Chapter 13. "Counsel to the Deal": Lawyers, Clients, and Conflicts in Complex Healthcare Transactions[1]

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[1]The authors acknowledge the significant contributions of Grace Chun, an associate with Inglesino, Webster, Wyciskala & Taylor, LLC, to this chapter. Some portions of this chapter have appeared in different and/or preliminary form in various earlier papers and articles by one or both of the authors, particularly including William W. Horton, Lisa D. Taylor & Grace Chun, *"Counsel to the Deal": Conflicts, Confidences and Other Legal Ethics Challenges in Transactional Representation*, which appears in the program materials from Am. Health Law. Ass'n, *Healthcare Transactions* (2014); William W. Horton, *"Whose Lawyer Is It, Anyway?" Legal Ethics and Conflicts in the Academic Medical Center Setting*, which appears in the program materials from Am. Health Law. Ass'n, Legal Issues Affecting Academic Medical Centers and Other Teaching Institutions (2009); and William W. Horton, *The Legal Ethics of the Deal: Professional Responsibility in Today's Business Environment*, which appears in the program materials from Am. Health Law. Ass'n, In-House Counsel Program (2006).

I. We All Know What the Deal Is; You Just Get the Papers Drawn Up

A. Another Day at the Office

Patience Blackstone, General Counsel of St. Zephyrinus Memorial Health System, was sitting in her opulent corner office, idly leafing through her new copy of *OIG Special Fraud Alerts for Dummies* and scrolling through the results of her "Chief Legal Officer" search on monster.com. In the days before she had joined the St. Z's team, Patience had been a successful health lawyer at Post & Tweet, LLC, her city's most white-shoe law firm, where she had represented not only St. Z's but also a variety of the state's preeminent healthcare players. Indeed, Patience had become one of the area's best known, most trusted healthcare lawyers until she took her skills off the open market to devote all her energies to the rapidly growing health system and its dynamic leader, Bosworth "Boss" Mann.

And therein lay the problem. For on this otherwise peaceful day, Boss Mann appeared in Patience's door with a gleam in his eye and a plan on his mind. "Patience," he cried, "have I got a deal for you!"

Mann proceeded to explain that he had met the previous

evening with Dr. Barry Sharp, the president of Cutting Edge, P.C., a large orthopedic surgery group based on the campus of St. Z's flagship hospital. The Cutting Edge physicians, said Mann, had been making veiled threats for some time to form their own ambulatory surgical center and pull their outpatient cases from St. Z's. "But I've saved the day, Patience! Last night, I told Barry Sharp that we'd put up the funds to build a new state-of-the-art ASC and form a limited liability company with Cutting Edge to own it, and he's agreed! You just have to draw up the papers."

"Now, we've got to make this look good, Patience," Mann went on. "I told Barry we'd own everything 50/50, share and share alike, and they could have three of the five seats on the Board of Managers. But we need to make sure the operating agreement gives us veto power on anything really important, and we get to decide when cash gets distributed and whether any new docs get to join up. Also, we'll need a contract for St. Z's to manage the center and do all the billing. I'm thinking a 10% management fee and a 15-year, no-cut contract."

Furiously scribbling down notes, Patience said, "We can start out with all that, but if Cutting Edge has a decent lawyer, we can expect a negotiation on some of those points. Did Dr. Sharp mention what law firm they planned to use as counsel?"

"Ah," said Mann, "that's the beauty part. Barry said you used to do a lot of work for them back before you came on board here, and he says the docs all trust you implicitly. They don't want to spend a lot of money on legal fees, so they just want you to draw all the documents up and tell them what they say. They trust you to be fair. We've shaken hands on the deal, so all you really have to do is put it in 'lawyer language.' "

"B-b-but . . ." Patience began to sputter, but Boss Mann cut her off as he headed back out the door. "No more time to chat, Patience. Got to be at a lunch meeting out at the club in 15 minutes. Listen, could you light a fire under this? I told Barry Sharp you'd have a draft of the documents ready for his doctors to approve at their partners' meeting Monday night. You just remember to take care of St. Z's in there, you know?"

B. A Lawyer Can Never Have Too Many Clients—Except Sometimes

As any lawyer who has spent any time in private practice knows, it is very important to know who one's client is. In the first place, it is normally the client who pays the fee, and it is good to make sure that one is sending the bill to the right place. Beyond that, of course, it is typically the client to whom the lawyer owes many of his or her duties: the duty of competent representation, the duty of diligence, the duty of confidentiality, the duty to avoid conflicts of interest, and so on.

Somewhat unfortunately, most of these duties are expressed in rules of professional conduct that were largely written around the model of a single, individual lawyer's being hired by a single, individual client to undertake a single, discretely defined task. Even those rules that expressly contemplate different models still assume, to some extent, a well-defined relationship with a single client decisionmaker.

Of course, this is often not the case. Lawyers representing "entity" clients frequently deal with a multiplicity of overlapping client authority figures, some of whom may themselves be functioning as lawyers for the client. Further, a lawyer's representation of such a client may be defined or limited in such a way as to raise questions about how broad the lawyer's responsibilities are and what role the lawyer has vis-à-vis other lawyers representing the same client or affiliates of the same client.

Things get even more complicated, however, when a lawyer undertakes to represent multiple players in the same transaction or ongoing business relationship. Attorneys who concurrently represent multiple clients in a transaction are commonly referred to as "draft counsel" or "deal counsel." Attorneys referring to themselves as "deal counsel" often do so in the context of representing both sides to a transaction—for example, as in the opening scenario above, where an attorney represents both parties in forming a joint venture, such as an ambulatory surgical center.

The perceived benefit of having "deal counsel" is that it provides the parties an opportunity to save legal fees by selecting just one attorney to "represent the deal" and act as scrivener. In theory, having one attorney may also improve efficiency, since (in the parties' view) a single attorney is

working toward the parties' common goal and pursuing the transaction with shared interests in mind. The time and cost associated with multiple drafts of documents and incorporation of multiple sets of comments can be reduced. The parties may also believe that having "deal counsel" can reduce confusion and dissension during a negotiation. However, if the attorney is "representing the deal," a question arises as to who the client really is, not only from a practical perspective (because the "deal" may not exist)[3] but also from a legal and ethical perspective (because the parties to the transaction may each perceive that the attorney is representing their personal interests and not the shared interests of all parties).

No matter how much the parties may insist that they are "all on the same page," multiple parties to a transaction will have competing interests, many of which may not become clear until the deal is well down the road. The attorney's ethical duty of confidentiality (and its narrower cousin, the attorney-client privilege) further complicates dual representation, since the "deal counsel" has the simultaneous duty to keep one constituent's confidences and yet zealously represent the other constituent or constituents. These dual duties could force a "deal counsel" to pick sides between constituents to the deal and face the consequences, which could be quite severe.[4]

For example, if one party to a transaction reveals to the attorney that party's bottom line negotiating position, how does the attorney negotiate with the other party regarding that bottom line? A "deal counsel" cannot zealously represent both constituents regarding the transaction in the same way as he or she would if that attorney represented only one of the constituents. If the conflict is or becomes too great, the

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[3]Which may, among other things, make it difficult for counsel to figure out to whom the bill should be directed.

[4]*See, e.g.,* Schlesinger v. Herzog, 672 So. 2d 701 (La. Ct. App. 4th Cir. 1996), writ denied, 679 So. 2d 1381 (La. 1996) (discussed below) (upholding $5.5 million malpractice verdict against lawyer who allegedly represented seller in transaction with another client of the lawyer); *see also* In re Herzog, 710 So. 2d 793 (La. 1998), reinstatement granted, 753 So. 2d 824 (La. 2000) (ordering 18-month suspension from practice for lawyer); *cf.* Eriks v. Denver, 118 Wash. 2d 451, 824 P.2d 1207 (1992) (attorney who represented both investors and promoters in audit of tax shelter forced to disgorge legal fees for breach of fiduciary duty).

"deal counsel" will become too materially limited to effectively represent at least one party, making dual representation unsustainable both ethically and practically. The "deal counsel" then would have to withdraw from both representations and might well be dragged into subsequent disagreements between the parties.

Several basic professional responsibility obligations apply to any representation by a lawyer. A lawyer must "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf"[5]—i.e., the duty of zealous representation. A lawyer must maintain the confidentiality of information relating to the representation of a client.[6] A lawyer may not represent a client if such representation would be directly adverse to another client or if there is a "significant risk" that such representation will be "materially limited" by the lawyer's obligations to another current or former client or a third party or by a personal interest of the lawyer.[7] Where a lawyer is dealing with a third party who is unrepresented by counsel, the lawyer may not state or imply that he or she is disinterested and must take reasonable steps to clarify any confusion on the part of the third party as to the lawyer's role. Further, if the lawyer knows or reasonably should know that the interests of an unrepresented third party have "a reasonable possibility of being in conflict with the interests of the client," the lawyer may not give any legal advice (other than the advice to obtain counsel) to the third party.[8] Simultaneously abiding by these obligations may be difficult, if not impossible, for a lawyer acting as "deal counsel."

