

ACCIDENTAL CLIENTS

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I. WHY "ACCIDENTAL" CLIENTS?

Imagine any legal ethics issue, perhaps one you have read about, seen in a movie, or witnessed in person. What do all of these issues have in common? A client.

Thirty years ago, philosopher Richard Wasserstrom wrote an article exploring "role-differentiated behavior" in lawyers.¹ He began by observing that we all engage in this behavior when we favor the interests of some persons, for example, our children, over the general interests of others, for example, the children of our community, nation or world.² Like parents, lawyers rightly favor the interests of clients over the interests of others. The significance of choosing such a personal relationship brings with it obligations we do not otherwise recognize. For parents, nurture and support; for clients, fiduciary duties to stay focused on the clients' best interests as articulated by the client. In fact, some legal ethics issues arise because we owe these fiduciary duties to clients, which we may not properly intuit on our own. Once a client-lawyer relationship is formed, the law governing lawyers recognizes that the lawyer has assumed four core fiduciary obligations (the "4 C's"):

- Competence,³
- Communication,⁴
- Confidentiality,⁵
- Conflict of interest resolution.⁶

1. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1, 3 (1975).

2. *See id.* at 4.

3. *See* MODEL RULES OF PROFESSIONAL CONDUCT R. 1.1, 1.3 (2003) [hereinafter MODEL RULES].

4. *See id.* at R. 1.4.

5. *See id.* at R. 1.6, 1.8(b), 1.9(c).

Legal remedies⁷ for breach of the 4 C's, such as professional discipline,⁸ malpractice,⁹ breach of fiduciary duty,¹⁰ fee forfeiture¹¹ and disqualification¹² also belong primarily, but not exclusively, to "clients."¹³

At the same time, lawyers may be consulted, and even paid, but not serve as "lawyers" for clients. Examples abound. Lawyers may be sought out by others because they are friends, escrow agents, corporate officers or other agents, rather than primarily for the purpose of obtaining legal assistance.¹⁴ When this occurs, the attorney-client privilege and work product doctrine do not protect their communications in subsequent litigation.¹⁵ Lawyers also act as expert witnesses, which usually limits some of the fiduciary duties they might otherwise owe.¹⁶ And, of course, lawyers may also be clients, which raises intriguing questions about the relationship between the lawyer's lawyer and the client-lawyer's clients.¹⁷

Another group of legal ethics issues arises because in representing clients, lawyers assume other obligations to non-clients and to courts that can conflict with client loyalties. For example, lawyers have affirmative obligations not to assist client crimes and frauds and, on occasion, to disclose client confidences to prevent them.¹⁸ Similarly,

6. *See id.* at R. 1.7-1.8, 1.11-1.12.

7. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 5-6 (2000) [hereinafter RLGL].

8. *See id.* at § 5.

9. *See id.* at §§ 48, 50, 52-54.

10. *See id.* at § 49.

11. *See id.* at § 37.

12. *See id.* at § 6 cmt. i.

13. For example, in representing an organization, the "client" envisioned by Model Rule 1.13 will not be the same as the "client" for purposes of the prohibition against sexual relationships with "client" in Model Rule 1.8(j) and Comment 19. MODEL RULES, *supra* note 3, at R. 1.13, 1.8(j), 1.8 cmt. 19.

14. *See generally* Hughes v. Meade, 453 S.W.2d 538 (Ky. 1970) (holding that a lawyer retained by a person who sought to return stolen property primarily because of lawyer's good relationship with the police was required to reveal client's identity); *cf.* Dean v. Dean, 607 So. 2d 494, 495 (Fla. Dist. Ct. App. 1992) (holding that a lawyer retained to return stolen property who asked client whether client sought legal advice and whether the provision of legal advice included a condition precedent that the lawyer not disclose the client's identity was protected by the attorney-client privilege from revealing client's name).

15. RLGL, *supra* note 7, at §§ 72, 87.

16. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-407 (1997) (discussing a lawyer as an expert witness or expert consultant).

17. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-406 (1997) (discussing conflicts of interest in regard to representing opposing counsel in unrelated matter).

18. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-366 (1992) (discussing withdrawal when a lawyer's services will otherwise be used to perpetrate a fraud); ABA Comm. on

lawyers must be able to identify whether opposing parties or witnesses are “represented persons” to avoid prohibited *ex parte* contacts.¹⁹

In most situations, parents know who their children are, and lawyers know their clients. They dutifully and proudly enter each new client’s identity in a law firm conflicts data base, check for conflicts with current and former clients, and proceed only if no conflict is revealed, or if proper informed consent to the conflict has been obtained.²⁰ But increasingly, the law governing lawyers has identified “accidental” clients, those clients that lawyers had little or no idea existed. This Article considers legally recognized client-lawyer relationships, many of which can be created accidentally from a lawyer’s point of view, and often when a lawyer least expects it. Some of these may seem obvious, but others probably will surprise many lawyers and law students. So here, with apologies to David Letterman²¹ and Anne Tyler,²² is the Top Ten List of Accidental Clients.

II. THE TOP TEN ACCIDENTAL CLIENTS

10. *Court Appointments*

Client-lawyer relationships can be established by court order, regardless of lawyer consent.²³ In criminal cases, courts have recognized a constitutional right to counsel for over seventy years.²⁴ This right to defense representation was recognized first in some,²⁵ and then in all felony cases, on the ground that defense lawyers “are necessities, not

Ethics and Prof’l Responsibility, Formal Op. 98-412 (1998) (discussing disclosure obligations of a lawyer who discovers that her client has violated a court order during litigation).

19. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 97-408 (1997) (discussing communication with government agency represented by counsel); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95-396 (1995) (discussing communication with represented persons); 93-378 (1993) (discussing *ex parte* contacts with expert witnesses); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 91-359 (1991) (discussing a lawyer’s contact with former employees of an adverse corporate party).

20. N.Y. CODE OF PROF’L RESPONSIBILITY DR 5-105(E) (2000) (requiring lawyers to maintain such a conflicts record keeping system, and to check it before taking on a new client).

21. David Letterman, Top Ten List, Late Show with David Letterman, available at http://www.cbs.com/latenight/lateshow/top_ten/ (last visited May 20, 2005).

22. See generally ANNE TYLER, *THE ACCIDENTAL TOURIST* (1985).

23. *Powell v. Alabama*, 287 U.S. 45, 73 (1932).

24. See Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1448-60 (1992) (giving a history of the American tradition of an independent criminal defense bar).

25. *Powell*, 287 U.S. at 70 (stating that the Sixth Amendment requires counsel if fundamental unfairness would result); see *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938) (holding that the Sixth Amendment requires counsel in all federal criminal proceedings).

luxuries,” both to protect against the risk of wrongful conviction and to provide due process of law.²⁶ Rights to counsel in juvenile and certain misdemeanor cases followed in the 1960s.²⁷ Today, a person accused of a crime has a right to retained or appointed counsel in all “critical stages”²⁸ of criminal felony prosecutions and in misdemeanor cases where the defendant is sentenced to a term of imprisonment.²⁹ In addition, a person convicted of a crime has a Fourteenth Amendment right to counsel for capital sentencing hearings and for the first appeal of right.³⁰

Courts have inherent power to appoint counsel to preserve this constitutional right in criminal cases.³¹ For related reasons, courts recognize their inherent power in civil cases to preserve access to public dispute resolution for individual litigants and to maintain public respect for the courts as a politically legitimate arm of the justice system. Thus, where indigency prevents equal access to the civil justice system, courts can and will use statutory or inherent powers to request³² or conscript³³ unwilling lawyers to represent clients when counsel is reasonably necessary to pursue a relatively complex case. Constitutional challenges to this inherent power have not succeeded unless clients’ constitutional

26. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that the Sixth Amendment requires right to counsel in all felony cases).

27. *In re Gault*, 387 U.S. 1, 34-42 (1966) (holding that the Sixth Amendment requires counsel for juvenile proceedings that may lead to commitment in state institutions); *Argersinger v. Hamlin*, 407 U.S. 25, 36-37 (1972) (holding that the Sixth Amendment requires counsel in misdemeanor cases where defendant is imprisoned); *Alabama v. Shelton*, 535 U.S. 654, 674 (2002) (holding that the Sixth Amendment requires counsel in misdemeanor cases where defendant receives a suspended sentence).

28. Critical stages include preliminary hearings, some pretrial identification proceedings, and questioning by prosecutor or police designed to elicit inculpatory statements. WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* 569 (3d ed. 2000).

29. *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (holding that counsel is not required in misdemeanor cases where the defendant is fined but not imprisoned); *Nichols v. United States*, 511 U.S. 738, 746-47 (1994) (holding that the defendant can receive an enhanced term of incarceration under federal sentencing guidelines even if a prior misdemeanor conviction resulted in a fine where no counsel was provided).

30. *Douglas v. California*, 372 U.S. 353, 357-58 (1963); *Ross v. Moffit*, 417 U.S. 600, 610 (1974) (holding that no right to counsel exists for discretionary state appeals); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (holding that no right to counsel exists in state habeas corpus proceedings).

31. *In re Amendments to Rules*, 573 So. 2d 800, 803-04 (Fla. 1990).

32. *Mallard v. U.S. Dist. Ct.* 490 U.S. 296, 301-02 (1989) (holding that 28 U.S.C. § 1915(d) allows federal judges to request that counsel serve pro bono in a civil case, but does not grant them the power to appoint unwilling lawyers).

33. *Bothwell v. Republic Tobacco Co.*, 912 F. Supp. 1221, 1227 (D. Neb. 1995).

rights are at stake,³⁴ or the appointment prevents a lawyer from otherwise earning a "decent living."³⁵

As officers of the courts, lawyers have a concomitant duty to accept court appointments.³⁶ The Model Rules reflect this understanding by obligating a lawyer to serve when appointed by a court unless that lawyer convinces the judge that a particular appointment would violate some other provision of the lawyer code, such as a duty of competence, confidentiality, or loyalty.³⁷

For example, a lawyer who represents the other side in litigation would be faced with a nonconsentable conflict of interest.³⁸ A more common excuse is lack of competence, but courts put the burden on lawyers to establish their own lack of ability, and they assume that lawyers can become competent through study and mentoring.³⁹ Lawyers also have argued that taking on a representation will create an "unreasonable financial burden," but most courts refuse to accept this excuse unless accepting a court appointment would result in near total loss of the lawyer's current employment.⁴⁰ The same rule permits lawyers to plead that the client or cause is so personally repugnant that it would interfere with a client-lawyer relationship, but that too can be difficult to establish.⁴¹ So if the judge orders a lawyer to serve, the lawyer should sit back and enjoy the learning experience. That lawyer might even be proud of the fact that he or she is serving in a system that does not consign people to jail without due process.

34. *E.g.*, *Zarabia v. Bradshaw*, 912 P.2d 5, 7-8 (Ariz. 1996) (holding that a rotating system for appointing private lawyers for criminal defense in a county that refused to establish a public defender office presents too great a risk of ineffective assistance of counsel).

35. *Jewell v. Maynard*, 383 S.E.2d 536, 547 (W. Va. 1989) (holding that no lawyer should be required to devote more than ten percent of his time per year to court-appointed cases); *Arnold v. Kemp*, 813 S.W.2d 770, 776-77 (Ark. 1991) (holding that statutory fee cap of \$1000 in capital cases constitutes an unconstitutional burden on appointed counsel).

