 288*].

100. *New York City Bar Ass’n Comm. on Prof’l & Judicial Ethics*, Op. 20 (1925).

101. *New York City Bar Ass’n Comm. on Prof’l & Judicial Ethics*, Op. 391 (1936), 319 (1934).

102. *ABA Formal Op. 288*.

103. *Id.*

Thus, the ABA Committee on Professional Ethics and Grievances, in its 1954 Opinion 288, rejected a "settled course"¹⁰⁴ of court decisions to the contrary in opining that loans that were not client-getting related were unethical.¹⁰⁵ Caselaw prior to Opinion 288 held financial assistance improper only if it was offered as inducement or retention of a client (client-getting) or if assistance repayment was contingent on recovery.¹⁰⁶

In the years following Opinion 288, some courts rejected or narrowly interpreted it,¹⁰⁷ some followed it,¹⁰⁸ and some ignored it.¹⁰⁹ Illustrative of the courts rejecting Opinion 288 is *In re Ratner*.¹¹⁰ The *Ratner* fact pattern in many ways follows that of *Brotherhood of Railroad Trainmen v. Virginia*.¹¹¹ In *Ratner*, respondents were regional counsel for the Brotherhood of Railroad Trainmen. The Wichita Bar Association levied several charges against respondents, grouped into four categories: (1) solicitation of employment; (2) stirring up and breeding litigation; (3) division of fees with a lay agency, namely the *Brotherhood of Railroad Trainmen*; and (4) advancement of living expenses to clients. The Supreme Court of Kansas eventually found against the bar and for the accused lawyers and imposed no discipline.¹¹² The first three categories of charges were largely obviated by the Supreme Court's contemporaneous holding in *Brotherhood of Trainmen*.¹¹³ As to the financial assistance, even the accusing bar did not object to the financial assistance except to the extent that it produced client-getting (and the corresponding new claims against the railroad).¹¹⁴ The evidence showed that respondents arranged for the Wichita State Bank to make loans to certain clients. The court held that such loans did not violate Canon 42 because all clients were personally responsible to the bank for the loans, because the law does not condemn friendly aid made to a "poor suitor who is prosecuting a meritorious cause of action,"¹¹⁵ because respondents never advertised that such loans were made, and because repayment of the loans was not premised on the

104. Payne H. Ratner, *Advancing Money to Clients—Whether Unethical*, 15 NACCAL J. 410, 413 (1955); *In re Ruffalo*, 370 F.2d 447, 461 (6th Cir. 1966) (Edwards dissenting) (Opinion 288 is "against the great weight of opinion in the courts in this country.")

105. Ratner, *supra* note 104, at 413 discussing ABA Formal Op. 288.

106. William Roger Strelow, *Loans to Clients for Living Expenses*, 55 CAL. L. REV. 1419, 1421 (1967), citing *McCallum*, 173 N.E.2d at 831; *Johnson*, 151 N.W. 125; *Mytton v. Mo. Pa. R.R.*, 211 S.W. 111 (Mo. App. 1919); *State ex rel. Neb. Bar Ass'n v. Rein*, 4 N.W.2d 829 (Neb. 1942).

107. *In re Ruffalo*, 249 F. Supp. 432, 440-45 (N.D. Ohio 1965); *In re Ratner*, 399 P.2d 865, 875 (Kan. 1965).

108. *Mahoning County Bar Ass'n v. Ruffalo*, 199 N.E.2d 396 (Ohio 1964); *El Janny v. Cleveland Tankers Inc.*, 209 F. Supp. 91, 94 (N.D. Ind. 1962).

109. *In re Moore*, 134 N.E.2d 324 (Ill. 1956); *State ex. rel. Beck v. Lush*, 103 N.W.2d 136 (Neb. 1960).

110. 399 P.2d 865 (Kan. 1965).

111. 377 U.S. 1 (1964) (holding that the First and Fourteenth Amendments protect the right of the Brotherhood to advise workers who are injured and recommend specific lawyers).

112. *Ratner*, 399 P.2d at 876.

113. *Id.* at 869 discussing *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964).

114. *Ratner*, 399 P.2d at 874.

115. *Id.*, quoting *Jahn v. Champagne Lumber Co.*, 157 F. 407, 418 (7th Cir. 1908).

outcome of litigation.¹¹⁶ Because there was not a “regular practice” of making these loans, there was no violation. The court quotes the most prominent legal ethics commentator of the time, Henry Drinker: “[A lawyer] may loan money to a client, but not as a regular practice,” sounding again the client-getting rationale for the prohibition.¹¹⁷

With the adoption of the *Model Code* in 1969,¹¹⁸ and the states’ rapid adoption of it,¹¹⁹ the legal profession’s policy on acquisition of interest and financial assistance became law. Until then, organized bar agitation in the form of prosecution of plaintiff’s lawyers,¹²⁰ the tentative acquisition prohibition,¹²¹ and Opinion 288,¹²² had had mixed success at best when faced with courts willing to engage in sustained policy analysis of the prohibitions’ value.¹²³ After the adoption of the *Model Code* provisions,¹²⁴ however, most courts reverted to a role of near-mindless application of the rules’s language, eschewing any policy analysis.¹²⁵ One court that did delve deeply into the policies underlying the rules could not rationalize them with the rule, leading to a strained, twisted reading of the rules to reach the result dictated by the policies.¹²⁶

In *Louisiana State Bar Association v. Edwins*, the Louisiana Bar Association brought charges of ethical violations against Edwins. Edwins had advanced living expenses to his clients. Edwins was disciplined for various other violations.¹²⁷ Concerning the financial assistance, the facts showed that Edwins advanced to one of his clients several different amounts of money on several different occasions.¹²⁸ However, under the circumstances here, the court was unwilling to apply a per se rule that DR 5-103(B)¹²⁹ was violated. The court held that the advancement of minimal living expenses, of minor sums necessary to prevent foreclosures, or of necessary medical treatment do not violate the “spirit

116. *Ratner*, 399 P.2d 865.

117. *Id.* at 875, quoting HENRY DRINKER, *LEGAL ETHICS* 95 (1953).

118. *MODEL CODE* (1969).

119. WOLFRAM, *supra* note 8, § 2.6.3, at 56.

120. *Johnson*, 151 N.W. 125; *Sizer*, 267 S.W. 922.

121. 1908 CANONS Canon 10.

122. *MODEL CODE* DR 5-103 (1969).

123. *Reece*, 31 N.E. at 749; *McCallum*, 173 N.E.2d at 831; *Johnson*, 151 N.W. 125; *Sizer*, 267 S.W. 922; *Ruffalo*, 249 F. Supp. at 440-445; *Ratner*, 399 P.2d at 875.

124. *MODEL CODE* DR 5-103(A), (B) (1969).

125. *See infra* section II.

126. *La. State Bar Ass’n v. Edwins*, 329 So. 2d 437 (La. 1976).

127. *Id.* at 444, 448.

128. *Id.* at 444-45.

129. *MODEL CODE* DR 5-103(B) reads as follows:

While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

of the intent”¹³⁰ of the disciplinary rule. The court was troubled that an ethics rule’s prohibitions would cause an impoverished person to be unable to proceed with his claim or to be forced to settle for an inequitably small amount because of his financial problems. The *Edwins* court could not abide the result that a lawyer ethics rule should deprive poor people from access to the courts. Therefore, the court here classifies living expenses such as *Edwins* had advanced under DR 5-103(B)’s permissible “expenses of litigation” umbrella. The court set out four requirements for this favorable treatment of the financial assistance: the advancements were not promised as inducement to obtain employment, they were reasonably necessary under the facts, the client retained liability for repayment of the funds, and the attorney did not encourage public knowledge of the practice.¹³¹ In its result, the *Edwins* decision is thoroughly consistent with *In re Ratner*,¹³² *In re Sizer*¹³³ and other prevailing pre-*Code* caselaw, permitting financial assistance in the absence of client-getting motives and contingent repayment.¹³⁴ But the adopted language of 5-103(B) made this result seem a strained, disingenuous interpretation of clear language to the contrary. While the court acknowledged the difficulty of making this reading of the *Code*, the court justified its strained reading based on the policies furthered by it.¹³⁵ No subsequent court has reached the *Edwins* result in the face of the language of DR 5-103(B) or Model Rule 1.8(e).

