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Expanding Duties of Attorneys to Non-Clients: Reconceptualizing the Attorney-Client Relationship and Other Inherently Ambiguous Situations

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EXPANDING DUTIES OF ATTORNEYS TO "NON-CLIENTS": RECONCEPTUALIZING THE ATTORNEY-CLIENT RELATIONSHIP IN ENTITY REPRESENTATION AND OTHER INHERENTLY AMBIGUOUS SITUATIONS

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I. INTRODUCTION

Under the traditional approach to legal malpractice, an attorney is liable for negligence only to a client, with whom the attorney is in a privity relationship.[1] Thus, an attorney's duties to non-clients are limited primarily to the avoidance of intentional wrongs.[2] Recently, courts have expanded

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1. *See, e.g.*, 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 7.1, at 360-61 (3d ed. 1989).

2. *See* 1 *id.* § 6.1, at 286-87 ("[T]he 'ex delicto' liability of the attorney to third persons exists only for fraud, collusion, or a malicious or tortious act . . . [including] fraud, malicious

duties owed by attorneys to third-party non-clients;[3] however, considerable confusion and disagreement exists regarding both the parameters and the rationales for such extensions.[4] For example, courts invoking such diverse legal doctrines as third-party beneficiary, negligent representation, gratuitous undertaking, and the "balance of factors" test in negligence have reached different results in cases involving fact patterns ranging from will and trust drafting and trust administration to litigation, opinion letters, and business transactions and disputes.[5]

In an effort to clarify or explain these cases, some commentators examine the various doctrinal approaches,[6] while others focus on the different fact patterns in which issues of third-party liability commonly arise.[7] Whether the viewpoint is doctrinal or contextual, determining the proper scope of a lawyer's duty to non-clients is complicated by competing policy demands. On one hand, there is a need to deter attorney misconduct[8] and to protect and compensate non-clients who have suffered as a result of an attorney's negligence.[9] This latter need is especially compelling when the non-clients have reasonably relied on the attorney to protect their interests.[10] On the

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prosecution, abuse of process, false arrest or imprisonment, interference with an advantageous relationship, intentional infliction of mental distress, invasion of privacy, [and] defamation . . . .").

3. *See* 1 *id.* § 7.9, at 375-76.

4. *See id. See generally* JAY M. FEINMAN, ECONOMIC NEGLIGENCE: LIABILITY OF PROFESSIONALS AND BUSINESSES TO THIRD PARTIES FOR ECONOMIC LOSS (forthcoming) (manuscript at ch. 9); Douglas A. Cifu, *Expanding Legal Malpractice to Nonclient Third Parties — At What Cost?*, 23 COLUM. J.L. & SOC. PROBS. 1 (1989); Donald B. Hilliker, *Attorney Liability to Third Parties: A Look to the Future*, 36 DEPAUL L. REV. 41 (1986); Walter Probert & Robert A. Hendricks, *Lawyer Malpractice: Duty Relationships Beyond Contract*, 55 NOTRE DAME LAW. 708 (1980).

5. *See generally* FEINMAN, *supra* note 4, §§ 9.3-.4 (organizing analysis of cases both by doctrine and by fact patterns).

6. *See, e.g.*, FEINMAN, *supra* note 4, § 9.3; Cifu, *supra* note 4, at 2-3; Hilliker, *supra* note 4, at 55-67; Gary Lawson & Tamara Mattison, *A Tale of Two Professions: The Third-Party Liability of Accountants and Attorneys for Negligent Misrepresentation*, 52 OHIO ST. L.J. 1309, 1311 (1991).

7. *See, e.g.*, FEINMAN, *supra* note 4, § 9.4; Forest J. Bowman, *Lawyer Liability to Non-Clients*, 97 DICK. L. REV. 267, 269-79 (1993); Helen Bishop Jenkins, *Privity — A Texas-Size Barrier to Third Parties for Negligent Will Drafting — An Assessment and Proposal*, 42 BAYLOR L. REV. 657 (1990); Robert F. Phelps, Jr., *Representing Trusts and Trustees — Who is the Client and Do Notions of Privity Protect the Client Relationship?*, 66 CONN. B.J. 211 (1992); Darrel A. Rice & Marc I. Steinberg, *Legal Opinions in Securities Transactions*, 16 J. CORP. L. 375, 391-402 (1991).

8. *E.g.*, Cifu, *supra* note 4, at 2.

9. *See id.*

10. In one of the earliest cases eroding the privity requirement for negligent misrepresentation, Glanzer v. Shepard, 135 N.E. 275 (N.Y. 1922), the court held that a public weigher could be held liable to a buyer of beans who had relied on a negligently issued certificate of weight,

other hand, there is a need to protect lawyers from indeterminate liability.[11] Further, any widespread extension of attorney liability will cause the public to bear a large share of the burden in the form of higher legal fees.[12]

Taken alone, these competing policy considerations are no different than those which exist in other areas of third-party liability, including that of accountants, architects, and engineers.[13] An additional concern that applies with special force in the legal profession, however, is the extent to which recognizing a lawyer's duty to third persons may diminish the quality of the lawyer's service to a client, particularly when the client and the third persons have actual or potential conflicting interests.[14]

Consider, for example, the development of third-party liability in California, the jurisdiction that led the way in extending a lawyer's duty to non-clients. The early cases involved a lawyer's liability to the beneficiaries of a negligently drafted will.[15] The traditional privity requirement was eliminated in favor of what appeared to be an extremely broad "balance of factors" test:

> The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and invokes the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the

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because the seller had requested the weigher to furnish the plaintiff with a copy of the certificate knowing that the plaintiff would rely on its accuracy. Similarly, in the well-known decision of Greycas, Inc. v. Proud, 826 F.2d 1560 (7th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988), negligent misrepresentation was the doctrinal basis for recovery against the debtor's lawyer by a lender who had relied on a formal opinion from the lawyer that the collateral for the loan was free of liens.

11. This fear was cited as early as 1879 in Savings Bank v. Ward, 100 U.S. 195, 198-200 (1879), the leading case on third-party economic loss. *See generally* FEINMAN, *supra* note 4.

12. *Cf.* Hilliker, *supra* note 4, at 54 (discussing cases justifying extensions of accountants' liability on grounds that the "profession is capable of passing the risk to its customers and the public").

13. *See, e.g., id.* (discussing third-party liability of accountants). *See generally* FEINMAN, *supra* note 4.

14. *See, e.g.*, Cifu, *supra* note 4, at 15-24.

15. In the leading case, Biakanja v. Irving, 320 P.2d 16 (Cal. 1958) (en banc), although the defendant was a notary public who prepared a will but negligently failed to have it properly attested, the court treated the case as one involving professional malpractice. Shortly thereafter, in Lucas v. Hamm, 364 P.2d 685, 687-88 (Cal. 1961) (en banc), *cert. denied*, 368 U.S. 987 (1962), the court applied the *Biakanja* holding to a case involving an attorney who had negligently drafted a will.

policy of preventing future harm.[16]

That the test was intended to be applied broadly is evidenced by subsequent California cases outside the legal malpractice area. Thus, the balance of factors test was applied both to eliminate restrictive rules of liability of possessors of land for injuries to persons entering upon the land[17] and to extend liability for negligent infliction of emotional distress[18] and negligent interference with prospective economic advantage.[19] Indeed, at one point the California Supreme Court boldly declared that in negligence cases generally, it had shifted away from "traditional notions of duty" in favor of "foreseeability as the key component necessary to establish liability."[20]

In the legal malpractice area, however, the court hastily retreated from the broad "foreseeability" test to a much narrower test in which virtually the only factor considered is the extent to which the transaction was intended to benefit the third-party non-client.[21] The stated reason for this retreat was the court's concern that extending an attorney's liability to third parties "with whom the client deals at arm's length would inject undesirable self-protective reservations into the attorney's counselling role, . . . [resulting in both] 'an undue burden on the profession' and a diminution in the quality of legal services received by the client."[22] The early will-drafting cases did not address these concerns

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16. *Biakanja*, 320 P.2d at 19.

17. Rowland v. Christian, 443 P.2d 561 (Cal. 1968) (en banc) (holding ordinary principles of negligence apply to social guests as well as to business invitees), *superseded by statute on other grounds*, CAL. CIV. CODE § 1714.7 (West 1985).

18. Dillon v. Legg, 441 P.2d 912 (Cal. 1968) (en banc) (allowing recovery for mother who suffered emotional trauma and physical injury from witnessing child negligently killed by defendant).

19. J'Aire Corp. v. Gregory, 598 P.2d 60 (Cal. 1979) (holding lessee could recover economic damages resulting from negligent delay in completion of construction project at premises where lessee operated its restaurant). In *J'Aire* the court explicitly stated that it had "repeatedly eschewed overly rigid common law formulations of duty in favor of allowing compensation for foreseeable injuries caused by a defendant's want of ordinary care." *Id.* at 64.

20. *Id.*; *see also* Schwartz v. Greenfield, Stein & Weisinger, 396 N.Y.S.2d 582, 584 (Sup. Ct. 1977) (referring to the "obsolescence of the strict privity doctrine" in holding attorney liable to third-party lender for failing to file and perfect security agreements).

21. *See, e.g.*, Cifu, *supra* note 4, at 11 ("[S]ubsequent interpretations of the [balance of factors] test by the California Supreme Court have cast doubt upon whether this is anything but a disguised rule of liability based upon third party beneficiary theory" (footnote omitted)). For example, in Goodman v. Kennedy, 556 P.2d 737 (Cal. 1976), the court refused to extend liability to an attorney who negligently gave his clients incorrect information about stock sold to plaintiffs by the clients. Subsequent cases have interpreted *Goodman* as limiting an attorney's liability to non-clients to "situations wherein the third party is the intended beneficiary of the attorney's services, or the foreseeability of harm to the third party as a consequence of professional negligence is not outweighed by other policy considerations." St. Paul Title Co. v. Meier, 226 Cal. Rptr. 538, 539 (Ct. App. 1986). *See generally* FEINMAN, *supra* note 4, at § 9.3.

22. *Goodman*, 556 P.2d at 743 (footnote omitted) (quoting Lucas v. Hamm, 364 P.2d 685,

because they did not involve any conflict of interest between the client-testators and the non-client beneficiaries.[23] Given this lack of conflict, it should not be surprising that the will-drafting cases are accepted in almost every jurisdiction as the one exception to the traditional privity rule, irrespective of the particular doctrinal approach taken.[24] Outside the narrow spectrum of will drafting cases, however, most cases do present the possibility of conflicting interests in varying degrees, thereby resulting in an understandable reluctance on the part of courts to extend the scope of a lawyer's duty to non-clients.[25]

Despite the concern with potential conflicts of interest, a growing number of cases have expanded the lawyer's duty to third-party non-clients who rely on the lawyer, in factual situations that go beyond the early will-drafting cases.[26] Many of these cases involve a lawyer dealing with multiple persons or entities where there is some ambiguity regarding the proper identification of the client or clients.[27] This ambiguity, which is often unstated, has been explicitly addressed in a series of related and sometimes overlapping cases where the plaintiff claimed an attorney-client relationship existed with the defendant-lawyer.[28] This claim frequently arises in cases involving a lawyer who represents an entity such as a closely held corporation or partnership and deals directly with individual constituents of the entity such as the officers, directors, shareholders, or partners.[29]

A particularly interesting aspect of these attorney-client relationship cases,

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688 (Cal. 1961) (en banc), *cert. denied*, 368 U.S. 987 (1962)).

23. Drafting a will may involve a potential for conflict regarding both the initial determination of whether and under what terms to make bequests and in any subsequent determinations of whether to change the will to the detriment of the initial beneficiaries. Once those decisions have been made, however, the testator and the beneficiaries have identical interests in having the attorney exercise reasonable care to translate the testator's intent into a valid will.

24. *E.g.*, 1 MALLEN & SMITH, *supra* note 1, § 7.10, at 379. Where a potential conflict exists between the testator and the beneficiaries, courts are less likely to permit any departure from the strict privity requirements. *See, e.g.*, Krawczyk v. Stingle, 543 A.2d 733 (Conn. 1988) (holding attorney not liable to third-party beneficiaries for negligent delay in execution of client's estate planning documents).

25. Thus, the more recent California cases involving legal malpractice rejected attempts by third parties to eliminate the privity requirement in factual situations ranging from opinions issued in connection with a sale of stock, *Goodman*, 556 P.2d 737, instructions to an escrow agent, *St. Paul Title Co.*, 226 Cal. Rptr. 538, and mortgage foreclosure proceedings, Sooy v. Peter, 270 Cal. Rptr. 151 (Ct. App. 1990) — all cases in which the courts declined to engage in any extensive analysis of the various policy considerations and instead favored the more traditional holding that the lawyer's professional duty of care does not extend to parties engaged in either adversarial proceedings or arm's length transactions.

26. *See, e.g.*, 1 MALLEN & SMITH, *supra* note 1, §§ 7.10-.11.

27. *See infra* parts II, VII.

28. *See infra* parts II, VII.

29. *See infra* parts II-V.

when viewed in conjunction with the third-party liability cases, is the extent to which the resolution of the attorney-client relationship question is similarly complicated by a concern for actual or potential conflicts of interest. Consequently, despite the difficulties in treating closely held corporations and small partnerships as entities distinct from their individual constituents,[30] courts have resisted claims of individual representation (at least in the absence of an express agreement) because they realize that the interests of entities and their constituents are often diametrically opposed.[31]

When the question is one of extending an attorney's liability to third-party non-clients, the concern that conflicting interests will chill an attorney's loyalty to a client is undoubtedly a cause for serious concern. When the question is one of recognizing the simultaneous representation of more than one client, however, the existence of conflicting interests is not always an unalloyed evil. Under the attorney ethics codes of all jurisdictions, the representation of conflicting interests is not necessarily unethical: Unless the lawyer fails to obtain the clients' informed consent, or the conflict is so severe that a reasonable lawyer would not agree to represent the clients in those particular circumstances,[32] then lawyers may and commonly do represent more than one client in a single transaction or proceeding.[33] Multiple representation is permitted because it is sometimes in the best interests of the clients to risk the inherent dangers of multiple representation to achieve a significant benefit in the form of either cheaper and more efficient representation or an enhanced ability to resolve minor differences and reach a shared goal.[34]

Further complicating the cases which directly address the existence of an attorney-client relationship is the prevalent view that the relationship is "fundamentally a contractual relationship," in which the law looks primarily to the actual intentions of the parties, whether express or implied.[35] Unfortu-

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30. *See, e.g.*, Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C., 309 N.W.2d 645, 649 (Mich. Ct. App. 1981) (per curiam).

31. *See, e.g.*, Goerlich v. Courtney Indus., Inc., 581 A.2d 825, 828 (Md. Ct. Spec. App. 1990), *cert. denied*, 586 A.2d 13 (Md. 1991).

32. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1983).

33. *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 349-58 (1986) (discussing conflicts in simultaneous representations); Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211 (1982) (discussing conflicts in simultaneous representations); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 201-02 (Tentative Draft No. 4, 1991) (discussing conflicts of interests).

