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Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients.

Eli Wald

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LOYALTY IN LIMBO: THE PECULIAR CASE OF ATTORNEYS' LOYALTY TO CLIENTS

ELI WALD*

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* Associate Professor of Law, University of Denver Sturm College of Law. I thank Alan Chen, Arthur Best, Ron Harris, Daniel Klerman, Tom Morgan, Steve Pepper, Matt Spitzer, Joyce Sterling, and participants in the University of Southern California colloquium in law, economics and organization, and the 8th Annual Symposium on Legal Malpractice and Professional Responsibility at the St. Mary's Law School for their useful comments. I would like to give a special thanks to Steve Pepper, whose willingness to read drafts and discuss his insights in detail helped shape this Article. University of Denver Sturm College of Law research librarians Diane Burkhardt and Carly Childress provided useful research assistance.

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When . . . lawyers are turned out upon the community each year, to graze upon all . . . no question is of more importance to the people than to know whether this dominating class is living up to its true mission. Despite this palpable truth, the laity has paid no attention to the subject. Nor does the Bar make any full, real, introspection of itself.

"Know thyself" was the Delphian invocation. . . . It has been overlooked, or neglected, by the lawyers in respect to their office. . . .

. . . .

It is of the first importance to endeavor to ascertain, accurately, the due relation of lawyers to other interests of the community, and then to inquire if they have lived up to it.

. . . .

It is quite well understood that to his clients the lawyer is held to unexceptionable purity of conduct . . . .

The lawyers stop here in the survey of their mission . . . . Fundamentally, they believe that, at the top and bottom of their professional career, they should serve their clients at all sacrifices . . . .

Accordingly, I know of no occupation more interesting, than to attempt to hold up to the lawyer, a faithful picture of his real mission. It then will be seen, that a large number of the lawyers are delinquents to society, not with malice prepense, but from a failure to appreciate the real and full nature of their professional duties.

John R. Dos Passos, *The American Lawyer: As He Was—As He Is—As He Can Be*[1]

1. JOHN R. DOS PASSOS, THE AMERICAN LAWYER: AS HE WAS—AS HE IS—AS

> The legal profession is a public profession. Lawyers are public servants. They are the stewards of all the legal rights and obligations of all the citizens. It is incumbent on stewards, if they are to be faithful to their trust, to render an accounting from time to time.
>
> Reginald Heber Smith, *Survey of the Legal Profession: Its Scope, Methods and Objectives*[2]

I. INTRODUCTION

Attorney loyalty to clients is considered a cornerstone of the attorney-client relationship.[3] It is therefore surprising that loyalty is under-explored,[4] misunderstood, and the subject of heated discord.[5] Indeed, loyalty seems to be a concept often invoked and passionately debated while lacking a common understanding, meaning, and scope.[6] Moreover, the loyalty discourse appears to be stuck. Trapped in disagreement, advocates of client-centered loyalty and their opponents both fail to provide a compelling

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HE CAN BE 3–6 (Fred B. Rothman & Co. 1986) (1907).

2. Reginald Heber Smith, *Survey of the Legal Profession: Its Scope, Methods and Objectives*, *in* ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES, at vii, vii (1953).

3. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 146 (1986) ("Whatever may be the models that obtain in other legal cultures, the client-lawyer relationship in the United States is founded on the lawyer's virtually total loyalty to the client and the client's interests." (internal cross-references omitted)); Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 21 (1987) ("In the relationship with a client, the lawyer is required above all to demonstrate loyalty.").

4. *But see generally* SUSAN P. SHAPIRO, TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE (2002) (providing a detailed empirical study of conflicts of interest encountered in the private practice of law).

5. *Cf.* L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 960 (1980) ("The central problem in the developing law of legal ethics, I believe, is the concept of the lawyer's duty of loyalty, which is central to the lawyer-client relationship. The major task in the jurisprudence of legal ethics is to define, or redefine, the lawyer's duty of loyalty to the client.").

6. *Cf.* Robert P. Lawry, *The Meaning of Loyalty*, 19 CAP. U. L. REV. 1089, 1089 (1990) ("[T]he concept [of loyalty] is not defined or explicated in any of the various codes of ethics that have dominated the governing of American lawyers in the 20th century. . . . [T]he use of the principle of loyalty is problematic because we really do not have a firm grasp on the concept itself."); William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1464–69 (2006) (discussing the development of the notion of attorney loyalty to clients in the corporate setting, and criticizing the Bar's position on this topic as being too narrow).

accounting of loyalty to clients and its consequences.

Leaving loyalty in limbo is an unacceptable state of affairs. As John Dos Passos and Reginald Heber Smith remind us, the legal profession bears the continuous burden of accounting for its own practices.[7] As a dominating class, it is subject to the duty of self-introspection and must persuasively justify its professional habits. The Bar simply cannot assert broad client-centered loyalty as a self-explanatory concept, thus shifting the burden of disproving loyalty to critics, nor can it hide behind lofty yet empty rhetoric. Critics of broad loyalty to clients, on the other hand, are not helping advance the discourse by advocating sweeping reform proposals divorced from practice realities, which purport to turn lawyers into gatekeepers who serve not clients but some abstract notion of the public good.

The goal of this Article is to unpack the concept of attorney loyalty to clients, explain away some of the confusion, and move the discourse forward. Part II explores the reasons for the loyalty limbo and makes the case that the time is right for clearing up the confused concept of loyalty. Part III studies competing definitions of loyalty, contrasting the narrow definitions of loyalty in the American Bar Association's Model Rules of Professional Conduct and the *Restatement (Third) of the Law Governing Lawyers* with the dominant broad client-centered approach advocated by the legal profession and pronounced in case law. It then examines the various justifications for loyalty and concludes that the legal profession fails to credibly account for its broad client-centered approach.

As stewards of the "rule of law," lawyers bear the burden of justifying loyalty. The legal profession's inability to defend broad loyalty to clients carries with it a corresponding duty to develop a narrower, workable concept. While the main objective of this Article is to remove rhetorical, analytical, and practical hurdles

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7. *See* JOHN R. DOS PASSOS, THE AMERICAN LAWYER: AS HE WAS—AS HE IS—AS HE CAN BE 4 (Fred B. Rothman & Co. 1986) (1907) ("It is of the first importance to endeavor to ascertain, accurately, the due relation of lawyers to other interests of the community, and then to inquire if they have lived up to it."); Reginald Heber Smith, *Survey of the Legal Profession: Its Scope, Methods and Objectives*, *in* ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES, at vii, vii (1953) ("Lawyers are public servants. They are the stewards of all the legal rights and obligations of all the citizens. It is incumbent on stewards, if they are to be faithful to their trust, to render an accounting from time to time.").

preventing this necessary discourse and allowing the Bar to live up to its obligation to account for its practices, Part IV takes a constructive step at fulfilling this duty by outlining some of the key considerations for a workable theory of attorney loyalty to clients. It distinguishes under-loyalty from over-loyalty to clients; argues that lawyers are not "ordinary agents" serving only client-principals, but rather are "limited agents" owing specific duties to the legal system and the public; and concludes by outlining the scope and meaning of these duties.

II. LOYALTY—THE CURRENT STATE OF AFFAIRS

A. *The Loyalty Limbo*

Attorney loyalty to clients is under attack.[8] The government is challenging the loyalty of defense attorneys to their clients suspected of terrorist activities.[9] Critics denounce the loyalty of corporate attorneys to their entity clients and constituencies.[10]

8. *See* Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1204 (2003) (arguing that the role of the corporate attorney as an "adversarial advocate" whose "loyalty runs to the client and only the client" is no longer plausible); David Luban, *Lawyers As Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 837 ("[T]he organizational attorney-client privilege [that many assert embodies broad loyalty to clients] should be abolished . . . ."); Charlie Cassidy & Cassandra Porsch, Current Development, *Government Monitoring of Attorney-Client Communications in Terrorism-Related Cases: Ethical Implications for Defense Attorneys*, 17 GEO. J. LEGAL ETHICS 681, 681–82 (2004) (discussing various ways in which attorney-client conversations are subject to government monitoring).

9. *See, e.g.*, Charlie Cassidy & Cassandra Porsch, Current Development, *Government Monitoring of Attorney-Client Communications in Terrorism-Related Cases: Ethical Implications for Defense Attorneys*, 17 GEO. J. LEGAL ETHICS 681, 682, 686–87 (2004) (describing notable cases in which lawyers have been asked by the government to sign "Special Administrative Measures" that permit the monitoring of the attorneys' communications with their suspected terrorist clients).

10. *See* Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1189–90 (2003) (proclaiming that a lack of regulatory enforcement allows lawyers to assist their corporate clients in harming others under the guise that "they are only doing the job they are supposed to do"); David Luban, *Lawyers As Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 837 (arguing that corporations and their counsel should not enjoy the protections of client confidentiality and attorney-client privilege because organizational clients do not possess the characteristics of human dignity, and attorney-aided corporate wrongdoing is too costly for the public); William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1464–69 (2006) (asserting that corporate counsel have a duty of loyalty to the

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In essence, the critique is that lawyers are too loyal to their clients.[11] This critique generally takes one of two forms: either lawyers are too loyal in the sense that they identify too closely with the interests of their clients, lose professional objectivity, and cross professional or moral lines helping clients achieve their goals;[12] or that lawyers fail to appreciate that they owe other constituencies, such as the courts, the legal system, and the public, competing duties of loyalty—that is, they let their loyalty to clients dominate their loyalty to other parties.[13] In other words, the former critique challenges the meaning and scope of attorney loyalty to clients,

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organization as a whole—including shareholders and other constituencies—not just to corporate managers, and arguing that the prevailing rationale supporting corporate attorney-client confidentiality must be re-examined in light of this fact); William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 247–51 (1998) (discussing the allegations of misconduct perpetuated by the law firm Kaye, Scholer, Fierman, Hays & Handler while representing Lincoln Savings & Loan in its dealings with the Federal Loan Bank Board); William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57, 59–60 (2003) (characterizing the Bar's doctrinal responses to the problem of internal client conflicts in organizational representation as "incoherent and implausible").

11. *See, e.g.*, Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1189–90 (2003) (explaining that corporate attorneys' notions of client loyalty permit them to assist company managers in engaging in behavior that is ultimately harmful to the corporation and the public); William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1464 (2006) (criticizing the idea that the role of a corporate attorney is to find a legal way to do whatever the client wants to do).

12. *See* ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 282 (1988) (describing the ideology of professionalism in large law firms and arguing that "when it comes to questions of legal policy that pertain to their practice[, large-firm lawyers] strongly identify with their clients' positions and interests"); James M. Fischer, *External Control over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 104 (2006) ("Most non-lawyers believe that lawyers over-identify with their clients."); Donald C. Langevoort, *The Social Construction of Sarbanes-Oxley*, 105 MICH. L. REV. 1817, 1840 (2007) ("[S]ociological evidence shows that corporate lawyers do tend to identify with their clients' needs and interests, an essential survival trait in a competitive market for high-end legal services."). *See generally* Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1 (2003) (exploring the extent to which lawyers should identify with their clients).

13. *Cf.* MODEL RULES OF PROF'L CONDUCT pmbl. (2008) (stating that in addition to the duty of loyalty lawyers owe their clients, attorneys also owe duties to the legal system and the public as a whole to act in a way that promotes respect for the legal profession and ensures that justice is served at all times); L. Ray Patterson, *The Function of a Code of Legal Ethics*, 35 U. MIAMI L. REV. 695, 697 (1981) (proposing that the duty of loyalty is inherently fraught with the fallacy that "the lawyer has an unalloyed duty of loyalty to the client, notwithstanding his duties of candor to the tribunal and fairness to others").

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and the latter questions the tendency of lawyers to allow client loyalty to trump other competing duties to non-clients.

The assault on attorney over-loyalty to clients is somewhat atypical in two respects. First, analysis of the duty of loyalty usually assumes, sometimes implicitly, that the problem to be addressed is one of insufficient loyalty of an agent to her principal. Critics of attorney loyalty to clients, however, assert that lawyers are too often over-loyal to their clients, rather than under-loyal.[14] To be sure, some lawyers breach their duty of loyalty to clients in the traditional sense by being disloyal and failing to act in the best interest of their clients. "Too much loyalty to clients" critics do not mean to belittle the extent of the conflict of interest problem, whereby an attorney's loyalty to a client is tainted by competing loyalties to other interests. Rather, they stress that while attorney disloyalty to clients is a serious concern, over-loyalty is also a troubling, and often unnoticed, phenomenon.[15]

Second, duty of loyalty scholarship often focuses on the relationship between principal and agent, with the typical query being: "Did the agent act in the best interests of the principal?"[16] Analysis of the consequences of loyalty from the perspective of third parties is usually secondary, limited to questions such as: "Is the principal going to be liable to third parties for disloyal or unauthorized conduct by her agent?" In contrast, the over-loyalty critique focuses explicitly on the interests of third parties—non-clients or non-principals.[17]

The issue at stake is the meaning and scope of the duty of loyalty to clients and its impact on non-clients. Put differently, the

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14. *See, e.g.*, Michael K. McChrystal, *Lawyers and Loyalty*, 33 WM. & MARY L. REV. 367, 367–68 (1992) (stating that although the duty of loyalty is the basis of the attorney-client relationship, too much loyalty has its costs for society as a whole).

15. *See, e.g.*, *id.* at 368 (providing examples of how over-loyalty to clients has resulted in the unsavory practice of attorneys protecting their clients from rules and regulations which are enacted to benefit the public and parties within the legal system).

16. *Cf.* Dennis J. Tuchler, *Unavoidable Conflicts of Interest and the Duty of Loyalty*, 44 ST. LOUIS U. L.J. 1025, 1030 (2000) (asserting that the duty of loyalty owed to clients by their attorneys is based on agency relationships and enhanced by attorneys' additional duty as agents of pursuing their clients or principals' ends "with selfless, partisan zeal").

17. *See* D. Ryan Nayar, *Almost Clients: A Closer Look at Attorney Responsibility in the Context of Entity Representation*, 41 TEX. J. BUS. L. 313, 323–35 (2006) (stating that recently, courts have begun to hold that in addition to owing their clients a duty of loyalty, attorneys may be liable for breaching a duty of loyalty owed to third party non-clients under theories of "breach of fiduciary duty" and "various theories of negligence").

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question is the extent of and limits on lawyers' obligations and allegiances to clients. The subject ought to be addressed in terms of attorney loyalty to clients, however, because when accused of over-loyalty, lawyers not only deny specific allegations of wrongdoing,[18] but argue that their conduct—pushing the legal envelope on behalf of clients—is required by their duty of loyalty to clients. That is, the legal profession's standard response to critics, who are often outsiders (non-lawyers or law professors), is basically "you do not understand what we do. Our role as lawyers is to be loyal to our clients, to push the legal envelope on their behalf, and to implement objectives set by the clients to the best of our abilities. To state that we are too loyal to clients or not loyal enough to other parties is to misunderstand what lawyers do."[19]

Notwithstanding the apparent extent of the disagreement, no meaningful exchange regarding the scope and meaning of loyalty ensues. Because there is no common definition or understanding of attorney loyalty to clients and its scope, proponents and opponents of loyalty never reach the substance of their disagreement, and instead engage in exchanging rhetorical blows.

