

Spring 2008

Virtual Clients: An Idea in Search of a Theory (with Limits)

Stephen Gillers

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Stephen Gillers, *Virtual Clients: An Idea in Search of a Theory (with Limits)*, 42 Val. U. L. Rev. 797 (2008).
Available at: <https://scholar.valpo.edu/vulr/vol42/iss3/3>

This Symposium is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



Lecture

VIRTUAL CLIENTS: AN IDEA IN SEARCH OF A THEORY (WITH LIMITS)

Stephen Gillers*

I. INTRODUCTION

"The client is no longer simply the person who walks into a law office."¹ But, then, who else might it be?

Judge Arthur Sprecher, prescient, wrote the quoted words nearly three decades ago. They were true then, truer today. No longer can lawyers safely subscribe to the traditional understanding, as I shall call it, which posits an identifiable client to whom, and to whom only, the lawyer owes nearly the entire gamut of professional duties. True, the great majority of clients today are "the person who walks into a law office" if we include in that figurative description the lawyer who walks into the client's office, the lawyer and client who meet (for example) via telephone or e-mail, and the lawyer who visits the client in prison, perhaps following court appointment. The traditional understanding simplifies the lawyer's life. As Lord Brougham famously said, "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."² Brougham had a great advantage. He could be confident that he could know who his client was, but modern lawyers cannot.

For strategic reasons, Brougham may have chosen to exaggerate what he was prepared to do for Queen Caroline, but he captured an idea still widely shared: A lawyer's task is to achieve the client's goal, ethically and legally, come what may.³ He "knows" only the client, or almost only. Even in the traditional view, lawyers have duties to

* Emily Kempin Professor of Law, New York University School of Law. This Article was presented as the Tabor Lecture at the Valparaiso University School of Law on April 12, 2007. I thank the D'Agostino/Greenberg Fund for the assistance that permitted me to work on this Article.

¹ *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1318 (7th Cir. 1978).

² GREAT BRITAIN PARLIAMENT HOUSE OF LORDS, CAROLINE, 2 THE TRIAL OF THE QUEEN OF ENGLAND, IN THE HOUSE OF LORDS, 1820 3 (1821).

³ Variations on this idea appear in the ethics rules of some American jurisdictions. *See, e.g.*, D.C. RULES OF PROF'L CONDUCT R. 1.3(b)(1) (2007) ("(b) A lawyer shall not intentionally: (1) Fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules").

opposing lawyers and parties, the public, and the courts, but these pale by comparison to the duties owed clients.⁴ Traditionalists maintain that is a good thing because, for two reasons, the less lawyers owe to others, the better. First, lawyers do not then have to worry as much about civil or disciplinary liability, a worry that might detract from the vigor with which they pursue a client's interests.⁵ Second, the creation of duties to others places limits on the lawyer's professional freedom and the ability of others to hire her. If, for example, a lawyer acquires a duty to a third party by virtue of representing a client, she (and all lawyers in her firm by imputation) may not be able to accept a new client if the new work may require her to violate that duty.⁶

"I am my client's junkyard dog," a prominent law professor once told a legal ethics conference I attended.⁷ Others have used the metaphor "pit bull."⁸ Although few lawyers are likely to embrace this canine imagery, most would accept the qualities they imply—scrappy, relentless, and fierce. Surely, no lawyer would invoke dogs of milder disposition. "I am my client's poodle?"

The traditional understanding remains dominant, but qualified by duties to others that lawyers cannot ignore (or ignore at their peril). One of those qualifications, the subject of this Article, consists of judicial developments that give lawyers professional duties to those I shall call virtual clients. What is a virtual client? A virtual client is a person or entity to whom the lawyer owes at least some of the duties lawyers owe traditional clients whether or not (and most often not) the lawyer has

⁴ Examples reside in duties of candor to the court. See MODEL RULES OF PROF'L CONDUCT R. 3.3 (2003); see also *id.* at R.4.2 (the prohibition against communicating with the represented person); *id.* at R.4.4(a) (the prohibition against using "means that have no substantial purpose other than to embarrass, delay, or burden a third person."); *id.* at R.4.4(b) (the requirement to "promptly notify the sender" where a lawyer knows or reasonably should know that she has received documents inadvertently sent).

⁵ See, e.g., *Pelham v. Griesheimer*, 440 N.E.2d 96, 100 (1982).

⁶ See, e.g., *In re Gabapentin Patent Lit.*, 407 F. Supp. 2d 607 (D.N.J. 2005) (discussing that, in common interest arrangements, lawyers acquire duties to non-clients that thereafter prevent partners of those lawyers from appearing for firm clients adverse to the non-clients).

⁷ Identification has been omitted because it was many years ago and because I do not think speakers should be burdened with casual (metaphorical) oral comments at bar meetings.

⁸ Deborah Rhode, *Opening Remarks: Professionalism*, 52 S.C. L. REV. 458, 462 (2001) (quoting a Washington, D.C. lawyer as saying: "[I]f clients want 'pit bull' lawyers who engage in pit bull tactics . . . then that's what those clients are going to get."); see also William Hornsby, *Clashes of Class and Cash: Battles from the 150 Years War to Govern Client Development*, 37 ARIZ. ST. L.J. 255, 271 (2005) (discussing lawyers who successfully defended a grievance alleging misconduct for using the telephone number 1-800-PIT-BULL).

agreed to accept those duties. A virtual client is not someone who has retained a lawyer to provide a legal service solely for herself (whether or not the lawyer is charging a fee). Nor is it someone whom the lawyer has accepted as a client though paid by others who may or may not also be clients. Nor is it someone whom a court has assigned the lawyer to represent. A traditional client comes to a lawyer *ex ante*, through agreement or court assignment.⁹ A person becomes a virtual client because somewhere in the course of the representation of a traditional client, even after it ends, a court will say so. Duties to virtual clients, I will argue, should be created cautiously and with awareness of the central value of the original understanding, namely to assure clients the help of legal experts whose loyalty and concern run mainly to them. I will suggest a methodology for recognition of virtual clients but I will also try to identify limits to the doctrine intended to preserve the values encompassed by the traditional understanding. While the category of virtual client is here to stay, there is a danger that it will be recognized casually, without true need or awareness of the effect of its recognition on the central values of the traditional relationship and with a serious, even a profound, effect on advocacy.

What has been said so far and will be said hereafter requires us to tweak Judge Sprecher's language a bit. Perhaps his sentence should read; "The person to whom a lawyer owes one or more professional duties is no longer simply the person who walks into a law office." Less elegant, certainly, but more accurate. We are addressing the circumstances in which a lawyer may owe a person all or (more likely) some of the professional duties owed traditional clients and whether that person is called a virtual client or something else is less important. The term virtual client is convenient. Judge Sprecher would likely agree. After citing several cases in which lawyers owed duties to others, he wrote:

In none of the above categories or situations did the disqualified or disadvantaged lawyer or law firm actually represent the "client" in the sense of a formal or even express attorney-client relation. In each of those categories either an implied relation was found or at

⁹ Absent court assignment or class certification, the attorney-client relationship is traditionally a product of contract, express or implied. *Cox v. Geary*, 624 S.E.2d 16, 22 (Va. 2006).

least the lawyer was found to owe a fiduciary obligation to the laymen.¹⁰

Two long held and compatible assumptions in the world of lawyer regulation are at stake in decisions whether or not to give lawyers duties to persons other than traditional clients and, if so, which persons and what duties. Both assumptions—which have something close to canonical status in the world of lawyer regulation—are legitimate bases for rules regulating the bar because each encompasses values that deserve respect. The question is how much respect when balanced against other interests. The values behind either assumption can be exaggerated or slighted as the profession and society change, leading to rules that misplace priorities.

The first assumption underlies what may be called the consumer protection model of lawyer regulation. Because lawyers are trained in the law and legal institutions, and clients mostly are not, clients and others need rules that protect them from lawyers who may, consciously or not, overreach or somehow take advantage of them. The result is a consumer protection code, where the product sold is legal services and the client is the consumer.¹¹

The second assumption is behind the Lord Brougham model. It sees the lawyer-client relationship as one in which the lawyer stands up for the client against all the world. The lawyer is the client's gladiator or champion. Courts, in this view, should not give lawyers duties to others because doing so may compromise the zeal with which the lawyer fights for the interests of the client. Although this assumption works best in litigation with clearly defined adversaries and an umpire, it influences our view of professional relationships broadly. The first assumption, then, purports to protect the client from the lawyer. The second assumption purports to insure that the lawyer is free to protect the client from everyone else.

I count seven types of virtual clients. While these are not equally well recognized in law, and while the duties a lawyer owes to the members in each category (if any) vary by category and among

¹⁰ Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978).

¹¹ Much in the ABA Model Rules of Professional Conduct requires or proscribes conduct to protect clients, prospective clients, or third persons from lawyers. See generally Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985).

jurisdictions, each category has substantial recognition. The categories are:

1. The clients of other lawyers in a common interest arrangement (also, but inaccurately, known as joint defense agreements);¹²
2. the subsidiaries, parent, or sister companies of a corporate client;¹³
3. the members of a lawyer's trade group client;¹⁴
4. the principal of an agent-client (or beneficiary of a fiduciary client) who has hired the lawyer to assist in protecting the principal (or beneficiary);¹⁵
5. intended third party beneficiaries of a legal service performed for a client;¹⁶
6. a third party who gives a lawyer confidential information to assist in providing legal services for a traditional client because of some special relationship between the third party and the traditional client; and,¹⁷
7. a third party that, as the lawyer does or should realize, will rely on the accuracy of the lawyer's factual assertions or legal analysis on behalf of a traditional client.¹⁸

I recognize that these categories do not have fixed boundaries; however, they share some qualities. In fact, the last four categories can fall under an umbrella description—persons who, as the lawyer can or

¹² See, e.g., *Nat'l Med. Enters., Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996).

¹³ See, e.g., *JP Morgan Chase Bank v. Liberty Mut. Ins. Co.*, 189 F. Supp. 2d 20 (S.D.N.Y. 2002).

¹⁴ *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746 (2d Cir. 1981).

¹⁵ See, e.g., *Oxdine v. Overturf*, 973 P.2d 417, 421 (Utah 1999) (noting that “in most cases, the personal representative’s attorney will have a fiduciary duty to represent the interests of all statutory heirs,” but rejecting the duty in the current matter because of a “conflict” between the personal representative and the heir).

¹⁶ See, e.g., *McLane v. Russell*, 546 N.E.2d 499 (Ill. 1989) (duty of attorney who drafted a will to testator’s intended beneficiary).

¹⁷ See, e.g., *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263 (7th Cir. 1983).

¹⁸ See, e.g., *Mehaffy, Rider, Windholz & Wilson v. Central Bank of Denver, N.A.*, 892 P.2d 230 (Colo. 1995). This category does not include formal opinion letters that a client asks its lawyer to provide to an opponent, generally in a transaction. Because of the formality of the event, the lawyer knows that he or she is assuming a traditional duty—of competence—to the recipient.

802 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

should foresee, will directly benefit from or will rely on the lawyer's work. Yet each of the seven categories deserves individual analysis.

Even outside these categories, lawyers have duties to third persons who are neither traditional nor virtual clients. I will describe these tangential situations in Part II of this Article and explain why they are doctrinally distinct from the seven virtual client categories. Part III will then develop the seven categories with examples from case law and other authority. Part IV will tease out two distinct theories behind the creation of these categories and argue that some of the categories may compromise the value of client loyalty and concern that is at the center of the traditional understanding, without corresponding benefit.

II. DUTIES TO THIRD PERSONS WHO ARE NOT VIRTUAL CLIENTS

In several circumstances, lawyers may owe duties to third persons who are not their clients. These must be distinguished from the virtual client categories. I want to focus on two of those circumstances.

A. *Violation of Substantive Law*

First, like anyone else, a lawyer who knowingly assists a client's violation of fiduciary duty or other intentional misconduct may be sued along with the client. The fact that the lawyer purported to act in his or her professional role will not be a defense any more than if the lawyer assisted a client's crime.

Consider *Thornwood, Inc. v. Jenner & Block*.¹⁹ The complaint alleged the following: Two business partners, Thornton and Follensbee, were developing land as a residential community and golf course.²⁰ The effort was running into trouble when Follensbee started negotiating with PGA Tour Golf Course Properties (PGA) to designate the course a Tournament Players Course (TPC).²¹ An earlier effort to do that had failed.²² In violation of his fiduciary duty as a partner, Follensbee did not tell Thornton about his revived negotiation with PGA.²³ He then purchased Thornton's partnership interest.²⁴ Jenner & Block represented Follensbee on the buyout and on the renewed negotiation with PGA.²⁵

¹⁹ 799 N.E.2d 756 (Ill. App. Ct. 2003).

²⁰ *Id.* at 760.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 761.

²⁴ *Id.*

²⁵ *Id.*

Four years later, when Thornton had discovered this history (it is unclear how), he sued Jenner & Block, alleging that the firm knew about its client's breach.²⁶ The court's opinion spends a lot of time on whether the releases accompanying the buyout were effective (concluding they were not on the facts alleged), then upholds Thornton's claims that Jenner & Block aided and abetted Follensbee's breach:

Certainly, as Jenner & Block points out, mere receipt of copies of letters authored by Follensbee, which expose his breach of fiduciary duty, probably does not constitute aiding and abetting under Illinois law. Here, however, Thornton alleges more. He alleges that Jenner & Block aided and abetted by knowingly and substantially assisting Follensbee in breaching his fiduciary duty by (1) communicating the competitive advantages available to the Partnership from the PGA/TPC plan to other parties, but specifically not to Thornton; (2) expressing Follensbee's interest in purchasing Thornton's interest in the Partnership and negotiating the purchase of that interest without disclosing to Thornton the continued negotiations with the PGA and Potomac; (3) reviewing and counseling Follensbee with regard to the production of investment offering memoranda, financial projections, and marketing literature, which purposely failed to identify Thornton as a partner; and (4) drafting, negotiating, reviewing, and executing documents, including the Jenner & Block and Follensbee Releases, relating to the purchase of Thornton's interest and the PGA/TPC plan with knowledge that Thornton was not aware of the PGA/TPC plan. All of these acts are alleged to have been perpetrated by Jenner & Block while it had knowledge that Thornton and Follensbee were partners, that Follensbee had a duty to disclose the PGA/TPC plan to Thornton, and that Follensbee did not disclose the PGA/TPC plan to Thornton despite having the opportunity and duty to do so. Importantly, Thornton is not required to prove his allegations at this time. Thus, even though Thornton may face an uphill battle in

²⁶ *Id.* at 762.