34. *See, e.g.*, Moore, *supra* note 33, at 213-14.

35. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.13:106, at 75 (2d ed. Supp. 1993); *see also* Ronald I. Friedman, *The Creation of the Attorney-Client Relationship: An Emerging View*, 22 CAL. W. L. REV. 209, 213 (1986) ("[T]he starting point of analysis in the

nately, all too often the parties have not thought about the matter in precisely those terms, and yet the "clients" may have relied on the attorneys to protect their interests in the transaction or proceeding. This reliance is particularly notable in cases involving entity-constituent relations, in which lay individuals typically do not view the entity in the same abstract manner as do lawyers.[36] Thus, in the entity context, individual constituents frequently rely on the entity lawyer to protect their interests. Although the reliance may be both reasonable and foreseeable, these individuals may be precluded from recovery when the lawyer is negligent because: (1) concern about conflicts and a rigid adherence to formal notions of privity prevent courts from finding an attorney-client relationship;[37] and (2) concern about conflicts prevents the courts from extending liability to the constituent as a third-party non-client.[38]

Entity representation is a good example of a situation where there is inherent, or at least frequent, ambiguity regarding the identification of the client both by the parties themselves, at the time of the relevant events, and by the courts, which must reconstruct the significance of these same events at a later time. The purpose of this article is to explore the possibility that the difficulties posed by entity representation and similar situations are better dealt with by reconceptualizing the attorney-client relationship, rather than by extending the attorney's duty to third-party non-clients.

Part II of this article surveys several recent decisions in the entity representation area that reveal the courts' current confusion regarding both the potential liability of the lawyer to individual constituents and the appropriate role of the lawyer in dealing with such individuals. It concludes that while courts increasingly recognize the difficulties in treating these businesses as entities distinct from the shareholders or partners, the present inclination to resolve these difficulties by extending third-party liability is problematic. A better approach might be to recognize that the entity lawyer may have entered into an attorney-client relationship with an individual constituent even though the lawyer did not intend to do so.

Part III discusses one of several obstacles that prevents courts from exploring this alternative solution: the reliance that courts often place on the provision in attorney ethics codes that an entity lawyer represents the entity and not its constituents. Part III examines both the radical view that the entity theory of representation has no meaning in the context of small organizations like closely held corporations and the more moderate view that while the entity itself cannot be ignored, the ethics rules should not be read to exclude the possibility that an entity lawyer might also represent one or more individual

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creation of an attorney-client relationship is the law of contract.").

36. *See infra* text accompanying notes 76-91.

37. *See infra* parts II-IV.

38. *See supra* text accompanying notes 21-25.

constituents. The more prevalent view is that there is at least a presumption that entity lawyers represent only the entity itself and not the individuals, but that specific circumstances may show otherwise. Unfortunately, it is not clear what circumstances suffice to demonstrate individual representation in particular cases.

Part IV discusses another major obstacle to the recognition of an attorney-client relationship in the context of entity representation: the continued adherence to a contract-based standard for determining when the relationship is formed. Part IV concludes that this approach has little justification and that a tort-based approach is preferable to a contract-based approach, at least in the many jurisdictions in which a malpractice action can be brought in tort. Part IV then examines an appropriate tort-based approach to the formation of an attorney-client relationship. Borrowing from a line of cases involving attorney disqualification, the section concludes that an appropriate standard would include situations in which a foreseeable risk exists that individuals will act under the reasonable expectation that a lawyer is representing them. Under the proposed standard, lawyers who fail to clarify their role in inherently ambiguous situations will be considered to have entered into an attorney-client relationship with all persons who reasonably rely on the lawyer to protect their interests.

Part V refines the reasonable expectations test and demonstrates how it might be applied to legal malpractice cases involving entity representation.

Part VI considers the advantages and disadvantages of reconceptualizing the attorney-client relationship in this manner. The alternative would be a more functionalist approach in which courts take into account the purpose to be served and in which additional categories like "quasi-client" or "derivative client" are recognized. Part VI concludes that while a more functional approach makes sense in some cases, there are significant advantages to the reconceptualization approach in cases in which the rationale for imposing liability involves confusion regarding the lawyer's role.

Finally, Part VII suggests how reconceptualizing the attorney-client relationship might be useful in clarifying some recent cases in other representation areas, including representation of family members, transactions between buyers and sellers or borrowers and lenders, and representation of fiduciaries, including trustees and guardians.

II. VIEWING THE PROBLEM IN THE CONTEXT OF ENTITY REPRESENTATION

A quick survey of several recent decisions in the entity representation area reveals considerable confusion regarding not only the potential liability of an entity lawyer to individual constituents, but also the proper role of the lawyer in dealing with such individuals. Some of the decisions reflect the traditional restrictive approach where courts refuse to find either an attorney-client relationship or any third-party liability, regardless of the extent to which the

individuals may have reasonably relied on the attorney to protect their interests.[39] Other decisions indicate increasing discomfort with the inflexibility of the traditional approach and a willingness to examine the facts of each case.[40] However, even these courts have been unable to articulate a consistent rationale for particular extensions of liability, in large part due to their rigid adherence both to a contractual, privity-based concept of the attorney-client relationship[41] and to a narrow view of the proper role of an entity lawyer in dealing with individual constituents.[42]

The traditional restrictive approach to entity representation is illustrated by *Torres v. Divis*,[43] a recent decision by the Illinois Appellate Court. Torres was one of several investors and incorporators of a business formed to purchase and manage a restaurant. After Torres and his co-investors took over the restaurant, they became aware of numerous debts that had been previously incurred by the business. Unable to rescind the purchase agreement, Torres brought a malpractice action against the defendant lawyer who had incorporated and represented the corporation. While Torres did not deal directly with the lawyer, Torres stated he believed the lawyer was representing him, just as the lawyer represented one of Torres's co-investors, Powers. Without even exploring the reasonableness of this belief,[44] the court held that no attorney-client relationship existed between Torres and the lawyer because that "relationship is consensual and arises only when both the attorney and client have consented to its formation," and no evidence suggested that the lawyer had expressly agreed to represent Torres.[45]

The court also held that Torres could not recover under a third-party liability theory because the facts did not demonstrate that the primary purpose of the attorney-client relationship (between either the lawyer and Powers or the lawyer and the corporation) was to benefit Torres.[46] The court emphasized that its reluctance to find that the defendant lawyer owed any duty to Torres stemmed from its concern for potential conflicts between the individual investors:

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39. *See infra* text accompanying notes 44-46.

40. *See infra* text accompanying notes 60-72.

41. *See infra* text accompanying note 51.

42. *See infra* text accompanying notes 52-57.

43. 494 N.E.2d 1227 (Ill. App. Ct. 1986).

44. In his brief, Torres alleged that Powers testified that the lawyer had agreed to represent the incorporators; however, no such testimony appeared in the record. *Id.* at 1231 n.2. The court did find that Torres presented evidence indicating that the lawyer had agreed to represent Powers and to incorporate and represent the corporation formed to purchase the restaurant. *Id.* at 1231. The defendant lawyer apparently did not deny that he was aware that Torres was one of the incorporators.

45. *Id.* For a discussion of the problems of this contract-based approach, see *infra* part V.

46. *Torres*, 494 N.E.2d at 1231.

> The interests of the incorporators of a closely-held business are not always the same, and they are often adverse. Each incorporator may seek to maximize his personal return and to minimize his personal contributions. . . . It would be unwise to impose on an attorney, retained by only one of several incorporators for the purpose of organizing a corporation, a duty to act on behalf of all of the incorporators in the absence of an agreement that he do so. Recognition of such a duty would create an unacceptably wide range of potential conflicts of interest.[47]

The court, however, failed to address both the obvious potential for conflict between the two clients the lawyer *did* expressly agree to represent — the corporation and Powers[48] — and the fact that lawyers frequently do represent groups of individuals forming an entity such as a partnership or corporation.[49] If the defendant lawyer could reasonably have foreseen that Torres and the other investors would rely on him as their attorney, then surely that fact ought to have had some bearing on the determination of whether the lawyer owed them any duty.[50]

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47. *Id.*; *see also* Buford White Lumber Co. Profit Sharing & Sav. Plan & Trust v. Octagon Properties, Ltd., 740 F. Supp. 1553, 1561 (W.D. Okla. 1989) (holding that attorney for general partner owes no duty to limited partners in a securities exchange transaction; to find otherwise would require an inference that the lawyer represented both the seller and the purchasers in "a potential direct conflict-of-interest situation"); Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627, 636-37 (Ct. App. 1991) (refusing to extend liability of the attorney for a closely held corporation to a minority shareholder because of the potential for conflicting interests between the shareholder and the corporation); Felty v. Hartweg, 523 N.E.2d 555, 557 (Ill. App. Ct. 1988) (refusing to extend duty of corporate attorney to minority shareholder because "[e]ven in closely held corporations, minority shareholders often have conflicting interests with the corporation").

48. For example, if Powers sought to "maximize his personal return and to minimize his personal contribution," *Torres*, 494 N.E.2d at 1231, that may have adversely affected both the solvency of the newly formed corporate entity and the financial interests of the co-investors.

49. *See, e.g.*, *In re* Ireland, 706 P.2d 352 (Ariz. 1985) (en banc) (per curiam); Schaeffer v. Cohen, Rosenthal, Price, Mirkin, Jennings & Berg, P.C., 541 N.E.2d 997 (Mass. 1989); Lewis v. Alper, 224 N.Y.S.2d 996 (App. Div. 1962) (mem.).

50. At the very least, it would be appropriate to acknowledge that the lawyer had a duty to exercise care in incorporating the business and should have been liable if damages had occurred as a result of any negligent incorporation. *Cf.* Adell v. Sommers, Schwartz, Silver & Schwartz, P.C., 428 N.W.2d 26 (Mich. Ct. App. 1988) (holding limited partner may sue lawyer hired by general partner for negligence in formation of partnership, including failure to secure tax advice); Gunn v. Mahoney, 408 N.Y.S.2d 896 (Sup. Ct. 1978) (holding plaintiff stated a cause of action when he alleged lawyer failed to incorporate his business); *Lewis*, 224 N.Y.S.2d at 996 (holding incorporators who sued lawyer for negligence in delayed filing of certificate of incorporation failed to prove the issue of causation). Indeed, prior to incorporation, the fictional corporate entity does not yet exist. *E.g.*, Speedee Oil Change No. 2, Inc. v. National Union Fire Ins. Co., 444 So. 2d 1304 (La. Ct. App. 1984) (extending third-party liability to grant plaintiff corporation a cause of action against lawyer who gave negligent advice to promoters regarding option to extend a lease). *But cf.* Jesse v. Danforth, 485 N.W.2d 63, 67 (Wis. 1992) (holding that when

In *Torres* the court invoked the contractual nature of the attorney-client relationship as a barrier to finding that the attorney who drafted incorporation papers represented the incorporators individually.[51] Other courts have raised as a barrier a narrow, unrealistic view of the proper role of a lawyer retained by a corporation or other similar entity. For example, in *Egan v. McNamara*[52] the estate of Rohrich, the majority shareholder of a small, closely held corporation, sought to rescind a buy-sell agreement between the shareholders and the corporation, alleging a breach of fiduciary duty on the part of the lawyer for the corporation who was himself a director and a shareholder, as well as a party to the agreement. The estate claimed that the defendant lawyer also represented Rohrich, and indeed the lawyer had previously represented Rohrich both prior to the lawyer's association with the corporation and subsequently, during a "period of extensive estate and corporate planning"[53] in which Rohrich and the lawyer initiated a series of transactions which ultimately led to the buy-sell agreement. This series of transactions was initiated to achieve various personal goals established by Rohrich.[54]

Despite this extensive history of prior dealings, the District of Columbia Court of Appeals summarily rejected the possibility of any attorney-client relationship between the defendant lawyer and Rohrich. Citing Ethical Consideration 5-18 of the District of Columbia Code of Professional Responsibility, the court held that because a lawyer employed by a corporation "represents the entity, not its individual shareholders, officers and directors," the lawyer's sole duty in the transaction was to protect the corporation's "primary concerns."[55] The court, however, failed to address the possibility that Rohrich might have continued to view the defendant as *his* lawyer,[56]

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a lawyer is retained by a person to form a corporation, the corporation becomes the client retroactively).

51. *See Torres*, 494 N.E.2d at 1231; *see also* Chicago Title Ins. Co. v. Holt, 244 S.E.2d 177 (N.C. Ct. App. 1978) (holding vice-president who indemnified a corporate loan could not sue the corporation's attorney for negligent certification of title).

52. 467 A.2d 733 (D.C. 1983).

53. *Id.* at 736.

54. *See id.*

55. *Id.* at 738. For a discussion of EC 5-18 of the *Model Code of Professional Responsibility*, on which the D.C. Code provision was based, see *infra* text accompanying note 75. For another decision citing EC 5-18 as a ground for rejecting an attorney-client relationship between an entity lawyer and its constituent, see, *e.g.* Quintel Corp., N.V. v. Citibank, N.A., 589 F. Supp. 1235, 1240 (S.D.N.Y. 1984) (citing EC-5-18 of the New York Code of Professional Responsibility in holding that the duty of a lawyer who represented a limited partnership runs to the partnership, not to the limited partners).

56. The lawyer testified that "he expressly told Rohrich not to rely on him as counsel since he was party to the agreement." *Egan*, 467 A.2d at 737. The court, however, did not even mention this testimony in the portion of its opinion discussing the estate's claim of an attorney-

especially in light of the fact that the corporation itself had no real interest in the particular transaction.[57]

In *Egan* Rohrich's estate also alleged that, apart from any attorney-client relationship, the lawyer owed Rohrich a fiduciary duty based on the trust relationship between shareholders and participants in a close corporation. The court also rejected this claim.[58] However, in *Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C.*,[59] the Michigan Court of Appeals accepted a similar claim in a lawsuit brought by a fifty percent shareholder against the corporation's lawyer. In *Fassihi* the defendant lawyer drafted the agreements pertaining to membership in a professional corporation in which physicians Fassihi and Lopez were equal shareholders. Eighteen months later, the lawyer assisted Lopez in ousting Fassihi from the corporation while Lopez simultaneously exercised the authority he had under prior agreements with the hospital to oust Fassihi from the staff of the radiology department.[60] In his subsequent lawsuit against the lawyer, Fassihi alleged that the lawyer breached his fiduciary duty to Fassihi by failing to inform him either that the lawyer was representing Lopez individually or that he was aware of Lopez's prior agreements with the hospital.[61]

Like Rohrich's estate in *Egan,* Fassihi alleged a breach of fiduciary duty based on both an attorney-client relationship and a separate trust relationship.

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client relationship. *See id.* at 738-39. In any event, the lawyer had reviewed the agreement, and though the court found that he did so on behalf of the corporation, *id.* at 739, Rohrich may well have viewed himself and the corporation as indistinguishable. For a further discussion of the significance of such a statement in determining the existence of an attorney-client relationship under the standard proposed in this article, see *infra* text accompanying note 174.

