

Saint Louis University School of Law
Scholarship Commons

All Faculty Scholarship

2003

Toward a Multiple Party Representation Model: Moderating Power Disparity

Henry Ordower
Saint Louis University School of Law

Follow this and additional works at: <https://scholarship.law.slu.edu/faculty>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Ordower, Henry, *Toward a Multiple Party Representation Model: Moderating Power Disparity* (2003). *Ohio State Law Journal*, Vol. 64, No. 5, 2003; Saint Louis U. Legal Studies Research.

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarship Commons. For more information, please contact ingah.daviscrawford@slu.edu.

**Toward a Multiple Party Representation Model:
Moderating Power Disparity**

HENRY ORDOWER*

This Article argues that the zealous representation model of contemporary legal practice, with its emphasis only on the client, often results in lawyers assisting and motivating their clients to exploit the clients' power advantages in non-litigation contexts. The Article recommends that ethical rules shift to a multiple client representation model, based upon the Brandeisian "lawyer for the situation." The model would empower attorneys in non-litigation settings to encourage their clients to consider and evaluate the impact on other constituencies that the representation may affect. Attorneys would become better able to encourage their clients to seek distributional fairness and balance in their business and personal legal activities to the possible long-term advantage of both client and lawyer.

I. INTRODUCTION

Americans probably would agree that the rule of law is critical to a peaceful society. Reliance on and belief in disinterested judges, administrative specialists and arbitrators to resolve disputes fairly and peacefully are fundamental to the modern American system. Government agencies are available to enforce judgments and awards. Complex pleading rules that America inherited from England have disappeared; transparent and easily mastered pleading rules have replaced them. Yet, legal process is not free from complexity or opportunity to delay and sometimes prevent the rendition of court judgments by use of motions and discovery.¹

* Professor of Law, Saint Louis University School of Law. J.D., M.A., The University of Chicago, A.B., Washington University. The author thanks his student research assistant, Rebecca Shiflet, and Margaret McDermott, a law librarian, for assistance with research; his faculty colleagues who read and commented upon an earlier draft of this Article at a faculty workshop in February 2002; and his spouse, Ilene Ordower, who proofread several drafts of this Article.

¹ See generally Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561 (1996); Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597 (1998); Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709 (1998).

Deeply embedded in American legal practice, zealous advocacy defines the legal culture,² and remains vital to lawyers' understanding of their professional role.³ Zealous advocacy can take precedence over one's own moral views as law students learn not to decline to represent individuals with whom the students disagree or who advance unpopular causes (whether or not the students agree with the cause).⁴ Law schools traditionally rely on casebooks for instructional material, emphasizing litigation and litigation outcomes as a primary method for learning the rules of law. Winning the case is of paramount importance. In the first year of law school, when students generally take a legal writing course, they observe that skill in persuasion and advocacy defines the quality of the lawyer. Students learn to argue their client's interests whether the students believe their client to be right or wrong. The Model Rules sanction such an approach to the client's interests.⁵ Even negotiation as a topic of law school curricula emphasizes advocacy. Negotiation targets securing the most beneficial outcome for one's client rather than seeking a balanced reconciliation of competing interests. The assumption is that the counter-party to the negotiation also seeks the most beneficial outcome for the counter-party's client as well and will competently advocate for that client. With zealous advocates on both sides of the negotiation, the outcome should achieve a reasonable balance; if not, one of the advocates failed to represent her client adequately.⁶

Lawyers and law students most often learn contract-drafting skills outside the law school setting,⁷ through summer or part-time employment with a law firm. As law students begin to prepare contracts, they rely heavily on existing forms that lawyers in the firm may have developed over lengthy periods and numerous transactions. The forms tend to depart from non-performance and remedies rather

² The Model Code of Professional Responsibility, also referred to as the "Model Code" in the following, imposes the duty of zealous advocacy upon lawyers. Ethical Consideration 7-1 reads: "[t]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law." MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1986).

³ While the Model Rules of Professional Conduct, also referred to as the "Model Rules" in the following, soften the emphasis on zeal as the cultural norm of law practice, the Model Rules nevertheless begin with zealous advocacy and moderate zeal as necessary to respond to non-adversarial contexts. MODEL RULES OF PROF'L CONDUCT pmb. ¶ 8 (2002). The primary sets of ethical rules this Article examines are those the American Bar Association issued.

⁴ MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2002).

⁵ *Id.*

⁶ "Power negotiating is the ability to change the attitude or behavior of another—to *get your way* when dealing with others." DAVID V. LEWIS, POWER NEGOTIATING TACTICS AND TECHNIQUES 9 (1981).

⁷ Law schools frequently do integrate some drafting exercises into a variety of courses and through their legal research and writing programs, but contract drafting rarely consumes as much of the student's time as brief writing or expository writing (law review notes).

than assumed performance and satisfactory economic accommodation. Thus, new lawyers learn that their primary objective is to protect their client from all possible eventualities when the other party to the contract fails to perform. Professor Karl Llewellyn observed, “[b]usiness lawyers tend to draft to the edge of the possible.”⁸ The orientation toward one-sided, all-eventualities drafting becomes the office practice complement to Rambo depositions and similar discovery practices in litigation.⁹ And new lawyers learn from other lawyers to provide the same zealous representation.

The growth of the law and economics movement has fortified the culture of zeal by making the comparison of economic costs and benefits the essence of legal analysis. The Coase Theorem stimulated the law and economics movement,¹⁰ a now dominant feature of modern American legal analysis and planning.¹¹ Consistent with economic analysis,¹² American lawyers strive to attain maximal benefit for their clients within the bounds of the law. So long as the client does not violate the law, harm to others from maximizing the client’s

⁸ N.Y. LAW REVISION COMM’N, 1 HEARINGS ON THE UNIFORM COMMERCIAL CODE 177 (1954). The then proposed unconscionability provision of the Uniform Commercial Code would have protected consumers from unreasonable and unnecessary contractual provisions.

⁹ See *supra* note 1 and accompanying text.

¹⁰ R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), has been read in a number of differing manners. One formulation of the Coase Theorem might be that identifiable and stable property rights—without regard to moral considerations—are critical to a rational legal and economic system because stable rights facilitate economically efficient bargaining with respect to the rights. Moral considerations might help parties to predict legal outcomes where the legal rights are uncertain, but they do not contribute to efficient resource allocations. Changes in legally protected rights generate displacements. With any change in rights, there may be both positive and negative impacts. Thus, in formulating or changing legal rules, courts or legislatures ought to regard total effect, rather than some narrower transactional effect. Coase, however, does not limit total effect to economic factors alone. See discussion *infra* Part VI.

¹¹ Economic analysis is less significant to litigation than it is to transactional planning because litigation outcomes depend upon the analytical methods that third party arbiters employ. Even sound economic analysis, as opposed to other non-economic factors, may not persuade the fact finder or judge. Certain judges do have the reputation for applying economic analysis in their decision making. Most recognizable among judges who consistently employ law and economics analysis to their decisions are Richard Posner and Frank Easterbrook of the Seventh Circuit. See Mitu Gulati & Veronica Sanchez, *Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 IOWA L. REV. 1141 (2002), for empirical research and analysis of the frequency with which casebooks cite opinions that economics-oriented judges write.

¹² The Coase Theorem assumes equal bargaining power and a well-defined property rule in order to generate an economically efficient outcome. Power disparity may distort the efficiency of the result. Moreover, Coase does not limit analysis to readily quantifiable economic factors. Coase, *supra* note 10, at 42–44; see also discussion *infra* Part VI.

benefit may become a matter of cost-benefit comparison.¹³ So if the costs of the client's actions, including compensation for damage that the client may have to pay for harm caused, are less than the benefit the client derives, the lawyer will recommend the course of action accordingly.¹⁴ Decision making becomes a function of cost-benefit analysis as lawyers encourage their clients to disregard non-economic factors.

Some recent legal scholarship suggests that the legal profession attracts adversarial personalities to its ranks. Susan Daicoff identifies eight characteristics of those drawn to law that confirm the adversarial personality of lawyers:

materialism, need for achievement, preference for dominance, competitiveness, tendency to respond to stress by becoming more aggressive and ambitious, insensitivity to interpersonal, emotional, humanistic concerns, the Myers-Briggs dimension of "Thinking" as an approach to decision making, and a "rights" orientation to moral decision making (as opposed to an ethic of care).¹⁵

Accordingly, lawyers' embedded personality traits perpetuate zeal as fundamental to the lawyering culture. Other studies, like the interviews that Lawrence Joseph conducted, confirm the existence of a personality range among those that the legal profession draws.¹⁶ Similarly, clients have come to expect zeal from their lawyers. The popular media, both print and television, generally depict attorneys in their litigating postures as ardent advocates of their clients' causes. This image of the lawyer regularly enjoys a positive spin as attorneys determinedly pursue unpopular but just causes and help to free clients who are wrongly accused of crimes, even when the representation is not remunerative. Newsworthy lawyers often are those who sit beside their clients at Congressional hearings and protect

¹³ Lawyers often consider the costs and benefits of violating the law as they evaluate the risk of possible criminal sanctions to the client in adopting certain courses of action. Participants in both the tobacco and the automobile manufacturing industries have pursued courses of conduct that have harmed others, possibly criminally, following careful legal analyses of the risks. See discussion of the "Pinto analysis" in George Priest, *Economic of Civil Justice Reform Proposals*, 9 KAN. J.L. & PUB. POL'Y 401, 402-03 (2000).

¹⁴ Economic factors are not necessarily predictable or simple to quantify despite widespread use of this type of economic analysis.

¹⁵ Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO J. LEGAL ETHICS 547, 594 (1998).

¹⁶ LAWRENCE JOSEPH, *LAWYERLAND* (1993) (presenting a study of the lawyer's personality reflected through a series of partially fictionalized interviews that offers a bleak picture of the lawyer's character); see also Pierre Schlag, *The Lawyerland Essays*, 101 COLUM. L. REV. 1730, 1730-96 (2001) (offering commentaries by Schlag, David A. Skeel, Jr., Robin West, Sarah Krakoff, David Luban, Robert Weisberg, and Lawrence Joseph).

their clients by advising them not to answer questions. The public face of the legal profession emerges from and reinforces the culture of zeal.

But this public view of lawyering takes shape primarily in litigation settings where zealous advocacy may be both desirable and essential. The lawyer's personality traits "may be psychologically necessary to allow lawyers to represent unpopular clients or causes" and facilitate "equal access to justice."¹⁷ In an adversarial posture in which each adversary has the luxury of competent representation and adequate resources to pursue litigation, few would doubt that the lawyer ought to represent the client zealously and seek to assist the client to accomplish the client's lawful objectives.¹⁸ Much lawyering, however, either is not inherently adversarial,¹⁹ or involves circumstances of power disparity that preclude one of the adversaries from advancing his interests effectively.²⁰

This Article inquires whether the culture of zeal with its accompanying single client representation model confines lawyering inappropriately and unnecessarily by prohibiting or restricting lawyers from representing multiple clients, as they should, in many non-litigation contexts. The Article observes that single client representation as a generally ideal lawyering model,²¹ is a myth when applied to the lawyer's role in modern civil, office practice.²² The single client model often propels the lawyer to encourage her client to exploit a power advantage in ways that might not occur to the client, that the client would eschew absent the lawyer's encouragement and that even might not be in the client's best interests in the long term.

The Article argues that despite real and potential conflicts of interest, a multiple client representation model better suits much non-litigation practice than

¹⁷ Daicoff, *supra* note 15, at 594.

¹⁸ See MODEL RULES OF PROF'L CONDUCT pmb. ¶ 8 (2002); see also *supra* note 3.

¹⁹ Attorneys help solve an array of problems that do not place parties at odds to one another. In fact, lawyers even seek to solve problems that clients and prospective clients do not know they have. See discussion of the lawyer as entrepreneur *infra* Part VII.C.

²⁰ See discussion of power disparity *infra* Part VI.

²¹ For example, Debra Lyn Bassett, *Three's a Crowd: A Proposal to Abolish Joint Representation*, 32 RUTGERS L.J. 387, 388 (2001), forcefully argues that existing conflicts of interest rules are too lax, as they are "aimed at facilitating the business of law rather than the professionalism of lawyers."

²² The American Bar Association's recent revisions to the Model Rules would seem to acknowledge how common multiple client representation is in contemporary American law practice. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002) governing conflicts of interest focuses upon the issue of concurrent conflicts of interest far more than its predecessor, MODEL RULES OF PROF'L CONDUCT R. 1.7 (2001), did. The newer rule permits the lawyer to represent multiple clients with concurrent conflicts so long as each client gives "informed consent" to the common representation. Commentary to the newer rule elaborates extensively on the common representation model of practice but does not encourage adopting the model as this Article does.

the traditional single client model.²³ A multiple client representation model would permit and, in some instances, require the lawyer to evaluate the impact of her advice to the client on other constituencies that the prospective conduct affects. Lawyers would accommodate legal advice to the needs and interests of those other constituencies.²⁴ The underlying premise of the multiple client model is that clients, free from contrary influences, including legal advice grounded in economic analysis and evaluation of legal exposure, generally prefer not to exploit power in ways that are harmful to others. Clients are willing to forego some immediate economic advantage in favor of harmony and conflict avoidance that might serve them better in the future.²⁵ Recent behavioral studies using economic game playing confirm that fair dealing and sharing take precedence over profit maximization.²⁶ Moreover, economic game theory suggests that cooperative sharing frequently enhances profitability for all parties.²⁷

Part II of this Article will provide some background concerning how current ethical rules encourage zealous advocacy in a single client representation model. Part III explores traditional multiple party representation as a model for non-litigation lawyering. Part IV looks at other constituencies that attorneys' representation of clients affects and builds upon the multiple client representation model to propose a standard for consideration of those constituencies. Part V briefly reviews current discourse in legal ethics as it addresses separate codes for specialty areas and the development of the ethics of care. Part VI addresses power disparities and their exploitation. Part VII introduces concepts of the lawyer's varying interventional roles. Part VIII presents examples of interventional functions and interests of other constituencies. Part IX concludes that current ethical rules limit lawyers' responsibility to indirect clients and recommends

²³ See *infra* Part III.

²⁴ See *infra* Parts VI, VIII.

²⁵ Cf. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* ch. 10 (1994) (proposing a moral discourse with the client as part of the lawyer's counseling). The authors express the view that the client will adopt a conciliatory course of action if the lawyer gently offers an analysis based upon fairness. *Id.* In the authors' example the client wishes to oppose a zoning variance for a home for men but the lawyer persuades the client to evaluate the operation of the home and its impact on the neighborhood, thereby leading the client to conclude that the impact on the neighborhood will not be as unfavorable as the client initially anticipated. *Id.* at 116–19. The context of the example is litigation-like, with the lawyer acting with respect to specific instructions and seeking to persuade the client to abandon his chosen course of action. *Id.*; cf. *infra* Parts VII.A, VIII.C (discussing the scrivener lawyer).

²⁶ See generally Bruce Bower, *A Fair Share of the Pie: People Everywhere Put a Social Spin on Economic Exchanges*, 161 *SCI. NEWS* 104 (2002) (comparing studies of economic exchanges within various cultures). See further discussion *infra* Part VI.

²⁷ See generally JOHN F. NASH, JR., *ESSAYS ON GAME THEORY* (1996); MARTIN J. OSBORNE & ARIEL RUBINSTEIN, *BARGAINING AND MARKETS* (1990).

broader indirect client obligations based upon a multiple party representational model as part of the norm for legal ethics.

II. BACKGROUND ON THE CULTURE OF ZEAL, THE MODEL CODE AND THE MODEL RULES

Level playing fields enable disinterested arbiters, judges and arbitrators to make informed and fair decisions. Whenever one party has greater resources than the other, this paradigm shifts. Differentials in resources may provide tactical advantages. No longer does the disinterested arbiter necessarily gain access to all information that might be pertinent to a fair decision. One party may use its greater resources to limit access to important information,²⁸ overwhelm the arbiter with information favorable to that party or simply delay the rendition of an unfavorable decision in order to arbitrage the difference between pre-judgment interest and investment return.²⁹ Conscientious arbiters, undoubtedly, free themselves from the influences of resource disparity and reach a fair result in any event. And thoughtful, creative advocates may enable the resource-disadvantaged party to overcome the limitations on resources through persuasive advocacy. Nevertheless, power disparity remains troubling because it increases the risk that the legal system will generate an unjust result as the zealous advocate for the resource-advantaged party exploits her client's superior resources to her client's advantage. Furthermore, non-litigation-based interaction with the legal system lacks the intermediation of a disinterested arbiter to aid in leveling the playing field. Unfortunately, standard ethical rules governing law practice do not change with the power paradigm or the non-litigation context.³⁰

Criticism that the Model Code suited only litigation practice and not the transactional practice of law in part led the American Bar Association to develop the Model Rules.³¹ While the Model Rules may address some ethical issues that the transactional lawyer faces better than the Model Code did, both the Model Rules and the Model Code fortify the adversarial, single client advocacy model. Single client models are simple and easy to police. Divided loyalties and

²⁸ Resisting discovery, for example. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 511 (1994).