804 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

proving his claims, we cannot at this time affirm the dismissal of his complaint.²⁷

Or take another example.²⁸ William Granewich was a shareholder in a closely held Oregon corporation.²⁹ He sued the other two shareholders, Harding and Alexander-Hergert, claiming that they breached their fiduciary duties to him by “depriving [him] of his position as a director, of the value of his shares of stock, of his further employment with and compensation from FFG [the company], and of the benefits of participating in the corporate affairs of FFG.”³⁰ Granewich also named the company’s outside counsel as defendants, charging that they knowingly assisted the other shareholders in violating fiduciary duties to him.³¹ Although there was no Oregon law directly on point, the state supreme court concluded that the legal authorities were “virtually . . . unanimous in expressing the proposition that one who knowingly aids another in the breach of a fiduciary duty is liable to the one harmed thereby. That principle readily extends to lawyers.”³² Reinstating the complaint against the lawyers, the court wrote:

The complaint alleges that the lawyers entered into an agreement with Harding and Alexander-Hergert to take such actions as may be necessary to squeeze plaintiff out of FFG and to deprive plaintiff of the value of his FFG stock, objectives that are alleged to be in breach of Harding’s and Alexander-Hergert’s fiduciary duties to plaintiff as majority shareholders and directors. . . . In addition, the amended complaint alleges that the lawyers knew that the object to be accomplished was the breach of [these] duties . . . that the lawyers provided substantial assistance to them in their efforts in that regard, and that plaintiff was damaged as a result.³³

²⁷ *Id.* at 768-69.

²⁸ *Granewich v. Harding*, 985 P.2d 788 (Or. 1999).

²⁹ *Id.* at 790.

³⁰ *Id.* at 791.

³¹ *Id.* at 790.

³² *Id.* at 793-94 (footnotes and citations omitted).

³³ *Id.* at 795. *See also* *United States v. Ross*, 190 F.3d 446 (6th Cir. 1999). Attorney Mark Ross was found guilty of drug and money-laundering conspiracies. In part the evidence against him showed that he had assisted his clients in transferring real property and in posting a cash bond. Both acts advanced the client’s crimes. The court found “ample evidence to support a finding that . . . [Ross] knew of and joined in both conspiracies by engaging in money laundering in connection with the . . . [real] property.” *Id.* at 451. Thus,

The Oregon court later wrote that the holding in *Granewich* depended on the fact that the client of the defendant lawyer was the corporation, not the co-shareholders whom the plaintiff alleged the lawyer aided in their breach of their fiduciary duty.³⁴ *Reynolds v. Schrock*³⁵ held that lawyers had a qualified privilege to assist a client's breach of fiduciary duty so long as they acted within the scope of the professional relationship.

The claimants in these cases do not fit within the virtual client categories because the rights they assert are independent of the lawyer's professional status. Rather, the claim is that a lawyer, like anyone else, is (or should be) liable for conduct that assists a breach of fiduciary duty, an intentional tort (like fraud), or a crime. That assistance does not even colorably fall within the scope of services lawyers may legitimately offer. Consequently, we should have no concern that liability for engaging in this conduct will compromise a lawyer's willingness to pursue a client's goal within the bounds of the law. Whether in any particular situation the factual allegations support liability is a distinct question. The allegations do not, in any event, cite a duty to a person standing in the (virtual) shoes of a client.³⁶

B. Violation of Ethics Rules that Require Protection of Others

Beyond the substantive law, ethics rules are a second source that may give lawyers duties to third persons. Perhaps the most prominent development in legal ethics in the last twenty-five years is the increased authority, or even obligation, of lawyers to protect third persons, including courts and other tribunals, from harm at the hands of clients or

"the jury could find that Mark Ross knew that drug proceeds would be used to post the bond for . . . [a third party] with the hope that he would not cooperate with the government." *Id.* at 452.

³⁴ *Id.*

³⁵ 142 P.3d 1062 (Or. 2006).

³⁶ Other conduct falls within the same general category. See, e.g., *Morgan Roth & Morgan Roth v. Norris, McLaughlin & Marcus P.C.*, 331 F.2d 406 (3d Cir. 2003) (fraud on creditors); *Gen. Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297 (3d Cir. 2003) (abuse of process); *Zamos v. Stroud*, 87 P.3d 802 (Cal. 2004) (malicious prosecution); *Wasmann v. Seidenberg*, 248 Cal. Rptr. 744 (Ct. App. 1988) (violation of obligations as an escrow agent); *Rothman v. Jackson*, 57 Cal. Rptr. 2d 284, 287 (Ct. App. 1996) (permitting defamation action against singer Michael Jackson and his lawyers based on press conference in which the defendants allegedly accused plaintiff, a lawyer, of making "false accusations against Jackson in order to extort money from him."). Each of these cases as well as those cited in the text expose lawyers to the same risks of civil liability as anyone else, notwithstanding that they may have committed their acts in the course of representing a client.

others. Here, I mainly want to focus on ethics rules that mandate conduct to protect others.

Model Rule 1.6(b) contains six exceptions to the duty of confidentiality set out in Rule 1.6(a), but all of the exceptions are permissive.³⁷ For our purposes, they allow lawyers to reveal confidential information to protect third persons from serious physical injury³⁸ and to prevent, mitigate, or rectify financial injury caused by a client's fraud or crime (as well as to prevent the crime or fraud itself) where the lawyer's services are being used or have been used to commit the fraud or crime.³⁹ But in some jurisdictions the exception is mandatory when the threat is of physical harm.⁴⁰ In other jurisdictions it is mandatory even when the injury is financial.⁴¹ In one circumstance, the Model Rules require a lawyer to reveal confidences, namely to remedy a fraud on a tribunal.⁴²

³⁷ The rule provides:

b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (6) to comply with other law or a court order.

MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2003).

³⁸ *Id.* at R. 1.6(b)(1). The threat does not have to come from the client nor must the conduct creating the risk be criminal. The ABA adopted this rule in 2002, when it deleted these two preconditions—that the act be the client's and a crime. Deleted, also, was the requirement that the harm be imminent. One consequence is to make it clear that a lawyer may reveal that a dangerous consumer product is on the market.

³⁹ *Id.* at R. 1.6(b)(2)-(3).

⁴⁰ This is so in Arizona, Connecticut, Illinois and Washington State, among other jurisdictions. See STEPHEN GILLERS & ROY SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 86-93 (2008) (discussing the rules in these jurisdictions, and a compendium of other significant state variations from the ABA version of Rule 1.6).

⁴¹ New Jersey and Wisconsin are in this category. For the variations in these jurisdictions, see GILLERS & SIMON, *supra* note 40.

⁴² ABA Model Rule 3.3 provides in part:

This is not the place to catalogue the circumstances in which any of these duties arise either under the Model Rules or state variations. But it is important to recognize that the duties exist and that they run to non-clients (or the tribunal directly and therefore the adversary indirectly).

The consequences for violation of these rules are not entirely clear. Of course, failure to warn or reveal confidential information when a rule requires it will support professional discipline. The harder question is whether the failure can lead to civil liability. Harder still is whether failure can support civil liability when the confidentiality exception is only permissive, not mandatory. So far as can be determined, no court opinion has yet supported a lawyer's civil liability to a third person *solely* for failure to comply with a permissive or mandatory disclosure rule in a jurisdiction's ethical code for lawyers. Yet a theory of liability would not be difficult to construct, at least if the confidentiality exception were mandatory.⁴³ In any event, the existence of an exception coupled with a

(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false. (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

MODEL RULES OF PROF'L CONDUCT R. 3.3 (2003).

The word "tribunal" is defined to include a "court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity." MODEL RULE 1.0(m). Further, Model Rule 3.9 imposes the duties contained in Rule 3.3(a) through (c) on a "lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding." MODEL RULE 3.9.

⁴³ This is particularly true in the few jurisdictions that have held that a violation of a rule of professional conduct can in and of itself be the basis for civil liability. See, e.g., *Griva v. Davison*, 637 A.2d 830, 846-47 (D.C. App. 1994) ("case law confirms that a violation of the Code of Professional Responsibility or of the Rules of Professional Conduct can constitute a breach of the attorney's common law fiduciary duty to the client"). Even in jurisdictions where the rule permits but does not require revelation of confidential information to protect third parties from financial injury or to rectify injury that has occurred, the

lawyer's failure to invoke it would increase the potential for liability because the lawyer's opponent would be able to offer the ethical authority or obligation as some evidence of violation of a civil law duty. The lawyer would not be able to defend on the ground that revelation would have violated the jurisdiction's ethical rules. True, the Scope section of the Model Rules cautions that the Rules "are not designed to be a basis for civil liability."⁴⁴ But a few sentences later, impelled no doubt by substantial case law ignoring the contrary view in previous versions of the Rules, the Scope concludes that "since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."⁴⁵

III. THE UNIVERSE OF VIRTUAL CLIENTS EXPLAINED

Duties to virtual clients, by contrast, do not arise because of a rule of substantive civil or criminal law that is applicable to everyone including lawyers, nor because of an ethics rule whose purpose is the protection of third persons. They arise instead for one of two reasons. First, they may arise simply because of the nature of the relationship between the traditional client and the virtual client. Second, they may arise because of the nature of that relationship where, in addition, the lawyer has received information from the virtual client. Merely receiving information from a third party is insufficient to create duties to the source of the information. Lawyers receive information from many sources in representing clients without thereby creating a duty to the source. A contrary rule would make law practice as we know it impossible. Although I consider seven categories of virtual clients, I do not suggest that they are exclusive or that others will not hereafter appear.

language of Rule 1.6(b)(2) and (3), the duty can become mandatory through the operation of Rule 4.1, which requires a lawyer to disclose information to "avoid assisting a criminal or fraudulent act by the client, unless disclosure is prohibited by Rule 1.6." MODEL CODE OF PROF'L CONDUCT R. 1.6 (2003). A permissive exception to confidentiality means the disclosure is not "prohibited." The duty imposed by Rule 4.1 will therefore arise if non-disclosure would, under substantive law, mean the lawyer is "assisting a criminal or fraudulent act." See MODEL CODE OF PROF'L CONDUCT R. 4.1 cmt. 3 (2003).

⁴⁴ MODEL CODE OF PROF'L CONDUCT. R. Scope. (2007).

⁴⁵ MODEL CODE OF PROF'L CONDUCT (2003). See generally Note, *The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard*, 109 HARV. L. REV. 1102 (1996). While the use of ethics rules violations as some evidence of civil liability is most frequent in malpractice cases, the Model Rules themselves are not so restrictive. See also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 52(2) (2000), which would allow consideration of a rules violation "to the extent that (i) the rule . . . was designed for the protection of persons in the position of the claimant and (ii) proof of the content and construction of such a rule or statute is relevant to the claimant's claim."

A. *Common Interest Arrangements*

The concept here is simple. Two or more clients, represented by two or more lawyers, have a common legal interest. The most frequent example is of two or more people facing indictment or criminal trial, each with his or her own counsel. They have a common interest (avoiding conviction) and a common enemy (the prosecutor).⁴⁶ Because this is the most frequent example, the doctrine is sometimes mislabeled the joint defense privilege. But the doctrine does not protect defendants only (let alone solely defendants in criminal cases); plaintiffs can claim it too.⁴⁷ And some courts have allowed the doctrine's protection where there is no pending or impending litigation, where the matter is entirely transactional, so long as the common interest is legal, not commercial.⁴⁸ However, other courts have refused to go that far.⁴⁹ The label "joint defense privilege" is incorrect in a more fundamental way. The doctrine does not create a privilege. It describes a rule that avoids loss of a privilege that is otherwise present. Lawyer-client communications ordinarily lose their privilege if a third person who is not reasonably necessary to the professional relationship is present. Absent the common interest rule, the presence of another lawyer's client, or the other lawyer, would defeat privilege for the communication. The rule avoids that result so long as one of the lawyers in a valid common interest arrangement is a party to the communication.⁵⁰

A complication arises if one client in the common interest arrangement claims that by virtue of it another client's lawyer owes him or her a duty of some kind. For example, Lawyer A and Client A may have a common interest arrangement with Lawyers B and C and their clients (B and C). Whether an arrangement is explicitly described as among the clients only or also includes the lawyers need not concern us; if, however, the lawyers are parties, it will be easier for a client to argue that the lawyer for another client owes her professional duties. Client

⁴⁶ Of course, their interests may not be identical because either may have a factual or legal defense that is of no help to the other or may even harm the other. See, e.g., *Griffin v. McVicar*, 84 F.3d 880 (7th Cir. 1996), where the two homicide defendants had a common enemy—the prosecutor; but one also had a defense (present at the crime but not a participant) that was factually unavailable to the other, who had to rely on alibi and mistaken identification. *Id.*

⁴⁷ This is clearly explained in *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989).