57. The court attempted to articulate an interest of the corporation that was separate from the interests of the shareholders, but its discussion merely underscores the extent to which the only interests in a buy-sell agreement are those of "existing shareholders [who] do not want outside parties to obtain control of the corporation through the purchase of shares upon the death or withdrawal of a present shareholder." *Egan*, 467 A.2d at 739. For a discussion of the view that the entity theory of representation may have no meaning in the case of small organizations such as a closely held corporations or partnerships, see *infra* text accompanying note 78.

58. The court stated the following:

> Assertions that in a close corporation . . . the individuals involved *are* the corporation, do not disturb the conclusion that there was no fiduciary duty. [The lawyer] represented the corporation, an entity legally distinct from its directors, officers, and shareholders. As [the corporation's] counsel, his obligation was to ensure that the agreement was in the best interest of the company, regardless of its impact on individual shareholders.

Egan, 467 A.2d at 739 (emphasis in original); *accord* Felty v. Hartweg, 523 N.E.2d 555 (Ill. App. Ct. 1988); Schaeffer v. Cohen, Rosenthal, Price, Mirkin, Jennings & Berg, P.C., 541 N.E.2d 997 (Mass. 1989).

59. 309 N.W.2d 645 (Mich. Ct. App. 1981) (per curiam).

60. *Id.* at 647.

61. *Id.*

Not surprisingly, the court in *Fassihi* quickly disposed of the claim that an attorney-client relationship existed between the lawyer and Fassihi, citing the same narrow view of the role of a corporate attorney taken in *Egan*:

> A corporation exists as an entity apart from its shareholders, even where the corporation has but one shareholder. While no Michigan case has addressed whether a corporation's attorney has an attorney-client relationship with the entity's shareholders, the general proposition of corporate identity apart from its shareholders leads us to conclude, in accordance with decisions from other jurisdictions, that the attorney's client is the corporation and not the shareholders.[62]

Although the court rejected any possibility that the lawyer had assumed an attorney-client relationship with Fassihi when he agreed to help form the professional corporation, the *Fassihi* court nonetheless was disturbed that the lawyer had sided with Lopez against Fassihi from the very outset. The court sympathetically noted Fassihi's claim that "he reposed in [the defendant lawyer] his trust and confidence and believed that, as a 50% shareholder . . ., defendant would treat him with the same degree of loyalty and impartiality extended to the other shareholder, Dr. Lopez."[63] Moreover, although the court distinguished corporate veil piercing cases, it agreed that those cases were instructive in pointing out "the difficulties in treating a closely held corporation with few shareholders as an entity distinct from the shareholders."[64]

These "difficulties" did not persuade the court to re-examine its summary rejection of an attorney-client relationship between the defendant and Fassihi. The court, however, indicated that the lawyer may have owed Fassihi a fiduciary duty based on the concept of a "confidential relationship" arising from the trust and confidence Fassihi alleged he placed in the lawyer.[65] But, the court did not explain the significance, *in this context*, of distinguishing between a fiduciary duty based on a relationship of trust and an ordinary attorney-client relationship.[66] In *Fassihi* the defendant lawyer allegedly

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62. *Id.* at 648 (citations omitted).

63. *Id.*

64. *Fassihi*, 309 N.W.2d at 649.

65. *Id.* at 648. As stated by the court:

> A fiduciary relationship arises when one reposes faith, confidence, and trust in another's judgment and advice. Where a confidence has been betrayed by the party in the position of influence, this betrayal is actionable, and the origin of the confidence is immaterial. Furthermore, whether there exists a confidential relationship apart from a well-defined fiduciary category is a question of fact. Based upon the pleadings, we cannot say that plaintiff's claim is clearly unenforceable as a matter of law.

Id. (citations omitted).

66. For a discussion of the significance of a fiduciary duty separate from an attorney-client

breached a duty of loyalty, but it could just as easily have been a question of incompetence. If, for example, the lawyer had negligently failed to create a valid corporation, it would be hard to understand how the court could hold that Lopez, but not Fassihi, could recover damages; and if Fassihi could have recovered damages based on negligent incorporation, then the court clearly would have created the functional equivalent of a full-scale attorney-client relationship.

A similar result was reached in *Kelly v. Kruse, Landa, Zimmerman & Maycock*,[67] a case decided by the Tenth Circuit Court of Appeals under Utah law. Plaintiff Kelly was an officer and director of Earth Energy Resources (EER), which hired the defendant law firm to represent it in several securities transactions. EER sold some limited partnerships in violation of state securities laws and the purchasers of the partnerships sued Kelly and others individually. Kelly in turn sued the law firm for failure to inform her of her potential liability.[68]

As in *Egan* and *Fassihi,* Kelly alleged that an attorney-client relationship existed between herself and the law firm. Indeed, even under the traditional tests, fairly strong support for such a relationship existed because the retention agreement specifically stated that the law firm "agreed to provide '[a]dvice with respect to liabilities . . . [of] officers, directors and others in connection with . . . the offering.'"[69] Nonetheless, the *Kelly* court summarily rejected this claim, invoking the standard litany that "'the fact that an attorney represents a corporation does not make that attorney counsel to officers and directors of the corporation.'"[70] The court, however, did acknowledge that the agreement created an intended third-party beneficiary relationship and that the law firm had breached its duty of care to Kelly.[71] Given the specific language of the retention agreement, this result is not surprising; however, it *is* surprising that the court failed even to consider whether the agreement created an attorney-client relationship based on the law firm's express promise to render legal advice to Kelly and the other officers and directors of the corporation.

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relationship in the context of a motion to disqualify an attorney in pending litigation, see *infra* text accompanying notes 137-50.

67. No. 89-4033 and 89-4039, 1991 U.S. App. LEXIS 19742 (10th Cir. 1991) (unpublished opinion).

68. *Id.* at *1-*2. After the purchasers obtained a judgment against Kelly, she threatened to file bankruptcy. The purchasers then agreed to drop their claims against her in return for her agreement to pursue a legal malpractice claim against the law firm and assign most of any recovery to the purchasers. *Id.* at *2.

69. *Id.* at *7 (alteration in original) (quoting appellant's brief at 6).

70. *Id.* at *6 (quoting Kline Hotel Partners v. Aircoa Equity Interests, Inc., 708 F. Supp. 1193, 1195 (D. Colo. 1989) (mem.)).

71. *Id.* at *7.

As decisions like *Fassihi* and *Kelly* demonstrate, courts are beginning to recognize that in some entity cases the nature of the relationship between an entity's lawyer and its individual constituents may be such that the lawyer owes a duty to the constituents. But what type of duty is owed, and how will it be established from case to case? To call it a "fiduciary duty" as the *Fassihi* court did ignores situations where an individual's interest in competent representation may be just as compelling as her interest in loyalty. Calling it "third-party liability," as the *Kelly* court did, solves the competency problem; however, under this approach it would not be clear whether or when a duty of loyalty or confidentiality will be imposed, because third-party liability traditionally has not included an attorney's fiduciary duties.[72]

Perhaps the better approach is to recognize that given the frequent ambiguity of the relationship between an entity's lawyer and its individual constituents, entity lawyers who fail to clarify their role may be held to have entered into an attorney-client relationship with individual constituents, even though they had no intention of doing so. Before the merits of this approach can be fairly examined, it is first necessary to explore some of the obstacles that have prevented courts from exploring this alternative solution. These obstacles include the misuse of ethics code provisions relating to entity representation and the continued adherence to an outdated contract-based model for the formation of an attorney-client relationship.

III. THE MISUSE OF ETHICS CODE PROVISIONS IN ENTITY REPRESENTATION CASES

As in *Egan v. McNamara*,[73] courts that refuse to find an attorney-client relationship between an entity lawyer and an individual constituent often rely on attorney codes of conduct.[74] These ethics codes typically provide that "[a] lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity."[75] Reliance on such provisions raises several problems, including both the questionable viability of the concept of entity representation for lawyers dealing with closely held corporations and partnerships and the strong possibility in particular cases that the lawyer is representing *both* the entity itself and one

72. *See* 1 MALLEN & SMITH, *supra* note 1, § 7.3.

73. 467 A.2d 733 (D.C. 1983).

74. *See supra* text accompanying note 55.

75. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18 (1983). The *Model Code of Professional Responsibility* was superseded in 1983 by the *Model Rules of Professional Conduct*, which provide that "[a] lawyer employed or retained by an organization represents the organization through its duly authorized constituents." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(a) (1992).

or more of its individual constituents.

The concept of entity representation has been generally accepted for large, publicly held corporations.[76] However, there is increasing dissatisfaction with its usefulness in the context of smaller organizations,[77] particularly in regard to such intra-organizational matters as choice of an organizational form, questions of capital structure, finance or control mechanisms, and disputes among constituents. According to one view, a small organization like a closely held corporation may well be a separate legal entity for purposes of its dealing with outsiders; however, with respect to intra-organizational relations, the fictional "entity" has no interests to represent and the only relevant interests are those of the individuals themselves.[78]

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76. *See* Lawrence E. Mitchell, *Professional Responsibility and the Close Corporation: Toward a Realistic Ethic*, 74 CORNELL L. REV. 466, 469 & n.13 (1989) (stating that the *Model Rules of Professional Conduct* were drafted with the traditional corporate model in mind (footnote omitted)).

77. *See id.* at 468-69.

78. *Id.* at 466-81. At one point, Professor Mitchell makes this point by analogizing shareholders of a close corporation to partners, at least in their dealings with one another. *Id.* at 469. He suggests that partnerships, unlike corporations, are treated as an aggregate of individuals under the Model Rules. *Id.* at 470 & n.15. However, a recent ABA opinion states that "[a] partnership is an organization within the meaning of Rule 1.13" and that "[g]enerally, a lawyer who represents a partnership represents the entity rather than the individual partners." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-361, at 1 (1991); *see also* Michael R.H. Post, *Representing a Tax Matters Partner: Who is the Client?*, 6 GEO. J. LEGAL ETHICS 527, 532-34 (1993) (stating that, under the *Model Rules*, the lawyer for a partnership owes primary allegiance to the entity).

The support cited by Professor Mitchell — a statement suggesting that the entity theory under Rule 1.13 applies only when the entity is treated as such under other law — initially appeared in the *Legal Background* section to an early version of Rule 1.13. *See* Mitchell, *supra* note 76, at 470 n.15 (citing ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, LEGAL BACKGROUND 147 (1984)). At that time, the comment to Rule 1.13(a) stated merely that "[t]he duty defined in this Rule applies to unincorporated associations." ABA COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT 85 (Proposed Final Draft, May 30, 1981). As officially adopted in 1983, this statement was revised to read: "The duties defined in this Comment apply *equally* to unincorporated associations." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. (1992) (emphasis added). In addition, the application of the entity theory in Rule 1.13(a) to unincorporated associations was given further prominence by the addition of the sentence in the comment: "'Other constituents' as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations." *Id.*

Most courts treat partnerships, particularly limited partnerships, like corporations for purposes of the entity representation rule. *See, e.g.*, Quintel Corp., N.V. v. Citibank, N.A., 589 F. Supp. 1235 (S.D.N.Y. 1984); Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985). However, a few California cases hold that an attorney for a partnership represents all partners in matters regarding partnership business. *See* Hecht v. Superior Court, 237 Cal. Rptr. 528 (Ct. App. 1987); Wortham & Van Liew v. Superior Court, 233 Cal. Rptr. 725 (Ct. App. 1987); *cf.* Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 294 F. Supp. 1148

This view, although not widely held, was adopted for at least some situations by the Oregon Supreme Court in a series of attorney disciplinary cases. In the first case, *In re Banks*,[79] the accused lawyers, Thompson and his law partner Banks, represented a family corporation owned by R.S. Michel, his wife, and his two daughters, each of whom was also a director of the corporation. Michel was the company's "creator, organizer, founder, chief executive, and driving force" and completely dominated the business, running it "as his private fief."[80] The lawyers conducted estate planning, will drafting, and other private business for Michel and his wife and represented the corporation in both its business and litigation matters. Thompson drafted a ten-year employment contract with the corporation whereby Michel received a percentage of the gross income of the corporation and was thus "in a position to assure himself of substantially all immediate benefits from the operation of the corporation."[81] The wife and daughters subsequently gained control of the corporation and Thompson took various actions against Michel, including rendering an opinion to the board that Michel had breached his employment contract.[82]

In defending against disciplinary charges brought by the Oregon State Bar, the lawyers claimed that in drafting the employment agreement Thompson represented the corporation and not Michel. The court, however, refused to apply the general rule of entity representation "to a closely held family corporation which is substantially controlled and operated by one person and where the corporation's attorneys have been that person's personal attorneys

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(E.D. Pa. 1969) (mem.) (holding counsel to unincorporated association has attorney-client relationship with each member of the association). Both *Wortham* and *Hecht* involved application of the attorney-client evidentiary privilege and were distinguished in a case involving attorney disqualification. *See* Responsible Citizens v. Superior Court, 20 Cal. Rptr. 2d 756 (Ct. App. 1993). In *Responsible Citizens* the court interpreted the relevant California ethics provision as an attempt to avoid "enmesh[ing] members in the intricacies of the entity and aggregate theories of partnership." *Id.* at 764 (quoting CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-600 cmt. (West Supp. 1994)); *see also* Security Bank v. Klicker, 418 N.W.2d 27 (Wis. Ct. App. 1987) (stating that although Wisconsin follows the aggregate theory of partnerships for most purposes, it does not follow that the entity theory does not apply in terms of the attorney-client relationship).

An intermediate position is to treat partnerships and other unincorporated associations and groups as entities "[i]f the group is seen as having an identity apart from the individuals who comprise it." 1 HAZARD & HODES, *supra* note 35, § 1.13:103, at 390.2; *see also Security Bank*, 418 N.W.2d at 31 (stating a partnership is a legal entity if the parties treat it as one). Under this approach, it is imperative that lawyers clarify whether they represent the group as an entity, the individual members, or both. 1 HAZARD & HODES, *supra* note 35, § 1.13:103, at 391.

79. 584 P.2d 284 (Or. 1978) (en banc) (per curiam).

80. *Id.* at 285.

81. *Id.* at 285-86.

