Pluralizing the Client-Lawyer Relationship

John Leubsdorf
The lawyer-client relationship traditionally has been conceived as one between individuals. Indeed, this conception is built into the very words we use to describe the relationship. Scholarship, professional rules, and judicial opinions speak of "a lawyer" and "a client."¹

In reality, legal services today are usually rendered by groups of people for other groups of people, or perhaps by organizations for other organizations. Lawyers increasingly practice in firms, legal service or government offices, and other groupings.² Clients are typically businesses, government agencies, or other organizations.

This Article is a preliminary attempt to explore the implications of these realities for the law governing client-lawyer relationships. In particular, I suggest some alternative conceptions of these relationships. Though scholars have considered some of the problems discussed, the subject as a whole is novel: how to apply a body of law, presupposing relationships between individual clients and lawyers, when the group nature of clients or lawyers is important. Investigating this subject shows how enigmatic and contested the familiar terms "client" and "lawyer" really are.

The theories discussed here have practical consequences. Indeed, this exploration grows out of my experience as one of the reporters for the proposed Restatement of the Law Governing Lawyers,³ an experience that forces one to consider the application of legal rules to a variety of circumstances. I realize, of course, that no single con-

---

¹ E.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1989) [hereinafter MODEL RULES]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (1980) [hereinafter MODEL CODE] (referring to "a lawyer" and "his client").


ceptual scheme adequately encompasses the range of modern lawyer-client relationships, and even an adequate scheme will not ineluctably determine particular rules to regulate lawyers. Too many problems exist for any one definition to handle. Nevertheless, the ways in which we conceptualize relationships between lawyers and clients inevitably influence our choice of rules.

This is particularly true when words we use, like "lawyer" and "client," come freighted with normative implications about how lawyers should feel and behave. These words are the basic terms of the law of lawyers, terms that rulemakers and critics take for granted. Surely scholars in this field have a duty to display and challenge these presuppositions but as yet they have not fulfilled this obligation. In part, this reflects the failure of most legal scholars, until recently, to find professional responsibility worthy of intellectual interest. More, however, is at stake. Referring to large organizations as "the client" and "the lawyer" enables the speaker to cast over them the aura of personal rights and personal service that traditionally accompanies the troubled client seeking help from a trusted lawyer.4

I

CLIENT GROUPS

An example may illustrate some of the difficulties associated with applying to groups rules conceived in terms of individual clients:

An environmental class action is brought on behalf of the members of a chapter of the Sierra Club. The chapter is an unincorporated association. The named plaintiffs are five of the fifteen members of the chapter’s executive committee. The other members have either declined to participate or are unable because they lack standing. Who is the client or clients who instructs the lawyer in the litigation?5 Who is the client or clients whose confidential statements to the lawyer will be protected by the attorney-client


5 See, e.g., County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1325 (2d Cir. 1990) (court may approve settlement that most named plaintiffs oppose); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1176-78 (5th Cir. 1978) (named class representatives normally make decisions, but lawyer must point out conflicts of interest within the class to the court), cert. denied, 439 U.S. 1115 (1979).
privilege? Who is the client or clients who may not be inter-
viewed by the defendant's lawyer unless the class lawyer con-
sents? If the national Sierra Club offers to pay for the suit on the
condition that it be conducted consistent with Club environmental
policies, may the class lawyer agree without violating the profes-

Many commentators have written on the problems of represent-
ing groups, such as corporations, unions, governments, or classes in
class actions. The discussions usually focus on one of the questions
raised above. Who can speak for the group? The usual response is
to treat the group as an entity, thus restoring the traditional single
client theory. Who speaks for the entity is determined by whatever
law governs its internal structure—for example, corporate or gov-

tment law.

This approach fails, however, when the client group has no
decisionmaking arrangements. In class actions, when the class is
not the membership of an organized association and the named
plaintiffs disagree, lawyers are thrown into a situation where con-

6 Compare Penk v. Oregon State Bd. of Higher Educ., 99 F.R.D. 511, 516-17 (D. Or. 1983) (no privilege for communications by class members who are not named plaint-

allowed to send members of plaintiff class a settlement offer approved by court) with
Model Rules Rule 4.2 (lawyer may not communicate with represented party without
consent of that party's lawyer or legal authorization).