²⁹ *Id.* at 536.

³⁰ The Model Rules assume that "personal conscience and the approbation of professional peers" guide the lawyer's behavior with respect to matters that neither law nor the Model Rules govern. MODEL RULES OF PROF'L CONDUCT pmb. ¶ 7 (2002). And the negative inference of Model Rules preamble eight suggests that zealous representation may be inappropriate when the opponent is not well represented. *Id.* at pmb. ¶ 8.

³¹ For a brief description of the history of the professional responsibility rules, see Steven C. Krane, *Ethics 2000: What Might Have Been*, 19 N. ILL. U. L. REV. 323 (1999).

balancing of interests, the touchstones of multiple client representation, are not accommodating to bright line rules for codes of professional conduct.³² Yet multiple client representation is characteristic of much of civil, non-litigation representation.³³

Until the most recent revision of the Model Rules,³⁴ neither the Model Code nor the Model Rules provided practical guidelines for ethical conduct in the realm of traditional multiple party representation.³⁵ Neither departs from the adversarial, single client advocacy model to address constituencies other than readily identifiable clients.³⁶ Both sets of rules emphasize the primacy of the client in the lawyer-client relationship. Both tend to trivialize the impact that representation may have on third parties and do not compel the lawyer to consider broader ethical questions of other parties in the course of client representation. The Model Code focuses on the identifiable client, as it requires the lawyer to represent the “client zealously within the bounds of the law.”³⁷ Under the Model Code, the advocate has no duty to adversaries or other third parties other than the duty to avoid needless injury to others³⁸ and the more general obligation to the courts that requires lawyers to disclose adverse authority.³⁹

³² Compare MODEL RULES OF PROF'L CONDUCT pmb. ¶ 9 (2002).

³³ See discussion *infra* Part IV.

³⁴ See *supra* note 22 (discussing recent changes to Model Rule 1.7).

³⁵ Until the most recent revision of the Model Rules that withdrew MODEL RULES OF PROF'L CONDUCT R. 2.2 (2001), the Model Rules sought to address some non-representational roles that lawyers assume with that rule. Model Rule 2.2 permitted the lawyer to serve as an intermediary but required withdrawal when the going got rough. For an extensive discussion of the concept of intermediation under the withdrawn Model Rule 2.2, see John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741 (1992). The Model Rules now view intermediation primarily as a non-representational role that the Model Rules no longer expressly regulate. MODEL RULES OF PROF'L CONDUCT pmb. ¶ 3 (2002).

³⁶ MODEL RULES OF PROF'L CONDUCT pmb. ¶¶ 1–9 (2002) address broader roles for the lawyer but do not transform many of those roles into rules of conduct. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002), a conflict of interests regulation, acknowledges the prevalence of multiple party representation and both facilitates and discourages such representation. *But see* Dzienkowski, *supra* note 35, at 765–67 (observing that Model Rule 2.2 as in effect, before withdrawal, was applicable and permitted a broad variety of multiple client representation).

³⁷ MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1986); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1986).

³⁸ Model Code EC 7-10 offers that zealous advocacy does not preclude treating others with consideration in order to avoid inflicting “needless harm.” Implicit is the assumption that the lawyer will inflict harm on others when necessary to zealous client representation. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-10 (1986).

³⁹ MODEL CODE OF PROF'L RESPONSIBILITY DR 7-106(B)(1) (1986).

In fact, an obligation not to lie is absent from the Model Code and the Model Rules.⁴⁰ The Model Code controls misrepresentation to opponents through conflict rules that prohibit communication to a represented party⁴¹ and prohibit advising a party whose interests may be adverse to those of one's client.⁴² The Model Rules go somewhat further and prohibit the making of "a false statement of material fact or law to a third person" and the failure to disclose material facts if necessary to prevent the lawyer from assisting a criminal or fraudulent act.⁴³

Not only did the American Bar Association fail to compel lawyers to be truthful but also missed its opportunity to limit attorneys' assistance to clients who overreach less powerful contracting parties by including unenforceable and unconscionable provisions in contracts. The ABA failed to intervene at contract drafting level as it rejected a proposed rule that would have prohibited attorneys from including illegal provisions in contracts.⁴⁴

⁴⁰ Discussion drafts of the Model Rules, if adopted, would have required significantly more truthfulness in negotiation than the rule the ABA adopted. *See* MODEL RULES OF PROF'L CONDUCT R. 4-4.3 (Discussion Draft 1980). *See generally* Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to be Trustworthy when Dealing with Opposing Parties*, 33 S. CAL. L. REV. 181 (1981) (examining whether lawyers should have an obligation to be truthful and concludes that each practice level (lawyering subculture) has its own conventions and that general rules on truthfulness other than fraud proscription are impractical); Gary Tobias Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411 (1988) (contending that lawyers always should be truthful and the ABA missed its opportunity to require truthfulness).

⁴¹ MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (1986).

⁴² MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(2) (1986).

⁴³ MODEL RULES OF PROF'L CONDUCT R. 4.1 (2002). The affirmative disclosure obligation with regard to material facts is prospective only so that the lawyer will not further a criminal or fraudulent act. Completed client acts require no disclosure. Model Rule 1.6 governing confidential communications precludes disclosure of most prospective matters if disclosure would violate a client's confidence. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002). Recently, however, the Internal Revenue Service has argued successfully that the tax practitioner-client privilege under I.R.C. 7525 (2003) does not protect the generalized advice that a tax practitioner (or attorney) provides in creating a tax shelter product for a promoter even if the practitioner has contact with the promoters' clients. *See United States v. BDO Seidman, L.L.P.*, 337 F.3d 802, 813 (7th Cir. 2003) (denying investors right to intervene to prevent enforcement of a summons for customer lists).

⁴⁴ The ABA rejected the draft of Model Rule 4.3 that would have included that prohibition. The proposed rule read: "[a] lawyer shall not conclude an agreement, or assist a client in concluding an agreement, that the lawyer knows or reasonably should know is illegal, contains legally prohibited terms, would work a fraud, or would be held to be unconscionable as a matter of law." MODEL RULES OF PROF'L CONDUCT R. 4.3 (Discussion Draft 1980). For thoughtful analysis and criticism of that rejected provision, see William T. Vukowich, *Lawyers and The Standard Form Contract System: A Model Rule That Should Have Been*, 6 GEO. J. LEG. ETHICS 799, 833 (1993).

At the same time, confidentiality rules expressly disfavor multiple party representation that would serve as a model for the balancing of varying interests.⁴⁵ Multiple party representation creates an unavoidable conflict because effective representation of one party may require the attorney to use and reveal confidential information received from another represented party. While all parties may consent to the multiple representation and concomitant disclosures in support of the representation, the Model Rules make the representation awkward. Consent to disclosure before the necessary degree of disclosure becomes known renders it difficult to ascertain whether the attorney will be able to comply with the requirement that the representation not “be materially limited by the lawyer’s responsibilities to another client.”⁴⁶

Further, neither the Model Rules nor the Model Code offers strong protection to the public from lawyers’ misconduct. Neither provides remedies to clients, much less non-clients, whom the lawyer’s conduct affects.⁴⁷ If the relevant state bar has adopted either the Code or the Rules, violations of specific ethical rules may result in the bar or the state’s high court taking disciplinary action against the lawyer. Historically, no private right of action inured to the parties the lawyer’s misconduct affected under the Code or the Rules.⁴⁸

In fact, compliance with the Code or the Rules as the relevant jurisdiction adopts them may shield the attorney who follows the rules from liability for misconduct.⁴⁹ Professional malpractice arises when the professional fails to meet

Courts occasionally have been better than the legal profession’s self-regulatory associations in limiting the exploitation of power advantages as they refuse to enforce particularly distasteful contractual rights. *See, e.g.*, *Besta v. Beneficial Loan Co. of Iowa*, 855 F.2d 532, 535 (8th Cir. 1988) (concerning a lender not telling borrower that she could have repaid the same loan with lower monthly payments in one-half the time deprived her of fair notice and amounted to unfair surprise); *Vockner v. Erickson*, 712 P.2d 379, 379–80, 383–84 (Alaska 1986) (holding it was unconscionable for real estate agent to purchase 73 year-old woman’s property on 30-year term with payments that did not even cover the accruing interest; court reformed contract to reflect reasonable payments); *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264, 266 (N.Y. Sup. Ct. 1969) (finding purchase price of \$1235 for freezer unit worth approximately \$300 unconscionable and reduced by court).

⁴⁵ MODEL RULES OF PROF’L CONDUCT R. 1.6 (2002).

⁴⁶ MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2) (2002).

⁴⁷ The Model Rules mention disciplinary proceedings, but look to substantive law for other regulation of lawyers’ behavior. The Model Rules do not offer a private right of action. *See* MODEL RULES OF PROF’L CONDUCT scope ¶¶ 14–15 (2002).

⁴⁸ RONALD E. MALLEN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 6.31 (5th ed. 2000); *see Hizey v. Carpenter*, 830 P.2d 646, 654 (Wash. 1992) (en banc) (rejecting reference to the ethical rules during trial as not relevant to the legal standard of care); *see also* Note, *The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard*, 109 HARV. L. REV. 1102, 1105–06 (1996).

⁴⁹ *Cf.* Lowenthal, *supra* note 40, at 445–47.

industry standards in the practice of a profession.⁵⁰ The Code and the Rules provide a valuable definition of industry standards with respect to general, operational matters, as opposed to level of skill and competence, in representation of clients.⁵¹ So compliance with the Code or Rules means that the attorney has met certain industry standards while failure to comply is not *prima facie* evidence of malpractice (although failure to comply may be evidentiary of malpractice).⁵²

III. MODELING MULTIPLE PARTY REPRESENTATION⁵³

Despite ethics rules that disfavor multiple party representation,⁵⁴ such representation remains common and generally successful.⁵⁵ With the possible exception of divorce,⁵⁶ multiple party representation is successful in the sense that few complaints to state bar associations⁵⁷ and few legal malpractice claims arise

⁵⁰ See RESTATEMENT (SECOND) OF TORTS, § 299A (1965) for an explanation of professional negligence.

⁵¹ *Id.*

⁵² See, e.g., *Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.*, 453 S.E.2d 719, 721 (Ga. 1995) (holding that professional ethical standards are evidence of the common law duty of care); see also Note, *supra* note 48, at 1108.

⁵³ Compare the discussion of Justice Louis D. Brandeis's concept of the "lawyer for the situation" in GEOFFREY C. HAZARD, JR., ET AL., *THE LAW AND ETHICS OF LAWYERING* 634–37 (3d ed. 1999) or the more extensive discussion in Dzienkowski, *supra* note 35, at 748–57. Brandeis' concept embraced a far greater interventional model than simply drafting documents for a deal. His lawyering for the situation included a considerable mediation or arbitration function.

⁵⁴ See *supra* note 46 and accompanying text.

⁵⁵ Dzienkowski, *supra* note 35, at 783–84 (rejecting firmly the Brandeisian notion of representing the situation rather than the parties, so that intermediation is multiple client representation and not situational representation).

⁵⁶ *Id.* at 759. While divorce is regularly a matter of mutual assent, animosities are difficult to overcome and emotions may run high rendering it extremely difficult for a single lawyer to intermediate between the divorcing parties.

⁵⁷ For example, the Illinois Attorney Registration and Disciplinary Commission assembled some statistics for 2000 that disclose that 21% of complaints filed with the Hearing Board involve conflicts of interest. ILL. ATTORNEY AND DISCIPLINARY COMM'N, ANNUAL REPORT OF THE ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION chart 8 (2000), available at http://www.iardc.org/main_annreport.html (last visited Nov. 7, 2003). More than half of those filings involved concurrent conflicts in violation of Model Rule 1.7 but the statistics do not show how many of those complaints were non-consensual concurrent representation. *Id.* One-third of the concurrent conflict cases resulted in disciplinary action. *Id.* at chart 15. Moreover, a far smaller percentage of docketed charges (probably under 5%) involved violation of Rule 1.7. *Id.* at chart 2. Similarly, John E. Howe, *Report of the Office of Chief Disciplinary Counsel*, 56 J. MO. B. 277, 280–81 (2000), shows 4 cases of transactional conflicts in Missouri of 925 complaints filed.

from a lawyer representing multiple parties in business transactions or general representation involving multiple family members.⁵⁸ Multiple party representation generally compels the lawyer to balance competing interests of the clients the representation concerns. Limited anecdotal evidence suggests that lawyers whose practices regularly place them in multiple party representational settings develop a facility for balancing interests and making clients comfortable with the lawyer's role.⁵⁹

While the task of balancing multiple, sometimes disparate interests seems daunting, many practitioners do just that with considerable success. Mindful of the barriers that the ethical rules present to such representation, many of those practitioners would deny that they represent multiple clients in a single transaction or context where disharmonies among the clients are present. Candor with respect to multiple party representation threatened and certainly delayed the Senate Confirmation of Justice Brandeis' appointment to the United States Supreme Court.⁶⁰ Yet, multiple client representation is common⁶¹ and provides a useful model for protecting the interests of other constituencies that the representation affects.

The paradigm for multiple client representation involves several parties acting together who agree to engage the lawyer to prepare documentation for a business venture in which they all will participate. The parties negotiate the economic, managerial and control terms of their deal and the lawyer will describe the deal's structure and the parties' interests in the venture in appropriate

⁵⁸ The American Bar Association has collected limited amounts of statistical information in ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., LEGAL MALPRACTICE CLAIMS IN THE 1990S (1996) and ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., PROFILE OF LEGAL MALPRACTICE CLAIMS 1996-1999 (2001) [hereinafter ABA PROFILE OF LEGAL MALPRACTICE CLAIMS 1996-1999]. Table 5 to the 1996-1999 study discloses that only 5% of claims involve a conflict of interest. *Id.* at 12. In commenting on the increase in conflicts of interest claims from the 1990s study, the 1996-1999 study observes: "[t]hese claims are brought upon by the volatile nature of the business community with executives and key employee [*sic*] moving from company to company and their lawyers also changing firms at a greater rate than ever before." *Id.* Thus, the committee does not see multiple party representation as the source of conflicts claims. While some nearly 9% of malpractice claims involve estates, trusts and probate, many of those involve complaints that the attorney had inadequate knowledge of the law or that the attorney did not consider or represent interests of non-client family members. *Id.* at 5; *see also* Geoffrey C. Hazard, Jr., *The Privity Requirement Reconsidered*, 37 S. TEX. L. REV. 967, 981-83 (1996).

⁵⁹ The anecdotal evidence stems from discussions with sole and small firm practitioners and personal observation in practice settings.

⁶⁰ John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 697-99 (1965). Being Jewish, however, may have been a more significant factor causing the Senate to scrutinize Brandeis' record with greater care than it might have had he not been a Jew.

⁶¹ Dzienkowski, *supra* note 35, at 761.

documents.⁶² The lawyer is to be a scrivener,⁶³ preparing the document according to instructions, making it legally understandable and enforceable by all. To the extent the lawyer has any advisory role, it is to identify structural flaws in the negotiated terms that might interfere with the smooth operation of the transaction. The lawyer's role is not to advise each party with respect to matters specific to that party, but all understand that the lawyer may suggest modifications that are helpful to one party and not adverse to the others.

When the lawyer accepts the engagement, she is mindful of the rules of legal ethics. She cautions the parties that she represents none of them individually and intends to remain neutral. The lawyer tells the clients that she will continue to act only so long as the parties define the terms of the deal and reconcile any differences they may have with one another without her intervention. She will withdraw from common representation and will not represent any party if the parties come into conflict with one another.⁶⁴ Thus, the lawyer avoids the conflict of interest prohibitions on representing multiple parties.

One finds, however, that the strictness of the representation limits is far more fluid than the description in the preceding paragraph would suggest. Frequently, the lawyer becomes a mediator among the parties without her role becoming defined as mediator. Sometimes, perhaps regularly, the lawyer continues to act for one party while the others either act for themselves or secure separate representation.⁶⁵ Frequently, the lawyer, possibly inadvertently, represents one party over the others because she has existing information about that party that causes her to see that party's position and legal needs more clearly than those of other parties. While all this fluidity may conflict with or violate the ethical rules set forth in the Model Rules, the nature of law practice, human nature, and the specific representational context make the fluidity inevitable.

⁶² Model Rule 1.7 permits the lawyer to represent multiple parties under limited circumstances, or, more generally, with their informed consent. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

⁶³ As defined *infra* in Part VII.A, a scrivener prepares legal documents according to a client's instruction without rendering legal advice (other than as to the form of the documentation). It is unlikely that a lawyer could argue successfully in a disciplinary or malpractice context that she rendered no legal advice at all. Dzienkowski, *supra* note 35, at 780–81, sees acting as scrivener as a form of intermediation under withdrawn Model Rule 2.2 so that all parties are clients to whom the lawyer renders advice.