36. MODEL RULES, *supra* note 3, at R. 6.2; RLGL, *supra* note 7, at § 14(2); *Hawkins v. Comm'n. for Lawyer Discipline*, 988 S.W.2d 927, 931, 940-41 (Tex. App. 1999), *cert. denied*, 529 U.S. 1022 (2000) (estate planning lawyer who intentionally violated a court appointment order and told HIV positive defendant he was not entitled to counsel, suspended from practice for one year).

37. MODEL RULES, *supra* note 3, at R. 6.2; RLGL, *supra* note 7, at § 14(2).

38. MODEL RULES, *supra* note 3, at R. 1.7(b)(3); RLGL, *supra* note 7, at § 122.

39. *E.g.*, *Stern v. Grand*, 773 P.2d 1074, 1080 (Colo. 1989) (holding that lawyer appointed to represent felony defendant did not meet his burden of establishing incompetence where he was a competent civil practitioner and could educate himself and associate with co-counsel).

40. *Cunningham v. Sommerville*, 388 S.E.2d 301, 304-05, 307 (W. Va. 1989) (holding that lawyer employed full time as corporate counsel not required to take criminal defense appointment, if employer's prohibition on taking outside employment meant she would lose her job).

41. *United States v. Travers*, 996 F. Supp 6, 14-16 (Fla. 1998).

9. *Accidental Consensual Client-Lawyer Relationships:
Of Reasonable Reliance*

Nearly all lawyer code provisions assume that a professional relationship has been established, but do not explain how that occurs. General legal principles found in contract and tort law fill this gap.

Courts find that a consensual client-lawyer relationship has been formed if a prospective client requests legal assistance or advice (offer), a lawyer provides the service or agrees to provide it (acceptance), and the client pays for the service or agrees to pay for it (consideration).⁴² The typical case that comes to mind involves a prospective client who sits down with a lawyer, discusses a legal matter, and hires the lawyer to proceed.

Courts also recognize implied client-lawyer relationships that can create accidental clients. They have found that a prospective client's reasonable reliance on a lawyer's advice or assistance suffices as an alternative for consideration (promissory estoppel).⁴³ Some courts prefer a torts analysis, which leads to similar results: A lawyer who renders legal service or advice to a person under circumstances which make it reasonably foreseeable that harm will occur to that person if the services are rendered negligently will be accountable to that person, even in the absence of any overt agreement to provide services or promise to pay.⁴⁴

For example, a lawyer who tells a prospective client "I don't want to take your case" and "You don't have a case" may find that the prospective client reasonably relies on the second statement as legal advice. If the statute of limitations runs before this person finds out she may have a case, the lawyer who remembers only telling her he was not interested may find himself with an accidental client who can successfully assert malpractice against him.⁴⁵ Further, a lawyer who allows a non-lawyer employee to advise putative clients to notify potential defendants of an injury on the premises, arranges for a medical exam with the defendant's insurer, and instructs them to write the lawyer requesting legal assistance may have bound the lawyer by actual or apparent authority to an accidental client-lawyer relationship as well.⁴⁶

These cases illustrate that courts impose a pre-contractual duty of good faith on lawyers by looking back on the matter from the

42. Bd. of Overseers of the Bar v. Mangan, 763 A.2d 1189, 1192 (Me. 2001).

43. Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686, 693 (Minn. 1980).

44. *Id.* at 693.

45. *Id.* at 690-91.

46. DeVaux v. Am. Home Assurance Co., 444 N.E.2d 355, 356-57, 359 (Mass. 1983).

perspective of a reasonable client. As a result, a lawyer's memory of who said what when may not be the version that ultimately prevails. An engagement or nonengagement letter will clarify the meaning of an initial consult, as well as plant the seeds of good will for future potential retainers.

Except in a few jurisdictions, the rules of professional conduct—for matters other than contingent fee agreements (a quite important exception)—do not require retainer or engagement letters. New York is the exception to this rule, recently enacting a new rule that requires engagement letters in all cases except those where the lawyer charges less than \$3,000 or the “attorney’s services are of the same general kind as previously rendered to and paid for by the client.”⁴⁷ The New York rule illustrates why the use of engagement letters is such a good idea. It requires lawyers to address matters that have been the greatest source of misunderstanding between clients and lawyers: (1) an explanation of the scope of the legal services to be provided; (2) an explanation of attorney’s fees to be charged, expenses and billing practices; and (3) information about the client’s right to arbitrate fee disputes.⁴⁸ Taking the time to craft such an effective engagement letter is the best insurance policy against an unhappy, confused or cantankerous client.

Beyond these basic requirements, lawyers also can use engagement letters to prevent misunderstandings by clarifying other issues that might arise during the course of the matter, such as:

- Identifying the client and related parties;
- Identifying the goals of the representation;
- Defining the scope of the engagement;
- Identifying proposed staffing as well as agents of client or lawyer;
- Identifying third-party neutrals;
- Identifying and providing consents to actual or potential conflicts of interest;
- Determining confidentiality ground rules in multiple representations;
- Describing responsibilities of lawyer and client;
- Describing the fee agreement and billing schedule;
- Describing law firm policy about file retention;
- Specifying methods of communication;

47. N.Y. Ct. R. §§ 1215.1, 1215.2. In domestic relations matters, New York requires lawyers to provide clients with both a Statement of Client’s Rights and Responsibilities and a written retainer agreement, regardless of the fee charged. *Id.* at §§ 1400.2, 1400.3.

48. *Id.* at § 1215.1(b).

- Specifying grounds for withdrawal or termination;
- Specifying methods of dispute resolution between lawyer and client.⁴⁹

8. *Prospective Clients*

When prospective clients discuss the possibility of obtaining legal services with lawyers, implied client-lawyer relationships can develop. Though prospective clients may not always become full-fledged clients, they become clients to the extent that they reasonably rely on a lawyer's legal advice.⁵⁰ Even when lawyers make it clear that they will not take on a representation, to the extent a lawyer offers legal advice and gains information from such a person, two duties, however limited, attach to such an encounter: competence in any advice offered and confidentiality that cloaks anything the lawyer learns.⁵¹

In fact, anytime a lawyer banishes a prospective client from his or her office, the lawyer should confirm the rejection of the client in writing in a nonengagement letter, lest the client assert later she thought the lawyer agreed to handle her matter. Nonengagement letters can be used to decline a specific request for representation, to clarify that a lawyer represents some, but not all of the parties to a matter, to prevent reliance by unrepresented third parties, who may or may not be beneficiaries of a client, or to prevent a claim for negligent misrepresentation.⁵²

With respect to the duty of competence, lawyers should be careful to say what they mean. "You have no case" is legal advice, and if offered to a prospective client it means that the lawyer has accepted that person's offer or request for legal services. Add consideration (any payment for the consult) or detrimental reliance and courts will find a client-lawyer relationship, complete with the 4 C's appropriate to the scope of the representation. If a lawyer means, "I don't want to waste my time determining whether you have a case," or "I don't ever handle matters like this one," or "I can't take your case because I currently represent the other side," the lawyer should make that clear, or run the

49. RONALD E. MALLIN & JEFFREY M. SMITH, PREVENTING LEGAL MALPRACTICE § 2.12 (5th ed. 2000 & Supp. 2003); GARY A. MUNNEKE & ANTHONY E. DAVIS, THE ESSENTIAL FORMBOOK: COMPREHENSIVE MANAGEMENT TOOLS FOR LAWYERS 141-144 (2000); see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 02-425 (2002) (discussing retainer agreements requiring the arbitration of fee disputes and malpractice claims).

50. *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319-20 (7th Cir. 1978).

51. MODEL RULES, *supra* note 3, at R. 1.18; RLGL, *supra* note 7, at § 15.

52. MUNNEKE & DAVIS, *supra* note 49, at 280.

risk that a prospective client will remember the conversation differently after the statute of limitations expires.⁵³

Determining whether to retain a lawyer requires a prospective client to disclose some information.⁵⁴ To facilitate this exchange, the law governing lawyers cloaks the initial prospective client consult with the same confidentiality protection clients receive.⁵⁵ If a lawyer decides not to represent the prospective client, that person or entity becomes a "former client" for purposes of the confidentiality rules.⁵⁶ The result: Even if a lawyer never opens a client file, the lawyer must enter the prospective client's identity in the law firm's conflicts database, and refrain from using or disclosing the information shared in the discussion.⁵⁷

In addition to the formal prospective client-lawyer meeting, prospective clients lurk in at least ten circumstances that have trapped unwary lawyers in accidental client-lawyer relationships that they never intended to create.

A. Beauty Contests

Increasingly, prospective clients want to audition lawyers. Some seek a lawyer for a personal matter, such as a divorce, and want to personally assess the style as well as the skills of the lawyer. Others face large-scale litigation and want to find the best lawyers before other parties to the matter engage them.

Model Rule 1.18 parallels case law and reminds lawyers of their confidentiality obligations to their prospective clients.⁵⁸ It also provides that learning confidential information from another party to the matter need not necessarily conflict out a law firm, as long as two conditions are met. First, the firm has to have taken steps to avoid gaining no more than the minimum information required to learn if it can take on the matter.⁵⁹ Second, the lawyer or lawyers who learned the information have to be screened from working on the new matter.⁶⁰

53. *Flatt v. Super. Ct. of Sonoma City*, 885 P.2d 950, 951 (Cal. 1994) (holding that lawyer who informed prospective client she could not represent her due to a conflict has no duty to warn prospective client about relevant statute of limitations).

54. MODEL RULES, *supra* note 3, at R. 1.18 cmt. 3.

55. RLGL, *supra* note 7, at § 15.

56. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-358 (1990) (discussing protection of information imparted by prospective clients).

57. MODEL RULES, *supra* note 3, at R. 1.18(b); RLGL, *supra* note 7, at § 15.

58. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-358 (1990) (discussing protection of information imparted by prospective clients).

59. *Poly Software Int'l, Inc. v. Su*, 880 F. Supp. 1487, 1491 (D. Utah 1995) (holding that lawyer who controlled disclosures in initial interview so that no details of proposed litigation were

What if several prospective clients interview a lawyer for the same matter? If that lawyer had no understanding with the first prospective client that meeting with her—regardless of what was said—would not preclude an alternative representation, then that prospective client will be able to conflict that lawyer and that law firm out of representation of other clients in the same matter if the lawyer learned any confidential information.⁶¹ Courts may uphold advance waivers from prospective clients in this situation as long as the waiver warns that anything said at the beauty contest will not be asserted as a basis for barring them from taking on another client in the same matter.⁶² And, as with all prospective waivers, this one will be subject to challenge on the ground that the client had no idea when it entered into it that the law firm would learn so much about the prospective client.⁶³ The irony here is that the more a lawyer shows off at the audition, the more likely it is that lawyer will be conflicted out, even if he or she secured a prospective waiver.⁶⁴

B. Public Speeches

Prospective clients sit in audiences listening to lawyers speak and answer questions, and they also read books, articles and brochures prepared by lawyers. Lawyers should be proud of their role in educating the public about legal rights and obligations, and, of course, such occasions present the opportunity to advertise the lawyer's expertise and willingness to take on new clients as well. As long as the lawyer-speaker describes the law generally or explains its applications to general patterns of conduct, the lawyer does not accept any offer of any

revealed not disqualified); *B.F. Goodrich Co. v. Formosa Plastics Corp.*, 638 F. Supp. 1050, 1052-53 (S.D. Tex. 1986) (holding that a one-day discussion of case did not disqualify lawyer where client's inside legal counsel monitored disclosures and confidential information disclosed not likely to harm prospective client).