8 Compare Model Rules Rule 1.8(f) (stating the rule) with Restatement of the
Law Governing Lawyers § 215(2) (Tentative Draft No. 4, 1991) (allowing payor influ-
ence "only if the influence is reasonable in scope and character and the client expressly
consents" in advance).

9 For a few examples, see supra note 10.

10 See, e.g., Model Rules Rule 1.13(a); Federal Bar Ass'n, Ethical Considera-
tions for Federal Lawyers, F.E.C.-5-1 (1973); Charles W. Wolfram, Modern Legal
Pope, Two Faces, Two Ethics: Labor Union Lawyers and the Emerging Doctrine of Entity Ethics,
68 Or. L. Rev. 1 (1989) (concluding that labor union lawyers must on occasion protect
union members from their leaders).

11 Bash v. Firstmark Standard Life Ins. Co., 861 F.2d 159 (7th Cir. 1988); In re
Agent Orange Prod. Liab. Litig., 800 F.2d 14 (2d Cir. 1986). See Stephen Ellmann, Cli-
et-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest
Similar problems arise even with corporations, when the officers and directors, who normally speak for the corporation, arguably violate their fiduciary duties. And what if the shareholders vote on an issue, should they be considered "the client" so that the lawyer would bring problems to their attention? In at least one common, yet undiscussed situation, when a lawyer represents a subsidiary corporation, the single client concept breaks down. This situation may require a different analysis for different purposes. For example, one might treat the parent corporation as a client for most conflict of interest purposes, such as when a subsidiary's lawyer wishes to concurrently represent a former employee of the parent in a suit against the parent, and nevertheless allow the lawyer to represent the subsidiary in dealings with the parent.

In practice—and with support from authority—lawyers generally treat the board and officers as the proper representative for the corporation. Consistency with the single client concept and the associated convenience of not having to deal with disagreeing clients are two reasons for this practice. This approach also reinforces the power of the individuals who hire the lawyers—the officers and the board.

The entity-as-client theory, even if acceptable in some areas, yields unsatisfactory results in others. It fails to account adequately for the law dealing with communications by and to clients. If a lawyer represents the corporate entity, it follows that the attorney-client privilege should protect any communication to the lawyer from any corporate employee about matters within the scope of her duties, provided that the communication was confidential and made in an effort to secure legal assistance for the corporation. The law, however, has not yet reached this conclusion, although it appears to be moving towards it. Neither has it extended the privilege to all statements made by union members, class members, and others to a lawyer representing their entities.

12 Model Rules Rule 1.13(b); see Lane v. Chowning, 610 F.2d 1385 (8th Cir. 1979) (attorney's representation of the bank did not create duty to director of a bank acting in his personal capacity).
14 One exception may be the doctrine of Garner v. Wolfinbarger, 430 F.2d 1093, 1103-1104 (5th Cir. 1970), under which a court may give stockholders bringing a derivative suit access to communications otherwise shielded by the corporation's attorney-client privilege.
16 See supra note 6. The professional requirement that a lawyer keep information received in the course of a representation confidential does not pose the problem dis-
The rule forbidding a lawyer to communicate directly with the client of another lawyer, if construed correctly, is likewise inconsistent with the entity-as-client theory. This rule should not prohibit communications with all corporate employees, union members, or government employees. Here, as with the privilege, policies of making evidence accessible to those litigating against the organization make it undesirable to characterize the organization in its entirety as the client. The absence of such a neat characterization, however, has generated considerable controversy about who should be designated the client. Corporate clients and their lawyers have sought to "lock up" present and former employees, by preventing opposing counsel from interviewing them or gaining access to their communications to corporate counsel. Opposing lawyers in search of evidence have resisted.

Both the traditional single client concept and the entity-as-client theory used to support it fail when we deal with what might be called binary system clients—pairs of individuals or groups, each of which has characteristics of a client, but one of which is more important than the other. One example is the relationship of an insured and her insurer, when the insurer selects and pays for the lawyer to defend the insured and assumes liability for some or all of an adverse judgment. Another is a public interest plaintiff or group of plaintiffs and the organization that sponsors the litigation.

