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UNAVOIDABLE CONFLICTS OF INTEREST AND THE DUTY OF LOYALTY

DENNIS J. TUCHLER*

I. THE PROBLEM

In theory, a client is entitled to the services of a lawyer who is free of conflicts that are likely to affect the representation adversely.¹ In some cases, conflict-free service is not possible. In such cases the representation should not continue.² The conflicts between a client's interests and a lawyer's interests arise naturally from the business relationship between them, and in many of those cases the representation continues nonetheless.³ This Article

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This piece is one of several articles written in honor of Eileen Searles, our marvelous law librarian, on the occasion of her retirement from the faculty of the School of Law. What has an article about the regulation of lawyers to do with Eileen or law libraries? A law librarian is a gatherer and guardian of all tangible evidence of law and learning in the law, a job Eileen has done brilliantly over the many years of her service. As one cannot limit her service to subject matter, it is equally impossible to limit the range of subjects that could be written in her honor. So, a piece on any topic having to do with law or libraries is appropriate, including one on the regulation of lawyers.

My thanks to my colleagues, Tim Greaney, John Griesbach, Carol Needham, and Douglas Williams for their helpful comments.

1. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1995) [hereinafter MODEL RULES].

2. *Id.* at Rule 1.16.

3. Unavoidable conflicts also arise because of conflicting interest of clients, rather than conflict between the personal interests of a lawyer and the interests of a client. An example is that faced by a lawyer who discovers a conflict after entering an appearance in court as counsel for a party. The conflict becomes insoluble when the judge refuses to allow the lawyer to withdraw. Another example is of the inter-client conflict problem arising in class actions. The lawyer finds that the class he is representing may include people whose interests diverge from the rest in a significant way, and whose departure to form another class could damage the chances of those who remain. He also finds that those people do not yet know that it would be wise for them to set up another class.

deals with three kinds of such conflicts.⁴ The first is the case in which a lawyer must refer a client to another lawyer or other provider of services with whom the referring lawyer has a friendly and profitable relationship. In the second case, a lawyer with no excess capacity in his practice must allocate work among matters in a way that the lawyer would reasonably believe may well have an adverse effect on one of the affected clients' interests. The last kind of conflict to be discussed is that in which a lawyer is encouraged to fashion strategy and tactics in a way that enhance the value of the practice to future clients. Again, this conflict may be a disadvantage to a current client whose cause might only later profit from the lawyer taking a riskier position or a choosing riskier tactic.

In each of these situations, the lawyer is making a decision with respect to the representation of the client that should not be made in the context of conflicting interests.⁵ Yet in each of these cases, a decision will be made that may well adversely affect the client's interests that are entrusted to the care of the lawyer.⁶ According to the Model Rules of Professional Conduct, such conflicts of interest impose on the lawyer the duty to end the representation.⁷

4. There are, of course, other unavoidable conflicts faced by a lawyer in the pursuit of the practice and a client's business. One set of such conflicts, closely related to the problem of allocation of work discussed *infra*, arises from the fee arrangement. The applicable rules carve out an area of permissible conflicts of interest with respect to the relationship between work done and the gain expected. See MODEL RULES, *supra* note 1, at Rule 1.5(c) (allowing contingency fees). The same problem arises with employment for a fixed sum. There is an obvious temptation to overdo a matter if the fee is hourly. For the sake of enhancing the availability of legal services to the non-affluent, an exception similar to that for contingent fees is made for advanced costs and expenses. See MODEL RULES, *supra* note 1, at Rule 1.8(e). Another unavoidable conflict not discussed in this piece is the conflict faced by a lawyer who is asked to give up all or part of his fee in exchange for concessions on the other side.

5. MODEL RULES, *supra* note 1, at Rule 1.7.

6. It is of course hard to determine, at the point the decision must be made, how a conflict will affect the outcome of the representation. The representation must be terminated if, when the conflict arises, the lawyer does not reasonably believe that the representation of the affected client will not be adversely affected. See MODEL RULES, *supra* note 1, Rule 1.7(b)(1).

7. The rule reads as follows:

Conflict of Interest: General Rule

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and

The proposed Restatement of the Law Governing Lawyers is more permissive than the Model Rules in its description of non-waivable conflicts,⁸ but still prohibits representation under conditions in which the conflict between a lawyer's interest and those of a client's are likely to have a substantial adverse effect on the representation.⁹

Were these conflicts noted as matters raising serious ethical concern, they would curtail the availability of legal services significantly. Experience in practice and anecdotal evidence from former students persuades me these conflicts are not noticed, and that the representations continue despite these conflicts. These conflict-laden cases occur because a lawyer is in business not client-by-client in the present, but for many clients and cases now and in the future. The value of the practice to the lawyer lies not simply in providing service for current clients, but also in his ability to retain and attract business and to keep or attain a particular kind of client base. Decisions as to referrals, tactics, and strategy are made in that context. At some point a lawyer finds that some uses of his time are worth more to him than other uses, and some referrals yield a greater return than do others.¹⁰ This is not to say that a lawyer

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- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Id. at Rule 1.7.

8. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Proposed Final Draft No. 1, 1996). Section 201 defines a conflict of interest as one in which there is "a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person." *See id.* § 201. Section 206 repeats this prohibition with respect to conflicts involving "the lawyer's financial or other personal interests." *See id.* § 206. Section 202 allows waiver of conflicts other than those that are "not reasonably likely" to allow the lawyer "to provide adequate representation to one or more of the clients" or where the conflict is one in which "one client will assert a claim against the other in the same litigation." *See id.* § 202. The client must first be fully informed "about the material risks of such representation to that client . . ." *See id.* The client, then, may be asked to accept "adequate representation," which appears to be less than the quality of representation available to one served by a conflict-free lawyer. *See id.* The lawyer's ability to ask for consent is limited by the lawyer's ability to provide adequate information to the client, and the latter's ability to digest it. *See id.*

9. Even under the even more permissive regime of the Model Code of Professional Responsibility, which allowed waiver of such conflicts if the client consented "after full disclosure," the problems raised in this Article remain insoluble. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1982) [hereinafter MODEL CODE]. This is so because it is never clear just what notice is required or when it is required, *e.g.*, in the case of a lawyer in a busy office who takes on a new matter or decides to take more time on one than on another matter.