B. *The Parties to the Stalemate*

The debate over loyalty features two somewhat unorthodox adversaries. Rather than pitting jurisprudential conservatives against liberal jurists, or even "law and economics" scholars against "critical" thinkers, the loyalty debate sets in opposition the practicing Bar (judges and lawyers) and non-practicing lawyers.[20]

18. See, for example, the response of lawyers implicated in the representation of Enron to allegations of wrongdoing: "'There's nothing that [I am] aware of that we would change.... We never saw anything at Enron that we considered illegal.'" Mike France, *What About the Lawyers?*, BUS. WK., Dec. 23, 2002, at 58 (quoting Joseph C. Dilg, managing partner of Vinson & Elkins). "'We know all our work for Enron was of the highest caliber and consistent with all of our professional obligations.'" *Id.* (quoting Howard Ayers, managing partner of Andrews & Kurth).

19. *See, e.g.*, Eli Wald, *Lawyers and Corporate Scandals*, 7 LEGAL ETHICS 54, 58–61, 84 (2004) (describing the "we did nothing wrong" tactic and its core basis launched by lawyers and lawyer interest groups in response to the corporate scandals of the 1990s).

20. *See generally* Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283 (1998) (discussing the growing gap between the practicing Bar and legal academia with respect to the meaning of loyalty). As one author noted: "I fear that our law schools and law firms are moving in opposite directions." Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992). According to Edwards, "ethical practice" has been ignored by both parties. Law schools espouse "abstract theory at the expense of practical scholarship,"

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This is not, however, a battle between the legal profession and outside critics because a segment of the profession—namely law professors—generally opposes the practicing Bar's notion of loyalty.[21] Indeed, scholars from both the left and the right join outsiders in challenging the practicing Bar's idea of loyalty.[22]

The unusual identity of the parties complicates the debate by creating a disconnect, or an inherent failure to communicate. The practicing Bar, by definition, mostly abandons the academic arena occupied by legal scholars and therefore often does not engage directly with the assertions by law professors about loyalty published in law review articles. Law professors in turn tend to leave professional association arenas and non-scholarly publications to practicing lawyers and thus stay clear of settings where loyalty is defended. As a result, the parties tend to square

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while law firms "are moving toward pure commerce," with both sides sacrificing ethical ideals. *Id.* While "[l]aw schools and the practicing [B]ar have different missions to perform," they should "stop viewing themselves as separated by a 'gap' and recognize that they are engaged in a common enterprise—the education and professional development of the members of a great profession." A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE LEGAL PROFESSION: NARROWING THE GAP (1992), *available at* http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html.

21. *See, e.g.*, Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1189–90 (2003) (exhibiting one academic's viewpoint that the Bar's definition of client loyalty results in attorneys assisting their clients with behavior that is harmful to third parties); William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1464 (2006) (disagreeing with the Bar's definition of loyalty in the corporate sphere and criticizing the idea that the role of a corporate attorney is to find a legal way to do whatever it is the client wants to do); *see also* Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 283 (1998) (noting legal scholars' concern that economic pressures of practice transform the attorney's views of loyalty). Some academics, however, do advocate client-centered loyalty, as discussed in Part III(B) of this Article. *See generally* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 71–127 (3d ed. 2004) (discussing the duty of loyalty owed by attorneys to clients and stating that "zealousness continues today to be '*the* fundamental principle of the law of lawyering' and 'the dominant standard of lawyerly excellence[]'" (citations omitted)); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000) (stressing that attorneys owe a strict duty of loyalty to clients, even when the client has been accused of heinous crimes).

22. As I pointed out elsewhere, this odd alliance between left and right is not unusual in legal ethics debates. *See* Eli Wald, *An Unlikely Knight in Economic Armor: Law and Economics in Defense of Professional Ideals*, 31 SETON HALL L. REV. 1042, 1049 n.34 (2001) ("A critical stand against professional ideals unites those on the left of the political spectrum . . . with those on the right . . . .").

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off only on the pages of popular media, a venue ill-suited for a serious in-depth exchange. Consequently, a stalemate emerges where academics criticize the Bar's notion of loyalty repeatedly, and practitioners respond dismissively that "you do not understand what we do."

C. *The Timing*

Challenges to the meaning and scope of attorney loyalty to clients often take the form of "where were the lawyers?" following debacles involving either attorney conduct that facilitated client wrongdoing or a lack of attorney action to prevent client wrongdoing.[23] The point is not merely that in those particular moments the Bar is defensive of its practices. Rather, because the challenges to attorney loyalty are made in times of so-called crisis,[24] challengers tend to sometimes take a "crisis approach" and advocate a sweeping overhaul of the lawyer's role.[25] As such,

23. *See, e.g.*, Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1197, 1204–05 (2003) (denouncing the Bar's conception of corporate lawyers as libertarian-antinomians, neutral risk managers, or adversary advocates as unacceptable excuses for the behavior of Enron's corporate counsel); David Luban, *Lawyers As Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 837–38 (claiming that the savings and loan crisis of the 1980s and the whistleblower litigation concerning "Big Tobacco" serve to bolster the notion that corporations and their counsel should not enjoy the protections of client confidentiality and attorney-client privilege); William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1453 (2006) ("Lawyers were major participants in Enron and in similar controversies over corporate disclosure. Lawyers have also been key players in the corporate tax shelter industry. In both instances, their conduct has prompted federal regulations that repudiate to an unprecedented degree the [B]ar's traditional understanding of its structure and obligations."); William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 243, 268 (1998) (critiquing the Bar's explanations and justifications for the behavior of corporate counsel in response to the charges brought by the government against the law firm of Kaye, Scholer, Fierman, Hays & Handler).

24. Some commentators point out that the legal profession seems to be in a perpetual state of crisis. *See, e.g.*, Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 283 (1998) ("Lawyers belong to a profession permanently in decline. Or so it appears from the chronic laments by critics within and outside the [B]ar."). This widespread discontent is "increasingly pervasive and is driven by structural factors that are widening the distance between professional ideals and professional work." *Id.* at 284.

25. *See, e.g.*, Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1209–10 (2003) (discussing attempts to revive the "wise-counselor" version of the attorney's role as a way to re-define the role of attorneys in light of corporate scandals such as Enron, but ultimately discrediting this practice and suggesting a new role for corporate attorneys: the "Independent Counselor").

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they play into the hands of the "you do not understand what we do" demurrer from the Bar. Now is perhaps an opportune time to assess attorney loyalty to clients, as it appears that lawyers had little to do (in a good way) with the unparalleled collapse of Wall Street in the fall of 2008 and the ensuing economic downturn.[26]

To sum up, the inquiry this Article attempts to advance is the appropriate meaning and scope of attorney loyalty to clients, mitigating between, on the one hand, the legal profession and its broad client-centered interpretation of loyalty,[27] and, on the other hand, critics who attempt to constrain loyalty to clients by asserting lawyer duties to third party non-clients.

III. UNPACKING LOYALTY

The task of accounting for loyalty is complicated by the fact that the doctrine of attorney loyalty to clients includes two inconsistent

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26. One recent posting on a legal ethics blog, the *Biggest Legal Ethics Story of the Year?*, states:

> My choice is the current economic crisis. "Huh?" you ask. "What does legal ethics have to do with it?"
>
> Apparently nothing, and that's precisely my point. People are blaming the crisis on inadequate regulation of credit default swaps, inadequate regulation more generally, poor business leadership, irresponsible lenders and brokers, [and] irresponsible buyers, among many other failings. But so far, nobody's blaming unethical attorneys.
>
> The lack of a story is a welcome change from lawyers' complicity in many of the major economic scandals and crises of recent decades. Among other prominent examples, lawyers had a role in the Savings & Loan crisis and the Enron collapse. Moreover, political scandals have tended to involve lawyers, from Watergate to the torture memo controversy. The unfortunate reality is that major economic and political controversies have tended to implicate lawyers. The accusations sometimes turn out to be inaccurate or only partially true, but some of the accusatory fingers usually point in the direction of attorneys. And that's what makes the current economic mess—and the absence of any blame for lawyers—so noteworthy.
>
> Of course, I may have missed some fingers pointed at attorneys, and there may yet be blame headed that way. But for now, my nomination for the biggest legal ethics story of the year is the very absence of one connecting lawyers and an epic political/economic controversy. It's a pleasant and surprising development in an otherwise bleak and depressing storyline.

Posting of Andrew Perlman to Legal Ethics Forum Blog, http://legalethicsforum.typepad.com/blog/2008/10/the-biggest-leg.html (Oct. 5, 2008, 10:05 AM) (on file with the *St. Mary's Law Journal*).

27. In Dos Passos's words: "[T]hey believe that, at the top and bottom of their professional career, they should serve their clients at all sacrifices . . . ." JOHN R. DOS PASSOS, THE AMERICAN LAWYER: AS HE WAS—AS HE IS—AS HE CAN BE 6 (Fred B. Rothman & Co. 1986) (1907).

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definitions. On the one hand, the American Bar Association's Model Rules of Professional Conduct[28] (Rules) and the *Restatement (Third) of the Law Governing Lawyers*[29] (*Restatement*) define loyalty to clients relatively narrowly to include avoidance of conflicts of interest, some communications, competence, diligence, and protection of confidential information. Moreover, loyalty to clients is constrained by loyalties to non-clients, such as the courts and the legal system. On the other hand, case law defines loyalty broadly to include not only all of the components specified by the Rules and the *Restatement*, but also to encompass "entire devotion" and "warm zeal." Section A examines these conflicting definitions, and section B explores their respective justifications. Expanding the scope of the inquiry, section C studies the duty of loyalty of corporate agents, and section D looks briefly at various philosophical accounts of loyalty. The overall theme of Part III—seeking a justification for attorney loyalty to clients—is a function of the fact that the legal profession bears the burden of accounting for loyalty.[30]

A. *Competing Definitions of Attorney Loyalty to Clients*

1. The Rules' Approach to Loyalty—A Narrow Definition

No rule of professional conduct explicitly deals with, let alone spells out, the meaning of attorney loyalty to clients. Several rules, however, capture various elements of the duty.

Rules 1.7–1.11 deal with avoidance of conflicts of interest, which may taint the representation of a client. Rule 1.7, entitled "Conflict of Interest: Current Clients," prohibits representations tainted by a conflict of interest. The rule defines this to include instances whereby "the representation of one client will be directly adverse to another client"[31] and where "there is a significant risk

28. MODEL RULES OF PROF'L CONDUCT (2008). While the ABA Model Rules of Professional Conduct are not controlling law, they serve as the basis for the rules of professional conduct in most jurisdictions.

29. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

30. "[L]awyers are public servants. They are the stewards of all the legal rights and obligations of all the citizens. It is incumbent on stewards, if they are to be faithful to their trust, to render an accounting from time to time." Reginald Heber Smith, *Survey of the Legal Profession: Its Scope, Methods and Objectives*, *in* ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES, at vii, vii (1953).

31. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) (2008).

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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."[32] The rule thus protects clients from various kinds of disloyalty: client-to-client conflicts, which result from duties owed to another client;[33] lawyer-to-client conflicts, which result from a tension with the lawyer's own self-interest;[34] and third person-to-client conflicts, which result from narrow specific duties to third parties specified elsewhere in the Rules.[35] Rule 1.8 supplements Rule 1.7 and covers specific instances of prohibited conflicts.[36] Rule 1.9 extends the lawyer's duty to avoid conflicts of interest to former clients in specified circumstances.[37] Rule 1.10 imputes conflicts of interest from one tainted attorney to the entire law firm,[38] and Rule 1.11 explores conflicts of interest in the context of governmental lawyers.[39]

The explicit goal of Rules 1.7–1.11 is to promote attorney loyalty to clients. Comment 1 to Rule 1.7 states: "*Loyalty* and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest [which frustrate loyalty] can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests."[40] Comment 6, in relevant part, states that "[*l*]*oyalty* to a current client prohibits undertaking representation

32. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2008). Subsection 1.7(b) proceeds to prescribe conditions under which a conflict of interest may be cured, including requiring informed client consent. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2008); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.0(e) cmts. 6–7 (2008) (exploring the notion of informed consent).

33. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1)–(2) (2008).

34. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2008).

35. *Id. See generally* Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension Between Confidentiality Requirements and Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199, 247–49 (2007) (providing a typology of conflicts of interest covered by the Rules).

36. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8 (2008) (prohibiting specific instances of conflict of interest with regard to current clients).

37. *See* MODEL RULES OF PROF'L CONDUCT R. 1.9 (2008) (delineating an attorney's duties to former clients).

38. *See* MODEL RULES OF PROF'L CONDUCT R. 1.10 (2008) (outlining the imputation of conflicts of interest).

39. *See* MODEL RULES OF PROF'L CONDUCT R. 1.11 (2008) (exploring conflicts of interest that take place when lawyers move in and out of public practice with the government).

40. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2008) (emphasis added).

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directly adverse to that client without that client's informed consent."[41]

Rule 1.4 deals with mandatory communications between attorney and client.[42] While neither the rule nor the comment mentions loyalty, Comment 5 states: "The guiding principle is that the lawyer should fulfill *reasonable client expectations for information consistent with the duty to act in the client's best interests*, and the client's overall requirements as to the character of representation."[43] Rule 1.4 can therefore be read as adding a component of mandatory communication to the lawyer's duty of loyalty to clients and implicitly defining loyalty to mean acting in the client's best interests.[44]

Rule 1.1 states that a lawyer must provide competent representation.[45] Competent representation consists of four elements: "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[46] While neither the rule nor the comment mentions loyalty as a relevant consideration in assessing competence, commentators commonly identify competence and loyalty as core, interrelated values.[47]

Next, Rule 1.3, entitled "Diligence," briefly states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[48] Comment 1 to Rule 1.3 explicitly explains the need for diligence in terms of loyalty to clients. Not only should a lawyer "pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer," but in exploring the scope of the duty of loyalty, the comment asserts that a lawyer should "*take whatever lawful and ethical*

41. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 6 (2008) (emphasis added).

42. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 (2008) (establishing situations where an attorney must communicate with a client regarding the representation).

43. MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 5 (2008) (emphasis added).

44. *Cf.* Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 759–66 (2008) (discussing Rule 1.4 and noting it only guarantees clients some mandatory communications relating to the representation and fails to require an attorney to communicate all material information regarding the relationship to his or her clients).

45. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008).

46. *Id.*

47. *See, e.g.*, James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159, 1186–88 (2000) (identifying competence and loyalty to clients as two professional core values and exploring their interdependence).

48. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2008).

measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[49]

Finally, Rule 1.6, dealing with confidentiality, establishes that a lawyer must not reveal information that relates to the client's representation.[50] As usual, the rule fails to mention loyalty as a justification, but the comment explains the rule on the ground that it facilitates trust and loyalty between lawyer and client:

> A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.... *This contributes to the trust that is the hallmark of the client-lawyer relationship.* The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively ....[51]

Thus, the Rules guarantee a floor of loyalty by prescribing and proscribing certain attorney conduct. This floor is premised on a desire to protect clients from unfaithful attorneys by defining loyalty to include at least the avoidance of conflicts, providing for some mandatory communications between lawyers and clients, and delineating lawyers' duties of competence, diligence, and confidentiality.[52]

The Rules, however, do not set an upper limit on loyalty beyond the obvious—illegal conduct. Rule 1.2 states that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent," but the rule also states that "a lawyer may discuss the legal consequences of any proposed

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49. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2008) (emphasis added).

50. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2008) (limiting a lawyer's ability to "reveal information relating to the representation of a client" unless certain circumstances are present).

51. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2008) (emphasis added).

52. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.7–1.11 (2008) (discussing attorney avoidance of conflicts); MODEL RULES OF PROF'L CONDUCT R. 1.4 (2008) (describing a lawyer's duty to communicate with the client); MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008) (outlining the lawyer's duty of competence); MODEL RULES OF PROF'L CONDUCT R. 1.3 (2008) (stating the lawyer's duty of diligence); MODEL RULES OF PROF'L CONDUCT R. 1.6 (2008) (delineating the lawyer's duty of confidentiality).

course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."[53] In addition, the Rules implicitly suggest that attorney loyalty is limited by the lawyer's duty to exercise independent professional judgment,[54] and proclaim that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."[55]

While the Rules only set a floor and fail to impose any clear limits on the scope of attorney loyalty to clients, there is no apparent support in the Rules for the Bar's broad construction of loyalty to clients. For example, the Rules never require zeal in the representation of clients. Instead, zeal is only referenced in the above mentioned comment,[56] immediately followed by this tempering language: "A lawyer is not bound, however, to press for every advantage that might be realized for a client.... The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."[57]

2. The *Restatement*—Support for the Rules' Narrow Approach

Unlike the Rules, the *Restatement* explicitly identifies attorney loyalty to clients as a key aspect of the attorney-client relationship. In Chapter Two, entitled "The Client-Lawyer Relationship," the introductory note explains that the relationship is governed in part by agency principles.[58] As such, the *Restatement* notes, lawyers

53. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2008); *see also* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2008) (making it improper for a lawyer to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous"); MODEL RULES OF PROF'L CONDUCT R. 3.3 (2008) (recognizing an attorney's duty of candor toward the court and proscribing the dissemination of false information to the court by an attorney).

54. *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 (2008) ("In representing a client, a lawyer shall exercise independent professional judgment . . . .").

55. MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2008).

56. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2008) ("A lawyer must . . . act with . . . zeal in advocacy upon the client's behalf.").

57. *Id.*

58. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2, introductory note (2000) ("The subject of this Chapter is, from one point of view, derived from the law of agency. It concerns a voluntary arrangement in which an agent, a lawyer, agrees to work for the benefit of a principal, a client."). As we shall see in Part IV(B) of this Article, lawyers are not merely agents of clients but also officers of the legal system and

owe clients a duty of loyalty.[59]

Section 16, entitled "A Lawyer's Duties to a Client—In General," identifies four duties attorneys owe clients: to "proceed in a manner reasonably calculated to advance a client's lawful objectives"; to "act with reasonable competence and diligence"; to protect the client's confidences and avoid conflicts of interest; and to "fulfill valid contractual obligations to the client."[60] All of these duties are consistent with the Rules' interpretation of the meaning and scope of loyalty. Comment b, explaining the section's rationale, notes that "[a] lawyer is a fiduciary" whose services are needed to secure clients' legal rights.[61] Given the lawyer's role as a fiduciary, "[a]ssurances of the lawyer's competence, diligence, and loyalty are therefore vital" and lawyers are required "to protect their clients' interests with competence, diligence, and loyalty . . . ."[62]

Comment e makes the point clear. Entitled "Duties of loyalty," it characterizes the lawyer's role as an agent whose task is to "promot[e] the objectives of the client," and refers to the obligations that flow from that role as "duties of loyalty."[63] Comment e further explores the scope of attorney loyalty to clients, noting that the duties of loyalty generally "prohibit the lawyer from harming the client."[64] Loyalty entails protection of confidential client information, avoidance of conflicts of interest,[65] effective communications including being honest with clients, and maintaining the lawyer's independent judgment.[66]

Thus, the *Restatement*'s substantive definition of attorney loyalty to clients is similar to that provided by the Rules. It identifies the components of loyalty as avoidance of conflicts of interest,

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public citizens, in a manner that limits their loyalty to clients. The *Restatement* arguably recognizes the limited nature of lawyers' agency by stating that the relationship is governed *in part* by agency principles and that "[t]he subject of this Chapter is, *from one point of view*, derived from the law of agency." *Id.* (emphasis added).

59. *See id.* ("The lawyer is subject to duties of care, loyalty, confidentiality, and communication . . . .").

60. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (2000).

61. *Id.* § 16 cmt. b.

62. *Id.*

63. *Id.* § 16 cmt. e.

64. *Id.*

65. *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 121–33 (2000) (exploring further an attorney's duty to avoid conflicts of interest).

66. *Id.* § 16 cmt. e.

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communications, including a duty to be honest with the client, competence, diligence, and protection of confidentiality, and does not advocate a broader client-centered concept. In fact, Comment e to section 16 notes that attorney loyalty to clients is "subject to exceptions described elsewhere in this *Restatement*. Those exceptions typically protect the concerns of third persons and the public or satisfy the practical necessities of the legal system."[67]

3. Case Law—Client-Centered Loyalty

On the merits, case law's treatment of attorney loyalty to clients is consistent with the approach taken by the Rules and the *Restatement*, exploring loyalty mostly in the context of avoidance of conflicts of interest.[68] Indeed, cases often directly rely on the Rules as codified by the states in analyzing duty of loyalty cases.[69] Furthermore, consistent with the Rules, case law tends to examine in detail only the floor of loyalty—avoidance of conflicts, communications, competence, diligence, and confidentiality. Nonetheless, while it fails to explore in detail the scope of loyalty beyond these elements, case law does invoke lofty and broad language in describing the scope of the duty of loyalty. Setting the tone is Lord Brougham's famous statement of the advocate's duty to the client:

> "An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, *that client and none other*. To save that client by all expedient means—to protect that client at all hazards and costs to all others, and amongst others to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment,

67. *Id.*

68. The approach is apparent in both civil and criminal cases. *See, e.g.*, Hendry v. Pelland, 73 F.3d 397, 401 (D.C. Cir. 1996) (illustrating a civil case holding that an attorney violated a fiduciary duty of loyalty imposed by the District of Columbia Code of Professional Responsibility by representing five owners of property with conflicting interests); State v. Holland, 876 P.2d 357, 360 (Utah 1994) (demonstrating a criminal case in which the court held that an attorney violated his duty of loyalty under the Utah Rules of Professional Conduct because the lawyer "took a position in [an unrelated case] that was directly contrary to Holland's interest").

69. *See, e.g.*, Blough v. Wellman, 974 P.2d 70, 72 (Idaho 1999) ("[A] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest. Loyalty to a client prohibits undertaking representation directly adverse to that client without the client's consent." (citing IDAHO R. PROF'L CONDUCT 1.7 cmt. (1986))).

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the destruction, which he may bring upon any other."[70]

Modern case law follows suit. For example, in *Blough v. Wellman*,[71] the court stated: "The relationship of client and attorney is one of trust, binding an attorney to the utmost good faith in fair dealing with his client, and obligating the attorney to discharge that trust with complete fairness, honor, honesty, loyalty, and fidelity."[72] Likewise, in *Anderson v. Eaton*,[73] the court declared:

> One of the principal obligations which bind an attorney is that of fidelity, the maintaining inviolate the confidence reposed in him by those who employ him, and at every peril to himself to preserve the secrets of his client. This obligation is a very high and stringent one. It is also an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances.[74]

There we have it: a duty of loyalty that is client-centered, boundless, and without a ceiling—loyalty that calls upon lawyers to meet the standard of "utmost good faith,"[75] "complete ... loyalty,"[76] and full dedication serving the interests of wholly dependent clients.[77] Courts rarely explain the meaning of such phrases, let alone clarify what they might mean beyond avoidance of conflicts, communications, competence, diligence, and protection of confidentiality. Nonetheless, this client-centered rhetoric supports a professional ethos of pushing the legal envelope on behalf of clients and of erring on the side of over-loyalty to clients at the expense of non-clients.

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70. Showell Rogers, *The Ethics of Advocacy*, 15 LAW Q. REV. 259, 269 (1899) (quoting Lord Brougham).

71. Blough v. Wellman, 974 P.2d 70 (Idaho 1999).

72. *Id.* at 72.

73. Anderson v. Eaton, 293 P. 788 (Cal. 1930).

74. *Id.* at 789–90 (citations omitted); *see also* Flatt v. Superior Court, 885 P.2d 950, 958 (Cal. 1994) (reaffirming *Anderson*'s definition of attorney loyalty to clients).

75. *Blough*, 974 P.2d at 72.

76. *Id.*

77. *See* State v. Holland, 876 P.2d 357, 359 (Utah 1994) ("In almost all cases, defendants are wholly dependent on the dedication of their attorneys to protect their interests and to ensure their fair treatment under the law.").

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4. From Avoidance of Conflicts to "Entire Devotion" and "Warm Zeal"—The Loss of External Constraints on Loyalty to Clients

In defense of judges and lawyers advocating a broad conception of attorney loyalty to clients, it must be noted that the apparent gap between the Rules' and *Restatement*'s fairly narrow definitions of the scope of loyalty and case law's client-centered approach is to an extent the result of presentism—the attempt to explain complex historical developments (such as the expansion of the meaning and scope of loyalty) by means of contemporary insights (such as current rules of professional conduct).[78] While the current version of the Rules does not endorse a broad interpretation of attorney loyalty to clients, earlier codes of ethics certainly did. For example, the Alabama Code of Ethics—among the first promulgated American codes of legal ethics—used to state that "[a]n attorney 'owes entire devotion to the interest of his client, [and] warm zeal in the maintenance and defense of [the client's] cause . . . .'"[79]

Patterson argues that the scope of the duty of loyalty has expanded over time from a core consisting of avoidance of conflicts of interest, communications, and competence, to include the notions of "entire devotion" and "warm zeal."[80] The expansion of the scope of attorney loyalty to clients was introduced by codes of professional conduct—such as the Alabama Code of Ethics—with the support of prominent practitioners such as David Dudley Field who, according to Patterson, was inspired in part by Lord Brougham.[81]

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78. *See* Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1810 n.29 (2008) (defining "presentism" as "the attempt to explain historical phenomena from a contemporary perspective, thus failing to appreciate considerations that were important at the time but are not today" (citing Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251 (1975))).

79. L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 938 (1980) (quoting ALA. CODE OF ETHICS R. 10 (1887)).

80. *Id.* at 935–55 (discussing Patterson's interpretation of the evolving notions of attorney loyalty to clients and the eventual focus on a stronger sense of loyalty owed to clients by attorneys).

81. *See id.* at 941–47 (claiming that Field was "apparently . . . inspired by Lord Brougham"). *But see* Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191, 206 (1977) ("No one was more insistent in distinguishing himself from Brougham than David Dudley Field.").

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What explains this expansion in the scope of loyalty? First, to an extent, the language of "entire devotion" and "warm zeal" has always been somewhat of an exaggeration—a selling point to clients—rather than an attempt to expand loyalty substantively beyond avoidance of conflicts, communications, competence, and diligence. Second, in exploring the transformation of loyalty to clients, it is important to bear in mind that the expansion in the scope of loyalty, if only in rhetoric, took place when loyalty was considered a "three-legged stool": a lawyer was to be loyal to his client, to the courts, and to the legal system as a public citizen.[82] Client-centered loyalty—with "entire devotion" and "warm zeal"—was justified exactly because it was part of a "checks-and-balances" system, consisting of the advocate's moral role balanced against competing loyalties to other constituencies—the court and the public.[83]

In other words, when "entire devotion" and "warm zeal" were introduced by the Alabama Code of Ethics, to the extent that they added some substance to the attorney's duty of loyalty to clients, the expansion was mitigated by the lawyer's other competing duties to the court and the public. Until the middle of the nineteenth century, the prevailing professional ideology took for granted that the lawyer was a public person.[84] Accordingly, "'[t]he law and all its machinery [were] means, not ends; the purpose of their creation [was] justice: and he who, in his zeal for the means, [forgot] the ends, betray[ed] not only an unsound heart but an unsound understanding.'"[85]

Furthermore, while the common professional ethos identified the lawyer's primary duty as one owed to clients, it did not fail to specify duties to the court and the public:

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82. This tripartite relationship has been adopted by the current Model Rules of Professional Conduct. *See* MODEL RULES OF PROF'L CONDUCT pmbl. (2008) ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

83. *Cf.* L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 912 (1980) ("[U]ntil the 1850s the lawyer's duty to the client was deemed to be consistent with both a duty of respect for and candor to the court, as well as fairness to others.").

84. *See* Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191, 201 (1977) ("In the law, until the middle of the nineteenth century, it had been taken for granted that the lawyer was a public person.").

85. *Id.* at 206 (quoting David Dudley Field).

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> "[Lawyers owe a] duty to the [c]ourt, that it shall be assisted by the advocate; a duty to the adversary, not to push an advantage beyond the bounds of equity; a duty to truth and right, whose allegiance no human being can renounce; and a duty to the state, that it shall not be corrupted by the example of unscrupulous insincerity."[86]

By the 1870s, however, the conception of loyalty had undergone a significant transformation.[87] Instead of thinking of loyalty to clients as part of a "checks-and-balances" apparatus operating alongside loyalties to the court and the legal system to ensure just and fair outcomes, lawyers adopted a conception of loyalty, according to which "the lawyer would do the greatest good by submitting to the will of his clients, regardless of the justness of their causes."[88]

The transformation in the meaning and scope of attorney loyalty to clients corresponded with, and is explained in part by, a change in prevailing cultural sensibilities and common morality within and outside the practice of law. Leading attorneys of the era "had company in moving from a morality that was religious in its roots and civic in its expression to one more independent of religion and more individualistic in emphasis."[89] Lawyers shifted from being public persons, who took for granted a community to which they were responsible, to professional persons, guided by

> [t]he force of the market and the market morality, shattering earlier bonds of community .... The professions, in response, did not—could not—retrieve a world which had passed. They did not fight the decentralization of the moral life, they ratified it. Brougham spoke the language of the new professional .... Leading lawyers in the major cities by 1870 believed themselves primarily obliged to serve their clients' interests .... No interest besides that of the client was any longer palpable; the sense of community or of public obligation might be a memory or a dream, but it no longer was a

86. *Id.* at 207 (quoting David Dudley Field).

87. L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 912–13 (1980) ("'[B]y the 1870s leading American lawyers were coming to espouse a responsibility to their clients as their primary and even exclusive moral obligation as lawyers.'" (quoting Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191, 193 (1977))).

88. Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191, 192 (1977).

89. *Id.* at 207.

reflex in a community . . . .[90]

Mark DeWolfe Howe argues that after the Civil War, political achievements were no longer a dominant source of professional distinction, and the Bar was

> left tethered to nothing more substantial than the fluctuating desires of its clientele. Its morality and its principle descended to the level of the men by whom it was employed, and among the employers neither principle nor morality was evident. As a consequence, the lawyers lost the persuasion of their ancestors that the profession possesses other responsibilities than those owing to their clients.[91]

After 1850, lawyers "never knew the old and found all their dreams realized in the dedication of their talents to the expanding interests of their clients."[92] This was "the dizzy age of post-War transition," and the practice of law "'was necessarily affected by the character of the times.'"[93] As a result of this shift in attorney focus, Howe claims that the legal profession forwent an understanding of the practice of law as a vocation and calling inspired by duties to the public.[94]

Moreover, the transformation in the meaning of the scope of loyalty was not merely a reflection of the changing moral sensibilities of the era. Rather, it also was the product of a paradigm shift in the practice of law. By 1870, the role of leading lawyers had changed fundamentally from advocacy to counseling, and the paradigmatic client had changed from an individual to a corporate entity.[95]

The importance of the paradigm shift from advocacy to

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90. *Id.* at 208–09.