82. *Id.* at 287-88.

as well."[83] The court stated that "[a]t the time of the drawing of the contract *Michel was the corporation*[,]"[84] and "[i]n such a situation . . . common sense dictates that the corporate entity should be ignored."[85] The court acknowledged the entity theory underlying the ethics code provisions, but viewed this situation as a "logical exception" necessitated by the reasonable expectations of Michel.[86]

One year later, in *In re Brownstein*,[87] the Oregon Supreme Court reaffirmed and extended its willingness to ignore the entity representation rule in some cases. The accused lawyer, Brownstein, represented a close corporation comprised of three approximately equal owners, including Woods, whom Brownstein represented in other matters as well.[88]

The disciplinary action arose out of Brownstein's role in structuring a transaction in which a third party (who was also a client of Brownstein) made a loan to the corporation and received stock in the corporation and a corporate note personally guaranteed by Woods and another owner. The business subsequently faltered and Brownstein was dismissed as counsel for the corporation. Brownstein then represented the third party in an effort to collect from Woods on his personal guaranty of the corporate note.[89]

In response to Brownstein's defense that he represented the corporation and not Woods personally, the court cited *Banks* for the proposition that "in a small, closely held corporation the rights of the individual stockholders who control the corporation and of the corporation are virtually identical and inseparable."[90] In addition, although Woods did not testify unequivocally that he thought Brownstein was representing him, the court expressed concern that Brownstein never even discussed with Woods whom he represented or the possibility of conflicting interests. This concern led the court to state broadly that the attorney representing a close corporation may not undertake representation adverse to the stockholders because "[i]n actuality, the attorney in such a situation represents the corporate owners in their individual capacities as well as the corporation unless other arrangements are clearly made."[91]

After *Brownstein*, however, the Oregon Supreme Court retreated from the extreme view that absent a clear understanding to the contrary, lawyers representing small, closely held corporations *necessarily* represent the interests

83. *Id.* at 290.
84. *Banks*, 584 P.2d at 290 (emphasis added).
85. *Id.*
86. *Id.* at 292.
87. 602 P.2d 655 (Or. 1979) (per curiam).
88. *Id.* at 656.
89. *Id.*
90. *Id.* (citing *Banks*, 584 P.2d 284).
91. *Id.* at 657 (citing *Banks*, 584 P.2d 284).

of the individual owners. In a subsequent disciplinary case, *In re Kinsey*,[92] the court limited *Banks* to situations "where the controlling stockholder *was* the corporation."[93] Thus, the *Kinsey* court held that a corporate lawyer could not side with the controlling shareholder-directors against the corporation, because loyalty to the corporate entity was necessary to protect the interests of a minority shareholder.[94] As for its broad holding in *Brownstein*, the court explicitly modified its prior language:

> The language in *Brownstein*, "In actuality, the attorney in such a situation represents the corporate owners in their individual capacities as well as the corporation unless other arrangements are clearly made. . . ." should not be misinterpreted. It refers to the special relationship in *Banks* where the controlling stockholder *was* the corporation. The appropriate rule for a corporation with minority stockholders with substantial interests such as Klinicki's 33 percent is:
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> > "As a corporation speaks and acts only through its officers and directors, its counsel is their legal advisor in respect to its affairs, but in performing that duty he is acting as the corporation's attorney only and not as the attorney of any of its stockholders, directors, or officers as individuals, or any group or faction thereof."[95]

As *Kinsey* clearly demonstrates, difficulties may arise when the entity theory of representation is applied to small organizations. In most instances, however, the entity itself cannot simply be ignored, even in intra-organizational matters; this fact is especially true whenever there are minority interests in conflict with the controlling shareholders, because these interests need the protection offered by the standard ethics rule.[96] Nevertheless, even if the standard ethics rule insists on recognizing the separate existence of the entity in all circumstances, including intra-organizational relations, the basic purpose of such rules is not to exclude the possibility that the entity lawyer might *also* represent one or more individuals, but rather to clarify that a lawyer who represents an entity "does *not* thereby (and without more) become the lawyer for any of the entity's members, agents, [or] officers."[97]

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92. 660 P.2d 660 (Or. 1983) (per curiam).

93. *Id.* at 670 n.10 (emphasis in original).

94. *Id.* at 671.

95. *Id.* at 670 n.10 (citations omitted).

96. Absent the entity theory of representation, the only protection afforded a minority shareholder is recognition of the special duties owed by lawyers representing fiduciaries such as majority shareholders. While some cases have recognized the special status of minority shareholders and other beneficiaries as "derivative clients," the extent of protection provided under this doctrine is unclear. *See infra* text accompanying notes 179-84.

97. 1 HAZARD & HODES, *supra* note 35, § 1.13:102, at 387; *accord* ABA Comm. on Ethics

Thus, under a proper reading of the attorney codes of conduct, there is always a strong possibility the lawyer has not one, but multiple, clients.[98] Indeed, it is commonly recognized that individuals involved in an organization sometimes suppose that the lawyer represents them as well as the organization.[99] Even the highest officials in large publicly held corporations "often consider themselves to be indistinguishable from the entity."[100] As a result, the *Model Rules of Professional Conduct* provide that "[i]n dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."[101]

The problem is most acute in closely held corporations and small partnerships where, as the *Banks* court recognized, distinguishing between representation of the entity and its individual members is more difficult. This difficulty exists because, unlike the publicly held corporation, the ownership and management are substantially identical.[102] As a result, even entities in which a single dominant shareholder does not exist, counsel "typically will have regular contact with [the owners] and may well have personal relationships with some or all of them, each of whom is likely to have a significant financial stake in the enterprise."[103] In this context, it is difficult, if not impossible, to determine who speaks on behalf of the entity. Rather, "counsel is more likely to find individual participants attempting to realize their personal goals through the enterprise."[104] Because these individuals often have the legal authority to direct the affairs of the business,[105] neither counsel nor the individuals are likely to distinguish between advising the entity and advising the individual constituents.

Numerous authorities acknowledge the possibility of multiple representation in the entity context.[106] However, these authorities fail to articulate a clear and consistent standard for determining *when* attorney-client relationships will be found between the entity lawyer and the concerned individuals. According to one view, in the absence of a clear understanding that the lawyer

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and Professional Responsibility, Formal Op. 91-361, at 3 (1991).

98. *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(e) (1992) ("A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.").

99. 1 HAZARD & HODES, *supra* note 35, § 1.13:102, at 390.

100. *Id.* § 1.13:109, at 399-400.

101. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(d) (1992).

102. *See, e.g.*, Mitchell, *supra* note 76, at 476-77.

103. *Id.* at 479.

104. *Id.*

105. *See id.* at 480.

106. *See, e.g.*, sources cited *supra* note 49.

is representing only the entity and not the individual interests, the lawyer should be found to represent the individuals, at least in their dealings with one another.[107] This view, however, is similar to that taken by the Oregon Supreme Court before it decided *Kinsey* and is not widely followed.[108]

The more prevalent (and less radical) view is that there is a presumption that entity lawyers represent only the entity itself and not the individuals unless the specific circumstances show otherwise.[109] Unfortunately, it is not at all clear what circumstances suffice to demonstrate individual representation in a particular case. According to the ABA Standing Committee on Ethics and Professional Responsibility,

> [w]hether such a relationship has been created almost always will depend on an analysis of the specific facts involved. The analysis may include such factors as whether the lawyer affirmatively assumed a duty of representation to the individual . . ., whether the [individual] was separately represented by other counsel when the [organization] was created or in connection with its affairs, whether the lawyer had represented an individual . . . before undertaking to represent the [entity], and whether there was evidence of reliance by the individual . . . on the lawyer as his or her separate counsel, or evidence of the [individual's] expectation of personal representation.[110]

One or more of these factors is commonly present in entity representation, especially in representation of those involving small, closely held corporations or partnerships. Yet, it is extremely rare for courts to find an attorney-client relationship between an entity lawyer and an individual constituent. Thus, despite the increased willingness of some courts to extend lawyer liability to the individual constituents on grounds other than the existence of an attorney-client relationship, cases like *Torres, Egan, Fassihi,* and *Kelly*, in which the courts refuse to extend the parameters of an attorney-client relationship, remain the norm.

IV. FROM A CONTRACTS TO A TORT-BASED STANDARD FOR DETERMINING THE ATTORNEY-CLIENT RELATIONSHIP

Part of the difficulty of articulating standards for the formation of the

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107. *See* Mitchell, *supra* note 76, at 506. For a discussion of a similar view applied in the context of lawyer disqualification, rather than lawyer malpractice or discipline, see *infra* text accompanying notes 123-50.

108. *See* Mitchell, *supra* note 76, at 500.

109. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-361, at 3 (1991).

110. *Id.* at 4 (discussing representation of a partnership) (footnote omitted).

attorney-client relationship in the entity representation cases is that courts continue to emphasize the contractual nature of the relationship even when the action is brought in tort.[111] While most courts do not require a formal contract,[112] they do look for conduct evidencing "'an offer or request by the client for legal services and an acceptance of the offer by the attorney.'"[113] Moreover, some courts insist that the relationship is consensual and can only exist with the consent of both parties.[114] Because an entity lawyer rarely intends to enter into an attorney-client relationship with a constituent — unless the legal services involve personal matters unrelated to entity affairs[115] — it is extremely unlikely that an entity lawyer will be found to have entered into such a relationship under this test.

The strict contract-based approach has little to justify it, at least in the many jurisdictions in which malpractice actions can be brought in tort. After all, the courts began abandoning the privity of contract requirement in negligence actions as early as 1916[116] in favor of tests that emphasize the foreseeability of harm as the most important factor in establishing the existence and scope of the duty owed by one person to another.[117] In the legal

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111. In most jurisdictions an attorney's implied contract to exercise ordinary skill and knowledge gives rise to a remedy in tort, as well as in contract. 1 MALLEN & SMITH, *supra* note 1, § 8.5, at 417. In a controversial decision, the Illinois Supreme Court recently held that while non-clients can sue an attorney in tort, clients suing for purely economic harm can sue only in contract. Collins v. Reynard, 1991 Ill. LEXIS 104. *See generally* William C. Way, Note, *The Problem of Economic Damages: Reconceptualizing the Mooreman Doctrine*, 1991 U. ILL. L. REV. 1193.

112. Waggoner v. Snow, Becker, Kroll, Klaris & Krauss, 991 F.2d 1501, 1505 (9th Cir. 1993).

113. *E.g.*, Mursau Corp. v. Florida Penn Oil & Gas, Inc., 638 F. Supp. 259, 262 (W.D. Pa. 1986) (quoting *e.g.*, Connelly v. Wolf, Block, Schorr & Solis-Cohen, 463 F. Supp. 914, 919 (E.D. Pa. 1978) (mem.)), *aff'd*, 813 F.2d 396 (3d Cir.), *and aff'd*, 813 F.2d 398 (3d Cir. 1987).

114. *See, e.g.*, *Mursau Corp.*, 638 F. Supp. at 262; Torres v. Divis, 494 N.E.2d 1227 (Ill. App. Ct. 1986). This strict contract approach has been modified, though only slightly, in the recent draft of the *Restatement (Third) of the Law Governing Lawyers*. In the draft, the client's consent is still required, but the lawyer's consent may not be required, *i.e.*, if the lawyer

> fails to manifest lack of consent to [provide legal services], when the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services, or [when] a tribunal with power to do so appoints the lawyer to provide the services.

Id. § 26(2) (Tentative Draft No. 5 (1992)). For a discussion of the significance of this slight modification of the more traditional approach, see *infra* note 125 and accompanying text.

115. *See, e.g.*, Lane v. Chowning, 610 F.2d 1385, 1389 (8th Cir. 1979) ("The only way in which [the plaintiff] could have substantiated his claims against the attorneys is to have offered proof that [the attorneys] contemporaneously performed services for him, personally." (citing United States Indus., Inc. v. Goldman, 421 F. Supp. 7, 11 (S.D.N.Y. 1976) (mem.)).

116. MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).

117. *See, e.g.*, Hilliker, *supra* note 4, at 47-49 (discussing *MacPherson* in the context of products liability actions); *see also supra* text accompanying note 20 (discussing the trend in

malpractice field itself, most jurisdictions that permit some departures from strict privity in third-party liability cases do so not on the basis of contract doctrine but rather on the basis of the "balance of factors" test in negligence.[118] Even in standard legal malpractice actions, courts have recognized at least one instance in which the relationship is nonconsensual: situations involving court-appointed lawyers.[119]

Assuming tort theory is preferable to contract,[120] an appropriate tort-based approach to the formation of an attorney-client relationship must still be determined. The "balance of factors" approach has the advantage of explicitly acknowledging that the question is one of policy and not form;[121] however, it provides almost no guidance on how particular cases will be resolved. As a result, the test is unsatisfactory in determining whether an attorney-client

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California to eliminate restrictive tests in various aspects of negligence law in favor of using "foreseeability as the key component necessary to establish liability"). For a discussion of the trend to abolish the strict privity requirement in negligence cases against accountants, see Hilliker, *supra* note 4, at 49-54; Lawson & Mattison, *supra* note 6, at 1309.

Of course there are limits to the usefulness of foreseeability as the key to establishing a duty of care, even outside the legal malpractice area. For example, most courts have rejected attempts to create a new tort for the negligent infliction of economic harm, instead preferring to govern these relationships by what they perceive to be the more relevant contract doctrine. *See, e.g.*, Gary T. Schwartz, *The Beginning and Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 658 (1992). Under the negligence doctrine, however, most courts permit legal malpractice actions to be brought in tort, see *supra* text accompanying note 111, where foreseeability of harm continues to be the most important factors in determining the existence of a duty. *See generally*, Schwartz, *supra*, at 658 (discussing the dominance of negligence doctrine in modern tort law, including limitations in particular areas). Even the one jurisdiction that has recently held that clients can sue their attorneys only in contract, and not in tort, still permits non-clients to sue in tort. *See supra* text accompanying note 111.

118. *See, e.g.*, 1 MALLEN & SMITH, *supra* note 1, § 7.11, at 382-83.

119. *See* Friedman, *supra* note 35, at 216; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26(2)(c) & cmt. g (Tentative Draft No. 5, 1992) (discussing the creation of an attorney-client relationship via court-appointed counsel).

120. Tort theory may be preferable to contract theory simply because most jurisdictions permit a legal malpractice action to be brought in tort and because the strict privity requirement has been abolished as a basis for determining the existences of a duty in most tort actions. In addition, this move can be justified by reference to the underlying bases of tort and contract doctrine. According to at least one commentator, contract doctrine covers obligations voluntarily assumed, while tort doctrine covers obligations imposed by law. David B. Gaebler, *Negligence, Economic Loss, and the U.C.C.*, 61 IND. L.J. 593, 593 (1986). As a general matter, it is certainly desirable that both attorneys and clients decide whether or not to enter into an attorney-client relationship. However, clients (whether actual or putative) are not typically informed about the prerequisites for entering into a contractual relationships with attorneys. Thus, it seems preferable to look to tort rather than contract doctrine to determine whether, as a matter of law (i.e. public policy), lawyers should be found to have entered into relationships with those individuals who reasonably believe they are clients of a lawyer, particularly when the lawyer can foresee and, therefore, avoid such reliance.

121. *See supra* text accompanying note 16.

relationship has been formed, just as it has proved unsatisfactory in determining the scope of an attorney's duty to third parties.[122]

In negligence cases generally, courts typically emphasize foreseeability as the critical factor in determining the existence of a duty in tort.[123] In the typical personal injury case, foreseeability refers to the foreseeability of harm to a particular plaintiff. While foreseeability of harm has been rejected as too broad a test for determining the existence of a lawyer's duty to third parties, because it casts too wide a net and dilutes lawyers' loyalty to their clients,[124] foreseeability might still play a significant role in determining the existence of an attorney-client relationship in cases of entity representation.[125] For example, because there is inherent, or at least frequent, ambiguity regarding the question of client identification in entity representation cases, a foreseeable risk exists that absent an affirmative effort by lawyers to clarify their role, individual constituents will reasonably believe that lawyers represent them. The reasonable expectations of a would-be client have not yet been recognized as a basis for establishing an attorney-client relationship in legal malpractice cases.[126] However, there is considerable support in another line of entity representation cases — those involving attorney disqualification from litigation adverse to a former "client" — for the proposition that an attorney-client relationship (or its functional equivalent) may be found whenever there is a

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122. *See supra* text accompanying notes 15-21 (discussing application of balance of factors test in California third-party liability cases).