Under current approaches, one can classify these agreements in three ways. First, one can consider the insured or the public interest plaintiff to be a client, and the insurer or sponsor to be a non-client. Some courts and commentators currently use this analysis.
Existing law allows a nonclient to pay for litigation, but only if the nonclient does not interfere with the lawyer's professional judgment. Yet these payors have legitimate interests, such as the insurer's interest in avoiding excessive costs of discovery and pursuing a settlement for less than the policy limits. Similarly, the sponsor's interest is in sponsoring only litigation that promotes its view of the public interest. These interests warrant giving them at least some voice in what the lawyer does. Second, one could consider the insurer and sponsor to be co-clients. That, however, would permit these parties to exercise too much control over litigation in which only the named party will be bound by the judgment. Lawyers already have substantial incentives to protect the interests of those who pay them. If the payors also have the rights and powers of clients, lawyers may be involved in the exploitation of insured and public interest plaintiffs they claim to represent. Third, one could view these problems as insurmountable conflicts of interest which a lawyer must avoid, but this would only frustrate what are on the whole useful social arrangements.

The solution, I think, is to depart from our usual division of the nonlawyer world into two simple groupings: clients to whom almost everything is due and nonclients to whom almost nothing is due. Instead, insurers and sponsors should be regarded as members of an intermediate grouping. For example, these parties should be entitled to impose reasonable limits on the expense of the litigation, and to have their views seriously considered in settlement and strategy decisions. Initially, the extent of their prerogatives could be left to contracts between these parties and the main clients. However, limits should be imposed on the extent to which such a client may contract away control over litigation determining his or her rights, and to which a lawyer may take orders from one person in the representation of another. Modifying the traditional classificatory apparatus of clients and nonclient sponsors would thus bring into the open struggles over the control of public interest litigation that already trouble thoughtful lawyers.

---

22 Model Rules Rule 1.8(f); Model Code DR 5-107(B).
24 See supra note 8.
Insurance and public interest litigation are not the only examples of binary system clients. Another is provided by the lawyer for a trustee or executor. Even when the lawyer makes clear to the trust or estate beneficiaries that she does not represent them, these beneficiaries sometimes can get access to confidential information or recover from the lawyer damages caused by trustee or executor misconduct. The beneficiaries are not full-fledged clients, but they are more than ordinary nonclients. This may also be true of some other third parties that have been permitted to bring malpractice suits because they sought and relied on misrepresentations or erroneous assertions.

II

LAWYER GROUPS: FIRMS

In the traditional lawyer-client relationship, one lawyer represents one client. A great deal of law, theory, and professional self-respect is tied to the idea of the lawyer as an individual in whom a client confides, and who owes obligations to that client and the legal system. The recent growth of megafirms has not destroyed this notion. The Supreme Court, for example, recently held that litigation sanctions under Federal Rule of Civil Procedure 11 can only be imposed on lawyers whose names appear on an offending pleading, not on their firm. Rulemakers have likewise, for the most part, written in terms of the lawyer rather than the firm, though firms do influence rules dealing with fee-splitting, the “superior orders” defence for lawyers who follow certain instructions of their supervising attorneys, and vicarious disqualification for conflicts of interest. The nonlawyers working at a firm, moreover, remain almost

---


29 Model Rules Rule 1.5(e); Model Code DR 2-107(A).

30 Model Rules Rule 5.2.

31 Model Rules Rule 1.10, 1.11; Model Code DR 5-105(D).
totally invisible to a body of law based on the concept of the lawyer.\footnote{32 But see Model Rules Rule 5.3 (lawyer responsibilities for nonlawyer assistants); D.C. Rules of Professional Conduct Rule 5.4 (1991) (allowing nonlawyer partners); Restatement of the Law Governing Lawyers § 203 cmt. f (Tentative Draft No. 4, 1991) (nonimputation of conflicts involving nonlawyers to their firms); id. § 120 cmt. g (Tentative Draft No. 2, 1989) (disclosure of privileged communications to nonlawyer employees).}

Again, an example illustrates the kinds of questions that may arise when lawyers practice in firms:

Associate leaves a law firm where he has practiced for a year. While Associate was at the firm, Client—who had been brought to the firm by Partner, and consulted her about important matters—brought a minor matter to Associate, who has been handling it by himself. Is Associate Client’s lawyer for this matter, so that he continues to represent Client until he withdraws or is discharged?\footnote{33 While the specific question of the responsibilities of an associate has not been litigated, courts have repeatedly disciplined or held liable firms and solo practitioners who improperly cease representation. See, e.g., People v. Archuleta, 638 P.2d 255 (Colo. 1981) (discipline for leaving practice without arranging for substitute counsel); Central Cab Co. v. Clarke, 270 A.2d 662 (Md. 1970) (malpractice liability for not notifying client of withdrawal).} Is Partner (or the firm) Client’s lawyer, so that she (or it) is liable for malpractice if she ‘does not assign a new lawyer to the matter formerly handled by Associate?’\footnote{34 See Palomba v. Barish, 626 F. Supp. 722 (E.D. Pa. 1985) (former partner liable for malpractice of other former partners committed after partnership dissolved when client did not know of dissolution); Earl W. Wood, Fee Contracts of Lawyers 178-81, 220-21 (1936) (“Ordinarily, when one member of a firm is employed, the firm is employed, and the employer is entitled to the services of all members of the firm.”).} Is Associate Client’s lawyer, so that he may bring new matters to Client’s attention without violating rules against solicitation?\footnote{35 Compare ABA Comm. on Professional Ethics and Grievances, Informal Op. 1457 (1980) (allowing lawyer to notify clients on whose cases lawyer was working before departure) with Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 393 A.2d 1175 (Pa. 1978) (enjoining such communications), cert. denied, 442 U.S. 907 (1979); see generally Robert W. Hillman, Law Firm Breakups: The Law and Ethics of Grabbing and Leaving (1990).} May or must Associate, while at the firm, pass on to Partner (on the theory that Partner is also Client’s lawyer) confidential information of Client that another client of Partner might be able to use against Client?\footnote{36 See Restatement of the Law Governing Lawyers § 113(1)(a), id. cmt. d (Tentative Draft No. 3, 1990).} Would the answers to any of these questions be different had Associate been a one-month temporary employee?\footnote{37 See ABA Comm. on Professional Ethics and Grievances, Formal Op. 88-356 (1988) (imputed disqualification not always appropriate when lawyer works temporarily for several firms).}

Law firms can fit into rules governing client-lawyer relationships—for example, the rules in the above problem—in at least...
three ways: a multiple lawyer theory, a firm theory, and a graduated theory. Under a multiple lawyer theory, each lawyer in the firm becomes the lawyer of all of the firm's clients, at least unless a more limited representation is negotiated. This explains the imposition of certain professional duties on all of the firm's lawyers, but may lead to excessive duties, for example, in the case of lawyers who later leave the firm. Surely these lawyers do not owe continuing duties to every firm client.

Under a firm theory, the firm itself becomes the client's lawyer, with duties being imposed on partners, associates, and nonlawyer employees, simply because they are agents of the firm. For many firms, this theory corresponds to economic and social realities, but the theory fails to explain why former firm lawyers have any duties to a firm client.

Under a graduated theory, different lawyers in the firm (or formerly with the firm) may have different duties, depending on factors such as the degree of the lawyers' involvement with the client's representation and the nature of the duty in question. This theory is capable of both flexibility and vagueness.

In the conflicts of interest area, the American Bar Association (ABA) appeared to adopt the multiple lawyer theory when it amended its Model Code of Professional Responsibility in 1974 to provide that when a lawyer is obliged by the Code to decline or terminate a representation, no other lawyer in the first lawyer's firm may accept or continue employment. This rule follows plausibly from the belief that all lawyers in the firm represent the client whenever one does. Thus, the only way a tainted lawyer can be removed from the case is for all the lawyers to withdraw. Of course, there are more practical and policy-oriented approaches to the problem. The ABA's choice of an across-the-board prohibitive rule, with its obvi-

---

38 See SCA Serv. v. Morgan, 557 F.2d 110 (7th Cir. 1977) (appearance of law firm is appearance of every lawyer in the firm within meaning of judge disqualification statute); Harman v. La Cross Tribune, 344 N.W.2d 536 (Wis. Ct. App.) (all firm lawyers have duty of loyalty to all clients), cert. denied, 469 U.S. 803 (1984); MODEL CODE DR 5-105(D) (partners and associates of disqualified lawyers also disqualified).