Subsequently, the ABA set the Kutak Commission to work to reform the ethics code, eventually adopting the *Model Rules* in 1983. An early proposed draft of the Kutak Commission included a financial assistance prohibition but lacked an acquisition of interest prohibition entirely.¹³⁶ Once adopted though, the *Model Rules* retained both prohibitions from the *Model Code*.¹³⁷ Nonetheless, the ABA relaxed one aspect of the *Code*’s financial assistance rule, allowing for contingent repayment of litigation expenses and for outright payment of litigation expenses on behalf of indigent clients.¹³⁸ The definition of living expenses was no broader than the *Code*’s, certainly not the strained reading of the term given by the *Edwins* court. But the allowance of contingent repayment indicated a diminished reliance on the acquisition of interest rationale, or at least an acknowledgment that its dangers are no greater than those already found in the contingent fee arrangement

130. *Edwins*, 329 So. 2d at 445-47.

131. *Id.* at 446. Advances made by *Edwins* to a second client did not satisfy these requirements and the court disciplined him. *Id.* at 447-48.

132. *Ratner*, 399 P.2d at 875.

133. *Sizer*, 267 S.W. 922.

134. *Reece*, 31 N.E. at 749; *McCallum*, 173 N.E. at 831; *Johnson*, 151 N.W. 125; *Sizer*, 267 S.W. 922; *Ruffalo*, 249 F. Supp. at 440-45; *Ratner*, 399 P.2d at 875.

135. *Edwins*, 329 So. 2d at 446.

136. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 69-73 (Am. Bar Ass’n Ctr. for Prof’l Responsibility 1999).

137. MODEL RULES Rule 1.8(e), (i).

138. MODEL RULES Rule 1.8(e).

itself. Courts applying the Model Rule have been as formalistic in their application as were most of those following the *Model Code* provisions.¹³⁹

In recent years, a few states have created an exception to their financial assistance rules to allow loans for living expenses to indigents when “reasonably needed to enable a client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits . . .”¹⁴⁰ provided the client remains ultimately responsible for repayment and that no promise of such financial assistance was used in attracting the client.¹⁴¹ Others have simply amended their financial assistance rules to permit loans for “reasonably necessary medical and living expenses.”¹⁴² These exceptions are meant to answer the *Edwins* court’s argument that the strict enforcement of acquisition of interest rules inhibit access to courts for indigents. In effect, these states have done by rule most of what the *Edwins* court strained to do with statutory interpretation. While leaning in the right direction, these exceptions leave the rules intact without considering the inherent value in the rule itself. In effect, these amendments ameliorate the effects of rules that should not exist in the first instance.

The ALI undertook to create the *Restatement* in the 1990’s, publishing the final material in 1998.¹⁴³ The Reporters for the project had misgivings about the wisdom of the current law on financial assistance and acquisition of interest, but the adopted *Restatement* sections propose no substantive changes and Model Rule 1.8(e) or (i).¹⁴⁴

Most recently, the ABA’s Ethics 2000 Commission, charged with reform of the Model Rules, proposed no substantive change in the financial assistance or acquisition of interest rules, and the ABA adopted its final report largely intact.¹⁴⁵

II. FORMALIST TREATMENT OF THE RULES

These rules are ripe for formalist treatment, which surprisingly has hit its peak

139. See, e.g., *Taylor*, 648 So. 2d at 1191 (Lawyer gave used clothes and \$200 for basic necessities to client. Court held there was no violation of 1.8(e) because the assistance was not “in connection with” litigation. Court stated, quoting the referee: “Absent some kind of condition for repayment from suit proceeds or establishment/maintenance of the attorney/client relationship as a result of the assistance, I simply do not believe it is appropriate to sanction lawyers who provide used clothing for a client’s child or [give] \$200.00 for an indigent client’s necessities.”); *Kandel*, 563 A.2d 387 (holding appropriate a public reprimand for lawyer payments to client for car repairs to get to medical appointments despite finding that lawyer was not motivated by self-interest or personal gain); *Hastings*, 523 So.2d 571.

140. MINN. R. OF PROF’L CONDUCT Rule 1.8(e)(3); TEX. DISC. R. OF PROF’L CONDUCT Rule 1.08(d).

141. MINN. R. OF PROF’L CONDUCT Rule 1.8(e)(3).

142. TEX. DISC. R. OF PROF’L CONDUCT Rule 1.08(d).

143. RESTATEMENT (2000).

144. RESTATEMENT § 36 (1), (2). “The Reporters support the minority position, but that position was not accepted by the Institute.” *Id.* at § 36 Reporter’s Note.

145. The text of the adopted Ethics 2000 report may be found at www.abanet.org/cpr/e2k-report_home.html (last visited Nov. 15, 2002).

in the analysis of these rules in the second half of the 20th century,¹⁴⁶ long after formalism had given way in most legal analysis to legal realism and its descendants. Bar discipline and court review of it lean toward formalism generally.¹⁴⁷ Among the likely reasons for this lean toward formalism is the awkwardness of expressing and relying on rationales for rules that are bar self-interested.¹⁴⁸ As such, the lean is often at its strongest when the rationales for the bar ethics rules in question are most entwined in bar custom and self-interest. The rules apply only in the context of litigation, a difference in treatment between litigation and planning/business matters that the *Restatement* drafters delicately describe the rationale for as “largely historical.”¹⁴⁹ When the rationales are enmeshed with bar self-interest, the temptation is powerful for courts to short-cut any analysis of policy or of the rules’ rationales by uncritically applying the language of the rules, thus obviating the need to discuss the policies underlying the rule or their particular advancement by the rules’ application to the lawyer’s conduct in the particular case.¹⁵⁰ How awkward to recite the unflattering rationales advanced by the drafters, protecting their corporate clients from claims brought by injured workers or consumers.¹⁵¹

Since the adoption of the *Model Code*, courts reviewing disciplinary charges of lawyers accused of acquisition or financial assistance have almost entirely declined to consider arguments about the rules’ effectiveness, fairness, absence of harm to clients, just results, or lawyer good intentions.¹⁵² In 1934, Max Radin

146. See, e.g., *Arensberg*, 553 N.Y.S.2d 859 (lawyer disciplined under DR 5-103 for gift payments made to current client for personal financial needs, no solicitation, no acquisition of interest); *Pusser*, 254 S.E.2d 926 (lawyer disciplined under DR 5-103 for loaning client’s family \$1,000 for “food and Christmas”); *Berlant*, 328 A.2d 471 (Lawyer disciplined for making advances to indigent clients for food, rent, and other necessities. Court held that the purposes of the advances is irrelevant to the finding of a violation but may be used as mitigation of punishment); *Hellewell*, 811 P.2d 386 (lawyer disciplined under DR 5-103 for loaning medical malpractice client \$1,555); *Kandel*, 563 A.2d 387 (public reprimand for lawyer payments to client for car repairs to get to medical appointments despite finding that lawyer was not motivated by self-interest or personal gain); *Hastings*, 523 So. 2d 571 (Lawyer was disciplined for making arrangements for third party to make loans to clients with clients remaining responsible for repayment. He pled guilty, but argued that FELA permits such loans in FELA matters. Court “offers no opinion on the merit of [lawyer’s] argument, but accepts his plea of guilty.”); *Shea*, 374 S.E.2d at 64 (Court responded to lawyer’s argument that no harm is produced by violations of 5-103 as follows: “The short answer to that question is that the disciplinary rule says that such conduct is improper.”). But see *Taylor*, 648 So. 2d at 1191 (Lawyer gave used clothes and \$200 for basic necessities to client. Court says no violation of 1.8(e) because the assistance was not “in connection with” litigation. Court quoting the referee: “Absent some kind of condition for repayment from suit proceeds or establishment/maintenance of the attorney-client relationship as a result of the assistance, I simply do not believe it is appropriate to sanction lawyers who provide used clothing for a client’s child or [give] \$200 for an indigent client’s necessities.”).