60. MODEL RULES, *supra* note 3, at R. 1.18.

61. *Bridge Prods., Inc. v. Quantum Chem. Corp.*, No. 88 C 10734, 1990 WL 70857, at *4 (N.D. Ill. Apr. 27, 1990) (holding that a lawyer who learned settlement terms and strategy of a prospective client during a beauty contest and did not seek waiver was disqualified despite efforts to screen affected lawyer).

62. *See generally* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-372 (1993) (discussing waivers of future conflicts of interest).

63. *Id.*

64. *State ex rel. Youngblood v. Sanders*, 575 S.E.2d 864, 871 (W. Va. 2002) (holding that a lawyer was not disqualified from representing defendant where codefendant earlier consulted his paralegal but did not disclose information that was not already known by the police); *Bays v. Theran*, 639 N.E.2d 720, 724 (Mass. 1994) (holding that a lawyer was disqualified where one telephone conversation with prospective client included discussion of the merits of the case).

prospective audience-client to take on a new matter.⁶⁵ However, when a member of the lawyer's audience asks a question that depends upon an assumption of specific facts, the lawyer who offers a fact-specific answer may be accepting the offer by giving legal advice to that person.⁶⁶ To avoid this, lawyers should begin a response with "I'm not here to offer specific legal advice" (and then not do it), or "A person facing that situation would be wise to hire a lawyer for further advice" (which constitutes legal advice, but reliance on that admonition is unlikely to get the lawyer in trouble).

Lawyers are in especially dangerous territory when they begin a response with "There's no case/redress/cause of action in that circumstance" because the listener could rely on that advice and fail to seek a lawyer for a full opinion before the statute of limitations expires.

C. Advertising

Prospective clients also read or listen to advertising. Lawyers who are careful about giving legal advice to audiences should act with equal circumspection in writing advertising copy. It's great to educate the public about legal services and the law that provides persons with legal rights and responsibilities,⁶⁷ but stating anything about the law applied to specific facts that might be detrimentally relied on by a person unfamiliar with the law and its application can create an accidental client, whose name the lawyer does not know.

Lawyers can add a disclaimer to their advertising to prevent reliance, but they should be sure that it clearly informs readers why any reliance on their ad is not reasonable. "You should not rely on this message for legal advice" may not be sufficient if the lawyer has already given legal advice. Adding a "because" (every case differs, or a lawyer must evaluate all the facts, or the law provides for various defenses, or whatever else explains the situation) that spells out why the prospective client needs the lawyer (not just the lawyer's ad) and why reliance on the ad alone is unreasonable can eliminate an accidental client.

65. Utah Bar Ethics Advisory Op. Comm., Formal Op. 99-04 (1999) (discussing the ethical considerations that govern a lawyer who wishes to conduct legal seminars; provide legal information to groups of retirement home residents; conduct open houses; set up trade booths; participate in bar-sponsored question and answer sessions; or make in-person contacts with potential clients).

66. *See id.* (holding that a lawyer who provides individualized legal advice during the course of a law-related seminar would be providing legal services).

67. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974) (discussing the publicizing of the services of a legal services office).

D. E-Lawyering

Prospective clients also surf the web looking for legal information. If a lawyer would not say it in person to an audience, or write it in a newspaper, why would a lawyer create the same problem on the lawyer's website? Lawyers should feel free to use email and to create websites that advertise and educate the public, but also should understand that they may be entering a murky divide.⁶⁸ Targeted mailings—for example to the victims of an accident—are permissible.⁶⁹ In-person or telephone solicitations are not.⁷⁰ Although the Supreme Court has not yet weighed in on the issue, the comments to Model Rule 7.3 indicate that targeted email solicitations are permissible, but that interactive email conversations are not.⁷¹ Some jurisdictions do not make this distinction.⁷²

A lawyer's website can establish client-lawyer relationships with those who request the lawyer's assistance after reading the website's informative communication. But an unknown person also can rely on website legal advice that applies to that person's individual situation. For that reason, websites should invite inquiries, not reliance. Lawyers who want to offer prospective clients legal advice should know who they are, do a conflicts check, and, if they like, charge for the consult. These overt steps should trigger the lawyer's natural tendency to remember that the 4 C's have attached. Lawyers who want to attract new clients only after they have spoken to them should make sure their website disclaimer clearly informs prospective clients why.

E. Social Gatherings

Prospective clients occasionally appear at social events. A law firm that holds an open house to celebrate its new location may deliberately

68. N.Y. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 709 (1998) (discussing the use of the internet to advertise and to conduct law practice focusing on trademark; use of Internet e-mail; use of trade names).

69. *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 479 (1988); *cf. Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995) (upholding a state rule that bars such mailings within the first thirty days after the accident).

70. *Ohralik v. Ohio St. Bar Ass'n*, 436 U.S. 447, 454 (1978).

71. MODEL RULES, *supra* note 3, at R. 7.3 cmt. 1-3; Ohio Supreme Court on Legal Ethics and Prof'l Responsibility, Formal Op. 2004-1 (2004) (stating that lawyers are discouraged, but not prohibited from advertising legal services by sending unsolicited e-mails).

72. *E.g.*, D.C. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 316 (2002) (holding that lawyers may participate in chat rooms with prospective clients but should avoid giving specific legal advice).

invite them.⁷³ Everyone loves to get free legal advice, even if it is only worth what they are paying for it. Lawyers are easy targets at social occasions, where guests may be loosened up a bit and ready to talk. When the host introduces a lawyer and non-lawyer and the latter says: "So, you're a lawyer," the lawyer must think: *This may be a prospective client, so I should be careful about getting information and giving legal advice.* Of course, the lawyer who is too tired or otherwise under the weather, should just say, "Not tonight, I'm off the clock."

Again, any response to a specific legal question could indicate a lawyer's acceptance of the other person's offer or request for legal advice. If that person reasonably relies and is harmed, malpractice could result. Even if he or she doesn't rely on the lawyer's advice, the information shared could be confidential if that person later is identified as a prospective client under Model Rule 1.18.⁷⁴

F. Consulting Lawyers

Prospective clients may lurk in the guise of another lawyer who seeks a lawyer's advice. For example, when an old law school friend calls and asks what to do about a difficult client who will not pay his bill and threatens a malpractice suit, the responding lawyer has at least one accidental client. The law school friend is asking for legal advice and will become a client if the responding lawyer offers it. If the friend shares confidential information about his client for the purpose of furthering his representation of that client, then his client also might become the responding lawyer's client. Lawyers who wish to avoid these accidental clients should conduct such conversations in a hypothetical format. Even then, friends can be considered clients insofar as lawyers offer advice about the effect of the law on the friend's conduct (whether she can withdraw from the representation, collect her fee, or avoid a malpractice suit). If a lawyer has learned the identity of a consulting lawyer's client in the course of a conversation, and if the consulting lawyer has obtained the client's permission for the consult, then the responding lawyer probably has undertaken a client-lawyer relationship with the calling lawyer's client as well. That event should trigger a conflicts check before any advice is offered.⁷⁵

73. See Wis. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. E-94-3 (holding that lawyers may hold open houses to which business owners in the neighboring community receive written invitations).

74. MODEL RULES, *supra* note 3, at R. 1.18(b).

75. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-406 (1997) (discussing lawyers as the lawyer for, or client of, another lawyer).

G. Referral Fees

Prospective clients become real accidental clients when a referring lawyer intends to split a fee. Lawyers who are too tired, busy, or inexperienced to handle a matter wisely, refer the prospective client to the best lawyer in town who has agreed to share her fee with them. Everybody wins. But, does the referring lawyer have a client? If he or she shares the fee, yes.⁷⁶ Model Rule 1.5(e) allows for referral fees as long as three conditions are met.⁷⁷ The total fee must be reasonable, the client must agree in writing to the arrangement including the share each lawyer will receive, and the clincher: the fee must either reflect the proportion of services each lawyer provides to the client, or each lawyer "assumes joint responsibility for the representation."⁷⁸ The latter condition makes the referring and receiving lawyers jointly and severally liable for the "representation as a whole."⁷⁹ This means that they both have a client whether or not the referring lawyer agreed to or actually performed any service beyond the referral.

Recognizing referral clients as real clients should lead lawyers to take a number of other steps. First, the referred client's name should be entered in both lawyers' conflicts database. Second, if the client calls the referring lawyer for reassurance about advice or service received from the best lawyer in town, that lawyer should follow up to avoid his or her own tort liability. Third, the referring lawyer should be sure that the best lawyer in town properly informed the client in writing about the nature of the agreement. Otherwise, both lawyers have charged an illegal fee and may not be able to collect at all.

Lawyers who refer a case to another lawyer because they or someone in their firm has a nonconsentable conflict of interest cannot agree to or collect a referral fee, because it will be impossible for them to work on the matter or "assume[] joint responsibility for the representation."⁸⁰

H. Unrepresented Parties

Unrepresented parties, even those on the opposite side of a transaction in which a lawyer represents a client, also can masquerade as prospective clients. For example, such a person may attempt to get legal advice from the other party's lawyer. If the lawyer gives it, the lawyer

76. MODEL RULES, *supra* note 3, at R. 1.15(e).

77. *Id.*

78. *Id.*

79. MODEL RULES, *supra* note 3, at R. 1.5 cmt. 7.

80. MODEL RULES, *supra* note 3, at R. 1.5(e)(1).

has a new client. If the lawyer's legal advice conflicts with obligations to the lawyer's first client, the lawyer has violated both the conflicts of interest rules as well as the rule that protects unrepresented persons from overreaching.⁸¹ The lawyer should have warned the unrepresented party that the lawyer does not represent or advocate for anyone but the original client, and should have advised the unrepresented person to secure independent counsel.

Similarly, a lawyer who closes the real estate transaction for a buyer might be asked by the unrepresented seller to register the deed. If the buyer's lawyer agrees, most courts will find that the buyer's lawyer has a new client, albeit for a limited purpose.⁸² The unrepresented party asked the lawyer to perform a legal task, the lawyer agreed, and the seller's detrimental reliance substitutes for consideration. If the lawyer failed to follow through on what he or she agreed to accomplish and caused harm, that lawyer is liable. From the seller's prospective, it is foreseeable that the seller could be harmed if the buyer's lawyer fails to register the deed. Any lawyer who agrees to perform a legal task for an unrepresented party, should follow through or risk liability.

I. Family Members

Family members can appear to lawyers as clients, representatives of other clients, or prospective clients. For example, if Son asks a lawyer to draft Dad's will, or transfer Dad's assets to make Dad eligible for Medicaid, the lawyer's client is Dad, whose money and legal rights are at stake. Son is Dad's agent in requesting the lawyer's services. But what if Son is the beneficiary of some of Dad's transactions? Is Son then relying on Dad's lawyer for legal advice for himself as well?

Lawyers bear the burden of clarifying which family members they represent, and if they intend to represent more than one, to identify and respond appropriately to joint client conflicts of interest.⁸³ Written engagement agreements should force lawyers to think about the implications of any joint representation and clarify murky family situations.

J. Limited-Term Pro Bono Services

Persons who seek legal information from volunteers in a limited-term nonprofit program also qualify as prospective clients, and become

81. MODEL RULES, *supra* note 3, at R. 1.7, 4.3.

82. *E.g.*, *Kremser v. Quarles & Brady, L.L.P.*, 36 P.3d 761, 764-65 (Ariz. Ct. App. 2001) (holding corporation's lawyers responsible for perfecting nonclient creditor's security interest).