10. This may not always be an unavoidable problem. The lawyer can always refuse to take additional work and can refer work to other lawyers in order to make his workload manageable. As a practical matter, however, the situation is much more difficult. First, there are always

measures the gain from a practice in the same way that a manufacturer of gears or a seller of cars measures the gain from that business. The professional ideal denies such an equation. According to that ideal, the lawyer's psychic income for the practice—from the provision of good service to people who need that service—makes up for the possibility of a comparatively low return on invested capital. The lawyer who follows the professional ideal will not measure the success on any matter strictly in terms of gain to the lawyer as a return on invested capital.¹¹ The ideal notwithstanding, lawyers are allowed to refuse cases solely because they are not remunerative or because taking them on could affect the firm's reputation among current and potential clients.¹² For

alternative uses of the lawyer's time that compete with each other. Moreover, a lawyer is not always able to see that he has too much work to allow adequate devotion of resources to each job, and is not always able to refer work away without doing more harm to a client than by keeping the work (or so it could appear). Even if the lawyer were sensitive to the conflict among alternative uses of his time, then, the lawyer would not always be aware of the effect of his decisions on the outcome of a particular representation. It is not always the case that a matter is handled inadequately when it is not given every possible bit of time and effort that could affect the value of the job. I suspect that the lawyer in a busy office is always optimistic about his ability to give all matters the attention they require before him, and does not consider any addition to his workload something for which the lawyer needs to get the permission of any client with a matter currently being worked on by that lawyer.

11. The amount and quality of service to be rendered is supposed to be totally disconnected from the amount of the fee expected. One of the objections to "multidisciplinary" practice (MDP) is that the decisions as to service might be influenced by the money to be made by rendering that service. "The prohibition against MDPs is rooted in the perception that it prevents a layperson from exercising undue influence over the independence of a lawyer in the representation of a client in [an] attempt to subordinate the protection of clients to the pursuit of profit." See Commission on MDP, A.B.A., *Background Paper on Multidisciplinary Practice: Issues and Developments* (visited March 3, 2000) <<http://www.abanet.org/cpr/multicomreport0199.html>> (footnote omitted).

The ABA Commission on Evaluation of Professional Standards (the Kutak Commission) originally proposed relaxing these prohibitions. But the House of Delegates rejected its proposal. Among the objections raised were that (1) the Commission proposal would permit Sears, Montgomery Ward, H & R Block, or the Big Eight accounting firms, to open law offices in competition with traditional law firms; (2) nonlawyer ownership of law firms would interfere with the lawyer's professional independence; (3) nonlawyer ownership would destroy the lawyer's ability to be a [']professional' regardless of the economic cost; and (4) the proposed change would have a fundamental but unknown effect on the legal profession.

Id. (footnote omitted).

12. What if the lawyer finds that he has too much to do and, to be fair to his clients he must drop matters of some clients? The applicable rules limit the ability of a lawyer to withdraw from representation. Withdrawing from a matter in order to get rid of a conflict of interests would violate the "hot potato" rule. *Picker Int'l, Inc. v. Varian Assoc., Inc.*, 670 F. Supp. 1363, 1365 (N.D. Ohio 1987); Sylvia Stevens, *Hot Potatoes: When Can a Lawyer Drop a Client?*, 58 OR. ST. BAR BULL. 27 (1998). A decision to stop work on one matter for the benefit of others (and help the client find new counsel) could be seen as a betrayal of the client whose matter is dismissed.

the same reasons, lawyers may pare down the kind and amount of work to be done for a client,¹³ or in some cases, terminate a client-lawyer relationship.¹⁴ While a matter is entrusted to a lawyer's care, the lawyer's decision as to how to proceed with the matter may not be affected by financial considerations. Nevertheless, the busy lawyer must make decisions that are affected by the lawyer's interests in a way that may well affect adversely the client's interests.¹⁵ If the foregoing is correct, the law governing lawyers seems to prohibit acceptance or continuation of attorney-client relationships in many cases where such representation continues. At the same time, the rules appear to prohibit withdrawal from representation in order to avoid conflict.¹⁶

The situation seems anomalous and in need of some repair. Or does it? One alternative approach to the problem is to do nothing because things seem to have gone, and continue to go, smoothly. Lawyers try to do the right thing for their clients, and in general, clients are not harmed (that is, they receive adequate care) by decisions of the sort described, even if they are tainted by the lawyer's self-interest or loyalty to the firm. But, relying on the lawyer to do the right thing is rejected by the existence of rules regarding conflict of interests and confidentiality.¹⁷ Another alternative is to recast the rules of conflicts of interest, and perhaps rules on diligence and competence as well, to accommodate these areas of unavoidable conflict and provide added protection to clients.¹⁸ Finally, and perhaps in addition to the preceding alternatives, a lawyer's civil liability for malpractice may be recast to compensate a client for any harm resulting from inadequate attention to the client's needs.

This is a violation of the duty of loyalty because by making that decision about that client's matter, the lawyer prefers another client over the one whose matter is to be dropped.

13. MODEL RULES, *supra* note 1, at Rule 1.2(c).

14. "[A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client . . ." MODEL RULES, *supra* note 1, at Rule 1.16(b). In theory, a lawyer may not reduce or withdraw from representation where the withdrawal cannot "be accomplished without material adverse effect" when the money paid and payable by the client is inadequate to justify further representation. *Id.* I do not take Model Rule 1.16(b)(6), allowing withdrawal even if it will have a "material adverse effect" on the client's interests if "other good cause for withdrawal exists," to allow withdrawal when the representation becomes unprofitable. *Id.* I read that catch-all provision to take its limiting character from the preceding list of permissible grounds, rather than to include any cause that seems good (to whom?) at the time.

15. The "adverse affect" is on the representation—the outcome of the representation—not on the work as such. If less work is done when more might have been done, there is still no adverse effect if the result of the outcome is the same. *See* MODEL RULES, *supra* note 1, at Rule 1.7.

16. *See supra* note 12.

17. *See* MODEL RULES, *supra* note 1, at Rules 1.6 to 1.9; *see* MODEL CODE, *supra* note 9, at Canons 4 and 5.

18. An example is weakening the duty of loyalty or excepting certain kinds of conflicts of interest from the general prohibition on conflicts that affect the representation adversely.

Each of these approaches has its problems. For example, the first two alternatives threaten the behavior-regulating strength of the lawyer's loyalty to the client. The third approach is limited by the standard of care and the requirement that there be damages alleged and shown with reasonable certainty. Thinking about ways out of the problem of unavoidable conflicts invites one to question whether the duty of loyalty has any independent significance with respect to the lawyer's conduct, *i.e.*, whether the duty actually produces a level of quality of service higher than does the duty of care applied in malpractice cases. Before discussing alternative approaches, I turn to a brief discussion of the duty of loyalty and its function.