The "deal counsel" also has great exposure if the contract that he or she drafted—just as a scrivener, you know, because the parties were very clear that they knew what the

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[5]Model Rules of Prof'l Conduct R. 1.3, cmt. 1 (2014) ("Model Rules"). Unless otherwise indicated, references to ethics and professional responsibility rules in this chapter refer to the 2014 edition of the Model Rules, as adopted by the American Bar Association House of Delegates. The rules adopted in particular jurisdictions may vary from the Model Rules, sometimes in important particulars; the reader is admonished to consult the rules in effect in the jurisdictions in which he or she is licensed.

[6]Model Rules R. 1.6.

[7]Model Rules R. 1.7(a).

[8]Model Rules R. 4.3.

deal was—later becomes a subject of dispute. Despite the discussions that took place in advance about conflict waivers, despite the carefully worded engagement letter, each of the constituents may still believe, way down deep inside, that the deal counsel is really "their lawyer" who will represent them in the dispute. Less poignantly, perhaps, the deal counsel is also at risk of being sued if one party believes that the agreement favored the other party. And, of course, how a court may interpret the as-drafted agreement may also cut against the whole purpose of having a "deal counsel" in the first place as the court resolves ambiguities in a way that cuts against what the parties—and perhaps the deal counsel—intended. Finally, these perils are all in addition to the potential ethics exposure the attorney may have to face if the arrangement places the lawyer in a position of conflict of interest, which is particularly likely in the circumstances described.

For a variety of reasons, the healthcare industry is more vulnerable than others to situations in which "deal counsel" issues and other joint representation issues, both intentional and unintentional, may arise. In part, this is so because many healthcare enterprises are complex organizations, in which there may be a single corporate entity (or at least a common parent entity) but numerous other semiautonomous constituents who may not be separately represented but who may have perceived interests and priorities that differ from those of other constituents. Think, for example, of an academic medical center, in which there may be only one controlling legal entity but numerous potentially adverse subdivisions—the hospital, the medical school, the faculty practice plan, the adjunct "community" faculty, the various departments and services, etc.—that may or may not have a separate legal existence and that may all believe that the university counsel is "their lawyer." In part, it is so because it is common some in industry segments—e.g., ambulatory surgical centers—to operate through joint ventures organized through a sponsoring entity (a hospital or health system, perhaps, or an independent management company) that takes primary drafting responsibility for documenting a transaction and in which the other parties are either

unrepresented or under-represented.[9] Further, because of the regulatory complexity of the healthcare system, the parties to a transaction may rely (expressly or implicitly) on the regulatory expertise of one attorney even where all parties are otherwise represented independently.

This chapter will explore some of the professional and practical challenges facing healthcare counsel in those circumstances where counsel has agreed to represent multiple parties to a transaction or arrangement—or where such an agreement is effectively imposed on such counsel because he or she fails to clarify his or her role to all parties. The next section will supply background on relevant professional responsibility rules and related considerations. Later sections will review some cases where lawyers encountered some of the issues raised by those rules, generally to their chagrin, and discuss some practical considerations for healthcare lawyers in determining how to address the challenges that may arise when they are asked to be "counsel to the deal."

II. Rules of Engagement: The Professional Responsibility Framework for "Counsel to the Deal"

A. Confidentiality Obligations to Clients Under Model Rule 1.6

Without question, lawyers have a clear and well-established duty to maintain the confidentiality of information about a client obtained in the course of representing that client. Even this most fundamental of profession obligations, however, sometimes generates confusion. Every American with access to a television set is familiar with the phrase "attorney-client privilege" and the concept of "privileged

[9]The term "under-represented" is used here to refer to a party that is represented by counsel who seems to be less than optimally familiar with the healthcare industry, the type of transaction or arrangement involved, or both. The danger this presents to counsel in charge of documenting the deal is that under-represented parties may tend to form an implicit belief that the "deal counsel" has undertaken some sort of obligation to "be fair to everybody" and "look out or everybody's interest" even when such counsel has clearly been retained only by one party.

communications."[10] However, lawyers and their clients often refer to "client confidentiality" and the attorney-client privilege as if they were identical and interchangeable concepts, which is not the case at all. Certainly, they overlap, and certainly, they both play a significant role in the willingness of clients to confide in their lawyers and of lawyers to give full and complete advice to their clients. Yet, they are very distinct things, and any discussion of them must keep the distinctions in mind.

The attorney-client privilege is an evidentiary rule, or more precisely an exception to the general rules that provide for the admissibility of relevant, nonhearsay evidence. Strictly speaking, the privilege only comes into play in an evidentiary proceeding and provides that neither an attorney nor that attorney's client may be compelled to divulge communications that pass between them in the course of seeking and providing legal advice or representation unless the privilege has been waived (intentionally or otherwise) or unless an exception to the privilege arises.

Typically, the duty of confidentiality has much more relevance in the transactional setting than does the attorney-client privilege. Most transactions do not end up in litigation or administrative proceedings, and the question of whether the privilege may be asserted or can be, has been, or should be waived never arises. However, the existence of the privilege may play a significant role in a client's willingness to communicate necessary information to a transactional lawyer, particularly in these days when corporate behavior is under so close a microscope, and the transactional lawyer must at least have a general working knowledge of issues surrounding the attorney-client privilege (although those issues are largely beyond the scope of this chapter).[11]

The lawyer's duty of confidentiality, in contrast to the

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[10]For example, in the eighth episode of the second season of the popular AMC television series BREAKING BAD, attorney Saul Goodman famously tells protagonist Walter White and his colleague-in-crime Jesse Pinkman, in their initial meeting, "First, you're each gonna put a dollar in my pocket. . ..You want attorney-client privilege, don't you? Make it official." *See* https://breakingbaddict.wordpress.com/tag/saul-goodman-starts-helping-walt-and-jesse/.

[11]The discussion of privilege and confidentiality issues in this section is necessarily somewhat summary in nature. For a more elaborate medita-

attorney-client privilege, is an ethical obligation of the lawyer and applies to prevent the lawyer from communicating confidential information relating to the representation from a client in all contexts, not just in an adversarial proceeding. The duty of confidentiality does not apply only to communications between the lawyer and the client but also to all information obtained by the lawyer about the client in the course of the representation (including nonpublic information obtained from third parties). Thus, for example, the fact that a client has consulted a lawyer is not protected from disclosure by the privilege even though the communications between them are protected. On the other hand, the fact that such a consultation occurred is within the scope of information covered by the duty of confidentiality, and the lawyer may not reveal that fact without the client's consent unless such disclosure is necessary in connection with the purposes of the representation or the client has given an informed consent to disclosure.

Model Rule 1.6 outlines the scope of a lawyer's obligations to ensure the preservation of the confidentiality of client information. "Rule 1.6 governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client."[12] The lawyer's duty to maintain that confidentiality "contributes to the trust that is the hallmark of the client-lawyer relationship."[13]

This duty is critical when a lawyer advises a client on transactions in the healthcare industry. In general, a major problem facing any lawyer in advising a client on a business transaction or arrangement is obtaining full and complete information relevant to the representation: it is sad but true that clients often view lawyers as expensive worrywarts, naysayers to whom communications must be kept on a need-to-know basis. This challenge may be particularly acute in the healthcare industry, where the legal analysis of many transactions and relationships turns in large part on the intent of the parties due to the potential applicability of the

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tion on the role of the attorney-client privilege in transactional representation, *see* William W. Horton, *A Transactional Lawyer's Perspective on the Attorney-Client Privilege: A Jeremiad for* Upjohn, 61 BUS. LAW. 95 (Nov. 2005).

[12]Model Rules R. 1.6, cmt. [1].

[13]Model Rules R. 1.6, cmt. [2].

Anti-Kickback Statute,[14] which may convert a business arrangement that would be innocuous, even astute, in other settings into a source of criminal liability in the healthcare setting.[15] For example, in some circumstances, it may be possible to structure a transaction in a way that, on its face, complies with the Anti-Kickback Statute, but that transaction might still be subject to enforcement action if there were evidence showing that the parties had an impermissible intent in entering into the transaction.[16] In such a case, it is important for the lawyer advising on the transaction to obtain as much information as possible not only about the business specifics of the transaction but also about any underlying facts which might create the risk of a violation of law. The duty of confidentiality, as well as the attorney-client privilege, creates an environment in which the lawyer can provide his or her client with at least some assurance that speaking freely will be a safe endeavor.