⁶⁴ MODEL RULES OF PROF'L CONDUCT R. 1.7(a), 1.9 (2002).

⁶⁵ Generally, the lawyer either will withdraw if the transactional disagreements between or among the parties lead to litigation, or the lawyer will secure a waiver of the conflict from the parties she will not continue to represent so that she may continue to represent one party. *See* MODEL RULES OF PROF'L CONDUCT R. 1.9(a), (b) (2002). Many lawyers are reluctant to become the lawyer for the deal unless all parties recognize that the lawyer will continue to represent one party, rather than withdrawing, if disagreements arise. The lawyer must protect her source of revenue.

Clients opt for a single lawyer to prepare the documentation for the deal in order to avoid the economic inefficiency of multiple lawyers. One party generally suggests engaging the services of an attorney with whom that party already has a relationship.⁶⁶ The lawyer may be representing the client simultaneously on one or more other matters.⁶⁷ Perhaps the attorney is much in demand and the client assumes that he will gain increased access to the lawyer as the client brings the lawyer more business. Perhaps the client assumes that by using a lawyer with whom the client has a relationship, the lawyer, while remaining substantially neutral, will look out for the client's interests (and the client may be correct in that assumption). Other parties to the transaction may prefer their own attorneys but yield to the party who leads the deal or invests the greatest amount of capital into the deal. Thus, selection of the lawyer for the situation may be a function of power disparity among the parties to the transaction, as the client exploits his power advantage to insist upon the lawyer he thinks will be best for him.

From the attorney's perspective, refusing common representation is impractical. As much as she may wish the protection that separate representation may afford her, it is likely that she either will accept common representation or will end up with no part in the representation. In the absence of existing conflicts among the clients, she is unlikely to be able to convince them that each needs separate counsel. Failure to accept the engagement may lead her historical client to look elsewhere for general representation. The lawyer who becomes the lawyer for the deal has an opportunity to capture the general representation of each party. Thus, if the attorney declines the engagement, she may lose a client, but if she accepts the engagement, her business may gain new clients. So the lawyer resolves her dilemma by accepting the engagement—hoping that the deal will work out and the parties will not become adversaries.

As to the lawyer's neutrality, it may be more aspiration than practicality.⁶⁸ The parties should define the terms of their own deal. If the terms upon which the parties agree affect the lawyer's historical client adversely, and the client is unaware of the adverse impact, the lawyer will inform the historical client. A

⁶⁶ Dzienkowski, *supra* note 35, at 803 (seeing the lawyer's prior representation of one of the parties as a serious impediment to the lawyer's representation of multiple parties including that prior client because of loyalty and confidentiality concerns).

⁶⁷ Law firms with multiple lawyers may have the luxury to allocate different lawyers to different tasks so that the lawyer acting for the situation may not be involved with other matters involving the client who refers the business. Whether or not such firms successfully isolate the lawyer for the situation from other matters for the same client through "Chinese walls" is questionable. *See* discussion *infra* note 72 and accompanying text.

⁶⁸ Model Rules 1.7 and 1.8 characterize neutrality as a matter of loyalty and the ability to exercise independent judgment of behalf of a client. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.8, & cmts. (2002). The "informed consent" of all clients permits the lawyer to proceed with the representation. Comments to the cited Model Rules are cautionary and alert a lawyer to conflicts of loyalty. *Id.*

lawyer simply does not remain silent about such matters and allow her client to proceed with a disadvantageous transactional structure. The better the lawyer knows the client, and the more important the client is to the lawyer's revenue stream, the more likely it is that the lawyer will be sensitive to the general business, economic, and tax needs of that client. The attorney may be willing to provide similar service to the other parties to the transaction but, without the historical relationship, she may not be aware of matters that affect the other parties adversely.

If conflicts among the parties arise, the lawyer for the deal will not withdraw immediately. Fundamental to any successful business practice is focus on completing the transaction. Business lawyers explore variant structures, seek to find common ground, and bring the transaction to fruition. Withdrawal from representation as soon as conflicts arise is inconsistent with successful lawyering.⁶⁹ Only when one or more of the other parties engages separate counsel will the common representation cease. Even then, the lawyer is likely to continue her involvement in the transaction in an unclearly defined capacity, but in which her primary focus is, possibly inadvertently, on the interests of her historical client.⁷⁰

Continuing involvement by the attorney who represented multiple clients after some of the original clients engage separate counsel is also routine in business settings. Efficiencies lead business clients who anticipate that they will obtain separate representation before they complete the transaction to begin the process with a single lawyer. The lawyer will prepare the first drafts of the transaction agreement and the parties will negotiate as many of the basic terms as they can with the one lawyer involved. Then each party will engage separate counsel (except the one who brought the initial lawyer to the table) to review the contract on his behalf and recommend modifications for the specific party. All parties anticipate from the outset that the initial lawyer will continue to represent

⁶⁹ See Bassett, *supra* note 21, at 435 (characterizing the risk of conflicts and disqualification as an unavoidable and costly risk of joint representation).

⁷⁰ While there appears to be neither statistics nor other empirical study of withdrawal in the course of multiple client representation, anecdotal evidence suggests that lawyers, perhaps primarily for economic reasons, tend not to withdraw in many instances in which Model Rule 1.7 and its commentary would require withdrawal. See MODEL RULES OF PROF'L CONDUCT R. 1.7 & cmt. (2002). Bar associations neither solicit nor collect information on attorney withdrawal in office practice, but the ABA PROFILE OF LEGAL MALPRACTICE CLAIMS 1996–1999, *supra* note 58, at 12, discloses that about 3% of claims involve improper withdrawal from representation (probably not failure to withdraw following common representation) while some 5% involve conflicts of interest. Some portion of the conflicts claims may involve failure to withdraw under circumstances that Model Rule 1.7 requires. MODEL RULES OF PROF'L CONDUCT R. 1.7 & cmt. (2002).

the party who introduced her to the group so no one objects to the continuing involvement of the original lawyer.⁷¹

Chinese wall techniques,⁷² that large law firms use to isolate the attorney handling the multiple client matter from other firm representation of one of the parties, do little to ameliorate conflict of interest concerns. It is likely, and certainly understandable, that the attorney who has primary responsibility for the specific client will provide the attorney managing the matter with sufficient background information on the client to prevent the managing attorney from drafting documents adverse to that client's interests. While the Chinese wall concept may comfort other participants in the deal, the Model rules do not sanction it as a means to avoid conflicts of interest.⁷³

A single lawyer (or firm) acting for all parties to a transaction is a common occurrence. Small business representation often places the company's lawyer in the position of looking out for the interests of the various participants.⁷⁴ The practice of multiple party representation, with or without a primary client, is customary in family business representation,⁷⁵ estate planning for family groups,⁷⁶ and even more adversarial situations such as divorce settlements.⁷⁷ In all these cases, the Model Rules accommodate the representation but impose strict constraints that rely on the clients' informed, written consent to initiate representation and the lawyer's withdrawal from representation if certain serious

⁷¹ See the description of Brandeis' representation of the tannery bankruptcy in HAZARD, JR., ET AL., *supra* note 53, at 635.

⁷² Participants in the investment banking sector frequently apply the term "Chinese wall" to describe internal control systems that separate their underwriting from their brokerage functions to preclude transfer of information on pending offerings that might involve the brokerage function in insider trading. Accounting firms use the term to refer to separation of their audit from other client services functions to protect the independence of the audit function. The term refers, of course, to the Great Wall of China that Chinese emperors had their subjects build to keep out the barbarians. As Franz Kafka ironically noted in his story, *Beim Bau der Chinesischen Mauer (The Chinese Wall)*, it was impossible to undertake a vast project like the wall without leaving gaps. FRANZ KAFKA, SÄMTLICHE ERZÄHLUNGEN 289 (1969) (translated in FRANZ KAFKA, THE COMPLETE STORIES 235 (1971)). While the project united the populace, it provided inadequate protection to the kingdom from the "peoples of the north." *Id.*

⁷³ Model Rule 1.10 treats all firm members alike with respect to disqualification in conflict situations. See MODEL RULES OF PROF'L CONDUCT R. 1.10 (2002). But note that Model Rule 1.9(c) focuses on use of former client information. See MODEL RULES OF PROF'L CONDUCT R. 1.9(c) (2002). The Chinese wall might provide the lawyer not involved in the specific representation with the argument that he had no knowledge of the client matter and the information that the firm may have is not imputed to him.

⁷⁴ Dzienkowski, *supra* note 35, at 757-60.

⁷⁵ *Id.*

⁷⁶ See Jeffrey N. Pennell, *Ethics in Estate Planning and Fiduciary Administration: The Inadequacy of the Model Rules and the Model Code*, 45 REC. ASS'N B. CITY N.Y. 715 (1990).

⁷⁷ Dzienkowski, *supra* note 35, at 757-60.

conflicts of interest arise in the course of representation.⁷⁸ Yet, probably relatively few lawyers comply with the strict guidelines. They know their clients and their clients know and trust them. Often the clients prefer the lawyer in the conflict situation to a new attorney who neither knows the relationships among the parties, nor is sensitive to the group's common issues. In those instances, in which the lawyer has represented one party but not the others, the other parties regularly find that the representation, albeit unavoidably, is somewhat slanted in favor of the historical client, is nevertheless satisfactory for their needs too.

As peculiar as the observation may be that non-neutral, multiple client representation is acceptable, it makes sense if one is able to step back from the customary dichotomy of neutrality/advocacy. Where parties are working together toward completion of a defined transaction objective, they need neither a neutral arbiter to make decisions for them, nor a zealous advocate to represent them. The lawyer facilitates but does not define their relationship. Unlike litigation representation, in which the lawyer assumes a primary operational role, the lawyer in the transactional context is incidental to the parties and the transaction.

Moreover, a lawyer representing multiple parties cannot be a zealot. Multiple party representation forces the attorney to accommodate known interests of all parties, rather than advocating for a single party, lest she destroy what otherwise might become a successful business venture. While the lawyer may be familiar with the interests of one party, and able to address those interests in the course of the representation, she generally listens carefully to each party and seeks to learn what the other parties' needs are as well.

In fact, the other parties may be better off with the multiple party representation model than separate representation. Separate representation does not prevent the party with the superior bargaining power from dictating the terms of the deal. In that context, the lawyer for the party with superior bargaining power may have no compunction about the deal terms because the other parties have their own representation and understand the terms. On the other hand, multiple party representation may soften demands for harsh or one-sided terms. When the historical client wishes to treat the other parties unfairly, the lawyer is ideally situated to prevent overreaching. The client understands the conflict and the limitations that the rules of conduct impose upon the lawyer. The lawyer is well situated to be a voice of reason that coaxes and cajoles the client to do right so that the lawyer does not have to disclose the issue⁷⁹ to the other clients and possibly withdraw from representation.

⁷⁸ MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

⁷⁹ MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002) (explaining that disclosure would be fundamental to multiple party representation and implicit in the engagement).

The lawyer for the transaction may be the very model for the “ethics of care” that a number of commentators recommend to the legal profession.⁸⁰ She balances the competing interests of multiple clients in order to complete her task. She operates marginally outside the constraints of current ethical rules. The clients accept the limitations of the attorney’s role in order to accomplish their common goals efficiently and with as little animosity as possible.

IV. CLIENTS AND OTHER CONSTITUENCIES

Both the Model Code and the Model Rules emphasize that the lawyer be loyal to the client.⁸¹ The Model Rules require the lawyer to pursue the client’s objectives diligently,⁸² competently⁸³ and without conflicts of interest.⁸⁴ The Model Code requires that the lawyer not “[n]eglect a legal matter entrusted to him.”⁸⁵ Further the “lawyer should represent a client zealously within the bounds of the law,”⁸⁶ pursue the client’s lawful objectives,⁸⁷ and avoid conflicts of interest.⁸⁸ The Model Rules specifically assign to the client the privilege to determine the objectives of representation within provisions noted in the rule.⁸⁹ But while the lawyer’s obligation of loyalty is clear, the identity of the client may be uncertain.

In litigation practice, the client’s identity and, accordingly, the object of the lawyer’s loyalty, is usually unambiguous.⁹⁰ Most of the time, the term “client” embraces the individual who engages the lawyer and agrees to pay the lawyer’s fee. In non-litigation practice, where the lawyer represents affluent clients who deal exclusively with others that can afford and are willing to pay for legal services, identity of the client is similarly transparent. Less transparent is the identity of the client when the lawyer represents multiple parties in a transactional or family context. The lawyer owes duties to several individuals and must balance

⁸⁰ See discussion *infra* Part V.B.

⁸¹ MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1986); MODEL RULES OF PROF’L CONDUCT R. 1.7 & cmt. 1 (2002).

⁸² MODEL RULES OF PROF’L CONDUCT R. 1.3 (2002).

⁸³ MODEL RULES OF PROF’L CONDUCT R. 1.1 (2002).

⁸⁴ MODEL RULES OF PROF’L CONDUCT R. 1.7 (2002).

⁸⁵ MODEL CODE OF PROF’L RESPONSIBILITY DR 6-101(A)(3) (1986).

⁸⁶ MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1986).

⁸⁷ MODEL CODE OF PROF’L RESPONSIBILITY DR 7-101(A)(1) (1986).

⁸⁸ MODEL CODE OF PROF’L RESPONSIBILITY EC 5-1, 5-2 (1986).

⁸⁹ MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2002).

⁹⁰ Representation of organizations might create some ambiguity even in litigation contexts. See discussion *infra* in text accompanying notes 181–89.

their interests because all have engaged her and contribute to payment of her fee.⁹¹

Sometimes, however, even in cases where all parties can afford representation, the client is not the individual who engages the lawyer or agrees to pay the fee. An individual or an entity may engage the lawyer to represent a third party. Examples include one spouse engaging a lawyer to prepare a will for the other spouse (or wills for both spouses),⁹² a parent engaging a lawyer to represent her child in the purchase of a house, a sole shareholder engaging a lawyer to represent the corporation, an entity engaging a lawyer to represent a member of management, etc. In such cases, one may identify the client in terms of the lawyer's duties, rather than a person who engages her and pays her fee. However, despite the culture of zeal and its focus on the client, lawyers seem to owe some duties to other constituencies even under current rules of conduct.

Although the Model Code and the Model Rules assume that the lawyer interacts both with clients and non-clients, they express no specific duties to non-clients. At the same time, lawyers have rather amorphous general obligations to the world at large: "[a] lawyer . . . is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."⁹³ The drafters of the Model Rules recognized that a lawyer's obligations to non-clients might be a function of the degree and quality of representation that the non-client receives:

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.⁹⁴

The statement is incomplete. It does not provide specific guidance for those instances in which the opposing party is not well represented, not represented at all, or even is unknown.

Non-litigation practice is replete with instances of a lawyer's actions affecting people who are not the lawyer's direct client and who are unrepresented, underrepresented, and often unknown.⁹⁵ Lawyers draft documents and structure transactions that have direct impact on the well being of many people who are non-clients in most traditional views of the client/non-client split. This Article

⁹¹ See *supra* Part III.

⁹² See Pennell, *supra* note 76, at 719–23 (discussing the ethical issues arising in such estate planning contexts).

⁹³ MODEL RULES OF PROF'L CONDUCT pmb. ¶ 1 (2002).

⁹⁴ *Id.* at pmb. ¶ 7.

⁹⁵ See Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 191–94 (1997).

argues that impact and power to offset or avoid adverse impact, rather than narrow definitions of client, should determine whether or not the lawyer owes a duty to the affected person. Instead of dividing the lawyer's world into clients and non-clients, the correct division should be into three categories: direct clients, other constituencies to which the lawyer owes duties,⁹⁶ and other constituencies to which the lawyer owes no duties.

Clients are those who engage the lawyer or who define the subject of the legal representation. Constituencies to which the lawyer owes no duty are (1) those that the legal representation does not affect and (2) those that enjoy significant bargaining power and separate representation.⁹⁷ All other constituencies are those that the lawyer may anticipate that the legal representation will affect and that cannot protect themselves from the adverse impacts of decisions made in the course of the representation.⁹⁸ Lawyers should owe a duty to consider the impact of their representation on those other, inadequately protected constituencies. Lawyers should strive to "do no harm"⁹⁹ to them. Courts have applied this notion in defining the fiduciary duties of directors to corporations¹⁰⁰ and majority shareholders to minority shareholders.¹⁰¹ Such a

⁹⁶ These would be indirect or quasi-clients of some sort.

⁹⁷ In the absence of bargaining power, separate representation is illusory.