40 See Saltzberg v. Fishman, 462 N.E.2d 901, 907 (Ill. App. Ct. 1984) (even clients who come directly to an associate are clients of the firm); UNIFORM RULES FOR THE N.Y. STATE TRIAL COURTS § 130-1.1(b) (frivolous conduct sanctions against appearing firm); Wood, supra note 34, at 178-81.

41 See Model Rules Rule 1.11(a)(1) (disqualification of former government lawyer does not disqualify lawyer's screened partners and associates); Silver Chrysler Plymouth v. Chrysler Motors, 518 F.2d 751 (2d Cir. 1975) (former associate who worked peripherally on Chrysler matters may after leaving firm represent parties suing Chrysler).

42 MODEL CODE DR 5-105(D).
ous difficulties and economic disadvantages for large firms, suggests
the presence of conceptual rather than practical thinking.

The across-the-board rule, however, has not survived. Today,
for example, courts and rulemakers permit a firm to accept a case
even when one of its partners is barred because of past involvement
as a government official, provided that the partner is screened from
participating in or gaining profit from the case, and the government
is given notice. 43 Some courts have approved a similar "Chinese
wall" approach when a firm lawyer could not accept a case because
of past employment with another firm. 44 And surely a firm may ac-
cept a case even when one of its associates would be barred from the
representation due to conflicting personal political commitments or
poor health. 45

The entity theory may provide an adequate basis for this evolv-
ing disqualification law. One lawyer's taint may create adequate
grounds for preventing the entire firm from participating—for ex-
ample, because confidential information obtained during a previous
representation could reach other firm lawyers, who could use it
against the former client. On the other hand, taint based on one
lawyer's lack of competence or commitment normally leaves the firm
as a whole with adequate resources to take a case. In intermediate
cases, Chinese walls may provide grounds for concluding that the
firm as a whole is uncontaminated.

This conception of the problem does not answer the question
of when to bar all the firm's lawyers from participating in a matter.
Yet it does make it possible to pose the question in a way which
recognizes that one lawyer's conflict of interest or other disability
may or may not warrant excluding all the firm's lawyers.

An entity approach can likewise lead to sensible results when a
lawyer leaves a firm—and lawyers, at least in large firms, have re-
cently become more mobile. 46 Professional rules require a lawyer
who withdraws from a case to notify the client, obtain the client's
approval or have good cause for withdrawal, and to take steps to

43 E.g., Model Rules Rule 1.11; Armstrong v. McAlpin, 625 F.2d 433 (2d Cir.
1980), vacated for lack of jurisdiction, 449 U.S. 1106 (1981); see also Model Rules Rule 1.10
(stating general rule of imputed disqualification, which does not allow firms to continue
with the tainted lawyer screened from the case).

44 E.g., Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222 (6th Cir.
1988). Screening in such situations, however, is controversial. See, e.g., Thomas Morgan,
Screening the Disqualified Lawyer: The Wrong Solution to the Wrong Problem, 10 U. Ark.

45 Restatement of the Law Governing Lawyers § 203, id. cmt. a (Tentative Draft
No. 4, 1991).

protect the client's interests. These rules appear to apply to all lawyers working on the case, and arguably, under the multiple lawyer theory, to all lawyers in the firm. Yet few lawyers would believe that an associate could be disciplined for leaving a firm without notifying every client with a pending matter on which the associate had worked. Nor would most lawyers believe that if no explicit withdrawal occurred, the departing lawyer would be liable in malpractice for later defaults of the firm's lawyers.

A more realistic view would recognize that clients often look to the firm for representation, so that an individual lawyer is free to leave the firm and its cases without formality (at least when the lawyer was not in charge of a case and the firm had enough lawyers available to provide a replacement). Regarding clients as clients of the firm also explains, though it does not justify, the reluctance of courts and ethics committees to let departing associates urge firm clients to accept representation by those associates. One need not fit all firms into the rules in the same way. The clients of a large firm usually look to the firm for representation; this, however, may not be true of a smaller firm that consists of several individual practices.