In the context of joint representation of the parties to a transaction, this duty of confidentiality may come squarely into conflict with another duty: the duty under Model Rule 1.4(b) to "explain [to a client] a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[17] In the joint representation context, Rules 1.4 and 1.6 may become a true Scylla and Charybdis for the unprepared lawyer. As noted by the American Bar Association's Standing Committee on Ethics and Professional Responsibility,

> Lawyers routinely have multiple clients with unrelated matters, and may not share the information of one client with other clients. The difference when the lawyer represents multiple clients on the same or a related matter is that the lawyer has a duty to communicate with all of the clients about

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[14]42 U.S.C. § 1320a-7b(b).

[15]*See generally* William W. Horton, *The Past, Present and Future of the Anti-Kickback Statute: A Practical History*, in HEALTH CARE FRAUD AND ABUSE: PRACTICAL PERSPECTIVES (Linda A. Baumann, ed., 3d ed. 2013).

[16]*Cf.* U.S. Dep't. of Health & Human Services Office of Inspector General, Advisory Opinion No. 04-17 (Dec. 10, 2004) (noting that even where individual components of an arrangement might satisfy safe harbors, the totality of the arrangement might still violate the Anti-Kickback Statute where it reflected an impressible intent to induce referrals.)

[17]Model Rules R. 1.4(b).

> that matter. Each client is entitled to the benefit of Rule 1.6 with respect to information relating to that client's representation, and a lawyer whose representation of multiple clients is not prohibited by Rule 1.7 [to be discussed below] is bound to protect the information of each client from disclosure, whether to other clients or otherwise.[18]

Thus, a lawyer who represents two parties to a transaction or arrangement may be placed in a rather recursive ethical position: the lawyer's ethical duty to Client 1 may require the disclosure of confidential information concerning Client 2, which disclosure may be prohibited by the lawyer's ethical duty to Client 2, thereby putting the lawyer in breach of the duty to Client 1, which breach can only be cured by breaching the duty to Client 2 . . ..

How does the lawyer get into this position in the first place? Well, as might be expected, there are rules about that too.

B. Conflicts of Interest Under Model Rules 1.7 and 1.8

Model Rules 1.7 and 1.8 address the lawyer's professional obligations with respect to conflicts of interests involving

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[18] Am. Bar. Ass'n Standing Comm. on Ethics & Prof'l Responsibility, Formal Opinion 08-450 (Apr. 9, 2008). The potential for conflict between Rule 1.4(b) and Rule 1.6 may arise in circumstances even more difficult than in the joint representation of potential business partners. For example, in A. v. B., 158 N.J. 51, 726 A.2d 924 (1999), a law firm that was jointly representing a husband and wife in estate planning matters became aware that the husband had also recently become the father of a child with another woman (who had engaged the firm to bring a paternity suit against the father; due to a data entry error, the conflict had not been caught before the firm accepted that engagement, from which it withdrew when the conflict was discovered). The firm sought to disclose to the wife the existence of the out-of-wedlock child, and the father sought a restraining order to prevent that disclosure. On the particular facts of the case, including the terms of a conflict-of-interest waiver signed by the husband and the wife at the time they engaged the firm, the court found that limited disclosure to the wife (of the existence, but not the identity, of the child) was permissible; because the law firm affirmatively sought to make the disclosure, the court did not reach the question whether the disclosure was mandatory. This seems like a technically correct result on the facts, and arguably one that is consistent with philosophical ethics, if less clearly so as a matter of legal ethics. However, it seems unlikely that the end result was beneficial to the relationship between the law firm and any of its many clients.

current clients (as opposed to former clients as to which representation has terminated; obligations to those clients are covered in Model Rule 1.9, and are not discussed in this chapter). The starting point for analysis is Model Rule 1.7(a), which prohibits a lawyer (subject to consent by both affected clients under some permitted circumstances) from representing a client

> . . . if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> (1) the representation of one client will be directly adverse to another client; or
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> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.[19]

Model Rule 1.7(b) then creates a limited exception: an attorney may represent clients who present concurrent conflicts of interest if the attorney reasonably believes that he or she can competently and diligently represent each client, the representation is not otherwise prohibited, there are no claims between the clients, and each client gives informed consent.[20]

Does the representation of multiple clients in a business transaction or arrangement necessarily give rise to a concurrent conflict of interest? In some circumstances, the answer is obviously "yes": even though the interests of a buyer and a seller are in a significant sense aligned, in that both of them presumably want to close the deal in accordance with the bargain they believe they have struck, they invariably have different interests in the mechanics of the deal—security for the purchase price, for example, or indemnification obligations, or the right to terminate the agreement and walk away. It would be difficult, indeed practically impossible, for the same lawyer to ethically represent both buyer and seller even with the professed understanding that the lawyer was solely acting as a scrivener—there is hardly a clause in a purchase agreement that is not susceptible of being slanted

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[19]Model Rules R. 1.7(a).

[20]Model Rules R. 1.7(b).

in favor of one party or the other through even relatively straightforward drafting decisions.[21]

But what about the less obvious situation where the lawyer is called upon to represent multiple parties to a joint venture arrangement, in which the interests of the parties were notionally much more perfectly aligned (since the parties share a common goal of creating an entity that will allow them to jointly pursue a common interest and a long-term relationship, as opposed to an isolated sale transaction)? The commentary to Rule 1.7 suggests, correctly, that this circumstance likewise poses perils:

> Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.[22]

This commentary is helpful, but it leaves a fair amount in the nebulous territory of judgment calls. The commentary assumes that representing multiple parties in the formation

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[21]Indeed, the official commentary to Model Rule 1.7 expressly states that a (waivable) conflict of interest would exist where the lawyer had an existing client relationship with both the buyer and the seller even though one of them was separately represented in the particular transaction: "For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client." Model Rules R. 1.7, cmt. [7]. Notwithstanding the obvious conflicts involved in representing both buyer and seller in the same transaction, though, it is surprising how often that situation seems to come up; some instructive examples are discussed in section III below.

[22]Model Rules R. 1.7, cmt. [8].

of a joint venture is not per se a conflict of interest; instead, the comment suggests, a conflict arises if the lawyer's freedom to act on behalf of one party is "materially limited" by obligations to another party. As further indicated in the comment, a conflict does not (at least not necessarily) arise if there is a remote risk—a "mere possibility"—that a material limitation may develop. Rather, the analysis is a "double likelihood" test: how likely is it that a true conflict between the joint clients will develop, and how likely is it that, having developed, such conflict will materially interfere with the lawyer's representation of one of the clients? Thus, the temptation, especially when dealing with sophisticated business clients, may be to discount the potential concerns.[23] However, that should not be done hastily.

Further commentary to Model Rule 1.7 offers additional guidance, with a focus on the transactional context:

> Whether a conflict is consentable [i.e., whether a client may give an effective waiver of any conflict arising from the joint representation] depends on the circumstances. For example, a

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[23]Although it is beyond the scope of this chapter, the question of when a client is "sophisticated" and whether sophisticated clients ought to have a greater ability to grant consent to otherwise "non-consentable" conflicts is a topic of ongoing debate. *See, e.g.,* Law Firm General Counsel Roundtable, *Proposals of Law Firm General Counsel for Future Regulation of Relationships Between Law Firms and Sophisticated Clients* (Mar. 2011), *available at* www.americanbar.org/content/dam/aba/administrative/ethics__2020/ethics__20__20__comments/lawfirmgeneralcounsel__issuespaperconcerningmultijurisdictionalpractice.authcheckdam.pdf (proposal to Am. Bar Ass'n Ethics 20/20 Comm'n submitted by 33 major law firm general counsel recommending, inter alia, greater flexibility for sophisticated clients and law firms to contract around certain conflict-of-interest requirements in the Model Rules); Lawrence Fox, *The Gang of Thirty-Three: Taking the Wrecking Ball to Client Loyalty*, 121 YALE L.J. ONLINE 567 (2012) (sharply criticizing proposal); James W. Jones & Anthony E. Davis, *In Defense of a Reasoned Dialogue About Law Firms and Their Sophisticated Clients*, 121 YALE L.J. ONLINE 589 (2012) (responding to Fox). *See also* Milan Markovic, *The Sophisticates: Conflicted Representation and the Lehman Bankruptcy*, 2012 UTAH L. REV. 903 (2012) (analyzing the applicability of Model Rule 1.7's prohibition on representations that involve concurrent conflicts of interest to Sullivan & Cromwell's representation of Lehman Brothers in the weeks leading up to its bankruptcy). The Markovix article is discussed in some detail in William W. Horton, *Legal Ethics: What Penn State and Lehman Brothers Can Teach Lawyers About Conflicts Of Interest*, which appears in the program materials from Am. Health Law. Ass'n, Legal Issues Affecting Academic Medical Centers and Other Teaching Institutions (2013).

> lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.[24]

However, "[i]n considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination."[25] Thus, a lawyer evaluating whether to undertake such a representation, even where the clients appear willing to provide informed consent, must carefully consider the risks to both the clients and the lawyer.

Model Rule 1.8, which deals with certain specific conflict issues relating to conflicts in respect of current clients, identifies one major peril of multiple-client representation in the joint venture context: "A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by [the Model] Rules."[26] As the associated comment explains, "Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. [Rule 1.8](b) applies when the information is used to benefit either the lawyer or

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[24]Model Rules R. 1.7, cmt. [28].

[25]Model Rules R. 1.7, cmt. [29].

[26]Model Rules R. 1.8(b).

a third person, such as another client or business associate of the lawyer."[27]

How might this have relevance in the joint venture situation? Return to the discussion of Model Rule 1.4(b) above. Suppose, for the sake of simplicity, that two physicians hire a lawyer to help them put together an ambulatory surgery center joint venture in which the two will be equal partners and to assist them in negotiating with a lender for a working capital loan. The lawyer drafts the joint venture agreement and includes a relatively standard provision requiring that the members provide guaranties for the joint venture entity's debt, pro rata in accordance with their ownership interests. Dr. Horton confides to the lawyer that he is reluctant to provide such a guaranty because it will be necessary to provide the lender with information about his financial condition, which has bordered on insolvency since his recent divorce. Instead, Dr. Horton proposes the joint venture entity should seek financing from another source, which Dr. Horton believes will be willing to proceed without a guaranty, albeit at a higher interest rate. In this discussion, Dr. Horton adjures the lawyer not to say anything to Dr. Taylor about his financial travails.

Under Model Rule 1.4(b), the lawyer arguably has an obligation to tell Dr. Taylor about this communication, since her decision as to how to proceed with the financing, or indeed to continue in business with Dr. Horton at all, may be materially affected by knowing about Dr. Horton's straitened circumstances. Indeed, Dr. Taylor may want to recut the deal with Dr. Horton to provide that she will get a greater share of ownership in the joint venture to compensate her for the increased risk associated with being in business with Dr. Horton. But it is for precisely this reason that the lawyer cannot communicate that information (at least, absent Dr. Horton's informed consent, as discussed below). The disclosure of the adverse information to Dr. Taylor would, in all likelihood at least, be to the disadvantage of Dr. Horton, and so disclosure is forbidden under Model Rule 1.8(b). In other words, in the absence of informed consent by both clients, the joint representation arrangement results in the lawyer's having been put in a position to violate his or her ethical duties not only to one client but also to both.

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[27]Model Rules R. 1.8, cmt. [5].

The above example is a fairly mechanical one, involving playing off the text of multiple rules against each other. But Model Rule 1.7 also suggests the possibility of a more existential sort of conflict arising from this sort of joint representation. Model Rule 1.7(a)(2) provides that a conflict exists if "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." The commentary to Model Rule 1.7, as well as Model Rule 1.8 and its associated commentary, indicates that one focus of this rule is on circumstances where the lawyer has a personal financial interest that is different from that of the client(s), such as when a third party is paying the lawyer's bills or when the lawyer has a business interest (as opposed to simply an interest arising out of the representation of a client) in the subject of the transaction.[28] However, the "personal interest" concept may not appropriately be so limited.

Suppose, for example, that two parties to a proposed joint venture have jointly engaged a lawyer to help them organize the joint venture entity and structure its initial transactions. One party is a local physician who has regularly used the lawyer for various assignments in the past. The other is an out-of-state company making its initial entry into the local market and that has jointly engaged the lawyer at the behest of the physician because of the physician's comfort level with the lawyer. In that case, the lawyer must evaluate whether his or her existing relationship with the local physician—and his or her desire to continue to get new work from that physician—may create a material risk that the lawyer will be unable to be objective in advising the parties if a disagreement arises among them as to a course of action. In many cases, the answer is that the risk is relatively minimal; assuming the lawyer is generally competent and objective, it will likely be possible to steer the parties around any disagreements to a result that is consistent with their shared goals in forming the joint venture. However, one can conceive of situations where the lawyer's personal economic interest in seeing ongoing work from the existing client might at least be perceived as distorting the lawyer's judgment, and it would behoove the lawyer to think through the likely

[28] *See* Model Rules R. 1.7, cmt. [10], R. 1.8 (a), (c) and (d), and R. 1.8, cmts. [1] to [3], [9] and [11] to [12].

scenarios in advance before agreeing to the engagement and seek to address as many of them as possible through appropriate informed consent.

Later portions of this chapter will discuss how the lawyer might go about anticipating and addressing conflicts of the type discussed in this section. However, there are a couple of other special situations that should be discussed first.

C. One Client, Indivisible—Or Not

Issues of joint representation in the transactional setting do not arise only where the clients are separate persons or entities acting at arm's length. Increasingly complex healthcare organizations typically involve a variety of affiliated entities with varying levels of autonomy—subsidiaries, brother-sister entities, for-profit affiliates of nonprofit organizations, unconsolidated joint venture entities—as well as "entities" that may or may not have separate legal status, such as medical staff organizations, faculty practice plans, and operating divisions. Even a single, centralized parent organization may have subsidiaries in which others hold minority interests, or wholly owned subsidiaries that for various reasons are independently managed, with management teams and boards wholly or partially distinct from those of the parent. Beyond that, the transactional context not infrequently presents situations where a lawyer may be called upon to represent both an entity client and individual owners, directors, officers, or employees—for example, the situation where the lawyer engaged to represent a corporate client in a sale transaction is also called upon to negotiate employment agreements for senior officers or noncompetition agreements for key shareholders. The potential for conflicts in these types of situations may be less apparent than in the examples given above, but a lawyer engaged as deal counsel in such situations must be equally alert for professional responsibility issues.

1. Model Rule 1.13: The Organization as Client

As a threshold matter, if the lawyer's primary client is an organization, a separately organized legal entity, it is important for the lawyer to be clear as to whom he or she owes professional duties. Model Rule 1.13 provides the most

basic—and yet most difficult—rule of entity representation: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[29] Those constituents, in turn, are the officers, directors, employees and shareholders of a corporation, or those who hold analogous positions with entities that are not corporations.[30] Where the interests of a client organization and its constituents diverge, the lawyer who is engaged by the organization owes his or her duties to the organization and generally may not represent a constituent if the constituent's interests are adverse to those of the organization.[31]

Simple enough, it would seem. However, an organization, which in itself is a legal construct, acts only through real people. Some of those people may have multiple motives, some of which are more clearly consistent with the organization's interests than others. Further, those people may not perceive either the organization's interests or their own in the same way as the lawyer does. Beyond that, as noted above, the client organization may be the parent of multiple other organizations, or one of many affiliates of a common parent, and the persons responsible for those entities may view themselves as having priorities different than those of others in the corporate chain.

The ABA Standing Committee on Ethics and Professional responsibility struggled with "corporate family" issues for some years, choosing finally to address issues relating to the representation of related entities through Model Rule 1.7, the basic conflict-of-interest rule, rather than through Model 1.13. In Formal Opinion No. 95-390,[32] the Committee considered "whether a lawyer who represents a corporate client may undertake a representation that is adverse to a corporate affiliate of the client in an unrelated matter,

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[29]Model Rules R. 1.13(a).

[30]Model Rules R. 1.13(a), cmt. [1].

[31]*See* Model Rules R. 1.13(f) and cmt. [10].

[32]Am. Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, Formal Opinion 95-390, "Conflicts of Interest in the Corporate Family Context" (Jan. 25, 1995).

without obtaining the client's consent."[33] The Committee essentially concluded that the answer was "yes" unless circumstances indicated that it was "no" or perhaps "it depends."[34] Without belaboring the point, however, it is fair to say that although there may be a technical defense to an ethics complaint brought by one corporate affiliate where its counsel acted adversely to another corporate affiliate without consent of the first affiliate, in the real world, a lawyer who proceeds without such consent faces practical, if not technical, peril.

2. The Client as Sum of the Parts

Where a lawyer represents a separately organized component of an organization, such as an incorporated subsidiary, Model Rule 1.13 may be understood to apply to that component and not to other components or to a common parent, and Formal Opinion No. 95-390 may provide at least some arguable cutoff point for defining the lawyer's client. That interpretation may not work as good client relations, but at least it provides a theoretical basis for the lawyer to define the scope of his or her obligations. However, where a lawyer's apparent client is in fact an unincorporated component of a larger organization, such as a corporate division, a medical staff organization, or a school within a university, there is no particular relief to be found under the Model Rules.

As a technical matter, if a lawyer represents any nonsepa-

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[33] *Id*. at 1.