83. MODEL RULES, *supra* note 3, at R. 1.7 cmt. 27.

real clients for a limited time and purpose once they receive legal advice. For example, lawyers who agree to staff a hotline or "Ask a Lawyer" night at a local television station or at the local courthouse kiosk once a month, will be answering questions about legal problems, and probably offering legal advice. Some lawyers are making good on their pro bono commitment under Model Rule 6.1 and helping people who really need legal services.⁸⁴ These lawyers have assumed the 4 C's, which mean that they must communicate adequately, give competent advice, keep the client's confidences, and resolve conflicts.

But here, running a conflicts check before answering any questions would make short-term legal services virtually impossible to provide. Yet without such a check, the potential exists for a pro bono lawyer to give a person legal advice contrary to the interests of a current client of that lawyer's law firm. Model Rule 6.5 was drafted with these considerations in mind. Lawyers who serve pro bono hotlines are free to take on any matter that does not involve a readily apparent conflict of interest without making an elaborate conflicts check. This approach facilitates pro bono service by making lawyers responsible for conflicts only when they know about them on the spot. If a caller wants to sue the lawyer's biggest client, the lawyer must excuse himself or herself from answering the question. But the lawyer is not required to inquire into the potential adversary's identity, and if the lawyer does not know the name of the caller or the names of other parties, or if the lawyer does know, but does not know that the adversary is currently a client of the lawyer's law firm, then the rule protects both the pro bono client, who receives legal advice, and the lawyer, who is not aware of any conflict.

K. Future Prospective Clients

Future clients, those who have neither spoken to nor identified themselves to a lawyer, can appear as accidental clients in the midst of another client representation. For example, an opposing party might make a settlement offer contingent on the plaintiff's lawyer agreeing never to sue the defendant again. Or a global settlement agreement might be sought in a mass tort action, which purports to include all current as well as all future cases by the firm.⁸⁵ More creatively, a party might consider a restriction on future use of information learned during the

84. MODEL RULES, *supra* note 3, at R. 6.1; RLGL, *supra* note 7, at § 38 cmt. c.

85. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-371 (1993) (discussing restrictions on the right to represent clients in the future).

course of the representation against the same party.⁸⁶ These practices violate Model Rule 5.6, which bans lawyers from offering or accepting as part of a settlement any restriction on their right to practice law.⁸⁷ This rule is designed to save lawyers from the trap that would be created by it being in the best interests of the present client to accept the limitation even though the lawyer, and more importantly potential new clients, would want the lawyer experienced in these matters to be able to take on new representations against the same opponent.⁸⁸

Future clients also should be considered whenever funding restrictions or limitations appear imminent. For example, legal services lawyers may need to turn away otherwise eligible clients if faced with funding cutbacks, or may have to restrict the scope of future representations to meet funding restrictions.⁸⁹

7. *Joint Clients*

A. The Issues

Accidental clients sometimes cluster in groups. After all, as human beings, we want and need to work together. So many more endeavors are possible with cooperation: Family solidarity, successful business partnerships, and innovative joint ventures all come to mind. Yet lawyers, perhaps enabled by law school education, tend to atomize things. Our paradigm is one lawyer/one client. Undivided loyalty. We are also expensive. The costs for the legal fees associated with any endeavor presents an impediment to securing the necessary legal services. To compound that expense by requiring each prospective client to hire his, her, or its own lawyer only makes matters worse.

With that tension palpable, the temptation for the lawyer confronted with multiple clients to help them economize usually is quite high.⁹⁰

86. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-417 (2000) (discussing settlement terms limiting a lawyer's use of information).

87. Formal Opinion 00-417 provides an exception when a lawyer seeks or agrees to a settlement term limiting or prohibiting disclosure (rather than use) of information obtained during the representation. *Id.*

88. *Id.*

89. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-399 (1996) (discussing ethical obligations of lawyers whose employers receive funds from the legal services corporation to their existing and future clients when such funding is reduced and when remaining funding is subject to restrictive conditions).

90. A lawyer also might seek to use joint clients as a means to unfairly double bill them, something prohibited by ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993) (discussing billing for professional fees, disbursements and other expenses).

Whenever two or more prospective clients discuss a future representation with one lawyer, that lawyer must be clear whether he or she can represent one, some, all, or none. Some joint client conflicts are nonconsentable, which means that the lawyer must tell the parties that representation of all of them is not permitted. Other joint client conflicts are consentable, but first must be recognized before they can be waived by adequate informed consent, including attention to confidentiality as well as loyalty issues.⁹¹ Once again, lawyers bear the burden of identifying the conflicts issues and obtaining informed consent.

To get through the loyalty maze, two things must occur. First, the lawyer must carefully set out the ground rules for the joint representation. What will the lawyer do with one client's confidential information? What will occur if the lawyer identifies a conflict of interest? May the lawyer agree now to represent only one of the co-clients, subject obviously to potential challenge later by the others? Second, the lawyer must remain ever vigilant for the development of conflicts during the representation and immediately notify the clients and address the matter—it would be hoped based on prior understandings.

So if there are two or more people sitting across a lawyer's desk seeking legal services (even husband and wife), all of the lawyer's ethical antennae should be poised, and if the lawyer has any doubts about whether the representation can go forward on these terms, the lawyer should ponder his or her 4 C obligations to each individual client.

Lawyers also face a potential joint client circumstance when a prospective client seeks representation that will have a material adverse effect on another current client of the law firm. Of course, a lawyer will rarely be able to respond to such a circumstance unless the lawyer knows it exists. This is why every law firm, from solo practices to huge multi-office conglomerates, must have a conflicts system that allows each lawyer to search the file, as well as poll her colleagues, to determine whether a proposed client representation will conflict with the firm's representation of another current client.⁹²

B. The Lawyer's Role

The original ABA Model Rules included Rule 2.2, entitled "Lawyer as Intermediary," designed to address some joint representations. But

91. See, e.g., Fla. Bar Ass'n Comm. on Prof'l Ethics, Op. 02-3 (2002) (discussing the representation of both driver(s) and passenger(s) in a car accident).

92. See Susan R. Martyn, *What You Should Know About Implementing Effective Law Firm Conflict of Interest Systems*, 40 PRAC. LAW. 15 (1994).

this rule seemed to suggest that lawyers could think of themselves as being “lawyers for the situation” and neglect focused attention to conflict and confidentiality obligations. To clarify a lawyer’s obligation to joint clients, former Model Rule 2.2 has now been jettisoned, and its comments were rightfully moved to Model Rule 1.7, the general conflict of interest rule governing concurrent client conflicts of interest.⁹³

Thinking of themselves as lawyers for the situation can invite lawyers to favor the interests of one client at the expense of another. In the words of Judge Noonan, lawyers in all joint client representations can be tempted to “overidentify” with one client and “underidentify” with the other.⁹⁴ In serving the one, the lawyer may be tempted to breach duties to the other.⁹⁵

Judge Noonan recalls a famous incident that became the focus of future Justice Louis Brandeis’s Senate confirmation hearings.⁹⁶ Brandeis recommended that a client assign his business assets for the benefit of creditors.⁹⁷ He did not tell the client that this assignment constituted an act of bankruptcy, or that Brandeis’s law firm represented one of the creditors.⁹⁸ Five days later, Brandeis, as lawyer for the creditor, instituted involuntary bankruptcy proceedings against the client who had assigned his business assets.⁹⁹ Brandeis later claimed that he had been “counsel to the situation,” not counsel to each of his individual clients.¹⁰⁰ Here is Judge Noonan’s characterization of Brandeis’s conduct:¹⁰¹

Underidentification is here, no doubt, carried to the point of caricature. The lawyer does not remember that he took the client as a client. The lawyer does not give the client the most elementary advice about the consequences of the act the lawyer is advising him to perform. The lawyer represents another client and, acting for that client, puts his unremembered client into bankruptcy. At the heart of the situation is the lawyer’s desire to abstract himself from the needs and pressures of a particular individual in order to go on and straighten out a mess. In

93. MODEL RULES, *supra* note 3, at R. 1.7, cmts. 29-33.

94. See John T. Noonan, Jr., *Propter Honoris Respectum: The Lawyer Who Overidentifies with His Client*, 76 NOTRE DAME L. REV. 827, 833-34 (2001).

95. See *id.*

96. *Id.* at 829.

97. *Id.* at 831.

98. *Id.* at 832.

99. *Id.*

100. *Id.*

101. Judge Noonan points out that this episode was far from typical, but was the “most damaging episode” that Brandeis’s enemies could cull from a distinguished thirty year career in law practice. *Id.* at 829.

some other world, law could be practiced in that fashion. It is not the way law has been generally practiced in ours.¹⁰²

Lawyers like this can abstract themselves from clients, and may risk ignoring their fiduciary duty to one client because they favor another client's interest. In intentionally or inadvertently favoring one client over another, they act as instrumental lawyers willing to do the favored client's bidding, perhaps presuming that that client seeks the maximum financial reward, liberty, or security from the other client. At the same time, they act as directive lawyers for the other, less-preferred client, perhaps assuming that the favored client's best interest requires the lawyer to direct a particular result. In other words, representing joint clients can lead to instrumental behavior, as well as directive behavior with clients.

The law governing lawyers responds to both of these extremes with concrete incentives that steer lawyers away from the dangers of violating their fiduciary duty and exceeding the bounds of legitimate advocacy. Lawyers who favor or tend toward an instrumental role with some or all of their clients need to be especially alert to the limits of the law that apply to their own conduct as well as those of their clients. The lawyers who evade those limits suffer liability for fraud and malpractice, sanctions for violations of procedural rules, criminal liability, disqualification, and professional discipline. On the other hand, lawyers who favor or tend toward a directive role in some or all of their client-lawyer relationships need to be vigilant to avoid client remedies for breach of fiduciary duty, such as malpractice liability, disqualification, loss of a fee, and professional discipline.

Fortunately, most lawyers avoid both of these extremes most of the time by acting as collaborators with their clients. They do not favor one client over another, or, if they worry about whether they might, they refuse to take on a joint representation. They realize that the rules of professional conduct allow them a great deal of professional discretion to do the right thing.

When considering whether to represent joint clients, this means that a lawyer's advocacy role must be tamed to allow the joint clients to take over greater responsibility for the representation. The lawyer provides all of the legal options and the clients make all of the decisions. If the clients are unable or unwilling to do so, the lawyer must refuse to serve both or withdraw from representing both of them, because the lawyer will be unable to continue without favoring one over the other. The

102. *Id.* at 833.

clients will not be surprised at this result if the lawyer has warned them about it at the outset, including memorializing the confidentiality agreement they chose in the retainer agreement.

6. *Third-Person Direction*

A. The Issues

Just as representing joint clients can tempt lawyers to favor one client's interests over another, a third person who is not a client can tempt lawyers to treat them as if they too were clients. This is especially likely to occur if the third party pays for the representation. When a lawyer wakes up from the dream of guaranteed payment for the representation, suddenly the lawyer realizes that surprise, surprise, the third person does not take a totally passive view toward the lawyer's bills or even how the lawyer is handling the matter. The third person wants regular reports, wants to keep the cost down, or asks for detailed billings. The third person does not want the lawyer to take certain steps in the matter without prior approval. But, in law practice, he who pays the piper does not always call the tune.