⁹⁸ Commentators have discussed the issue of third party beneficiaries of legal representation extensively in the estate planning area. *See, e.g.*, Hazard, Jr., *supra* note 58, at 986–88 (arguing that privity should not bar estate beneficiaries from asserting claims against the estate planning lawyer); Bradley E.S. Fogel, *Attorney v. Client—Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 326 (2001) (arguing for protecting the attorney-client relationship by barring such claims in all but exceptional cases); Henry M. Ordower, *Trusting Our Partners: An Essay on Resetting the Estate Planning Defaults for an Adult World*, 31 REAL PROP. PROB. & TR. J. 313, 340 (1996) (arguing that in estate planning contexts wives often appear to be direct clients but their representation becomes subservient to the husband's representation, leaving her little more representation than unrepresented third parties).

⁹⁹ This is a customary and loose paraphrase of the Hippocratic Oath. The paraphrase corresponds to: "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect." LUDWIG EDELSTEIN, *THE HIPPOCRATIC OATH: TEXT, TRANSLATION, AND INTERPRETATION* 3 (Henry E. Sigerist ed., 1943). *THE WORLD MEDICAL ASSOCIATION, DECLARATION OF GENEVA* (1948), *PHYSICIAN'S OATH* (adopted by the General Assembly of the World Medical Association, Geneva, Switzerland, September 1948 and amended by the 22nd World Medical Assembly, Sydney, Australia, August 1968) reads in part, "[E]ven under threat, I will not use my medical knowledge contrary to the laws of humanity." The physician's oath paraphrase may be a good point of reference for lawyers as well as doctors.

¹⁰⁰ *See Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939).

¹⁰¹ *See Jones v. H.F. Ahmanson*, 460 P.2d 464, 471 (Cal. 1969) (involving a majority of shareholders creating a holding company to facilitate trading in the underlying operating company, but failing to invite the minority to exchange shares of the operating company for shares of the holding company); *Singer v. Magnovox Co.*, 380 A.2d 969, 977 (Del. 1977) (involving a freeze out merger).

duty would require lawyers to balance dissonant, often competing interests, in order to generate fairly distributed¹⁰² results in which clients do not overreach others whom the representation will affect.

A model of multiple client representation would acknowledge and give form to an attorney's broader obligations to more than her direct and immediate client under the ethical standards. The new rule would permit wide latitude in multiple client representation and extend that model to protect the interests of other affected constituencies. The standard will have to develop over time and integrate the thoughts of many experts. An initial draft of the standard might be:

Rule. Multiple Client Representation—Other Constituencies. Lawyers may represent multiple clients whenever the relationship of the clients suggests that it would be less efficient economically, personally, or both economically and personally for each client to employ separate counsel. For example, multiple party representation may be appropriate when the clients (i) have a common business objective with respect to the representation and a willingness to work out differences between or among them or (ii) are members of a family or other group having a unifying non-familial relationship. Similarly, multiple party representation is appropriate when one party is so dominant, economically or personally, that the other parties lack effective bargaining power such that their power would not increase materially as a function of separate representation. A lawyer representing multiple clients shall seek to balance the interests of all parties in achieving the objectives of the representation.

*Sub-rule 1. General Engagements—Uninstructed Lawyering.*¹⁰³ A lawyer who makes recommendations to clients on courses of legal action without specific and detailed instructions from the client should not encourage a client to exploit the client's power to the detriment of others. Rather, the lawyer should treat the client representation as multiple party representation, and ensure that other constituencies that the representation will impact are also treated as if they were clients under the general language of the Rule. Accordingly, the lawyer shall evaluate the impact that a specific legal course of conduct will have on other constituencies, balance the interests of the client and other affected constituencies, and recommend legal courses of action that reasonably serve the client without harming others materially.

Sub-rule 2. Instructed Lawyering. When a client engages the lawyer to follow a legal course of action that, following careful evaluation of the impact the action has upon other constituencies, the lawyer concludes will harm others materially, the lawyer should strive to persuade the client to modify or abandon the course of legal action to limit or obviate the harm to others. When the client will not abandon or modify a plan in order to diminish harm to other constituencies, the lawyer may decline to assist the client to accomplish the client's objectives whether or not those objectives may be lawful.

¹⁰² See *infra* Part VI (discussing fairness).

¹⁰³ See *infra* Part VII.B–C (discussing entrepreneur and architect lawyers).

Sub-rule 3. Nature of Evaluation under Sub-rules 1 and 2. In applying sub-rules 1 and 2 and the general language of the rule, the lawyer should not limit evaluation to economic analysis of quantifiable costs and benefits. Accordingly, proposals for legal courses of action and modifications to actions that lawyers recommend may limit appropriately the client's (and the lawyer's) economic gain even though the limitation does not increase the economic benefit (or diminish an economic detriment) to others commensurately. Thus, evaluation should include factors that are difficult to quantify, such as, self-esteem of affected parties and the reputation and status in the community of all affected parties, including the client and the lawyer.

Sub-rule 4. Non-application where no Power Disparity. When other affected constituencies have adequate representation and sufficient bargaining power to prevent harm to them, the lawyer may represent the client zealously without balancing interests. Thus, this rule generally will not apply to most litigation but may apply to pre-litigation preparation and settlement negotiation.

Sub-rule 5. Confidential Information. If, in order to accomplish the goals this rule sets forth, the lawyer must become privy to confidences of one or more persons who are not clients, the lawyer may assure each such person of protection of the confidence.

The proposed formulation of the rule is amorphous,¹⁰⁴ but current standards of conduct are no less so. Within the conflict of interest limitations,¹⁰⁵ the Model Rules anticipate that attorneys will represent multiple clients but provide only a broad outline for fulfilling that role.¹⁰⁶ In addition, the Model Rules contemplate broader non-representational roles, including intermediation,¹⁰⁷ to compel the attorney to monitor the relationship for conflicts so that the lawyer will withdraw at the appropriate moment if withdrawal becomes necessary.¹⁰⁸ More generally, current standards offer a limited array of specific rules and leave the difficult decisions,¹⁰⁹ when the attorney-client relationship is ambiguous, for the lawyer to

¹⁰⁴ See Vukowich, *supra* note 44, at 853–56 (proposing a standard requiring lawyers to consider counter-party interests in standard forms). Vukowich proposes the standard despite the uncertainties such a standard would entail for the lawyer. *Id.*; see also discussion *infra* Part VII.C.

¹⁰⁵ See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

¹⁰⁶ *Id.*

¹⁰⁷ MODEL RULES OF PROF'L CONDUCT pmb. ¶ 3 (2002).

¹⁰⁸ See *id.*; see Dzienkowski, *supra* note 35, at 799–801 (discussing these issues in the context of now withdrawn Model Rule 2.2).

¹⁰⁹ See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 29 (2002).

resolve.¹¹⁰ The Model Rules observe that they provide only “a framework for the ethical practice of law.”¹¹¹

V. ETHICS DISCOURSE TRENDS

Focus on other constituencies permeates the extensive discourse concerning the scope of legal ethics that continues even after the ABA’s 1980 adoption of the Model Rules. At least one commentator expressed regret that, by eliminating the three-tier structure of canon, ethical consideration, and disciplinary rule that characterized the Model Code, the Model Rules lost the aspirational anchor to the rules of conduct.¹¹² Other commentators emphasize the inadequacy of ethical codes or rules for specific practice areas.¹¹³ Much of the discussion concerning specialized codes involves either ambiguities in identifying the client or the relationship between the lawyer and others whose interests the lawyer reasonably may anticipate her representation will affect.¹¹⁴ Attention to the effects on, and needs of, individuals who are not the lawyer’s primary, direct clients is an issue that both proponents of separate ethics rules for specific practice areas and proponents of the ethics of care emphasize.¹¹⁵ This article suggests that traditional multiple party representation offers an ethical model satisfactory to the specialized codes line and the ethics of care line of the legal ethics debate.

A. Proliferating Codes of Ethics

An important trend in the legal ethics discourse relates to the inadequacy of a single set of rules to govern all practice areas. Commentators observe that the complexities of disparate areas of practice do not lend themselves to resolution with either the Model Code or the Model Rules. Professor Lorne, for example, emphasized the inadequacy of the Model Code in the context of a securities law practice where the attorney prepares public disclosure documents for the client.¹¹⁶

¹¹⁰ See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.13 (2002) (requiring lawyers representing organizations to reconcile the demands of management with the interests of the entity itself and the shareholders); see also discussion *infra* text accompanying notes 181–95.

¹¹¹ MODEL RULES OF PROF’L CONDUCT pmb1. ¶ 16 (2002).

¹¹² See, e.g., Krane, *supra* note 31, at 327–28.

¹¹³ See *infra* notes 118–26 and accompanying text.

¹¹⁴ See *infra* Part V.A.

¹¹⁵ See *infra* Part V.B.

¹¹⁶ See generally Simon M. Lorne, *The Corporate and Securities Adviser, the Public Interest, and Professional Ethics*, 76 MICH. L. REV. 423 (1978). Section 5 of the Securities Act of 1933, as amended, prohibits an issuer of securities from offering its securities to the public without disclosing in a prospectus all information that would be material to a prospective

In the National Student Marketing investigation,¹¹⁷ the Securities and Exchange Commission claimed that counsel owed a duty to the public investors to assure that disclosure documents were complete and accurate. Lorne argues that ambiguity as to the identification of the client in that context is troubling and precludes efficient application of the ethical rules.¹¹⁸ Attorneys would be unable to meet the demand that they advocate for the client because the client consists of many diverse interests. Under the SEC's argument, the client may include the purchasers of securities, the board of directors, management, and others whom the lawyer's activities affected. In many cases, the various clients' interests differ from one another. The common view of the client as the corporation itself is unsatisfactory because the corporation's board of directors always would need separate counsel.¹¹⁹ Lorne sees a need for a separate Code of Professional Advisorial Responsibility.¹²⁰ Some years after Lorne's article, Stanley Sporkin argued that the Model Rules did not solve Lorne's problem with the Code.¹²¹ Sporkin averred that a separate code is needed for corporate and securities practice because of the lawyer's obligations to a mix of interested parties, including shareholders and the public.¹²²

According to Professor Pennell, both the Model Code and the Model Rules are similarly inadequate to an estate planning practice.¹²³ Through discussion of a series of common problems arising in estate planning, Pennell identifies various areas of the estate planning practice in which interests of people other than the immediate client take on commanding importance to the lawyer's activities on behalf of the client.¹²⁴ Professor Zacharias expands on the concept of multiple party responsibilities with the notion that lawyers should consider the interests of third parties and the society at large in the course of representing a client.¹²⁵

investor. *See* 15 U.S.C. § 77e, § 77a-77aa (2003). Preparation of the prospectus is a collaborative process involving the issuer, accountants, lawyers, and investment bankers. *See id.*

¹¹⁷ SEC v. Nat'l Student Mktg. Corp., [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,027 (D.D.C. May 2, 1977) (reporting on the partial settlement in the case).

¹¹⁸ Lorne, *supra* note 116, at 477-78.

¹¹⁹ *Id.* at 437-38.

¹²⁰ *Id.* at 490.

¹²¹ Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149, 150-52 (1993).

¹²² *Id.* at 152.

¹²³ Pennell, *supra* note 76, at 716.

¹²⁴ *Id.* For a discussion of the lawyer's exposure to malpractice claims by non-clients and the argument that privity with the client should not preclude such actions, see Hazard, Jr., *supra* note 58, at 992. And for the contrary view, see Fogel, *supra* note 98, at 323.

¹²⁵ *See* Zacharias, *supra* note 95, at 175.

Zacharias also emphasizes the need for particularized rules that are tailored to the nature of the lawyer's practice.¹²⁶

B. *Ethics of Care*

A second significant trend in the legal ethics discourse involves efforts to understand and reconcile the tension between rights-based and care-based models for legal representation. This discussion deepened through the last two decades of the twentieth century as women entered law schools and law practice in increasing numbers.¹²⁷ Carol Gilligan's book spurred the discourse.¹²⁸ Gilligan argued that moral and psychological developmental theory derived from studies of males only.¹²⁹ Study of females would have offered different perspectives and led to other theories that emphasized interpersonal relations and caring for others rather than male-oriented hierarchies and universal principles.¹³⁰

Legal commentators adapted Gilligan's observations to the study of the structure of law practice and legal ethics to develop the concept of an ethic of care.¹³¹ Departing from Gilligan's example of the Heinz

¹²⁶ See *id.* at 204–09.

¹²⁷ “Women are expected to be the majority of first-year law students this fall [2001], compared with just 10% in 1970, and almost 50% of the 43,518 students who started law school last fall.” Sarah Stewart Taylor, *Women's Numbers in Professional Schools Still Low, at* <http://www.womensnews.org/article.cfm/dyn/aid/628/context/archive> (Aug. 23, 2001); see also Richard K. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 314–18 (2000).

¹²⁸ See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

¹²⁹ See generally *id.* Gilligan's thesis has been the subject of much criticism as well. For example, Linda K. Kerber, *Some Cautionary Words for Historians*, 11 SIGNS 304, 309 (1986), criticizes Gilligan for oversimplification and for misdirecting focus toward biological differences between men and women. See also Catherine G. Greeno & Eleanor E. Maccoby, *How Different Is the “Different Voice”?*, 11 SIGNS 310, 315 (1986) (pointing out a lack of qualitative support for conclusions); cf. Carol Gilligan, *Reply*, 11 SIGNS 324 (1986) (responding to Greeno and Maccoby's observations). Gilligan has retreated somewhat from her starkest observations. See Carol Gilligan, *Adolescent Development Reconsidered*, in *MAPPING THE MORAL DOMAIN* xvii–xix (Carol Gilligan et al. eds., 1988).

¹³⁰ See GILLIGAN, *supra* note 128, at 18.

¹³¹ See, e.g., Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 81 (1987) (emphasizing fundamental differences between men and women, with women emphasizing relationships and care rather than rights); CATHERINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 38–39 (1987) (criticizing the derivation of the ethic of care from women's subservient role); Mary Joe Frug, *Progressive Feminist Legal Scholarship: Can We Claim “A Different Voice”?*, 15 HARV. WOMEN'S L.J. 37, 50–60 (1992) (viewing Gilligan's book as either conservative or progressive and directs scholars to draw out the book's

dilemma,¹³² one commentator suggests that the lawyering process might look quite different if women rather than men fixed its rules.¹³³ She observes that women tend to look less to clear answers of right or wrong but seek to find a solution to problems that would be satisfactory to all.¹³⁴ Menkel-Meadow considers the possibility of transformation of lawyering as increasing numbers of women enter practice but worries that women may not alter the profession, as they will subscribe to the men's rules under which they received their training.¹³⁵

Another commentator sees the ethic of care as consistent with advocacy for a client¹³⁶ because the lawyer has the connection and context to direct and motivate the client as the lawyer gains insight into the client's world.¹³⁷ While no one has adapted the terminology of an ethic of care to business representation, business lawyers place great store in gaining insight into their clients' businesses and thought processes in order to design suitable representation.

Ethics discourse trends as disparate as the development of specialized rules for each practice area and a shift from rights-based rules to an ethics of care have much in common. Both discussions spotlight multiple interests in representation as opposed to the readily identifiable client. Commentators have become concerned with effects of the lawyer's and the client's actions and decisions upon

progressive features); Joan Williams, *Deconstructing Gender*, in *FEMINIST JURISPRUDENCE* 531 (Patricia Smith ed., 1993) (considering the negative implications for women of associating an ethic of care with women).

¹³² GILLIGAN, *supra* note 128, at 24–31, observes that an eleven year old boy and an eleven year old girl respond differently to Heinz's dilemma. Heinz's wife is dying of cancer but Heinz cannot afford the needed medication. Asked whether Heinz may steal the drug, the boy made a rights-based analysis and concluded that Heinz would be justified. The girl sought to find an alternative solution by suggesting negotiation between the druggist and Heinz. The girl chose caring and interpersonal relationship building to rights analysis.

¹³³ Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 *BERKELEY WOMEN'S L.J.* 39, 49 (1985).

¹³⁴ *Id.* Successful business lawyers often subscribe to a slightly different formulation of this concept. They believe that the lawyer should never recommend terms that will be unacceptable to the counter-party to the deal, but should propose terms that accommodate the interests of the counter-party in order to bring the transaction to completion acceptable to their own clients. They understand that they must identify what is most important to their own client and the counter-party and leave those matters static and not subject to negotiation while everything else is negotiable.

¹³⁵ See Menkel-Meadow, *supra* note 133, at 50.

¹³⁶ Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 *GEO. L.J.* 2665, 2715 (1993).