123. *See supra* text accompanying note 117.

124. *See supra* text accompanying notes 21-25.

125. For example, the recent draft of the Restatement makes a slight modification to the strict contract standard for the formation of the attorney-client relationship in cases where the client, but not the lawyer, has manifested consent to the relationship and the lawyer "fails to manifest lack of consent to do so, [or] when the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26(2)(b) (Tentative Draft No. 5, 1992). Interestingly, the Restatement justifies this modification as an exemplification of the principle of promissory estoppel, thus perpetuating the contract-based model of the formation of the attorney-client relationship. *Id.* § 26 cmt. e. Elsewhere, however, the Restatement abandons the contract model in favor of a tort model. *See, e.g., id.* § 26(2)(c) (recognizing the attorney-client relationship when a court appoints a lawyer to provide services).

126. A comment in the Restatement hints at but does not fully embrace this position. Under the heading "Organizational, fiduciary, and class action clients," the comment states that "[c]ircumstances may require that a lawyer clarify with those involved whether the client is the organization, individuals related to it, or both." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt. f (Tentative Draft No. 5, 1992). The comment does not indicate what consequences might follow when a lawyer fails to clarify the attorney-client relationship. Moreover, the text of § 26 makes only slight modifications to the strict contract-based model for formation of an attorney-client relationship, including maintaining a minimal requirement that the client "manifests to a lawyer the person's intent that the lawyer provide legal services for the person." *Id.* § 26(1).

foreseeable risk that the individual constituents will act under the reasonable belief that the entity lawyer represents them as well as the entity itself.

Just as courts have done in the area of third-party liability,[127] courts in recent disqualification cases have demonstrated an increased willingness to take action adverse to an attorney — here to grant a motion to disqualify an attorney from representing a client in pending litigation — despite the lack of evidence establishing an attorney-client relationship under a strict contract-based approach.[128] In the earliest cases, beginning with *E.F. Hutton & Co. v. Brown*,[129] the courts seemed ready to broaden the test for establishing an attorney-client relationship. However, in later cases, some courts have dispensed with the need to find an attorney-client relationship at all, relying instead on a broader notion of fiduciary duty, much as the *Fassihi* court did in a case involving third-party liability.[130]

In *E.F. Hutton* a federal district court found that an attorney-client relationship was established when an attorney representing E.F. Hutton & Co. appeared on behalf of Brown (then an E.F. Hutton regional vice-president) in SEC and bankruptcy hearings. Although the court acknowledged that the lawyer was representing the corporation at the hearings, it held that he was also representing Brown individually.[131] Taking "judicial notice that it is not uncommon for corporate counsel to represent an individual corporate officer when he is sued as a result of actions he has taken within the ambit of his official duties,"[132] the court stated that "[a]n attorney's appearance in a judicial or semi-judicial proceeding creates a presumption that an attorney-client relationship exists between the attorney and the person with whom he appears."[133] While this narrow holding will seldom be applicable in other

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127. *See supra* text accompanying note 3.

128. A much cited case exemplifying the application of the traditional approach to disqualification in entity representation cases is Meehan v. Hopps, 301 P.2d 10 (Cal. Ct. App. 1956). There the court refused to disqualify a corporation's lawyer in a lawsuit filed by the receiver for the company against Hopps — a former director, member of the executive committee, and chairman of the board — for dominating and managing the company's affairs for personal gain. *Id.* at 11. Despite the extent to which Hopps may have identified the corporate interest with his own interest, the court refused to consider that the lawyer may have had an attorney-client relationship with Hopps. In reaching its decision, the court relied on the familiar doctrine that an "attorney for a corporation represents it, its stockholders and its officers in their representative capacity" and "in nowise represents the officers personally." *Id.* at 14; *see also* Terre Du Lac Property Owners' Ass'n v. Shrum, 661 S.W.2d 45, 48 (Mo. Ct. App. 1983) (noting the court's refusal to disqualify plaintiff's lawyer who had represented the corporation owned by the individual defendant in another lawsuit, citing entity theory of representation and refusing to distinguish between generally held and closely held corporations).

129. 305 F. Supp. 371 (S.D. Tex. 1969) (mem.).

130. *See supra* text accompanying notes 63-66.

131. 305 F. Supp. at 387.

132. *Id.* at 388.

133. *Id.* at 387 (footnote omitted).

cases involving entities and their constituents, the court went on to address another factor on which it relied — "Brown's reasonable understanding of his relation with the attorneys" — which the court deemed to be "the controlling factor here."[134] Given that Brown was aware that evidence developed at the hearings could be used against him as well as against the company, the court found that "[i]n this atmosphere it would seem reasonable and natural for Brown to have assumed that [the lawyer] represented him as well as Hutton when the [lawyer] accompanied him to the hearing[s]."[135] Thus, the court granted Brown's motion to disqualify the law firm from representing Hutton in an action against Brown for alleged negligence and breach of fiduciary duty to the corporation.[136]

Subsequent to *E.F. Hutton*, some courts continue to rely on the "reasonable expectations" of a moving party in attorney disqualification cases. However, beginning with *Westinghouse Electric Corp. v. Kerr-McGee Corp.*,[137] courts have shifted from using such expectations as a basis for determining whether an attorney-client relationship has been formed, focusing instead on the existence of a separate fiduciary duty. In *Westinghouse* the law firm of Kirkland and Ellis (Kirkland) had been retained by the American Petroleum Institute (API) to assist it in resisting legislative proposals to break up the oil companies. Kirkland was asked to conduct surveys and interviews of API member companies (of which there were at least fifty-nine). API told Kirkland to keep this information "'in strict confidence, not to be disclosed to any other company, or even to API, except in aggregated or such other form as will preclude identifying the source company with its data.'"[138] Further, the individual companies were told that Kirkland was acting as independent special counsel for API and would hold any company information in strict confidence, as set forth above.[139] Subsequently, three member companies were among the defendants sued in an action brought by Westinghouse — which was represented by Kirkland — seeking to establish an illegal conspiracy in restraint of trade in the uranium industry. The three companies moved to disqualify Kirkland from representing Westinghouse, claiming that Kirkland had represented them when it obtained confidential information from them related to the API matter.[140]

The question was initially framed in terms of the existence of an attorney-client relationship: "whether an attorney-client relationship arises only when

134. *Id.* at 389.
135. *Id.* at 390.
136. *E.F. Hutton*, 305 F. Supp. at 401.
137. 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978).
138. *Westinghouse*, 580 F.2d at 1313 (quoting a letter API sent to Kirkland).
139. *Id.* at 1313-14.
140. *Id.* at 1312.

both parties consent to its formation or can it also occur when the lay party submits confidential information to the law party with reasonable belief that the latter is acting as the former's attorney."[141] Noting that the district court had applied narrow, formal rules of agency, in which the relationship "'arises *only* when the parties have given their consent, either express or implied, to its formation,'"[142] the Seventh Circuit Court of Appeals appeared to be willing to adopt a more flexible test in recognition of the fact that an attorney "'is dealing in an area in which he is expert and the client is not and as to which the client must necessarily rely on the attorney.'"[143] However, apparently reluctant to decide whether each of the fifty-nine members of the unincorporated association was an actual client of Kirkland,[144] the court found instead that the case "c[ould] and should be decided on a much more narrow ground."[145] Examining a number of situations in which a fiduciary obligation had been recognized despite the lack of an attorney-client relationship — including the obligation to maintain confidences of a prospective client and of criminal codefendants who exchange information regarding a common defense — the court noted that what these situations have in common is "'the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.'"[146] Thus, the court concluded that because the three member companies in *Westinghouse* "each entertained a reasonable belief that it was submitting confidential information regarding its involvement in the uranium industry to a law firm which had solicited the information upon a representation that the firm was acting in the undivided interest of each company,"[147] Kirkland had a fiduciary duty not to disclose this information and should thereby be disqualified from representing Westinghouse in the pending litigation.[148]

After *Westinghouse*, courts deciding disqualification motions typically view the relevant issue as not whether the lawyer's relationship to the party seeking disqualification "is in all respects that of attorney and client, but whether there exist sufficient aspects of an attorney-client relationship 'for

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141. *Id.* at 1312.

142. *Id.* at 1316 (emphasis in original) (quoting Westinghouse Elec. Corp. v. Rio Algom Ltd., 448 F. Supp. 1284, 1300 (N.D. Ill.) (mem.), *rev'd in part*, 588 F.2d 221 (7th Cir. 1978)).

143. *Westinghouse*, 580 F.2d at 1317 (quoting Udall v. Littell, 366 F.2d 668, 676 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967)).

144. The court did note that "[t]hree district courts have held that each individual member of an *unincorporated* association is a client of the association's lawyer." *Id.* at 1318 (footnote omitted) (emphasis in original).

145. *Id.* at 1319.

146. *Id.* (quoting CHARLES T. MCCORMICK ET AL., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 88, at 179 (Edward W. Cleary ed., 2d ed. 1972)).

147. *Id.* at 1321.

148. *Westinghouse*, 580 F. Supp. at 1321-22.

purposes of triggering inquiry into the potential conflict involved'" in the lawyer's representation in the pending litigation.[149] Moreover, it is usually sufficient for the moving party to demonstrate that it has submitted confidential information to the lawyer with the reasonable belief that the lawyer was acting as its attorney, regardless whether the lawyer believed she was acting as that party's attorney.[150]

Even under this expanded test, individual constituents in entity representation cases have sometimes found it difficult to establish a basis for attorney disqualification. For example, in *Bobbitt v. Victorian House, Inc.*,[151] a federal district court refused to disqualify the corporation's lawyer in a suit brought against the corporation by Bobbitt, a fifty percent shareholder-director. The court concluded that Bobbitt could not reasonably have thought that the lawyer was acting as his lawyer, since Bobbitt had consulted the lawyer primarily on corporate matters and thus could not have expected that the discussions would not be revealed to others in the corporation.[152]

If the primary test for attorney disqualification in the entity representation context is a constituent's reasonable expectations of *confidentiality*, then the "reasonable expectations" test is of limited use in the legal malpractice cases. As *Bobbitt* demonstrates, constituents will rarely disclose information regarding entity affairs which they will not assume will be shared with other constituents. Other cases, however, do not limit disqualification to the protection of confidences, but more broadly consider the importance of loyalty in the attorney-client relationship. For example, in *Rosman v. Shapiro*[153] the court held that the corporation's attorney could not represent one fifty percent shareholder in an action by the other.[154] The court found no reasonable expectation of confidentiality, because the two shareholders jointly consulted the attorney and thus neither could expect information to be withheld from the other.[155] Nevertheless, the court agreed that Rosman, the moving party, reasonably believed that the lawyer represented him as well as Shapiro:

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149. Glueck v. Jonathan Logan, Inc., 653 F.2d 746, 748-49 (2d Cir. 1981) (footnotes omitted) (quoting Glueck v. Jonathan Logan, Inc. 512 F. Supp. 223, 227 (S.D.N.Y. 1981)). *But see* Terre Du Lac Property Owners' Ass'n v. Shrum, 661 S.W.2d 45 (Mo. Ct. App. 1983) (adhering to traditional requirement of attorney-client relationship and entity theory of representation even in disqualification case involving close corporation).

150. *See* Jack Eckerd Corp. v. Dart Group Corp., 621 F. Supp. 725, 730 (D. Del. 1985) (mem.).

151. 545 F. Supp. 1124 (N.D. Ill. 1982) (mem.).

152. *Id.* at 1126; *see also* Wayland v. Shore Lobster & Shrimp Corp., 537 F. Supp. 1220, 1223 (S.D.N.Y. 1982) (stating that former shareholder, officer, director and employee "could not have reasonably believed or expected that any information given to the [law] firm would be kept confidential from the other shareholders or from the corporation as an entity").

153. 653 F. Supp. 1441 (S.D.N.Y. 1987).

154. *Id.* at 1446.

155. *Id.*

> Although, in the ordinary corporate situation, corporate counsel does not necessarily become counsel for the corporation's shareholders and directors, where, as here, the corporation is a close corporation consisting of only two shareholders with equal interests in the corporation, it is indeed reasonable for each shareholder to believe that the corporate counsel is in effect his own individual attorney.[156]

Moreover, the court further held that "[a] client reasonably expects that an attorney will remain loyal to his interests in matters on which that attorney previously represented him" and "[t]hat expectation is worthy of protection."[157] If a constituent's "reasonable expectations" that an entity lawyer is representing the constituent individually are sufficient to protect the constituent's interest in both confidentiality and loyalty, then it is perhaps a fairly small leap to recognize of a full-scale attorney-client relationship, for purposes of both disqualification and legal malpractice.[158]

V. REFINING AND APPLYING A "REASONABLE EXPECTATIONS" TEST TO MALPRACTICE CASES INVOLVING ENTITY REPRESENTATION

Extending the logic of attorney disqualification cases, an appropriate tort-based test for determining the formation of an attorney-client relationship in legal malpractice cases would focus on the reasonable expectations of the would-be client. In a strict sense, the test in the entity representation cases would be whether individual constituents reasonably believed that the entity lawyer was representing them as well as the entity, regardless of the lawyer's intent or belief, under circumstances in which such reliance was reasonably foreseeable. In most cases, satisfying this test will require not only evidence of the plaintiff's subjective belief, but also circumstances sufficient to make that belief a reasonable one.

Quickly reviewing our initial sampling of entity representation cases, *Kelly v. Kruse, Landa, Zimmerman & Maycock*[159] is clearly the easiest case to resolve.[160] Assuming Kelly testified that she believed the corporation's lawyers were representing her individually, the surrounding circumstances certainly would have supported this belief, particularly the explicit language in the retention agreement that the law firm was going to provide advice regarding the individual liability of corporate officers, directors and others in

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156. *Id.* at 1445 (citations omitted).

157. *Id.* at 1446.

158. For a discussion of the possible benefits of maintaining additional bases for attorney disqualification, aside from recognition of an expanded attorney-client relationship, see *infra* part VI.

159. No. 89-4033 and 89-4039, 1991 U.S. App. LEXIS 19742 (10th Cir. 1991) (unpublished opinion).

160. *See supra* text accompanying notes 67-71.

connection with the securities offering.[161] The circumstances would be even stronger if the advice were given directly to Kelly and the other individuals.

Similarly, *Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C.*[162] is a relatively simple case. Fassihi and Lopez were each fifty percent shareholders of a small, closely held corporation. Aside from corporations which exist as a virtual alter ego for a single, dominant shareholder,[163] corporations or partnerships with two or three relatively equal shareholders are precisely the entities in which the members are least likely to distinguish between the entity and the individuals,[164] especially when, as in *Fassihi*, the lawyer drafted the incorporation papers. After all, at the time of the initial representation the entity had not yet come into existence.[165] Unless the incorporators each had separate counsel, it is almost inconceivable that they would not view the lawyer as representing them individually.