147. SIMON, *supra* note 14, at 9; William Simon, *Should Lawyers Obey the Law*, 38 WM. & MARY L. REV. 217, 220 (1996) (relating the relationship between Positivism and categorical judgment).

148. James E. Moliterno, *Why Formalism*, 49 KAN. L. REV. 135 (2000).

149. RESTATEMENT § 36, cmt. b.

150. See, e.g., *Shea*, 374 S.E.2d at 64.

151. AUERBACH, *supra* note 56, at 41-50.

152. See *supra* cases cited in note 146.

encouraged courts to use legal realist analysis rather than formalism in financial assistance cases.

Courts should evaluate financial assistance and acquisition matters case by case, which would “substitute judgment by reality for judgment by category” There is no reason why judges should be relieved from the most important part of their task which is to take account of the actual conditions within which the parties before [the judge] live.¹⁵³

At Radin’s time, it seems, courts took such an approach, but abandoned it following the adoption of the *Model Code*. Take the financial assistance rule as applied in *Committee on Professional Ethics & Conduct of the Iowa State Bar Association v. Bitter*.¹⁵⁴ In *Bitter*, the lawyer was disciplined in part for loaning his impecunious clients \$986.70 interest free for humanitarian reasons.¹⁵⁵ This conduct violated DR 5-103(A).¹⁵⁶ To be sure, the violated rule is based in part on conflicts of interest grounds and in part on the common law of champerty, barratry, and maintenance (in this instance, especially maintenance).¹⁵⁷ Bitter’s conduct violated the plain meaning of the rule’s language.¹⁵⁸ The language of the rule does not require that Bitter have taken unfair advantage of his clients; thus, his motives and the good that his actions may have actually produced for his clients and for the justice system¹⁵⁹ are irrelevant.¹⁶⁰ Even if Bitter’s actions produced justice by, for example, allowing his clients to withstand delaying tactics or a low-ball settlement offer of the defendant and stay in the litigation to a judgment based on the merits of their claim, Bitter’s conduct would have violated the legal ethics rule and subjected him to discipline. Never mind that other conflicts of similar danger and magnitude allow for client waiver;¹⁶¹ this rule’s language does not permit waiver, so Bitter’s clients’ probable waiver or consent is irrelevant. Never mind that similar conduct in the absence of litigation, say during a client’s patent application process, but not during a patent infringement suit, would be permitted. The *Restatement*, in an admirable show of candor, acknowledges that this rule distinguishes between litigation and non-litigation

153. Radin, *supra* note 11, at 72-73, 78.

154. 279 N.W.2d 521 (Iowa 1979). See MODEL RULES Rule 1.8(e); MODEL CODE DR 5-103(A).

155. *Bitter*, 279 N.W.2d at 523.

156. *Id.*

157. See RESTATEMENT § 36 cmt. c; ANN. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(e) cmt 10 (2002).

158. Cf. MODEL RULES Rule 1.8(e).

159. Allowing, for example, a meritorious claim to be settled for an amount that more accurately reflects the plaintiff’s damages.

160. See Radin, *supra* note 11, at 72 (referring to the good that sometimes results from lawyer acts of champerty and maintenance).

161. See MODEL RULES Rule 1.7; *Lavaja v. Carter*, 505 N.E.2d 694, 699-700 (Ill. App. Ct. 1987) (allowing representation of multiple parties who were informed and consented).

settings for “largely historical” reasons.¹⁶² Never mind that there was no suggestion that Bitter’s clients’ claims were anything other than meritorious. Never mind that the actions and crimes for champerty, barratry, and maintenance (the historical antecedents to the ethics rule) all required a malice element;¹⁶³ the language of this rule does not, and so Bitter’s good motivation and the absence of any showing of malice toward his clients’ litigation opponents are irrelevant. How far would a court get if it had to make policy-based arguments in applying Model Rule 1.8(e) to Bitter’s conduct? In part, at least, the court would find itself analyzing what result would best serve the original drafters’ (the drafters of the 1908 *Canons* and ABA Opinion 288’s expansion of the prohibition) intent to restrain the bringing of personal injury claims by those unable to withstand the delay of litigation against the drafters’ corporate clients.¹⁶⁴ What better reason to use a formalist approach than to avoid dealing with awkward and embarrassing policy discussions?

Imagine the discussion of “legislative history” or historical context in a legal realist style opinion applying some of the bar ethics rules when the drafters’ intent was to exclude outsiders from the profession or diminish their ability to attract and serve clients. For example, setting higher educational standards for admission to the bar was one means chosen to keep the unwanted out of the profession, to “purify the stream at its source,” as one ABA source put it.¹⁶⁵

Somewhat ironically, a 1924 court treated these issues in a much more realist manner, using a candid, policy-based analysis.¹⁶⁶ In *Sizer*, the Missouri Supreme Court reviewed a petition to disbar two personal injury plaintiffs’ lawyers for soliciting clients and in particular for offering and in some cases providing financial assistance to their clients during litigation. Although the disciplinary matter was brought (as procedure required it to be) in the name of the bar association, the facts were investigated, the charges encouraged, and the litigation was financed by a consortium of corporate interests and their lawyers.¹⁶⁷ In language rare in court opinions reviewing bar discipline, the court considered the context of the matter before it, even as it insisted that the context should not alter its judgment:

Let us speak plainly, as courts should speak, and say that every earmark of the evidence in this case shows that it is an effort by corporation lawyers as against what they call damage-suit lawyers. All this (true, as it may be, and we think it

162. RESTATEMENT § 36 cmt. *b*.

163. See Radin, *supra* note 11, at 67.

164. Some states have amended their versions of Model Rule 1.8(e) to ameliorate this impact of the rule. See, e.g., MINN. R. OF PROF’L CONDUCT Rule 1.8(e) (2002); TEX. DISC. R. OF PROF’L CONDUCT Rule 1.08(d) (2002).

165. Am. Bar Ass’n Reports 656-88 (1921); for more on the bar’s interest in raising educational standards to exclude unwanted ethnic and racial groups from bar membership, see AUERBACH, *supra* note 56, at 113.

166. *Sizer*, 267 S.W. 922.

167. *Id.* at 923.

is) does not change this case. The motive for preferring the charges is of small consequence, if, in fact, the charges are sufficient in law, and the respondents are guilty. . . . [Nonetheless] [i]f the bar associations, sua sponte, had preferred the charges, we would have one background, but where the corporation lawyers of the [bar] associations have induced the associations to act upon evidence procured by [their investigator], the background is different.¹⁶⁸

The *Sizer* court considered the nature of the “damage-lawyers” clients’ injuries, the economic hardships being suffered by their families, and the settlement tactics undertaken by defendants in determining to dismiss the disciplinary charges against Sizer and Gardner.¹⁶⁹ The almost jarring nature of the court’s candor evidences its inconsistency with the modern norm in bar discipline cases and the usual absence of discussion of context.

Doing legal realist analysis of the application of a legal rule requires examination of the policies that drive the rule, in part by examination of the rationales that animated the rule’s makers. When those policies are embarrassing, or worse, the temptation is strong to confine the analysis to a more formalist approach. Particularly where the drafters are the legal profession, and the rule’s adopter and interpreter, a bar association or court, are also part of the legal profession, the push will be overwhelmingly toward formalism and away from any analysis that requires examination of the embarrassing policies for the rules.

III. THE PROFFERED RATIONALES

When courts do not apply the rules in a wooden, formalist manner, three rationales are prominently relied upon. First, they are conflicts rules, meant to prevent lawyer imposition on client interests. Second, they are champerty rules, meant to prevent the stirring of needless litigation. And third, closely related to the champerty rationale, they are client-getting, anticompetitive restrictions, meant to prevent lawyers from luring clients with promises of cash paid for good claims.¹⁷⁰

A. THE CONFLICTS RATIONALE

When a lawyer takes a stake in a client’s litigation, whether through acquisition of interest in violation of Model Rule 1.8(j), or through financial assistance in violation of Model Rule 1.8(e), some potential for conflict of interest is present. In the main, the lawyer’s interests have been aligned in a more-than-usual way with those of the client: the lawyer’s share in the claim or the lawyer’s interest in repayment of loans made to the client is more valuable in

168. *Id.* at 924-25.