Neither the multiple lawyer nor the entity theory may properly treat another area—client confidences. Under the entity theory, a lawyer who leaves a firm arguably has no continuing duty to the firm's client to protect the client's confidences, although she would still owe such a duty to the firm itself. Under both theories, a client's disclosure to one lawyer in the firm could be shared with other attorneys, who may be brought into the case without specific client authorization. In practice, firms operate in this way, but the rules must have exceptions. Disqualified lawyers isolated behind a Chinese wall must be shielded from client confidences and may not participate in the case. When a firm lawyer speaks with a prospective client, he may not disclose the resulting confidences to other firm lawyers until it is clear that no conflicting duties are owed to existing clients, except to the extent that disclosure is necessary to search for

---

47 Model Rules Rule 1.16(d). In some states lack of harm to the client may be considered a ground for withdrawal. Compare id. Rule 1.16(b) (stating that ground) with Model Code DR 1-110 (not stating that ground).


50 E.g., LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 259 (7th Cir. 1983).
such conflicts and, generally, to decide whether the firm should accept the prospective client's case.\(^{51}\)

To deal with these requirements, we may need to use a graduated approach which distinguishes among lawyers within the firm, and also imposes some duties on former firm lawyers. Such an approach is also appropriate for attributing a lawyer's knowledge to a client.\(^{52}\) Treating as client knowledge anything known by any lawyer in a huge firm, even one who has never heard of the client, is both unworkable and unrealistic.\(^{53}\)

A graduated approach would also be desirable for lawyers whose association with a firm is part-time or transient: law teacher consultants, temporary lawyers provided by agencies, and summer associates (although these individuals are not yet lawyers). Such persons must owe some duties to the firm's clients, but treating them as members of the firm or lawyers for all its clients would create massive disqualification and yield other unacceptable results.\(^{54}\) A graduated approach also might be equally appropriate for lawyers who share office space but are not partners, and for lawyers who work in different offices of a legal services organization.\(^{55}\) Two such lawyers, for example, should be able to represent opposing spouses in divorce proceedings when neither attorney has access to the other's files, when the spouses cannot afford paid counsel, and when the case involves no issue in which the legal services organization itself has an interest or commitment.


\(^{52}\) For examples of courts attributing lawyer's knowledge to the client, see Insurance Co. of North Am. v. Northampton Nat'l Bank, 708 F.2d 18 (1st Cir. 1983); Farr v. Newman, 199 N.E.2d 369 (N.Y. 1964).

\(^{53}\) Cf. Stangland v. Brock, 747 P.2d 464, 469-70 (Wash. 1987) (no malpractice liability when one lawyer wrote client's will leaving land to plaintiff, second lawyer in firm sold land for client three years later, and neither lawyer knew of the other's transaction).


III

OVERLAPPING CLIENT AND LAWYER GROUPS: CORPORATE HOUSE COUNSEL AND GOVERNMENT LAWYERS

The previous discussion of what has traditionally been called the lawyer-client relationship noted that the client is not always a client and the lawyer is not always a lawyer. This Part shows that the hyphen is not always a hyphen, because the client group and the lawyer group may overlap. Corporate house counsel are employees as well as lawyers of their corporation; government lawyers are sometimes entitled to make client decisions for their government. This overlap may render problematic rules and analyses presupposing a fundamental distinction between clients and lawyers. For example, suppose the following scenario:

The General Counsel of a corporation, who also serves on its board of directors, after conferring with members of the board, decides that the corporation should bring a lawsuit and instructs outside counsel to initiate it. After the suit fails, the defendants bring a malicious prosecution action against the corporation and General Counsel. Are General Counsel's discussions with other board members protected from discovery by the attorney-client privilege because General Counsel was acting as a lawyer? Do the special rules protecting lawyers from malicious prosecution claims apply to General Counsel, or does the General Counsel count as a client because she decided to bring the suit? If the General Counsel is discharged for refusing to comply with orders by the corporation's president to destroy documents sought in discovery, do the rules authorizing a client to discharge a lawyer at any time, with or without cause, prevent her from suing the corporation for bad faith discharge?