Other cases pose somewhat greater difficulties. Unlike the lawyer in *Fassihi*, the corporation's lawyer in *Torres v. Divis*[166] had no direct dealings with the plaintiff co-investor, even though the lawyer had agreed to incorporate and represent the corporation.[167] Moreover, while Torres testified that he believed the lawyer was representing him, this belief was based in part on representations made to him by Powers, the investor who was dealing directly with the lawyer.[168] It might be unfair to bind lawyers *solely* on the basis of unknown (and unforeseeable) statements of others, such as those Powers made to Torres.[169] However, in this instance the relationship of the lawyer to the individual investors was inherently ambiguous, and in such inherently ambiguous situations, lawyers who fail to clarify their roles — as they are ethically required to do[170] — ought to be held to have entered into an attorney-client relationship with persons who reasonably rely on the lawyer for legal advice or protection of their interests.

A more difficult question would arise if Torres had testified that absent

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161. *See Kelly*, 1991 U.S. App. LEXIS 19742, at *7.

162. 309 N.W.2d 645 (Mich. Ct. App. 1981) (per curiam).

163. See *In re* Banks, 584 P.2d 284 (Or. 1978) (en banc) (per curiam), discussed *supra* text accompanying notes 79-86.

164. *Cf.* Mitchell, *supra* note 76, at 503-04 (stating that each of the equal sides expects counsel's assistance in obtaining advantage over other); *see also supra* text accompanying notes 102-05.

165. *See Fassihi*, 309 N.W.2d at 647.

166. 494 N.E.2d 1227 (Ill. App. Ct. 1986).

167. *Id.* at 1230-31.

168. *Id.* at 1231.

169. *Cf.* Guillebeau v. Jenkins, 355 S.E.2d 453 (Ga. Ct. App. 1987) (seller told purchaser that she preferred defendant law firm to handle closing. Purchaser hired defendant law firm to handle closing on behalf of purchaser, but purchaser did not disclose seller's request to the firm).

170. *See supra* text accompanying note 101; *see infra* text accompanying note 194.

the statements made by Powers, he would not necessarily have understood the lawyer to be representing him individually. After all, it is often confusing for laypersons to know when an attorney-client relationship has been formed, particularly when they have not been asked to pay any legal fees. Indeed, it does not seem at all far-fetched that individual constituents like Torres would candidly testify that they had not really thought about the question in precisely those terms, but that they were certainly relying on the attorney to protect their interests in the transaction.[171]

This position may have been taken by Rohrich, had he lived to testify in *Egan v. McNamara*.[172] McNamara, the lawyer-defendant, had provided extensive estate and corporate planning services to Rohrich, both prior to and subsequent to his joining the corporation as an officer, director, and general counsel. While Rohrich retained other lawyers as well, including the lawyer who actually prepared the buy-sell agreement that was the subject of the malpractice suit, McNamara conceded that he reviewed the agreement to which he was also a party.[173] Rohrich might well have testified that while he had not specifically considered whether McNamara was representing him in reviewing the agreement, he generally thought of McNamara as his lawyer and relied on McNamara to protect his interests in the agreement. Nevertheless, the determining factor in *Egan* should have been McNamara's further testimony that "he expressly told Rohrich not to rely on him as counsel since he was party to the agreement."[174] Although not emphasized by the court, this explicit delineation by McNamara of his role, in the face of what he reasonably foresaw as possible confusion on Rohrich's part, should have been sufficient to protect against a finding of an attorney-client relationship in that case.

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171. For example, in Goerlich v. Courtney Indus., Inc., 581 A.2d 825 (Md. Ct. Spec. App. 1990), *cert. denied*, 586 A.2d 13 (Md. 1991), plaintiff Goerlich was an officer, director, and one-third shareholder of the defendant corporation when the defendant lawyer was retained by the corporation to draft a shareholders' agreement. The agreement contained a statement that Goerlich would be a managing employee of the corporation for the duration of its existence. *Goerlich*, 581 A.2d at 827. In refusing to find that the lawyer owed a duty to determine whether such statement was false or contrary to the law, the court initially relied on the general rule that the lawyer owed a duty only to the corporate employer. However, the court further stated "[e]ven assuming that there was some contractual privity between [the lawyer] and Goerlich in his capacity as an officer, director, and shareholder of the corporation, there was no contractual privity between [the lawyer] and Goerlich in his capacity as an employee of the corporation." *Id.* at 827. Contrary to this opinion, it is unlikely that Goerlich would have distinguished representation of him in his capacity as an officer, director, and shareholder and representation of him in his capacity as an employee. In any event, because the statement was made in the context of a shareholder's agreement, it is clear that Goerlich relied on the lawyer to protect his interest in his employment capacity, regardless of whether he believed that there was an actual attorney-client relationship.

172. 467 A.2d 733 (D.C. 1983).

173. *Id.* at 737.

174. *Id.*

VI. RECONCEPTUALIZATION VERSUS FUNCTIONALISM

We may want to assume that entity constituents like Torres, Fassihi, and Kelly should recover damages from an entity lawyer because there was a foreseeable risk that they would reasonably rely on the lawyer to protect their interests, and they suffered harm as a result. However, perhaps the better solution is to craft liability rules which do not rely on an expansion or reconceptualization of the attorney-client relationship. After all, not all problems can be solved by "specifying *ex ante* the identity of 'the client.'"[175] Indeed, there is much to be said in favor of a more functional approach, in which the purpose of examining the relationship is taken into account (e.g., malpractice, disqualification, evidentiary privilege)[176] and in which additional categories are recognized (e.g., prospective client[177] and "quasi-client"[178]).

One alternative which has been proposed is to recognize a special status for corporate constituents as "quasi" or "derivative" clients of an entity lawyer.[179] This suggestion — which apparently would apply regardless of

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175. Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 41 (1987).

176. *See* John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825, 841 (1992) (suggesting a "functional or balancing approach, in which each situation, or small class of situations, would be separately considered in light of the relevant interests and policies").

177. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 27 (Tentative Draft No. 5, 1992) (treating lawyer's limited duties to "prospective clients" as a category separate from duties owed to "clients"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73(1) (Council Draft No. 10, 1993) (treating lawyer's liability to "prospective clients" as a category separate from liability to both "clients" and "non-clients"). *Compare* Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980) (en banc) (per curiam) (holding a defendant attorney liable to a prospective client because an attorney-client relationship arose after attorney negligently advised client) *with* Procanik v. Cillo, 543 A.2d 985 (N.J. Super. Ct. App. Div.) (holding the defendant attorney not liable notwithstanding the court's express recognition of the special duties owed to a prospective client), *cert. denied*, 550 A.2d 466 (N.J. 1988).

178. GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 45 (1978). Professor Hazard now prefers to use the term "derivative client" for the same purpose. Hazard, *supra* note 175, at 31 (attributing origin of term "derivative client" to Dean Patterson in L. RAY PATTERSON, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY 65 (1982)); *see also* 1 HAZARD & HODES, *supra* note 35, § 1.3:108, at 78 (attributing origin of term "derivative client" to Justice Pashman of the New Jersey Supreme Court in *In re* Dolan, 384 A.2d 1076, 1082 & n.1 (N.J. 1978) (per curiam) (Pashman, J., concurring in result)). For a discussion of the difficulty of applying this terminology in the context of entity representation, see *infra* text accompanying notes 182-84.

179. "Quasi" or "derivative" clients are persons who have a special relationship to a lawyer's "primary" client, typically as beneficiaries of a client's fiduciary duty. *See* Hazard, *supra* note 175, at 38. Although it has been suggested that the terms can be applied in the context of the relationship between a corporate client and its constituents, this application is highly problematic. *See infra* text accompanying notes 182-84.

whether or not constituents reasonably believe they are being represented by the lawyers — was initially developed to meet the special concerns of a lawyer representing a fiduciary, such as a trustee or a guardian.[180] Because the lawyer is engaged to represent the fiduciary, "and the fiduciary is legally required to serve the beneficiary, the lawyer should be deemed employed to further that service."[181]

There are several problems with using the "derivative" client approach in the entity representation cases. First, it is the *constituents* who typically owe fiduciary duties to the *corporation*, and not vice versa, and so the original premise of the fiduciary-beneficiary relationship breaks down.[182] Second, and equally important, the precise nature and scope of a lawyer's duty to a derivative client remains unclear. Thus far, the recognized duties appear to be limited to a duty of loyalty (e.g., a heightened obligation to avoid participating in a fraud) and perhaps a duty of disclosure (e.g., when the lawyer discovers wrongful conduct on the part of the primary client toward the derivative client).[183] As so limited, these duties might not be sufficient to protect even constituents like Fassihi, who alleged a breach of fiduciary duty but whose ouster may not have been the result of unlawful conduct. They are certainly insufficient to protect constituents like Kelly, who reasonably relied on the lawyer to exercise reasonable care to protect her interests.[184]

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180. *See* Hazard, *supra* note 175, at 33.

181. 1 HAZARD & HODES, *supra* note 35, § 1.3:108, at 78.

182. In his initial essay, Professor Hazard very clearly articulated the difference between lawyers representing guardians, who owe fiduciary duties to their wards, and lawyers representing corporations, to whom corporate officers owe fiduciary duties. *See* Hazard, *supra* note 175, at 16. However, the consequences of this difference were never fully articulated.

183. *See, e.g.*, 1 HAZARD & HODES, *supra* note 35, § 1.3:108, at 79 (discussing the attorney's duty to disobey instructions of the primary client that would wrongfully harm the derivative client/beneficiary). The drafters of the Restatement have struggled to articulate the precise nature of the duties of lawyers representing fiduciaries. Most recently, the reporters rejected a broad duty to prevent or rectify a breach of fiduciary duty in favor of a more limited duty to prevent or rectify a "crime or fraud violating a fiduciary duty owed by a client" and even then, only "when the non-client is not reasonably able to protect its rights and recognizing such a duty would not create inconsistent duties significantly impairing the performance of the lawyer's obligations to the client." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73(4)(b) (Council Draft No. 10, 1993).

184. Professor Hazard suggests at one point that derivative clients may have a cause of action against the lawyer for the primary client for mere negligence, or for "being inattentive to his responsibilities in representing the guardian." Hazard, *supra* note 175, at 18. The case on which this suggestion is based, Fickett v. Superior Court, 558 P.2d 988 (Ariz. Ct. App. 1976), was indeed a negligence case; however, it was limited to negligence in discovering that the guardian was defrauding his incompetent ward. The case clearly does not hold that lawyers for fiduciaries owe the beneficiaries a general duty of care. In addition, the Restatement has thus far rejected any broad duty of a lawyer to prevent breaches of fiduciary duties by their primary clients, limiting the duty to the prevention or rectification of crimes or frauds. *See supra* text accompanying note 183.

A functional approach broad enough to encompass both *Fassihi* and *Kelly* would have to incorporate at least two doctrinal bases for recovery by a non-client in an entity representation case. Constituents like Fassihi would be covered by fiduciary duties arising either from the "derivative" status of constituents[185] or from confidential trust relationships to be determined on a case by case basis.[186] Those like Kelly would be covered, if at all, by some theory of third-party liability. However, even assuming that an appropriate theory of third-party liability for entity constituents could be developed,[187] there is an obvious danger that such a "radical functionalism"[188] would result (perhaps already has resulted) in an unnecessary proliferation of confusing categories.[189]

The relative simplicity of the proposed alternative — reconceptualizing the attorney-client relationship — is one of its several advantages. Another advantage is that unlike third-party liability, modifying the attorney-client relationship to take account of the reasonable expectations of putative clients is unlikely to result in any vast or indeterminate liability. The total number of putative clients is relatively small and, perhaps more importantly, lawyers can avoid liability simply by making sure (as they are ethically required to do anyway)[190] that the individuals involved clearly understand the limits of the lawyer's role.[191]

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185. Whether "all" entity constituents are to be considered derivative clients of the entity's lawyers is unclear. The concept begins to break down when the relationship between the parties becomes antagonistic and may not apply at all when the parties are engaged in arm's length negotiations, at least when the parties are separately represented. *See* Hazard, *supra* note 175, at 33-36. In addition, it is hard to imagine that all constituents would be covered, even in a "normal" situation, since constituents can include low-level employees and small shareholders of large publicly held corporations. At the very least, constituents who may reasonably believe that the lawyer is protecting their interest should be covered.

186. *See supra* text accompanying note 65.

187. In *Kelly v. Kruse, Landa, Zimmerman & Maycock*, No. 89-4033 and 89-4039, 1991 U.S. App. LEXIS 19742 (10th Cir. 1991) (unpublished opinion), the court was willing to extend third-party liability because the agreement between the lawyer and the corporation expressly called for the lawyer to advise corporate officers of their potential liability under the securities laws and thus there was a clear intent to benefit Kelly as a third party to the lawyer-client relationship. However, for the most part, courts have refused to extend the third-party beneficiary doctrine (or even the balance of factor tests) in situations in which there is any substantial possibility of conflicting interests between the client and the third party. *See supra* text accompanying notes 21-25.

188. Leubsdorf, *supra* note 176, at 841 (advocating "neither the *status quo* nor a radical functionalism, but merely a more conscious use of categories").

189. *See id.* (recognizing other dangers of a functional approach including "obvious potential for vagueness and ad hoc improvisation").

190. *See supra* text accompanying note 101; *see infra* text accompanying note 194.

191. In at least some situations, it may be undesirable to permit lawyers to avoid liability simply by clarifying that they are not representing the constituents and that the constituents should not rely on them to protect their interests. For example, lawyers declining representation are held

One reason courts have resisted extending the attorney-client relationship is fear that it would result in the unethical representation of conflicting interests.[192] To some extent this concern is simply a function of a misunderstanding (or an overly mechanical application) of the ethics code provisions in the entity representation area.[193] On the other hand, there may be concern that recognizing an attorney-client relationship when a lawyer has not manifested consent to the relationship may subject a lawyer to discipline for inadvertently representing multiple parties with conflicting interests, which may well happen. However, lawyers can easily minimize that danger by carefully attending to existing ethics rules which expressly caution them to clarify the nature and scope of the representation whenever their role might be misunderstood. In the context of entity representation, current rules require that "[i]n dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."[194] Aside from entity representation, current rules also provide that

> [i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.[195]

Thus, numerous authorities have urged lawyers dealing with groups (including unincorporated associations) to clarify whether the lawyer represents the group as an entity, as individuals, or both, particularly in the context of entity employees and individuals who may not understand the lawyer's role and may not have reason to appreciate the significance of any formal designation of that role.[196]

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to a duty to act competently in giving advice to prospective clients even as the representation is being turned down. *See, e.g.*, Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980) (en banc) (per curiam); Procanik v. Cillo, 543 A.2d 985 (N.J. Super. Ct. App. Div.), *cert. denied*, 550 A.2d 466 (N.J. 1988). Even if it is clear that the lawyer is refusing to represent the client, nonetheless it is foreseeable that the prospective client is likely to rely on the lawyer's advice. Thus, if liability is to be extended, it should be on the basis of the recognition of separate duties owed to prospective clients, not on the ground of an actual attorney-client relationship. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73(1) (Council Draft No. 10, 1993). For a further discussion of the possible need to recognize other discrete categories, such as "quasi-clients" or "derivative clients," see *infra* text accompanying note 244.