91. Mark DeWolfe Howe, Book Review, 60 HARV. L. REV. 838, 840 (1947) (reviewing 1 ROBERT T. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS, 1819–1947 (1946)).

92. *Id.*

93. *Id.* (quoting 1 ROBERT T. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS, 1819–1947, at 256 (1946)).

94. *See id.* at 840–41 ("[T]he leaders [of] the New York bar had lost all sense that the law was for them what the church was for the clergy. The law and the courts had become instrumentalities which lawyers utilized . . . to supplement the efforts of their clients to secure power and riches.").

95. *Cf.* Louis D. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555, 559 (1905) (noting the shift in a lawyer's general role, stating that "able lawyers have . . . allowed themselves to become adjuncts of great corporations" and urging a graduating class of law students to stand their professional ground and practice as lawyers for the people instead of as servants of corporate interests).

corporate law for the conception of attorney loyalty to clients cannot be overstated. Many of the external constraints on loyalty to clients were limited to the adversarial context and did not apply in the corporate sphere.[96] "Warm zeal" to clients arguably made sense in the context of the adversary system, where one attorney's entire devotion to his client was tempered by the opposing counsel's entire devotion to her client, and where a presumably objective and neutral judge presided over the trial. The changing paradigm of law practice, however, rendered loyalties to other parties—the court and the public—meaningless.[97] Unlike advocacy in the courtroom, counseling in the business conference room often did not involve an opposing party, and the court or its equivalent was not present.[98] Consequently, loyalty to clients was left unchecked and unimpeded by loyalties to other constituencies.

The interplay of changing moral sensibilities regarding the role of professionals—lawyers included—and of the paradigm shift in the practice of law led to the expansion of the meaning and scope of attorney loyalty to clients.[99] Leading lawyers of the day did not simply "sell out," preferring the interests of corporate clients over the interests of the legal system and the public. As Howe notes, an investigation into the careers of leading lawyers of the day leads to the following conclusion:

> [T]hey most fervently believed that the economic and social problems of the times were theirs. This does not, of course, mean that they approved of all the objectives of their clients; it does mean, however, that they shared their clients' faith that national welfare

96. *See* L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 953 (1980) (showing that a corporate lawyer often takes on the role of adviser or negotiator engaging in activity that affects future conduct of the client, whereas the advocate in the courtroom primarily is engaged in controversies involving past conduct).

97. *See id.* at 954–55 (showing that, since loyalty had become the "exclusive moral obligation" of the lawyer, when the lawyer engaged in counseling the client on future conduct, the concept of balancing loyalty between the client, the court, and others when a conflict developed was corrupted because the lawyer was now responsible for the client's actions that resulted from the counseling relationship).

98. *Cf.* Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191, 201 (1977) ("[B]usinesses asked lawyers for 'opinions'—not to defend them in court but to keep them from going to court. . . . [T]he law in this respect [became] more private than it had been.").

99. *See id.* at 191–92 (discussing the effects of a new era of "market morality" among professionals, which aided in enhancing the lawyer's loyalty to clients to the point of "submitting to the will of his clients, regardless of the justness of their causes").

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> depended upon the freedom of corporations from government regulation, that great prosperity for the few would bring adequate security for the many, and that the primary purpose of the [B]ill of [R]ights was to safeguard property. The lawyers wrote the constitutions of finance and industry as they did because they shared the convictions of their clients.[100]

Thus, to deny leading practitioners of the era their "convictions [was] to drain [their] character[s] of [their] integrity and convert [their] enthusiasm into cynicism."[101]

Another aspect of the paradigm shift from advocacy to counseling was the changed role of lawyers from advising litigants regarding past conduct to counseling clients about future conduct.[102] This change in the role of lawyers created significant challenges for the evolving client-centered concept of loyalty. Although the lawyer as advocate could plausibly deny responsibility for the past conduct of his client because the client's conduct usually took place before the attorney was asked to advise the client, "the lawyer as adviser could [in theory] share responsibility for the client's future conduct," which he helped plan and facilitate.[103] "The response of the legal profession . . . was to decline the opportunity to share the client's responsibility,"[104] and to embrace the "Principle of Nonaccountability."[105] Patterson concluded: "Thus, the new

100. Mark DeWolfe Howe, Book Review, 60 HARV. L. REV. 838, 842 (1947) (reviewing 1 ROBERT T. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS, 1819–1947 (1946)).

101. *Id.*; *see also* Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191, 209 (1977) ("This does not mean that . . . lawyers were not men of integrity, but it suggests that integrity took on a new meaning, that moral action took place in a frame of reference in which the authority of consumer demand was taken for granted. . . . By the early twentieth century, the practice of law as Brougham preached it was widely accepted among leading lawyers . . . .").

102. *See* L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 954–55 (1980) (showing that, since loyalty had become the "exclusive moral obligation" of the lawyer, when the lawyer engaged in counseling the client on future conduct, the concept of balancing loyalty between the client, the court, and others when a conflict developed was corrupted because the lawyer was now responsible for the client's actions that resulted from the counseling relationship).

103. *Id.* at 953.

104. *Id.*

105. *See* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 672–75 (1978) (coining the term "Principle of Nonaccountability" to mean that lawyers are not morally accountable for a client's choice of ends and means).

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practice simply carried forward an old idea [of loyalty], but it was an old idea out of context, and as such it had major consequences for the ethics of the profession."[106]

Avoidance of conflicts of interest, communications, competence, and diligence have long been recognized as the core of attorney loyalty to clients.[107] "Entire devotion" and "warm zeal," with confidentiality to boot,[108] were added as components of loyalty to clients by codes of ethics, leading practitioners and the courts at a time when they were tempered by competing attorney duties to the court and the public in the context of the adversary system. This expansion persisted even as the practice of law experienced a paradigm shift from advocacy to corporate counseling and in spite of the fact that outside of the adversary system, loyalties to the court and the public could not meaningfully constrain broad loyalty to clients.

Subsequently, codes of ethics, in part responding to the paradigm shift[109] and in part responding to public pressure,[110]

But see DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 148–49, 160–74 (1988) (arguing for a system of "'moral activism': a vision of law practice in which the lawyer who disagrees with the morality or justice of a client's ends does not simply terminate the relationship, but tries to influence the client for the better"); DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 19–64 (Gerald Postema ed., 2007) (criticizing the principle of non-accountability for protecting lawyers from moral culpability for a client's conduct).

106. L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 954 (1980) (citing Robert Swaine, *The Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar*, 35 A.B.A. J. 89, 91 (1949)).

107. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.1–1.4, 1.7 (2008) (discussing attorney duties to clients regarding conflicts of interest, communications, competence, and diligence).

108. *Cf.* L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 954 (1980) ("[C]onfidentiality, in turn, was a natural component of an increased closeness between lawyer and client and was justified on the basis of the lawyer's duty of loyalty. The duty of loyalty demanded confidentiality and the duty of confidentiality demanded loyalty. The reasoning was circular but self-interest made it effective.").

109. Revisions to the Rules have often been explained in terms of the relative decline in litigation as the paradigm for law practice and growth in other areas of law, including corporate law. *See, e.g.*, Charlotte (Becky) Stretch, *Overview of Ethics 2000 Commission and Report*, http://www.abanet.org/cpr/e2k/e2k-ov_mar02.doc (last visited May 8, 2009) ("The Commission was also mindful of . . . special concerns of lawyers in nontraditional practice settings . . . .").

110. Public pressure was explicitly cited by the ABA as a reason behind the last two major revisions of the Rules—the "Ethics 2000" changes and the August 2003 changes to Rules 1.6 and 1.13, which resulted in part from fear that Congress might act to federalize the regulation of lawyers. *See generally* A.B.A., REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY (Mar. 31, 2003),

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began to scale back the rhetoric of "entire devotion" and "warm zeal."[111] Yet courts and the legal profession adhere to client-centered loyalty, resulting in the current gap between the Rules' and *Restatement*'s relatively narrow approaches to loyalty and the broad perspective evident in case law.

While the historical perspective certainly explains how changing moral sensibilities and the paradigm shift in the practice of law brought about the expansive transformation in the meaning and scope of attorney loyalty to clients,[112] it fails to persuasively justify client-centered loyalty as a contemporary cornerstone of the practice of law. As John R. Dos Passos and Reginald Heber Smith remind us, lawyers owe clients and the public a compelling accounting of their practice realities, including loyalty to clients.[113]

The Rules and the *Restatement* have abandoned "entire devotion" and "warm zeal."[114] Case law asserts but does not

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http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf (reporting the results and recommendations of an ABA task force charged with studying "the dialogue now occurring among regulators, legislators, major financial markets and other organizations focusing on legislative and regulatory reform to improve corporate responsibility" in the wake of scandals linked to Enron's bankruptcy and related situations); Charlotte (Becky) Stretch, *Overview of Ethics 2000 Commission and Report*, http://www.abanet.org/cpr/e2k/e2k-ov_mar02.doc (last visited May 8, 2009) (noting that during the 2001 revision period, "[t]he Commission was also mindful of . . . increased public scrutiny of lawyers").

111. *See* Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1166–68 (2006) (describing that as codes of professional conduct evolved, "zeal as an American rule began to wither, at least in its written expressions" and further noting the gradual distancing between codes of professional conduct and the notion of zeal).

112. Client-centered loyalty was subsequently reinforced by demand-side pressures on lawyers, such as the rise of large corporate clients who grew increasingly powerful vis-à-vis their outside counsel, the rise of in-house counsel as an alternative to outside general counsel and increased competitiveness in the market for legal services. *Cf.* ANTHONY T. KRONMAN, THE LOST LAWYER 271–314 (3d prtg. 1995) (discussing the effect the development of the corporate model of law has had on notions of attorney loyalty to clients and the competing interests that have shaped notions of loyalty).

113. *See* JOHN R. DOS PASSOS, THE AMERICAN LAWYER: AS HE WAS—AS HE IS—AS HE CAN BE 115–63 (Fred B. Rothman & Co. 1986) (1907) (discussing in detail a lawyer's duties and obligations to the state, the court, and the client); Reginald Heber Smith, *Survey of the Legal Profession: Its Scope, Methods and Objectives*, *in* ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES, at vii, vii (1953) ("[Lawyers] are the stewards of all the legal rights and obligations of all the citizens. It is incumbent on stewards, if they are to be faithful to their trust, to render an accounting from time to time.").

114. *See* Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1166–68 (2006) (describing the gradual distancing between codes of professional conduct and the notion of zeal).

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explain broad attorney loyalty to clients. Because the legal profession bears the burden of justifying loyalty, the failure of the "law of loyalty" to account for a client-centered duty of loyalty is disappointing. But it does not, in and of itself, rule out the possibility that such a broad interpretation of loyalty is possible. Can a client-centered approach to loyalty be justified?

B. *Justifying Client-Centered Loyalty*

An initial obstacle in accounting for client-centered loyalty is that its key proponents—lawyers and judges—tend not to actively participate in the academic discourse. Because academic defenders of broad loyalty are few, justifying broad loyalty to clients is left to those who do not believe in the cause.[115]

Nonetheless, defending the core of attorney loyalty to clients—avoidance of conflicts of interest, communications, competence, and diligence—is not a particularly challenging task. The Rules and *Restatement* offer ample support for these components of loyalty. "A lawyer is a fiduciary" retained to help clients secure legal rights[116] and vindicate causes.[117] In order to effectively represent clients, a lawyer must avoid conflicts of interests inconsistent with clients' interests,[118] pursue the clients' objectives diligently,[119] and act with the requisite "legal knowledge, skill, thoroughness and preparation."[120] Furthermore, loyalty to clients encourages clients to communicate fully with the lawyer—"even as to embarrassing or legally damaging subject matter"[121]—information necessary to ensure successful representation.[122]

Justifying confidentiality as a component of loyalty is somewhat

115. *See, e.g.*, Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1190–97 (2003) (developing and subsequently rejecting justifications for client-centered loyalty).

116. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b (2000).

117. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2008).

118. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 6 (2008).

119. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2008).

120. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008).

121. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2008).

122. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 (2008) (outlining the proper level of attorney-client communication); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. e (2000) ("The responsibilities entailed in promoting the objectives of the client may be broadly classified as duties of loyalty, but their fulfillment also requires skill in gathering and analyzing information and acting appropriately.").

more tricky.[123] While the basic rationale for confidentiality postulated by Rule 1.6—that it plays an important role in fostering trust which in turn encourages clients to share all relevant information with their attorneys allowing for effective representation—is generally accepted,[124] Comment 2 to Rule 1.6 also suggests that confidentiality is justified on the ground that it allows lawyers to dissuade clients from wrongdoing.[125] The comment offers no empirical support for this justification, and commentators have pointed out that, increasingly, lawyers are not in a position to try to dissuade clients from wrongdoing, and that there is no evidence that lawyers either try to or are successful in doing so.[126] More importantly, while the doctrine of confidentiality is generally accepted as an important and useful element of the attorney-client relationship,[127] there is significant

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123. *See, e.g.*, L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 914–17 (1980) (recognizing some of the pitfalls that may occur because of attorney loyalty to clients, such as a lessening of the attorney's duty of loyalty to the court and society and allowing an attorney to "justify his lack of candor or fairness on the basis of the client's right of confidentiality which the lawyer had a moral obligation to respect").

124. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2008).

125. *Id.*

126. *See, e.g.*, ANTHONY T. KRONMAN, THE LOST LAWYER 276–77 (3d prtg. 1995) (lamenting the demise of the "lawyer statesman" and arguing that increased specialization and competition in the market for legal services have diminished the ability of lawyers to play the role of strategic advisors and exercise meaningful influence over clients).

127. By no means is confidentiality universally accepted. Starting with Jeremy Bentham's critique of the attorney-client privilege on the grounds that it only benefits the guilty, many have challenged the desirability of confidentiality. *See* 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 302–04 (Fred B. Rothman & Co. 1995) (1827) (discussing the relationship between lawyer and criminal defendant and arguing that, in some circumstances, society as a whole is harmed by attorney-client confidentiality because the attorney may know that the client is guilty but may not relate such information to the court, thus allowing a guilty individual to possibly escape conviction); *see also, e.g.*, Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 22–26 (1998) ("My argument is similar to Bentham's but goes further.... [T]he [attorney-client] privilege makes it more difficult for the innocent credibly to communicate that they have nothing to hide."); William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1454 (2006) ("Corporate confidentiality is dead, and the [B]ar's attempt to suggest that things could be otherwise is an exercise in myth making."); William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243, 280–82 (1998) (pointing out that while allowing a lawyer to give confidential advice to a client may dissuade some clients from violating the law because of a frank discussion of possible punishments, such confidential communications may actually induce other clients to break the law because the range of possible punishments is "much lower than expected"). *But*

disagreement as to its appropriate scope and exceptions.[128]

Defending "entire devotion" and "warm zeal" as elements of attorney loyalty to clients necessitates defining the meaning of loyalty beyond avoidance of conflicts, communications, competence, diligence, and some protection of confidentiality. That is, what does "entire devotion" and "warm zeal" actually entail? Bernstein argues that zeal includes commitment to one side, or partisanship and passion.[129] Others have defined it to include devotion, intensity, enthusiasm, and diligence.[130] Still, what would all of these professional qualities actually amount to?