One common way to deal with lawyers who are also employees of their clients is to divide the lawyer-employee conceptually into lawyer and nonlawyer capacities. Thus, if two corporate vice presidents confer, and both are members of the bar but one is the corporation's general counsel, their communications may be considered privileged only if the vice president approached the general counsel in her capacity as a lawyer, seeking legal advice. This approach preserves the traditional analysis, albeit at the cost of fiction. The approach also benefits both lawyer-employees, who preserve at least

57 On lawyer protection, see RESTATEMENT (SECOND) OF TORTS § 674 cmt. d; Debra E. Wax, Annotation, Liability of Attorney Acting for Client, for Malicious Prosecution, 46 A.L.R. 4TH 249 (1986).
58 See infra note 60 and accompanying text.
59 See GEORGIA-PACIFIC, 18 F.R.D. at 465.
some of the dignity and independence of outside counsel, and corporate management, which can extend the umbrella of privilege over many intra-corporate consultations.

Placing a corporation's or government agency's relations with its lawyer-employees into the traditional categories, however, breaks down when such lawyers assert their rights as employees. Some corporations, for example, have successfully relied on doctrines protecting a client's freedom to change counsel by arguing that a discharged lawyer-employee may not sue for bad faith dismissal and may forfeit accrued pension benefits. In the notorious Herbster case, the court held—on public policy grounds, forsooth—that a lawyer allegedly discharged for refusing to destroy documents sought in discovery had no wrongful discharge claim.\(^60\) Allowing such arguments to succeed would change rules meant to protect clients from lawyer domination into rules that further extend the enormous power clients currently exercise over lawyer-employees. The danger is subservience, not defiance. Any sound analysis must recognize that the relationship between employers and lawyer-employees is not a traditional client-lawyer relationship.

Lawyer discharge rules are not the only client-protective rules that lose their justification when a client is also a lawyer's employer. One can scarcely imagine, for example, a claim that the salary of a corporate or governmental lawyer should be refunded as an unreasonable fee,\(^61\) that funds made available for the use of a corporate or governmental counsel's office should be kept in a special trust account because they are funds of a lawyer's client,\(^62\) or that communications from such an office to corporate executives or government officers should be subject to the solicitation and advertising rules.\(^63\)

On the other hand, when corporate and governmental lawyers deal with outsiders, they should find it harder than firm lawyers to disclaim responsibility for their clients' decisions, at least to the extent that they have participated in those decisions. For example, litigation sanctions that might otherwise be reserved for clients should sometimes be imposed on employees who effectively are both lawyers and clients. In this respect, lawyer-employees resemble prosecutors as well as plaintiffs lawyers in class actions and derivative


\(^{61}\) See Model Rules Rule 1.5(a).

\(^{62}\) See Model Rules Rule 1.15(a).

\(^{63}\) See Model Rules Rules 7.1-7.3.
suits, who also commonly exercise some of the prerogatives of clients.  

**Conclusion**

The categories of "client" and "lawyer" are not self-defining but are socially constructed. This construction is often problematic. One can arrange for, pay for, and benefit from a lawyer's services without being a client, as when a corporation hires a lawyer to represent an employee facing criminal charges. One can also have the duties of a lawyer without working for, being paid by, or even knowing of a client, as when a lawyer's partner represents a client without fee.

The difficulties of the traditional terminology are by no means limited to group clients and group lawyers. They extend to situations when a lawyer is retained to render arguably nonlegal services, such as those of a mediator or perhaps a scrivener. They also extend to the temporal dimension. Thus, when a potential client approaches a lawyer who ultimately declines the representation, different standards may be appropriate for deciding when the person's communications are protected by the attorney-client privilege, when a lawyer may not disclose such communications, when the person counts as a former client under the conflicts of interest rules, when the person may bring a malpractice suit against the lawyer for negligent advice, and when court approval is needed for the lawyer's withdrawal.

Even when it seems unwarranted to require a lawyer to provide representation against the lawyer's wishes or to withdraw from representing a third person who has reasonably relied on the lawyer's representation, the lawyer should not be free to give negligent and harmful advice to a prospective client or to use private disclosures for the lawyer's profit. Some authorities handle these issues by finding a client-lawyer relationship exists when that will produce the desirable result; others recognize certain duties as owed to prospective clients. The latter approach is more forth-

---

64 See Model Rules Rule 3.8 (duties of prosecutor); A. F. Conard, Winnowing Derivative Suits through Attorneys Fees, 47 Law & Contemp. Probs. 269 (Winter 1984).