192. *See supra* text accompanying notes 30-31.

193. *See supra* part III.

194. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(d) (1992).

195. *Id.* Rule 4.3.

196. *Cf.* Roberts v. Heim, 123 F.R.D. 614, 624 n.6 (N.D. Cal. 1988) (citing a California CLE

Another possible reason for the resistance to reconceptualizing the attorney-client relationship is the fear that expanding the attorney-client relationship beyond the limits of contract will inevitably lead to the unwarranted expansion of attorney duties to other parties.[197] If so, then this concern seems misplaced. After all, there is already a trend toward extending attorney duties to third persons. If at least some of these cases can be explained by acknowledging that the plaintiff was not really a *third party* but rather an *unintended client*, then the trend could be slowed. This slow-down would occur because lawyers will then better protect themselves by being more explicit about whom they do or do not represent. In any event, the more important question is not whether there will be an increase or decrease of third-party liability, but rather whether courts will be able to articulate clearly the more appropriate rationales for the extensions of duty that are already being recognized.

The most serious issue arising from reconceptualizing the attorney-client relationship are the implications reconceptualizing has on related issues in which the attorney-client relationship plays a critical role. Examples of such issues include attorney disqualification, determination of the existence of attorney-client evidentiary privilege, and damages for breach of fiduciary duties. An expanded attorney-client relationship is probably not problematic when the issue is one of attorney disqualification, since courts have already recognized a "fiduciary duty," even in the absence of a contractual relationship,[198] and this situation — along with attorney-client evidentiary privilege — might well be one in which an explicitly functional approach is clearly justified.

A more difficult question could arise in lawsuits for damages for breach of fiduciary duty; for example, a lawsuit against an entity attorney who divulged to the entity information provided by a constituent who reasonably believed that the attorney represented that constituent as well as the entity. Perhaps the problem could be avoided by presuming that joint clients (*i.e.*, the constituent and entity) have agreed that any information provided by one will not be held in confidence from the other, as is presently the case with the

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publication cautioning lawyers for limited partnerships to "'properly identify the client and state clearly to all parties, in writing, the implications of the representation'"); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt. f (Tentative Draft No. 5, 1992); 1 HAZARD & HODES, *supra* note 35, § 1.13:109, at 399-400.

197. For example, although there is little support in the case law for recognizing a lawyer's duty to non-clients to prevent crimes imminently threatening death or serious bodily injury, as there is for psychotherapists, such a duty is being proposed by the Reporters to the Restatement. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 73(4)(a) & cmt. g (Council Draft No. 10, 1993). Undoubtedly, this proposal will be highly controversial.

198. *See supra* text accompanying notes 137-50.

attorney-client evidentiary privilege.[199] If not, lawyers may occasionally find themselves caught in an impossible situation; for example, when a managing partner who has been previously represented in other matters by the partnership lawyer confides in the lawyer that the managing partner has embezzled partnership funds. Neither the lawyer's withdrawal nor the lawyer's disclosure is an entirely satisfactory response in these situations. Nevertheless, the possibility that lawyer might be held liable to either the managing partner (if the lawyer discloses the confidential information)[200] or to the partnership (if the lawyer fails to disclose)[201] is neither inconceivable nor necessarily undesirable. After all, the lawyer could easily have avoided the problem by clarifying the nature and scope of the attorney-client relationship at the outset, and thus it was the lawyer's own conduct that created the lawyer's dilemma in the first place.

It is certainly possible that reconceptualizing the attorney-client relationship along the lines suggested in this article may create unintended difficulties both inside and outside the field of legal malpractice.[202] However, this risk must be weighed against the potential benefits of such a reconceptualization. The potential benefits in the entity representation area have already been discussed.[203] Adopting this approach may reap similar benefits in some non-entity cases as well.

VII. RECONCEPTUALIZING THE ATTORNEY-CLIENT RELATIONSHIP IN OTHER INHERENTLY AMBIGUOUS SITUATIONS

Aside from entity representation, a number of recurring situations are fraught with potential ambiguity regarding the identity of the client. These situations include representation of family members, representation in transactions between buyers and sellers or borrowers and lenders, and representation of fiduciaries, including trustees and guardians. In each of these situations, the cases reflect the same confusion currently found in entity

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199. *See, e.g.*, MCCORMICK ON EVIDENCE, *supra* note 146, at 219-20.

200. *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1992) (ethical duty of confidentiality).

201. *Cf. id.* Rule 1.4(a) (expressing the attorney's duty to keep client reasonably informed). If lawyers withdraw from representing the partnerships, they are arguably no longer under a duty to inform. However, lawyers withdrawing from representation owe duties "to the extent reasonably practicable to protect a client's interests." *Id.* Rule 1.16(d). At this point a clear tension exists between attorneys' duty to keep the individual partners' confidences and their duty to protect the partnerships' interests.

202. For example, although it may be desirable to bind lawyers to an attorney-client relationship under circumstances of inherent ambiguity, it would probably not be desirable to bind prospective clients in these same circumstances. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 26 cmt. e (Tentative Draft No. 5, 1992).

203. *See supra* text accompanying notes 189-91.

representation cases, along with an increasing willingness on the part of courts to impose liability on the attorney in at least some circumstances. Given these similarities, it is probable that reconceptualizing the attorney-client relationship will result in better, more coherent decisions in these areas, as well as in the entity representation area.

A. Family Representation

When a lawyer represents a family member, particularly in matters relating to the family, there is often confusion regarding who it is the lawyer represents. Indeed, the dangers in this context may be even greater than in entity representation. Unlike corporate lawyers, who frequently are clear in their own mind that they are lawyers for the corporations and not the constituents, "lawyers faced with requests for . . . family representation are often unable unequivocally to identify 'the client.'"[204] Perhaps this inability is because a family, unlike a business, is not ordinarily viewed as an entity (even by lawyers), but rather as a collection of individuals whose goals are sometimes shared and sometimes in conflict.[205]

Not surprisingly, this potential for ambiguity results in outcomes in legal malpractice cases which are strikingly similar to the entity representation cases. Absent evidence of an agreement or a mutual understanding that the lawyer will represent more than one person, courts typically reject any finding of dual representation, despite obvious indications that one family member has relied on a lawyer retained by another family member (typically a spouse) for legal representation affecting the interests of both.[206] Furthermore, in doing so courts typically invoke the standard conception of the attorney-client relationship as essentially contractual in nature[207] and express concern that the family members may have had conflicting interests.[208] In some cases,

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204. Patricia M. Batt, Note, *The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 GEO. J. LEGAL ETHICS 319, 325 (1992).

205. *But see* Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987); Sidney D. Watson, *Response: When Parents Die: A Response to Before Guardianship: Abuse of Patient Rights Behind Closed Doors*, 41 EMORY L.J. 863 (1992).

206. *See, e.g.*, Jordan v. Lipsig, Sullivan, Mollen & Liapakis, P.C., 689 F. Supp. 192 (S.D.N.Y. 1988) (mem.).

207. *Id.* at 195 ("Since an attorney-client relationship is essentially contractual, ordinary 'rules governing contract formation determine whether such a relationship has been created.'" (quoting Hashemi v. Shack, 609 F. Supp. 391, 393 (S.D.N.Y. 1984) (mem.))); *see also* McFarland v. O'Gorman, 814 S.W.2d 692, 694 (Mo. Ct. App. 1991) ("In order to state a cause of action on a contract, one must be a party to that contract from which the action arises." (citations omitted)); Parker v. Carnahan, 772 S.W.2d 151, 156 (Tex. Ct. App. 1989) ("The legal relationship of attorney and client is purely contractual and results from the mutual agreement and understanding of the parties concerned." (citation omitted)).

208. *See, e.g.*, Makela v. Roach, 492 N.E.2d 191, 193 (Ill. App. Ct. 1986).

the result is patently absurd. For example, in *Makela v. Roach*,[209] an Illinois appellate court refused to find that a lawyer engaged by the wife for estate planning purposes also represented her husband, even though as a direct result of the lawyer's advice to the wife, the husband voluntarily transferred his interest in jointly held property to the wife.[210] The court also noted that the lawyer could not have owed the husband a duty of care, since part of the plan was for the lawyer to represent the wife in a dissolution of marriage action, "thus making [the husband] the opposing party in an adversarial process,"[211] even though the purpose of dissolving the marriage was to protect the family's assets from the husband's medical creditors.[212]

The court in *Makela* also rejected liability under a third-party beneficiary theory, in part because of the perceived conflict of interest between the husband and wife in the dissolution action.[213] However, as in the entity representation cases, other courts have recently indicated an increased willingness to afford redress to a family member, usually under some theory of third-party liability. Moreover, as in the entity representation cases, the primary rationale for extending liability is that there was a foreseeable risk that the "non-clients" would reasonably rely on the attorney to protect their interests. For example, in *Jordan v. Lipsig, Sullivan, Mollen & Liapakis, P.C.*[214] a federal district court permitted the husband to sue the wife's lawyer for failing to advise the husband of a loss of consortium claim stating, "A spouse should reasonably be able to rely on the representation afforded to the injured spouse to inform him or her of his or her potential derivative claims for loss of consortium."[215] Similarly, in *Parker v. Carnahan*[216] a Texas appellate court permitted the wife to sue the husband's criminal defense lawyer for failing to advise her of the dangers of filing jointly as part of a strategy to reduce the husband's sentence for income tax evasion. The court expressly acknowledged the likelihood that the lawyer's conduct had reasonably led the

209. *Makela*, 492 N.E.2d 191.

210. The lawyer had drafted joint wills for the husband and wife. However, this fact was deemed irrelevant because the husband was not complaining about the will and had not requested or received legal advice as to the matters which were the subject of the instant lawsuit. *Id.* at 193-94.

211. *Id.* at 194.

212. *Id.*

213. *Id.* The court also stated that the husband had not benefitted from the transfer of marital assets, although the plan was to transfer the property to the daughter and her husband, who would in turn support both the husband and the wife. *Id.* The wife was not permitted to recover, because the court found that the plan to evade the husband's creditors was fraudulent, although there was no specific finding that the wife knew that the plan recommended by the lawyer was unlawful. *Id.* at 194-95.

214. 689 F. Supp. 192 (S.D.N.Y. 1988) (mem.).

215. *Id.* at 197 (footnote omitted).

216. 772 S.W.2d 151 (Tex. Ct. App. 1989).

wife to believe she was represented by the lawyer, but the court used this conduct as a basis for extending third-party liability rather than reformulating the standard for determining whether an attorney-client relationship had been formed.[217]

Given the obvious potential for ambiguity in family representation, it is certainly foreseeable that family members will sometimes rely on an attorney to protect their interests in situations in which even the lawyer is uncertain who is the client.[218] If lawyers fail to clarify their role under circumstances in which the risk of such reliance is foreseeable, then it is appropriate that such lawyers be held liable if a family member is harmed as a result of reasonable reliance. Moreover, as with the entity representation cases, it probably makes more sense to rest liability on the existence of an attorney-client relationship and not third-party liability, both as a means of limiting third-party liability and of ensuring that the duties owed include not only competence, but also loyalty and confidentiality.[219]

B. Buyer/Seller and Borrower/Lender

Another area involving potential ambiguities in client identification involves transactions between buyers and sellers or borrowers and lenders in which there is only one attorney. Unlike entity or family representation, the parties may have no prior or continuing relationship with each other or the lawyer. However, in many of these transactions it is customary for only one lawyer to participate.[220] Moreover, even though the lawyer may have been formally selected by one party for the purpose of representing that party alone, it is not unusual for the non-client party to pay the lawyer's fee as part of the underlying transaction.[221] Given the lawyer's usual role in drafting the relevant documents, explaining their terms, and overseeing their execu-

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217. *Id.* at 157. *But see* Kotzur v. Kelly, 791 S.W.2d 254, 258 (Tex. Ct. App. 1990) (citing *Parker* in support of a finding that a fact issue was raised regarding the existence of an attorney-client relationship in a real estate transaction between family members).

218. This is especially true when the lawyer gives legal advice to the "unrepresented" family member. For example, *In re* Estate of Nuyen, 443 N.E.2d 1099, 1102-03 (Ill. App. Ct. 1982), the attorney for the husband-decedent, who had been a "close personal friend of decedent and his family" and had represented the family in various matters, visited the wife during the husband's last illness and told her he would help her. Subsequently, the wife consulted him (at that point he had become attorney for the executor-bank), and he advised her to renounce the will. If the lawyer had not advised the wife that he represented the executor-bank and not her (as the court found that he did, *id.* at 1103), the ambiguity was such that a finding of an attorney-client relationship would clearly have been supported under the proposed test.

219. *See supra* text accompanying note 72.

220. *See, e.g.*, Moore, *supra* note 33, at 263 (discussing conflicts arising from real estate transactions).

221. *See, e.g.*, Guillebeau v. Jenkins, 355 S.E.2d 453, 457 (Ga. Ct. App. 1987).

tion,[222] clearly a foreseeable risk exists that some unsophisticated parties will believe that the lawyer is there to protect the interests of both parties.

Here, courts have also been reluctant to find an attorney-client relationship absent sufficient evidence of either an agreement or a mutual understanding,[223] but somewhat less reluctant to extend third-party liability when the "non-client" reasonably relies on the lawyer.[224] As early as 1897, the Supreme Court of Pennsylvania held that a lawyer who represented a borrower could be held liable to the lender, even absent an attorney-client relationship.[225] There, the court justified liability on the ground that the lawyer "undertook certain duties" for the lender (examining title and mistakenly advising the plaintiff that she had a first mortgage when in fact she held a third lien) "knowing that the plaintiff was relying on him, in his professional capacity, to see that her mortgage was the first lien."[226] This theory, embraced by some but not all courts, is known as the "gratuitous undertaking" theory of third-party liability.[227] It is most prevalent in these types of transactions, especially where the lawyer for one party offers to file or record a document for another.[228]

There are several problems with the gratuitous undertaking theory. First,

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222. *E.g., id.*; Nelson v. Nationwide Mortgage Corp., 659 F. Supp. 611 (D.D.C. 1987) (mem.).

223. *See, e.g.*, Savings Bank v. Ward, 100 U.S. 195, 206 (1879) (noting the Court's refusal to admit evidence of local usage that attorney examining title of applicant for loan was also acting for lender because express provisions of contract between attorney and borrower); *Guillebeau*, 355 S.E.2d 453 (seller's desire that attorney for buyer represent her at closing not communicated to attorney). *But cf.* Lawall v. Groman, 37 A. 98 (Pa. 1897) (finding evidence from which jury might have inferred mutual understanding that attorney was representing lender as well as borrower).

224. The leading case of *Savings Bank v. Ward*, 100 U.S. 195, exemplifies the traditional approach in which third-party liability is rejected. The Court adhered to the general rule that there must be some privity of contract between the parties before the lawyer can be sued for negligence.

225. *Lawall*, 37 A. 98.

226. *Id.* at 99.