The most explicit definition of client-centered loyalty is advanced by Pepper, who argues: "If the conduct which the lawyer facilitates is above the floor of the intolerable—is not unlawful—then . . . what the lawyer does is a social good. The lawyer is the means to first-class citizenship, to meaningful autonomy, for the client."[131] In other words, Pepper asserts that because it enhances client autonomy, client-centered loyalty calls upon lawyers to push the legal envelope on behalf of clients subject only to the "intolerable," which he defines to be the unlawful.[132]

An example might be useful. Suppose a lawyer represents an entity client regarding a prospectus filing with the Securities and Exchange Commission (SEC) in connection with a future initial public offering. Assume that as a result of a loophole in the securities laws, the client is allowed to omit a damaging material fact from its prospectus. Assume further that given the overall goal of the securities laws to ensure disclosure of all material information to the investing public,[133] it is clear to the lawyer that

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see generally Stephen Pepper, *Why Confidentiality?*, 23 LAW & SOC. INQUIRY 331 (1998) (providing a thoughtful defense of attorney-client confidentiality).

128. *See* Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension Between Confidentiality Requirements and Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199, 203–07 (2007) (summarizing the expansion of confidentiality and providing examples of critiques of confidentiality by courts and commentators).

129. *See* Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1171–75 (2006) (arguing that attorneys should exhibit partisan commitment and passion when representing clients).

130. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 6.2 (3d ed. Supp. 2003).

131. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617.

132. *Id.*

133. *See, e.g.*, Noreen R. Weiss, *Rule 10b-5 and the Corporation's Duty to Disclose Merger Negotiations: A Proposal for a Safe Harbor from the Storm of Uncertainty*, 55

failing to disclose the material fact in question, while not a technical violation of the securities laws, contradicts their stated purpose. What would client-centered loyalty require of a lawyer in this situation?

Note that the situation is quite different from an example regarding whether a lawyer ought to advise a client that she can assert the statute of limitations to escape paying back a loan to a poor lender. In this latter scenario, the only open question is the moral decision facing the client because the law is clear and intends to give a client the right to assert such a claim.[134] Furthermore, the stated goal of the statute of limitations is to promote reliance, efficiency, and finality in legal proceedings, as well as to economize judicial resources.[135] To be clear, the purpose of the statute of limitations is not to ensure the equitable paying back of loans. Thus, advising the client about the possibility of asserting the statute as a defense violates neither the law nor its spirit (although it might violate moral notions of fairness and justice).[136]

Client-centered loyalty seems to suggest that an attorney should advise the client about the loophole in the securities laws which would allow omission of the damaging material fact from its

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FORDHAM L. REV. 731, 732 (1987) ("The primary purpose of the securities laws is to protect investors by ensuring that they have an intelligent basis to form decisions regarding the purchase or sale of securities. To achieve this goal, the securities laws set up an intricate system for timely disclosure of material information." (citations omitted)).

134. To be clear, the statute of limitations is not intended to frustrate the paying back of loans. Nonetheless, the ability of debtors to assert the statute is not a loophole, but rather a contemplated outcome that the statute tolerates.

135. *See* Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 585 (2008) ("The primary purpose of a statute of limitations is fairness to the defendant and efficiency of the litigation process . . . ." (citation omitted)); *see also* Amelia Boone, Comment, *It's Not Too Late: Applying Continuing-Violation Theory to the Designation of Critical Habitat Under the ESA*, 83 WASH. L. REV. 403, 423 (2008) ("[T]he underlying purposes of the federal statute of limitations [are] 'avoiding stale claims, achieving finality, and protecting those who rely on the law.'" (citation omitted)).

136. Simon might argue that construing the purpose of the statute of limitations is a question of framing. While a narrow framing of the statute will allow asserting the statute as a defense to escape paying back a just debt, a broad framing of the statute consistent with the overall goals of contract law to facilitate and fulfill promises may not necessarily allow escaping the debt. *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1085–90 (1988) (discussing the libertarian and regulatory approaches to ethical decisionmaking and their preferences for narrow and broad framing of ethical issues, respectively).

prospectus and should help the client pursue such a misleading (but not illegal) filing with the SEC.

What accounts for this kind of broad loyalty? Monroe Freedman, a prominent advocate of client-centered loyalty, argues that in the context of the adversary system, entire devotion to clients supports client autonomy and zealous advocacy.[137] In the best defense of client-centered loyalty outside of the adversarial context, Pepper argues that in a highly regulated society, access to the law is a condition for first-class citizenship.[138] Because the law tends to be complex and therefore outside of the reach of nonlawyers, access to the law requires meaningful access to lawyers,[139] which in turn requires that clients trust lawyers enough to share with them all relevant information relating to the representation. Finally, such trust is not possible without the promise of client-centered loyalty.[140]

Critics have argued that while enhancing client autonomy is a desirable goal, it is by no means the only goal nor an absolute one.[141] Thus, even if client-centered loyalty is justified on the grounds that it enhances client autonomy, it does not mean that loyalty to clients should reach "entire devotion," especially outside of the context of the adversary system, in which it is kept in check by opposing counsel and the lawyer's duties to the court.[142]

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137. *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 71–72 (3d ed. 2004) (discussing client autonomy and zealous representation and stating that "[t]he ethic of zeal is . . . pervasive in lawyers' professional responsibilities because it informs all of the lawyer's other ethical obligations with 'entire devotion to the interest of the client'"). *See generally* Monroe H. Freedman, *The Trouble with Postmodern Zeal*, 38 WM. & MARY L. REV. 63 (1996) (providing Freedman's staunch defense of the adversarial system in the face of postmodern criticism); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000) (detailing another commentator's faith in the adversary system by examining and commending the work of criminal defense attorney Marvyn Kornberg in a highly publicized criminal case in New York).

138. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617 ("Put simply, first-class citizenship is dependent on access to the law.").

139. "Our law is usually not simple, usually not self-executing. For most people most of the time, meaningful access to the law requires the assistance of a lawyer." *Id.*

140. *Id.* at 616–18.

141. *See* David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 639 ("Pepper appears to have blurred the crucial distinction between *the desirability of people acting autonomously* and *the desirability of their autonomous act.*").

142. *Cf. id.* ("[S]ome things autonomously done are not morally right."). *But see*

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Pepper is careful not to endorse all instances of pushing the legal envelope on behalf of clients, emphasizing the line between explaining the law and offering legal advice and other forms of assistance. He writes:

> Providing the client with knowledge of the law and what that means for her options may in fact motivate or assist her in unlawful conduct .... Keeping that distinction in mind—knowing that providing knowledge of the law and its impact on the client does not entail or require further, more active assistance—is important both for guiding lawyers in their difficult decisions and for understanding the justification for lawyer-client confidentiality.[143]

To Pepper, client-centered loyalty includes providing clients with all the relevant information about the law;[144] nonetheless, Pepper does develop a "checks-and-balances" apparatus designed to limit loyalty to clients.[145] After providing the client with the relevant information about the law, Pepper argues that lawyers ought to engage in a moral dialogue with the client and attempt to dissuade the client from wrongdoing.[146] If the moral dialogue fails, the lawyer may contemplate withdrawal or other options available to her.[147]

Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. B. FOUND. RES. J. 657, 662–68 (conceding that client autonomy ought to be constrained, but arguing that lawyers should not informally restrict clients' autonomy).

143. Stephen Pepper, *Why Confidentiality?*, 23 LAW & SOC. INQUIRY 331, 337 (1998); *see also* Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1169 (2006) ("Critics have accused zeal of fueling partisan excesses, giving a platform to bullies, and bringing falsity into venues that would otherwise, presumably, be clean and honest. Not true .... Wrongful conduct is wrong by itself, and has no necessary connection to zeal.").

144. *See* Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1547–48 (1995) (averring "[t]he 'rule of law' ... requires promulgation" and "the lawyer's role is to be the conduit for that promulgation" by making the law accessible and known to her clients); *see also* Stephen Pepper, *Why Confidentiality?*, 23 LAW & SOC. INQUIRY 331, 334 (1998) (noting the law can neither be known nor be effective "without the assistance of a lawyer").

145. *See* Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1554–87 (1995) (discussing a series of distinctions to help determine "what information about the law to give the client, and what not to give").

146. *Id.* at 1563–64.

147. *See* MODEL RULES OF PROF'L CONDUCT R. 1.16 (2008) (delineating situations where it is proper for a lawyer to decline representation or to withdraw from representing a client, including where the representation would result in "violation of the rules of professional conduct or other law" or "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement").

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Applying these justifications to our example, Freedman would likely argue that "entire devotion" mandates that the lawyer help the client omit the damaging fact from its prospectus filing with the SEC. Pepper, on the other hand, would suggest that after advising the client regarding the possibility of filing the misleading prospectus, the lawyer should engage in a moral dialogue with the client and attempt to dissuade the client from such course of conduct if, for example, it is likely to result in substantial injury to future investors.

At the end of the day, client autonomy fails as a compelling justification for client-centered loyalty, at least if "entire devotion" means more than providing the client with relevant information about the law and assisting the client to act on the information provided. This broad interpretation of loyalty fails as a general justification because even defenders of autonomy-based loyalty would likely concede that in particular circumstances a lawyer should attempt to dissuade the client from wrongdoing and, if unsuccessful, might have to take additional remedial action.[148]

While client-centered loyalty is ultimately unjustified as a general proposition and requires ad hoc accounting in particular circumstances, it nonetheless has powerful consequences. Client-centered loyalty supports a professional ideology that calls for

148. *See* Andrew L. Kaufman, *A Commentary on Pepper's "The Lawyer's Amoral Ethical Role,"* 1986 AM. B. FOUND. RES. J. 651, 655 ("[T]here is no need to make a choice for all cases .... [I]t is a good thing not to have a model that justifies, at least presumptively, an amoral or moral role."). *But see* Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. B. FOUND. RES. J. 657, 658 (asserting that lawyers need "a coherent structure to apply to the ethical problems they confront if their choices are to be educated and thought through"). Kaufman persuasively points out that abstract reasoning hardly ever provides a compelling justification in particular cases and that lawyers, unlike philosophers, must exercise their professional judgment in an ad hoc fashion to determine an appropriate course of conduct in specific circumstances. Andrew L. Kaufman, *A Commentary on Pepper's "The Lawyer's Amoral Ethical Role,"* 1986 AM. B. FOUND. RES. J. 651, 655. *Compare* David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 639 (asserting that helping a client to do wrong is wrong regardless of the individual autonomy involved in the action), *with* Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. B. FOUND. RES. J. 657, 672–73 (arguing Luban oversimplifies the discussion by restricting his examples to actions wrong by their very nature, rather than actions wrong by interpretation). Pepper distinguishes between those actions in which "there is a clear and strong consensus" of wrongfulness and those in which there may be a "technical legal violation [that] may not be wrongful in any other significant sense." Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1576–80 (1995).

pushing the legal envelope on behalf of clients, thus generating a professional ethos of lawyers' identification with clients, which in turn makes it less likely that lawyers will attempt to engage in the kind of moral dialogue and counseling that Pepper calls for as a check on loyalty to clients. Client-centered loyalty, therefore, must be justified not only because the legal profession bears the burden of accounting for its practice, but because of the profound impact it has on the practice of law. In the words of Freedman and Smith, "The ethic of zeal is . . . pervasive in lawyers' professional responsibilities because it informs all of the lawyer's other ethical obligations with 'entire devotion to the interest of the client.'"[149]

Before taking the first step in moving loyalty forward, sections C and D offer a brief comparative analysis of loyalty in two arenas in which the concept has been thoroughly explored: corporate law and moral philosophy.

C. *The Duty of Loyalty in Corporate Law*

> [T]o say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations?[150]

The classic case of *Guth v. Loft, Inc.*[151] explored the scope of the duty of loyalty owed by corporate agents to the entity:

> Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. . . . [P]ublic policy . . . has established a rule that demands of a corporate officer or director . . . the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation . . . . [A]n undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest.[152]

The duty of loyalty is thus essentially a duty to refrain from conflicts of interest, narrowly defined to mean that an agent must place the principal's interest ahead of her own "to prevent the

149. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 71 (3d ed. 2004).

150. SEC v. Chenery Corp., 318 U.S. 80, 85–86 (1943).

151. Guth v. Loft, Inc., 5 A.2d 503 (Del. 1939).

152. *Id.* at 510.

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pursuit of inconsistent self-interest" by the agent,[153] and to "[g]enerally . . . impose[] an obligation on the corporate manager to avoid conflict of interest transactions."[154] Particularly, the duty of loyalty is not construed broadly to encompass extensive zeal. While *Guth* speaks in the familiar lofty terms of "an undivided and unselfish loyalty to the corporation,"[155] the actual content of the duty boils down to avoidance of conflicts of interest.[156]

The narrow construction of the content of loyalty is the result of a dynamic trend spanning decades. Not only was the duty initially defined narrowly to include little more than avoidance of conflicts, but over time the measuring stick for conflicts of interests has been reduced from a strict "automatic voidable" rule in case a corporate agent was tainted by a conflict of interests to the "fairness" test, which allows corporate agents to cure the conflict in question.

As late as 1880, American corporate law held that "any contract between a director and his corporation was voidable at the instance of the corporation or its shareholders, without regard to the fairness or unfairness of the transaction," because such a contract constituted a conflict of interests and a breach of the agent's duty of loyalty.[157] By 1910, however, "a contract between

153. Rebecca Lee, *In Search of the Nature and Function of Fiduciary Loyalty: Some Observations on Conaglen's Analysis*, 27 OXFORD J. LEGAL STUD. 327, 329, 333 (2007). "It is now generally accepted that the distinguishing obligation of a fiduciary is an obligation of loyalty, and that fiduciary loyalty relates to prohibition of improper profits and avoidance of conflicts of interests." *Id.* at 327 (citations omitted).

154. David S. Ruder, *Duty of Loyalty—A Law Professor's Status Report*, 40 BUS. LAW. 1383, 1386 (1985); *see also* E. Norman Veasey, *Duty of Loyalty: The Criticality of the Counselor's Role*, 45 BUS. LAW. 2065, 2067 (1990) ("The key threshold inquiry in any duty of loyalty problem is whether the director has an interest in the transaction."). While outdated regarding some of the details of the law, Ruder's article establishes that the duty of loyalty is defined narrowly around avoidance of conflicts of interests. *See generally* David S. Ruder, *Duty of Loyalty—A Law Professor's Status Report*, 40 BUS. LAW. 1383 (1985) (discussing the duty of loyalty in corporate relationships).

155. *Guth*, 5 A.2d at 510.

156. *See* Rebecca Lee, *In Search of the Nature and Function of Fiduciary Loyalty: Some Observations on Conaglen's Analysis*, 27 OXFORD J. LEGAL STUD. 327, 327 (2007) (stating "the distinguishing obligation of a fiduciary is an obligation" relating to the "prohibition of improper results and avoidance of conflicts of interests"); David S. Ruder, *Duty of Loyalty—A Law Professor's Status Report*, 40 BUS. LAW. 1383, 1386 (1985) (noting that the duty of loyalty is defined narrowly around avoidance of conflicts of interest); E. Norman Veasey, *Duty of Loyalty: The Criticality of the Counselor's Role*, 45 BUS. LAW. 2065, 2067 (1990) ("The key threshold inquiry in any duty of loyalty problem is whether the director has an interest in the transaction.").