A. *Loyalty and Quality of Service*

A lawyer's relationship with a client is governed by the law of agency, as well as by professional rules. The ordinary agent's duty is "to act solely for the benefit of the principal in all matters connected with his agency."¹⁹ An agent may not act as, or on account of, an adverse party without a principal's consent,²⁰ and must "deal fairly with the principal" in all transactions between them.²¹ Moreover, the agent must provide the principal with comprehensive information concerning the agency.²² The lawyer's duty to the client is greater than the agent's duty. The lawyer's duty is not merely to act solely and prudently in the interest of the client and free of conflicting interests. The lawyer is to seek the client's ends with selfless, partisan zeal.²³ The lawyer is also required to remain independent of the client. That independence enhances the lawyer's service to the client by sharpening the lawyer's ability to exercise judgment with a cool head in the pursuit of the client's ends. Subject to the law of contract or negligence, the agent may measure service by the economic value the agent expects from that service. The attorney may not measure service based on economic value.²⁴ The ordinary agent may ask the principal to waive conflicts that could well have an adverse effect on the relationship or

19. RESTATEMENT (SECOND) OF AGENCY § 387 (1957).

20. *Id.* §§ 389, 391.

21. *Id.* § 390.

22. *Id.* §§ 390, 392.

23. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.1 (practitioner's ed. 1986).

24. See *supra* note 10. Compare Model Rule 1.5(a), which includes as an allowable basis for calculating a fee: "(1) the time and labor required . . . ; [and] (2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer; . . ." among others. MODEL RULES, *supra* note 1, at Rule 1.5(a). These provisions favor making the price of the representation sensitive to the cost of the representation to the lawyer. Part of that cost is the lawyer foregoing alternative uses of the lawyer's time.

the agent's performance of his task.²⁵ Again, the lawyer may not act as an ordinary agent might act.²⁶

What is the point of this loyalty? Wherein is it valuable? One can value loyalty as good in itself—an end to be achieved.²⁷ It is also possible to point to cases of misplaced, or excessive loyalty, and good or justified disloyalty.²⁸ Also, the appropriate ends and intensity of loyalty varies with the relationship that founds it. One distinguishes among duties of loyalty according to the importance and function of the founding relationship in a cultural context. One can distinguish among the loyalty of a spouse, that of a friend, that of a child to her parent, and that of a parent to her child, in terms of both intensity and ends to be served.²⁹ As it is described in agency law, the duty of loyalty seems instrumental. It is valuable because it compels conduct that enhances an agent's service to a principal in the pursuit of the ends of that agency.³⁰ If loyalty is a virtue, then it is an instrumental virtue, focused on the ends of a professional relationship.

A lawyer's strong duty of loyalty seems to serve two psychological functions³¹ with respect to the establishment and maintenance of the

25. RESTATEMENT (SECOND) OF AGENCY §§ 389, 391 (1957).

26. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 202(2)(c) (Proposed Final Draft No. 1, 1996); MODEL RULES, *supra* note 1, Rule 1.7. *But see* MODEL CODE, *supra* note 9, at DR 5-101(A) (allowing consents to personal conflicts not involving the interests of other clients).

27. Josiah Royce took that position. JOSIAH ROYCE, *THE PHILOSOPHY OF LOYALTY* (1908, reprinted 1920).

28. An example of justified disloyalty might be that of the late Nobel laureate, Willy Brandt, who, during World War II, joined the resistance in Norway against his own country, Germany. *See* The Nobel Foundation, *Curriculum Vitae of Willy Brandt* (last modified July 10, 1995) <<http://nobel.sdsc.edu/laureates/peace-1971-bio.html>>.

29. Not all relationships involve reciprocal loyalty. The loyalty of a parent to a child can be understood in the context of the duty to care and educate, while that of the child to the parent can be understood in terms of the need for such loyalty to achieve the parent's function of care and education. One can also understand the loyalties of family members to one another in terms of the function of the family in the particular culture. If the family is more like a small nation or tribe, the loyalties expected are different from those expected in a family whose function is seen more functionally, *e.g.*, as a socializing and care-giving unit. The professional relationship between physician and patient or lawyer and client is semi-conductive. The professional servant's loyalty need not be reciprocated by the principal (client or patient), who may leave the professional service provider at any time and disclose or use secrets learned from the physician or lawyer without the latter's permission.

30. RESTATEMENT (SECOND) OF AGENCY § 387 (1957).

31. Loyalty may simply be a disposition toward someone or some cause. The loyal person stays and fights, and does not leave to serve one's own interests. The loyal person takes risks for the sake of that to which one is loyal. But this makes the duty of loyalty a duty to put oneself into a particular state of mind with respect to someone or some cause—to take on such a disposition, such a psychological relationship with the object of that duty. Compare the duty to love a spouse

professional relationship with a client.³² Loyalty to a client demands that a lawyer to do his best for the client—not the minimum necessary for an acceptable job. Moreover, loyalty may demand that the lawyer do more than what a reasonable lawyer would do in exercising a reasonable amount of care, skill, and diligence. Ultimately, loyalty in action for the client becomes a habit that helps to define the relationship. The job expected is the kind of job done by a person who wants to do the very best that he can do for the client in the pursuit of the latter's ends as they are entrusted to the lawyer.³³ As the loyalty of a lawyer induces the desire to do such a job for that client, that lawyer is expected to exercise all his judgment and diligence to that end.³⁴

The second function of the duty of loyalty is to encourage a client to have confidence in a lawyer's trustworthiness so that the client can set aside any suspicions of the lawyer (who is, after all, a stranger to that client) and cooperate fully with the lawyer to pursue their joint goals.³⁵ If a lawyer takes duty of loyalty to a client seriously, then the lawyer and the client will have the trust and openness necessary to achieve and enjoy a successful lawyer-client relationship. The duty of loyalty also justifies conduct in the pursuit of the client's goals, but only to the extent that pursuit is lawful.³⁶

There are limits to the strength and the justifying force of loyalty other than its temporary and transactional nature. Loyalty is limited in part by the

which arises from a promise in the wedding ceremony, or the duty to love a god, which has its origin in a commandment, or the duty of patriotism which is reinforced by a pledge of allegiance.

32. This discussion of loyalty can also be applied to the relationship of a physician to a patient.

33. The duties of competence and diligence are essentially baseline rules that impose a standard that no lawyer should fail to meet, however experienced and knowledgeable that lawyer may be. See MODEL RULES, *supra* note 1, at Rules 1.1 and 1.3. The loyal lawyer with substantial experience and ability should be expected to seek to exceed these standards. Merely meeting them could be a violation of the duty of loyalty. The duty of the lawyer defined by the law of malpractice sets the duty of competence and diligence to the standard of the "ordinary lawyer." This does not always rise to the quality of work which that particular lawyer could perform were there no competing calls on his time or judgment. See *id.* at Preamble [6].

34. Another way of looking at loyalty is in terms of commitment, by which certain alternative courses of action are automatically rejected as "unthinkable."

35. Model Rule 1.7(a) treats the relationship between the lawyer and the client as important and different from the lawyer's ability to serve the client. MODEL RULES, *supra* note 1, at Rule 1.7(a). The importance of a trusting relationship between lawyer and client is dealt with in an article by Robert A. Burt. Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981). How is the client made to know of, and believe in the efficacy of that loyalty?