[34] In fact, the Committee's majority conclusion was summarized thus:

> A lawyer who represents a corporate client is not by that fact alone necessarily barred from a representation that is adverse to a corporate affiliate of that client in an unrelated matter. However, a lawyer may not accept such a representation without consent of the corporate client if the circumstances are such that the affiliate should also be considered a client of the lawyer; or if there is an understanding between the lawyer and the corporate client that the lawyer will avoid representations adverse to the client's corporate affiliates; or if the lawyer's obligations to either the corporate client or the new, adverse client, will materially limit the lawyer's representation of the other client.

Id. at 1. However, the Committee noted that "a lawyer ordinarily would be well advised as a matter of prudence and good practice to discuss the matter with his existing client before undertaking a representation adverse to an affiliate of the client, even though consent may not be ethically required." *Id.* at 13. Several dissents to the opinion were sharply critical of the majority's failure to impose an ethical obligation requiring such a consultation.

rately organized component, the lawyer's actual client is presumably the organization as a whole. There is simply no mechanism for assuming a separation of interests between the organization and a nonseparate component part even if the parts appear to act autonomously. In such a case, the only truly effective relief would appear to be adopting written terms of engagement (or written policies within an internal legal department) that specify that the lawyer is to treat the division, school, etc. as his or her client as if it were a separate entity. In the absence of such terms, the lawyer should assume that his or her ultimate client is the legal entity that controls the nonentity "clients."

3. Officers, Directors, and Other Constituents

A fundamental principle of Model Rule 1.13 is that, by representing an organization, a lawyer does not necessarily represent its individual officers, directors, stockholders (or other owners), or employees. However, Model Rule 1.13(g) allows a lawyer to undertake such dual representation, subject to the conflict provisions of Model Rule 1.7, and in some circumstances that is a fairly common arrangement; for example, as alluded to below, the lawyer representing an organization in a transaction may also act on behalf of individual officers, etc., in negotiating employment or consulting agreements. Similarly, although tangential to the subject at hand, it is not uncommon for the same lawyer to represent a corporate defendant and individual management defendants as long as they share common defenses and their interests do not diverge. If the lawyer becomes aware of a conflict between the interests of the organization and some or all of the jointly represented constituents, the lawyer must advise the potentially adverse constituents that he or she represents the organization and that the affected constituent understands that the lawyer can no longer give him or her legal advice and that communications between them may not be privileged.[35]

[35] *See* Model Rules R. 1.13(f) and cmt. [10].

4. Application of Model Rule 1.7 to Corporate Representation

Model Rule 1.7 is applicable both to the joint representation of an organization and individual constituents and to the joint representation of organization clients. Thus, for example, the representation of a parent and a subsidiary, of sister organizations, or (if one has found a way to do it) divisions or other unincorporated components of a single unitary entity would remain subject to Model Rule 1.7. If a conflict between the two entities or quasi-entities were to develop, or if the lawyer's ability to represent one were compromised by responsibilities to the other, then the lawyer would not be able to continue the joint representation. The same general principle applies to the joint representation of an organization and individual officers, directors, etc.

That can change when the interests of the jointly represented clients begin to diverge. In fact, depending on the nature of the conflict, the lawyer might not be able to continue representation of either client in the particular matter at hand. Model Rule 1.9, governing duties to former clients, may require the lawyer to withdraw from representation of a client if the duties owed to a former client (in this case, the client the lawyer actually wants to withdraw from representing) limit the lawyer's ability to adequately represent the remaining client (for example, where such representation would be limited by the lawyer's obligation to protect the confidential information of the former client or where the two clients have developed directly adverse interests).[36]

D. The Involuntary Attorney

In general, the formation of an attorney-client relationship is, like that between physician and patient, a voluntary contractual arrangement between willing participants. That remains the case, albeit with more a bit more complexity, when the lawyer has been jointly engaged by multiple clients to act as "deal counsel." As has been alluded to above, when a lawyer has formally undertaken to represent an organization and one or more of its constituents but subsequently determines that the interests of the organization and the constituent have diverged, the lawyer has a duty to so inform

[36] *See* Model Rules R. 1.9 and cmts. [4], [5] and [33] to R. 1.7.

the constituent and, in all likelihood, withdraw from representation of the constituent (and perhaps from representation of the organization as well). Similarly, if a lawyer has undertaken joint representation of multiple parties to a business arrangement, the lawyer may be obliged to withdraw from representing one or more parties if a material divergence of interests arises.[37]

When the lawyer and the affected clients have entered into a voluntary, informed attorney-client relationship in the customary way, these situations may be personally painful, but they can be fairly straightforward mechanically, at least if the players have an appropriate engagement letter in place. On the other hand, it is entirely possible that a party to a transaction or a corporate constituent may form the impression that he, she, or it is the lawyer's client without the lawyer's having actually undertaken such a relationship. In-house counsel are particularly vulnerable to such developments because of their necessarily close and frequent interaction with client personnel in circumstances that are frequently less formal than interactions between such personnel and outside counsel.

This is certainly true in the corporation/officer setting, particular as one moves higher up the officer chain and senior officers become more convinced that their interests and those of the organization are indistinguishable, as well as in complex health system, where strong and independent personalities, overlapping roles, and complex organizational structures make life a good bit more confusing. For example, it is not unnatural for a physician/faculty member/administrative officer in an academic medical center who has been advised by a lawyer with regard to his or her administrative role to assume that he or she has a personal attorney-client relationship with that lawyer, and it is almost a truism that chief executive officers and other senior corporate officers regard the corporation's general counsel (inside and/or outside) as "their lawyer."

Less obviously, perhaps, a potential investor in a joint venture may come to believe that the lawyer "representing the deal," or at least "putting the deal together," owes profes-

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[37] *See* Model Rules R. 1.7, cmt. [4]. *See also* Model Rules R. 1.9 (regarding duties to former clients).

sional obligations not simply to the client that is paying the lawyer's bills but also to the other participants in the arrangement. This may be so even where a participant also has separate counsel.

In such a case, the lawyer must be sensitive to yet another Model Rule, Model Rule 4.3 (as well as to Model Rule 1.13(f), discussed above). Model Rule 4.3 requires that in dealing on behalf of a client with an unrepresented person, the lawyer must not profess to be disinterested and must try to correct any misunderstanding the unrepresented person as regarding the lawyer's role. Further, "[t]he lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[38]

Beyond that, there is the issue that may be characterized as the "client by estoppel." Under the Restatement of the Law Governing Lawyers,

> [a] relationship of client and lawyer arises when:
>
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
>
> (a) the lawyer manifests to the person consent to do so; or
>
> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services . . . .[39]

In other words, even where the lawyer has not expressly agreed to an attorney-client relationship, the lawyer may under some circumstances be deemed to have entered into one by "fail[ing] to negate consent [to the relationship] where the [prospective client] has reasonably assumed that the relationship is underway."[40] Such relationship may be construed to prevent the lawyer from representing another client that is adverse to the client-by-estoppel and at a minimum may limit such representation to the extent that the lawyer has a duty to protect confidential information of the client-by-estoppel.

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[38]Model Rules R. 4.3.

[39]Restatement (Third) of the Law Governing Lawyers § 14 (2000).

[40]GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING (3d ed. 2000 & Supp. 2009) § 2.5.

III. Morality Tales: Some Illustrative Cases

It is well and good to speak theoretically about the risks to the lawyer (and the client) that can arise in multiple representation/counsel-to-the-deal scenarios. However, actions (at law) may speak louder than words. The following subsections briefly summarize some of the cases that exemplify the real-world answer to the question "Just write down the deal? Sure, what can go wrong?"

A. *Baldasarre v. Butler*: Too Many Clients and Not Enough Lawyers

In *Baldasarre v. Butler ("Baldasarre I"),*[41] the plaintiffs were two sisters who had inherited a tract of land as part of their father's estate. Butler and his law firm represented the estate and had also represented the sisters and their spouses in a variety of legal matters. During 1986 and 1987, the sisters received a number of offers to purchase the land, as to which they generally consulted Butler, but rejected all the offers. According to Butler, the sisters also asked Butler to check around with his clients to see whether any of them had any interest in buying the land. DiFrancesco, a local real estate developer who was the brother of one of Butler's partners, made an offer to buy the property on the condition that he would be given the right to assign the agreement to another purchaser and requested that Butler represent him in pursuing the transaction and in obtaining subdivision approval for a planned development on the property. Butler transmitted DiFrancesco's offer to the sisters and, according to his testimony, explained the right of assignment, told the sisters he had represented DiFrancesco in the past, and "explained that if [the sisters] objected to [his] representing DiFrancesco, he would not do so." In connection with the offer, DiFrancesco signed what the court characterized as "a 'conflict of interest' letter prepared by Butler."[42]

According to Butler, he thereupon met with the sisters, "explained to [them] each paragraph of the agreement [with DiFrancesco] in detail [including the assignment clause] as

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[41]Baldasarre v. Butler, 254 N.J. Super. 502, 604 A.2d 112 (App. Div. 1992), aff'd in part, rev'd in part, 132 N.J. 278, 625 A.2d 458 (1993) ("*Baldasarre II*").