157. Harold Marsh, Jr., *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35, 36, 39–40, 43 (1966).

Wald: Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clie

a director and his corporation was valid if it was approved by a disinterested majority of the directors and was not found to be unfair or fraudulent by the court if challenged."[158] In other words, "automatic voidable" was replaced by a "conditional voidable" rule, allowing a disinterested board to cure the defect. Thus, "a contract in which a majority of the board was interested was voidable at the insistence of the corporation or its shareholders without regard to any question of fairness."[159] Finally, by 1960 the modern rule was that

> no transaction of a corporation with any or all of its directors was automatically voidable ... whether there was a disinterested majority of the board or no; but that the courts would review such a contract and subject it to rigid and careful scrutiny, and would invalidate the contract if it was found to be unfair to the corporation.[160]

Interestingly, the narrowing of the duty of loyalty owed by corporate agents—transformed from a prophylactic rule to a mixture of form and substance—took place between 1880 and 1960, the very same time frame in which attorney loyalty to corporate clients was being expanded. Further, Dibadj argues that loyalty of corporate agents continues to shrink as it is being replaced by contract law,[161] once again contrary to the increasingly expansive interpretation of attorney loyalty to clients asserted by the practicing Bar.[162]

158. *Id.* at 39–40.

159. *Id.* at 40 (citation omitted).

160. *Id.* at 43. Sommer, alluding to Marsh, concludes: "The statutes are invariably narrow in their scope. They generally are intended simply to negate the old common law rule that a transaction between a director and his corporation is per se void or voidable, and state the procedures or circumstances under which that doctrine may be avoided." A.A. Sommer, Jr., *The Duty of Loyalty in the ALI's Corporate Governance Project*, 52 GEO. WASH. L. REV. 719, 722 (1984).

161. *See* Reza Dibadj, *The Misguided Transformation of Loyalty into Contract*, 41 TULSA L. REV. 451, 452 (2006) ("[T]he law of unincorporated associations ... is transforming the duty of loyalty into a contractarian construct."). Dibadj further argues that "the duty of loyalty needs to be strengthened, not watered down." *Id.*

162. Drawing a quick analogy from the duty of loyalty of corporate agents to attorney loyalty may be misleading. That the corporate agent's duty of loyalty narrowly consists of avoidance of conflicts, diligence, and communications is in decline and is being replaced by explicit contracting between principal and agent is revealing, but should not automatically lead to the conclusion that attorney loyalty ought to be narrowed. As we shall see in Part IV(B) of this Article, lawyers are not "ordinary agents" but rather "limited agents," who owe duties to the legal system and the public.

The analysis of the duty of loyalty of corporate agents casts serious doubts on the justifications for broad attorney loyalty to clients. First, Dibadj—generally a critic of the narrowing of the fiduciary duty of loyalty owed by corporate agents—nonetheless acknowledges that contract law may be appropriate as a substitute for loyalty in the case of sophisticated parties who may not need the protection of default fiduciary duties.[163] Tellingly, however, expansive client-centered loyalty is asserted by corporate lawyers on behalf and to the benefit of large corporate clients, the very same clients that according to contractarians (and even their critics, including Dibadj) will do just fine with contracts.[164]

Second, a justification for the duty of loyalty in the corporate sphere is that "[s]ince the shareholders do not have the power to control the day-to-day operation of the corporation, the law has imposed obligations on corporate managers to act in a manner consistent with the trust and confidence reposed in them."[165] One might be tempted to argue that a similar rationale applies and justifies the duty of loyalty of attorneys to clients: since the client-principal does not have the power to control the day-to-day operations of the attorney-client relationship—that is, the manner in which goals are to be pursued[166]—fiduciary duties are imposed on the lawyer-agent, including the duty of loyalty.

While the divorce between ownership and control is desirable in the corporate context,[167] thus rendering fiduciary duties

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163. *See* Reza Dibadj, *The Misguided Transformation of Loyalty into Contract*, 41 TULSA L. REV. 451, 474 (2006) (recognizing several commentators who argue that sophisticated parties should be allowed to contract around the duty of loyalty).

164. *Cf.* JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 228 (2006) ("[L]awyers in large firms undergo a socialization process that leads them to 'strongly identify' with their corporate clients' interests." (citing ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 5 (1988))). *See generally* Stephen L. Pepper, *Lawyers' Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181, 194–95 (1999) (discussing the relevancy of the type and size of a client in determining the manner in which moral dialogue takes place between a lawyer and his client).

165. David S. Ruder, *Duty of Loyalty—A Law Professor's Status Report*, 40 BUS. LAW. 1383, 1385 (1985).

166. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2008) (stating that clients retain control over the "objectives of representation," but leaving day-to-day operations to the attorney).

167. *See generally, e.g.*, ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (spec. ed. 1993) (providing a thorough examination of trends in corporate development and arguing that in publicly-

necessary, clients in the attorney-client relationship are supposed to stay in control, at least with regard to the goals of the relationship.[168] To the extent that clients retain—at least in theory—more control over the objectives of the relationship compared to shareholders' control over the entity, it would seem that lawyers should owe clients "less" rather than "more" loyalty.

Finally, it is noteworthy that in corporate law loyalty is supposed to protect principals against disloyalty by agents,[169] whereas in the context of the attorney-client relationship, client-centered loyalty is often invoked as a weapon by the client-principal and lawyer-agent against third parties, thus further questioning the justification for broad attorney loyalty to clients.[170]

D. *The Duty of Loyalty Outside of the Law*

Neither the "law of attorney loyalty" nor corporate law supports a broad interpretation of attorney loyalty to clients. We turn finally to studies of loyalty in other contexts in search of justifications for client-centered loyalty.

> If you are loyal to something, then you probably favor it, in one way or another, in your actions. You might promote its interests, treat it with respect or veneration, follow its orders, or act as its advocate. But loyalty is not just a matter of how you act; it is also a matter of how you think, and how you are motivated.[171]

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held corporations, the divorce of ownership from control is inevitable and desirable); J.A. LIVINGSTON, THE AMERICAN STOCKHOLDER (1958) (providing another commentator's belief that separation of ownership and control in the corporate context is beneficial); Melvin Aron Eisenberg, *The Legal Roles of Shareholders and Management in Modem Corporate Decisionmaking*, 57 CAL. L. REV. 1, 33–60 (1969) (discussing the divorce of ownership and control in the corporate context and noting that in the absence of such a divorce, "'a firm may reach a size so great that, with a few exceptions, its control is beyond the financial means of any individual or group'" (citation omitted)).

168. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2008) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . . .").

169. *Cf.* David S. Ruder, *Duty of Loyalty—A Law Professor's Status Report*, 40 BUS. LAW. 1383, 1385 (1985) ("Since the shareholders do not have the power to control the day-to-day operation of the corporation, the law has imposed obligations on corporate managers to act in a manner consistent with the trust and confidence reposed in them.").

170. *See* Reza Dibadj, *The Misguided Transformation of Loyalty into Contract*, 41 TULSA L. REV. 451, 451–52 (2006) (noting principals are protected from an abuse of delegated power by the duty of loyalty); Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 6–7 (1998) (arguing that confidentiality allows client and lawyer to "collude" against third parties).

171. SIMON KELLER, THE LIMITS OF LOYALTY, at vii (2007).

Philosophical accounts of loyalty take the form of either a universalist morality, a theory based upon impartial principles,[172] or a moral agency, in which "loyalty is a central human need .... [One] need[s] to be loyal ... in order to understand or construct [her own] identity ...."[173] The philosophical literature on loyalty is vast, yet both types of accounts shed little light on professional loyalties, let alone on attorney loyalty to clients. Attorney-client loyalty tends to be partial towards clients and is thus inconsistent with universal approaches. Attorney-client loyalty is also explicitly instrumental and is therefore inconsistent with moral agency reasoning. Instead, attorney loyalty to clients is more akin to the loyalty of corporate agents, at least in the sense that the concept involves an agency problem—not moral agency—which in turn suggests that the Bar may have a high burden to meet in justifying its conception of loyalty.

As we have seen, history provides an explanation for, but not a justification for, broad client-centered loyalty. The lessons from corporate law tend to suggest that loyalty to clients ought to be narrowing, not expanding, and philosophical accounts of loyalty do not tend to shed additional light on attorney loyalty to clients.

IV. MOVING FORWARD WITH LOYALTY

Justifying attorney loyalty to clients turns out to be a difficult chore. While ample support exists for certain components of loyalty—avoidance of conflicts, communications, competence, diligence, and confidentiality—a broader conception of client-centered loyalty, while popular with the practicing Bar, cannot be easily defended. And yet the enormity of the task at hand does not negate the legal profession's burden of accounting for loyalty, especially given the role it plays in shaping professional ethos, ideology, and identity.

Moving forward requires developing an account of the scope and limits of attorney loyalty to clients, which in turn will depend on, and be a part of, a general theory of lawyering. The problem is

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172. *See id.* at viii–ix (defining the theory of "universalist morality" as the use of impartial moral principles).

173. *See id.* at ix; *cf.* GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS 25 (1993) ("In acting loyally, the self acts in harmony with its personal history."); JOSIAH ROYCE, THE PHILOSOPHY OF LOYALTY, at viii (1908) (presenting "the spirit of loyalty as the central spirit of the moral and reasonable life").

that no such generally accepted theory of lawyering exists,[174] and given the increased specialization and the resulting fragmentation of legal practice, as well as the growing recognition regarding the importance of context,[175] perhaps such a grand theory of law practice may never emerge. Indeed, one might be tempted to justify loyalty not from the top down, but from the ground up, offering varying defenses of loyalty in different legal contexts.

For example, client-centered loyalty might be easy to defend in the context of the adversary system with its "checks-and-balances," such as the loyalty of opposing counsel to her client, and the existence of a neutral court supervising the proceeding. This is especially true in the criminal arena, where loyalty may also be justified given the power of the state vis-à-vis the defendant.[176] Thus, client-centered loyalty might be justified while representing criminal defendants before a court, but not while counseling corporate clients in the conference room.[177] Or one might follow the two hemispheres' insight[178] to develop different accounts of

174. *Cf.* Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470, 480–82 (2008) (summarizing three typical approaches to describing legal professionalism). Quite a few prominent legal ethics scholars have attempted to develop such a theory. *See generally* THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT (1981) (proposing a system of legal ethics based on Christian moral principles); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 195–215 (1998) (suggesting a "Contextual View" of legal ethics consisting of "a disciplinary regime consisting largely of contextual norms, and a set of rules designed to encourage voluntary ethical commitments and strengthen the forces that make for informal enforcement of such commitments").

175. *See* David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 515 (1990) (discussing the importance of context in "interpret[ing] and apply[ing] legal rules").

176. *See generally* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS (3d ed. 2004) (discussing the adversary system's role in a lawyer's duty to her client).

177. *See generally* Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185 (2003) (discussing the role that attorney conduct played in the Enron scandal, and arguing that client-centered loyalty in the corporate context often allows "lawyers [to] assist corporate managers [in] inflicting enormous damage and then argue, often plausibly, that they are only doing the job they are supposed to do").

178. *Cf.* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 37–54 (1982) (defining "the two hemispheres" as the distinction between those attorneys working primarily for corporations and those working primarily for smaller businesses and individuals, and discussing "[t]he organization of lawyers' work" among different specializations); JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 29–47 (2005) (finding that lawyers

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loyalty for individual clients, as opposed to organizational clients. Accordingly, broader attorney loyalty to clients might be more appropriate in the representation of individual clients by solo practitioners, as opposed to the representation of entity clients by large law firms.

Such fragmented accounts of loyalty, however, risk winning the loyalty battle while losing the war for the future of the Bar as a unified profession. An integrated concept of attorney loyalty to clients across practice contexts stems from the fundamental conception of a lawyer as an advocate of client interests, an understanding that informs all of the lawyer's other ethical obligations, role, and professional ideology. Giving up on a cohesive notion of attorney loyalty to clients constitutes the first step in giving up on the idea of one legal profession and the ideal of the "One Bar."[179] While this Article does not advance a theory of attorney loyalty to clients, it does develop an agenda for future research by offering the following guiding principles intended to move loyalty forward.

A. *Distinguishing Under-Loyalty from Over-Loyalty*

The problem of attorney over-loyalty to clients is separate and distinct from the traditional concern addressed by the duty of loyalty—under-loyalty of agents to principals.[180] While some

work in two fairly distinct hemispheres—individual and corporate—and that mobility between the hemispheres is relatively limited).

179. *Cf.* Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension Between Confidentiality and Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199, 269 (2007) (describing an "institutional transformation of practice arenas" that can complicate the application of existing rules of professional conduct).

180. An informative historical example of over-loyalty can be found in Lord Brougham's statement regarding Queen Caroline's defense against the bill of divorce submitted by King George IV. Lord Brougham stated:

> An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save that client at all expedient means—to protect that client at all hazards and costs to all others, and among others to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other.

L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 909 (1980).

One of the more glaring examples of under-loyalty is the story of Arnold Friedman's representation by Peter Panaro in a case where Friedman and his son Jesse faced multiple charges of sexually abusing a child. *See* Abbe Smith, *Telling Stories and Keeping Secrets*, 8

agent-lawyers no doubt betray the interests of their principal-clients, client-centered loyalty features a unique challenge that the standard duty-of-loyalty doctrine was not meant to address.

Conceptually, distinguishing disloyalty from client-centered loyalty is important. In fact, many of the recent crisis claims involving lawyers' failure to stop clients from wrongful conduct and the resulting calls for attorneys acting as gatekeepers stem from confusing under-loyalty and over-loyalty. When lawyers serve the interests of the corporate agents who have the authority to hire and fire them at the expense of their clients—the corporate entity—they are being disloyal to their clients. The problem is one of a conflict of interests: being under-loyal to the client (the entity) in order to serve the interests of others (the corporate agent and the lawyer herself).[181] While the Rules are clear that a lawyer representing an entity client represents the entity and not its constituents,[182] there is ample evidence to suggest that many corporate attorneys and corporate agents alike either misunderstand or ignore this rule.[183]

Guarding against instances of attorney over-loyalty to clients has nothing to do with, and should not compromise, efforts to protect clients from under-loyalty.[184] Justifying client-centered loyalty only concerns the former. In other words, "entire devotion" to clients in the sense of pushing the legal envelope on behalf of clients at the expense of the legal system and the rule of law is the subject of inquiry pursued here.

D.C. L. REV. 255, 257–58 (2004) (relating Panaro's representation of Friedman). While being interviewed for a television documentary, "Panaro [felt] free to talk about everything from his revulsion toward Jesse's father [and co-defendant] to his belief that Jesse must have been guilty." *Id.* at 258.

181. *See generally* William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57 (2003) (discussing how a lawyer's responsibilities to organizational clients are affected by internal conflicts in the corporate context).

182. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2008) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.").

183. *See, e.g.*, Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143, 143–44, 173 (2002) (noting hundreds of corporate fraud cases involving lawyers' responsibilities and the harm in many lawyers' shifting loyalties from the client-entity to the client-entity's managers).

184. To be clear, the avoidance-of-conflicts component of loyalty to clients is well justified and is not in question as a measure of protecting clients from lawyers' disloyalty.

B. *Distinguishing "Ordinary Agency" from "Limited Agency"*

American corporate law renders corporate officers and directors ordinary agents tasked with the sole goal of acting in the best interests of the principal-entity, defined to be the best interests of its shareholders.[185] Corporate agents, in particular, do not serve the interests of, and do not owe fiduciary duties—loyalty or otherwise—to other constituencies such as creditors and employees.[186] Client-centered loyalty to the entity, subject to the law, makes sense given the mandate to the corporate agent, who serves only one client—the entity.