36. As the duty of loyalty defines the lawyer's task with respect to the client's goals, it must not only guide the lawyer with respect to the client, but it must also serve as a shield against moral claims on the lawyer by third persons who may be harmed by the lawyer's pursuit of the client's ends entrusted to the lawyer. See Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 673 (1978); David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER 83, 87-91 (David Luban ed., 1983).

requirements of the relationship. A lawyer does not owe the client a duty, for example, to eat only at the client's restaurant, or buy only from the client's retail stores. Nor is the lawyer completely precluded from serving the client's competitors or political enemies. The lawyer need not favor the client over the lawyer's spouse or friends in matters unrelated to the representation. Loyalty does not always justify the lawyer's acts on the client's behalf. The decision to take on or pursue a duty is subject to criticism, and, at times, may result in adverse legal consequences. Moreover, in many matters relating to an agency, an agent has discretion with respect to the execution of the agency. To the extent that the agent has discretion, it is not always sufficient justification for the exercise of that discretion that is exercised to further the purposes of the agency.³⁷

The agent's loyalty does not arise in a relationship of people with a common social history. The agent's loyalty is a creature of contract. If, as George Fletcher says, loyalty is a result of one's living in relationships with others—one's historic self—then it is hard to understand the loyalty of an agent in the way we understand loyalty to family, friends, or community.³⁸ Given its origin in contract and dependence on rules rather than relationships, vague exceptions to this duty of loyalty can be detrimental to its psychological effectiveness. If the boundary of an area of conduct relating to the relationship excluded from the duty is not at least verbally distinguishable³⁹ from a broader area of conduct subject to that duty, loyalty to the client becomes a weak,

37. A lawyer has two kinds of discretion. One kind relates to the lawyer's expert function, and describes the limits within which the lawyer may determine and select the means by which to pursue the client's interests. The other kind, the one referred to in the text, is the kind the lawyer is allowed by the rules governing the lawyer's conduct with respect to the pursuit of the client's goals. The exercise of that kind of discretion is governed by more than the consideration of the client's interests and calls upon the lawyer to act, not just as professional representative, but as citizen, friend, and in such other roles that define that lawyer's place in the social system.

38. GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 21-23 (1993). Fletcher finds "professional loyalty" different from loyalty as that word is generally understood, because "the historical self" is not "pivotal" in it. *Id.* at 23. He distinguishes the evidentiary privilege arising out of the professional relationship from that which protects spouses from the testimony of their spouses. The former is merely instrumental, while the latter arises from the intimacy of the spousal relationship. *Id.* at 79-80.

39. A fundamental assumption in this discussion of loyalty and quality of work is that the rules governing lawyer conduct have effect—that they actually induce and support a duty of loyalty to the client and thereby cause the lawyer to seek to do the best job he can do for the client. Hence, the assumed need for verbally clear exceptions to the duty of loyalty, which set out the kind of decisions that the lawyer may make "on his own." Such verbal clarity is needed to prevent practically unavoidable exceptions from effecting a general weakening of the lawyer's commitment to the client's service, where such a commitment rejects automatically considerations of the lawyer's own advantage in the selection of means or definition of ends. It should not matter that the logical distinction between excepted and non-excepted conduct is hard to make out, so long as the excepted conduct is clearly stated.

permeable barrier against the demands of the lawyer's own interests and actions. This not only affects the quality of the lawyer but it could well affect the client's confidence in the lawyer's faithfulness to the client's cause.⁴⁰

B. Conclusion

The conflicts of interest with which this Article is concerned arise from practical problems in the operation of a law practice. These problems include allocating work among matters before the firm and dealing with the conflict between work and other uses of the lawyer's time as well as maintaining or improving the client base, and maintaining or improving the value of service the practice offers to present and future clients. These conflicts arise because the lawyer is not in business to serve just one or a group of current clients, but rather is in business for the long term. The conflicts to be considered here are of three kinds: the allocation of work among matters, the referral of clients to other service providers, and the limitation of strategic and tactical decisions in order to maintain a favorable position with respect to judges, administrators, and other lawyers. Each kind of conflict raises the possibility of a lawyer taking advantage of a client to further the lawyer's interests and, perhaps, to benefit other clients. Where a lawyer must decide how to allocate scarce time and effort among matters before him, that lawyer may be maximizing income rather than giving each matter proper attention. Referring clients to other providers of services may be both a way to help the client and a way by which the lawyer maintains a source of future clients or rewards friends. In deciding on tactics or selecting issues to raise, the lawyer may be looking ahead to other cases and other clients, where the lawyer will forego a possible advantage for one client in order to assure success in the same arena in future cases.

All this calls into question the function of the duty of loyalty in the maintenance of high standards of quality of service. The duty is supposed to cause the lawyer to take upon himself a disposition to do the best he can for the client, and not merely what will avoid liability for malpractice. Such disposition must be weakened as the area regulated by that duty becomes indistinct and the boundaries become unclear where the lawyer may consider his own interests when deciding what to do. There exist areas of conduct in the service of a client where conduct relating to representation cannot be free of influence by the lawyer's own interests. How should we deal with that area? Should we ignore the problem and leave things as they are? Should we try to shore up the strength of the lawyer's loyalty to the client, and add to the client's security against self-serving decisions by lawyers with respect to conduct in the course of representation, through changes in the law governing lawyers?

40. Of course, this assumes that the client is aware of the limitations on the lawyer's loyalty. This may not be the case. *See also* Burt, *supra* note 35.

II. AMELIORATIVES

Are there solutions or just ways of making things a bit better for the client? If the latter, and the conflicts must continue, how does that affect the quality-of-service assurance function of the duty of loyalty? Finally, is there a practical difference between the duty of loyalty and the duty of care for malpractice purposes with respect to the overall assurance of quality? If there is no practical difference between the two, has this not serious implications for the prohibition on fee sharing and allowing ownership interests in law firms to non-lawyers?