¹³⁷ *Id.* at 2695.

non-clients,¹³⁸ intended beneficiaries of the attorney's efforts on behalf of the client,¹³⁹ multiple clients,¹⁴⁰ and clients of ambiguous identity.¹⁴¹

VI. POWER DISPARITY, THE LAWYER'S ROLE IN ITS EXPLOITATION, AND DISTRIBUTIONAL FAIRNESS

Assorted guises of power disparities play varying roles in relationship to lawyers' intervention. Occasionally, physical power plays a role in the legal system. Intimidation, for example, deters individuals with legally significant information from making that information available. Similarly, victims of abuse fail to testify against or seek legal protections from their abusers. But despite such examples, physical power disparities affect the American system of justice only to a very limited degree. In office practice, physical intimidation is likely to be of only minor significance. Furthermore, existing ethical rules clearly preclude the lawyer from participating in the client's intimidation of a third party.¹⁴²

In contrast, economic power disparities assume a far greater role in United States law. For example, employers historically controlled the terms and conditions of employment. Many employers offered low wages and poor working conditions to their employees. Lawyers played a crucial role for employers in structuring unbalanced employment contracts and in lobbying to prevent the legislatures from intervening on behalf of workers.¹⁴³ Recognition of the significance of that economic power disparity led to unionization, as employees sought power balance.¹⁴⁴ Unionization counter-balanced the employers' power and led to improved wages and working conditions.¹⁴⁵ Occasionally, as the power balance shifted to the unions, union leaders abused the union's

¹³⁸ See, e.g., Menkel-Meadow, *supra* note 133, at 50–55.

¹³⁹ See, e.g., Pennell, *supra* note 76.

¹⁴⁰ See, e.g., Lorne, *supra* note 116.

¹⁴¹ See, e.g., *id.*; Sporkin, *supra* note 121.

¹⁴² Model Rule 1.2(d) prohibits the lawyer from assisting the client in criminal activity, and physical intimidation often constitutes the crime of assault. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2002).

¹⁴³ See generally ANTHONY WOODIWISS, RIGHTS V. CONSPIRACY: A SOCIOLOGICAL ESSAY ON THE HISTORY OF LABOUR LAW IN THE UNITED STATES (1990) (explaining the sociology of power relationship in management-labor relations).

¹⁴⁴ The findings and policies underlying the NRLA are to foster collective bargaining in order to eliminate part of the imbalance in bargaining power between employers and employees. National Labor Relations Act, 29 U.S.C. § 151 (2003).

¹⁴⁵ *Id.* "The inequality of bargaining power [that unionization offsets] . . . tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." *Id.*

consolidated power to gain personal advantages or to destroy businesses.¹⁴⁶ Even when legislation prohibited employers from engaging in specific anti-labor activities,¹⁴⁷ lawyers helped, and possibly motivated, employers to comply with the letter, but not necessarily the spirit, of the law.¹⁴⁸

Economic power is a broad concept. Whenever someone controls a limited resource, the control bestows economic power. Resource control enables the holder to impose terms of supply upon others who wish access to the resource. For example, a small town grocer may enjoy monopolistic power over grocery prices in the town and charge far higher prices than a supermarket in a big city.¹⁴⁹

Informational power disparities also play a vital role in enabling the power holder to wield economic power. On a simple level, auction-type markets with time sensitive conditions that preclude the buyer from assembling value information tend to exploit informational power disparities. One example might be souvenir shopping in popular tourist destinations, where the buyer has little time and pricing is a function of bargaining with the vendor.¹⁵⁰ Similarly, before information on dealers' costs became public, pricing of automobiles depended upon the consumer's lack of information, which enabled the automobile dealer to control the price negotiation.

As consumers become better educated as to pricing mechanisms, either as a function of individual education or as the market assimilates data, consumers sometimes learn to be patient and wait for the lowest price at which the seller will be willing to sell. At the same time, informational power disparity is often a function of economic power disparity. The person with better or more complete

¹⁴⁶ *Id.* "Experience has further demonstrated that certain practices by some labor organizations . . . have the intent or the necessary effect of burdening or obstructing commerce . . ." *Id.* See, for example, discussion of the Genovese family takeover of Local 560 in Clyde W. Summers, *Union Trusteeships and Union Democracy*, 24 U. MICH. J.L. REFORM 689, 691-92 (1991).

¹⁴⁷ National Labor Relations Act, 29 U.S.C. § 158 (2003).

¹⁴⁸ Consider the plant closing to avoid unionization that violated section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), in *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965), that might have withstood challenge had counsel constructed a better argument for business purpose. See generally Note, *The Liability of Labor Relations Consultants for Advising Unfair Labor Practices*, 97 HARV. L. REV. 529 (1983).

¹⁴⁹ Economists observe that monopolistic power is generally relative to and a function of barriers to entry. If the price becomes too high, barriers to entry that permitted monopolistic power in the monopolized market cease to deter competition, or potential consumers of the item either find a substitute or a less convenient source of supply. Moreover, the small town grocer may have to charge higher prices if he is unable to capture economies of scale that are available to the supermarket.

¹⁵⁰ Of course, the buyer may not have much interest in the pricing when the souvenir items are low cost and the buyer is in a free-spending mode on vacation.

information may have or have had access to education, advisors, and informational resources commensurate with her economic power.

Power disparities also may be a function of societal, family or other group structures that allow one person to restrict access to group resources. For example, religious leaders regularly wield power that is disproportional to their physical strength or wealth because group members believe them to have informational superiority. Clergy have the power to deliver or withhold societal approval.¹⁵¹ Similarly, in many cultures, a father's decisions govern the family even if the decisions are obviously unjust or unreasonable.¹⁵²

Attorneys regularly play a role in facilitating, encouraging, and even motivating their clients' exploitation of power disparities.¹⁵³ That role, however small, presents the issue of the propriety of lending one's skills to the use and abuse of power. Professor Menkel-Meadow¹⁵⁴ recommends teaching the ethic of care to sensitize lawyers (and clients) to the interests, concerns, and effects their actions have on third parties, particularly when they abuse power. Menkel-Meadow suggests placing the lawyer in the position of the opponent in order to ask the question: "Would I want this done to me?"¹⁵⁵

Consider, for example, onerous contractual provisions. The legal culture of zeal, fortified with law and economics, well may lead the lawyer to seek enforcement for her client. Without considering the power differential that permitted the provisions to become part of the contract, the lawyer may see only the net benefit to her client, rather than her client's priorities.¹⁵⁶

Traditional, and possibly superficial, application of law and economics principles supports enforcement and exploitation of the power advantage. Lawyers commonly understand law and economics to mandate a simple balancing of measurable costs and benefits that emanate from existing legal rules

¹⁵¹ And possibly even certain eternal benefits—if the belief system in the culture assigns such control to clergy.

¹⁵² See generally LAWRENCE H. FUCHS, *BEYOND PATRIARCHY: JEWISH FATHERS AND FAMILIES* 22–23 (2000) (describing family structure and blind adherence to paternal decisions); see also *PATRIARCHY AND ECONOMIC DEVELOPMENT: WOMEN'S POSITIONS AT THE END OF THE TWENTIETH CENTURY* (Valentine M. Moghadam ed., 1996) (collecting essays).

¹⁵³ Ordower, *supra* note 98, at 315; cf. SHAFFER & COCHRAN, JR., *supra* note 25, at 5–14 (comparing the role of the lawyer to that of the Godfather).

¹⁵⁴ Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75, 109–10 (1994).

¹⁵⁵ *Id.* at 109 (internal citations omitted). Menkel-Meadow certainly intends the question to include: "Would I want this done to my child, spouse, parent, etc.?" One may trivialize Menkel-Meadow's question by noting that the question restates the "Golden Rule," and Menkel-Meadow would wish lawyers to apply the Golden Rule. Recent cultural studies suggest, however, that the Golden Rule informs behavior unless one has learned not to apply it. See generally Bower, *supra* note 26 and discussion *infra* in text accompanying note 175.

¹⁵⁶ Cf. SHAFFER & COCHRAN, JR., *supra* note 25, at 5–14.

and their ambiguities. If the economic benefits to one's client outweigh the economic costs of a specific course of conduct to one's client, the lawyer recommends that course of action. Non-quantifiable factors are not pertinent to the analysis.

Because economic analysis measures costs and benefits relative to time,¹⁵⁷ immediate benefits are more valuable than the cost of future lost opportunities. In a situation where a party uses his power advantage to impose a penalty, the immediate benefit is the amount received from enforcing the penalty. The costs include transaction costs and the difficult to quantify cost of the counter-party's ill will. Some of the ill will is immediate and some is possibly continuing, so that even if one could quantify it, the future ill will would require time value adjustment. Ill will includes the loss of future good will and possible future patronage. The more remote in time the cost becomes, the less significant it is to the economic analysis. Similarly, economic analysis might compare the avoided cost of eliminating a defect in an existing product with the future, time adjusted cost of compensating an injured user of the product and the loss of patronage to the vendor of the product when the injury occurs. Both the compensation and the loss of patronage are more remote in time. The avoided cost of eliminating the defect is an immediate benefit.¹⁵⁸ Such matters as feelings, self-esteem, and long-term impact on the other party either become quantifiable or lose their place in the analysis.

Undoubtedly, many attorneys might be initially uncomfortable lending their skills to impose unfair transactional terms on their clients' counter-parties when the client holds the dominant position relative to the other party. However, the rules of ethics remind them that their first obligation is to the client,¹⁵⁹ and zealous representation under the ethics rules can motivate them to recommend exploitation of power advantages. Other attorneys may feel that a fundamental

¹⁵⁷ Constant time analysis is fundamental to economic analysis. One cannot compare amounts received at different times without adjusting them through present or future value analysis with an assumed interest rate to a single moment in time—generally the present time or a future time at which all events become complete. The following formula represents the present value of a future receipt:

$$PV = \frac{FV}{(1 + i)^n}$$

Where *PV* is the present value, *FV* is the future value, *i* is the interest rate per compounding period, and *n* is the number of compounding periods.

¹⁵⁸ Cigarette manufacturers and automobile manufacturers have confronted this analysis of avoided costs when making decisions with respect to their products. See Derek Yach & Stella Aguinaga Bialous, *Junking Science to Promote Tobacco*, 91 AM. J. PUB. HEALTH 1745, 1745 (2001); Evan P. Schultz, *Dollars for Bodies*, LEGAL TIMES, Aug. 13, 2001, at 43.

¹⁵⁹ Model Rule 1.2(a) squarely makes the client the primary decision-maker—so long as the activity is neither criminal nor fraudulent. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002).

fairness principle ought to drive their practice but fear that application of that principle might threaten their livelihood.¹⁶⁰ Those attorneys may wonder whether it is possible to reconcile their duty to their client with more general principles of honesty and fair dealing when the governing rules of ethics preclude such fairness considerations. A shift to the multiple client representation model that this Article recommends would expand ethical boundaries to accommodate the interests of others whom the lawyer's counsel affects, in order to promote fairness.

Both the Coase Theorem¹⁶¹ that stimulated the law and economics movement and current behavioral studies¹⁶² support those lawyers who would choose to dissuade their clients from exploiting the clients' power advantages. Although Coase's theories are foundational to law and economics, Coase's seminal article¹⁶³ does not aver that economic analysis can and should determine legal rules. Rather, Coase expresses concern that legislators and courts fail to take economic displacements into account sufficiently when they alter existing legal rules.¹⁶⁴

In fact, Coase effectively deconstructs any assumed dependence of the legal rule upon economic efficiency. Instead, Coase argues that the parties can achieve an economically efficient result so long as the legal rule is stable and predictable and transaction costs are minimal.¹⁶⁵ The legal rule, once settled, gives one party

¹⁶⁰ Zacharias, *supra* note 95, at 190 (noting that doing right may threaten the attorney's livelihood as a more aggressive attorney may lack such compunction).

¹⁶¹ See generally Coase, *supra* note 10 and accompanying text.

¹⁶² See, e.g., Bower, *supra* note 26.

¹⁶³ See Coase, *supra* note 10.

¹⁶⁴ *Id.* at 44.

¹⁶⁵ *Id.* at 8. Coase observes:

It is necessary to know whether the damaging business is liable or not for damage caused since without the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them. But the ultimate result (which maximizes the value of production) is independent of the legal position if the pricing system is assumed to work without cost.

Id. As to transaction costs, Coase notes that they often are significant and preclude the efficient market transaction that would make the positioning of the legal rule irrelevant. *Id.* at 15–16. Hence, the legal rule does impact economic efficiency when transaction costs come into play. Coase argues:

It would therefore seem desirable that the courts should understand the economic consequences of their decisions and should, insofar as this is possible without creating too much uncertainty about the legal position itself, take these consequences into account when making their decisions. Even when it is possible to change the legal delimitation of rights through market transactions, it is obviously desirable to reduce the need for such transactions and thus reduce the employment of resources in carrying them out.

Id. at 19.

certain rights that he may sell to the other party whenever it would be economically efficient for the other party to buy those rights. At the same time, Coase proves that economic analysis has nothing to say about which party should have the legal rights to sell. If the other party had the legal rights, he would sell them to the first party as long as it was economically efficient for the parties to do so. Once the legal right becomes fixed, however, the right takes on a value.

Property pricing assumes the stability of that right, and parties buy and sell their property assuming that fixed legal rights pass with the property. The market assimilates the existence of the right in determining the value of the property.¹⁶⁶ Therefore, in establishing legal rules, Coase deems it critical that economic factors become part of the basic legal analysis.¹⁶⁷ He does not argue that economic factors are the only ones significant to legal analysis. More important to Coase, it seems, is the role that economic analysis plays as a factor to consider carefully when courts and legislatures contemplate altering an existing legal rule.¹⁶⁸ He seems especially concerned that, as one changes rules, economic displacements occur. There are winners and losers.¹⁶⁹

Throughout his analysis, Coase assumes that the parties have equal bargaining power so that the legal rule alone, rather than a power imbalance,

¹⁶⁶ Similarly, the efficient capital market hypothesis assumes that the marketplace rapidly assimilates public information and economic conditions and builds them into the price of securities. ROBERT W. HAMILTON & RICHARD A. BOOTH, *BUSINESS BASICS FOR LAW STUDENTS* 384–87 (2d ed. 1998). Fair markets require that all participants in the market have equal access to material information so that the marketplace can assimilate the information and price the securities accordingly. Thus, in order to provide fair markets in securities, Congress mandated disclosure of material information as the foundation of the securities laws for the efficient functioning of the markets. See LOUIS LOSS, *SECURITIES REGULATION* ch. 1G (2d ed. 1961).

¹⁶⁷ Coase, *supra* note 10, at 44.

¹⁶⁸ *Id.*

¹⁶⁹ Coase writes:

But in choosing between social arrangements within the context of which individual decisions are made, we have to bear in mind that a change in the existing system which will lead to an improvement in some decisions may well lead to a worsening of others. . . . In devising and choosing between social arrangements we should have regard for the total effect.

Id.

Pursuing distributional fairness, social justice, and avoidance of harm to others might be just as important to legal analysis as weighing economic costs and benefits, although those latter factors might be more difficult to address than readily quantifiable costs and benefits.

determines which party will make a payment to the other.¹⁷⁰ Coase's law and economics would not favor exploitation of power disparities, as such inequality is a structural flaw that is economically inefficient.¹⁷¹

Fairness, of course, is not an absolute concept. It tends to be situational. Lawyers often think of fairness strictly in procedural terms. So long as each party has access to a disinterested forum for resolution of disputes and is not prevented from securing competent legal representation, resource disparity is not unfair. This Article acknowledges a working, procedural definition of fairness but prefers a concept of fairness that demands a balance in outcome that equal bargaining power and resources would generate.¹⁷²

In seeking a distributionally fair result, indicia of unfairness are not always transparent. Lack of negotiation may suggest that one party has the power to dictate the transaction's terms to the other party's detriment. But absence of meaningful negotiation in economic transactions may only reflect the transaction's simplicity and the parties' agreement as to value and terms. When there is little to negotiate because terms are fair, inequalities in bargaining power are trivial. Equality in bargaining power would produce no different result. Such cases may be easy for the attorney and she may prepare documentation to complete a fair transaction even if the attorney's client dictates the terms. This Article does not concern itself with such transactions, of which there are many, except to suggest that, so long as the transactional counter-parties do not enjoy equal bargaining power, a risk that one party will take advantage of the other is ever present.

Reports on recent behavioral studies using economic, market exchange experiments in a variety of cultures suggest that distributional fairness—rather than exploitation of power advantages—is the dominant norm among cultures.¹⁷³ The studies disclose a pattern of fair dealing and sharing both within groups and among members of different groups, especially where a market economy is familiar to the participants.¹⁷⁴ Researchers conducting the studies attribute fair dealing in part to conflict avoidance.¹⁷⁵ This cutting-edge research contradicts

¹⁷⁰ *Id.* at 5. In this situation, Coase chooses a legal rule to apply to the cattle-raiser and the farmer and allows them to negotiate freely. Coase does not address power to act with impunity contrary to the legal rule. *Id.*

¹⁷¹ *Id.* at 44.

¹⁷² The Delaware Supreme Court adopted a concept of “entire fairness” that embraced both fair dealing and a fair price for corporate mergers in *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710–11 (Del. 1983), thereby rejecting the notion that fair procedures alone suffice to preclude claims by disgruntled minority shareholders.