⁴⁸ *In re Regents of the University of California*, 101 F.3d 1386 (Fed. Cir. 1996).

⁴⁹ *Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London*, 676 N.Y.S.2d 727 (Sup. Ct. N.Y. Co. 1998), *aff'd* 692 N.Y.S.2d 384 (1st Dept. 1999).

⁵⁰ See, e.g., *Volpe v. Conroy, Simberg & Ganon, P.A.*, 720 So. 2d 537 (Fla. App. 1998).

810 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

A's interests may become adverse to those of clients B and C.⁵¹ Lawyer A may then find herself in the position of either asserting claims against or having to cross-examine Clients B and C. Can she? Or will her prior participation in the common interest arrangement preclude her? Perhaps she learned confidential information in the common interest arrangement that she can now use to their disadvantage. Is she obligated to protect that information? Does the existence of the common interest arrangement create fiduciary duties to clients of other lawyers? Does it turn them into traditional clients? To the extent that the answer to any of these last three questions is yes, the consequences to the lawyer's work, including her (and her firm's) ability to continue to represent her client, can be significant. That prospect raises a fourth question: Can the members of the common interest arrangement displace an affirmative answer by agreement?

Courts have given lawyers in common interest arrangements fiduciary duties to the clients of other lawyers, and at least some courts have gone further, holding that lawyers in a common interest arrangement have an "implied" attorney-client relationship with clients of other lawyers.⁵² The most common consequence will be

⁵¹ For example, A may settle with the common opponent and agree to testify. This is most common in criminal cases where one of several defendants reach a plea bargain in exchange for testimony. *See, e.g.,* *United States v. Stepney*, 246 F. Supp. 2d 1069 (N.D. Cal. 2003). But it can also happen in a civil case. *See, e.g.,* *In Trinity Ambulance Service, Inc. v. G. & L. Ambulance Services, Inc.*, 578 F. Supp. 1280 (D. Conn. 1984). One of two plaintiffs in an antitrust action realigned as a defendant after reaching an accord with the original defendant. *Id.* While a plaintiff, its counsel had participated in joint strategy sessions with the other plaintiff and its counsel. *Id.* The court disqualified the attorney for the realigned defendant after concluding that the attorney had had a professional relationship with the remaining plaintiff, which had divulged confidences in the belief that it was "approaching the attorney in a professional capacity with the intent to secure legal advice." *Id.* at 1283.

⁵² In *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000), the court held that "[a] joint defense agreement establishes an implied attorney-client relationship" between a lawyer for one defendant and the co-defendant. As a result, when the co-defendant plead guilty and appeared as a prosecution witness against the lawyer's client, the lawyer's motion to withdraw to avoid cross-examining the co-defendant should have been granted. *United States v. Almeida*, 341 F.3d 1318 (11th Cir. 2003), reaches a contrary result, concluding that by deciding to cooperate and testify against former co-defendants, a government witness has waived the privilege for communications with the lawyers of the co-defendants. In *United States v. Stepney*, 246 F. Supp. 2d 1069 (N.D. Cal. 2003), Judge Patel, perhaps impelled by *Henke*, required lawyers in a multi-defendant drug and weapons conspiracy case to put all joint defense agreements in writing and submit them to the court. *Id.* at 1071. After reviewing the submissions, the judge concluded that the agreements had to be redrafted. *Id.* at 1085. She read *Henke's* reference to an "implied attorney-client relationship" to be limited to the creation of a duty of confidentiality only, not a duty of loyalty, to the clients of other lawyers. *Henke*, 222 F.3d at 637. She required that the agreements before her specifically waive this duty of confidentiality. Her order follows:

disqualification from representation of the lawyer's traditional client.⁵³ Liability for malpractice or breach of fiduciary duty would be a doctrinally modest extension.

*In re Gabapentin Patent Litigation*⁵⁴ is an unremarkable example of the duties a lawyer (and therefore his entire firm) might unwittingly assume by virtue of a common interest arrangement, despite seemingly sensible precautions that the court ruled were inadequate. Attorneys Lindvall and Clarke had represented IVAX, a defendant in *Gabapentin*, while at the firm Darby & Darby.⁵⁵ That representation ended in June 2003, although IVAX remained a party.⁵⁶ In March 2005, Kaye Scholer was contemplating offers to Lindvall and Clarke.⁵⁷ But, at the time, Kaye Scholer was representing Pfizer, the plaintiff in *Gabapentin*, in another matter in the same court.⁵⁸ The firm anticipated that Pfizer might ask it to substitute in as its counsel in *Gabapentin*.⁵⁹ Obviously, if Lindvall and Clarke were then working at Kaye Scholer, the firm would be in the position of being adverse to their former client IVAX in the very same litigation in which they had represented IVAX.⁶⁰ So the firm conditioned offers to Lindvall and Clarke on IVAX's consent to screen them from the representation of Pfizer adverse to IVAX if they joined Kaye Scholer.⁶¹

For the foregoing reasons, the Court rules as follows:

- (1) Any joint defense agreement entered into by defendants must be committed to writing, signed by defendants and their attorneys, and submitted *in camera* to the court for review prior to going into effect.
- (2) Each joint defense agreement submitted must explicitly state that it does not create an attorney-client relationship between an attorney and any defendant other than the client of that attorney. No joint defense agreement may purport to create a duty of loyalty.
- (3) Each joint defense agreement must contain provisions conditionally waiving confidentiality by providing that a signatory attorney cross-examining any defendant who testifies at any proceeding, whether under a grant of immunity or otherwise, may use any material or other information contributed by such client during the joint defense.
- (4) Each joint defense agreement must explicitly allow withdrawal upon notice to the other defendants.

Id. In effect, Judge Patel required the defendants to give up the protection that she read *Henke's* default rule to provide. Obviously, then, the parties to a common interest arrangement can reach the same agreement on their own.

⁵³ *In re Gabapentin Pat. Lit.*, 407 F. Supp. 2d 607 (D.N.J. 2005).

⁵⁴ *Id.*

⁵⁵ *Id.* at 609.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 610.

812 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

IVAX gave consent and the lawyers went to work at the firm.⁶² Kaye Scholer then appeared for Pfizer in *Gabapentin*.⁶³ IVAX's co-defendants moved to disqualify the firm.⁶⁴ The question before the court was whether Lindvall and Clarke, and by imputation Kaye Scholer, had any duty to IVAX's co-defendants.⁶⁵ The court held that they did because of a joint defense agreement ("JDA") among IVAX and its co-defendants. "In assessing this position, the Court must consider whether the JDA (and actions taken pursuant thereto) created a fiduciary relationship or implied attorney-client relationship among all the parties thereto and their respective counsel, thus placing the co-defendants in a position to seek disqualification of Kaye Scholer."⁶⁶ The court looked at the JDA and inferred a duty to the co-defendants:

An examination of the terms of the JDA reveals a clear intent that any voluntarily-shared information would remain confidential and be protected by the attorney-client privilege. For example, the JDA states that the signatories are required to "take all steps necessary to maintain the privileged and confidential nature of the information."⁶⁷

This and other language permitted the court "to conclude that an implied attorney-client relationship arose between Mr. Lindvall and Ms. Clarke, as counsel for Ivax, and the other . . . [defendants] by virtue of their joint participation in the defense of the Gabapentin matter."⁶⁸ While the court's conclusion prevented Kaye Scholer from representing Pfizer, the opponent in the litigation, its analysis is potentially more consequential. No lawyer for any of the parties to the joint defense agreement would be able to continue representing his or her client in the event adverse positions emerged between or among the parties to the

⁶² *Id.*

⁶³ *Id.* at 611.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 611-12.

⁶⁷ *Id.* at 613.

⁶⁸ *Id.* at 614. The court also found a fiduciary relationship. *Id.* at 615. The fact that Lindvall and Clarke were screened did not change the result. *Id.* The New Jersey professional conduct rules recognize screening of lateral lawyers, but only if those lawyers did not have "primary responsibility" for the matter at their prior firm. NEW JERSEY RULE 1.10(c)(1). However, Lindvall and Clarke did have primary responsibility. But imputation of their status would only have been proper under Rule 1.10(a) if the reason for their disqualification was a former client conflict, not some other reason. Consequently, the court's finding of an "implied attorney-client relationship" with the co-defendants was essential to its conclusion.

agreement. That conclusion necessarily follows from the decision to label the relationship between any lawyer and another lawyer's client as an "implied attorney-client relationship."⁶⁹ So, for example, if it came to pass that there was adversity among all the co-defendants—as might happen if it became necessary to allocate responsibility for each defendant's proportionate share of damages—they would each have to get new lawyers. That disruptive consequence is not one the court seems to have recognized.

The basis for a lawyer's duties to other members of the common interest arrangement is: first, the fact of the relationship created by the arrangement; and, second, the fact that because of this relationship the lawyer may have learned information about the other clients in it.⁷⁰

B. *Affiliates of a Corporate Client*

Recurring questions for lawyers whose corporate clients are members of a family of companies are: When does the representation of one corporate family member create duties to other members of the corporate family? What is the nature of those duties? Do they encompass the entire package of duties subsumed in the attorney-client relationship or something else? For example, a lawyer may represent a subsidiary of a corporate parent. Does she have duties to the parent or to its other subsidiaries, and, if so, what are they? This is a sensitive subject because an affirmative answer, depending on its breadth, can have significant consequences to the work of a lawyer, especially when the traditional client is in a family with dozens or hundreds of affiliates, whose identity may change monthly. The broader the duties and the

⁶⁹ *In re Gabapentin Patent Litigation*, 407 F. Supp. 2d at 609.

⁷⁰ The *Gabapentin* court did not identify specific confidential information that could be used to the disadvantage of the other defendants. *Id.* at 607. Instead, it inferred, from language in the agreement referring to confidential information, that relevant confidences were shared. *Id.* at 609. Under the substantial relationship test as it conventionally operates, the former client seeking disqualification does not have to identify the confidential information at risk but only that the current matter is substantially related to the matter on which the opposing firm once represented it. MODEL CODE OF PROF'L CONDUCT R. 1.9(a) (2003). The existence of the relationship is meant to support the conclusion that relevant confidences were imparted and endangered. *Gabapentin* is different. There is no question of a substantial relationship. The matter in which the lawyers represented IVAX and the matter in which Kaye Scholer wished to represent Pfizer are the same. The *Gabapentin* court instead drew its inference from the text of the JDA. *Gabapentin*, 407 F. Supp. 2d at 612. Unclear is what the result would have been had the JDA omitted reference to confidential information—*i.e.*, if there had been a joint defense effort without mention of confidence sharing. Perhaps then testimony that such information was in fact shared would have been required.

814 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

larger the population of corporate family affiliates to whom they are owed, the greater will be the potential exposure to civil liability and also the exclusion of the lawyer—and because of the imputation rule, exclusion of the lawyer's colleagues—from other representations.⁷¹ Answers here are not entirely clear. Bar opinions and courts have stated various tests for determining what if anything a lawyer owes a client's corporate affiliates.

ABA Opinion 95-390⁷² concluded that the representation of one company will make its corporate affiliate a client only under limited circumstances.⁷³ Certainly if the law firm and the client agree that affiliates of the client will (or will not) be deemed clients of the law firm, that may conclude the matter. Beyond agreement, which may be implicit, an affiliate of a client may be deemed a client if the two companies operate as alter egos; if the two companies have integrated operations and management; if the in-house legal staff handles legal matters for both the affiliate and the client; or if representation of the client has provided the law firm with confidential information about the affiliate that would be relevant in a matter in which the firm has appeared adverse to the affiliate.⁷⁴

The ABA Opinion attempted to put one issue to rest, but it has resurfaced in the Restatement of Law Governing Lawyers and some cases. Its resolution can have significant consequences when law firms represent a member of a corporate family. Suppose a firm represents Parent in several matters. It is then retained to bring a claim against Subsidiary. Assume the claim is factually unrelated to any work the firm does for Parent. And assume that none of the tests in the ABA Opinion would make Subsidiary the client of the firm for any purpose. What if the action against Subsidiary involves a great deal of money? Perhaps it could put Subsidiary out of business. That in turn may cause Parent substantial harm. Should the fact that the action could have a serious financial effect on the firm's client prevent the firm from acting adversely

⁷¹ For example, in 1996, a district judge, ruling on a motion by Sprint to disqualify Jones Day because the law firm represented another company in the Sprint family, denied the motion, pointing out that Sprint had "over 250 subsidiaries and affiliated entities," while Jones Day had "1098 attorneys spread over 20 world-wide offices." *Rueben H. Donnelly Corp. v. Sprint Publ'g and Adver., Inc.*, 1996 WL 99902 (N.D. Ill. 1996).

⁷² ABA Opinion 95-390.

⁷³ *Id.*

⁷⁴ In addition, a law firm will have a conflict if the representation adverse to one member of a corporate family will be compromised by its reluctance to antagonize the client member of the corporate family. In that instance, the conflict is one that affects the adversary of the non-client affiliate and its consent will remove the conflict.

to nonclient Subsidiary? On the one hand, much that a law firm may do for one client could have harmful economic consequences to another client, yet ordinarily that alone will not create a conflict. Firms may even represent economic competitors.⁷⁵ Similarly, it would not ordinarily be disloyal to real estate client A for its law firm to represent tax client B in a distinct effort to win an interpretation of the tax code that will, as it happens, increase A's income taxes. But is the situation different when a lawsuit against a client's affiliate could cause the client substantial financial injury?