169. *Id.* at 925-34.

170. *See infra* section III.C.

direct proportion to the client's success.¹⁷¹ In this respect, the lawyer may be more-than-usually interested in doing well by the client's interests.

Some danger does exist, however, that the lawyer may favor the lawyer's own interests over those of the client. Imagine, for example, a lawyer who regularly purchases a two-thirds interest in client's cases, investing both her time and money. Imagine that lawyer has ten client matters pending on day one. Over time, four of those matters settle and the lawyer reaps her two-thirds share of the claims. Imagine that five more of the ten matters have gone to trial, at considerable expense to the lawyer, and all produced defendant verdicts, resulting in a loss to the lawyer of the amount paid for the two-thirds shares of those client's claims. A settlement offer is made in the tenth case that would be acceptable to the client. The lawyer may prefer to gamble on a successful outcome at trial in order to recoup some of her losses on the five unsuccessful claims. The lawyer may press the client, shading the lawyer's advice toward continuing to trial, favoring the lawyer's interests over the client's. There lies the conflict. A similar example in which the lawyer regularly advances money to clients works less well at producing a conflict. In such an example, the lawyer's interest in the matter is not precisely proportional to the recovery on the claim, but rather is fixed at the amount of financial assistance and the agreed to terms for its repayment, modified by the likelihood of recovery from the client.¹⁷² As a result, the lawyer's interest will not be altered in the same way by the amount of a client's recovery. Rather, the conflict created in the loaning money context may cut the other way, causing a lawyer to be more risk-averse. When the client owes a lawyer a fixed amount, the lawyer may prefer that a client accept a settlement offer rather than gamble on a greater (or a zero) recovery at trial, again shading advice toward the lawyer's interests.

In general, conflicts rules focus on effects that are adverse to the client.¹⁷³ And because of the costs associated with eliminating a client's counsel of choice, conflicts-induced disqualifications "should . . . be no broader than necessary."¹⁷⁴ Not every adverse effect on representation produces a disqualifying conflict.¹⁷⁵ Only those that present a "substantial risk" of being "material" ought to be

171. RESTATEMENT § 125 cmt. c ("[The acquisition of interest prohibition], which applies to an interest arguably consistent with the client's, is derived more from the common-law rules against maintenance and champerty than from a concern about a conflict of interests, although it can also involve the latter.")

172. As a business transaction between lawyer and client, these terms would have to comply with Model Rule 1.8(a).

173. MODEL RULES Rule 1.7; RESTATEMENT § 121.

174. RESTATEMENT § 121 cmt. b.

175. Unlike many other conflicts situations, disqualification of a client's lawyer is an inappropriate remedy for a violation of the financial assistance rule. *Shade v. Great Lakes Dredge & Dock Co.*, 72 F. Supp. 2d 518 (E.D. Pa. 1999). *Contra Waldman v. Waldman*, 499 N.Y.S.2d 184, 185 (App. Div. 1986) (Wife's lawyer was disqualified for loaning her money to pay car insurance and mortgage payments. "There is nothing in the record to indicate that the advances of money by [the lawyer to the client] were motivated by anything other than [the lawyer's] genuine concern for [the client's] financial plight.")

disqualifying.¹⁷⁶ “The standard requires more than a mere possibility of adverse effect.”¹⁷⁷ Even then, only conflicts that are not amenable to client waiver produce disqualification.¹⁷⁸

The effects on clients of acquisition of interest and financial assistance transactions may not be conflicts at all, or at least not the sort of conflicts that otherwise trigger the application of the general conflict rules.¹⁷⁹ What passes as a conflict in this context may be no different from the ordinary economic conflict of interest that lawyers and clients have as a matter of routine and that does not trigger the application of the conflicts rules. Any time a lawyer bills for time spent, the lawyer has an interest in continuing to work on a client’s matter for a longer rather than shorter time. A client, by contrast, paying for the lawyer’s services by the hour, would prefer a like resolution or recovery on a claim in a shorter rather than longer time. A lawyer in such circumstances has an interest in continuing a matter beyond a settlement offer that might be acceptable to a client, conceivably shading advice toward the lawyer’s and away from the client’s interest. This circumstance does not give rise to a conflicts analysis under the ethics rules. Elliott Cheatham, in his early casebook on legal ethics asserts that “[t]here is an inescapable conflict of interest between a lawyer and client in the matter of fees.”¹⁸⁰ And in the common sense of the word “conflict,” he is quite correct. Lawyers and clients have adverse interests in the fee contract, with lawyers often in a position to take advantage of a disparity in knowledge and bargaining power. But no one regards the hourly fee contract and the potential issues of lawyer advantage taking in it as an event that requires the application of the conflict of interest rules. Though it presents a conflict of similar magnitude, the financial assistance rule does not bar a lawyer who owns stock or other ownership interest in an enterprise from being retained by enterprise to conduct litigation.¹⁸¹ The difference between this and other examples of lawyer-client economic conflict and that of maintenance or champerty is imperceptible.¹⁸²

Further, the genuine conflicts of interest harm that comes from violations of Model Rule 1.8(e) or (i) are not different in kind from those that inhere in

176. MODEL RULES Rule 1.7; RESTATEMENT § 121 cmt c.

177. RESTATEMENT § 121 cmt c(iii); see Board of Educ. of N.Y. v. Nyquist, 590 F.2d 1241, 1246-47 (2nd Cir. 1979) (refusing to use “appearance of impropriety” standard for conflicts); Sherrod v. Berry, 589 F. Supp. 422 (N.D. Ill. 1984) (same).

178. RESTATEMENT § 122.

179. MODEL RULES Rules 1.7, 1.9.

180. ELLIOTT CHEATHAM, CASES AND MATERIALS ON THE LEGAL PROFESSION 170 (1938).

181. RESTATEMENT § 36 cmt c.

182. See also Comm. of Prof’l Ethics and Conduct of the Iowa State Bar Ass’n v. McCullough, 468 N.W.2d 458 (Iowa 1991) (no violation of DR 5-104(A), 5-101(A), and 5-103(A) because the court had previously held that taking a contractual security interest to secure payment of attorney’s fees does not constitute entering into a business transaction with a client).

acceptable contingent fee arrangements.¹⁸³ The acquisition rule has in its text an exception for reasonable contingent fees. In a contingent fee matter, the lawyer buys a stake in the client's claim with the lawyer's otherwise uncompensated time and effort. Substituting into this transaction the lawyer's money or other assets for the lawyer's time and effort changes the acceptable contingent fee into a violation of Model Rule 1.8 (j). Similarly, in a conflicts sense the concern with financial assistance to a client relates to the lawyer's personal interests in the outcome of the matter. Again, the difference between such a stake and the contingent fee stake are negligible. In most financial assistance matters, the magnitude of the lawyer's interest attributable to the financial assistance will be far less than that attributable to the contingent fee contract.

Contingent fees do not require client consent in the conflicts sense. Rather they require a substitute for client consent: a written fee agreement must be signed by the client; that agreement must clearly inform the client regarding client liability and accounting terms for litigation expenses.¹⁸⁴ Further, the mere fact that the fee agreement is a voluntarily entered contract dictates that every fee arrangement carries implicit client consent. Similar substitute-for-consent provisions could accompany rules regulating rather than prohibiting acquisition and financial assistance.

The positive effects of contingent fees also apply to financial assistance and acquisition of interest, but these rationales are seldom given as support for allowing financial assistance or acquisition of interest. The Restatement praises the positive effects of contingent fees:

[Contingent fees] give lawyers an additional incentive to seek their clients' success and to encourage only those clients with claims having a substantial likelihood of succeeding. . . . [They] enable the client to share the risk of losing with the lawyer, who is usually better able to assess the risk and bear it by undertaking similar arrangements in other cases.¹⁸⁵

These features no less apply to acquisition of interest and financial assistance, and help explain why rational clients would desire to undertake such transactions with their lawyers, belying the paternalistic client-protection conflicts rationale proffered by the organized bar.¹⁸⁶ The conflicts argument given for the financial assistance and acquisition of interest rules is largely the same paternalistic, disingenuous argument made by the turn of the 20th Century bar leaders: clients

183. RESTATEMENT § 36 cmt. *a* (The Restatement recognizes the connection between the acquisition of interest, financial assistance and contingent fee rules. "[This section is] ancillary to sections 34 and 35 which regulate lawyers in fee contracts and restrain certain conflicts of interest that tend to distract lawyers from their clients' interests.").