When these triangular relationships cause a lawyer's collar to tighten, it is time to remember the identity of the lawyer's client and the 4 C's. If Son pays for Dad's legal advice or services, Dad, not Son, is the lawyer's client.¹⁰³ Parents who pay for the representation of minor children may want to know everything and control the representation, but Child, not Parents, is the client.¹⁰⁴ As a result, Child controls what Parents get to hear and ultimately, Child determines his or her own best interests. Model Rule 1.8(f) requires that lawyers get a client's consent to any third-person payment, inform clients that they will keep client's confidences from all, including the third-party payer, and that the lawyer will exercise independent professional judgment on behalf of the client.¹⁰⁵ Model Rule 5.4(c) further mandates that lawyers continue this single-minded devotion to their client's interests throughout the representation.¹⁰⁶

The tension created by third person influence also occurs in other circumstances. For example, a potential beneficiary of a will (who may or may not also be the lawyer's client) may recommend or pay the

103. MODEL RULES, *supra* note 3, at R. 1.8(f), 5.4(c).

104. *Id.*

105. *Id.* at R. 1.8(f).

106. *Id.* at R. 5.4(c).

lawyer to draft the document.¹⁰⁷ Or a lawyer may be asked to share fees with a corporate employer or sponsoring pro bono organization. Such a lawyer who exercises independent professional judgment, may be required to reimburse the corporation for its costs when he or she works for others, but may not share fees, because the corporate employer's influence would be too great if it could reap profits from the lawyer's independent labors.¹⁰⁸ On the other hand, sharing fees with sponsoring pro bono organizations is not prohibited, because the economic interest of the organization "is not likely to be a predominant factor but at most a subsidiary one in the non-profit organization's sponsorship of the litigation."¹⁰⁹

B. The Lawyer's Role

If lawyers cannot favor one client's interest over another's, they certainly cannot allow themselves to be directed by a non-client third person. Yet some allegiance to the person or entity that pays the lawyer seems natural, especially when the lawyer hopes for or becomes accustomed to repeat business. As in joint client situations, such a lawyer faces dual difficulties. An insurer can cause a lawyer to over-identify or act instrumentally on its behalf because the lawyer's financial instinct is to further the insurer's business and approval of the legal services in order to keep the business coming. But doing so may cause the lawyer to under-identify or engage in directive behavior with the lawyer's other primary client, the insured. In serving the interests of the insurer, lawyers may be tempted to breach duties to the insured or even aid the insurer in neglecting its contractual obligations to the insured.

Lawyers who translate the least bit of third-person allegiance into influence or advocacy, mistake the payer for the true principal—their client. And, if the third-person influence is carried just a bit too far, the lawyer risks breaching some or all of the 4 C fiduciary duties owed to clients. Lawyers can violate a client's confidentiality by disclosing the client's confidences without the client's consent. Lawyers can disregard loyalty by favoring the third person's interests over their client's. Lawyers can act incompetently by failing to recognize or implement

107. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-428 (2001) (discussing drafting a will on recommendation of a potential beneficiary who also is a client).

108. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-392 (1995) (discussing sharing fees with a for-profit corporate employer).

109. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-374 (1993) (addressing the sharing of court-awarded fees with sponsoring pro bono organizations); Roy D. Simon, Jr., *Fee Sharing Between Lawyers and Public Interest Groups*, 98 YALE L.J. 1069, 1076 (1989). Prof. Simon's article led to recently amended Model Rule 5.4(a)(4), which makes this rule explicit.

viable legal options for their clients. Lawyers can ignore basic obligations to communicate by failing to obtain their client's (not the third person's) informed consent about key issues that surface during the representation. All of this can cause incalculable damage to clients.¹¹⁰

The remedy: Lawyers should recognize and identify their real clients, to whom they owe the 4 C's, and expect to explain these fiduciary obligations to the third person. Lawyers cannot permit the third person to regulate or to interfere with a lawyer's independent judgment on behalf of a client, may accept third-party direction only if the client consents to it.¹¹¹ Even when client consent is given, lawyers must remain vigilant that third-person influence never compromises the 4 C's.¹¹²

Of course, the power and influence of some third-party payers, such as insurers, makes it difficult to resist their attempts to interfere. Fortunately, other law, such as insurance bad faith, helps lawyers because it imposes penalties on the third person when it seeks to interfere, say by refusing to settle within policy limits or by insisting that the lawyer help it establish a policy defense.¹¹³ Courts also help by imposing obligations on third parties to provide separate counsel where conflicts arise between the third-party payer and the clients.¹¹⁴ And do not forget collaboration. Clients may want to consent to disclosures to

110. See *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App. 1991). In *Perez*, the court upheld a cause of action for breach of fiduciary duty against lawyers who represented both employer and employee following a truck accident where twenty-one children died. The lawyers promised the employee truck driver confidentiality and took his sworn statement about the accident. *Id.* at 263. Without his consent, they then gave his statement to the prosecutor, who indicted the driver for twenty-one counts of involuntary manslaughter. *Id.* at 264. Maggie Rivas, *Truck Driver Says He Spent Years After Bus Crash Doing Penance; He Went into Self-Imposed Exile at Home as Punishment*, DALLAS MORNING NEWS, May 7, 1993, at 1A; Maggie Rivas, *Trucker Absolved of Bus Deaths; '89 Alton Tragedy Killed 21 Students*, DALLAS MORNING NEWS, May 6, 1993, at 1A. The employee waited over three years for trial and was acquitted on all counts.

111. See MODEL RULES, *supra* note 3, at R. 1.8(f); MODEL RULES, *supra* note 3, at R. 5.4(c).

112. See RLGL, *supra* note 7, at § 134; *In re Rules of Professional Conduct*, 2 P.3d 806, 807, 815 (Mont. 2000) (stating that Montana lawyers may not abide by an insurer's billing and practice rules which impose conditions limiting or directing the scope and extent of the representation of insureds and may not submit detailed descriptions of professional services to outside persons or entities without first obtaining the informed consent of the insured).

113. For a case involving sexual misconduct by a physician where the court found that the lawyer offered a "splendid" defense under a reservation of rights, see generally, *St. Paul Fire & Marine Ins. Co. v. Engelmann*, 639 N.W.2d 192 (S.D. 2002). For a case where the lawyer failed to get it right, see generally *Beckwith Machinery Co. v. Travelers Indem. Co.*, 638 F. Supp. 1179 (W.D. Pa. 1986), where the failure to send a reservation of rights letter or file a declaratory judgment action estopped the insurer from denying coverage and created liability for bad faith and breach of contract.

114. See *Wolpaw v. Gen. Accident Ins. Co.*, 639 A.2d 338, 340 (N.J. Super. Ct. App. Div. 1994).

Dad or involvement by Daughter in estate planning. The lawyer's job is to clarify the client's interests apart from third-party influence.

5. Insurance Defense

Typical liability policies promise to "defend" when a covered person is sued for a covered event, and to "indemnify" that person up to an insured amount. Defending a claim requires the insurer to provide a lawyer to represent the insured. When an insurer hires a lawyer to defend an insured, all jurisdictions agree that the lawyer represents the insured. At this point, a split develops. Many characterize insurance defense as a one-client situation, with defense counsel paid by a third party, the insurer.¹¹⁵ Others prefer a joint client approach, meaning that the lawyer represents both the insured and the insurer.¹¹⁶

This joint client construct solves some problems and creates others. It gives the insurance company financing the engagement more clout with the lawyer; some would say too much clout. It also cements claims of privilege for communications with the insurance company. On the other hand, if it is a joint representation, the lawyer, from the beginning, has to worry about conflicts between the insurance company and the insured. As a result, some of these proposed joint representations will be non-starters because issues relating to coverage are already present. And if those conflict issues are not apparent in the beginning they can develop at any time. In addition, the joint representation model means that issues relating to the confidentiality of information must be addressed. When the lawyer could learn from the insured client confidential information that could provide a policy defense (such as intentional misconduct or lack of cooperation), the lawyer is barred from sharing that information with the co-client insurance company.¹¹⁷

In fact, it may not matter which of these characterizations a jurisdiction has adopted, because two-client courts usually go on to assert that the insured is the primary client whenever a conflict develops.¹¹⁸ And third-party payment one-client jurisdictions often find that the insurer is the agent of the insured for purposes of the attorney-client privilege. So, be clear that the lawyer's primary or only duty is to the insured, despite daily reminders to the contrary. The insured, not the

115. *See id.*

116. *See* RLGL, *supra* note 7, at § 134 cmt. f.

117. *See* Paradigm Ins. Co. v. Langerman Law Offices, P.A., 24 P.3d 593, 598 (Ariz. 2001).

118. *See, e.g., id.* at 597.

insurer, controls the representation because neither Model Rule 1.8(f) nor 1.7(b) will let lawyers behave any other way.¹¹⁹

The same policies provide that the insurer retains the right to control most aspects of the representation, including the right to select counsel and usually, when to settle the matter.¹²⁰ This policy language grafts an additional layer of conflict on the client-lawyer relationship, which courts routinely resolve in favor of the insured parties.¹²¹

4. Organizations

Representing an entity can create dozens of accidental clients. Lawyers can be inside or outside counsel to a large publicly held corporation or a governmental unit.¹²² Or they might occasionally provide legal advice to a partnership,¹²³ a family business, a trade association,¹²⁴ or a non-profit organization. Model Rule 1.13 governs all of these representations and begins by instructing lawyers that their client is the organization, not any constituent of the organization.¹²⁵ It further requires that when any doubt clouds a given representation or

119. See MODEL RULES, *supra* note 3, at R. 1.8(f), 1.7(b); *cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-421 (2001) (discussing ethical obligations of a lawyer working under insurance company guidelines and other restrictions); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-403 (1996) (addressing obligations of a lawyer representing an insured who objects to a proposed settlement within policy limits).

120. See *Moritz v. Med. Protective Co.*, 428 F. Supp 865, 871 (W.D. Wis. 1977) (construing insurance policy to provide that "when the insured elects to tender to the insurer the defense of a claim against him or her, he or she consents to having the insurer choose the lawyer who is to defend the claim").

121. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-403 (1996) (detailing obligations of a lawyer representing an insured who objects to a proposed settlement within policy limits); *see, e.g.*, *Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 407 N.E.2d 47, 49 (Ill. 1980) (holding that defendant lawyers' duty to plaintiff insured stemmed from the attorney-client relationship apart from the insurer's authority to settle without insured's consent).

122. See *generally* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-405 (1997) (discussing issues raised under conflict of interest provisions of the Model Rules where lawyers agree to represent a government entity while at the same time representing private clients against the government); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-393 (1995) (discussing the disclosure of client files to non-lawyer supervisors in government elder care offices after express consent is given by client in accordance with Model Rule 1.6).

123. See *generally* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-361 (1991) (addressing the question of whether a lawyer representing a partnership represents the entity or the individual partners and at what point that lawyer may have an attorney-client relationship with individual partners).

124. See *generally* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-365 (1992) (discussing the circumstances by which a lawyer may represent an individual against a trade association that the lawyer also represents without being in violation of the conflict of interest provisions of the Model Rules).