The ABA Opinion concluded that the answer is no.⁷⁶ Economic adversity, standing alone, would not create a conflict. But the Restatement of Law Governing Lawyers appears to disagree. It states the general rule that, when a lawyer represents Corporation A, the company "is ordinarily the lawyer's client; neither individual officers of Corporation A nor other corporations in which Corporation A has an ownership interest, that hold an ownership interest in Corporation A, or in which a major shareholder in Corporation A has an ownership interest, are thereby considered to be the lawyer's client."⁷⁷ So far, so good. But the comment then goes on to say that in some situations this will not be true, such as "where financial loss or benefit to the nonclient person or entity will have a direct, adverse impact on the client."⁷⁸ The comment then gives this example:

Lawyer represents Corporation A in local real-estate transactions. Lawyer has been asked to represent Plaintiff in a products-liability action against Corporation B claiming substantial damages. Corporation B is a wholly owned subsidiary of Corporation A; any judgment obtained against Corporation B will have a material adverse impact on the value of Corporation B's assets and on the value of the assets of Corporation A. Just as Lawyer could not file suit against Corporation A on behalf of another client, even in a matter unrelated to the subject of

⁷⁵ "[S]imultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients." MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. [6] (2003).

⁷⁶ ABA Op. 95-390, *supra* note 72.

⁷⁷ RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 121 cmt. d (2000).

⁷⁸ *Id.*

Lawyer's representation of Corporation A (see § 128, Comment *e*), Lawyer may not represent Plaintiff in the suit against Corporation B without the consent of both Plaintiff and Corporation A under the limitations and conditions provided in § 122.⁷⁹

A lawyer's duties to affiliates of a corporate client may be based solely on the fact of the corporate family relationship, or they may be based on the fact of the relationship coupled with receipt of the affiliate's information. The nature of the lawyer's duties will vary depending on the basis for them.

C. Members of a Lawyer's Trade Group Client

A law firm may pursue the interests of clusters of companies organized in a trade association. The association is the traditional client but its function is to protect the common interests of its members. It may not have interests of its own except as they inure to the benefit of the members, though it will need legal help to operate as an organization (for example, real estate, contract, and employment law advice). What then does the firm owe the membership? The answer to this question can influence responsibilities in other cluster situations, for example associations of individuals, a syndicate of banks participating in loans and joint ventures, but here my focus is trade associations (corporations embody clusters, too, of the shareholders who own them, but corporate representation has spawned an independent body of rules⁸⁰). Courts have recognized that the client of a lawyer for a trade association is the association itself, not its members.⁸¹ But if the members have provided

⁷⁹ *Id.* Interesting though this issue may be, when economic effect appears in the corporate family context, there is generally a whole lot more going on that would independently support disqualification. See, e.g., *JP Morgan Chase Bank v. Liberty Mutual Ins. Co.*, 189 F. Supp. 2d 20 (S.D.N.Y. 2002) (an action against the non-client subsidiary). If successful, the claim would have had a profound effect on the parent, a client of the firm. *Id.* The parent owned 95 percent of the non-client, which accounted for 90 percent of the parent's business. *Id.* at 21. The court emphasized this fact, however, the case also involved common management and headquarters among other factors. *Id.*

⁸⁰ Model Rule 1.13(a) specifically instructs that a "lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Any other rule would create a potential for paralyzing conflicts between the organization's lawyers and its constituents (board members, officers, employees, and agents). Information from an organization's constituents provided to the entity lawyer is the entity's information. The lawyer's duties of confidentiality and loyalty, as well as the right to assert privilege, runs to the entity. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985).

⁸¹ This would seem to be true by definition. See, e.g., *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746 (2d Cir. 1981).

(or are likely to have provided) the lawyer with confidential information to enable the lawyer to advance the interests of the association and therefore its members, the lawyer will not be permitted to act adversely to the source of the information in a matter where the information is relevant. To this extent, the members are virtual clients.⁸²

The Second Circuit's analysis in *Glueck* supports the "information overlap" basis for finding client identity, but it is actually far more complex than that.⁸³ Philips Nizer represented the Apparel Manufacturer's Association, of which Jonathan Logan was a member, in labor negotiations.⁸⁴ It then sued Jonathan Logan in a labor matter.⁸⁵ The Court wrote:

Disqualification will ordinarily be required whenever the subject matter of a suit is sufficiently related to the scope of the matters on which a firm represents an association as to create a realistic risk either that the plaintiff will not be represented with vigor or that unfair advantage will be taken of the defendant. Moreover . . . once that risk appears, it is appropriate to assess the risk that prosecution of a plaintiff's lawsuit by an association's law firm will inhibit the free flow of information from the defendant to the firm that is necessary for the firm's proper representation of the association.⁸⁶

We see here several concerns beyond the most obvious one — that the association's law firm will in fact have received information from the defendant, a member, which can be used to the member's disadvantage in the current action. First, there is the concern that the representation of the association may lead the law firm to compromise its "vigor" on behalf of the plaintiff against the association's member.⁸⁷ The worry is that the firm will not wish to unduly antagonize the association, which may be an important client. This was particularly a concern here because an executive vice president of the Apparel Manufacturer's Association, and a member of its negotiating committee, was president

⁸² *Id.* *Glueck* uses the term "vicarious client." *Id.* at 749.

⁸³ *Id.* at 750.

⁸⁴ *Id.* at 748.

⁸⁵ *Id.*

⁸⁶ *Id.* at 750.

⁸⁷ *Id.* at 749.

818 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

of a division of Jonathan Logan, the adverse party in the lawsuit.⁸⁸ Philips Nizer would then be in a position as counsel to the association to work with this person in its representation of the association, while also acting adversely to the company of which she was an officer.⁸⁹ As such, the firm might qualify its “vigor.”⁹⁰ But that is a problem for the plaintiff, not the association or its member, who may have been willing to waive the conflict.

A second concern reflected in the excerpt from the court’s opinion is the “risk . . . that . . . unfair advantage will be taken of a defendant,” here, Jonathan Logan.⁹¹ Reference to “risk” broadens the scope of potential disqualification.⁹² The member would not have to prove that *in fact* the law firm had received relevant information from the member. It was sufficient that the firm represented the association in the same area of law as the litigation adverse to Jonathan Logan. Or to put it another way, the court created a conclusive presumption that Jonathan Logan will have given the firm information in the area of labor relations that could now be used against it. Then the court broadened the scope of the unacceptable risk even further when it wrote that the pendency of the lawsuit might inhibit Jonathan Logan from providing the law firm with information it needs to properly represent the association, thereby threatening the quality of that representation, too. All of these threats, at least in combination, supported disqualification of the firm.

The basis for a lawyer’s duties to a member of a trade group client is, first, the fact of the relationship created by the existence of the group and, second, the fact that the lawyer may have received or will thereafter need to receive relevant information from the member in order to represent the association.

D. The Principal of an Agent-client (or beneficiary of a fiduciary client) Who has Hired the Lawyer to Assist in Protecting the Principal (or Beneficiary)

Agents hire lawyers to assist them in work for their principals within the scope of their agency.⁹³ The agency relationship is by definition fiduciary,⁹⁴ although not all fiduciaries are agents.⁹⁵ In some

⁸⁸ *Id.* at 748.

⁸⁹ *Id.*

⁹⁰ *Id.* at 749.

⁹¹ *Id.* at 750.

⁹² *Id.*

⁹³ Most obviously, lawyers for organizations, including corporations, are necessarily hired by their agents.

⁹⁴ RESTATEMENT (SECOND) OF AGENCY § 1 (2000).

jurisdictions, a lawyer (like anyone else) who knowingly assists an agent's or fiduciary's act of disloyalty may be jointly liable to the principal for harm done.⁹⁶ The trickier questions are these: Does a lawyer have an affirmative duty to the agent-client's principal or the fiduciary's beneficiary by reason of the professional relationship? For example, if the lawyer discovers the agent's or fiduciary's breach of fiduciary duty to which the lawyer may or may not have provided unwitting assistance, what does the lawyer owe the principal or beneficiary? Or if the lawyer commits malpractice in his or her work for the principal or beneficiary through the agent or fiduciary, is the lawyer liable to the former for injuries caused?

Cases are inconsistent on these questions. An Arizona opinion held that "when an attorney undertakes to represent the guardian of an incompetent, he assumes a relationship not only with the guardian but also with the ward."⁹⁷ Consequently, if the attorney "knew or should have known that the guardian was acting adversely to his ward's interests, the possibility of frustrating the whole purpose of the guardianship became foreseeable as did the possibility of injury to the ward."⁹⁸ The court upheld the denial of the lawyer's summary judgment motion, finding "a legal relationship and concomitant duty to the ward."⁹⁹ Taking a contrary view is *Angel, Cohen & Rogovin v. Oberin Inv., N.V.*¹⁰⁰ The ABA has concluded that the Model Rules do not give a lawyer any greater obligation to the beneficiary of a fiduciary client than the lawyer has to any other third party.¹⁰¹ This opinion construes the Model Rules only. The committee has no authority to construe the law of fiduciary duty. The court in *Trask v. Butler*, after setting out a balancing test, concluded that a trustee or the executor of an estate owes no duty to beneficiaries in the performance of his task.¹⁰² But *Leyba v. Whitley*¹⁰³ reaches a different conclusion where the fiduciary was a

⁹⁵ For example, doctors have fiduciary duties to patients but are not thereby agents of the patient. *Moore v. Regents of University of California*, 793 P.2d 479 (Cal. 1990); *Taber v. Riordan*, 403 N.E.2d 1349 (Ill. App. 1980).

⁹⁶ See *supra* Part II.A (discussing substantive law violations).

⁹⁷ *Fickett v. Superior Court of Pima County*, 558 P.2d 988, 990 (Ariz. Ct. App. 1976).

⁹⁸ *Id.*

⁹⁹ *Id.* at 991; see also *Albright v. Burns*, 503 A.2d 386, 389 (N.J. Super. Ct. App. Div. 1986) ("[T]he attorney had reason to foresee the specific harm which occurred").

¹⁰⁰ 512 So. 2d 192 (Fla. 1987) (stating that negligently helping a fiduciary violate trust does not state claim).

¹⁰¹ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-380 (1994).

¹⁰² 872 P.2d 1080 (Wash. 1994).

¹⁰³ 907 P.2d 172 (N.M. 1995).

child's personal representative in a wrongful death action, distinguishing a trustee.

A trustee in the traditional sense has broad discretionary powers over the estate assets and must make difficult investment and distribution decisions. The attorney for the trustee must assist the trustee to make these discretionary decisions. A personal representative under the Wrongful Death Act, by contrast, must simply distribute any proceeds obtained in accordance with statute and has no discretionary authority.¹⁰⁴

That distinction led the court to find a duty to the beneficiary of the personal representative.¹⁰⁵

The basis for a lawyer's duty to the principal of an agent-client (or the beneficiary of a fiduciary) is the relationship between the principal (or beneficiary) and the agent (or fiduciary). It may also be, however, that the lawyer has received the principal or beneficiary's confidential information, directly or through the agent or fiduciary, and this may be a separate basis to prevent the lawyer from acting adversely to the principal or beneficiary on a matter where that information can be used detrimentally.

E. Intended Third Party Beneficiaries of a Legal Service Performed for a Client

This category resembles the prior one, but it differs in this way. Here, the client is not an agent or fiduciary, but is instead hiring the lawyer to perform a service with the intention of benefitting a third party, possibly along with the client. Unlike an agent, the client has no fiduciary duty to the third party. The classic example is the testator who instructs her lawyer to include a bequest to another. The lawyer forgets to include the bequest. The testator dies and, of course, her intention is frustrated. She is no longer able to sue. Can the third party beneficiary of the testator's instruction sue the lawyer for negligence? Surely there was negligence. If the beneficiary cannot sue, perhaps the executor of the estate may do so, which can have the same consequence. Courts are divided on whether an intended beneficiary has standing to sue the testator's lawyer for malpractice.¹⁰⁶ Although the will cases are perhaps

¹⁰⁴ *Id.* at 178.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 182. Compare *Needham v. Hamilton*, 459 A.2d 1060, 1062 (D.C. 1983) (will beneficiary has standing), and *Blair v. Ing*, 21 P.3d 452, 473-74 (Hawaii 2001) (standing for

the most common example for this category, the paradigm can fit elsewhere. For example, a separation agreement may require the husband to maintain an existing life insurance policy with his children as beneficiaries. The wife's lawyer may then fail to notify the insurance company that the beneficiaries cannot be changed. The now former husband eventually changes the beneficiaries to the children of his second marriage. The change is discovered on his death. Do the children of the first marriage have a claim for the lost insurance against their mother's lawyer?¹⁰⁷

The basis for a lawyer's duty to the third party beneficiary of legal services performed for a client is the relationship between the client and the beneficiary.

F. A Third Party Who Gives a Lawyer Confidential Information to Assist in Providing Legal Services for a Traditional Client because of the Nature of the Relationship Between the Third Party and the Traditional Client

This category, perhaps the least refined, presents a variation on the corporate family and trade group issues described above, but there is no overarching entity. We saw that a lawyer for one member of the corporate family can acquire duties to an affiliate that gives the lawyer information to assist her in providing legal services to the client.¹⁰⁸ The difference here is that the source of the information is not a member of a client's corporate family. Nor is she a member of a trade group client, which presents a similar but distinct situation. At the same time, of course, a lawyer does not, and could not be expected to have a duty to every source that provides the lawyer with information for use in

trust beneficiaries), *with* Taylor v. Maile, 127 P.3d 156, 162 (Idaho 2005) (denying standing to residuary trust beneficiaries). Texas has refused to allow a beneficiary to sue the testator's lawyer, but has permitted the estate's personal representative to do so, even if he happens also to be a beneficiary. *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 787-89 (Tex. 2006). In *Belt*, the allegation was not that the testator's lawyers inadequately drafted a bequest, but rather of negligent tax planning causing depletion of the estate. *Id.* at 782.