184. MODEL RULES Rule 1.5(c).

185. RESTATEMENT § 35 cmt. *b*.

186. AUERBACH, *supra* note 56, at 42-48; *Topps v. Pratt & Callis, P.C.*, 564 N.E.2d 196, 198 (Ill. 1990) (the purpose behind DR 5-103 is to maintain an attorney's independent professional judgment on behalf of a client).

need to be protected from over reaching by unscrupulous personal injury plaintiff's lawyers.¹⁸⁷

Contingent fees themselves have withstood recent attacks, attacks that are not unlike those of the historical period that gave rise to the rigid restrictions on acquisition of interest and financial assistance.¹⁸⁸

The English prohibitions on champerty and maintenance were based on the same rationales as were their prohibition of contingent fees.¹⁸⁹ When those rationales failed to support a prohibition of contingent fees in the United States' different circumstances, so should they have failed to support restrictions on champerty and maintenance.

Prior to the adoption of the *Model Code*, courts as well recognized that loaning money raises a possible conflict, but only when the lawyer subverts the client's interests.¹⁹⁰ "By loaning money to his client, the [lawyer] put[s] himself in a position where his personal interests might well become adverse to [the client's]. The making of such a loan by the lawyer is not, however, necessarily unethical conduct. It is unethical only if the loan is made to accomplish some purpose contrary to the client's welfare or if, in seeking repayment, the lawyer pursues practices which are unfair or unduly oppressive."¹⁹¹ When the financial assistance is an outright gift, as in *Arensberg*¹⁹² and *Taylor*,¹⁹³ there is no buying-interest-type conflict. The remaining conflict is the fear of client unwillingness to overrule the lawyer's judgment at various litigation stages because of a sense of obligation to the client's benefactor. But this sort of conflict exists when a lawyer does pro bono work or when a lawyer gives a client exceptionally dedicated service, neither of which would ever be regarded as a conflict, let alone an unwaivable one. Far from suggesting impropriety, these are both examples of admirable lawyer professionalism.

If financial assistance and acquisition of interest present conflicts, however,

187. AUERBACH, *supra* note 56, at 42-50.

188. Compare SHARSWOOD, *supra* note 60, at 153-64, AUERBACH *supra* note 56, at 43-50, and Am. Bar Ass'n Reports 33, 61, 63-74 (1908), with Richard M. Birnholz, *The Validity and Propriety of Contingent Fee Controls*, 37 UCLA L. Rev. 949 (1989); Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 Fordham L. Rev., 247 (1996); Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark*, 37 UCLA L. REV. 29 (1989); Michael Horowitz, *Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee Reform*, 44 EMORY L.J. 173 (1995); Thomas J. Micelli & Kathleen Segerson, *Contingent Fees and Lawyers: Their Impact on Litigation and Accident Prevention*, 20 J. LEGAL STUD. 382 (1991) (arguing that contingent fee arrangements do not provide incentives to take due care); Terry Thompson, *Are Attorneys Paid What They're Worth? Contingent Fees and the Settlement Process*, 20 J. LEGAL STUD. 187 (1991) (arguing that in certain types of cases clients are better off without representation than with contingent fee attorney representation).

189. BODKIN, *supra* note 8, at 75-76.

190. Grievance Comm. of the Fairfield County Bar v. Nevas, 96 A.2d 802 (Conn. 1953). In many respects, ABA Formal Op. 288 first added an explicit conflict rationale to financial assistance restrictions.

191. Nevas, 96 A.2d at 805.

192. Arensberg, 553 N.Y.S. 2d 859.

193. Taylor, 648 So.2d 1190.

they are no more grave than conflicts that are routinely waivable by clients in other circumstances. Interests of client autonomy dictate that clients make trade-offs in conflict situations all the time.¹⁹⁴ The client's power to consent is generally limited by three factors: client incapacity or inadequate information regarding the conflict; the representation violates law; or the conflict is so grave that "it is not reasonably likely that the lawyer will be able to provide adequate representation"¹⁹⁵ If the client is sufficiently informed by the lawyer regarding the conflict, any conflict, then the "inadequate information" rationale for denying the client's power to waive fails.¹⁹⁶ Unlawful representations that cannot be waived include multiple defendant representations in capital cases, for example.¹⁹⁷ To be sure, where substantive law separate from the ethics rules continue to prohibit maintenance or champerty in a broad way (not to include the traditional narrowing element of malice, for example), the representation would be precluded. But few such jurisdictions remain.¹⁹⁸ As such, only if acquisition of interest or financial assistance conflicts are so grave that the lawyer cannot provide adequate representation to the client should clients be denied the power to waive any conflict that may be present.

Under this rationale, the rules fence out only the gravest conflicts as those for which waiver is not permitted.¹⁹⁹ For example, clients may not waive the conflict that arises when their lawyer also represents their direct adversary in litigation,²⁰⁰ although even such conflicted representation may be waivable in certain types of multiparty litigation where the conflict is somewhat less direct and less certain to place the lawyer in the position of harming one client's interests to advance another's.²⁰¹ Clients may not waive a conflict when their lawyer may effectively be an opposing party.²⁰² And clients may not waive the conflict present when their lawyer owns a substantial interest in the opposing party.²⁰³ In all of these examples, the conflict is far graver than that presented by either an acquisition of interest or a financial assistance transaction, and there are no obvious trade-off positive effects as exist for the client in the financial assistance or acquisition of

194. RESTATEMENT § 122 cmt. *g(iv)* ("[C]oncern for client autonomy generally warrants respecting a client's informed consent."); *Unified Sewage Agency v. Jelco Inc.*, 646 F.2d 1339, 1350 (9th Cir. 1981) ("We do not find it necessary to create a paternalistic rule that would prevent the client in every circumstance from hiring a particular attorney if the client knows [the likely ramifications of the conflict]. Clients who are fully advised should be able to make choices of this kind if they wish to do so.").

195. RESTATEMENT § 122 cmt. *b*.

196. *Id.* at § 122 cmt. *c(i)*.

197. *Id.* at § 122 cmt. *g(i)*; *Fleming v. Georgia*, 270 S.E.2d 185 (Ga. 1980).

198. *See infra* section III.C.

199. RESTATEMENT § 122 cmt. *g*.

200. *Id.* at § 128 cmt. *c(i)*, § 129.

201. *Id.* at § 128 cmt. *c(ii)*.

202. *See, e.g.*, *Greene v. Greene*, 391 N.E.2d 1355 (N.Y. 1979) (client's lawyers were former members of defendant law firm making client's lawyers potential judgment payers).

203. RESTATEMENT § 125 cmt. *c*, illus 1; *Kapelus v. State Bar*, 745 P.2d 917 (Cal. 1987); *In re Holmes*, 619 P.2d 1284 (Or. 1980); *Attorney Grievance Comm'n v. Collins*, 457 A.2d 1134 (Md. 1983).

interest situations.²⁰⁴

In all other conflicts situations, clients are empowered to waive the conflict and go forward with their lawyer of choice, understanding and accepting the conflict's risks in exchange for benefits they perceive from the engagement of the lawyer. The client in a maintenance or champerty situation may well prefer to undertake the risks of the lawyer conflict in exchange for a benefit. The benefits come in several forms: the client may wish to share the risk of recovery with a knowledgeable person (his lawyer);²⁰⁵ the client may be able to pursue the litigation beyond early settlement offers with the investment or financial support of the lawyer;²⁰⁶ the client may well regard as valuable the "investment" of the lawyer in the matter in that the lawyer's own interests are at stake making the lawyer far less likely to lack diligence.²⁰⁷ To the extent that these are conflicts rules, invoking client interests at stake, clients ought to be permitted to weigh the advantages and risks and choose if they wish to waive the conflicts involved in maintenance and champerty situations.²⁰⁸

Some early cases treated the purchase of a share of the subject matter of litigation as a business transaction between lawyer and client, voidable unless the lawyer can show the transaction's objective fairness.²⁰⁹ These requirements approximate modern waiver of conflicts, and parallel the requirements for business transactions between lawyers and clients found in Model Rule 1.8(a). Requiring such safeguards ameliorates the likelihood of harm from any conflict that might be present in the transaction. For an acquisition of interest or financial assistance transaction, these safeguards are present in Model Rule 1.8(a). Under Model Rule 1.8(a), heightened conflict waiver requirements must be met. A lawyer entering into a business transaction with a client must ensure that the transaction is "fair and reasonable," that its terms are submitted to the client in writing and in terms understandable by the client, that the client has an opportunity to obtain independent advice and counsel concerning the transaction, and that the client consents to the transaction in writing.²¹⁰ In the absence of prohibitions on acquisition of interest or financial assistance, lawyers entering such transactions with clients would be obligated to comply with Model Rule 1.8(a)'s stringent requirements.