Lawyers, however, are under a more complex mandate. By definition, lawyers serve not only the interests of clients, but also owe allegiance to the courts, the legal system, and the public interest.[187] In other words, whereas corporate officers and directors are "ordinary agents," lawyers are "limited agents," in the sense that in addition to being agents of their principal-clients by virtue of their role and role-morality as attorneys, they owe duties to additional constituencies (such as the courts, the legal system, and the public), which should result in external constraints on client-centered loyalty.[188] Whatever the meaning and scope of attorney loyalty to clients—and even if it includes not only avoidance of conflicts, communications, competence, diligence,

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185. *See* Z. Jill Barclift, *Fuzzy Logic and Corporate Governance Theories*, 6 PIERCE L. REV. 177, 181–82 (2007) (discussing the relationship between corporate officers and directors with shareholders, and concluding "[s]enior officers are agents of the corporation and of the shareholders, and owe agent fiduciary duties—to act in the best interests of both").

186. *See* Jonathan C. Lipson, *Directors' Duties to Creditors: Power Imbalance and the Financially Distressed Corporation*, 50 UCLA L. REV. 1189, 1197–98, 1200–01 (2003) (discussing the duty of loyalty owed by corporate directors and stating that "[w]hen a firm is solvent, there is little reason to think that corporate directors should owe fiduciary duties to creditors"); Terry A. O'Neill, *Employees' Duty of Loyalty and the Corporate Constituency Debate*, 25 CONN. L. REV. 681, 681–86 (1993) (recognizing the general rule that "corporate directors owe their loyalty exclusively to the corporation and its shareholders, not to any other corporate constituency," while recognizing the goal of some reformers is to "make all members of the corporate community, including employees, creditors, local communities, and shareholders, the beneficiaries of the directors' duty of loyalty").

187. MODEL RULES OF PROF'L CONDUCT pmbl. para. 1 (2008) ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

188. *See id.* at 1–8 (citing lawyers' wide-ranging duties in their roles as public citizens, members of a learned profession, and officers of the legal system).

and the protection of confidentiality, but also "warm zeal" and "entire devotion"—it must be balanced against and constrained by the duties of lawyers as officers of the court, officers of the legal system, and public citizens.[189]

Distinguishing "limited agency" from "ordinary agency" helps avoid a pitfall that has stalled developments in the loyalty discourse. Following recent corporate debacles and allegations regarding the role corporate lawyers played in them, a gatekeeping cottage industry has emerged.[190] Proponents of the gatekeeping theory try to reinvent the role of lawyers by asserting lawyers owe duties to third parties, while their opponents warn against the end of the legal profession as we know it if these "extra" duties are added. Both sides seem to miss the point. Lawyers are not mere agents; rather, they are "limited agents," owing duties not only to clients but also to the public interest.[191] Therefore, there is nothing new about demanding external constraints on attorney loyalty to clients. The question, then, is not whether such constraints are warranted, but instead how to strike the appropriate balance in specific contexts and practice areas between the interests of clients and of non-clients.

Conceptually and historically, there is nothing new about perceiving lawyers as "limited agents." The historical decline of advocacy and the rise of corporate counseling, however, did complicate things. Implementing "limited agency" was easier to do in the advocacy context, because the adversary system provided a convenient institutional framework in which to impose limits of attorney loyalty to clients. Specifically, the presence of opposing

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189. Drawing the distinction between "ordinary agency" and "limited agency" helps explain the *Restatement*'s language. The *Restatement* notes: "The subject of this Chapter is, *from one point of view*, derived from the law of agency. It concerns a voluntary arrangement in which an agent, a lawyer, agrees to work for the benefit of a principal, a client." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2, introductory note (2000) (emphasis added). A lawyer is not a mere or ordinary agent. Thus the subject matter of the *Restatement* is not *exclusively* drawn from ordinary agency law. Rather, a lawyer is a "limited agent," or a constrained agent, whose conduct on behalf of clients is limited by obligations to the legal system and the rule of law.

190. *See, e.g.*, JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 4, 192–94 (2006) (questioning whether gatekeepers such as attorneys hired and paid by corporations can be trusted in their watchdog functions, and analyzing the distinctions between corporate lawyers and traditional advocates).

191. *See* MODEL RULES OF PROF'L CONDUCT pmbl. paras. 1–8 (2008) (describing attorneys' roles as representatives of clients, members of society in general, and officers of the legal system as a whole).

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counsel and a court demanding duties of candor and disclosure served as a check on zealous loyalty. The business conference room, by contrast, does not lend itself to the development and implementation of external constraints on attorney loyalty to clients. Counseling is often provided behind closed doors where no adversary is present as a check and there is no court present to demand competing loyalties. The future threat of litigation and the shadow of, for example, the SEC, is not enough of a balance, especially because such intervention takes place only ex post and is subject to significant constraints, such as evidentiary rules, the existence of private plaintiffs subject to the apparatus of derivative lawsuits or SEC budgetary and political constraints, etc.

"Limited agency" used to include the "officer of the court" and the "public citizen" constraints on client-centered loyalty. The move away from litigation and the adversary system as the paradigm for law practice, however, rendered the "officer of the court" meaningless for many lawyers who never appear before courts. Increased specialization and changing perceptions about the value of participation in public life and politics reduced the impact of the "public citizen" on the lives of many lawyers. The challenge of justifying client-centered loyalty lays in redefining lawyers' "limited agency" with content given changing practice realities.[192]

192. In contrast with the "limited agency" concept advocated in this Article, Patterson advocates a "reciprocal agency" or dual agency model in which agent-lawyers serve principal-clients and at the same time agent-clients serve principal-lawyers. *Compare* L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 914 (1980) ("[T]he . . . notion of the nature of the lawyer-client relationship can best be characterized as one of reciprocal agency rather than one of simple agency."), *with* David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 880–81 (1998) (arguing that a client is not "'an *agent of the lawyer*'" but agreeing that "[a]t a minimum . . . clients bear some responsibility *to lawyers* to discharge their own obligations responsibly"). The attempt to limit attorney loyalty to clients by holding lawyers accountable as principals to third parties for the consequences of their own over-loyalty to clients, and by making clients owe a fiduciary duty of loyalty as agents to attorneys is admirable, but ultimately not convincing because it is a fiction. Clients are simply not agents of lawyers. Patterson himself acknowledges the conceptual awkwardness: "The idea seems strange in view of . . . the awkwardness of characterizing the client as an agent of the lawyer." L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 914 (1980). Simply put, reciprocal agency is a concept that does not fit the reality of the attorney-client relationship.

C. *Lessons from the Adversary System*

Loyalty as a three-legged stool in the adversary system is based on the understanding that client-centered loyalty is grounded in an institutional setup and is subject to the rules of the institutional game.[193] In that sense, for example, offering perjury is considered "breaking the rules" of the adversarial game and is thus forbidden.[194] Importantly, in refusing to help clients commit perjury, lawyers are not being disloyal to clients; rather, such so-called "disloyalty" is constrained by the institutional setup.[195] Client-centered loyalty is justified within the adversarial context and therefore the rules of the adversary game must be obeyed.[196]

The adversary system teaches us that constraints on client-centered loyalty can be formulated in relatively narrow-fashioned rules, as opposed to open-ended standards, and that such rules need not compromise the premise of loyalty to clients. Thus, an attorney is primarily a representative of clients, but Rule 3.3 forbids a lawyer from knowingly presenting false evidence and requires a lawyer to take remedial action if such evidence is presented to the court.[197] Similarly, within the adversarial context, attorney-client communications per Rules 1.4 and 1.13(b)—in which an attorney attempts to dissuade a client from wrongdoing—are sometimes deemed insufficient, and Rules 1.6(b), 1.13(c), and 1.16 kick in, allowing a lawyer to disclose confidential information and withdraw.[198]

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193. *See generally* Richard Wasserstrom, *Lawyers As Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975) (arguing that justifications for role-morality are dependent upon the institutional setup within which the role is defined).

194. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2008) (explaining that an attorney who knows his client intends to commit perjury "shall take reasonable measures, including, if necessary, disclosure to the tribunal").

195. *But see* Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1471 (1966) ("[T]he accused who knows that he is guilty has an absolute constitutional right to remain silent. The moralist might quite reasonably understand this to mean that, under these circumstances, the defendant and his lawyer are privileged to 'lie' to the court in pleading not guilty. In my judgment, the moralist is right.").

196. *See generally* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975) (arguing that the justifications for a lawyer's moral role is often dependent on how the role is defined by the legal institution).

197. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2008).

198. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 (2008) (governing communications with clients); MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2008) (instructing organizational counsel to "proceed as is reasonably necessary in the best

In other words, the first lesson from the adversary system is that client-centered loyalty can be effectively and sufficiently curtailed by the Rules in a narrow fashion that keeps the underlying premise regarding the primary role of lawyers as representatives of clients' interests intact. In particular, curtailing client-centered loyalty need not involve open-ended and vague standards calling on lawyers to do "the right thing," akin to Canon 8 of the American Bar Association's superseded Model Code of Professional Responsibility.[199]

Returning to the example of a lawyer counseling a client who can get away with omitting a damaging material fact from a filing with the SEC, specific rules can be promulgated which will prohibit a lawyer from assisting such conduct. A rule of professional conduct similar to Rule 3.3 can forbid presenting the SEC with false material information, defining "presenting false material information" to include omission of all material facts, and mandate remedial action if such information is presented. Similarly, rules akin to Rules 1.6(b), 1.13(c), and 1.16 can allow a

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interest of the organization" if the lawyer knows that an officer or employee of the organization is involved in activity "that might reasonably be imputed to the organization, and that is likely to result in substantial injury to the organization"); MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2008) (allowing a lawyer to make disclosures of privileged information if withholding the information could lead to death or serious bodily harm, or if the disclosure would serve to prevent a client from committing a criminal act "that is reasonably certain to result in substantial injury to the financial interests or property of another"); MODEL RULES OF PROF'L CONDUCT R. 1.13(c) (2008) (allowing for disclosure by organizational counsel when the lawyer is otherwise unable to prevent "a violation of the law" that is "reasonably certain to result in substantial injury to the organization"); MODEL RULES OF PROF'L CONDUCT R. 1.16 (2008) (providing for situations in which a lawyer should refuse to represent, or withdraw from representing, "a client in order to maintain compliance with ethical guidelines").

199. MODEL CODE OF PROF'L RESPONSIBILITY Canon 8 (1979) ("A lawyer should assist in improving the legal system."); *see* MODEL CODE OF PROF'L RESPONSIBILITY EC 8-1 (1979) ("[L]awyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients." (footnote omitted)); MODEL CODE OF PROF'L RESPONSIBILITY EC 8-2 (1979) ("Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law."); MODEL CODE OF PROF'L RESPONSIBILITY EC 8-9 (1979) ("The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.").

lawyer to reveal confidential information or withdraw under some circumstances in situations where misleading information was filed with the SEC using the attorney's services.[200]

One consequence of the "limited agency" insight is that constraints on attorney loyalty to clients stem from lawyers' duties to the legal system and the public interest as public citizens, not from duties to third parties. In recent years, case law has begun to erode the privity requirement, allowing non-clients to sue lawyers for professional malpractice.[201] Importantly, expanding lawyers' duties to non-clients does not follow from the notion of constrained loyalty to clients. Lawyers are, first and foremost, representatives of clients. While the Rules acknowledge limited duties to non-clients,[202] such duties are the exception to the role-morality of lawyers. Limits on attorney loyalty to clients should be grounded in duties to the legal system and the public interest, not in duties to third parties.

Similarly, critics have attempted to build on the notion (and metaphor) of the lawyer as a gatekeeper whose goal is to actively prevent clients from pursuing certain kinds of conduct. Once again, limiting client-centered loyalty does not necessitate such a departure from the primary role of lawyer as a representative of her own clients' interests. To the extent that gatekeeping involves actively opposing the client on behalf of third parties, such a concept is not warranted by "limited agency." The adversary system teaches us that limiting client-centered loyalty need not, and should not, take the form of open-ended obligations to specific third parties. Instead, constraints on loyalty to clients should be

200. Indeed, given the lack of adversarial conditions, disclosure in the securities context may take place in more lax circumstances compared with disclosure in litigation.

201. *See* D. Ryan Nayar, *Almost Clients: A Closer Look at Attorney Responsibility in the Context of Entity Representation*, 41 TEX. J. BUS. L. 313, 323–35 (2006) (stating that recently, courts have begun to hold that in addition to owing their clients a duty of loyalty, attorneys may be liable for breaching a supposed duty of loyalty owed to third party non-clients under theories of "breach of fiduciary duty" and "various theories of negligence"). *See generally* Katerina P. Lewinbuk, *Let's Sue All the Lawyers: The Rise of Claims Against Lawyers for Aiding and Abetting a Client's Breach of Fiduciary Duty*, 40 ARIZ. ST. L.J. 135 (2008) (surveying and analyzing the "increased litigation of nonclient claims" accusing lawyers of "aiding and abetting their clients' breach of fiduciary duty").

202. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 4.1 (2008) (noting that an attorney must disclose material facts to third parties "when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client" and describing a lawyer's duty to refrain from knowingly making a "false statement of material fact or law to a third person").

based on loyalties to the legal system and the public, akin to the adversary's duties as an officer of the court and a public citizen.

Finally, some client-centered loyalty critics have advanced the notion of "purposive lawyering," suggesting that lawyers owe a duty to interpret the law not only according to the letter of the law but also pursuant to its spirit.[203] The implication is that lawyers should not construe the law in the best interests of clients and push the legal envelope as far as the letter of the law will permit; rather, attorneys ought to consider the spirit of the law and its purpose and not pursue client-centered interpretations that are inconsistent with the spirit of the law.[204]

Conceptually, the notion that lawyers owe the legal system and the public interest a duty to interpret the law pursuant to its stated purposes is consistent with "limited agency." However, the lessons from the adversary system suggest that purposive interpretation is unnecessary. Not only does it compromise the role of lawyers as representatives of clients, the adversary system experience suggests that rather than adopting open-ended standards that call upon lawyers to do the right thing,[205] codes of professional conduct can include specific bright-line rules that capture the duties of lawyers as officers of the court and public citizens, negating the need for purposive lawyering.

D. *From "Officer of the Court" to "Officer of the Legal System"*

Reasserting loyalty as a three-legged stool outside of the adversary system is a challenging task given contemporary practice realities. Acting as an "officer of the court" outside of the courtroom is not only an oxymoron, but also a confusing proposition. For example, the notion of a securities attorney acting as an officer of the SEC fails because unlike the court—which was designed to be a neutral adjudicator among adversaries—the SEC is more akin to a client's adversary. Thus,

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203. *See* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 22–30 (1988) (developing the concept of purposive lawyering).

204. *See id.* (advocating that lawyers ought to seek their clients' best interests by following the spirit of the law, rather than by pushing the envelope as to the letter of the law).

205. Examples of open-ended standards include purposive lawyering and Canon 8 of the Model Code of Professional Responsibility. *See* MODEL CODE OF PROF'L RESPONSIBILITY Canon 8 (1979) ("A lawyer should assist in improving the legal system.").

acting as an "officer of the SEC" will likely trigger a conflict of interest vis-à-vis representation of clients subject to SEC jurisdiction.

The proper extension of the "officer of the court" role outside of the adversary context should be better understood in terms of loyalty not to any particular agency, but rather to the legal system.[206] Thus, a securities attorney's loyalty to clients would be constrained not by specific duties to the SEC or to shareholders, but rather to the legal system. In context, a securities lawyer will have duties to observe the "rules of the game" akin to the litigator's duty to the court. Such duties may encompass, for example, a duty not to file or facilitate filings on behalf of clients that are materially misleading.