A. Referrals

It is often the case that a lawyer will want to refer a client to a lawyer in another practice or to another provider of services, for example, the services of a trustee or executor, an insurer, or a medical or legal specialist. Where the lawyer is free of conflicts and loyal, the client should expect not only good judgment, but also the lawyer's best judgment because the client has received a referral to the best practitioner for the client's needs and purse. But, the exercise of individual judgment with respect to such providers can entail extensive search costs, and thus become quite expensive—more costly than the usual client may be willing to pay—and yield marginal benefits inadequate to justify the expense. This is especially the case when the referring lawyer has a list of possible providers of services composed after years of having done business with or having made referrals to the same people with no serious difficulties. Were the client fully informed as to the costs and benefits of a search for the appropriate service provider, one would expect that the client usually would not ask for a special search among all possible providers of the required service.⁴¹ Were the lawyer free of any ulterior purpose in referring a client to a service provider, it is likely that the quality of the selection would be roughly the same, on average, as a selection made by a lawyer with a preexisting business relationship with the referred-to service provider. Finally, one can rely on the lawyer not to send clients to providers who would harm them.⁴²

41. Nevertheless, there are occasions in which a particularly skillful choice of a service provider is required, and the lawyer is asked to exercise individual judgment to find the best provider of services for the client. In such a case, the element of self-interest in the selection of the person to whom the referral is made is potentially harmful. In any case, it would interfere with the lawyer's duty to select the person without regard to self-interest and with a thought only to the best interests of the client.

42. It is not the point of the duty of loyalty and the rules governing conflicts of interest to preserve the client from harm, unless harm includes any result other than the one that would have been achieved if the referring lawyer's judgment were guided by the latter's commitment to the client's welfare—the duty of loyalty. As to the assurance provided by the expectation that the

But it is notorious that referrals are often made with a view of their effect on the client base. Even non-lawyers to whom referrals are made can be relied upon to refer acquaintances, customers, or patients to lawyers from time to time. It is not unusual for banks, insurance companies, insurance agencies, trust companies, physicians, or accountants to have informal reciprocal referral relationships with lawyers. In some cases, the referring lawyer has an ownership interest in the referred-to provider. In the ordinary case, so far as available information allows one to guess, there is no serious damage done by this sort of self-interested referral, at least where the referred client is expected to be the source of future business. The problem of conflicting interests with respect to referrals makes it difficult to spot whether the referral is of a routine sort or is one requiring special care.

There are several variations on the theme of referrals to lawyers. The most obvious is self-referral, where a lawyer recommends himself to a client by simply not referring the client elsewhere. I suppose the conflict here is insurmountable and bearable. A referral may be to another lawyer in the same law firm or to a specialist in a field not covered by a lawyer in the firm. The referred-to lawyer may be a contract lawyer, working for the firm matter-by-matter, with neither the status nor the benefits of a full-time associate, but nevertheless part of the firm for the purpose of vicarious liability. The referring attorney's firm may be part of an archipelago of firms, each of which provides a limited range of services to clients, and refers clients to other firms in the group of lawyers with the expectation that the other members of the group reciprocate. The referred-to lawyer may be a specialist in a relatively arcane field of the law that the firm finds unprofitable to include among its offered services. That specialist is more likely chosen for his apparent skill rather than as a source of clients, although the relationship between the firms would be made stronger by a reasonable expectation that the firms will refer clients to each other when it is appropriate to do so.

The referral of clients to other lawyers within a law firm seems perfectly natural—as natural as self-referral and as difficult to include under the lawyer's duty of loyalty to the client.⁴³ If an attorney is helping a client with

lawyer will do the right thing for the client, the applicable rules about conflict of interests reject that expectation by imposing strict constraints on the context in which the lawyer acts.

43. Of course, one can fudge the issue by the purely formal dodge of saying that the client hires the firm, as opposed to any particular lawyer in the firm. A person may be brought to use one or another lawyer in a firm because of the work of a third lawyer whose function, with respect to that client, is strictly that of a rainmaker. That person can be said to be a client of the rainmaker's or of the firm. Looked at closely, that is not terribly impressive. The duties of a lawyer as set out in the applicable rules governing lawyer conduct address the issues relating to an individual lawyer to a particular client. The lawyer advising the client (which includes the rainmaker!) has a duty of loyalty to that person. The issue here is how do we modify that duty and the rules that impose and enforce it to give it greater practical effect.

an estate plan, and the client needs a personal injury lawyer, the attorney will likely refer the client to another lawyer in the firm, without considering the possibility that there may be lawyers outside the firm who could give the client more skillful service for the same or lower fee. It would be odd, and rather costly to the referring lawyer, if that referring lawyer made anything other than an intra-firm referral. Excluding these two kinds of referral from the duty of loyalty is easy, not because it is logically different in effect from referral to a lawyer outside the firm, but because it is easy to verbally separate the intra-firm referral from all other referrals.⁴⁴ Moreover, a firm is interested in the firm's quality of the work available to clients, not only because of potential malpractice claims that can affect the partners' purse as well as the size of their year-end bonus, but also because offering high quality service enhances the earning potential of the firm. The contract lawyer probably comes under the same heading, in part because the contract lawyer receives work that, most likely, will be less difficult and demanding than the work given an associate or partner.

What of the almost-firm—the group of small firms that share clients among them? The safeguards that one can expect in such a law firm are attenuated in this relationship. Without a way to regulate the quality of the lawyers in each part of the archipelago, other than the threat of kicking them out, it seems unreasonable to impose civil responsibility on each firm in the archipelago for the failures of representation in the other firms.⁴⁵ On the other hand, given the arrangement with respect to future client referrals, the situation here seems similar to that which exists between lawyers who divide fees, where the kicked-back portion is really a commission for sending the client.⁴⁶ If the referral is allowed only if the referring lawyer agrees to full civil liability for the malpractice of the lawyer to whom referral is made, and if the referring lawyer fully informs the client of the relationship between the two lawyers, the cost to the client of self-serving referrals in terms of risks of inadequate representation should be reduced. Moreover, the client has one last chance (because she has been given a reason) to find an alternative lawyer. It is not unreasonable to extend this requirement to all cases of inter-firm referrals

44. The distinction is implicit in the rules governing fee splitting. See MODEL CODE, *supra* note 9, at DR 2-107; MODEL RULES, *supra* note 1, at Rule 1.5(e).

45. The reciprocal relationship that joins firms and habitually sends clients to one another raises questions about solicitation as well. See MODEL RULES, *supra* note 1, at Rule 7.2(c) (prohibiting giving “anything of value to a person for recommending the lawyer’s services”).

46. Model Rule 1.5(e) allows division of fees between lawyers either in proportion to the work done by each or if “each lawyer assumes joint responsibility for the representation. . . .” Compare MODEL RULES, *supra* note 1, at Rule 1.5(e), with MODEL CODE, *supra* note 9, at DR 2-107(A) (allowing division of fees “in proportion to the services performed and responsibility assumed by each”).

where there is more than a casual relationship between the firms.⁴⁷ If the referring lawyer did not take such responsibility, there would be no common law basis for imposing it nonetheless, so long as the referral itself was not negligent. It would be reasonable to bind the lawyer to warrant the work of the referred-to lawyer. An analogous situation relates to the warranty of suitability in the Uniform Commercial Code.⁴⁸

It is more difficult to analyze a referral to a non-lawyer. The reasons for referral are various and the nature of the relationship between a lawyer and a referred-to provider of service is similarly various. The motives are often mixed. The referring lawyer may have confidence that the referred-to person is skillful and honest, as well grateful to the lawyer for the referral. The result is that the client will be sent to a person who is not incompetent or lazy, and that the referred-to provider of service will also likely return the favor by sending clients to the lawyer.⁴⁹ One alternative approach to this problem is to prohibit referrals by lawyers to non-lawyers because of the danger of conflicts of interest tainting the referral, which is to the client's disadvantage. The client will likely have other resources from which to determine where to go for other services. If the client needs the lawyer and the other provider of services to work together (*e.g.*, an accountant in tax or securities matters), such cooperation can be arranged by the client, usually with little difficulty. Yet, referrals by a lawyer who knows something of the person to whom referral is made are valuable services and prohibiting such referrals may do more harm than good.