204. For positive effects, see *infra* notes 206-08.

205. RESTATEMENT § 35 cmt. *b* (Contingent fees "enable the client to share the risk of losing with the lawyer, who is usually better able to assess the risk and bear it by undertaking similar arrangements in other cases.").

206. See MINN. R. OF PROF'L CONDUCT Rule 1.8(e) (2002).

207. RESTATEMENT § 35 cmt. *b* (Contingent fees "give lawyers an additional incentive to seek their clients' success and to encourage only those clients with claims having a substantial likelihood of succeeding.").

208. For two cases that treat acquisition of interest as a waivable conflict, see *In re Ainsworth*, 614 P.2d 1127 (Or. 1980) and *State ex rel Neb. State Bar Ass'n v. Hollstein*, 274 N.W.2d 508 (Neb. 1979).

209. *Valentine v. Stewart*, 15 Cal. 387, 401 (1860), *reh'g denied* 15 Cal. 405 (1860); SHARSWOOD, *supra* note 60, at 155 n.1.

210. MODEL RULES Rule 1.8(a); RESTATEMENT § 126.

Neither the acquisition of interest nor the financial assistance transaction presents a conflict of consequence. To the extent that they do so present in particular cases, the conflicts are insufficiently grave to warrant denying clients the power to consider their circumstances and waive the conflict.

B. THE STIR LITIGATION, ABUSE SYSTEM RATIONALE

Although litigation, and especially excessive or unnecessary litigation, is often criticized in the United States, the intensity and breadth of disdain for litigation present in England never made the trip across the Atlantic. Worries about stirring litigation are far less weighty in the United States than in England. Litigation in the American culture is not viewed as universally evil such as it was in Christian Medieval Europe. Indeed, litigation has served to shape policy and social good in ways unknown in England. Frivolous litigation, to be sure, is to be discouraged and sanctioned, but there is no religious or universal societal evil that attaches to enforcing rights and imposing justified liabilities through court action. As such, devices that allow individuals to bring justified litigation are not against public policy. That difference allowed the growth and acceptance of contingent fees, dictated the American rule regarding fee shifting, and generally drove policies that allowed American courts to be more open than their English counterparts. Nonetheless, some courts continue to state a stirring litigation rationale for the acquisition of interest and financial assistance rules.²¹¹

Historically, champerty and maintenance stirred litigation by the powerful against the weak.²¹² Additionally, the malice element meant that litigation advanced by means of champerty or maintenance was by definition brought with ill intentions and was unlikely to be meritorious. United States courts early on recognized the parallel between maintenance and acceptable contingent fees: each made meritorious litigation possible by the weak against the powerful, a virtually opposite result from the imported doctrines' effect in England.²¹³

Outside of the lawyer ethics rules, the law of champerty has diminished in importance, scope and effect.²¹⁴ The notion that meritorious claims ought to be suppressed was never embraced by American courts; rather it was advanced by the organized bar as a means of serving the interests of the bar's leaders'

211. *Kandel*, 563 A.2d 387; *In re Brown*, 692 P.2d 107 (Or. 1984) (Lawyer was disciplined for providing financial assistance to personal injury client without mention of claims' merits. "Payments or advances of this type for living expenses encourage either the commencement or continuance of legal proceedings."); *Topps*, 564 N.E.2d at 198 (The Court voided loan agreements between lawyer and client because they violated the *Code of Professional Responsibility*. The Court maintained the harm is not to client but to justice system.).

212. Radin, *supra* note 11, at 64; RESTATEMENT § 36 cmt. b ("Maintenance and champerty . . . Thought to breed needless litigation and to foster the prosecution of claims by powerful and unscrupulous persons.").

213. *McCallum*, 173 N.E. at 831; *Johnson*, 151 N.W. 125; *Sizer*, 267 S.W. 922.

214. See generally Susan Lorde Martin, *Financing Plaintiffs' Lawsuits: An Increasingly Popular (and Legal) Business*, 33 U. MICH. J.L. REFORM 57 (2000); see *infra* section III.C.

corporate clients.²¹⁵

With sophisticated controls on frivolous litigation already in place, current acquisition of interest and financial assistance rules disproportionately prevent the bringing of meritorious claims, not frivolous ones. For the same reasons that lawyers are less likely to bring frivolous claims on contingent fee bases, lawyers are less likely to buy frivolous claims or support clients during litigation of frivolous claims.²¹⁶ Giving lawyers a greater interest in claims is likely to reduce rather than increase the incidence of frivolous claim bringing. Lawyers, particularly those knowledgeable regarding the value of claims, will be unlikely to invest in weak, let alone frivolous claims. A lawyer investing in a frivolous claim would face a double disincentive: not only is she likely to lose her investment in the claim, but she risks litigation sanctions as well.²¹⁷

C. THE CLIENT-GETTING RATIONALE

The current restrictions on acquisition of interest and financial assistance are not sufficiently supported by a conflicts of interest rationale. To the extent that conflicts exist, they should be waivable ones.²¹⁸ Neither are they sufficiently supported by a stirring litigation rationale.²¹⁹ If these rules are to be sustained, they rest on a client-getting restriction rationale.

From the time of its importation into the United States until ABA Opinion 288 and the adoption of the expanded *Model Code* prohibitions in the 1960's, the primary rationale for maintenance and champerty law was the restriction of client-getting, with litigation stirring in the background.²²⁰ The client-getting rationale remains prominent.²²¹

Client-getting restrictions have always been "grade B" ethics, more etiquette

215. AUERBACH, *supra* note 56 at 42-50.

216. Van Gieson v. Magoon, 20 Haw. 146, 149 (1910) ("If an attorney undertakes to pay [litigation expenses], he is more likely to do so in a meritorious claim than in one devoid of merit."). RESTATEMENT § 35 cmt. b.

217. FED. R. CIV. P. 11.

218. See *infra* section III.A.

219. See *infra* section III.B.

220. Sizer, 267 S.W. 922; McCallum, 173 N.E. 827; Johnson, 151 N.W. 125; Mytton, 211 S.W. 111; Rein, 4 N.W.2d 829; Ratner, 399 P.2d at 874 (Accusers conceded propriety of financial assistance as long as practice is not a regular one that would amount to client-getting activity.); Moore, 134 N.E.2d 324 (Court declined to discipline lawyer for financial assistance to client when payments were unrelated to attracting client.); New York City Bar Ass'n Comm. on Prof'l & Judicial Ethics, Op. 391 (1936) (permissible to make a loan as long as the practice does not produce client-getting); DRINKER, *supra* note 117, at 95 ("[A lawyer] may loan money to a client but not as a regular practice.").