125. See MODEL RULES, *supra* note 3, at R. 1.13, cmt. 2.

occasion (from the client's point of view) the lawyer must clarify the identity of the client as well as his or her own role in the client's matters.¹²⁶

Yet in practice, lawyers deal face-to-face with constituents, who can become their clients as well. If that person asks for personal legal advice, and the company lawyer gives it, or if the lawyer has given personal advice before, that lawyer is only that constituent's detrimental reliance away from another client-lawyer relationship.¹²⁷ Consider, for example, a lawyer's membership on the client's board of directors.¹²⁸ Do they rely on the lawyer for legal advice? If so, the lawyer should clarify when he or she is acting as a lawyer (and for whom) to ensure that the attorney-client privilege attaches to the conversation.¹²⁹ Similarly, accompanying employees to depositions does not necessarily mean that the lawyer represents them.¹³⁰ But if the employee depends upon the company's lawyer for personal legal advice, that lawyer should be sure to clarify his or her role.¹³¹

This does not mean that a lawyer cannot represent both organization and employee.¹³² Their interests may not be adverse. The real question, however, is whether the employee's lawyer who is also the company's counsel will ever be free to give the employees the advice they may need. The employees might want to take the Fifth Amendment, or might want to confide that they are worried about keeping their jobs, or worried about what the lawyers may do with the information that these employees reveal. The company's lawyer may not even be able to give them advice on these issues. On the other hand, it could be that the interests of the employer and the employees are perfectly aligned. The problem is that at the time the lawyer takes on the representation of the employees the lawyer often will not know enough to make that determination, and there may be a substantial risk that material limitations exist now or will arise later.

126. See *id.* at R. 1.13, cmt. 10.

127. *E.g.*, *Cooke v. Laidlaw, Adams & Peck, Inc.*, 510 N.Y.S.2d 597, 598-99 (N.Y. App. Div. 1987) (involving a lawyer who represented both company and officer); *Margulies v. Upchurch*, 696 P.2d 1195, 1198 (Utah 1985) (involving a lawyer who represented general partners and limited partnership when general partners reasonably relied on lawyer acting on their behalf).

128. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 98-410 (1998) (discussing the propriety of a lawyer serving as director of a client corporation).

129. See MODEL RULES, *supra* note 3, at R. 1.7, cmt. 35.

130. See Lawrence J. Fox, *Defending a Deposition of Your Organizational Client's Employee: An Ethical Minefield Everyone Ignores*, 44 S. TEX. L. REV. 185, 188-89 (2002).

131. See MODEL RULES, *supra* note 3, at R. 1.13; R. 1.7 cmt. 34.

132. See *id.* at R. 1.13(g).

Lawyers who decide to proceed with a joint representation should make clear to the employee that he or she is a client and owed the same fiduciary duties afforded to that person's employer.¹³³ But joint representation depends upon a careful conflicts analysis, as well as attention to confidentiality, including clear disclosure about what events (conflicts) will require the lawyer to withdraw from the matter.

Entity lawyers also can learn of misconduct from a constituent of an organizational client. If the lawyer does nothing about it, that lawyer may suffer later liability to the organizational client for failing to protect it from the actions of a rogue employee.¹³⁴ The lawyer's duty of care requires protecting the entity client from harm, which is why entity lawyers are required to refer serious matters to a higher authority in the organization.¹³⁵

3. *Clients Who Morph*

Accidental clients can be created when clients morph or change. Lawyers have been inadvertently caught in conflicts,¹³⁶ accused of incompetence,¹³⁷ and even charged with fraud¹³⁸ because a client's name was misspelled, or because a lawyer forgot to recognize that client identity can change over time. The most obvious client metamorphoses occur because of a specific event, such as a change in a client name, brought about by marriage, merger, acquisition, or corporate reorganization. All these changes must be entered in a lawyer's state of the art conflicts system, which is only as good as the information put into the database.

Yet, many instances of change in client identity are less obvious and have accordingly caught the most well-intentioned lawyers unaware.

A. Entities

Entity clients may or may not think and act like their legal structure. Some assume that every subsidiary, sibling or even joint venture morphs into one unified profit center for purposes of shareholder success, employee pensions, or lawyer loyalty. Others operate

133. See *id.* at R. 1.13(g) cmt. 12.

134. See *id.* at R. 1.13(b).

135. See GEOFFREY C. HAZARD JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 4.8 (3d. ed. 2001).

136. See *A v. B.*, 726 A.2d 924, 925 (N.J. Sup. Ct. 1999).

137. See *In re Am. Cont'l Corp./Lincoln Sav. and Loan Sec. Litig.*, 794 F. Supp. 1424, 1438-39 (D. Ariz. 1992).

138. See *In re Forrest*, 730 A.2d 340, 342 (N.J. Sup. Ct. 1999).

subsidiaries independently. Family-owned businesses may treat the corporation as Dad's, and Dad may assume that the company's lawyer is his personal lawyer as well.¹³⁹ In identifying an entity client all of this matters.¹⁴⁰ Generally, a lawyer can rely on the name of the entity in identifying the client. But if the client is a family business, a wholly owned subsidiary, or the parent of a wholly owned subsidiary, the lawyer needs to clarify which entities or constituents are represented. If this clarification is not sought, then the CEO or parent company later may claim that the lawyer represented all of them, and seek the lawyer's disqualification in any subsequent matter against the affiliates the lawyer did not think were clients.¹⁴¹

Lawyers who represent family businesses need to be especially clear that taking on personal matters for family members may create reasonable expectations by those individuals that the lawyer is their personal as well as their corporate lawyer.

Lawyers who represent companies with related subsidiaries also may find that conflicts can be "thrust upon" them by changes in their corporate organization. For example, a client company might acquire the defendant against whom the lawyer proceeds on behalf of the plaintiff. It does not seem fair that the lawyer would have to stop representing plaintiff. But if the lawyer proceeds without consent this could be a violation of the rules of professional conduct. The corporate client may give the lawyer a waiver. If not, and if it moves to disqualify the lawyer or the lawyer's firm, the lawyer could urge the judge to use her discretion to let the firm continue. The ABA has promulgated a new comment to Model Rule 1.7 that permits the lawyer to choose to continue to represent one client or the other.¹⁴²

B. Clients Who Die

If a client dies while a matter is pending, that client's lawyer has lost one client and probably gained another. Survivor statutes retain a cause of action for a deceased person, but transfer it to a legal

139. See, e.g., Maryland St. Bar Ethics Op. 01-04 (2001) (discussing conflict of interest pertaining to multiple representation of a corporation, its officers and directors).

140. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-390 (1995) (discussing conflicts of interest in the corporate family context).

141. See RLGL, *supra* note 7, at § 121 cmt. d.

142. See MODEL RULES, *supra* note 3, at R. 1.7 cmt. 5; RLGL, *supra* note 7, at § 132 cmt. j.

representative, such as a personal executor or the estate.¹⁴³ Wrongful death statutes create a new cause of action on behalf of new parties.¹⁴⁴

A lawyer who continues to assert, even implicitly, that he or she represents a living person who has died commits a fraud, both because the client ceases to exist for legal purposes and because the client's legal rights may change upon death.¹⁴⁵ The truth is, right after the client's death, the lawyer has no client. Yet if the lawyer pursues a settlement the lawyer will be implicitly representing that he or she continues to represent someone who no longer exists. Under these circumstances the lawyer may not take any further steps until a new client retains the lawyer (e.g., the estate of the former client) and the other side is informed of the unfortunate untimely demise of the former client.¹⁴⁶

This is why lawyers must acknowledge the client's change of identity with opposing counsel, in court, and in their conflicts database as soon as this event occurs.¹⁴⁷ Entity clients also die, through bankruptcy, reorganization, or dissolution. Competence demands that lawyers understand the nature of this legal metamorphosis and respond accordingly.

C. Clients with Diminished Capacity

1. The Issues

A client's diminished capacity to make decisions can cause a subtle or complete change in the client-lawyer relationship, creating one of the most difficult of legal ethics problems.¹⁴⁸ Model Rule 1.14, the rule that addresses this issue, recognizes that capacity exists on a continuum and

143. See RESTATEMENT (SECOND) OF JUDGMENTS § 46 cmt. a (1982); Eric W. Gunderson, *Personal Injury Damages Under the Maryland Survival Statute: Advocating Damages Recovery for a Decedent's Future Lost Earnings*, 29 U. BALT. L. REV. 97, 104 n.49 (1999).

144. See *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593, 597 (Tenn. 1999).

145. See *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507, 512 (E. D. Mich. 1983).

146. *Giroux v. Dunlop Tire Corp.*, 791 N.Y.S.2d 769 (N.Y. Sup. Ct. 2005) (where plaintiff's lawyer failed to seek substitution within a reasonable time after plaintiff's death, the trial court properly granted a opposing party's motion to void the settlement agreement and dismiss the action under N.Y. C.P.L.R. 1021 and properly denied plaintiff attorney's cross-motion to substitute plaintiff's administrator as plaintiff).

147. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-397 (1995).

148. See, e.g., N.Y. Bar Ass'n Comm. on Prof'l Ethics, Formal Op 746 (2001) (discussing representation of an incapacitated client, and petitioning for appointment of guardian); Ala. Comm. on Prof'l Ethics, Formal Op. RO-95-03 (1995) (addressing representation of a client in manic stage of bipolar manic depression).

requires that lawyers “maintain a normal client-lawyer relationship” “as far as reasonably possible.”¹⁴⁹

When lawyers represent a client with diminished capacity, they need to be circumspect in relying on another person who purports to speak for the client, especially when that family member or friend stands to gain or lose from the communication. Lawyers have an obligation to clarify their client’s intent, or to protect the client if the lawyer cannot discern it.¹⁵⁰

When the client’s intent is not clear, the Restatement recommends that lawyers pursue their own “reasonable view of the client’s objectives or interests as the client would define them if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions.”¹⁵¹ When a client’s diminished capacity threatens serious physical, financial or other harm, lawyers should take other protective measures, and lawyers are impliedly authorized to breach confidentiality to consult with others to do so, such as the client’s family, or with other individuals or entities that can act to protect the client.¹⁵² In an extreme case of threatened harm, lawyers may seek the appointment of a guardian to protect the client.¹⁵³ If that occurs, the lawyer may have a new client, the guardian, or, depending on the extent of the guardianship, the lawyer may have two clients: the client with diminished capacity for all purposes not covered by the guardianship and the guardian for all other purposes. Remember, however, that the guardian can choose another lawyer, which leaves the lawyer with either the impaired client for matters outside the guardianship or, if a general guardianship has been established, with a former client but no current client at all.

2. The Lawyer’s Role

Representing a client with diminished capacity creates some of the most difficult dilemmas for lawyers because they can neither blindly follow such a client’s instructions nor ignore them.

The professional rules tell lawyers to treat all clients as autonomous to the greatest extent possible, including a virtually absolute duty of confidentiality.¹⁵⁴ And lawyers must take direction from clients, acting

149. See MODEL RULES, *supra* note 3, at R. 1.14(a); RLGL, *supra* note 7, at § 24.

150. See MODEL RULES, *supra* note 3, at R. 1.14 cmt. 3.

151. See RLGL, *supra* note 7, at § 24(2).

152. See MODEL RULES, *supra* note 3, at R. 1.14(b) cmt. 5.

153. See *id.* at R. 1.14(b) cmt. 7.

154. See *id.* at R. 1.6.

in each client's best interests as defined by that client. When should the lawyer stay her hand in the name of her client's autonomy? On the one hand, lawyers are admonished by fiduciary duty to do everything they can to help fulfill the client's goals of the representation, goals that are to be determined by the client. On the other hand, clients may make decisions that the lawyer believes reflects bad judgment or, worst of all, risks substantial harm to the client. When lawyers place too much weight on the former proposition—simply being instruments unquestioningly abiding their clients' instructions—they can disserve their clients' true autonomy by failing to share their independent view of the merits of the course of action. If the client has legal obligations to others, accepting a client's decision at face value also can open such a client (and perhaps the lawyer as well) to potential liability.