[42]604 A.2d at 115.

well as the potential conflicts of interest raised by various terms in the event he represented both [the sisters] and DiFrancesco," had them sign a "conflict of interest letter," and suggested that they "take the agreement and conflict of interest letter to another attorney 'for independent advice and consultation,' " a suggestion the sisters apparently rejected.[43]

The sisters signed the real estate contract with DiFrancesco. Shortly thereafter, DiFrancesco agreed that he would sell the property, after he completed the purchase from the sisters, to a construction company owned by Messano, a developer who had, through another entity, submitted a proposal for the property that the sisters had rejected. The Messano agreement provided for Messano to pay to DiFrancesco a substantially higher price than DiFrancesco was to pay the sisters, contingent upon obtaining subdivision approval within a prescribed time, and also contained a strict confidentiality clause prohibiting Messano from doing anything that would tend to indicate that his company would be the ultimate purchaser of the property. Although Butler met with the sisters at various times thereafter in connection with the transaction, he did not tell them directly about the agreement between DiFrancesco and Messano.[44]

As the months passed, it became necessary, or at least desirable, for DiFrancesco to obtain from the sisters an extension of the time to close. In October 1987, Butler met with the sisters to communicate that request but did not disclose the existence of the Messano agreement; the sisters granted the extension notwithstanding their professed concern that the property value was escalating. Sometime thereafter, one of the sisters called Butler because she had "heard a 'rumor' that the property had been 'resold' by DiFrancesco," but Butler still did not disclose his knowledge of the Messano agreement and instead recommended that the sisters discuss the matter directly with DiFrancesco. Shortly after that meeting, the sisters learned about the deal between DiFran-

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[43]*Id.* at 116. Material portions of the two "conflict of interest letters" are contained in *Baldasarre II*, 625 A.2d at 460–461.

[44]604 A.2d at 115. Butler alleged that he did tell one of the sisters' husbands about the Messano agreement, a statement the husband denied.

cesco and Messano and learned that Butler had represented DiFrancesco in connection with it.[45]

Thereafter, stuff began to hit the fan rather quickly, as the sisters sued Butler and his law firm, as well as DiFrancesco, seeking rescission of their agreement with DiFrancesco and damages arising from Butler's and DiFrancesco's alleged fraud—that fraud being that they had wrongfully failed to disclose the existence of the Messano agreement and fraudulently induced the sisters to grant the extension. The complaint also asserted that Butler had violated his professional duties to the sisters and that his law firm was jointly and severally liable to them due to Butler's alleged misconduct.[46] With regard to the claim against Butler and his firm, the court "found that Butler had 'comprehensively complied' with ethical guidelines in undertaking his dual representation of [the sisters] and DiFrancesco by advising [the sisters] of the potential conflicts, recommending that they seek independent legal counsel and having them sign a 'comprehensive' conflict of interest letter."[47]

The Appellate Division disagreed, citing both the then-existing New Jersey version of Model Rule 1.7 and relevant case law to conclude that, under the particular circumstances, Butler's representation of both the sisters and DiFrancesco constituted an impermissible conflict of interest that was not cured by the "conflict of interest letter" signed by the sisters.[48] In particular, the court found that "where [an] attorney is called upon to participate in the *negotiations* of the terms of [a complex real estate] transaction, a conflict of interest will exist and 'consent to continued representation is immaterial[.]' "[49] The court noted that it was not determinative that the parties had agreed to the purchase price by themselves, without Butler's involvement in the negotiations, and pointed to several components of the transaction as to which Butler might have sought to obtain more favorable terms for the sisters but did not do so. In any

[45] *Id.* at 117.

[46] *Id.*

[47] *Id.* at 118.

[48] *Id.*

[49] *Id.* at 120 (quoting then-current version of N.J. Rules of Prof'l Conduct 1.7(c)(1)) (emphasis in original).

event, the court noted, at the time of the October 1987 meeting with the sisters to discuss DiFrancesco's request for an extension of time to close, "Butler had an absolute duty to advise [the sisters] of the existence of the Messano agreement. At this point, Butler's representation of [the sisters] was 'materially limited by [his] responsibilities to another client,' DiFrancesco, and his failure to disclose plainly violated the letter and spirit of [Rule 1.7]." That is, DiFrancesco's interest lay in having Butler withhold information about the Messano agreement because the sisters would likely not have granted the extension had they known about it, while the sisters' interest was, of course, exactly the opposite: had they known about the Messano agreement, they would presumably have either denied the extension or sought to negotiate greater consideration for granting the extension.[50] The court further found that it was irrelevant what the sisters would actually have decided to do had they been provided with the relevant information; what was important was that Butler had allowed himself to be placed in a situation in which he could not satisfy his professional obligations to one client without disadvantaging the other client.[51]

The court went on to find that the sisters had offered "compelling" evidence that Butler had intentionally withheld information about the Messano agreement that he had an ethical duty to disclose to them, with the result that both Butler and his law firm were liable to the sisters in damages for legal and equitable fraud. Further, the court found, Butler had been acting as DiFrancesco's agent, authorized to speak on DiFrancesco's behalf and directed by DiFrancesco to obtain the extension from the sisters, and thus Butler's fraud could be imputed to DiFrancesco.[52]

The findings of the *Baldasarre* courts may not be of broad

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[50]604 A. 2d at 120.

[51]*Id*. at 121.

[52]*Id.* at 121–122. In *Baldasarre II*, the New Jersey Supreme Court reversed the *Baldasarre I* court's finding on DiFrancesco's vicarious liability for Butler's alleged fraud, finding that Butler's failure to avoid impermissible conflicts of interest could not result in imputable liability to his client DiFrancesco absent a showing that DiFrancesco had "direct[ed], advise[d], consent[ed] to or participate[d] in [Butler's] improper conduct." 625 A.2d at 464–465.

instructional utility because of the "train wreck" nature of the facts; it is objectively hard to defend Butler's actions in continuing the dual representation after becoming aware of DiFrancesco's insistence on keeping the existence of the Messano agreement confidential, much less after the October 1987 meeting at which his other clients, the sisters, made him aware that they were reluctant to grant DiFrancesco's requested extension because of their belief that they might be leaving money on the table due to the increased property value. Butler, in effect, found himself in a hole and kept on digging. However, there is utility in noting the doctrinal basis for the *Baldasarre I* court's holding—in effect, that disclosure and waivers can only take a lawyer so far if the lawyer is going to have any material involvement in the *negotiation* of a transaction between two clients and not simply in its documentation. Even where parties to a deal have entered into a detailed term sheet or memorandum of understanding, there will always be terms to be fleshed out, and some of those terms will favor one party over another. The lawyer who takes on an assignment must be ultra-sensitive to the need to make disclosure of those sorts of issues and let the parties resolve them, including with the advice of other counsel if that seems necessary.

B. *Schlesinger v. Herzog*: An Oral Agreement Is't Worth the Paper It's Printed On[53]

In *Schlesinger v. Herzog*,[54] the plaintiff, Schlesinger, agreed to merge his real estate management company with another company owned by Lassen, with Schlesinger retaining only a 1% interest in the surviving company. At the same time, Schlesinger and Lassen were to enter into what they referred to as "the Asset Deal," in which "Lassen was to obtain a 52% interest in valuable commercial real estate properties belonging jointly to Schlesinger and various of his relatives in return for a multi-million dollar infusion of equity by

[53]A variation on a quote widely, but probably incorrectly, attributed to the film producer Samuel Goldwyn. *See* http://quoteinvestigator.com/2014/01/06/verbal-contract/.

[54]Schlesinger v. Herzog, 672 So. 2d 701 (La. Ct. App. 4th Cir. 1996), writ denied, 679 So. 2d 1381 (La. 1996).