¹⁰⁷ *Pelham v. Griesheimer*, 440 N.E.2d 96 (Ill. 1982). This was the situation in *Pelham*, where the court declined to find that the attorney for the mother had accepted a duty to the children. *Id.* at 101. For such a duty to exist, the court wrote, "there must be a clear indication that the representation by the attorney is intended to directly confer a benefit upon the third party." *Id.* at 100. Elsewhere, the court wrote that "the nonclient must allege and prove that the intent of the client to benefit the nonclient third party was the primary or direct purpose of the transaction or relationship." *Id.* at 99. In subsequent cases, courts in Illinois have had to analyze the client's "primary" purpose. *McLane v. Russell*, 546 N.E.2d 499, 502 (Ill. 1989).

¹⁰⁸ *See supra* Part III.B.

822 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

representing a client. Rather, there must be a relationship of some sort between the source and the client, as there is in the corporate family or trade group context, which induces the source to give the lawyer its information. But what kind of relationship will suffice? Two appear influential.

As might be expected, the first is when the lawyer's work for the traditional client will directly benefit the source of the information, thereby providing the source with an incentive to share the information in the first place. The position of the source, then, may be seen roughly to approximate the position of a traditional client and create a duty not to appear adversely to the source in a matter in which the information can be used to its detriment. But, for this principle to hold, the benefit must be particular to the source of the information and derive from the source's relationship to the traditional client. It cannot be a benefit enjoyed generally or by many. For example, in seeking a zoning variance that will allow a client to open a retail business in a particular neighborhood, area property owners who support the change (perhaps it will make their lives easier), may provide the lawyer with information about their own property and needs. That help should not be sufficient to create a duty to the neighbors.

Contrast *Analytica, Inc. v. NPD Research, Inc.*¹⁰⁹ Malec was an employee of NPD between 1972 and 1977. He had two shares, or ten percent, of NPD's stock. During the course of his employment, his two co-owners wished to give him an additional two shares of stock as compensation for his services. They told him "to find a lawyer who would structure the transaction in the least costly way."¹¹⁰ Malec hired Richard Fine, a partner in Schwartz & Freeman. Fine then devised a plan for the transfer of the stock. Because the stock had to be evaluated, NPD gave Fine information on its financial condition, sales trends, and management. Several months later, Malec left NPD and formed Analytica to compete with it. He then hired Fine's law firm to represent Analytica in an antitrust action against NPD, which moved to disqualify Fine's firm.

The firm argued that NPD had never been its client. Malec, it said, was the only client. The court thought otherwise, but it also wrote that the issue was immaterial.

¹⁰⁹ 708 F.2d 1263 (7th Cir. 1983).

¹¹⁰ *Id.* at 1265.

If NPD did not retain Schwartz & Freeman [Fine's firm] – though we think it did – still it supplied Schwartz & Freeman with just the kind of confidential data that it would have furnished a lawyer that it had retained; and it had a right not to see Schwartz & Freeman reappear within months on the opposite side of a litigation to which that data might be highly pertinent.¹¹¹

The second type of relationship between a traditional client and a source of information that may create duties to the source is not commercial but personal or familial. Suppose a young woman is charged with driving under the influence of alcohol. Her mother hires a lawyer. The client is the driver, not the mother, who is paying the fee. The mother may also provide the lawyer with confidential information about the family, including financial and medical information, to assist in the representation. The daughter may not herself know all of the information. The parent directly benefits from the lawyer's goal on behalf of her daughter, although not economically, as in *Analytica*. But neither is the benefit incidental and shared by many, as would be so for the property owners in the neighborhood of the client who seeks a zoning variance. So far as the legal service is concerned, the mother and daughter share what we might call legal identity in seeing the justice system deal least harshly with the daughter, just as the owners of NPD Research and Malec shared a legal identity in achieving the most tax advantageous stock transfer.

The familial context is rare, but one example is *Hornish v. Hoffer*,¹¹² which tells an unhappy tale. Hornish sued Hoffer, her former boyfriend, and Hoffer appeared through the Moots law firm.¹¹³ Hornish claimed that she and Hoffer had an agreement that she would help him build a house on the understanding that she and her children could live in it, that she had spent more than 1000 hours in the construction of the house, and that, on completion, Hoffer would not allow her and her children to live in it.¹¹⁴ Hornish moved to disqualify the Moots law firm on the ground that it had "previously represented her minor son in a criminal

¹¹¹ *Id.* at 1269. The court cited *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978), a trade association case in which the court had disqualified Kirkland & Ellis as counsel for the plaintiff because the firm, in its representation of the American Petroleum Institute, had received Kerr-McGee's "confidential information . . . in connection with the law firm's work for the Institute." *Id.*

¹¹² No. CV05003240, 2006 WL 696542 (Conn. Super. Ct. Mar. 2, 2006).

¹¹³ *Id.* at *1.

¹¹⁴ *Id.*

matter” in which Hoffer was the alleged victim.¹¹⁵ She argued that disqualification was necessary because her son’s criminal action and the present action had “the relationship between herself and the defendant” in common.¹¹⁶ The Moots law firm claimed that it had never had an attorney-client relationship with Hornish and therefore she could not seek its disqualification.¹¹⁷ The court held:

This case presents a unique situation, in that the plaintiff was not a client of . . . [the Moots firm], but rather participated in discussions with them in which she revealed confidential information about her relationship with the defendant while they were representing her minor son. . . . [The disqualification rule] applies in this case because “[t]he issue is whether plaintiffs’ counsel derived confidential information from [his] former representation . . . which may disadvantage the defendant in this case.” . . . Clearly, though the plaintiff was not the true client of [the firm], she was, in a significant manner, in the role of their client as she acted as guardian for her minor son. The plaintiff has stated that in the course of that representation, she revealed to the attorney information regarding her relationship with the defendant, which she claims could be used to her detriment in the current action.¹¹⁸

The basis for a lawyer’s duty to a source who provides information to facilitate the representation of a client is a relationship between the source and the client coupled with provision of information.

G. A Third Party That, as the Lawyer Does or Should Realize, Will Rely on the Accuracy of the Lawyer’s Factual Assertions for a Traditional Client

A lawyer represents a defendant charged with negligence for failing to safely maintain the pavement in front of his property as a city ordinance requires. The plaintiff is seeking \$250,000. The lawyer tells plaintiff’s counsel that the defendant is insured for only \$100,000. The defendant’s lawyer believes this is so because he has seen the insurance policy with that limit. The plaintiff settles for the policy limit and provides a general release. Later, it transpires that the defendant had a

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at *4 (internal citation omitted).

second policy for \$300,000, which was available to the lawyer among the defendant's papers, but which the lawyer failed to discover. He was wrong in what he told the plaintiff, but believed that what he said was true. The plaintiff may or may not have further recourse against the settling defendant personally. Our question is whether the plaintiff can now sue the lawyer for negligent misrepresentation or another tort.

These facts are a variation of those in *Slotkin v. Citizens Casualty Co.*¹¹⁹ A child's parents brought a medical malpractice action against the hospital in which the child was born and others, alleging that the child suffered neurological and brain damage as a result of professional negligence at his birth.¹²⁰ While the trial was in progress, but before a verdict, the parties settled for \$185,000.¹²¹ Counsel for the hospital made certain representations to counsel for the plaintiffs.¹²² On one occasion, the hospital's lawyer said that he "knew" the hospital's insurance coverage was only \$200,000.¹²³ On another occasion, he said that this was so "to the best of his knowledge."¹²⁴ In agreeing to the settlement, the plaintiffs relied on these statements. It later transpired that the hospital had a separate insurance policy for \$1 million in addition to the \$200,000 policy to which its counsel was referring.¹²⁵ Its counsel had documents in his file (of which he claimed to be unaware) revealing the excess coverage.¹²⁶ After the settlement and after the plaintiffs learned about the additional insurance coverage, they sued the hospital's counsel, among others, alleging fraud and related claims. Judgment against the hospital's lawyer was upheld. His "insistence that the policy limit was \$200,000...renders him liable under the New York definition of scienter as reckless indifference to error, a pretense of exact knowledge, or (an) assertion of a false material fact susceptible of accurate knowledge but stated to be true on the personal knowledge of the represententer."¹²⁷

¹¹⁹ 614 F.2d 301 (2d Cir. 1979).

¹²⁰ *Id.* at 305.

¹²¹ *Id.* at 304.

¹²² *Id.* at 307.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 304.

¹²⁶ *Id.* at 307.

¹²⁷ *Id.* at 314. The complaint and the court characterized the lawyer's conduct as "for fraud, or its legal equivalent." *Id.* at 304. But the basis for liability was not lying, but recklessness. *Id.* at 314. Today, the plaintiffs would likely sue for negligent misrepresentation because 13 years after *Slotkin*, the New York Court of Appeals recognized that a third party could assert such a claim against a lawyer despite the absence

826 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

This category should be distinguished from formal opinion letters that a lawyer writes to a third party to assist a client's objectives. For example, in a Colorado case, a borrower's law firm sent an opinion letter to the lending bank, stating the signator's "opinion that the Town and the Authority have adopted the Urban Renewal Plan in accordance with requirements of the laws of the State of Colorado and the Charter of the Town," and that allegations in a pending lawsuit against the town were therefore "without merit."¹²⁸ The court held that this language created a duty to the lending bank that could support its action for negligent misrepresentation.¹²⁹ The difference between this case and *Slotkin* or *Rubin* is the formality of the representation. *Slotkin* and *Rubin* arose out of statements casually made in negotiation, whereas statements in the Colorado case were formalized in a letter to the bank lending money to the lawyer's client.

The basis for the lawyer's liability here is the relationship between the recipient of the lawyer's statement and the traditional client, generally opposing parties in a transaction, which includes a settlement.

H. Summary

The seven categories and the basis for lawyer liability arising from each are summarized in the following chart:

of privity. *Prudential Insurance Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood*, 605 N.E.2d 318 (1992). The RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 51(2) (2000) would also recognize this claim. *See also* *Rubin v. Schottenstein, Zox & Dunn*, 143 F.3d 263, 270 (6th Cir. 1998) (*en banc*). *Rubin* was an action for securities fraud and common law fraud against a borrower's attorney, who defended on the ground that the lender's attorney had no right to rely on the borrower's attorney's factual statements. *Id.* at 265. The court responded:

That principle . . . is limited to reliance on the opinions or research of the other party's attorney on points of law The theory is that one's own lawyer ought to be able to detect and cure misleading statements of law from the other side. Extending the principle to factual representations would put an investor in far greater peril in speaking to an issuer's counsel than in speaking with the president of the company. In short, it would allow an attorney to mislead investors with impunity. We cannot endorse this perverse result.

Id. at 270. An attorney in "a securities transaction," the court said, "may not always be under an independent duty to volunteer information about the financial condition of his client, [but] he assumes a duty to provide complete and nonmisleading information with respect to subjects on which he undertakes to speak." *Id.* at 268.

¹²⁸ *See, e.g.,* *Mehaffy, Ryder, Windholz & Wilson v. Central Bank of Denver, N.A.*, 892 P.2d 230, 237-38 (Colo. 1995).

¹²⁹ *Id.*

Category	Basis for Duty to Virtual Clients
Common interest arrangement	Relationship to client and presumption of sharing of relevant information
Affiliates of corporate client	Relationship to client <i>or</i> relationship <i>and</i> proof of shared information
Members of trade group client	Relationship to client and presumption of sharing of relevant information
Principal of agent-client	Relationship to client
Third party beneficiary of client	Relationship to client
A source of information to the lawyer	Relationship to client and shared information
Third party who relies on lawyer's statement	Relationship to client and lawyer represents factual information

IV. RATIONALIZING AND CRITIQUING THE SEVEN CATEGORIES OF VIRTUAL CLIENT

As stated, I make no claim that these seven categories comprise the universe of situations in which lawyers may have “client like” duties to third persons because of their professional work. I recognize, too, that the categories overlap and certainly not all American jurisdictions view them (or their boundaries) in the same way. Nonetheless, the categories account for the great majority of circumstances giving rise to potential liability (some more than others) and remarkably just two underlying themes (a relationship between the traditional and virtual clients or a relationship plus the fact or the presumption of shared information) explain them all (although in the final category the information travels from lawyer to virtual client).

When courts ascribe a duty of some dimension to a lawyer in one of the circumstances described here, they create a default rule that governs

if it is not displaced. A lawyer can often seek to contract around the default rule by agreement with the traditional client or the putative virtual client,¹³⁰ but failing that, the duty arises.

My argument is that courts have adopted the wrong default rule in some of these situations. They have done this without sufficient analysis of pertinent policy considerations, looking only to one or both of the two underlying conditions—relationship and information. But when and why these conditions should afford virtual client status has been inadequately addressed. Decisions whether to create lawyer-like duties to persons or entities that are not traditional clients should be approached with caution, though not forbidden, because of the potential effect on the attorney-client relationship and the availability of the lawyer (or her colleagues) to new clients. A presumption should ordinarily work against creation with the burden of offering persuasive policy justifications to create the default duty on the party seeking to impose it. In meeting that burden, proponents should be required to address three distinct questions: (a) whether the virtual (or non-traditional) client who seeks the benefit of the duty could readily have negotiated for it; (b) the likely expectations, if nothing is said, of the lawyer, his traditional client, and the party seeking to impose the duty; and, (c) the effect of judicial creation of a duty to a virtual client on the lawyer's (and her firm's) ability to represent the traditional client and others who may seek their help. These factors are not meant to prescribe a formula. They are considerations for analyzing the particular facts of each matter. I will now apply the considerations to each of the seven categories described above.