For the many lawyers who do not practice before courts, the notion of being an "officer of the court" has little meaning. Justifying client-centered loyalty outside of the adversary system context requires developing the concept of the "officer of the legal system" by promulgating specific bright-line rules of professional conduct that would limit, in appropriate circumstances, the scope of attorney loyalty to clients.

E. *A "Public Citizen" in the 21st Century*

As lawyers, attorneys owe a special allegiance to the rule of law:

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice .... A lawyer should aid the legal profession in pursuing these objectives and should help the [B]ar regulate itself in the public interest.[207]

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206. For a thoughtful analysis of lawyers' obligations to the rule of law and their duties to clients given these commitments, see W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004), and W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 FORDHAM L. REV. 1473 (2006).

207. MODEL RULES OF PROF'L CONDUCT pmbl. para. 6 (2008); *see, e.g.*, W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 424 (2004) (advocating that attorneys

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Law, in other words, is a public good.[208] The role of lawyers as "limited agents," owing duties to the legal system and the public, is explained exactly in terms of the role of lawyers as public citizens and guardians of the legal system. However, some argue that competitive practice realities, emphasizing the financial bottom line, and featuring increased specialization, render the ideal of lawyers as public citizens obsolete.[209] Indeed, the "public citizen" leg of loyalty is not likely to be resurrected in terms of lawyers' commitment to living professional lives in the public sphere. An alternative conception suited to contemporary practice realities can, however, bind lawyers and limit their loyalty to clients. Lawyers are public citizens in the sense that they are guardians of the rule of law and owe duties to maintain and uphold the law.[210]

To better grasp the idea of lawyers as guardians of the law, contrast it with the role of truck drivers vis-à-vis the roads they travel on. Truck drivers' primary duty is to their "clients"—their employers—to safely deliver goods from one point to another. Surely, truck drivers also have residual duties to non-clients, such

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are obligated to respect the law, ensuring the legal system functions as a framework for social activity); W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 FORDHAM L. REV. 1473, 1475–76 (2006) (recognizing lawyers as custodians of the law, obligated to preserve the legal system's integrity and ability to "secure the benefits of peace and stability of mutual expectations").

208. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 616.

209. *See, e.g.*, ANTHONY T. KRONMAN, THE LOST LAWYER 271–300 (3d prtg. 1995) (discussing the decline of the "lawyer-statesman ideal" as lawyers have moved into large firm practice and have begun to place greater emphasis on monetary returns for legal services rendered); *see also* MARY ANNE GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 35–59 (1st paperback ed. Harvard Univ. Press 1996) (describing the evolution of the practice of law from "the era of the generalist country lawyer" to today's world of large corporations). As a result of these changes, "the practice of law [has become] increasingly specialized, as to both clientele and subject matter." MARY ANNE GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 41 (1st paperback ed. Harvard Univ. Press 1996). These changes have "not only promoted a separation between the cultures of counselors and advocates; they [have] also accentuated the distinctions between elite and low-status lawyers." *Id.*

210. *See, e.g.*, W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 424 (2004) (advocating that attorneys are obligated to respect the law, ensuring the legal system functions as a framework for social activity); W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 FORDHAM L. REV. 1473, 1475–76 (2006) (recognizing lawyers as custodians of the law, obligated to preserve the legal system's integrity and ability to "secure the benefits of peace and stability of mutual expectations").

as to drive carefully and refrain from injuring other drivers and pedestrians. One might even imagine a duty to the road itself: to drive safely and keep the road well maintained to the benefit of other drivers by refraining from tossing trash out the window, keeping public toilets at the side of the road clean, etc.

In all of these ways, truck drivers' conduct and role vis-à-vis the road is akin to lawyers' conduct and role vis-à-vis the law. But the roles part ways in the following sense: truck drivers have no explicit direct duties to maintain the roads. If, for example, a truck driver notices a boulder or a pothole in the road, we might expect him to notify the appropriate authorities, but we would certainly not expect him to attempt to assume responsibility and fix the road. Indeed, we might fear that a truck driver, and importantly, *any* truck driver, might lack the competence and expertise to fix the problem.

Lawyers, however, do owe a duty to the law, and in an analogous situation should attempt to "fix" the legal road. Unlike truck drivers, we would want a lawyer to fix the situation, and if not the lawyer who discovered it, then another lawyer. Moreover, it *must* be a lawyer who attempts to "fix" problems with the law because lawyers exercise a monopoly over the provision of legal services, and therefore, no one else but lawyers are in the position, and have the ability, to assume responsibility for the rule of law.[211]

Pursuant to Arrow's seminal social bargain theory,[212] the Bar guarantees the quality of legal services, and in return, the legal profession is granted a monopoly over the provision of legal services and the authority to self-regulate its members.[213] "The

211. The work of Tanina Rostain on the response of the organized tax to the tax shelter controversies of the mid-1990s constitutes a fascinating example of the ability of lawyers to "fix" problems with the law by promulgating specific rules of conduct. Rostain argues that the tax bar "rein[ed] in the tax shelter market. The bar's initatives included due diligence obligations for opinion letters issued in connection with tax shelters and other proposals intended to strengthen practice standards." Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77, 77 (2006).

212. *See* Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 943 (1963) (noting the trust inherent in customers' transactions with medical care providers and the understood ethical restrictions doctors must observe).

213. *See* Eli Wald, *An Unlikely Knight in Economic Armor: Law and Economics in Defense of Professional Ideals*, 31 SETON HALL L. REV. 1042, 1075 (2001) (applying Arrow's insights to the legal profession and advocating "an implicit social contract in

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[B]ar guarantees that lawyers practice law on behalf of and to the benefit of clients in a manner that reflects the current state of specialized [legal] knowledge," while ensuring that lawyers treat "their own private interests as a secondary concern."[214] This arrangement helps clients "develop trust in lawyers and to surrender themselves to legal judgment without perceiving the need to monitor lawyers. This trust and the resulting autonomy are, in turn, of tremendous value to the legal profession. Not only are its members granted societal respect and prestige but also above-average incomes."[215]

To be clear, lawyers' responsibilities and duties to the rule of law are not merely the "price" the legal profession must pay for the privilege of exercising a monopoly over the provision of legal services. In other words, it is not as if the legal profession receives a monopoly over the provision of legal services so it could be responsible for the rule of law. Rather, pursuant to the social bargain, lawyers as professionals are uniquely positioned because of their esoteric knowledge not only to self-regulate but also to safeguard the rule of law. This is better thought of not as the "price" for exercising a monopoly, but rather as the source of the obligation that, to follow our metaphor, distinguishes the Bar from the case of truck drivers and the road. Lawyers *qua* lawyers benefit from the legal profession's monopoly over the provision of legal services. In return, lawyers *qua* lawyers assume responsibility for the law as a public good and owe a duty to protect it from manipulation and abuse by clients, including their own clients. By virtue of their role, attorneys are "limited agents," owing loyalty not only to their clients, but to the legal system and the public.

F. *A Cautionary Tale About Lawyers, Loyalty and Self-Interest*

The gap between the narrow definition of attorney loyalty to

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which the legal profession guarantees the quality of legal services, and in return . . . is granted effective self-regulation of the behavior of its members" (citation omitted)).

214. *Id.*

215. *Id.*; *cf.* Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 954 (1963) (recognizing that in a doctor-patient relationship, "there is always a theoretical case for collective action if each participant derives satisfaction from the contributions of all"). This theory may be analogized to the legal profession, where both the client and the attorney benefit from a relationship based on trust and collective action. Clients are benefited through zealous representation, while attorneys are rewarded with heightened prestige and incomes.

clients—avoidance of conflicts, communications, competence, diligence, and confidentiality—and the Bar's broad conception of loyalty—"entire devotion" and "warm zeal"—is explained in part by the fact that lawyers benefit from selling clients the promise of client-centered loyalty.[216]

Client-centered loyalty offers lawyers a competitive advantage in the marketplace because the legal profession is able to be loyal to an extent far greater than other service providers. Other agents' duty of loyalty is constrained by the law in the sense that over-loyalty that violates the law will result in sanctions. In the corporate sphere, for example, we assume and expect legal constraints to bind agents and limit their loyalty to their principals.[217] In law, however, the challenge of over-loyalty is figuring out exactly how far lawyers should push legal constraints on behalf of clients. Law is not understood as an external constraint on loyalty to clients; rather, it is the subject matter of attorneys' expertise. Consequently, whereas legal constraints (as in a prohibition on illegal conduct) may suffice as a limit on corporate agents' loyalty to the entity, they fail as effective constraints on attorney loyalty to clients because the professional ethos of client-centered loyalty calls upon lawyers to push the legal envelope on behalf of clients.

Moreover, the benefits over-loyalty to clients confers on lawyers are unmitigated by corresponding costs. Because of the principle of non-accountability,[218] lawyers are generally not liable to third

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216. Rules of professional conduct grant lawyers competitive advantages in the marketplace. *See generally* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 3–9 (1998) (discussing how confidentiality confers economic and reputational advantages on lawyers through an increase in the value of legal advice, the protections provided by attorney-client and work-product privileges, the increased cost of discovery, and lawyers' ability to avoid sanctions or negative publicity).

217. *See* Troy A. Paredes, *Too Much Pay, Too Much Deference: Behavioral Corporate Finance, CEOs, and Corporate Governance*, 32 FLA. ST. U. L. REV. 673, 700 n.110 (2005) (observing the danger that corporate officers' charisma and self-confidence will influence employees to take risky business moves and "possibly engag[e] in fraud or illegal conduct" as a result of too much loyalty to the officers). *But see* Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1, 38 (2006) ("A manager who knowingly causes the corporation to violate the law will seldom violate the duty of loyalty, because typically the manager does not engage in self-interested conduct, and will seldom violate the duty of care, because typically the manager rationally believes that the illegal conduct will serve the end of profit maximization.").

218. *See* L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 953–54 (1980) (finding lawyers' lack of responsibility for their clients' conduct

parties for the conduct of their clients,[219] and due to the stringent doctrine of malpractice, lawyers are often not liable to their own clients for giving legal advice that is too loyal or too risky.[220] Thus lawyers have an economic self-interest to be over-loyal to clients and little reason to fear sanctions for such client-centered loyalty.

To be sure, it is by now an obvious statement that the practice of law is not only a profession but a business and, in particular, a means of making a living. The mere fact that client-centered loyalty is in the best interests of lawyers does not in and of itself render it undesirable from clients' perspectives or from the public's point of view.[221] The legal profession's self-interest in being perceived as over-loyal to clients does warrant a cautionary tale. Lawyers are fond of asserting, without proof, that loyalty benefits the public interest because it allows attorneys to learn all the relevant information relating to their clients' representation and, in turn, allows lawyers to dissuade clients from wrongdoing and enhance client autonomy.[222] The legal profession must rise to

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remained the same although lawyers' roles changed over time in other respects).

219. Lawyers, for example, are not liable under the federal securities statutes for aiding and abetting. *See* Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143, 169 (2002) ("[A] secondary actor in a securities transaction (e.g., an accountant or a lawyer) is not liable for damages for aiding and abetting a securities law violation." (citing Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994))). *But see* D. Ryan Nayar, *Almost Clients: A Closer Look at Attorney Responsibility in the Context of Entity Representation*, 41 TEX. J. BUS. L. 313, 323–35 (2006) (chronicling legal decisions in which courts have held attorneys liable to third parties for breaching duties of loyalty). *See generally* Katerina P. Lewinbuk, *Let's Sue All the Lawyers: The Rise of Claims Against Lawyers for Aiding and Abetting a Client's Breach of Fiduciary Duty*, 40 ARIZ. ST. L.J. 135 (2008) (surveying and analyzing the "increased litigation of nonclient claims" accusing lawyers of "aiding and abetting their clients' breach of fiduciary duty").

220. Elements and requirements of malpractice, however, have been relaxed in recent years, permitting non-clients in some circumstances to overcome the privity requirement and allowing plaintiffs to establish causation without the need to meet the "trial within a trial" standard. *See, e.g.*, Max N. Pickelsimer, *Attorney Malpractice in Will Drafting: Will South Carolina Expand Privity to Impose a Duty to Intended Beneficiaries of a Will?*, 58 S.C. L. REV. 581, 581 (2007) ("[T]he vast majority of states . . . have abandoned the strict privity requirement in legal malpractice cases.").

221. *See generally* Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997) (noting that private parties do not typically concern themselves with the effects of their litigation on society as a whole); Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982) (considering the cost of litigation to private parties and society and finding there is not necessarily a connection between the benefits of suit to private parties and society).

222. As a comment to the Rules states:

Wald: Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clie

the occasion, see beyond its own self-interest in defending client-centered loyalty, and successfully, on the merits, meet the burden of accounting for loyalty. Indeed, the Bar's self-interest in loyalty warrants it meet an even higher burden and offer compelling justifications for client-centered loyalty.

V. CONCLUSION

Lawyers cannot have their cake and eat it too. If the legal profession wishes to continue benefiting from its elevated cultural and economic status—"America's aristocracy" in the words of de Tocqueville[223]—and reap the advantages of exercising a monopoly over the provision of legal services, it must live up to its obligations and persuasively account for its practices, client-centered loyalty included. Attorneys' role as high priests of law as a civic religion[224]—guardians of the legal system—and role as "limited agents" imposes on members of the legal profession duties to serve constituencies other than their clients, and in particular, imposes limits on attorney loyalty to clients. Lawyers who argue client-centered loyalty, advocate a client-based role-morality, and refuse to assume the liabilities imposed by their role

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> A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, *to advise the client to refrain from wrongful conduct.* Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. *Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.*

MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2008) (emphasis added); *see also* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 5 (1998) ("Confidentiality rules enable clients to obtain the benefit of legal advice without having to bear the cost of disclosing information they would prefer to remain secret." (citation omitted)).

223. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 301–11 (Arthur Goldhammer trans., Library of Am. 2004) (1835) (analyzing the practice of law in the United States and discussing the integral role played by the law and lawyers in American society).

224. *Cf., e.g.*, Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1879–1910*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA, at 51, 51–74 (Gerald W. Gawalt ed., 1984) (exploring the elevated role and status of lawyers in American society).

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as "limited agents" ought to correspondingly forgo the benefits conferred on them by "limited agency," including the benefits derived from exercising a monopoly over the provision of legal services.[225]

For far too long the Bar has eluded critics challenging client-centered loyalty by simply asserting that such critics "do not understand what we do." And yet, what lawyers do is a "limited agency," which requires serving constituencies other than clients and striking a balance between loyalty to clients and loyalties to the legal system and the public. Of course, identifying the role of lawyers as one of "limited agents" is but the first step in the right direction. With the conceptual and analytical confusion out of the way, and with the principles identified in this Article to guide it, the legal profession must move loyalty forward by implementing its obligations to the legal system and the general public interest pursuant to the "limited agency" model and promulgating specific rules of professional conduct that would limit, in appropriate circumstances, its client-centered loyalty.

225. Although as Morgan argues in this very issue, the days of the legal profession exercising a monopoly over the provision of legal services to the exclusion of other service providers and amateurs might be numbered. *See* Thomas D. Morgan, *Professional Malpractice in a World of Amateurs*, 40 ST. MARY'S L.J. 891, 892 (2009) ("Work we thought we did well for clients that we have known seemingly forever is threatened by people promising to do the same work better, faster, cheaper, or all of these.").