Lassen."[55] Herzog and his law firm apparently were engaged for the joint representation of Schlesinger and Lassen, and Lassen later characterized Herzog's role as

> . . . just a "scrivener," in effect a scribe employed for the sole purpose of setting down in writing the terms of the transaction agreed upon by [Schlesinger] and Lassen, with the expectation by all parties that he would transcribe whatever terms and conditions were agreed to by the parties and that no party expected Herzog to warn of legal pitfalls.[56]

Alas, such pitfalls were soon to emerge. According to Schlesinger, Herzog assured him that if the Asset Deal did not close for any reason, the merger of Schlesinger's management company with Lassen's company would be unwound and the parties would be put back where they had started.[57] However, that putative agreement was apparently not reduced to writing, and when the Asset Deal "fell apart . . . Lassen refused to unwind the [management company] merger."[58] There was, in any event, no dispute that the "unwind agreement" asserted by Schlesinger was not reflected in any written document signed by the parties or prepared in connection with the merger transaction.[59]

Schesinger sued Herzog and his firm for malpractice in state court, alleging that Herzog had breached his duties to Schlesinger by

> . . . failing to recommend to Schlesinger that he reduce the agreement to unwind the merger to writing so that it would be enforceable, by generally advancing Lassen's interest in pref-

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[55] *Id.* at 705.

[56] *Id.* at 707.

[57] *Id.* at 705. In related securities fraud litigation in federal court, "testimony was introduced that Herzog had told others that the merger would be reversed if the [Asset Deal were] not completed. Herzog [did] not deny that he suggested that as a possibility but was steadfast in his testimony that such an agreement . . . was never prerequisite to the merger." Schlesinger v. Herzog, 2 F.3d 135, 140, Fed. Sec. L. Rep. (CCH) P 97756, 26 Fed. R. Serv. 3d 1393 (5th Cir. 1993).

[58] 672 So.2d at 705. In the federal litigation, the Fifth Circuit clarified something that was not apparent in the state-court opinion, which was that Schlesinger himself had called off the Asset Deal, apparently because it would have required funding from him and his family that they lacked the resources to provide. 2 F.3d at 138.

[59] *See* Schlesinger v. Herzog, No. 90-4051, 1991 WL 19531, at *3 (E.D. La. 1992).

> erence to [Schlesinger's]; and by failing to disclose to Schlesinger the true nature of the risks he ran in acquiescing in the dual representation.[60]

At trial, the jury awarded Schlesinger a $5.5 million judgment against Herzog and his firm, and they (and their malpractice carrier) appealed.[61] The Louisiana Court of Appeals upheld the judgment.

In so doing, the court pithily outlined the fine line between conflicts that may be cured by disclosure and informed consent and conflicts that may not:

> The mere disclosure of the existence of a conflict does not relieve an attorney of the duty to warn his client of dangers he may see in his client's path, especially when he should have known his client would expect him to do so. Schlesinger's acceptance of the existence of Herzog's conflict of interest was based on a combination of Schlesinger's faith in and reliance upon Herzog arising out of a relationship of many years along with Schlesinger's failure to appreciate the legal consequences of his acts, consequences to which Herzog had a duty to alert him . . . .
>
> A disclosure of a conflict is not the same as a license to intentionally advance the interests of one party to the known detriment of another. It is customary to expect one's counsel to aggressively assert one's rights in preference to those of another party. However, where an attorney discloses a conflict he does so to let his client know that this may not be a realistic expectation under the circumstances because the attorney may lose his objectivity without intending to do so and without even realizing it. It is a fact of human nature that reminds us of the biblical admonition that man cannot serve two masters. Therefore, a disclosure of a conflict is a warning that the attorney may not pursue his client's interests with the singleness of purpose normally expected. It does not serve as adequate notice to the client that the attorney will actively pursue the ruin of one client for the benefit of another. A waiver by the client of objection to a conflict is not a waiver of that client's right to complain about the intentional infliction of harm by the attorney or the "obvious negligence" of the attorney to prevent such harm. Herzog never disclosed to

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[60] 672 So. 2d at 705.

[61] *Id.*

> Schlesinger that he intended to work against him or would fail to warn him of obvious legal danger.[62]

Of course, the problem with this distinction is that which side of the line the lawyer's activities fell on will be determined in hindsight, after something has happened with which at least one client is unhappy. Herzog's actions in the course of the joint representation would not have changed simply because the parties completed the Asset Deal (assuming for the sake of the argument that Schlesinger had the ability to hold up his end of it) or if Lassen had agreed to give Schlesinger back his company; the only change would be that Schlesinger would not have had occasion to be upset and start casting about for a scapegoat. It is a temptation to for parties who know and trust a lawyer to feel comfortable with that lawyer's acting as a scrivener, as counsel to the deal, and it is a temptation for the lawyer to want to accommodate such parties. However, it is absolutely critical for the lawyer to think through what can go wrong and who will incur damage if it will; if that damage can possibly be laid at the feet of the lawyer, the path from "not having the singleness of purpose normally expected" to "actively pursuing the ruin of one client for the benefit of another" may be a good bit shorter than one might think.

C. *Metcap Securities, LLC v. Pearl Senior Care, Inc.*: It Was All Going So Well Up Until Now . . .

Metcap Securities, LLC v. Pearl Senior Care, Inc ("MetCap I"),[63] one of a number of reported decisions arising out of the 2006 acquisition of the Beverly Enterprises nursing home chain,[64] provides a careful discussion regarding the role and power of a "deal counsel" and the potential liability associated therewith.

North American Senior Care, Inc. (NASC) was a special purpose entity formed solely to pursue a merger in which it

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[62] *Id.* at 709.

[63] MetCap Securities LLC v. Pearl Senior Care, Inc., 2007 WL 1498989 (Del. Ch. 2007).

[64] *See also* Metcap Securities LLC v. Pearl Senior Care, Inc., 2009 WL 513756 (Del. Ch. 2009) ("*MetCap II*"), judgment aff'd, 977 A.2d 899 (Del. 2009), and Grunstein v. Silva, 2014 WL 4473641 (Del. Ch. 2014).

would acquire Beverly Enterprises. Along with two affiliated entities (together with NASC, the "NASC Group"), NASC entered into a merger agreement with Beverly in August 2005. Prior to doing so, NASC engaged MetCap Securities, LLC to serve as its "financial and business advisor" for the deal pursuant to an agreement that provided for an "investment advisory fee" to be paid to MetCap upon the closing of the transaction; section 5.10 of the original merger agreement specifically noted that Metcap would be owed a fee, to be paid by NASC at closing.[65] The principals of the NASC Group included Leonard Grunstein, a lawyer with the Troutman Sanders law firm, who had been involved as a principal in two prior acquisitions of nursing home chains and who was also a principal of Metcap.[66]

The deal became complicated, largely because NASC was a shell with no money and was dependent upon finding equity to fund the transaction. Ultimately, the NASC Group entities reached an agreement with another set of affiliated companies, the "Pearl Group," to transfer the NASC Group's obligation to purchase Beverly to the Pearl Group, and in November 2005, the various parties set about negotiating a Third Amendment to the merger agreement to, among other things, substitute the Pearl Group for the NASC Group as the acquiror.[67]

Troutman Sanders represented the NASC Group in the negotiations, and Joseph Heil of Dechert, LLP represented the Pearl Group.[68] On November 18, 2005, while negotiations over the Third Amendment continued, Grunstein and Mark Goldsmith, another Troutman Sanders partner who was a principal of some of the NASC Group entities, exe-

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[65]2007 WL 1498989 at *1–*2.

[66]*See Grunstein*, 2014 WL 4473641 at *3–*7; *MetCap II*, 2009 WL 513756 at *1. One or more other Troutman Sanders attorneys was apparently also involved as a principal of one or more of the NASC Group entities. *See Grunstein*, 2014 WL 4473641 at *6 and n.51.

[67]*See Metcap I*, 2007 WL 1498989 at *2.

[68]*Id.* There is some suggestion in the record that Troutman Sanders would assume the representation of the Pearl Group in closing the deal with Beverly, although that is not entirely clear; in any event, it appears that Troutman Sanders would receive at least some portion of its fees from the Pearl Group when the Beverly deal closed. *See* note 75 and accompanying text below.

cuted signature pages to be attached to the final version of the Third Amendment and had them delivered to be held in escrow by another Troutman Sanders lawyers.[69]

On November 20, 2005, the negotiations continued fast and furious, and the parties circulated multiple drafts of the Third Amendment throughout the day, none of which changed the provisions of section 5.10 providing for the payment of Metcap's fee by the purchaser in the Beverly transaction (the purchaser would, of course, become the Pearl Group if the Third Amendment were signed). By 7:00 that evening, Beverly's Board of Directors approved the then-current draft, and "[a]round 10:00 p.m., Grunstein and Goldsmith, apparently believing that no further changes would be forthcoming, went home."