A. *Common Interest Arrangements*

Parties to common interest arrangements do not need a court's help in defining the duties, if any, owed them by lawyers for other clients in the arrangements. Using the three questions described in the prior paragraph, this is one of the easier conclusions. By definition, the arrangement is contractual and each of the parties to the agreement has counsel able to protect his or her client in the manner deemed best. The

¹³⁰ If the default rule is to create the duty to the virtual client, the participants may be able to waive the protection of that rule since a traditional client can waive the protection of confidentiality rules or most conflict rules. See MODEL CODE OF PROF'L CONDUCT R. 1.6(a), 1.7(b), 1.9(a)-(c) (2007). A virtual client should be able to do the same either directly or through an agent (for example, a parent company) with authority. If, conversely, the default rule would not recognize a duty to the putative virtual client, the parties can agree to create one (for example, of confidentiality), but that agreement would be contractual. It would not be imposed by rules of ethics.

presumption should be against any duty to another lawyer's client with the parties free to defeat that presumption by defining specific obligations. These may cover a fairly broad set of arrangements. For example, the parties may agree that shared documents will be returned to their source, that no lawyer will thereafter be adverse to clients of other lawyers during the pendency of the arrangement (or ever) on the subject of the common interest arrangement, or that no lawyer or client will use or disclose any information from another lawyer or client in the arrangement. But if nothing is said, and absent unusual circumstances compelling a different conclusion, the presumption of no duty to other lawyers' clients, including for information they may have provided, should be conclusive.

Using this test, *Gabapentin*¹³¹ appears to be wrong. The scope of any obligation of each lawyer to the clients of the other lawyers is left unclear. The court tells us that:

[a]n examination of the terms of the JDA reveals a clear intent that any voluntarily-shared information would remain confidential and be protected by the attorney-client privilege. For example, the JDA states that the signatories are required to "take all steps necessary to maintain the privileged and confidential nature of the information."¹³²

What duty does the quoted JDA language impose? Is this promise meant to forbid *use* of the information for the benefit of the lawyer's own client or only revelation? Is it meant to prevent pursuit of investigative leads based on the information? The opinion goes on to find, from this language of the JDA, that the lawyer for each of the defendants acquired "a fiduciary and implied attorney-client relationship" with the clients of other lawyers in the JDA.¹³³ That is too broad. Fiduciary and attorney-client relationships come with a lot of baggage and the potential for significant civil liability. Here, the only objective was to protect information so it would have sufficed for the court to recognize, at most, a *contractual* duty of confidentiality. Furthermore, if the lawyers accepted only a contractual (or even a fiduciary) obligation, there would be no basis in the professional conduct rules for imputing their duty to

¹³¹ *In re Gabapentin Pat. Lit.*, 407 F. Supp. 2d 607 (D.N.J. 2005).

¹³² *Id.* at 613-14.

¹³³ *Id.* at 615.

other lawyers at a successive law firm and then to disqualify their new firm as the court did, relying on these rules.¹³⁴

B. Affiliates of a Corporate Client

Obligations to the clients of other lawyers in common interest arrangements can be defined by agreement. Self-help is readily available. In theory, a law firm and a company that is part of a corporate family should also be able to establish their own conflict rules by agreement. For example, the retainer agreement can provide that, by virtue of the representation of Parent, the law firm has no attorney-client or fiduciary relationship with Subsidiaries. Or, conversely, a client can request that the law firm accept an attorney-client relationship with (or specific duties to) every company (or certain companies) in its corporate family if it represents any member of it. To some extent, market power will dictate the resolution. The firm whose expertise makes it highly desirable in a matter can condition retention on its preferred understanding of the relationship. The client with many lucrative matters to offer can do the opposite. But this sort of private ordering of conflict rules is not always easy in the corporate family context for two reasons.

First, neither party may have the market power to insist on its preference over the jurisdiction's default rule. The firm may realize that the client can go elsewhere and the client may realize that the value of its business is insufficient to persuade any firm it may choose to agree to its request. Second, a client's agreement that retention of a firm does not create an attorney-client relationship with or duties to other members of its corporate family does not guarantee that a court will not decide otherwise if unforeseen events (or at least events not foreseen in the language of the retention agreement) arise in the course of the representation. For example, while working for a parent, the firm may ask a subsidiary to provide it with confidential information that it needs to represent the parent. That event may, under current doctrine, create certain duties to the subsidiary notwithstanding generic waiver language in the earlier retainer agreement that did not specifically anticipate that eventuality.

¹³⁴ MODEL CODE OF PROF'L CONDUCT R. 1.10(a) (2007). Rule 1.10(a) imputes a conflict to other lawyers if the conflict arises under "Rule 1.7 or 1.9." *Id.* If the lateral lawyer's disability arises because of a contractual promise—or indeed even if it is fiduciary—he or she is not "prohibited . . . by Rule 1.7 or 1.9" from representing the client and there should be no imputation under Rule 1.10(a). *Id.*

Where nothing is said, a jurisdiction can opt for either a more or a less client-protective rule. In determining what the general default rule should be, a jurisdiction cannot make assumptions about the sophistication of the client or the availability of independent counsel to advise it. Even though many companies that are part of a corporate family will be sophisticated in the use of lawyers and will have inside counsel to advise them, many others will not. Does this variation support a more or a less protective rule? To put it another way: Which party, client or lawyer, should have the burden to contract for a rule more favorable to it?

Before considering what the rule should be, I return to the dominant default rules today. They identify several circumstances that give rise to duties to a corporate client's affiliate, without regard to the size or complexity of the corporate family or its access to independent counsel. The circumstances fall into four categories. The first is any express or implied agreement the parties may have.¹³⁵ The second is what we might call the "sharing" category—the client and its affiliates may share one or more of the following: management, location, operation, and information systems, or general counsel.¹³⁶ Sharing in one or more of these categories will not necessarily operate to create virtual client identity,¹³⁷ but it may, depending on the degree of sharing and other factors. The third circumstance is the law firm's receipt of confidential information from the affiliate that is relevant to a new matter adverse to the affiliate.¹³⁸ The last is the economic effect of the work on the client member of the corporate family.¹³⁹

¹³⁵ See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-390 (1995).

¹³⁶ *Id.*

¹³⁷ See, e.g., *Apex Oil Co., Inc. v. Wickland Oil Co.*, No. CIV-S-94-1499-DFLGGH, 1995 WL 293944 (E.D. Cal. Mar. 2, 1995) (the court meticulously analyzed the degree of overlap between the personnel of two subsidiary companies of a common parent). Although a common in-house lawyer supervised the work of both subsidiaries, the court declined "to draw the inference that the corporate parent expected to be treated as a client where, except for sharing the same corporate attorney, in all other respects . . . [the two] are distinct companies." *Id.* at *3.

¹³⁸ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-390 (1995).

¹³⁹ *Id.* The ABA Opinion recognizes a fifth basis for disqualification even when all of the others are absent. *Id.* A lawyer for one member of a corporate family, say the parent, may be reluctant to zealously represent a client that is adverse to another member of the corporate family, say a subsidiary, for fear of antagonizing the parent. *Id.* That risk could fall within Rule 1.7(a)(2), which states that "significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer," where the personal interest would be the lawyer's reluctance to antagonize a current client. But this

832 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

Where the basis for a duty is in the first category, agreement that the affiliate will be treated as a client, we simply have displacement of the default rule by the contract and there will be no reason for the court to apply a default rule that contradicts the agreement. Where the basis for the duty is some degree of sharing, that circumstance will ordinarily be known at the outset of the representation and can be specifically recognized. The final two bases for creating a duty to an affiliate—receipt of its relevant information or economic effect on the client member of the corporate family—occur, if they occur at all, after the professional relationship is formed; although sometimes either possibility will be foreseeable at the outset.

Before deciding whether and when any of these circumstances should inform a jurisdiction's default rule, it makes sense to examine some policies underlying the structure and content of lawyer ethics rules. As stated earlier,¹⁴⁰ the plurality if not the majority of ethical rules can be likened to consumer protection laws. They protect clients, who are after all consumers of the profession's product, which is legal service. Some rules protect adversaries, third parties, or the system of justice, instead of or in addition to clients, but the plurality of rules protect clients. Should not, then, the content of a court's ethics rule meant to protect clients be guided, at least in part, by assessing the client's need for court protection, which depends in part on the client's sophistication in the purchase of the product?¹⁴¹ Certainly some corporate clients are as (or more) sophisticated in both the market for legal talent and lawyer conflict of interest rules as (or than) are the lawyers they retain, and, in

consideration focuses on the danger to the client adverse to the non-client member of the corporate family, not on any duty owed to the latter.

¹⁴⁰ See *supra* note 11 and accompanying text.

¹⁴¹ The idea of client sophistication has been more prominent of late, although the rationale was always implicit. The idea is that a client who is sophisticated in the use of lawyers needs less protection from the rules than does one who is not. This position may appear in discussing the ability of a client to consent to a future conflict. See, e.g., ABA Model Rule 1.7 cmt. 22; RESTATEMENT OF LAW GOVERNING LAWYERS § 122 cmt. d. See also MODEL CODE OF PROF'L CONDUCT R. 1.10(a) (2007):

In determining whether the information and explanation provided are reasonably adequate [to support the requirement of informed consent], relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

fact, many corporate clients retain counsel under the supervision of other lawyers who are especially knowledgeable and experienced consumers of legal services. This obvious fact has not been accorded the influence it deserves in defining the content of the rules governing corporate family conflicts. We are haunted by the traditional model of the worldly lawyer and the dependent (perhaps confused), needy (if not desperate) client at the mercy of the lawyer's sense of professional duty, or the lack of one. Surely, many clients meet that description, but many do not.

Given vast differences in legal market savvy among corporate clients, it seems misplaced for the same set of rules to govern duties to affiliates of corporate clients regardless of client sophistication. Courts should instead evaluate the need for protection before deciding what default rule should govern a particular situation. Doing so does carry the disadvantage of substituting complexity for simplicity; it is much easier to apply a "one size fits all" rule. In exchange, though, when a conflict is alleged, courts will be better able to allocate as between lawyer and client who had the *ex ante* responsibility for negotiating a deviation from the default rule. If we move away from a "one size fits all" rule, many parties may not be able to predict, at retention, what default rule a court will adopt *ex post* (but many will, among them large companies with house counsel). That uncertainty should encourage them to resolve the question in advance by agreement. When the default rule may be less protective of a corporate client's affiliates if nothing is said, the client, if it cares about the question, is motivated to raise it. If the default rule may be more protective of the corporate client's affiliates, as it would for corporate clients whom the court, under the circumstances, finds less sophisticated in the market for legal services, it is the law firm that has the motivation to displace it.

I will now suggest how a flexible default rule might work where the basis for the conflict is (a) sharing arrangements, (b) receipt of the affiliate's information, and (c) economic effect.

Shared management, general counsel, location, and systems should not be a basis to create duties to a corporate client's affiliates where the client is sophisticated in the employment of counsel. At the very least, this test should not be mechanically applied. There are two reasons for this. Compared to the law firm, the client is in a superior position at the start of the professional relationship to know the degree of such sharing among members of the corporate family. If it believes that its level of integration requires (or causes it to desire) this protection, it should request it or forego reliance on this basis in the event the law firm later

appears adverse to affiliates. Separately, the broad scope of disqualification when based on sharing extends to foreclose representation adverse to one or even many client affiliates on any matter. If, for example, the affiliate who shares management with a corporate client is for that reason deemed a client for conflict purposes, no lawyer in the law firm can act adversely to the affiliate on any matter while the professional relationship remains current. If all affiliates share the same management—for example, all or most of the topmost control group—the law firm may not be able to oppose any of the affiliates, regardless of number, on any matter for the duration of the representation of a single member of the corporate family. If a sophisticated corporate client wants that level of protection, a level that severely circumscribes the firm's availability, it should have to bargain for it. It should not receive it by operation of a categorical rule or *ex post* via a court decision.

I will now turn to receipt of an affiliate's confidential information in the course of representing a member of its corporate family as a basis to forbid representation adverse to the affiliate. Here the scope of the disqualification is narrow. It is only on matters where the received information is relevant that the firm is disqualified from opposing the affiliate. On the other hand, the particular conflict will continue even after the representation of the corporate family member has ended. But here, too, a categorical prohibition may produce an inequitable result. For one thing, when a law firm receives information from a corporate client it may not always be clear who, within the corporate family, owns the information. Information does not necessarily come with a label. We can call this the "ownership" issue. Second, even for information that originally came from the affiliate, the client may independently have the information, in which case the affiliate will not itself have been asked to produce anything that could later be used against it. Where the ownership or source of the information is unclear, a law firm under the current default rule may be unaware that receipt of the information will disqualify it from relevant matters adverse to the affiliate, with the result that another client will lose its chosen lawyer.

By contrast, the client will not ordinarily labor under this lack of clarity. It will know to whom information belongs and the source of the information. Consequently, receipt of relevant information should not be an automatic basis to disqualify a law firm. Rather, for that basis to apply the circumstances should make it clear that the firm knows or should have known the provenance of the information. Only then is the firm able to negotiate for a less strict conflict rule should it wish to be

free to appear adverse to the affiliate in a matter where the information is relevant.¹⁴² Where this clarity is absent, the burden to identify the ownership of the information should fall on the corporate client; if it does not do so, it must accept that the law firm will not be prevented from appearing adverse to the affiliate in a relevant matter.¹⁴³

The final basis to forbid representation adverse to a client's affiliate is the economic effect of the matter on the client, if successful. This basis has a checkered history. There is authority for the proposition that it should not be a basis at all and authority for the proposition that it is a basis when the economic consequences are large.¹⁴⁴ Even the ABA opinion that rejected this as a basis for conflict recognized that adversity against a client's affiliate in a matter that could prove harmful to the economic health of the client may be the basis for disqualification, not because of the economic harm *per se*, but because the prospect of significant economic harm caused by a company's own law firm (albeit in unrelated matters) could undermine the trust and confidence that is essential to the professional relationship and that the client has a right to enjoy.¹⁴⁵ In those jurisdictions prepared to recognize substantial economic harm to the client as a result of representation adverse to one of its affiliates—and I believe it is a legitimate basis for identifying a conflict if used with caution—the risk of this eventuality will ordinarily be theoretical and equally apparent to lawyer and client in the formation of the attorney-client relationship. Consequently, either is in a position to negotiate for a different rule and neither is likely to have superior

¹⁴² Often, the law firm will not be able to decline to receive the information, even if it is alerted to its source, because it will need the information to competently represent the client member of the corporate family. At those times, however, at the very least the firm will be on notice of the limitations of its representation and can plan accordingly.