Model Rule 1.14 offers an approach to a collaborative relationship with a client who suffers from diminished capacity.¹⁵⁵ It parallels mental health law by envisioning autonomous capacity as a spectrum, and it recognizes several causes of diminished capacity, such as minority, old age, mental retardation, dementia, chemical dependency, or depression. Following the logic and dictates of this rule can help a lawyer determine whether his or her conduct risks under-identification and directive behavior or over-identification and instrumental behavior that disregards the client's real interests.

Model Rule 1.14 begins by admonishing lawyers to maintain a normal client-lawyer relationship to the extent reasonably possible.¹⁵⁶ When a client proposes to act within legal bounds, lawyers ordinarily can and should rely on the client's decisions. When the decision seems idiosyncratic, or contrary to what most clients would believe in their best interests, the lawyer instinctively may pause to consider whether the client suffers from some compromise in judgment that disservices the client's autonomous self or true interests. But whenever a lawyer does this, the lawyer should do so within the goal of maintaining a normal client-lawyer relationship by remembering the 4 C's.

Lawyers can start by recognizing that communicating with an impaired client should require more rather than less explanation, and may require the assistance of others who know the client well.¹⁵⁷ The client may elect to have family members, trusted friends, or clinicians

155. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-404 (1996) (discussing client under a disability).

156. See MODEL RULES, *supra* note 3, at R. 1.14(a).

157. See Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 98-17 (1998) (addressing how to represent an elderly client who makes "questionable" decisions).

participate as the client's agents in discussions to help articulate the client's interests. If a lawyer secures the client's consent to the help of these third parties, they become agents for the purpose of the attorney-client privilege. If the lawyer fails to obtain that consent, communication with third parties present may destroy the privilege.

With respect to decisionmaking, the lawyer should rely on informed consent, explaining the matter to the extent necessary to enable the client to understand the risks of the behavior or decision as well as the alternative choices to enable the client to determine his or her own best interests. Such an explanation should include the lawyer's experience with similar clients or situations in the past and the reasons most people might find the client's articulated choice unrealistic. Further, because capacity can fluctuate, the lawyer should expect to give the client additional time to consider the matter, as long as a delay does not prejudice the client's interests. A lawyer who has known a client for some time should consider whether the client has ever spoken of similar matters in the past, and if so, should remind the client about former expressions of belief that may inform the current decision.¹⁵⁸ Once again, a client's decision within the bounds of the law, even if idiosyncratic, must be upheld.¹⁵⁹

As lawyer and client elect to expand the decisionmaking process, the lawyer must remember confidentiality and loyalty. Disclosures to family members or others without the client's consent are not in order. If someone other than the client (such as family members) retains the lawyer, the lawyer must remember that the payer is not the principal in such a triangular relationship and should keep his or her eye on the articulated interests of the client.¹⁶⁰

If the client suffers from significantly diminished capacity, which prevents the client from recognizing his or her own interest, maintaining such a normal relationship may involve seeking the advice or assistance of others. If the client's decision or inaction risks substantial physical, financial, or other harm to the client unless action is taken, the lawyer may make disclosures to outsiders such as clinicians to seek assistance without the client's consent.¹⁶¹ Shifting from an autonomy orientation to

158. See RLGL, *supra* note 7, at § 24 cmt. d.

159. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-404 (1996).

160. Mass. Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Op. 04-1 (2004) ("When circumstances indicate that a client may not have had the capacity to make an adequately considered decision to discharge the lawyer, the lawyer should take further steps to ascertain whether the discharge represents the client's real wishes.").

161. See MODEL RULES, *supra* note 3, at R. 1.14 cmt. 5.

a best interests mode is justified to protect the client from harm (such as suicide), on the theory that the same client with full capacity would recognize the danger and respond accordingly.¹⁶² If no one else can protect the client, protective action may even include seeking the appointment of a guardian or conservator over the client's stated or unstated objections. Here, disclosures to protect the client's best interests may be "impliedly authorized" under Model Rule 1.14(c), but only if reasonably necessary to protect the client.¹⁶³ Model Rule 1.13(c)(2) allows similar disclosures on a similar theory in representing organizations, in the name of the best interests of the organization.¹⁶⁴

D. Class Actions

Identifying the client in a class action may not be easy. Initially, a lawyer represents the named class representatives, but not the unnamed class members, especially for the purposes of conflicts resolution.¹⁶⁵ Yet, a "fiduciary duty not to prejudice the interests that putative class members have in their class action litigation" may exist even before the class is certified, including the duty to notify and afford absent class members a chance to object to the lawyer's actions that would put their rights at risk.¹⁶⁶ After certification, the named plaintiffs represent a larger group, which means that their lawyer has assumed fiduciary duties to the entire class, not just the named plaintiffs.¹⁶⁷ As the representation continues, class action lawyers have the obligation to "act for the benefit

162. Estate of Robinson *ex rel.* Robinson v. Randolph County Comm'n, 549 S.E.2d 699, 706 (W. Va. 2001) (Starcher, J., concurring) (explaining that defense lawyer who allegedly knew his incarcerated client was suicidal should have intervened to seek adequate care to prevent suicide); People v. Fentress, 425 N.Y.S.2d 485, 497 (Dutchess County Ct. 1980) (finding that client waived confidentiality and commented that lawyer-friend of criminal defendant "would have blindly and unpardonably converted a valued ethical duty into a caricature, a mockery of justice and life itself" had the lawyer not warned the police about the client's suicide threat); Mass. Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Op. 01-2 (2001) ("A lawyer may notify family members, adult protective service agencies, the police, or the client's doctors to prevent the threatened suicide of a client if the lawyer reasonably believes that the suicide threat is real and that the client is suffering from some mental disorder or disability that prevents him from making a rational decision about whether to continue living."). At the same time, courts have refused to find criminal defense lawyers liable for failing to prevent a client's suicide. *See, e.g.,* Snyder v. Baumecker, 708 F. Supp. 1451, 1463-64 (D. N.J. 1989) (finding that a lawyer who allegedly delayed the prosecution of decedent's criminal defense was not liable for client's suicide because suicide is not a foreseeable risk of legal malpractice).

163. *See* MODEL RULES, *supra* note 3, R. 1.14(c).

164. *See id.* R. 1.13(c)(2).

165. *See id.* R.1.7 cmt. 25.

166. Schick v. Berg, No. 03 Civ. 5513, 2004 U.S. Dist. LEXIS 6842, at *18 (S.D.N.Y. Apr. 20, 2004).

167. *See* RLGL, *supra* note 7, at § 14 cmt. f.

of the class as its members would reasonably define that benefit."¹⁶⁸ At this point the class action client can morph because conflicts between class representatives and class members may require that the lawyer recommend redefining the class or creating subclasses.

Recent changes to Rule 23 of the Federal Rules of Civil Procedure require court approval of a settlement only after the class is certified.¹⁶⁹ This raises the issue of whether the rules of civil procedure have the ability to change the rules of professional conduct. On the one hand, the court does not have to approve or supervise a pre-certification settlement. On the other hand, the lawyer filed the lawsuit as a class action. When that occurred, the lawyer undertook to represent the class. At that moment the lawyer accepted a fiduciary duty to the class that cannot easily be discarded simply because suddenly the lawyer wishes to put the interests of his or her initial individual clients or the lawyer's own interests in the driver's seat.

E. Ending a Representation

When lawyers complete a client matter, withdraw from a representation, leave a job or are fired, their current clients morph into former clients.¹⁷⁰ At this point, lawyers lose all but one of the fiduciary duties they assumed when they took on the representation. They no longer owe duties of competence or communication, and their fiduciary obligation of loyalty only remains to the extent that they cannot undermine what they have accomplished.¹⁷¹ Confidentiality, on the other hand, lasts forever, even after the death of the client.¹⁷² The substantial relationship test protects former clients by requiring that lawyers obtain the informed consent of former clients before the lawyer may represent any subsequent clients whose interests are materially adverse to those of the former client in a substantially related matter.¹⁷³ Lawyers can be disqualified or disciplined if they take on a new matter when they should not. To clarify this change in status and obligation at the end of a

168. *Id.*

169. See FED. R. CIV. P. 23(e)(1)(A).

170. See MODEL RULES, *supra* note 3, at R. 1.9 cmt. 1.

171. See ABA Comm. on Ethics and Grievances, Formal Op. 177 (1938) (ruling that an attorney who represented the licensees of a patent in a suit brought by the licensor may not subsequently represent a third-party defendant in an infringement suit brought by the licensor); ABA Comm. on Ethics and Grievances, Formal Op. 64 (1932) (concluding that an attorney who drafts a will and after the testator's death drafts an instrument in supposed execution of the will may not thereafter accept employment from devisees and legatees under the will to attack the validity of the instrument formerly drawn by him).

172. See *Swidler & Berlin v. United States*, 524 U.S. 399, 399 (1998).

173. See MODEL RULES, *supra* note 3, at R. 1.9; RLGL, *supra* note 7, at § 132.

representation, lawyers should move their client's entry in the law firm's conflicts database from the current client conflicts file to the former client conflicts file whenever a lawyer completes a matter or the representation otherwise ends.

Disengagement letters also are helpful when lawyers complete a matter, decide to withdraw, are fired by the client, or when they leave a law firm and do not intend to continue to work on a matter. The letter should make clear the reason the relationship has ended, and include appropriate warnings about unfinished work and time deadlines.¹⁷⁴ Lawyers may want to address whether the client wants them to communicate with successor counsel, and how the lawyer intends to provide for the orderly transmission of client files and documents. Lawyers also can use this opportunity to convey a willingness to serve in additional matters in the future.

A lawyer who hopes for future business in a disengagement letter should be careful to clarify his or her lack of continuing obligation in the matter for which he or she no longer assumes any responsibility. Otherwise, the client may reasonably believe that the lawyer stands ready to be his continuing counsel, and may rely on the lawyer's lack of communication as legal advice that all is well, or that nothing else needs to be done.

2. *Quasi-Clients*

It seems axiomatic that lawyers owe no fiduciary duties to third persons who are not clients.¹⁷⁵ Yet, some situations create quasi-fiduciary duties to some third persons or entities.¹⁷⁶ These third persons can be called "quasi-clients" because they do not have all the legal rights clients possess, but they can become accidental clients of a sort, imposing some legal obligations upon a lawyer simply because that lawyer is another person's lawyer. A lawyer who drafts documents, represents fiduciaries, or agrees to accommodate someone else on behalf

174. See *Gilles v. Wiley, Malchom & Sirota* 783 A.2d 756, 757 (N.J. Super. Ct. App. Div. 2001) (holding that a former client stated a cause of action against lawyers who withdrew at the last minute without adequately warning her by certified mail that the statute of limitations was about to run on her medical malpractice case).

175. See *In re Estate of Drwenski*, 83 P.3d 457, 467 (Wyo. 2004) (holding that a daughter was not the intended beneficiary of her father's divorce).

176. *Fickett v. Superior Court of Pima County*, 558 P.2d 988, 989-90 (Ariz. Ct. App. 1976) (holding lawyer who failed to detect and prevent conservator's misappropriation of assets liable to incompetent person).

of a client, must be clear whether he or she has assumed obligations to someone that lawyer never intended to represent.¹⁷⁷

A. Third-Party Beneficiaries

If a client asks a lawyer to benefit a specific third party, for example, by writing an opinion letter or by drafting a document like a will or trust, the lawyer acts competently by fulfilling the wishes of the client. However, unlike the typical matter in which the lawyer's only exposure is to the client, here the lawyer knows that a third party—to whom the lawyer otherwise owes no duties and as to whom the lawyer may have been negotiating vigorously on behalf of the client—is relying on the lawyer's opinion. Therefore, if it is negligently prepared, even though there is no privity between the bank and the lawyer, the lawyer may be held liable to the bank as well if it turns out that the lawyer's opinion was in error.