However, W. Brinkley Dickerson, another Troutman Sanders partner, and Heil continued negotiating, and another draft of the Third Amendment was produced in the wee hours of the morning. That draft deleted the language from section 5.10 that related to payment of the MetCap fee; Dickerson had apparently removed the language at the request of Heil but had not consulted with Grunstein or Goldsmith before doing so (or, apparently, pointed it out when the revised Third Amendment was circulated to Grunstein and others, not including Goldsmith).[70] The ultimate discovery of this change was a rude awakening to both NASC and MetCap, both of which had assumed that the Pearl Group would succeed to NASC's obligations to MetCap; however, that discovery did not occur until some months after the parties released the escrowed signature pages and exchanged the signed Third Amendment (without the language providing for payment of MetCap's fee) at 4:00 a.m. on November 25. At that point, the only written obligation for anyone to pay that fee was the advisory agreement between MetCap and NASC, an entity with no assets.[71]

MetCap and NASC sued the Pearl Group on various theories of fraud and unjust enrichment, claiming that Dickerson had not been authorized to agree to the change requested by Heil and that the Pearl Group, as the purchaser in the

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[69] *Id.*

[70] *Id.* at *3.

[71] *Id.* at *3–*4.

Beverly transaction, should be obligated to pay the MetCap fee.[72] In the complaint, NASC described Mr. Dickerson as " 'deal counsel' to all the buyers in the transaction, collectively 'coordinating and representing everyone on the buyer's side,' but that he lacked the authority to bind [the NASC Group entities] individually."[73]

In addressing that contention, the court noted that the role of "deal counsel" lacked clear definition:

> The definitional contours of "deal counsel," a term without well-defined, independent significance, present a recurring conundrum. Indeed, it is not clear from the Complaint whether NASC seeks to describe a role for Dickerson that differs from Troutman Sanders generally. Whether an attorney representing others as "deal counsel" has exceeded the scope of his or her authority would, of course, depend upon the conduct and understanding of the parties whom he or she was representing. It would also be a question for this Court, one that could only be considered in light of, among other things, the nature of the parties' relationship and the existence of any limitation on that relationship.
>
> It is not surprising that, in the context of negotiating complex transactional documents, parties (and their attorneys) routinely accept that those attorneys representing counterparties to a contract are acting with the requisite authority to bind their principals. Although a motion to dismiss provides the Court with a poor forum for considering the issue of apparent authority, especially because all reasonable inferences must be drawn in favor of the nonmoving party, the Court would eventually be guided by the general maxim within our law that "[i]f a third party relies on the agent's apparent authority in good faith and is justified in doing so by the surrounding circumstances, the principal is bound to the same extent as if actual authority had existed." [Citation omitted.] For the moment, however, it is notable that MetCap and NASC have offered no allegation in their Complaint that Heil, as counsel to Pearl and its related entities during the negotiations, was aware of any limitation on Dickerson's authority whether as "deal counsel" or as a partner in Troutman Sanders for purposes of the Beverly transaction.[74]

The court rejected the suggestion that the enforceable "real agreement" among the parties had been reached when

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[72] *Id.* at *4.

[73] *Id.* at *3.

[74] *Id.* at *9, n. 71.

Grunstein and Goldsmith left because the parties, through their counsel, "were still in the fluid process of negotiating, drafting, and arriving at a common agreement."[75] Further, the court went on to explain that Dickerson's knowledge, as an agent of the NASC Group, that section 5.10 had been changed would be imputed to the entire NASC Group unless the NASC Group members' interests were divided or Dickerson's own interests were adverse to the NASC Group. Noting that the complaint "carefully and somewhat flimsily—but sufficiently—" alleged facts that might be construed to assert that Dickerson did have such adverse, or at least conflicting, interests, the court found that NASC's complaint survived, "perhaps only marginally," the Pearl Group's motion to dismiss.[76]

In a subsequent proceeding, the court granted summary judgment for the defendants, finding that, as a matter of law, Dickerson had the authority to act as an agent for the NASC Group and that the only interest asserted by NASC as being adverse was Dickerson's (and his firm's) desire to get paid the legal fees due on closing of the transaction (which, by agreement, would have been paid by the Pearl Group if the deal closed).[77] Thus, MetCap went unpaid, having only the shell entity NASC to pursue for its fee, and, it may be assumed, conversations around the water cooler at Troutman Sanders took on a certain chill. Yet there was at least some benefit from this series of unfortunate events: a court had competently and eloquently articulated a standard to be applied to "deal counsel," coupling that with a tangible illustration of how a "deal counsel" arrangement could lead to unexpected and unhappy results.

IV. Why Being "Deal Counsel" Is a Bad Deal (And How to Mitigate the Risks if the Bad Deal Cannot Be Avoided)

So, can or should a lawyer agree to represent both sides in a joint venture or other business transaction and simply "document the deal"? At a minimum, such an arrangement

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[75] *Id.* at *9.

[76] *Id.* at *10.

[77] *See MetCap II*, 2009 WL 513756 at *4–*5.

would require fully informed consent by both sides.[78] However, as a practical matter, the reality is that, in the vast majority of cases, the arrangement simply does not work. If the result of such joint representation does not lead to unhappiness for at least one of the clients and recriminations against the lawyer, that is good fortune; it is not because the strategy was a good idea. Even where the parties have agreed to a detailed term sheet or letter of intent, they are unlikely to have considered all of the complexities that arise in connection with, for example, the determination of what happens if one joint partner wishes to get extricated from the deal under circumstances disadvantageous to the other or what happens if there is a management deadlock ("Oh, we'll work everything out like reasonable folks. There's no need to put a lot of complicated dispute resolution stuff in there . . ."). Lawyers, on the other hand, are paid to identify and address such issues, and it is rare that the means of addressing them do not involve factors that favor the interests of one party over the other. If the lawyer makes a drafting decision that favors one client without advising the other client of the risks to it that are implicit in that decision, the lawyer has breached his or her duty of loyalty. It is almost impossible to avoid these types of conflicts in a dual representation situation; there are simply too many ways for them to arise.[79]

If the lawyer cannot, for whatever reason, avoid taking on dual representation in the first place, it is absolutely critical that the lawyer take the following steps:

- At the very outset of the engagement, take the time to consider and identify all major areas where potential conflicts are likely to arise and where the lawyer's representation of both clients may inhibit his or her ability to advance the interests of either client over the other

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[78]"'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Model Rules R. 1.0(e).

[79]*Cf.* the immortal words of former client Teddy Lewis (Mickey Rourke) to attorney Ned Racine (William Hurt) in BODY HEAT (The Ladd Company 1981): "Any time you try a decent crime, you got fifty ways you're gonna [foul] up. If you think of twenty-five of them, then you're a genius . . . and you ain't no genius."

in the same way he or she could if that client were the only client.

- Review those areas carefully with each client and explain the nature of any potential limitations on the scope of the lawyer's representation.
- Document that review carefully, and reflect it in the engagement letters with each client.
- Make clear in the engagement letters that communications between each client and the lawyer will not be confidential with regard to the other client—i.e., that the lawyer will share all material information provided by either client with the other.
- Advise the clients of their right to have separate, independent counsel review the engagement letter and document their decision in that regard.
- Throughout the engagement, be vigilant for changing circumstances that make it impossible for the lawyer ethically to continue the joint representation (because a nonconsentable conflict has developed) and be prepared to act if those circumstances materialize.

Beyond that, transaction counsel must also be sensitive to the situation where he or she has not formally agreed to a joint representation arrangement but where it becomes apparent that there is a risk that a party (other than the lawyer's actual, formally engaged client) may be implicitly assuming that the transaction counsel has some duty or responsibility to advise that party or protect that party's interest. If there is any question as to whom the lawyer is representing—for example, if the party who is not the lawyer's client does not identify a lawyer or indicates that "we don't need a lawyer for this"—the lawyer should make it clear, politely but in a manner that leaves no doubt, that he or she represents only the "true" client and that the lawyer cannot render legal advice to the other party. This is particularly true where the other party to the transaction or arrangement is an individual constituent of the true client or an entity affiliated the true client but that has interests that may diverge from those of the true client.[80]

In the end, though, the bottom line is this: Although in

[80]It is also useful, if self-serving, to include language in relevant transaction documents in which all parties acknowledge that counsel who

theory the use of a single attorney to memorialize a transaction may be intended to simplify what appears to be a straightforward matter, intervening events and other unanticipated circumstances can cloud what initially appeared to be a clear agreement among the parties. This can lead to significant challenges for the attorney involved, including potential exposure under both professional liability rules and under other laws relating to fraud, malpractice, etc. To the extent that acting as "counsel to the deal" is not prohibited outright by applicable ethical rules, attorneys considering doing so need to appreciate that the role can be a veritable minefield and that the perceived benefit may not be worth the risk—at least to the attorney, and in the end, probably not to the client(s) as well.

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is controlling the documents represents only whichever client he or she represents, that the other parties have been advised to consult with other counsel to the extent they deem necessary, and that the other parties acknowledge that "deal counsel" does not represent them. Self-serving statements may be of varying utility, but they are called "self-serving" for a reason and should not be lightly discarded.