¹⁴³ The law firm, of course, remains obligated not to reveal or adversely use the information. MODEL RULES OF PROF'L CONDUCT R. 1.9(c) (1983) (amended 2003).

¹⁴⁴ See *supra* notes 75-79 and accompanying text.

¹⁴⁵ The ABA Opinion is cursory in identifying this risk, but it is recognized. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 95-390 (1995). It states that a "lawyer must consider whether the representation . . . of the corporate client may be materially limited by the representation of the client adverse to the affiliate." *Id.* The point is simply that the client has a right to expect to be able to work in an atmosphere of trust and confidence with its law firm. *Id.* at 298. When that same law firm is adverse to an affiliate in a manner that can cause the client substantial economic harm, this may not be possible. Of course, the test cannot be the offended client's own comfort level. If it were, the rules would be entirely subjective and open to manipulation. Rather, the perspective for determining whether the adverse representation so undermines the professional relationship with the client member of the corporate family must be objective. See RESTATEMENT OF LAW GOVERNING LAWYERS § 121 cmt. C (iv) ("This Section employs an objective standard by which to assess the adversariness, materiality, and substantiality of the risk of the effect on representation").

knowledge.¹⁴⁶ A default rule that preserves this basis for disqualification is therefore appropriate. That rule does nothing more than recognize the client's—any client's—right to expect to work with a lawyer in an atmosphere of trust and confidence and that, using objective criteria, such right will be compromised when the lawyer or his or her firm is opposing an affiliate of the client in a matter that could cause the client substantial economic harm.

C. Members of a Lawyer's Trade Group Client

Corporate clients need legal counsel for their own problems whether or not they also happen to be members of a corporate family. Trade organizations need legal counsel, too, but with a difference. Some of their legal needs will be the routine ones incident to running any organization. These include real estate, tax, employment, and the ordinary run of tort liability matters. But often the need will stem from the work the group does for its members. The trade group exists for the direct benefit of others, its members. Its “business” is the pursuit of its members’ interests. Whether technically an agent for its members or not, its role is instrumental. Its members have decided that certain of their own political, commercial, or legal objectives can be usefully pursued (though not necessarily exclusively) through an entity that represents their common interests. A lawyer retained by a trade group knows that, and knows, too, or should know, that much of the information the client imparts will have its source in the files of its members. For example, a lobbying effort may draw on proprietary commercial data from a group’s members, data not publicly available and the specifics of which may not become public in the lobbying endeavor. When a law firm for a trade group (or similar entity) gets member-specific proprietary information, it must or should know that members have provided the information to the group in order to advance the interests of the membership including their own.

For these reasons, it is appropriate to have a default rule that treats the members of a trade group as virtual clients of the group’s law firm to the extent of prohibiting the law firm from acting adversely to a member in any matter in which a member’s information is relevant and the law firm obtained that information in its work for the trade group. In *Glueck*, the Second Circuit inferred that Philips Nizer had received Jonathan Logan’s confidential information from the fact that the law firm

¹⁴⁶ On rare occasion, a law firm may have superior knowledge, as when it is contemplating an action of substantial magnitude against a client’s affiliate.

represented a trade association in which Jonathan Logan was a member in an area of law (labor relations) that was the subject of the litigation against Jonathan Logan. The court was not only influenced by the risk to information the defendant may have given the firm, it also apprehended that Jonathan Logan would thereafter be inhibited from sharing information with the firm lest that information be used against it in *Glueck*. The disqualification therefore rested on two presumptions—a presumption of a threat to imparted information and a presumption of inhibition against providing additional information—and these presumptions in turn depended on the fact that both representations were in the same area of law. This inference is reasonable on the facts of *Glueck*, but it is prone to false positives (*i.e.*, finding a threat to information or an inhibition when none exists) if too casually applied. Consequently, for the default rule to protect the trade association member, a court should insist on a close fit between the two representations.¹⁴⁷ The disqualification of the firm would not extend to other matters in which it may appear adversely to the member and where the information is not relevant. It is true that the members of a trade group, especially those who work closely with a law firm for the group, might prefer that the firm be forbidden to appear adversely to them in any matter at all. But, for two reasons, it does not make sense to adopt so broad a prohibition as the default rule. First, some trade groups are large and so the scope of the disqualification and attendant denial of

¹⁴⁷ The *Glueck* court did not closely analyze the fit between Phillips Nizer's legal work for a trade association and the case before it. *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746 (2d Cir. 1981). On behalf of the association, the firm conducted multi-employer collective bargaining with a union. *Id.* *Glueck* was an executive of one of the association members – Logan – not a member of the union. *Id.* Yet the court concluded:

Judge Conner [the district judge] relied upon the risk that the issue of whether Logan had cause to terminate *Glueck* might well arise in the course of collective bargaining discussions conducted by Phillips Nizer for the Association. He also noted the risk that in preparing for collective bargaining sessions, the law firm might learn of Logan's policies or past practices bearing on the subject of *Glueck*'s termination. These risks demonstrate the requisite relationship between *Glueck*'s lawsuit and the subject matter of Phillips Nizer's representation of the Association.

Id. at 750 (emphasis added).

This conclusion is highly suppositional with predictions founded on what "might" or "might well" happen. It would be different if *Glueck* were in the union with which the law firm was bargaining, but he was not. Rights of union members and *Glueck*'s claims as an executive would seem distinct. Of course, the court also cited other bases for disqualification. It may be, of course, that the risk was great enough to warrant disqualification, but the suppositions in the circuit opinion do not support that conclusion.

choice of counsel and limitation on practice would be large.¹⁴⁸ Keeping counsel available is a value that deserves respect, though not unqualified deference. Second, as a sophisticated employer of legal services, the trade group (whose governing board is likely to be composed exclusively or largely of some of its members and which may have in-house counsel as well) can negotiate for the broader prohibition at the outset of the retention. The issue is not hidden and the client (and its members) is likely to be sophisticated about these matters.¹⁴⁹

D. Beneficiaries and Reliers

This is an inclusive group, meant to identify the common denominator in the final four categories of virtual clients. Again, those four categories are: (i) the principal of an agent-client (or beneficiary of a fiduciary client) who has hired the lawyer to assist in protecting the principal (or beneficiary); (ii) intended third party beneficiaries of a legal service performed for a client; (iii) a third party who gives a lawyer confidential information to assist in providing legal services for a traditional client because of the nature of the relationship between the source and the traditional client; and, (iv) a specific third party that, as the lawyer does or should know, will rely on the accuracy of the lawyer's factual assertions or legal analysis on behalf of a traditional client. The common denominator is this: in each situation, the lawyer knows or should know that the work, at least in part and perhaps entirely, is intended either to benefit or to influence someone besides the immediate and traditional client. In at least one of these situations, the third, the beneficiary of the work has, in addition, provided the lawyer with information to facilitate the work. That may also be true in the first two situations. For example, the beneficiary of a fiduciary client may have provided the lawyer with information—directly, or indirectly through the fiduciary—to assist his or her work for the fiduciary.

¹⁴⁸ For example, the United States Internet Industry Association, founded in 1994, claims more than 200 members. U.S. Internet Industry Association, <http://www.usiia.org/about/fact.htm> (last visited Jan. 4, 2008). The Association of American Publishers had 314 members as of 2005. Association of American Publishers, Annual Report for Fiscal Year 2004/2005, <http://www.pubilshers.org/about/annualreport.cfm> (last visited Nov. 4, 2007). The American Seed Trade Association web site reports that it has "about 850 member companies, including roughly 550 active members." American Seed Trade Association, About ASTA, [http://www.amseed.com/about.asp_\(last visited Nov. 4, 2007\)](http://www.amseed.com/about.asp_(last%20visited%20Nov.%204,%202007)).

¹⁴⁹ As discussed *supra* text accompany notes 83-92, an additional basis for conflict would be (1) if the lawyer's interest in maintaining a good relationship with the trade group client compromised the lawyer's ability to represent a client adverse to a member of the trade group, or (2) if representation adverse to a member of the trade group that was active in the affairs of the group, including the need to work with a lawyer, undermined the ability of the trade group client to have trust and confidence in its law firm.

In each of these situations, the presumptive default rule should ordinarily give the lawyer professional duties to the virtual client although those duties need not and generally will not be the full complement of duties a lawyer owes to a traditional client. As before, complexity precludes a single metric across all four of the situations or even for each one. In exchange for the loss of simplicity, we get rules that respond to factual differences. While this will diminish predictability, we should keep in mind that the chosen default rules in each instance will favor the party most in need of protection, in part because of lack of sophistication in the market for legal services and in part because of the equities of the situation, and that, as with other default rules, they can be displaced with appropriate informed consent. Furthermore, predictability is not lost entirely. Variations in the factual circumstances can be identified *ex ante* and appropriately weighted in deriving the probable default rule.

Before discussing each of the variations within this collective category, that of beneficiaries and reliers, I want to return to the second canonical assumption referenced earlier.¹⁵⁰ It is that judicially created “client-like” duties to third parties should be an exception because they threaten to compromise the zeal with which the lawyer will champion the traditional client’s goals. They will do this, the argument goes, because lawyers who face a risk of liability to third parties will temper their devotion to the traditional client’s matter to avoid that risk. Litigation is where this model works best. Certainly, we should not create duties to a litigation client’s adversaries beyond those necessary to protect against discovery abuse, fraud on the court, and other systemic harms. These duties run to the justice system, with the adversary as beneficiary. They are not what I am calling “client-like” duties, that is, duties that lawyers owe traditional clients such as competence, confidentiality, and freedom from conflicts of interest.

Outside litigation, recognizing “client-like” duties in the four situations under discussion should not be seen to threaten the lawyer’s loyalty to the objectives of his or her traditional client. Consequently, in these situations, with qualifications discussed below, a lawyer should have: (i) a duty of competence to the principal (or beneficiary) of an agent (or fiduciary) client and also the duty to protect the principal or beneficiary from the agent’s or fiduciary’s disloyalty; (ii) a duty of competence to intended third party beneficiaries of legal services for a client; (iii) a duty to specified sources of information to refrain from

¹⁵⁰ See *supra* text accompanying note 11.

adverse representation in a matter where the information is relevant; and, (iv) a duty of care to third parties who, the lawyer does or should realize, will rely on the accuracy of the lawyer's statements of fact. Generally, none of these duties will detract from the zeal with which the lawyer pursues the client's goals, but they should prevail even if they do. Further, in the first and second instances, and to some extent in the third and fourth, the party claiming virtual client status will often not have been in a position to negotiate for protection.

1. The Principal or Beneficiary of an Agent or Fiduciary Client¹⁵¹

Where an agent or other fiduciary retains a lawyer for the specific purpose of obtaining legal advice in order to benefit the principal or beneficiary, the lawyer should have a duty of competence to the principal or beneficiary and a duty to protect him or her in the event of a violation of fiduciary duty. The lawyer should also be excluded from appearing adversely to the principal in any matter in which information obtained from the principal, directly or through the agent, is relevant. Today, the exceptions to confidentiality in ABA Model Rule 1.6(b)(2) and (3) go only a modest way toward enabling a lawyer to protect the principal from injury by the agent. These exceptions are permissive only; further, they require that the lawyer's work have been used in causing the injury. They also require that the conduct causing the injury be the result of a fraud or crime and that the injury be "substantial."¹⁵²

a. *Competence*

We are assuming that the agent or other fiduciary has retained the lawyer to advise it in protecting the interests of the principal. It would seem, then, that the interests of the agent and the interests of the principal in competent legal advice are congruent. Indeed, because the principal is the one who will personally benefit from the lawyer's work, the principal's interest in competence would seem to be greatest. Further, by giving the principal a right of action against the lawyer for malpractice, we should in no way affect the quality of the lawyer's work for the agent since the agent also wants competence. We might

¹⁵¹ The assumption here is that the lawyer has been retained for the specific purpose of obtaining legal advice in order to benefit the principal or beneficiary. Where the agent or fiduciary is retaining the lawyer because his or her interests have become adverse or potentially adverse to the principal or beneficiary—that is, where the agent or fiduciary has a personal need for counsel—the lawyer's sole professional obligation should run to the agent or fiduciary.