65 See Model Rules Rule 2.2 & cmt. (distinguishing lawyer intermediary between clients from lawyer-mediator); Wolfram, supra note 10, at 251, 325, 372-73 (lawyer-scrivener). See also supra notes 59, 60 (lawyer-corporate employee).


right and permits different results for different issues, but still requires courts to decide whether there are different kinds of prospective clients, and whether a given person was a nonclient, a prospective client, or a client.

Similar temporal problems arise when the issue is whether a client-lawyer relationship has ended. Lawyers must often decide whether the lawyer has continuing relationship with a client, or rather a series of representations each of which has ended. Clearly, when a lawyer has continuously represented a person, but no matters are presently pending, basing the analysis on whether the person is or is not a continuing client is unhelpful. In such a situation, continuing clientship is usually not a relationship ascertainable from the intentions and behavior of the parties, but rather a concept imposed with little evidentiary support by a court or commentator in order to resolve one or another question. Thinking of the person as a client for some purposes but not others may be appropriate. Thus the lawyer might be required to notify the client of communications or even important legal changes affecting client matters, but also be free to regard the client as a former client under the conflict of interest rules.

Ultimately, whether one is a client or a lawyer depends on the expectations not only of the parties, but also of the profession and legal system, as to what duties are owed in what circumstances. Recognizing an individual or some group as a client's lawyer not only imposes the various duties discussed here, but also vests the lawyer or lawyers with extensive powers to bind the client. Legal representation is thus a political relationship, in which society authorizes one person to wield power for and over another, as is the case with political representation or representation in a class action. That relationship may well vary from culture to culture.

At present, the client-lawyer relationship is usually treated more as a natural, pre-existing category rather than a problematic

---


69 See IBM v. Levin, 579 F.2d 271 (3d Cir. 1978).


one whose recognition is often disputable. Rules are written and read by lawyers who think of paradigmatic instances in which the identification of clients and lawyers is not in doubt. As a result, the surprisingly numerous marginal cases are rarely discussed despite their theoretical and practical importance. When these cases arise, they are often disposed of either by mechanical application of rules, or by unconscious manipulation of the categories to reach a result that the manipulator—who may be a lawyer or a judge—finds desirable.

An obvious alternative would be a functional or balancing approach, in which each situation, or small class of situations, would be separately considered in light of the relevant interests and policies. Some courts, for example, have held a lawyer liable for misadvising the opposing party in a business transaction, on the theory that she thereby became that party's lawyer. Yet, the same courts surely would not require the lawyer to continue a representation which directly conflicts with her present duty to the original client.

A functional approach, aside from its obvious potential for vagueness and ad hoc improvisation, would not be neutral in application. By obscuring the distinction between clients and nonclients, it would undermine the grounds that make it seem natural for lawyers to dedicate themselves to the single-minded pursuit of the interests of clients. Similarly, by breaking up the compact package of duties that lawyers are now thought to owe clients, it could encourage lawyers to pursue their own interests by arguing that a sparser bundle of obligations is more appropriate, or by seeking to "contract out" of some duties. More broadly, it would be consistent with the trend toward deprofessionalization that some have detected in the legal profession.

For the present, I advocate neither the status quo nor a radical functionalism, but merely a more conscious use of categories. Perhaps those who find this recommendation disappointingly untheoretical could view it instead as a postmodern return to traditional perspectives, illuminated by destabilizing critiques. In any event, I have no rigorous theory, positive or normative, to offer.

We should continue to speak of lawyers and clients. Any attempt to state the law of our profession without using those terms, or to define them in the same way for all purposes, would lead to unimaginable prolixity, confusion, and ultimately, futility, as did

---

74 Magali Larson, Proletarianization and Educated Labor, 9 Theory & Soc'y 131 (1980); see Eliot Freidson, Professional Powers ch. 6 (1986); Abel, supra note 2, at 226-45.
some Realist attempts to dispense with rules. Indeed, how can we avoid the terms “client” and “lawyer” without unimaginably revising our notions of what it is to perform legal services? A lawyer who is not representing a client would not be a lawyer but something else, perhaps a political actor or a public functionary. Deconstructing the concepts that compose our legal world cannot remove us from that world into another one, or free us from the conflicts and complexities of our own outlook. We should, however, be aware that our concepts are problematic, that their application requires thought and theory, and that the appropriate theory may vary from instance to instance.

75 See G. Edward White, Tort Law in America ch. 3 (1980).