¹⁷³ See generally Bower, *supra* note 26.

¹⁷⁴ See *id.*

¹⁷⁵ See *id.* at 105–06 (discussing studies). The “Golden Rule” may have an ascertainable basis in human behavior. In the legal literature, there is a growing movement in law and

earlier assumptions that human beings seize whatever advantages they can. Bower writes:

Many evolutionary biologists hold that natural selection has favored individuals who are genetically inclined to act out of self-interest in order to propagate their own genes.

Henrich [Joseph Henrich, anthropologist at the Institute for Advanced Study in Berlin] theorizes that, throughout humanity's evolution, groups that devised the most successful social guidelines for pursuing fair interactions left competing groups in the dust. This process advanced genetic traits in the surviving groups that proved conducive to hashing out equitable deals.¹⁷⁶

Accordingly, the lawyer who recommends courses of action to her clients that produce distributional fairness may be serving the client better than those who encourage and legitimate exploitation of power advantages. The extended multiple client representation model of this Article would enable the lawyer to analyze the needs and interests of constituencies other than the immediate client and to recommend a distributionally fair course of conduct to the immediate client.¹⁷⁷

behavioral science that looks closely at the behavioral studies in building law and economics models. See generally Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000) (introducing modified law and economics methodology to include behavioral sciences). The authors do not conclude that departure from standard rational choice models is irrational. Rather, they suggest that rational choice theories of law and economics are flawed and fail to offer a complete behavioral picture. *Id.* at 1143–44. Coase may well have understood this behavior, but perhaps his law and economics successors did not. See *supra* text accompanying and following note 161.

¹⁷⁶ Bower, *supra* note 26, at 106. Similarly, in a classic paper reporting on game theory experiments, the description of the decisional process in the experimental games includes observations that, despite stated game goals of selfishness and competitiveness, the players were cooperative. G.K. Kalisch et al., *Some Experimental n-Person Games*, in NASH, JR., *supra* note 27, at 61, 68. Further, the authors (with disappointment) report that in three person cooperative games, “[t]he results of this experiment were rather negative. The players were simply unwilling to play competitively.” *Id.* at 86.

¹⁷⁷ Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581 (2002). As a proponent of behavioral law and economics, Greenfield makes similar arguments in favor of corporate constituency statutes. Fairness requires that corporate directors take employees and possibly others into account in corporate decision making. Behavioral ultimatum games demonstrate that within groups, individuals choose fair distribution of wealth over individual wealth maximization. *Id.* at 632–34.

VII. DEFINING INTERVENTIONAL FUNCTIONS

Intervention is a matter of the extent to which the client directs the lawyer. As the client permits the lawyer increasing autonomy, the lawyer intervenes more to define the legal course of action. At least three discrete interventional levels characterize American legal practice. The lawyer may move between interventional functions in the course of representation on a single matter. The following paragraphs describe the levels in ascending degree of the lawyer's transactional intervention.

A. *Scrivener-Lawyers*

A lawyer may act in a ministerial manner without becoming engaged in the client's decision making. The lawyer drafts required documents according to the client's instructions.¹⁷⁸ In this instance, the lawyer is a scrivener.¹⁷⁹ A scrivener who believes that the goals the client wishes her to assist in pursuing are wrong is in a difficult position. The client has sought no advice, but may be unaware of potential exposure to liability and may welcome the lawyer's analysis and recommendations. Further, the client simply may have concluded that because others use similar structures,¹⁸⁰ the client would be at a disadvantage in avoiding them. Also, the client may not have considered possible adverse impacts of the structures on third parties or how objectionable legal structure might affect the

¹⁷⁸ Needless to say, existing ethical rules generally do not limit the lawyer's responsibility for actions taken while acting as a scrivener. For example, the lawyer may not assist the client in commission of a crime or fraud. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2002). As scrivener, the lawyer must remain mindful of the conflict of interest rules. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002). On the other hand, if the scrivener truly acts as an intermediary between or among clients because she renders no legal advice, the Model Rules offer no specific guidance. MODEL RULES OF PROF'L CONDUCT pmb. ¶3 (2002).

¹⁷⁹ Frequently, attorneys offer to assume that role when multiple parties with potentially disparate interests have the unity of purpose to be co-participants in a common transaction. In large law firms, the lawyer, acting as the scrivener, prepares the necessary documentation. *See supra* note 63 and accompanying text. She seeks to isolate herself from other lawyers in the firm who continue to represent one of the parties to the transaction on other matters. The effectiveness of this "Chinese Wall" between members of the firm is questionable. The wall requires the scrivener to favor neither the interests of the firm's historical client nor the interests of the non-client parties. In order to do so, the attorney must ignore what she knows from prior representation about the interests of the existing client in structuring and drafting documentation for the transaction.

¹⁸⁰ *See infra* Part VII.C. (discussing use of form contracts).

client's reputation negatively. Sometimes the lawyer's only option may be refusal of representation if the client's goals are not acceptable to her.¹⁸¹

B. *Architect-Lawyers*

Often a client brings to the lawyer the client's transactional and economic objectives and leaves design and implementation of the transaction to the lawyer. This Article calls this function the architect-lawyer. Here the attorney has the opportunity to show the breadth of her creativity. The attorney may have an array of techniques and structures: some will impact third parties adversely, others may not. If the lawyer withholds recommending a creative, permissible structure that affects third parties adversely, the lawyer fails to provide the client with the full range of available structures and possibly falls short in diligence.¹⁸² Yet if the lawyer offers a legal tool that the lawyer knows to be harmful to third parties, the lawyer may appear more responsible for that harm than a scrivener who implements but makes no recommendation.

C. *Entrepreneur-Lawyers*

Lawyers assume entrepreneurial roles in the interest of generating business. Plaintiff's personal injury lawyers regularly advertise with the goal of informing potential clients of their possible claims that they may not have pursued. Business and tax lawyers seek out planning opportunities that enable their clients to gain some economic or legal advantage about which the client otherwise might be ignorant. Sometimes, the lawyer as entrepreneur recommends to the client a transaction that the lawyer or a third party has introduced, or the client may have a nascent transaction concept and the lawyer develops the idea. Lawyers also design concepts and market them through others to the client,¹⁸³ rather than the client defining goals. In this case the lawyer may have immediate responsibility for collateral effects of the plan equal to or greater than the client to whom the lawyer sold the plan.

¹⁸¹ A lawyer may terminate or decline representation so long as the termination or refusal of representation does not materially affect the client adversely. MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (2002). Preparing documents or structuring the transaction in a manner contrary to the client's instructions without informing the client is not an option, as such actions would directly violate the attorney's contractual agreement with the client.

¹⁸² See generally MODEL RULES OF PROF'L CONDUCT R. 1.3 (2002) (requiring lawyers to be diligent in representation).

¹⁸³ Investment banking firms have marketed many corporate tax shelters. Tax professionals, including tax lawyers, design the shelter techniques and script the implementation for investment bankers to sell. See, e.g., Lee A. Sheppard, *Dynegy's Tax Shelter*, 95 TAX NOTES 305, 307-08 (2002).

The motivational vector from the attorney's recommendation to the client's acceptance of the plan is identifiable and direct. In the case of scriveners, the motivational vector seems to be the reverse—running from the client to the lawyer. For architect lawyers, direction of the motivation is less obvious—the attorney designs the plan to suit the client's objectives. Nevertheless, the examples in the next part of this Article demonstrate that the motivational direction with all three types of legal invention often is the same—the attorney motivates the client.

VIII. INTERVENTIONAL ROLES AND OTHER CONSTITUENCIES: SOME EXAMPLES

In Part III, this Article described the common business practice of single lawyer representation of multiple parties to a transaction. The lawyer knows that she must balance the interests of the parties in order to complete the assignment successfully. In other instances, multiple party representation is inherent in the nature of the engagement. For example, lawyers who represent organizations routinely engage in multiple party representation.¹⁸⁴ The organization acts through its duly authorized constituents¹⁸⁵ who may not have identical interests.¹⁸⁶ Constituents include officers, directors, employees, shareholders and other constituents.¹⁸⁷ Other constituents might mean the communities at large in which the organization's headquarters or operations are located,¹⁸⁸ in the case of a publicly traded organization,¹⁸⁹ the

¹⁸⁴ MODEL RULES OF PROF'L CONDUCT R. 1.13(e) (2002).

¹⁸⁵ MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2002).

¹⁸⁶ See MODEL RULES OF PROF'L CONDUCT R. 1.13(d), (e) (2002) (requiring the lawyer to explain the identity of the client when the organization's interests are adverse to the constituent's interests and permitting the lawyer to represent the organization and one or more constituents).

¹⁸⁷ MODEL RULES OF PROF'L CONDUCT R. 1.13 cmts. 1–5 (2002) (“The Entity as the Client”).

¹⁸⁸ See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985) (citing Martin Lipton & Andrew R. Brownstein, *Takeover Responses and Directors' Responsibilities: An Update*, ABA NAT'L INST. ON THE DYNAMICS OF CORP. CONTROL, Dec. 8, 1983, reprinted in 40 BUS. LAW. 1403 (1985)). *Unocal* makes other constituencies, including creditors, employees, vendors, etc., part of the mix of affected parties that corporate directors may consider in evaluating whether or not to defend against a takeover attempt. If the board of directors may consider the other constituencies, the lawyer for the organization would have to consider those constituencies as well. *But see* *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 176 (Del. 1986) (limiting consideration of other constituencies once an auction for control of the corporation commences).

¹⁸⁹ Some thirty states have enacted specific constituency statutes that permit or require corporate boards to consider the interests of various third parties in corporate decision making.

investing public¹⁹⁰ and, in the case of a charitable organization, the underlying charitable beneficiaries.¹⁹¹ Similarly, whether or not one considers privity to bar the beneficiary from making claims against the estate planning lawyer,¹⁹² estate planning by definition involves interests of more than one party: the property owner who is deciding how to transmit wealth and the ultimate recipients of that wealth.¹⁹³ Further, lawyers prepare many form contracts, especially consumer contracts, knowing that the counter-party to the direct client whom the contract also will bind has neither separate representation nor the bargaining power to influence the provisions of the contract, even if he had separate representation.¹⁹⁴

The direct client, or in the case of an entity client, management of the entity, in each of the above examples uses the lawyer's skills in a manner that affects the other constituencies. The other constituencies often have insufficient bargaining power to alter that effect.¹⁹⁵ The attorney should apply a multiple party

In evaluating a prospective takeover, Oregon's statute, for example, permits corporate directors to "give due consideration to the social, legal and economic effects on employees, customers . . . and on the communities . . . in which the corporation operate[s] . . . including the possibility that these interests may be best served by the continued independence of the corporation . . ." OR. REV. STAT. § 60.357(5) (1999). New York's statute is similar, 6 N.Y. BUS. CORP. § 717(b) (2001). *See generally* Greenfield, *supra* note 177 (discussing constituency statutes in the context of behavioral law and economics and arguing that broadening corporate directors' fiduciary duties to include employees and others might increase economic efficiency overall even though shareholders' wealth might decline); *see also* Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85 (1999) (comparing various constituency statutes).

¹⁹⁰ *See* Lorne, *supra* note 118; Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507 (1994).

¹⁹¹ *Creighton Univ. v. Kleinfeld*, 919 F. Supp. 1421 (E.D. Cal. 1995) (allowing Creighton to bring an action against drafting attorney for making it, as residuary beneficiary, solely responsible for taxes on QTIP trust); *see also* *Jewish Hosp. v. Boatmen's Nat'l Bank of Belleville*, 633 N.E.2d 1267 (Ill. App. Ct. 1994) (finding that because the beneficiaries of charitable trusts, unlike beneficiaries of private trusts, are ordinarily indefinite, the state's attorney general has primary responsibility for the supervision of charitable trusts and is generally the proper party to enforce them); *see, e.g., Hardman v. Feinstein*, 240 Cal. Rptr. 483 (Cal. Ct. App. 1987). Standing for beneficiaries was found nonetheless in *Jones v. Grant*, 344 So. 2d 1210, 1212 (Ala. 1977) (students of university sue trustees for breach of fiduciary duties in administering trust), but the Alabama Nonprofit Corporation Act, ALA. CODE §§ 10-3A-1 to 3A-225, superceded that right in 1984.

¹⁹² *Compare* Fogel, *supra* note 98 (no obligation to beneficiaries), *with* Hazard, *supra* note 58 (obligation to beneficiaries).

¹⁹³ Ordower, *supra* note 98, at 332-33.

¹⁹⁴ Vukowich, *supra* note 44, at 800, 811.

¹⁹⁵ Trade unions and organized consumer groups may be able to consolidate power to combat overreaching, but in many cases the employer or the vendor under a one-sided contract may act before the group can assemble information concerning the transaction structure that overreaches. *Cf. supra* note 145 and accompanying text; *see generally* MICHAEL D. YATES,

representation model whenever she anticipates that the nature of the representation will affect persons other than her direct client and those others who, for whatever reason, cannot negotiate to moderate her direct client's decisions.¹⁹⁶ The next section offers an example of each interventional level and explores whether the responsibility that accompanies a multiple party representation model should be universal or should vary as a function of the lawyer's role.

A. *Cash Balance Conversions and the Lawyer as Entrepreneur*

The lawyer approaches the client and informs the client (or prospective client) that the client has need for specific legal services of which the client may have been unaware. The lawyer recommends a legal structure or transaction without the client first engaging the lawyer to advise on the matter. While the lawyer's mode of reaching prospective clients differs from that of the much-maligned "ambulance chaser,"¹⁹⁷ it involves marketing one's services as personal injury practice often does. The lawyer meets clients through referrals or pursues previous representation contacts (including cross-selling of services to clients of a firm) and seeks to persuade the clients that the lawyer can provide a legal product that has economic value for the client.¹⁹⁸

One such product is the cash balance pension plan.¹⁹⁹ Employers that convert their existing defined benefit retirement plans²⁰⁰ into cash balance plans are able

WHY UNIONS MATTER (1998); FELIX G. RIVERA & JOHN L. ERLICH, COMMUNITY ORGANIZING IN A DIVERSE SOCIETY (2d ed. 1995).

¹⁹⁶ See *supra* Part IV (discussing proposed standard).

¹⁹⁷ "[A]mbulance chaser. 1. A lawyer who approaches victims of accidents in hopes of persuading them to sue for damages." BLACK'S LAW DICTIONARY 80 (7th ed. 1999).

¹⁹⁸ One lawyer I interviewed who actively engages in a pension plan practice cautions that lawyers do little of the marketing of pension plans and modifications of existing plans. Consultants develop the products and prepare slick presentations for the clients. Lawyers cannot hold a candle to pension consultants when it comes to marketing plan changes and new structures to plan users. His view was that the lawyers serve more the scrivener role than the entrepreneur role. The consultants sell the product to the clients and the clients have the lawyers prepare the documents and do the compliance work.

¹⁹⁹ Edward A. Zelinsky, *The Cash Balance Controversy*, 19 VA. TAX REV. 683 (2000), explains the conversion, the reasons for converting, and the benefits to the employer. The controversy involves only conversions and not independent establishment of cash balance plans. A cash balance plan is a defined benefit plan under which the employee's pension benefit is a function of the balance in his or her account at the time of retirement and, thus, resembles a defined contribution plan. The cash balance builds at a substantially constant rate throughout the term of employment.

²⁰⁰ Pension plans under the Employee Retirement Income Security Act of 1974 ("ERISA"), codified in part in 26 U.S.C. §§ 401-09 (2001) and 29 U.S.C. §§ 1001-1461 (2001), are either defined benefit or defined contribution plans. Employers or employees, or

to utilize the excess plan value,²⁰¹ without incurring tax-based penalties,²⁰² to fund benefits that would be attractive to young, possibly mobile²⁰³ employees. Conversions tend to limit older employees' continuing benefit accruals.²⁰⁴ The

both employers and employees, contribute to defined contribution plans that establish accounts for the employees. The contributions and earnings on the account of an employee provide the fund from which the employee draws upon retirement. Accordingly, the contribution is defined but the benefit is unknown until retirement. In the case of a defined benefit plan, the employer establishes a plan to provide a specific benefit to retiring employees based upon their compensation, age, and length of service. Actuarial computations enable the employer to determine how much to contribute to the plan each year to fund the benefit for all current employees. The plan defines the benefit but not the contribution, since the contribution is a function of the composition of the work force (including age, length of service, etc.), rates of return on invested capital in the plan, and life expectancy of employees.

²⁰¹ Rapid investment appreciation during the 1990s produced the excess. The accumulations are excess because under the plan's actuarial assumptions, the plan will not need the accumulations to fund employees' retirement benefits. Actuarial assumptions evaluate factors including age and length of service of employees in determining how much the plan must have in order to fund the retirement benefits. Under a traditional plan, benefit accrual rates increase steeply as employees age and approach retirement. So, adding younger employees to the work force does not materially increase the amount of plan assets the plan requires and does not consume the excess assets that successful investment generates. Zelinsky, *supra* note 196, at 709-13.