¹⁵² MODEL RULES OF PROF'L CONDUCT R. 1.6 (b)(2), (3).

analogize this situation to an agent who employs a subagent for the benefit of the principal. The subagent, as a fiduciary of the principal, will have a duty of care to the principal.¹⁵³ It is important to stress again what this category does not involve. The assumption is that the agent has hired the lawyer because the agent needs legal counsel for the ultimate benefit of the principal. This is not a situation where the agent seeks counsel personally or because of a divergence between its interests and those of the principal.

b. Fiduciary Misconduct

Much has been written about whether and when a lawyer should be permitted or required to reveal client communications to protect a third person from injury from a client's crime or fraud.¹⁵⁴ The Model Rules now permit a lawyer to reveal confidences when the third person's financial injury is substantial and the lawyer has been used (or misused) in the client's misconduct.¹⁵⁵ Whatever the merits of permissive rather than mandatory disclosure, or of conditioning the lawyer's authority to reveal client confidential information on the client having used the lawyer's services to commit the crime or fraud, where the person injured is a principal or beneficiary and the lawyer has been retained to benefit the principal through assistance to the agent (or other fiduciary), the lawyer should be required to warn the principal without regard to whether the lawyer's services have been used in causing the injury. The principal in this situation is not the "third person" usually imagined in routine discussions of this exception to confidentiality. The principal, we might say, is the ultimate client: the intended recipient of the value of the lawyer's labor. I suppose all would agree that the lawyer who stumbles on the agent's breach of fiduciary duty would at the very least have to resign if remaining had the effect of advancing the misconduct. But that might be insufficient notice of dereliction to the principal. One compromise would require the lawyer to inform the principal that he or she has resigned "for professional reasons," in the expectation that doing so will lead the principal to investigate. This is but a variation on the noisy withdrawal authority long contained in the comments to the

¹⁵³ RESTATEMENT (THIRD) OF AGENCY: DUTIES OF AGENT AND PRINCIPLE TO EACH OTHER § 8.01 cmt. c (2006). "A subagent owes fiduciary duties to the principal as well as to the appointing agent." *Id.*; see also *id.* at § 3.15(1), cmt. d.

¹⁵⁴ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6, 1.13 (1983) (amended 2003). Much of this debate was sparked by the ABA's adoption of new exception to confidentiality. See also Lawrence A. Hamermesh, *The ABA Task Force on Corporate Responsibility and the 2003 Changes to the Model Rules of Professional Conduct*, 17 GEO. J. LEGAL ETHICS 35 (2003).

¹⁵⁵ MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)-(3).

842 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

Model Rules.¹⁵⁶ But why muzzle the lawyer from revealing the specifics? A second compromise would authorize but not require the lawyer to reveal the agent's dereliction. But why not mandate revelation given the fiduciary duty?

The point here, again, is that the principal stands in a posture different from the usual "third person" envisioned by ethics rules, and the lawyer stands in a different posture to the principal than lawyers stand in relation to third persons to whom clients do not owe a fiduciary duty. The situation here is instead closer to the lawyer for an entity who discovers misconduct among its officers and who is then required to report to higher officials. True, there is a difference because the officers are not the lawyer's clients while the agent is, but on the assumption made (the purpose of the lawyer's retention is to benefit the principal), the agent is a client only as a "pass through" for the benefit of the principal, so this distinction should not matter.

2. Third Party Beneficiaries of a Legal Service

The premise here is that the interests of the client and the interests of the third party are either the same or at least that the interests of the latter are wholly "lesser included" within (and so consistent with) the interests of the former. The client's intention, in other words, is that the third party should benefit from the legal service, perhaps along with the client. The classic example is the beneficiary under a will. But there will be other examples. A purchaser of real estate may want title to pass to a specific third person on death or on a certain occurrence. A divorce client may want to insure that her children remain as beneficiaries under their father's life insurance policy or that the father will have a legal obligation, not otherwise present, to pay for a certain benefit, like college or graduate school. Or, in a different vein, a shareholder in a corporation may hire a lawyer to perform a service that will benefit the corporation (as well as the shareholder).¹⁵⁷ In these and like circumstances, the traditional reason for refusing to recognize a duty, here of competence, to the third party has scant validity. It cannot compromise the lawyer's commitment to the traditional client to give the intended beneficiary of that client's retainer legal standing to require competent work (as the

¹⁵⁶ MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 10, 4.1 cmt. 3 (1983) (amended 2003).

¹⁵⁷ See, e.g., *Williams v. Mordkofsky*, 901 F.2d 158, 164 (D.C. Cir. 1990) (corporation had standing to sue a lawyer who had been retained by its shareholders and an affiliated company for the purpose of benefitting the corporation; lawyer "knew or should have known that . . . [corporation] would be directly affected by his advice in regard to the [matter]").

default rule), because that is exactly what the traditional client also wants. It bears stressing that the third party is not a stranger to the work—not someone who incidentally will stand to benefit, as it happens, from the work—but someone whom the client hired the lawyer specifically to benefit, at least in part.¹⁵⁸

3. A Third Party Source of Information

As stated,¹⁵⁹ this category does not sweep within its protection *any* third party who gives a lawyer information useful in the representation of a client.¹⁶⁰ It further requires a particular relationship between the source and the client that has encouraged the source to provide the information. That relationship may, for example, be parent and child. While a parent may not *legally* benefit when the representation of a client is successful, thereby distinguishing the prior category, the parent's interests are satisfied simply because of the relationship. Indeed, it is the relationship that predictably encourages the parent to provide the information in the first place. In the commercial world, similarly, an employer may provide confidential information to an employee's lawyer because success for the employee directly benefits the employer. We saw an example of each instance of these—familial and commercial—above.¹⁶¹ In each, the fact of the information then prevented the lawyer from acting adversely to the source in a matter in which the information was relevant (and therefore could be used against the source). That was true even when the client of the lawyer in the (later) adverse matter was the same (traditional) client as in the prior matter.

Admittedly, this category has vague borders. What relationships will create a duty to the information source? What if there is adversity or the obvious potential for adversity at the time the information is supplied? For the default rule to impose a duty to the source of information, the appropriate test should require that the source: (a) stands directly to benefit from the lawyer's work, but the benefit need not be to a legal or commercial position; (b) is motivated to provide the information because of that expected benefit; and, (c) is not benefitting simply because it is a member of the public.

¹⁵⁸ *Id.* at 163 ("The third party, however, must allege more than mere harm from the conduct in question. He must show in addition that he was 'the direct and intended beneficiary of the attorney-client relationship.'") (citing *Needham v. Hamilton*, 459 A.2d 1060, 1062-63 (D.C. 1983)).

¹⁵⁹ See *supra* Part III.F.

¹⁶⁰ See *supra* Part III.F.

¹⁶¹ See *supra* Part III.F.

4. A Third Party Who Relies on the Lawyer's Assertions or Analysis

This category must be distinguished from formal opinion letters, by which I mean letters whose circumstances clearly signal to the lawyer that he or she is making a statement about the facts or the law to a third person who is expected to rely on or draw comfort from the statement. It may be a letter that the recipient, often an opponent of the traditional client in a transaction, has requested as a condition of the transaction.¹⁶² Under these circumstances, no policy argues against requiring the lawyer to be free from negligent error. While any claim arising from reliance on representations that prove false may be labeled negligent misrepresentation, the proof will be similar if not identical to the proof a traditional client might mount in a legal malpractice claim based on negligence.¹⁶³

The distinct but related situation I mean to encompass with this category entails less formality. Whereas, with formal opinion letters, the lawyer does know the context for the representations, here the lawyer may not fully appreciate the context. Yet it is a precondition to liability for negligence that the recipient was entitled to rely on what the lawyer said. We are not here discussing predictions or claims of value, but statements of fact or law.

*Lawyers Title Ins. Corp. v. Baik*¹⁶⁴ may push the outer limits of negligent misrepresentation based on statements of fact or law to a third person. Anderson, Burrows & Galbraith prepared the federal and state tax returns for a decedent's estate (in addition to performing other legal work for the estate).¹⁶⁵ One asset of the estate was residential property, which the estate quitclaimed to the decedent's brother and his wife, who then sold the property to their two sons and their wives.¹⁶⁶ The purchasers applied for a mortgage, and the lender required title

¹⁶² See, e.g., *Mehaffy, Rider, Whindholz & Wilson v. Central Bank of Denver, N.A.*, 892 P.2d 230 (Colo. 1995) (an opinion letter need not be dressed up in any particular way). See also *Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987). The lawyer for the borrower told the lender, who had required his opinion, that the collateral was "free and clear of all liens or encumbrances." *Id.* at 1562. It was not, and following default the lender successfully sued the lawyer. *Id.* at 1568.

¹⁶³ *Id.* The court concluded that Illinois law, which applied, would have supported a professional malpractice claim, but the lender was also free to sue for negligent misrepresentation. *Id.* "We know of no obstacle to such an election; nothing is more common in American jurisprudence than overlapping torts." *Id.*

¹⁶⁴ 55 P.3d 619 (Wash. 2002).

¹⁶⁵ *Id.* at 620.

¹⁶⁶ *Id.*

insurance.¹⁶⁷ Lawyers Title offered the insurance but excluded any taxes the estate might owe.¹⁶⁸ The policy of Lawyers Title was to remove this exclusion if the estate's law firm stated "that no estates taxes were due."¹⁶⁹ Chae, a lawyer at the Anderson firm, wrote the following in a letter to Lawyers Title: "I am informing you that, based on our tax preparation, no estate taxes are due and owing to the state or federal government. Likewise, to my knowledge, no other taxes are outstanding against the estate."¹⁷⁰ Lawyers Title issued the policy. As it turned out, the statement that no taxes were due was wrong.¹⁷¹ The federal government filed a lien against the residential property and Lawyers Title paid the IRS more than \$618,000 in taxes, penalty, and interest.¹⁷² Lawyers Title then sued the Anderson law firm (among others) for negligent misrepresentation.¹⁷³

By a vote of 4-3, the Washington Supreme Court reversed a summary judgment motion in favor of the law firm. The court addressed several issues, but most interesting for our purposes is how it dealt with the firm's argument that the statement in the letter to Lawyers Title was not false and, therefore, not a misrepresentation. The law firm claimed that its statement to Lawyers Title was literally true; that is, that "based on [its] tax preparation, no estate taxes" were due. The law firm did not categorically say that no estate taxes were due, only that its work revealed none. The court rejected that argument:

The respondents argue that Lawyers Title's negligent misrepresentation claim fails because, "[a]s a matter of law, Mr. Chae made no false representations" in his opinion letter to Lawyers Title. . . . The respondents' approach to the "false information" element of a negligent misrepresentation claim would immunize all communications that were explicitly (or even arguably) presented as opinions. Every defendant would claim that he or she had accurately and truthfully stated his or her opinion, and the content of even the most negligently obtained opinion would go unexamined: whether the opinion had been derived by tossing a coin

¹⁶⁷ *Id.* at 622.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 623.

¹⁷² *Id.*

¹⁷³ *Id.*

or consulting an astrologer would be of no consequence, so long as the letter accurately stated the opinions that those methods had yielded. The respondents' self-serving approach is plainly at odds with the . . . conception [in Restatement (Second) of Torts §552] of the "false information" element of a negligent misrepresentation claim.¹⁷⁴

Strengthening a duty to the recipient here is that the word of lawyers, being lawyers, will carry special weight. Others will presume accuracy (care) and integrity. Courts have emphasized the credibility that a lawyer's status carries and have supported claims for damages in part based on it. For example, as in the *Slotkin* case,¹⁷⁵ lawyers for defendants have been sued for misstating the amount of their client's insurance coverage. In *Fire Ins. Exchange v. Bell*,¹⁷⁶ the Indiana Supreme Court held "as a matter of law" that the opposing counsel had a right to rely on an insurance coverage statement.¹⁷⁷ It rejected the argument that there was no right to rely because the relationship was adverse or because opposing counsel could have discovered the true coverage on his own. The court emphasized that the incorrect statement was made by lawyers:

A lawyer's representations have long been accorded a particular expectation of honesty and trustworthiness. . . . The reliability of lawyers' representations is an integral component of the fair and efficient administration of justice. The law should promote lawyers' care in making statements that are accurate and trustworthy and should foster the reliance upon such statements by others.¹⁷⁸

The Supreme Court of Iowa has similarly stressed the lawyer's duty (and risks) in this situation, again relying on the speaker's status as a lawyer:

We hold that once a lawyer responds to a request for information in an arm's length transaction and undertakes to give that information, the lawyer has a duty to the lawyer requesting the information to give it

¹⁷⁴ *Id.* at 624-25.

¹⁷⁵ *Slotkin v. Citizens Casualty Co.*, 614 F.2d 301 (2d Cir. 1979).

¹⁷⁶ 643 N.E.2d 310 (Ind. 1994).

¹⁷⁷ *Id.* at 313.

¹⁷⁸ *Id.* at 312-13.

truthfully. Such a duty is an independent one imposed for the benefit of a particular person or class of persons. We further hold that a breach of that duty supports a claim of equitable indemnity by the defrauded lawyer against the defrauding lawyer.¹⁷⁹

V. CONCLUSION

In the three decades since Judge Sprecher's acute observation, ambiguity over who may be entitled to a lawyer's professional concern—who has a claim to some component of "clienthood"—has increased beyond what the judge or anyone at the time could have imagined. The field will never be as clear as it once was, say, circa 1950. Yet lawyers must plan because errors can lead to disqualification or liability for malpractice and breach of fiduciary duty. They can try to reach agreements that anticipate the question, but that will get them only so far. Some developments cannot be foreseen. Even when prediction is possible, lawyers may be unwilling to ask clients or others to accept terms that may appear unduly one-sided in the lawyer's favor. Lawyers have to accept that a person or entity that is not a formal client can make a claim to occupy one of the virtual client categories. Of course, a claim is not a right, only the possibility of one. If the lawyer cannot resolve the claim when it arises, he or she must weigh the degree of risk and consequences of guessing wrong.

Like any client caught in the whorl of developing legal doctrine, lawyers may bemoan the absence of bright lines. That is understandable, but the dilemma is here to stay. It will not arise often. The clients of most lawyers most of the time will still be the person who walks in the door. But what the doctrines described here tell us is that the door is not the only point of entry to a professional relationship.

¹⁷⁹ Hansen v. Anderson, Wilmarth & Van Der Maaten, 630 N.W.2d 818, 825-26 (Iowa 2001).