221. "[The financial assistance] rule precludes solicitation of clients with promise of living expense loans." RESTATEMENT § 36 cmt c; Taylor, 648 So. 2d at 1991 (A lawyer gave used clothes and \$200 for basic necessities to a client. The Court found no violation of 1.8(e) because the assistance was not "in connection with" litigation.); Arensberg, 553 N.Y.S.2d 859 (lawyer charged under both 5-103 and state judiciary law, sec 488(2)-488 (2) which prohibits soliciting with promises of payment); Kandel, 563 A.2d 387 (Public reprimand for lawyer payments to client for car repairs to get to medical appointments. Court found that lawyer was not

than ethics.²²² Much of the early restriction on client-getting was based on what were perceived to be unfair competitive devices among lawyers.²²³ A lawyer willing to advance funds to a client was at a competitive advantage. Arguably that advantage was unrelated to quality of service (although clients may feel that quality includes a willingness to serve the client's needs, including financial needs, every bit as much as it includes prompt returning of telephone calls and other service-related activities). Advantages unrelated to quality were once deemed inappropriately anti-competitive, and were suppressed in various ways by the bar.²²⁴ As recently as 1995, courts continued to occasionally suggest that an anti-competitive rationale for the financial assistance rule was appropriate.²²⁵ In *Carroll*, the court disciplined a lawyer for providing financial assistance and suggested that advances are an "improper inducement" for retention, and that naturally a client will retain the lawyer who makes advances without regard to quality.²²⁶ But that suggestion is not fundamentally different from the assertion that a client will always choose the lawyer who charges the lowest fee, or who provides some other benefit that may be unrelated to quality. Appropriateness of fee competition is well established.²²⁷ These sorts of restrictions on practice have faded, with lawyers permitted to compete with one another on many levels. Most notable among such now unlawful restrictions are minimum fee schedules.²²⁸ Bar-imposed minimum fee schedules were considered to be simply price-supporting, anticompetitive devices, meant to restrain a lawyer from taking a competitive advantage (a lower fee) that was unrelated to the quality of service provided. Since *Goldfarb*, such a rationale for the acquisition of interest and financial assistance rules, though once the prominent client-getting rationale, must fail.

motivated by self-interest or personal gain. Court says there is a public policy to avoid unfair lawyer competition for clients and avoid acquisition of interest in litigation).

222. DRINKER, *supra* note 117, at 211 ("Since there is no inherent malum in se in a lawyer's advertising . . . or directly soliciting employment, [advertising and solicitation rules] are really rules of professional etiquette rather than of 'ethics.'").

223. *Id.* at 190-91, 211 n.6 (coupling advertising and solicitation with encroachment upon other lawyers's clients).

224. *E.g.*, bar-set minimum fee schedules, unlawful since *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); early anti-contact rule rationale included the unseemliness of attracting away other lawyers's clients, see DRINKER, *supra* note 117, at 190 (including discussion of anti-contact rule in chapter on lawyer duties to fellow lawyers); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 17 and 124, applying Canon 9 ("Compensation for his services is an attorney's professional right and, [fellow lawyers are required to avoid interfering with that right.]"); restrictions on encroachment of other lawyers' clients, see DRINKER, *supra* note 117, at 190-91.

225. *Attorney HH*, 671 So. 2d 1293 (applying Model Rule 1.8(e), court expresses concern that permitting financial assistance would cause "bidding wars" for cases and lead to the further denigration of the legal justice system); *In re Carroll*, 602 P.2d 461 (Ariz. 1979).

226. *Carroll*, 602 P.2d at 467.

227. *Bates v. Arizona State Bar*, 433 U.S. 350 (1977); *Goldfarb*, 421 U.S. 773.

228. See *Goldfarb*, 421 U.S. 773.

Since *Bates v. Arizona State Bar*,²²⁹ states have lacked power to discipline lawyers for truthful, non-misleading advertising of lawful services. Although discipline for misleading statements about services²³⁰ and many forms of in-person solicitation remain within the states' power to prohibit,²³¹ poor taste and lack of professional dignity are not sanctionable.²³² Arguably, the Supreme Court has reopened the prospect of discipline for lack of dignity by considering evidence of diminished respect for the legal profession in *Florida Bar v. Went For It*.²³³ The restrictions upheld in *Went For It* were time, place, and manner restrictions, rather than blanket prohibitions of particular practices. While data could undoubtedly be generated regarding public disdain of lawyers who would buy claims or advertise support of personal injury clients through litigation, a substantial expansion of *Went For It* would have to occur to warrant using the dignity rationale to prohibit rather than regulate acquisition of interest or financial assistance.²³⁴

Advertisement of unlawful acts or practices is also appropriately disciplinable.²³⁵ For example, a lawyer's truthful promise in an advertisement to engage in bribery or assaultive tactics on clients' behalf or that offers a prohibited contingent fee in a criminal matter²³⁶ would subject the lawyer to discipline²³⁷ and in certain instances criminal liability as well.²³⁸

But here the client-getting rationale for the acquisition of interest and financial assistance rules becomes circular. How would lawyer advertisements change if the ethics rules on acquisition of interest and financial assistance rules were abolished? They might sound something like: "We pay top dollar for good

229. *Bates*, 433 U.S. 350.

230. See, e.g., *In re RMJ*, 455 U.S. 191 (1982).

231. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

232. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (holding unconstitutional provisions such as DR 2-101(B), requiring advertisements be done "in a dignified manner.").

233. *Fla. Bar v. Went For It*, 515 U.S. 618 (1995) (using data regarding client-getting practice's tendency to diminish public regard for the legal system in evaluating restrictions on the practice).

234. For lower courts' application of the *Went For It* invitation to consider the reputation-damaging effects of advertising on the profession as a legitimate state interest, see *Chambers v. Stengel*, 256 F.3d 397 (6th Cir. 2001) (upholding Kentucky criminal statute imposing 30 day solicitation ban and recognized reputation of lawyers as a substantial state interest); *Ficker v. Curran*, 119 F.3d 1150, 1154 (4th Cir. 1997) (state of Maryland asserting protection of "reputation and dignity of the legal profession"); *Moore v. Morales*, 63 F.3d 358 (5th Cir. 1997) (upholding Texas 30 day mail solicitation waiting period rule because Texas submitted public complaints regarding such solicitation); *Revo v. Disc. Bd. of the Sup. Ct. of N.M.*, 106 F.3d 929 (10th Cir. 1997) (holding blanket ban on mail solicitation unconstitutional, indicated that 30 day ban would be permissible and agreed with New Mexico that protecting the perception of the legal system is a substantial state interest); John Phillips, *Six Years After Florida Bar v. Went For It, Inc.: The Continual Erosion of First Amendment Rights*, 14 GEO. J. LEGAL ETHICS 197 (2000).

235. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973); *Bates*, 433 U.S. at 384.

236. MODEL RULES Rule 1.5(d)(2).

237. *Bates*, 433 U.S. at 384.

238. WAYNE R. LAFAVE, CRIMINAL LAW § 6.4 (3d ed. 2000); MODEL PENAL CODE § 5.03(1).

claims”; “We’ll afford you a generous living allowance during litigation”; “Why wait years for your ship to come in? We pay up front for good claims.”²³⁹ These sorts of ads, if truthful, may not be restricted unless the acts offered are unlawful. And today, the acts are made unlawful almost exclusively by the ethics rules themselves rather than by some external legal rule.

Outside of the lawyer ethics rules, the law of champerty has diminished in importance, scope and effect.²⁴⁰ In Massachusetts, “the common law doctrines of champerty, barratry, and maintenance [are] no longer . . . recognized.”²⁴¹ In New York, courts have narrowed the doctrine, ruling that it only exists when some particular mischief or strife has resulted from the champertous conduct.²⁴² Similarly, the Florida Supreme Court has redefined champerty according to a “modern view.”²⁴³ The Florida court suggested that “officious intermeddling is a necessary element” of champerty and that the law of champerty and maintenance is no longer defined in strict, formalist terms.²⁴⁴ In reality, this “modern view” may be closer to the original elements, which included malice.²⁴⁵ Only the lawyer restrictions, and primarily the lawyer restrictions beginning with the *Model Code* in the late 1960’s, sent courts into a strict formalist mode of application of the law of champerty and maintenance.²⁴⁶ In some states, remaining restrictions are tied to the notion that gambling, in this context speculation in claims, is against public policy,²⁴⁷ a notion that fades further into the 19th Century ethos with each passing year and each state that legalizes gambling or authorizes a lottery. A number of states, while appearing to have champerty restrictions that remain in force, have not enforced the restrictions for many years.²⁴⁸

None of the currently legitimate rationales for restrictions on client-getting practices justifies a blanket ban on financial assistance or acquisition of interest as a client-getting device.²⁴⁹ Even where they do, provisions regulating rather than

239. I am no ad man. Well polished, creative versions of these themes would no doubt appear in the marketplace.

240. See generally Martin, *supra* note 214.

241. *Saladini v. Righellis*, 687 N.E.2d 1224, 1224 (Mass. 1997).