²⁰² I.R.C. § 4980 (2001). The employer cannot use the excess accumulation to provide portable benefits to younger employees under a defined contribution plan because the tax rules do not permit free movement of assets from defined benefit to defined contribution plans. Use of the funds from the defined benefit plan would be a reversion subject to the reversion penalties under I.R.C. § 4980. Since the cash balance plan is a defined benefit plan, conversion of the traditional plan into a cash balance plan occurs without penalty. Conversion permits the employer to fund the increased and possibly portable benefits for the younger employees with the accumulated excess in the traditional plan. The employer does not have to contribute to another plan for those employees. In most conversion instances, the conversion benefit provides a windfall to the employer who did not anticipate the windfall as part of his business plan. The potential windfall provides the entrepreneurial lawyer with a valuable marketing tool.

²⁰³ Unlike traditional defined benefit plans, cash balance plan accounts are often portable. Portability means that the employee has a vested account in the plan. When the employee leaves before retirement, the employee keeps the account balance rather than losing benefits under a traditional plan. Accordingly, pension benefits cease to depend on a lifelong commitment to a single employer.

²⁰⁴ While conversion does not reduce older employees' accrued benefits, it does diminish the rate of future accrual. In addition, a "wear-away" feature typically limits additions to older employees' cash balance plan accounts. If the older employee's accrued benefit at the time of conversion exceeds the amount that the employee would have accrued under the cash balance plan, as is likely to be the case, the plan would fund the older employee's future benefit by "wearing away" that excess rather than by increasing the employee's separate account balance. See Zelinsky, *supra* note 199, at 743-48.

adverse impact of the conversions on older employees has attracted media attention,²⁰⁵ litigation,²⁰⁶ and controversy.²⁰⁷

While some commentators view the benefit formula of new rather than converted cash balance plans as being neutral with respect to age,²⁰⁸ conversion of traditional plans into cash benefit plans shifts future accrual benefits from older to younger employees.²⁰⁹ Accordingly, conversion discriminates against the most expensive employees under traditional defined benefit plans.²¹⁰ As conversion impacts older employees adversely, it benefits employers. Conversion provides

²⁰⁵ See, e.g., Richard A. Oppel, Jr., *Clinton Seeks Disclosure Rules on Changes to Pension Plans*, N.Y. TIMES, July 14, 1999, at C11. In light of the Enron Corporation's recent bankruptcy filing, the media are likely to focus attention on so-called 401k plans, named after the enabling provision I.R.C. § 401(k) (2001), that invest in the employer's securities.

²⁰⁶ *Esden v. Bank of Boston*, 229 F.3d 154, 165 (2d Cir. 2000), holds that the plan must use interest rates under I.R.C. § 417(e)(3)(A) (2001) to determine lump sum distributions of accrued benefits under cash balance plans. Similarly, I.R.S. Notice 96-8, 1996-1 C.B. 359 mandates use of government supplied interest rates for computing lump sum plan distributions. Recently, in *Cooper v. IBM Pers. Pension Plan*, 2003-2 U.S. Tax Cas. (CCH) ¶ 50,596 (S.D. Ill. 2003), on cross-motions for summary judgment in a class action suit, the court held the IBM benefit accrual formula under its cash balance plan to be age discriminatory in violation of ERISA. And in *Berger v. Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755 (7th Cir. 2003), also a class action, employees who participated in the cash balance plan and took a lump sum distribution on termination of employment successfully challenged the manner in which the plan computed the benefit. The court held the formula to violate non-discrimination rules in ERISA.

²⁰⁷ The government proposed to limit the impact of the conversions through increased disclosure obligations in order to eliminate informational power disparities between the employer and the employee. See, e.g., Pension Reduction Disclosure Act of 1999, S. 1708, 106th Cong. (1999) (proposing to amend ERISA § 204(h) to mandate increased data disclosure).

²⁰⁸ The neutrality observation is itself controversial. See, e.g., Zelinsky, *supra* note 196, at 734.

²⁰⁹ Controversy surrounding cash balance conversions led the Internal Revenue Service to require that plan sponsors request technical advice before conversion, Rev. Proc. 2001-5, 2001-1 C.B. 164, 170, in order to enforce a Clinton administration moratorium on conversions. I.R.S. Announcement 2003-1, 2003-2 I.R.B. 1, announced that responses to technical advice would follow final regulations on age discrimination. The Department of the Treasury promulgated proposed regulations that permit, without age discrimination limitations, the reduction of accruals based upon years in service, as opposed to age, even though age and years in service correlate. See I.R.C. § 411(b), Reductions of Accruals and Allocations because of Attainment of Any Age, 67 Fed. Reg. 76,123 (Dec. 11, 2002); see also, Lee A. Sheppard, *A Square Peg in a Round Hole: Cash Balance Plans Ratified*, 97 TAX NOTES 1386 (2002) (providing a brief critique of the proposed regulations).

²¹⁰ Sheppard, *supra* note 206. This may not be discrimination in participation and benefits that ERISA prohibits. But see Richard C. Shea, et al., *Age Discrimination in Cash Balance Plans: Another View*, 19 VA. TAX REV. 763 (2000); Kevin P. O'Brien & Rosina B. Barker, *Letter re Cash Balance Wear-Away*, 2001 TAX NOTES TODAY 249-13 (2001).

employers the opportunity to offer portability in a cash balance plan which facilitates the employer's ability to attract young, enthusiastic, mobile employees who might not view a specific job as life-long. Retirement benefits that those employees do not lose when they change employment are an appealing feature of a compensation package. Further conversion enables the employer to capture for itself some of the historical investment success of its existing defined benefit plan and use it to fund those portable benefits.²¹¹

Thus, the conversion product would benefit the entrepreneurial lawyer's direct client, the employer, and would harm others. Those others, the older employees, could do little to prevent the harm from conversion even if they had separate representation because selection of plans and conversion is wholly within the employer's control (without participation of the employees the conversion affects). Informational power disparity may accompany the direct power disparity of the employer-employee relationship. Moreover, direct power disparity between the employer and the employee tends to increase as the employee ages and becomes less mobile and marketable.²¹²

For the lawyer, traditional definitions of the client identify only the employer as the client. The single client representation model and the culture of zeal lead to the conclusion that the lawyer should develop and recommend the conversion structure to the employer. The structure benefits the employer, who the lawyer represents (or hopes to represent) zealously. The single client model does not mandate that the lawyer explore options that might provide a smaller benefit to the employer but be less harmful to others.

As primary motivator, the lawyer must bear a large share of the responsibility for the plan's adverse effects on employees. Sensitivity to the older employees might lead to the establishment of a parallel or integrated cash balance plan. All employees could elect plans. Older employees would be likely to elect the traditional plan while younger employees would prefer the cash balance plan.²¹³ By giving older employees this option, the employer achieves the goal of portability for younger employees but loses some or all of the opportunity to capture for itself the benefit of a historically successful investment performance of

²¹¹ See Zelinsky, *supra* note 198, at 709–13.

²¹² Employment options for older individuals diminish because older employees have become expensive and often specialized. With their relatively short-term employment futures, older employees are less desirable to prospective employers than younger individuals. Employers often are unwilling to invest in retraining for new jobs. See e.g., NATIONAL COUNCIL ON THE AGING, 2001 PUBLIC POLICY AGENDA, at <http://www.ncoa.org/content.cfm?sectionID=168&detail=74#workers> (last visited Nov. 12, 2003). However, the *New York Times* reports improvements in the job market for older individuals as older workers make up a larger percentage of the work force (approximately 12%) than they did in 2000. Louis Uchitelle, *Older Workers Are Thriving Despite Recent Hard Times*, N.Y. TIMES, Sept. 8, 2003, at A1.

²¹³ Zelinsky, *supra* note 198, at 697.

the plan's assets.²¹⁴ The trade-off for reducing the windfall to the employer would be fairer treatment of the older employees.²¹⁵

B. Estate Planning and the Architect Lawyer

Most clients come to their estate planners with a basic idea of how they desire to distribute their wealth when they die. The clients expect the lawyers to design estate plans to carry out those wishes in a tax-efficient manner. The degree of intervention by the lawyer is less than it is in the case of the lawyer-entrepreneur because the client comes to the lawyer, not the lawyer to the client. But the degree of intervention in the case of estate planning does not necessarily make the lawyer less responsible for the impact of the representation on other constituencies. Estate planning clients are particularly vulnerable to the influence from their estate planning lawyers.²¹⁶

The lawyers remain keenly aware of their competition both from other lawyers and from non-lawyer participants in estate planning and tend to respond to the competition by offering each client the full range of standardized planning products. Frequently, lawyers do not understand the underlying family dynamics. Instead, lawyers offer plans that employ a variety of clever techniques—qualified terminable interest property trusts (Qtips)²¹⁷ and dynastic trusts,²¹⁸ for example—

²¹⁴ It is unclear whether or not partial conversion is possible to permit the employer to use part of the excess from the traditional plan to fund the cash balance plan. If it is, the amount of available excess would be less than that available under complete conversion because the costs of funding the older employees with the continuing traditional plan would be higher.

²¹⁵ *But see* John M. Vine & Richard C. Shea, *Re: The Anti-Backloading Rules*, 2001 TAX NOTES TODAY 110, 110–23 (2001) (featuring a letter to William Sweetnam, Esq. that expresses the concern that the IRS application of anti-backloading rules would preclude such protection of older employees). Legislative or regulatory intervention might be necessary to facilitate the bifurcated plan but the plan would not be contrary to the public policy that ERISA advances.

²¹⁶ *See, e.g.*, Ordower, *supra* note 98, at 314–15.

²¹⁷ I.R.C. § 2056(b)(7) (1992) permits passage of property to a surviving spouse in a manner that qualifies the testamentary gift for the unlimited, estate tax marital deduction but denies the survivor control over investment of the property, access to the corpus, and power to designate the recipients following the survivor's death. For arguments against the propriety of the qualified terminable interest property trust because it disempowers and degrades women, see Ordower, *supra* note 98 at 343–44; Wendy C. Gerzog, *The Marital Deduction Qtip Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301 (1995).

²¹⁸ Historically, the rule against perpetuities prevented the transfer of property in trust if the trust would continue for a period longer than lives in being plus twenty-one years. Recently several states, North Dakota and New Jersey among them, have enacted legislation that eliminates the rule against perpetuities and permits establishment of trusts that will continue for many generations. While the trusts enjoy tax-favored status because their assets become subject to the estate or gift tax and the generation-skipping tax only once, they often delegate to a trustee who is not the beneficiary considerable control over the wealth and its disposition.

to pass wealth while seeming to keep control of the wealth for the donor. However, the donor does not retain control because the donor will be dead when the trusts become operative. Instead, control goes to the deputy for the client/donor and the intended recipients of the client's estate are somewhat disempowered.

In many instances, some or all of the beneficiaries of the trusts are also clients of the same lawyer. Estate planners routinely prepare estate plans for the family unit consisting of husband, wife, and sometimes children.²¹⁹ The owner of the bulk of the family's wealth may be one spouse, perhaps the husband. The estate planning lawyer discusses the estate plan with the husband, as the lawyer prepares wills and trusts for husband and wife. The lawyer mentions or recommends to the husband the Qtip trust and describes it as a common and popular estate planning mechanism. It helps to preserve the family wealth for the children in the event the wife remarries. It also allows the client to designate someone other than the wife as trustee, so the wife need not concern herself with management of the family wealth.

The Qtip disempowers the wife with respect to ultimate control over the family's wealth.²²⁰ The husband may have had no intention of disempowering his wife. And even if it did occur to the husband, it may be a wrong-headed and offensive notion.²²¹ Nevertheless, because this is "standard" practice and the attorney's recommendation legitimizes the Qtip device, rendering it appropriate and helpful, the husband follows the attorney's advice. A sense of balance may lead the lawyer to recommend that the wife create a similar trust for her husband. Since she controls little of the family unit's wealth, parallel financial disempowerment and balance is illusory.

The estate plan for the marital unit seems contrary to the best interests of the wife, and possibly the family as a whole, as it denies the wife decision making power with respect to the children as they mature. Under existing rules, if the lawyer recognizes that the plan she has devised may be objectionable to the wife, she must not represent the wife unless the wife gives her "informed consent" to the representation. In order for consent to be informed, however, the lawyer would have to provide full disclosure of the objectionable elements of the proposed plan and explain why they are objectionable.²²² Since the wife is unrepresented, the lawyer may recommend only that the wife secure separate

²¹⁹ Cf. Pennell, *supra* note 76 (describing trend towards estate planning for family units as opposed to individuals).

²²⁰ The Qtip is just an example. As much as the estate planning industry depends upon various trust configurations, many trusts disempower their beneficiaries without compelling reasons for so doing. See Ordower, *supra* note 98 at 328.

²²¹ See, e.g., Gerzog, *supra* note 217.

²²² See MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2002).

counsel.²²³ Unfortunately, separate counsel for the wife will not cure the defect. Except for the power of persuasion that separate counsel might bring to bear, separate counsel is substantially powerless. The wife's lawyer has power only derivatively through the wife. Since the wife controls the smaller portion of family wealth, she has little economic bargaining power. Even though state law offers the wife a forced share of the husband's estate, that share is woefully inadequate. While state legislatures designed the forced share to substitute for the wife's dower rights under common law and to prevent husbands from disinheriting their wives, both dower and forced share statutes are extremely limited in scope.²²⁴ Most often, electing the forced share would leave the wife in a financially less secure position than would result from accepting the Qtip and its control limitations.²²⁵ Further, even the separate counsel's power of persuasion is exercisable only through the wife. Ethical rules generally bar separate counsel from contacting the husband directly.²²⁶ Divorce might approach equalization of the spouses' wealth but is hardly a tactic one might recommend in an otherwise successful marriage.

The estate planning lawyer might avoid the conflict if she enters the representational relationship with a clear understanding of all affected parties. The husband would understand that the lawyer represents multiple parties, including the wife, children, and possible collateral relatives and charities as well. The lawyer, then, would be sensitive to the interests and needs of all parties and would be able to maintain limited confidences and to negotiate an overall plan that accommodates the principal objectives of all. Planning in this manner demands a

²²³ See MODEL RULES OF PROF'L CONDUCT R. 4.3 & cmts. 1-2 (2002).

²²⁴ The limited scope is similar to the unconscionability concept in the Uniform Commercial Code, which prevents only the most egregious overreaching in consumer contracts. See U.C.C. § 2-302 (2002); discussion *infra* Part VIII.C (discussing related issues with form consumer contracts).

²²⁵ By electing the forced share, the wife relinquishes other interests in the husband's estate. Generally, the forced share is one-third of the husband's estate, excluding proceeds of life insurance that are not payable to the husband's estate. Economically, the present value of the income interest in the bulk of the husband's estate often is significantly greater than the amount of the forced share. For example, Missouri gives the surviving spouse the power to take one-half the deceased spouse's estate if there are no lineal descendants and one-third if there are lineal descendants. See Mo. Rev. Stat. § 474.160 (1957). The decedent's estate is enhanced by lifetime transfers and life insurance payable to the surviving spouse but not by transfers or insurance payable to third parties, and the elective share decreases by the value of lifetime transfers and life insurance payable to the surviving spouse. See Mo. Rev. Stat. § 474.163 (1981). Under the 1969 UPC, the spouse was entitled to a one-third share. Under the current version, however, the share percentage depends on the length of the marriage (from "supplemental amount only" for a newlywed couple, up to 50% for a fifteen-plus year marriage) and the valuation is based on the "augmented estate" which includes nonprobate transfers to others. See UNIF. PROBATE CODE § 2-202 (1990).

²²⁶ See MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002).

high level of engagement and a willingness to reject the easy to use, estate-planning molds. The lawyer might have to refrain from recommending some techniques that—like the Qtip—tend to disempower individuals in favor of a more inclusive approach to estate planning. Undoubtedly, there will be situations in which such multiple party representation would be impossible. Ethical rules should not bar multiple party representation generally, as it frequently is the most efficient manner in which to address family needs and is likely to prove less costly and breed less ill will. The family becomes representative of the situation in the multiple party representation model that Part II of this Article describes.

C. Form Consumer Contracts and the Scrivener Lawyer

Most businesses that provide goods or services for future delivery rely on form contracts to define their relationship with their customers.²²⁷ Business owners and managers understand that many, possibly most, of their customers will sign the form contract without reading, much less comprehending, the terms of the contracts.²²⁸ The longer and more detailed the contract is, the less likely customers are to read the contract, especially if the transaction is routine²²⁹ or time is critical.²³⁰ While educated consumers are more likely to read the contract than uneducated consumers, both are likely to forego the reading because both realize that the contractual terms are non-negotiable.²³¹ The customer either signs the form contract or the transaction will not take place. Whether or not onerous provisions of the contract are enforceable is of little consequence.