The third-party beneficiary of such a letter is not the lawyer's client, but many courts grant certain classes of third-party beneficiaries duties of competence for malpractice purposes.¹⁷⁸ If the lawyer's client specifically names a third-party beneficiary in a document, the lawyer should assume that he or she owes coextensive duties to that person. If the lawyer's drafting requires that the lawyer assert certain propositions to be true, the lawyer should make sure that the boilerplate language accurately conveys what the lawyer has done (e.g., conducted a UCC tax and judgment search) and found (e.g., the farm property is free and clear of all liens). Relying on a client for these assertions is risky at best, because inaccurate statements can make a lawyer liable for malpractice or misrepresentation to the third-party beneficiary.¹⁷⁹

A different rule may apply when lawyers draft a public offering that will be relied on by thousands. They are not third-party beneficiaries, even if they may be foreseeable plaintiffs. Here, absent fraud, many courts limit liability to those who are specifically identified or invited to rely on the lawyer's work at the time of the service.¹⁸⁰

177. See RLGL, *supra* note 7, at § 51.

178. See *In re Guardianship of Karan*, 38 P.3d 396, 397 (Wash. Ct. App. 2002) (finding that minor child has malpractice cause of action against mother's lawyer who set up child's trust to allow pilfering of the estate); *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961) (intended beneficiaries of a will were third-party beneficiaries eligible to recover from a lawyer if they could show lawyer was negligent in drafting document that caused them to lose testamentary rights).

179. See *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1560 (7th Cir. 1987).

180. See RLGL, *supra* note 7, at § 51 cmt. e; *Conroy v. Andek Resources 81 Year-End Ltd.*, 484 N.E.2d 525, 537 (Ill. App. Ct. 1985).

What if, in drafting a document that third persons will rely upon, a lawyer discovers confidential information that the third party would love to know, but the lawyer's client does not want to share? Of course, the lawyer owes only one client the 4 C's. That lawyer must first be competent, and second communicate his or her client's legal obligation to disclose. Third, confidentiality requires the lawyer to seek the client's permission to disclose the smoking gun. With respect to conflicts of interest, if disclosure is just too much for the lawyer's client to bear, then the client, not the lawyer, decides whether to forgo the whole deal (if relevant law requires disclosure) or to disclose the information. The lawyer's loyalty obligation to the client comes first, and only when the client decides to provide information or benefit to a third party is the lawyer's duty of competence to that third person triggered.¹⁸¹ If the client insists that the lawyer write the letter without the legally required disclosures, the lawyer cannot proceed, if to do so would violate a legal obligation of the client or the lawyer.

B. Client-Fiduciaries

Lawyers who represent trustees, guardians, corporate directors, or partners, should be mindful of the beneficiaries of their clients' fiduciary duties as well as duties owed to the client to avoid later claims of malpractice by either.¹⁸² Some commentators call the beneficiaries of a client's fiduciary duties "derivative client[s]," because such beneficiaries do not stand at arm's length with the lawyer's client.¹⁸³ A lawyer's legal advice to these clients, such as trustees, can impose a duty of competence to the beneficiaries.¹⁸⁴ If a lawyer suspects breach of fiduciary duty by a client, the lawyer should tell that client so in no uncertain terms. If the conduct does not stop, the lawyer should withdraw to avoid counseling or assisting the client's illegal or fraudulent act.¹⁸⁵

Lawyers should not be held liable for later malpractice when their client's legal duties to another client conflict with the client's own rights or responsibilities. For example, courts have refused to find that a lawyer who represented an estate executor had a duty to beneficiaries of the

181. See MODEL RULES, *supra* note 3, at R. 2.3.

182. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-380 (1994) (discussing counseling a fiduciary).

183. See HAZARD & HODES, *supra* note 135, at § 2.7.

184. See *id.*

185. Cf. *Whitfield v. Lindemann*, 853 F.2d 1298, 1303 (5th Cir. 1988), *cert. denied*, 490 U.S. 1089 (1989) (lawyer who aided trustee in purchase of overvalued property liable to pension plan).

estate, because the beneficiaries' interests may conflict with those of the estate's administration.¹⁸⁶ The lawyer should be free to advise about both duties, so the lawyer's sole client is the executor.

C. "Accommodation" Clients

The Restatement created the label "accommodation client" to describe agreements by lawyers to provide limited services to third parties as an accommodation to a current client (often for no additional charge), for example, in a common representation situation.¹⁸⁷ Courts, however, often have rejected this concept, holding that an agreement to represent an accommodation client creates a real client-lawyer relationship.¹⁸⁸ This is why lawyers should never rely on their characterization of a favor to a client as "perfunctory" or "an accommodation," because a court, if later asked to address the matter, usually in the context of a disqualification motion or a malpractice claim, probably will disagree and find a client-lawyer relationship.

For example, when a lawyer accompanies the CFO of a client company to a deposition, the CFO is either unrepresented or he is the lawyer's client. Calling the CFO an accommodation client does not answer any question that will guide the lawyer's conduct. If the lawyer had two concurrent clients in the same matter, even after the representation of the CFO has been completed, the CFO remains a former client. And if the lawyer proposes to bring a claim on behalf of the company against the CFO in the same matter in which the lawyer once represented the CFO, that lawyer would violate Model Rule 1.9 in doing so. The CFO was a real client. The information the CFO shared with the lawyer must be kept confidential. And whether the lawyer was just doing the CFO (or the company client) a favor, the CFO is entitled to the loyalty the rules provide for former clients.

Lawyers who want to accommodate a client by taking on another representation are free to do so, but should recognize that they are taking on a new client, and that the burden rests on their shoulders to clarify and justify the limited nature and scope of the service, as well as any conflicts that may lurk in the representation.¹⁸⁹ Lawyers who want to accommodate a current client by providing service to a related party or entity should add that party to the law firm's current client database and

186. *Trask v. Butler*, 872 P.2d 1080 (Wash. 1994).

187. See RLGL, *supra* note 7, at § 132 cmt. i.

188. See, e.g., *G.D. Matthews & Sons Corp. v. MSN Corp.*, 763 N.E.2d 93, 97 n.4 (Mass. App. Ct. 2002).

189. See *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449, 455 (S.D.N.Y. 2000).

assume all the obligations to the "accommodatee" provided to all of their other clients.

1. *Imputed Clients: Of Law Firms and Shared Office Space*

If a lawyer has a client, so does every other lawyer in that lawyer's entire law firm, which may include associated law firms,¹⁹⁰ temporary lawyers,¹⁹¹ and joint defense agreements. Likewise, if any other lawyer in the firm has a client, so does each lawyer associated with the firm.¹⁹² But even when lawyers have not set up their practices to share revenue and clients,¹⁹³ they may in fact look or act like they have done so. Lawyers who share office space may also share secretarial or other office help, and may cover for each other, or share file space as well. Office-sharing lawyers also may interact informally as lawyers in law firms do, consulting each other on cases or becoming involved in informal office discussions about the matters of the day. Lawyers who use a common letterhead, or have a secretary answer a common phone with all of the lawyer's names in the same sentence, are holding themselves out as a firm even if they do not otherwise share revenue.¹⁹⁴ Similarly, lawyers who allow other lawyers access to their client files, or discuss their cases with other lawyers in their office space, are sharing client confidences and therefore treating their clients as if they were clients of the "firm."¹⁹⁵ This will impute all of each lawyer's conflicts of interest to the other lawyers in the firm and vice versa.

Lawyers who share office space must therefore be clear about the legal implications created by their practices. Courts will treat the clients of office-sharers as those of a law firm if they either hold themselves out to be or otherwise act like they are a "firm."¹⁹⁶ Lawyers who want this flexibility and interaction should enjoy the benefits of the collaboration, but combine each lawyer's client files for purposes of conflicts checks. Lawyers who do not want to be treated as a firm for conflicts purposes

190. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-388 (1994) (addressing relationships among law firms); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 84-351 (1984) (discussing the letterhead designation of "affiliated" or "associated" law firms).

191. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988) (discussing temporary lawyers).

192. See MODEL RULES, *supra* note 3, at R. 1.10.

193. A network of law firms may fit this description. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-388 (1994) (analyzing relationships among law firms).

194. See *In re Sexson*, 613 N.E.2d 841, 842-43 (Ind. 1993).

195. See MODEL RULES *supra* note 3, at R. 1.0(c), 1.0, cmt. 2.

196. See *id.*

should not act or look like one. They should bar access to client files, keep client confidences, answer each phone individually, and use separate letterheads.

Of course, like clients, law firms can morph, through merger, reorganization, or association for a joint defense agreement. Or, when a sole practitioner dies, some successor will need to make sure that client matters are not neglected.¹⁹⁷ That lawyer picks up new clients in the process. Similarly, when a lawyer changes law firms, or leaves a government¹⁹⁸ or corporate office¹⁹⁹ for new employment, the lawyer's current law firm clients become former clients. Those matters the lawyer worked on bring conflicts that will be imputed to the new law firm or office, and those the lawyer did not have any contact with will not. The matters in the middle, where the lawyer perhaps performed slight work or consulted just a bit on the case, require focused attention if the new law firm seeks to successfully oppose a disqualification motion.²⁰⁰ All of this means that lawyers engaged in job negotiations with an adverse law firm or party who make the shift while the matter is pending, will conflict their new employer out of any subsequent representation in the matter.²⁰¹

III. CONCLUSION

Accidental clients, those that lawyers never thought existed, can appear when lawyers least expect them and can impose some or all of the same fiduciary duties on lawyers that real clients can. Lawyers who ignore the presence of these accidental clients set themselves up for trouble, whether in the form of malpractice, disqualification, or professional discipline.

197. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-369 (1992) (addressing the disposition of deceased sole practitioners' client files and property).

198. See generally ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 342 (1975) (evaluating ethical obligations of former government lawyers).

199. E.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-415 (1999) (analyzing representation adverse to organization by former in-house lawyer).

200. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-414 (1999) (discussing the ethical obligations a lawyer has when he or she changes firms).

201. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-400 (1996) (reviewing job negotiations with an adverse firm or party); *Kala v. Aluminum Smelting & Ref. Co.*, 688 N.E.2d 258, 262-63 (Ohio 1998).

As Monroe Freedman has reminded us again and again, the act of deciding who to represent is the lawyer's first ethical act.²⁰² The catalogue of accidental clients in this article also should remind lawyers that they can take on clients they never meant to represent.

Once lawyers learn to identify all of their clients, they will be well on their way to avoiding a client-lawyer relationship they do not intend or wish to create, or well on their way to recognizing the moment when fiduciary obligations attach to a client-lawyer relationship that they desire to undertake. They also will have clarified when they do not represent a client, or when some other lawyer has taken on that responsibility. In other words, recognizing accidental as well as intended clients gives lawyers control over their law practices; control that enables them to take on fiduciary obligations only when they choose to do so.

202. See Monroe H. Freedman, *Address to Hofstra University School of Law Student Body (1976)*, reprinted in MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 371-72 (3d. ed. 2004).