242. See, e.g., *Fairchild Hiller Corp. v. McDonnell Douglas Corp.*, 270 N.E. 2d 691 (N.Y. 1971); *Limpar Realty Corp. v. Uswiss Realty Holding Inc.* 492 N.Y.S. 2d 754 (App. Div. 1985); *Wainco Funding v. Logiudice*, 606 N.Y.S. 2d 86 (App. Div. 1993).

243. *Kraft v. Mason*, 668 So. 2d 679 (Fla. Ct. App. 1996).

244. *Id.* at 682.

245. WOLFRAM, *supra* note 8, at 490, n.46; BODKIN, *supra* note 8, at 5, 50.

246. See *infra* section II.

247. See, e.g., *Wilson*, 688 So. 2d 265; *Tosi*, 685 N.E.2d at 583; *Reece*, 31 N.E. at 751 (referring to courts past discouragement of the gambling spirit).

248. Martin, *supra* note 214, at 67.

249. An additional practical problem with prohibiting financial assistance as an inappropriate client-getting device exists. A client may discharge a lawyer at any time for any reason. The current rule precludes a lawyer from offering a loan prior to the establishment of the lawyer client relationship, but nothing precludes a client from asking for a loan after the relationship begins and discharging a lawyer who declines to make the loan.

prohibiting acquisition of interest and financial assistance could be crafted to eliminate their use as client-getting devices. In this way, the conflicts and harm to third parties and the system could be isolated and regulated or permitted while prohibiting the use of acquisition of interest or financial assistance to attract clients. This is in essence of the distinction drawn by the *Sizer* court in the 1920's and the position taken by the Minnesota amendments liberalizing the practice of providing financial assistance.²⁵⁰ The exclusively client-getting restriction rationale is a purely anti-competitive one: lawyers willing to advance financial assistance or buy claim shares would have an advantage over lawyers unwilling to make such arrangements.

IV. A BRIEF NOTE ABOUT ECONOMICS

A complete economic analysis of a market for claims²⁵¹ is beyond both the scope of this article and my expertise. Nonetheless, a few things economic may be said here.

There are currently very active markets for judgments and markets for unmatured contract claims. Those markets are the business of collection agencies and support the active trading of mortgage, credit card, business, and other debt. The market for tort judgments has grown more active in recent years, resulting in several successful investment corporations that purchase portions of judgments at a discounted rate, allowing a successful plaintiff to have funds in hand in exchange for the value of the judgment during appeal and enforcement.²⁵² An expanded market for tort claims, particularly one that included lawyers as permissible players, would benefit tort victims, investors, and the tort system itself.²⁵³ The effects might be most positive on class action litigation.²⁵⁴

Most fundamentally, restraints on voluntary transactions make markets less efficient. Lawyers and clients are currently constrained by the acquisition of interest rules from engaging in risk sharing transactions, despite a desire on the part of some lawyers and clients to enter such transactions. Restraints have a tolerated-but-negative economic effect when some external policy reason exists, the power of which exceeds the negative economic impact. The policy

250. *Sizer*, 267 S.W. 922; MINN. R. OF PROF'L RESPONSIBILITY Rule 1.8(e).

251. See Robert Cooter, *Towards a Market in Unmatured Tort Claims*, 75 VA. L. REV. 383 (1989); Ari Dobner, *Litigation for Sale*, 144 U. PA. L. REV. 1529 (1996); Martin, *supra* note 214; Donald L. Abraham, *Investor-Financed Lawsuits: A Proposal to Remove Two Barriers to an Alternative Form of Litigation Financing*, 43 SYRACUSE L. REV. 1297 (1992); Daniel C. Cox, *Lawsuit Syndication: An Investment Opportunity in Legal Grievances*, 35 ST. LOUIS U. L.J. 153 (1990); Pamela Blatt Wilson, *Attorney Investment in Class Action Litigation: The Agent Orange Example*, 45 CASE W. RES. L. REV. 291 (1994).

252. Margaret Cronin Fisk, *Large Verdicts For Sale*, NAT'L L.J. Jan. 11, 1999, at A1.

253. See generally Dobner, *supra* note 251; Martin, *supra* note 214; Abraham, *supra* note 251; Cox, *supra* note 251; Peter Choharis, *A Comprehensive Market Strategy for Tort Reform*, 12 YALE J. ON REG. 435 (1995); Mark Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329 (1987).

254. See generally Wilson, *supra* note 251.

underpinnings for the acquisition rules are weak and limited,²⁵⁵ leaving an unjustified negative economic impact to result from the enforcement of the acquisition rules.

Markets are more efficient when the players in the market have knowledge. The market in unmaturing claims, including tort claims, such as would be created by the abolition of the acquisition of interest rules, would add players with knowledge that are currently shut out of such markets. Lawyers to whom clients come for services, particularly personal injury services, have expertise in evaluating claims. The Restatement drafters recognized that among the advantages to allowing the analogous contingent fee are that lawyers would “encourage only those clients with claims having a substantial likelihood of succeeding” and that lawyers are “usually better able to assess the risk [of recovery] and bear it by undertaking similar arrangements in other cases.”²⁵⁶

Markets are more efficient when the players are more directly affected by the outcomes of market activity. Here again, a market for claims that involve lawyers more directly ought to produce a more efficient market. Lawyers are always interested in the outcome of their clients’ matters. Abolition of the acquisition of interest rules would enhance that interest in an economically efficient manner.

V. CONCLUSION

The financial assistance and acquisition of interests rules ought to be abolished or substantially amended. Their history is shallow and weak rather than deep and strong as has been mythologized by the 20th Century organized bar. None of the three usual rationales support the rules in their current form. The rules present no genuine conflict of interest that is not otherwise present in ordinary, everyday lawyer-client relationships. To the extent that any true conflict exists, it is not the sort of grave conflict for which no informed waiver should be allowed. Rather, there are clear benefits to a client in the relationship that in many cases will outweigh the conflict risks. In such circumstances, waiver is permitted elsewhere in the conflicts rules and ought to be allowed here. To the extent that these rules continue with a conflicts rationale, the Texas and Minnesota modifications should prevail as they at least ameliorate the effects of ill-founded rules.

The risks of system abuse through frivolous claims of aggressive lawyering are adequately guarded against by control systems not present in the heyday of maintenance and champerty law. Among other controls, Federal Rule of Civil Procedure 11 and other litigation abuse sanctions as well as malicious prosecution actions obviate the need for the rules on the abuse-of-system rationale. If anything, furthering the interests of lawyers in the claims of their clients is likely to decrease rather than increase the incidence of frivolous claim bringing.

255. *See infra* section III.

256. RESTATEMENT § 35 cmt. b.

The client-getting suppression of competition rationale is circular. Client-getting tactics that are distasteful are not sanctionable. If advertisements regarding financial assistance or acquisition offers are truthful, there remains only the “unlawful offer” objection to such client-getting tactics. The demolition of the criminal and tort champerty and maintenance law in most jurisdictions means that the only unlawfulness of these offers is created by the ethics rules themselves. If the ethics rules are not supported by either of the first two rationales, they fail to be supported by the third, since the third, in the absence of the others, represents a sort of bootstrapping problem: in client-getting rationale terms, the rules make their own unlawfulness rationale, which would otherwise not be the case.

Abolition of these rules would allow lawyers to support clients and acquire claims, creating an efficient market for unmatured claims, including tort claims. It would eliminate the awkwardness of courts punishing innocent lawyer financial assistance to clients based on vacuous reasoning. It would close happily one more chapter on the self-interestedness of bar ethics rules.