Referral in hopes of future reciprocal referrals from the non-lawyer resembles the referral for which a lawyer expects a monetary reward from the referred-to service provider. This reward would likely be a proportion of the fee paid the referred-to service provider by the client. Some states prohibit such a referral; others states allow the payment of proportional fees, but only under very stringent conditions. For example, the Ethics Advisory Opinion Committee of the Utah State Bar considered the payment of proportional fees

47. It is difficult to distinguish between the case of a relationship in which referrals are expected on both sides and one in which there is no such expectation. An adequate relationship for the purpose of such a rule would be one in which it is reasonable to expect reciprocal referral. The expectation could be proven by actual reciprocal referrals.

48. *See* U.C.C. § 2-315 (1995). Such a warranty could be disclaimed if the client consented to the disclaimer in a sufficiently clearly written and explained written waiver. If the warranty is disclaimed, it does not follow that liability for failure of care in recommending a particular provider of service would be disclaimed as well.

49. Where the referred-to person is an expert whose service includes possible service as an expert witness (*e.g.*, a physician) the looked-for reward is not necessarily the future referral of a client. The referred-to physician will have an incentive to diagnose and treat in a way that maximizes the physician's and the referring lawyer's advantage. The ethics of the referral would include the ethics of tempting others to violate their own duties to the client.

for referrals.⁵⁰ The committee's opinion discussed the decisions of other states' bars, some of which barred, and some of which allowed such referrals. The Committee assumed that the client was fully aware of the relationship between lawyer and the referred-to service provider, had consented to the referral in writing, and paid no additional fee for the referral. Acknowledging that many (unspecified) issues need to be considered when making the referral to assure that the lawyer is not exerting "undue influence" on the client, the Committee stated:

For example, notwithstanding having given written approval for the transaction, the client may later have concerns that the lawyer is not providing unbiased advice or that loyalty to the client is compromised by the financial arrangement with the investment advisor. It is possible that the lawyer's professional judgment might be compromised by a motivation, overt or subconscious, to preserve the advisor's fee-sharing arrangement, even though a change in the client's financial interests might suggest some other arrangement. It is possible a lawyer might be motivated to give the client different or inferior legal advice due to the pecuniary interest involved with the financial advisor. There is a potential conflict if the lawyer were asked to mediate, litigate, or otherwise remedy a problem due to deficiencies on the part of the financial advisor. There is a possibility that the client might have been able to negotiate a lower commission had the lawyer not been receiving a commission from the investment advisor, and hence the arrangement might not be fair to the client. For example, a lawyer performing estate-planning services for the client might be in a position that is more likely to exert undue influence than a lawyer providing entirely unrelated legal services. Additional issues arise if the investment advisor is also a client of the lawyer.⁵¹

The Committee did not indicate what kind of evidence would show that a referral of a client to a provider of services in exchange for money violated the applicable rules,⁵² and seemed to leave the matter to the ethical judgment of the lawyer making the referral. Apparently, the Committee considered the service provided by the referring lawyer in expectation of a future reward too valuable to Utah clients to be prohibited.⁵³ Utah and the states that follow

50. ("It is not *per se* unethical for a lawyer to refer a client to an investment advisor and take a referral fee from the commission paid to that advisor, although the lawyer has a heavy burden to insure compliance with applicable ethical rules."). See also the ethics opinions from Ohio (against referral for fee) and Michigan (for such referrals) reported in 16 ABA/BNA Lawyers' Manual on Professional Conduct 89 (Mar. 15, 2000).

51. Utah State Bar Ethics Advisory Opinion Comm., Op. No. 99-07 (1999) (visited Mar. 21, 2000) <http://www.utahbar.org/opinions/html/body_99-07.html>.

52. *Id.* (citing to UTAH RULES OF PROFESSIONAL CONDUCT, Rules 1.7 and 1.8(a)).

53. An alternative, which might have allowed the lawyer more ethical security and at the same time continued the practice of referrals, would be to require that the referral fee be paid to the lawyer by the client. Of course, this would not help in the case where the referral was paid for by the expectation of future, reciprocal referrals.

Utah's lead would likely have little trouble with referrals of the sort discussed in this Article.

What of imposing civil liability on the referring lawyer in case the referral ends badly for the client?⁵⁴ The ordinary rules of vicarious liability would not include such liability in the case of work done by independent contractors; the referred-to persons outside the lawyer's firm clearly are independent contractors. As referral is easily included within the set of services provided by a lawyer to a client, failure to use adequate care in recommending a person to the client is already covered by malpractice. More likely than not, the damages for negligent failure to exercise due care in the selection of a person to whom work is to be referred, would include the damages recoverable from the service provider for the latter's negligence.⁵⁵ The lawyer's duty of care would assume that lawyer has sufficient information about the services to be rendered and the needs of the client with respect to those services to make a reasonably informed judgment as to the best person to whom to refer the client.⁵⁶ Moreover, liability for malpractice in making a referral need not turn on the civil liability of the service provider. An attorney would not serve as guarantor of the service provider's due care, but rather, the attorney would be responsible for the service provider's suitability to the referred client's needs. For example, sending a client to a chiropractor when the referring lawyer should have known that the client needed an orthopedic surgeon would result in liability for inadequate care, even if the chiropractor acted as a reasonable, responsible chiropractor under the circumstances. Similarly, sending a client to a relatively inexperienced, but competent engineer would violate the lawyer's duty of care if the lawyer had reason to know that the client's problem was complex and unusual, and, therefore, was best addressed by a more experienced engineer.

These suggestions of remedies for the client in the case of a bad referral would add protection for the client against the referral's harmful effects. Generally, clients accept the high likelihood that such a referral will be tainted by conflict of interest, but they allow it nonetheless. Clients expect that a lawyer would find it in his own interest not to refer a client to someone who

54. Of course, civil liability is effective only if damages can be proven with reasonable certainty. It will be hard to prove damages if the client received some value, albeit less than would have been received were the referral done with greater care.