A colleague described her recent encounter with an unenforceable contract. The operator of a facility that provides children's birthday parties requires each parent to sign a waiver of liability form upon arrival before the child may enter the facility. The form exculpates the facility and its employees from any responsibility for injury to any child attending a birthday party. The circumstances are coercive. A parent who does not wish to sign the waiver must leave with the child after the child has seen all her classmates or friends entering the facility.

²²⁷ See, e.g., Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631–32 (1943); Vukowich, *supra* note 44, at 802.

²²⁸ See, e.g., Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 504 (1967).

²²⁹ The purchase of ordinary consumer goods, for example.

²³⁰ Renting a car is an example where the customer is often short of time, and an impatient line of other customers is waiting for service. The person presenting the contract for signature generally has no power to vary the contractual terms on behalf of the vendor. The clerk at a rental car counter has the power only to permit the customer to accept or waive additional insurance coverages but has no authority with respect to the printed contract terms.

²³¹ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 448–49 (D.C. Cir. 1965), (viewing absence of choice and unreasonable contract terms as unconscionability); see also Vukowich *supra* note 44, at 800.

Imagine the parent's dilemma! There can be little reason for the waiver other than to give the facility operator leverage to use against those parents of injured children who are not aware that the provision is unenforceable.²³²

Sometimes legislation regulates the contract by providing the consumer with a cancellation option for a limited period.²³³ Legislation or judicial decisions may limit enforceability of onerous contractual provisions as well. Forfeiture penalties²³⁴ and confession of judgment clauses²³⁵ often are unenforceable. Nevertheless, the contracts tend to remain one-sided and frequently include provisions that are not enforceable or are of doubtful enforceability.²³⁶

Lawyers prepare the forms. Some of those lawyers are architect lawyers²³⁷ who design the contract for a specific type of client. The architects anticipate all imaginable eventualities and resolve them in favor of the client.²³⁸ Often, however, attorneys prepare one-sided form contracts in response to clients' specific instructions. Clients in those instances are not seeking legal advice but following what they perceive or what the lawyers think their clients perceive to be the industry norm. Frequently, the client will have seen a competitor's contract or a contract used in a related industry and will instruct the lawyer to prepare a similar form for the client's consumer transactions. Whether as architects or scribes, the lawyers know that some provisions in the contract are not

²³² See, e.g., *Westlye v. Look Sports, Inc.*, 22 Cal. Rptr. 2d 781 (Cal. App. Dep't Super. Ct. 1993) (holding that a contractual disclaimer in a written agreement did not insulate defendant lessor of ski boots from strict products liability in tort). However, courts have held that exculpatory agreements, within the context of recreational activities, are not adhesion contracts. See, e.g., *Mario R. Arango & William R. Trueba, Jr., The Sports Chamber: Exculpatory Agreements Under Pressure*, 14 U. MIAMI ENT. & SPORTS L. REV. 1, 7 (1997). Then again, contracts parents sign for minors are subject to disaffirmation and additional validation scrutiny. See, e.g., *Del Bosco v. United States Ski Ass'n*, 839 F. Supp. 1470 (D. Colo. 1993) (finding that nothing in the agreement indicated that by signing the agreement the skier's mother agreed to waive the skier's claims). Even experienced lawyers, however, may doubt whether the waiver is unenforceable and are dissuaded from bringing an action for a compensable, but non-permanent, injury to their child.

²³³ See, e.g., 15 U.S.C. § 1635 (1995) (providing a rescission right with respect to consumer credit transactions); Rule Concerning a Cooling-Off Period, 16 C.F.R. § 429 (2001) (outlining the FTC's door-to-door sales rule).

²³⁴ See *Vukowich*, *supra* note 44, at 822.

²³⁵ See *id.*

²³⁶ Proposed Model Rule 4.3 would have prohibited the lawyer from drafting an agreement that is "illegal, contains legally prohibited terms, would work a fraud, or would be held to be unconscionable as a matter of law." *Vukowich*, *supra* note 45 at 833.

²³⁷ Cf. *supra* Part VII.B.

²³⁸ Karl Llewellyn observed that lawyers draft "to the edge of the possible." N.Y. LAW REVISION COMM'N, *supra* note 8.

enforceable,²³⁹ others are of doubtful enforceability,²⁴⁰ and still others are enforceable but exploitive of the client's superior bargaining position relative to the customer. One commentator argues that legislative change and decisional law "have tended to correct the imbalance in the standard form contract system," but that the process of correction has been inefficient and slow.²⁴¹

Federal law, for example, renders disclaimers of the warranty of merchantability unenforceable.²⁴² Similarly, the warranty of habitability in a residential lease is not subject to waiver whether by express contract or otherwise.²⁴³ Nevertheless, broad disclaimers of warranty still accompany the sale of many consumer goods and severe habitability warranty limitations persist in some rental contracts. With respect to unenforceable provisions, their inclusion in the contract is solely strategic. Their presence in the contract benefits the client not through application but because they will deter some customers from acting contrary to the express, but unenforceable, contractual language. What reason could there be for including the language other than to take advantage of the other party's informational deficit? Informed parties would know the provision to be unenforceable and would proceed as if the unenforceable provision did not exist. The uninformed, on the other hand, may forego an opportunity or a remedy otherwise available because of the unenforceable language. Lawyers who draft the language aid their clients in exploiting their informational power superiority.²⁴⁴

While the proposed rule the ABA rejected governing illegal contract language²⁴⁵ would not have barred many imbalanced provisions of form

²³⁹ See Ass'n. of the Bar of the City of New York Comm. On Prof'l Ethics, Op. 722 (1948) (determining that it is unethical to include an unlawful tenant waiver of a sixty-day period in which to cancel a rent increase).

²⁴⁰ See Vukowich, *supra* note 44, at 823.

²⁴¹ *Id.* at 824 (proposing greater policing of the forms by the legal profession that creates them).

²⁴² Magnuson-Moss Warranty Act, 15 U.S.C. § 2301–2312 (2001).

²⁴³ See *Teller v. McCoy*, 253 S.E.2d 114, 130–31 (W. Va. 1978) ("[S]ince '[i]t is fair to presume that no individual would voluntarily choose to live in a dwelling that had become unsafe for human habitation,' we hold that waivers of the implied warranty of habitability are against public policy." (footnote omitted)); *Boston Hous. Auth. v. Hemingway*, 293 N.E.2d 831, 836 (Mass. 1985).

²⁴⁴ The waiver may not be utterly without function other than to deceive. The express contractual waiver, under the Parol Evidence Rule, may serve the function of precluding the other party from introducing oral warranties because the contract addresses warranties in writing. "Parol-evidence rule. The principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence that adds to, varies, or contradicts the writing." BLACK'S LAW DICTIONARY 1139 (7th ed. 1999).

²⁴⁵ MODEL RULES OF PROF'L RESPONSIBILITY R. 4.3 (Proposed Official Draft 2002). See Vukowich, *supra* note 44.

contracts, the rule at least would have compelled practitioners to reflect upon the language they drafted and the impact that language has on the contracting parties. Without the rule, the Model Rules do not prohibit inclusions of unenforceable provisions,²⁴⁶ but neither do the Rules promote those inclusions as part of the lawyer's obligations to the client. If the client specifically requests the inclusion, the lawyer presumably should include the provisions because the client defines the scope and goals of the representation so long as the lawyer does not assist the client in perpetrating a fraud or a criminal act.²⁴⁷ The Rules' silence as to unenforceable provisions is neutral on the issue and each lawyer must decide whether including unenforceable provisions serves a permissible objective for the client.²⁴⁸

Language of doubtful enforceability and other one-sided provisions appear in the contract because the other party lacks the bargaining power to resist their inclusion. Under current rules emerging from the culture of zeal, the lawyer's obligation well may be to include such provisions to assist the client in maximizing his economic position. At the same time, the attorney preparing the language confirms for or signals to the client that the language is customary, appropriate, and part of an industry norm representative of the industry's participants. Thus, unbalanced contracts can become the norm in the industry as soon as one lawyer prepares one for one client. Without evaluating the impact of the contractual language on the customers, each industry participant implicitly may have relied upon counsel to provide a contract that was suitable to the type of transaction in which the client customarily engaged. Many industry participants themselves may not comprehend the function of the offensive contractual language. Frequently, when one questions specific language, the industry participant responds that the language is just what the lawyers provided and that he, the industry participant, does not ever seek to enforce the provision.²⁴⁹

In fact the normalization of one-sided contracting may saddle an industry with a reputation for dishonesty and unfair dealing. Customers may approach the industry with distrust.²⁵⁰ While occasionally clients may benefit from one-sided contractual terms, clients also may lose business to other industries that provide a marginally substitutable product when the competing industry enjoys a consumer

²⁴⁶ See MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002).

²⁴⁷ See *id.*

²⁴⁸ If the lawyer finds the purpose of language unacceptable, the lawyer may withdraw from representation. MODEL RULE OF PROF'L CONDUCT R. 1.2 (2002).

²⁴⁹ Evidence of this practice is anecdotal but it does seem commonplace. Cf. N.Y. LAW REVISION COMM'N, *supra* note 8, at 113 (reporting Karl Llewellyn's observation that clients frequently do not want drafting to the edge of the possible at all); see also Vukowich, *supra* note 44, at 803 n.20.

²⁵⁰ Vukowich, *supra* note 44, at 810–11 (observing that consumers discount the significance of terms because they assume that they are the industry norm).

reputation for honesty and fair dealing. Even scrivener lawyers should help their clients evaluate whether what the clients perceive to be the industry norm is useful or desirable for the client. A lawyer who, adopting a multiple party representation model, sees the unrepresented consumer as a constituency upon which the lawyer's activities have a significant impact, will evaluate the overall impact of the type of contract the client will use more carefully than the single client lawyer.²⁵¹ A scrivener should explain to the immediate client, whether or not asked, the ramifications of the contract, limitations on enforceability, and possible effect of the contract's language on the client's reputation. The benefit of the imbalanced language measured against the effect on the client's reputation and harm to other affected constituencies may suffice to dissuade the client from following the industry norm and, by abandoning the norm, the client may effect a shift in the norm to balanced contracting.

IX. CONCLUSION: THE MULTIPLE PARTY REPRESENTATION MODEL

Both the Model Code and Model Rules provide helpful bright line rules of conduct for client representation in genuine adversarial contexts, that is, preparation for or conduct of litigation. Drafters of the Model Rules, however, expressed considerable discomfort with the culture of zeal generally. As noted earlier,²⁵² commentary accompanying the Model Rules, but not the Rules themselves, suggests that zealous advocacy is inappropriate when the opposing party is poorly represented, not represented, or lacks sufficient power to alter the outcome even if well-represented. The Model Rules do not integrate the limitation on zealous advocacy into any rule and thus fail to develop the standard of legal conduct for instances in which zealous advocacy may be inappropriate.

Bright line rules facilitate compliance. But bright line rules of conduct emanating from the single client, zealous advocacy model of legal practice have led to a level of ruthlessness in law practice that has sullied the reputation of the legal profession.²⁵³ In many instances, the legal profession has propelled its

²⁵¹ Compare this with the proposal to shift responsibility to lawyers for the standard form contract system. *See id.* at 826–41.

²⁵² MODEL RULES OF PROF'L CONDUCT pmb. (2002); *see also supra* note 94 and accompanying text.

²⁵³ See the rather bleak picture of the legal profession that emerges from JOSEPH, *supra* note 16. Lawyers' ratings in recent public confidence surveys confirm the public view of lawyers. *See* Symposium, *American Bar Association Report on Perceptions of the U.S. Justice System*, 62 ALB. L. REV. 1307, 1320 (1999) (“[O]nly 14% of respondents said they are extremely or very confident in lawyers. In fact, the only category generating less confidence than the U.S. Congress and lawyers is the media at 8%. . . . Further, almost half of all respondents (42%) lack confidence in lawyers.”). For a summary of the extensive 1993 Hart Survey on public opinions of lawyers, *see* Daicoff, *supra* note 15, at 552. *See also* Marc

clients to focus only on immediate benefit to themselves in their legal dealings. But single client advocacy models ignore the realities of ordinary legal practice. Lawyers do not operate in a vacuum in which only lawyer and client are important. Ethical rules that require or encourage the lawyer to pretend that the vacuum exists disserve the legal community.

In litigation contexts, increasing reliance on negotiation and mediation rather than litigation suggests broad-based discomfort with the culture of zeal as the pre-eminent basis for all legal representation and settlement of disputes. Rather than motivating clients to exploit power disparities, lawyers can encourage their clients to moderate or even abandon that tendency. Ethical rules that acknowledge the impact of legal representation on people other than the direct client better serve the legal community. In making the transition away from exploitation of power advantages, such ethical rules would enable lawyers to take other constituencies into account rather than prohibit them from doing so.²⁵⁴

The task of developing rules to accommodate the interests of people with little bargaining power in a specific context is formidable. The certainty that bright line rules offer may have to yield to an inexact standard of conduct like the one this Article proposes.²⁵⁵ That standard assigns to the lawyer the burden of representing all interests that the representation will affect. This new rule of conduct is based upon a multiple party representation model in which the lawyer has a primary client but will look after other clients and constituencies with an underlying “do no harm” standard. Under the multiple client model, lawyering becomes inclusive rather than isolating as it is now.

The proposed standard of conduct requires the lawyer to do what many lawyers always have done.²⁵⁶ They treat each representational setting as if they have several clients who wish to work together but have moderately diverging interests. Because the current rules limit multiple party representation, lawyers may not acknowledge that the clients’ interests diverge or that the lawyer is engaging in the balancing of interests. Even if, as Hazard describes it, the lawyer is playing “god,” the practice may be unobjectionable nevertheless.²⁵⁷ It accomplishes the clients’ common objective as effectively, and often more effectively, than separate, adversarial representation would and tends to moderate the cost of the legal services for the transaction.²⁵⁸

Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 808–10 (1998).

²⁵⁴ By focusing on the primacy of the client, Model Rule 1.2, for example, prohibits lawyers from considering third party interests in any meaningful way.

²⁵⁵ See *supra* Part IV.

²⁵⁶ See Dzienkowski, *supra* note 35, at 761–62.

²⁵⁷ See GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 64–65 (1978).

²⁵⁸ See Dzienkowski, *supra* note 35 at 747; see also Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 414 (1998). But see Bassett, *supra* note 21, at 436–37 (arguing

The multiple client representation model would give substance to the vague hints in the Model Rules' commentary concerning doing justice and moderating zeal when the adversary is inadequately or not represented.²⁵⁹ Such a rule frees lawyers to do what they do well without the need to worry that their conduct violates ethical limitations and potentially will attract disciplinary sanctions. The proposed rule permits lawyers to add thoughtful balance to their analytical guidance and keen problem-solving skills. Initially, the rule may have to remain aspirational and permissive, rather than mandatory, lest it become a source for malpractice claims.²⁶⁰ In a limited number of practice areas, however, including estate planning and securities practice where impacts on persons other than the direct client are immediately within the design of the client representation, the proposed rule should become the mandatory norm.

Without doubt, each reader can identify specific situations in which the standard this Article proposes is impractical. Certainly the lawyer who represents a sports star negotiating for an increased salary from the team cannot respond adequately to the impact the salary will have on ticket prices and the general public. Higher ticket prices well may exclude some fans that will be unable or unwilling to pay the higher price.²⁶¹ On the other hand, willingness to consider that the negotiated salary might result in exclusion of some fans, higher concession prices, or smaller community donations by the team's owner, extends cost-benefit analysis into the realm of items that are exceedingly difficult to quantify. Included in that realm are other matters that the proposed standard identifies as legitimate aspects of lawyers' evaluative processes such as historical and continuing interpersonal relations, self-esteem of affected people, and the reputation of the client in the community. Thus, identifying fact patterns in which the Article's standard might be too broad or might fail completely is not a challenge. By permitting lawyers the flexibility to consider matters other than direct economic costs and benefits, the proposed standard empowers lawyers to serve their clients more effectively than current rules permit. The real challenge is to identify the array of instances in which lawyers would welcome the proposed standard that would allow them to represent their clients with a view toward their own and their clients' position in a broader societal or familial context.

that attorney disqualification results in cost and effort duplication and eliminates potential cost savings).

²⁵⁹ MODEL RULES OF PROF'L CONDUCT pmb. (2002).

²⁶⁰ As noted earlier, ethical rules generally do not provide a source for malpractice liability, but most jurisdictions view them as evidence of the standard of conduct. *Supra* note 52 and accompanying text. A significant change in the rules may lead some to use the change as an argument for imposing malpractice liability.

²⁶¹ A colleague proposed this hypothetical instance to highlight the flaw of the broad-based reach of the proposed standard.