227. *See, e.g.*, Schwartz v. Greenfield, Stein & Weisinger, 396 N.Y.S.2d 582 (Sup. Ct. 1977). The doctrine is variously described as an: "assumption of duty," Cifu, *supra* note 4, at 14; "voluntary agency," Simmerson v. Blanks, 254 S.E.2d 716 (Ga. Ct. App. 1979); or "undertaking," FEINMAN, *supra* note 4, § 9.3.4. Some, but not all courts rely on either an agency theory, *see, e.g.*, *Simmerson*, 254 S.E.2d at 718, or a tort theory, *see, e.g.*, American State Bank v. Enabnit, 471 N.W.2d 829, 832 (Iowa 1991). *See generally* 1 MALLEN & SMITH, *supra* note 1, § 7.3, at 363-64.

228. The leading authority for the voluntary undertaking approach is Stewart v. Sbarro, 362 A.2d 581 (N.J. Super. Ct. App. Div.) (per curiam), *cert. denied*, 371 A.2d 63 (N.J. 1976), in which the attorney for the buyers of all the stock in a corporation failed to obtain signatures on a mortgage to secure payment to the sellers, as they were required to do under the agreement of sale. *See also Simmerson*, 254 S.E.2d 716 (buyer's attorney gratuitously promised to file financing statement for seller and was negligent in doing so).

it may cover only acts of misfeasance and not nonfeasance. Thus, in *Nelson v. Nationwide Mortgage Corp.*[229] a federal district court permitted the borrower to recover from the lender's attorney because the lawyer affirmatively gave her certain legal advice regarding the transaction. The nub of her complaint, however, was not the affirmative advice she had been given, but rather the lawyer's failure to explain adequately her rights and the nature of the documents she was signing.[230] Given her allegation that the lawyer held himself out as "'the' settlement attorney and purported to act on behalf of all parties,"[231] it is at least arguable that her right to recover should not have rested on the court's willingness to acknowledge an affirmative undertaking to give her advice. Rather, the fact that he volunteered to provide a legal explanation of the documents and affirmatively responded to questions she raised should have been relevant primarily in determining whether the circumstances were such that it was foreseeable that she would reasonably believe that he was acting as her attorney.

Another problem with the gratuitous undertaking theory is that it is uncertain how the doctrine can be limited to avoid both indefinite liability and the imposition of duties to conflicting interests. As for limiting liability, one jurisdiction has held that the lawyer must deal with the third party "face to face."[232] This factor is certainly relevant; however, if a lawyer can foresee reasonable reliance even when the dealings between the parties are indirect,[233] then the justification for imposing liability may be just as compelling as in "face to face" transactions. As for conflicting interests, another jurisdiction has held that a lawyer will not be found to have undertaken a duty to a third party when there is a conflict with the lawyer's duty to the client.[234] Once again, however, the existence of conflicting interests may be relevant in determining whether the third party's reliance is reasonable; however, if that party is unaware of either the fact or the significance of the conflict, then the rationale for denying liability is unclear.

Part of the difficulty with the gratuitous undertaking doctrine is that these transactions typically involve arm's length bargaining — where at least some interests are likely to conflict — and yet it is not uncommon for one lawyer to undertake to perform some aspect of the transaction for both parties,[235]

229. 659 F. Supp. 611 (D.D.C. 1987) (mem.).

230. *Id.* at 617.

231. *Id.* at 618.

232. Langeland v. Farmers State Bank of Trimont, 319 N.W.2d 26 (Minn. 1982) (noting that the lawyer did not deal directly with the plaintiffs or act gratuitously on their behalf).

233. *Cf. supra* text accompanying notes 166-70.

234. Louisiana Bank & Trust Co. v. Anderson, 526 So. 2d 1386 (La. Ct. App. 1988) (noting that no duty arose out of debtor's lawyer's agreement with bankruptcy court to take certain steps to protect creditors).

235. *See* Bergman v. New England Ins. Co., 872 F.2d 672, 675 (5th Cir. 1989) ("It is not

even when both parties are separately represented.[236] Furthermore, even when both parties are separately represented, it would not be unusual for one party (and that party's lawyer) to rely on the other party's lawyer to perform the task undertaken,[237] if only to avoid unnecessary duplication and inefficiency. If the rule is (as one court has broadly articulated it) that "where an attorney assumes a fiduciary obligation, it applies to persons who, though not strictly clients, he has or should have reason to believe rely on him," or where "an attorney undertakes a duty to one other than his client, he may be liable for damage caused by a breach of that duty to a person intended to be benefitted by his performance,"[238] then it is indeed a rule of potentially indefinite application.

Perhaps there is some justification for recognizing a separate theory of third-party liability for at least some gratuitous undertakings. Nevertheless, it might prove easier to articulate the limited circumstances in which this doctrine should apply if a significant number of these cases could be explained on other grounds. In addition, if the third party's reliance is based primarily on a misunderstanding of the lawyer's role, then basing liability on a reconceptualized attorney-client relationship makes it easier for lawyers who properly clarify their role to avoid any inadvertent undertaking of unwanted duties.

C. Trustee/Beneficiary

Lawyers for a trust are generally considered to be representing the trustee, an individual with fiduciary obligations to the beneficiaries of the trust.[239] As in the other areas of representation, the traditional rule is that absent fraud or another malicious act, an injured beneficiary may not sue the lawyer directly because there is no privity of contract.[240] Of course, the earliest cases departing from the strict rule of privity were estate planning cases.[241] However, the cases involving trusts and other fiduciaries have been distinguished from the early will drafting cases on the ground that there are

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unusual for the attorney representing one party to prepare the instruments which are to be signed by all parties. It would stun the practicing bar to learn that when an attorney did so, he or she became accountable as the attorney for all parties-signatory.").

236. *See* Stewart v. Sbarro, 362 A.2d 581 (N.J. Super. Ct. App. Div.) (per curiam), *cert. denied*, 371 A.2d 63 (N.J. 1976).

237. *Stewart*, 362 A.2d at 588 (noting sellers of corporate stock, who were separately represented, successfully sued buyers' attorney who failed to obtain signatures on mortgage as required under the contract).

238. *Id.* (citations omitted).

239. *See generally* Phelps, *supra* note 7, at 211.

240. *Id.* at 212.

241. *See supra* text accompanying note 15.

conflicts of interest between trustees and trust beneficiaries which are not typically present between testators and beneficiaries under a will.[242] Nevertheless, as in other areas, there has been significant movement away from the strict rule of privity in a number of recent cases involving fiduciaries.[243]

Some of these cases involve issues of public policy unrelated to any confusion regarding client identification on the part of the beneficiaries. For example, in *Fickett v. Superior Court*[244] an Arizona appellate court held that a lawyer for a guardian owed duties to both the guardian and the ward. Because the ward was incompetent, there was no possibility that he had relied on the attorney to protect his interests. However, this incompetence (and resulting inability to protect his interests) was in itself a compelling reason to impose additional duties on the attorney as a matter of public policy.

It may be true that cases like *Fickett* can only be explained by recognizing some type of functional approach to legal representation in which a lawyer's duties are divided between "primary" and "derivative" clients.[245] However, there are other cases in which the lawyer for a trustee or other fiduciary has engaged in direct dealings with a beneficiary, causing considerable confusion regarding the lawyer's role. For example, in *Baer v. Broder*[246] a widow who was both the executrix and the beneficiary of her late husband's estate hired a lawyer to prosecute a wrongful death action on behalf of the estate. When she later sued the lawyer in her individual capacity for malpractice, a New York appellate court permitted a rare departure from that state's strict privity rule, on the ground that "plaintiff and defendant were engaged in a face-to-face relationship" and "[i]n a real sense, the plaintiff in this action was also one of the real parties in interest in the wrongful death action."[247] The case is typically viewed as an example of "special circumstances" in which attorneys incur liability to third-party non-clients.[248] However, given that the widow certainly did not distinguish between the lawyer's representation of her in her institutional and her individual capacities, the case could just as easily and perhaps more suitably be described in terms of an attorney-client relationship. Similarly, in *Pizel v. Zuspann*[249] an attorney for a settlor met

242. Phelps, *supra* note 7, at 212-13. *But see* Elam v. Hyatt Legal Servs., 541 N.E.2d 616 (Ohio 1989) (stating that beneficiaries whose interest in estate had vested are in privity with fiduciary and can sue lawyer for negligent performance).

243. *See, e.g.*, Phelps, *supra* note 7, at 213-16.

244. 558 P.2d 988 (Ariz. Ct. App. 1976).

245. *See* Hazard, *supra* note 175, at 17-19.

246. 447 N.Y.S.2d 538 (App. Div. 1982) (mem.)

247. *Id.* at 539.

248. *See, e.g.*, Weingarten v. Warren, 753 F. Supp. 491, 496 (S.D.N.Y. 1990).

249. 795 P.2d 42 (Kan. 1990) (involving family representation because the co-trustees were nephews of the settlor), *modified on other grounds*, 803 P.2d 205 (Kan. 1990).

several times with the settlor's co-trustees, who were also intended income beneficiaries upon the death of the settlor, for the purpose of explaining various trust documents. The court refused to find an attorney-client relationship between the co-trustee/beneficiaries and the lawyer.[250] Nevertheless, the court permitted the plaintiffs to sue the lawyer for negligent failure to advise them of their trust duties because they were found to be third-party beneficiaries of the contract between the lawyer and the settlor.[251] Once again, given the obvious ambiguity concerning the lawyer's role, the case could also be explained as yet another example of a lawyer inadvertently assuming an attorney-client relationship by providing informal advice concerning the trust.

The difficulty with the "derivative" client doctrine is that the nature and scope of the lawyer's duties to such clients are unclear,[252] particularly when the relationship between a primary and a derivative client becomes antagonistic.[253] It may well be that like "gratuitous undertakings," there are some fiduciary cases, such as *Fickett*, in which a separate doctrine of third-party liability is necessary. This is particularly true where the lawyer's duty will be limited to something less than the full panoply of duties owed an actual client. Nevertheless, if the primary reason for extending liability is the lawyer's failure to clarify her role, as in *Baer* and *Pizel*, then basing liability on an extended and reconceptualized attorney-client relationship is almost certainly a better approach.

VIII. CONCLUSION

The law regarding the liability of attorneys to third-party "non-clients" seems hopelessly confused. Most jurisdictions recognize at least some departures from the traditional strict privity requirement; however, there is no agreement regarding either the appropriate doctrinal basis or even the common fact patterns in which courts will find an attorney liable. While it once appeared that a lawyers's duty might extend to all who foreseeably would be harmed as a result of the lawyer's negligence, courts have continued to

250. *Pizel*, 795 P.2d at 49.

251. *Id.* at 51.

252. *See supra* text accompanying notes 183-84.

253. This conflict happens most often between income and remainder beneficiaries where the executor or trustee is forced to side with one against the other. *See, e.g.*, Neal v. Baker, 551 N.E.2d 704 (Ill. App. Ct.) (attorney for executor took position that plaintiff-income beneficiary, rather than residuary estate, should pay inheritance tax), *appeal denied*, 555 N.E.2d 378 (Ill. 1990). In these cases, unless there is some confusion as to whose interest the lawyer is protecting, there is no apparent reason why the lawyer should owe even a "derivative" duty to one or the other group, as opposed to a full duty of care to the executor to assist it in fulfilling its administrative and fiduciary duties.

struggle to limit liability, partially driven by their concern to avoid embroiling the lawyer in impermissible conflicts of interest, contrary to both public policy and attorney ethical codes.

Attempts to rationalize third-party liability law through the adoption of a single doctrinal approach seem doomed to failure. Rather, it is probably more useful to acknowledge that what we have are various clusters of cases in which liability is imposed for differing reasons. Therefore, the results of will beneficiary cases differ fundamentally from legal opinion and gratuitous undertaking cases, which, in turn, differ fundamentally from cases involving fiduciaries taking advantage of incompetent or helpless beneficiaries.[254]

Along these lines, this article has focused on a particular cluster of cases in which there are inherent ambiguities regarding the appropriate identification of the client or clients. This situation exists in many instances of entity representation as well as in representation of family members, transactions between buyers and sellers or borrowers and lenders, and representation of trustees and other fiduciaries. This article proposes that these cases be treated not as examples of when an attorney's liability might be extended to third parties, but rather as examples of when actual attorney-client relationships may be formed, even when the attorney had no intention of doing so. To accomplish this result, it has been necessary to propose that the attorney-client relationship be reconceptualized to take into account the reasonable expectations of persons, including entity constituents, who are understandably confused as to who the lawyer actually represents. One of the advantages of this approach is that it gives lawyers stronger incentive to clarify the nature and scope of their representation. This clarification should not only reduce attorney liability, but also avoid the very reliance which should not have occurred in the first place.

Lawyers are increasingly confronting the legal consequences of their own behavior. What they are discovering is that in addition to the ethical codes, a host of legal doctrines regulate their conduct, either directly or indirectly, including: 1) the law of malpractice (torts and contracts); 2) criminal law; 3) criminal and civil procedure; 4) evidence; 5) agency; 6) securities; and 7) corporation law.[255] Much of this doctrine is confusing, particularly as it is

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254. The *Restatement of the Law Governing Lawyers* creates four separate categories of enforceable duties to non-clients: (1) duties to a prospective client; (2) duties to a non-client when the lawyer or lawyer's client "invites" reliance; (3) duties to non-clients whom the client intended to benefit; and (4) duties to non-clients when necessary to prevent certain types of harm. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 (Tentative Draft No. 7, 1994). The second category includes both the legal opinion and the gratuitous undertaking cases. The third category refers primarily to the will beneficiary cases. Finally, the fourth category includes both intended victims of a client's criminal conduct threatening imminent death or serious bodily harm as well as victims of a breach of fiduciary duty who are not reasonably able to protect themselves.

255. *See* Nancy J. Moore, *Intra-Professional Warfare Between Prosecutors and Defense*

applied to the relationship between attorneys and their clients and between attorneys and third parties.[256] If we believe, as most of us do, that there should be fundamental differences in the legal consequences which apply to these two types of relationships,[257] then it is of critical importance that we be able to distinguish between the two. Moreover, it is just as important that the basis of the distinction be grounded not in the historical anachronism of strict privity of contract, but rather in sound public policy taking into account the reasonable expectations of those who would be clients.

Attorneys: A Plea for an End to the Current Hostilities, 53 U. PITT. L. REV. 515 (describing the "law of lawyering"). All of these various sources of law are presently being brought together in the American Law Institute's ongoing Restatement project. *See* Charles W. Wolfmam, *The Concept of a Restatement of the Law Governing Lawyers*, 1 GEO. J. LEGAL ETHICS 195 (1987).

256. Contributing to the confusion is the uncertain relationship between ethics law, as set forth in ethical codes, and other law, including the law of legal malpractice. *See* Moore, *supra* note 254, at 516 & n.9.

257. Even if we acknowledge that there are variations in the duties owed to different types of third parties, including the "derivative client," there will still be differences between even a "derivative client" and an actual client. *See* Hazard, *supra* note 175, at 39 (noting upon collapse of triangular relationship, lawyer may continue to represent client "in the full and formal sense").