55. This would be a substantially weaker basis for liability than the proposed warranty of suitability suggested. *See supra* note 42. Like that warranty, such liability could conceivably be limited or waived by a properly informed and evidenced client consent. *See* MODEL RULES, *supra* note 1, at Rule 1.8(h).

56. Liability could be excluded in the case in which the lawyer told the client that he had no personal knowledge relating to the quality of the referred-to service provider, and that the name was provided solely as a matter of convenience. This disclosure should be evidenced in a writing containing the notice and executed by the client.

would not provide reasonably good service. On the other hand, clients assume that rules of civil liability for provable harm are sufficient to protect the client and encourage the lawyer. That is, the rules concerning conflict of interests and the ethos that one expects from the working of the duty of loyalty add nothing on their own.

B. Allocation of Work in a Busy Office

When a lawyer decides to allocate resources with respect to the various matters before him,⁵⁷ he acts in the representation of each of those clients and those decisions are governed by the rules concerning conflicts of interest.⁵⁸ Work for one client often means less work for another. So, the allocation is one the lawyer must make untrammelled by personal interests or the conflicting interests of his clients. Arguably, a lawyer in a busy office is simply not going to be able to devote the time to each case that the lawyer would if that were the lawyer's only case. This seems to indicate that the outcome may not be as good for some matters as it would have been if the particular matter was the only one occupying the lawyer's time. Part of the problem is that the need to allocate sneaks up on the conscientious lawyer. How would one know what the level of care each matter, taken alone, deserves—what amount of work would have been allocated to a matter if that matter was only one before the office? Indeed, if the matter were accorded less than right amount of work, how would one know that any harm was done? The only reliable judgment as to how a firm's resources are best utilized is the judgment of the lawyer familiar with the matter in question. That judgment should not be affected by the value of that matter or that client to the law office, of course. But one suspects that it will be. It may be that a shift in effort from matter A to matter B will slow down the resolution of the former, or else yield a less than perfect result. It is also possible that, in the attorney's opinion, there is no substantial benefit to the client when devoting more energy to matter A. But that judgment is itself tainted by the attorney's own interests as they are affected by the value to the practice of alternative uses of resources. How ever one views it, the lawyer who must allocate resources among matters in a busy office is not simply deciding whether more work on a given matter is needed for the proper execution of the job. In deciding how to allocate sources, a conflict exists between the lawyer's and the relevant client's interests. One can say that a person who brings work to a busy office must be held to have consented

57. The problem is more complicated if all alternative uses of the lawyer's time are taken into account.

58. Model Rule 1.7 relates to the representation of each affected client whose matter is before the lawyer, and by such an allocation, "the representation of that client may be materially limited by the lawyer's responsibilities to another client." MODEL RULES, *supra* note 1, at Rule 1.7.

to this conflict, whether the client's matters are active or are likely to be active in the near future. If that is so (and it can't be by any fair reading of the rules' requirement of consultation),⁵⁹ the client's submission of the work could be considered informed consent of the potential conflict of interests in the attorney's representation of the client. Nevertheless, at some point, the conflict, which continues so long as resource allocation judgments are made by the lawyer, threatens the value of the representation to that client. At that point, a strict reading of the applicable rule saps the consent of any vitality and counsels the lawyer to withdraw.

The problem of allocating scarce office resources is not unlike the problem that arises when the lawyer finds that it might help some members of a group of clients to settle all the claims of that group together. Aggregate settlements are prohibited unless each client receives with adequate information about the settlement.⁶⁰ The difference lies in a client's opportunity to pull out and find another lawyer once the client learns of the situation.⁶¹ It is unlikely that the affected client would be adequately informed as to the situation where the question relates to the amount of time or work to be given to that client's matter.

What if one attacked the problem by redefining the situation that gives rise to it? One might define the duty of loyalty as one that depends for its scope and strength on the circumstances of the lawyer at the time he takes on the duty. That would allow the lawyer to give such care to the client's matter as is allowed by the needs of other matters on the lawyer's plate. Under such a formulation, would the "material limitation"⁶² caused by the need to attend to other matters refer only to that conflict that appears to exist when the matter is

59. "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." MODEL RULES, *supra* note 1, Terminology. The "matter in question" in this context is the quality of work the client may expect under the circumstances. Not even a sophisticated client has enough information about the office to waive the conflict between his interests and those of the lawyer (and other clients whose projects the lawyer may favor over those of the client in question). Of course, there is little reason for the more sophisticated client to worry if he is also a relatively important client. The ones who need to worry are those whose matters are less important, in part because of the relative importance of the client to the value of the practice.

60. MODEL RULES, *supra* note 1, at Rule 1.8(g), stating:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients. . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Id. See also MODEL CODE, *supra* note 9, at DR 5-106.

61. Adequate consultation should include advice concerning the client's chances of getting a better settlement with another lawyer. See MODEL RULES, *supra* note 1, Terminology, "Consult."

62. MODEL RULES, *supra* note 1, at Rule 1.7(b) ("A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities . . . or by the lawyer's own interests . . .").

brought into the office? Alternatively, would such baseline circumstances include some expectation that new work will surface and further decrease the attention given to other matters, such that current work may well require greater attention than was foreseeable originally when the duty of loyalty first applied? This view of the duty of loyalty effectively reduces the client's protection by the duty of care applicable in malpractice cases. Is that, finally, all the client is entitled to?⁶³ Should a defendant's verdict in a malpractice case preclude the imposition of sanctions on the lawyer for the same acts?

No new rule governing conflicts of interest is likely to add to a lawyer's willingness to prevent overloading his practice to the detriment of current projects. After all, the current rule prohibits exactly the kinds of conflicts of interest that arise daily in a busy law office because of competing claims demanding the lawyer's attention.⁶⁴ It requires, by its terms, that there be no more work before an office than can be done in a way that each matter, taken alone, receives its due attention. As suggested earlier, the current rule is not likely to be much of a deterrent to a lawyer overloading his practice because it is not always possible for the lawyer to accurately judge the effect of new business on existing business. Even if the rule were understood to apply to this resource allocation problem it would be ineffective because, as was suggested earlier, it would not be noticed by the lawyer until it was well past the time for cure. If the lawyer noticed the problem in time and it was possible to comply with a rule without serious detriment to the practice's financial value, the rule would be ineffective except as a matter addressed purely to the lawyer's conscience.⁶⁵ This is because, in most cases, clients will not notice when an allocation of resources has been detrimental to a particular matter; therefore, the problem will not be reported to the bar. In those cases where a client has complained to the bar about a lawyer's inadequate attention, the lawyer would likely be punished with sanctions upon a showing of a substantial difference between the value of the outcome achieved and the value of the outcome that would have been achieved. Generally, the lawyer would receive this

63. Compare MODEL CODE, *supra* note 9, at DR 5-105(c). The waiver language allows the lawyer to obtain a waiver so long as "it is obvious that he can adequately represent the interest" of the affected client. *Id.* The adverb "adequate" might be read to refer only to that representation demanded by the standard of care for malpractice—that representation expected of a lawyer with ordinary skill and knowledge, exercising reasonable care and diligence. See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 (1998) (imposing the same standard).

64. MODEL RULES, *supra* note 1, at Rule 1.7(b); MODEL CODE, *supra* note 9, at DR 5-105(A) and (B). If the conflict is seen not as a conflict between the interests of clients but between the interests of the lawyer as business proprietor and one or more clients, it is waivable under Model Code DR 5-101(A). MODEL CODE, *supra* note 9, at DR 5-101(A).

65. Even in those cases in which a lawyer should know that he is risking liability for inadequate work on a matter, one suspects, the ideal of loyalty to the client notwithstanding, that risk will be effective to affect conduct only if it threatens liability for an amount that is greater than that gained by the failure to allocate adequate resources to that matter.

punishment only if several such complaints are made.⁶⁶ A similar problem of proof of loss precludes civil liability for malpractice or breach of fiduciary duty from being much of a deterrent.

One could simply admit that this is a problem that, as a practical matter, cannot be dealt with in terms of conflict of interests as set out in Model Rule 1.7 or the Restatement, and that the client's protection must come from someplace else. In the service of candor, to isolate this problem as one that cannot be dealt with in terms of the duty of loyalty, a separate paragraph might be added to Rule 1.7. The new paragraph might state that all decisions concerning the allocation of resources among matters before the attorney, including the acceptance of new matters, should be made in a way that will not have a material adverse effect on any client. Regulatory focus would then shift from prohibition to harm reduction by changing the law governing the lawyer's fees⁶⁷ and perhaps the level of care due from a lawyer.⁶⁸

C. *Managing Relations with Others*

A problem similar to allocation of resources arises when a lawyer depends on good relationships with judges or administrators with whom he has frequent contact. Indeed, the lawyer may be hired because of his experience before a particular tribunal, where the lawyer has avoided making arguments that would harm his standing with the tribunal. For example, such a lawyer might not challenge the fairness or authority of the person hearing the matter, even though the challenge could benefit the client (*e.g.*, by providing a ground for appeal or modification of the judgment). The situation is paradoxical because the lawyer's good reputation with the tribunal is often the reason the client went to that lawyer in the first place. One is tempted to say to the client that he must take the bitter with the sweet—the lawyer's need to curry favor (or at least not to burn bridges) in order to maintain effectiveness. Yet, if we take the duty of loyalty seriously, and insist that the lawyer ought not favor one client over another, even if one of the clients is a future and not a present client, the lawyer is duty-bound to make the case that will win for the client. Here, again,

66. The history of the bar's enforcement of rules governing competence and diligence suggests this.

67. Perhaps this could be accomplished by reducing the fee on a showing that the resources devoted to the matter were inadequate in the light of the result to be expected from a lawyer who bills at that rate.

68. This could be done by making the lawyer's experience and public claims of experience and expertise raise the standard of care to be met by the defendant in a legal malpractice suit. The rule of basic competence could be changed so that the required minimum rises with the lawyer's experience and the lawyer's claimed expertise as seen from the lawyer's advertising and the lawyer's billing rate. MODEL RULES, *supra* note 1, at Rule 1.1; MODEL CODE, *supra* note 9, at DR 6-101. Raising the bar would impose a duty of growth in the profession on top of the basic duty of competence.

the perception and judgment of the lawyer is affected by the desire to maintain and increase the value of his practice. Of course, the lawyer is only going to make non-frivolous arguments that will persuade. That threshold rises, in the lawyer's mind, as the lawyer's concern for future success before the tribunal affects his judgment of what is frivolous and what is not, what will succeed and what will not. Again, as a practical matter, the duty of loyalty is reduced to a duty to avoid malpractice.⁶⁹ As with the preceding problem, that of allocating resources among clients' matters, there is no practical way in which an amendment to the rules governing conflict of interests can resolve this problem.

D. Conclusion

In at least three cases of conflicting interests, the duty of loyalty and the rules enforcing the duty are ineffective. The conflicting interests consist of referral of clients to other service providers; allocation of office resources; and decisions about strategy and tactics in a context in which the lawyer does, and expects to do, a great deal of business. Strict enforcement of the rules in these cases would be difficult at best, and at worst, would deprive clients of valuable services. The alternative to rule enforcement—reliance on the good judgment and rational self-interest of the lawyer⁷⁰—taken by the Utah bar in the case of referrals in exchange for a share in the fee⁷¹—seems to have recommended itself to the bar. All that remains is to make the exclusion of these matters from the normal rules of conflict of interest plain, at least to insulate what is left against erosion.

What of the duty of loyalty? There is no solid empirical evidence for any claim that the duty of loyalty has, itself, any efficacy in the regulation of lawyer conduct in the face of the lawyer's other interests as business proprietor. Yet, the independent efficacy of the duty of loyalty seems to be considered an important ground for rules against lay participation in the operation of a law firm and the acceptance of "multidisciplinary practice" where lawyers and other non-lawyers would join to provide a broad range of services to clients.⁷²

The independent importance of the duty of loyalty is important as well to the discussion of lawyers' ethics insofar as they affect the rights and security of persons other than the client. It is suggested that that duty would be weakened considerably if, in the service of the client, the lawyer had to consider the

69. The malpractice plaintiff would have to show that there was plainly an alternative tactic or strategy which (a) would likely have been successful and (b) would have been selected were it not for the conflict.

70. Such self-interest is informed by the law of malpractice and breach of fiduciary duty.

71. *See supra* note 44.

72. *See supra* note 7.

interests of third persons, not to mention opponents. Yet it is already clear, if this Article is accurate, that such loyalty-affecting dissonance pervades private practice when a lawyer's interests in the maintenance and development of the law practice conflict with a client's interests.

How does one protect the client from harm that may result if the lawyer is excessively concerned about the health of the practice? This Article suggests some changes in the laws governing lawyers. Liability for malpractice should be strengthened by setting the duty of care at the standard of the defendant-lawyer's purported skill and actual experience in the practice of law. A lawyer should also be held to warrant the suitability of a referred-to service provider for the client's original desire for a referral. A fee should be held unreasonable both for disciplinary purposes and as a defense against the claim for a fee, to the extent that the resources devoted to the work for that client were not what one should have expected for the fee charged. Finally, the baseline requirements of competence and diligence should be applied to each lawyer according to that lawyer's experience in the practice of law. These changes would add to the lawyer's reasons for care when referring clients and would improve the lawyer's treatment of the client's problems in the course of the lawyer's busy and growing law practice.