

# THE MULTILAWYERED PROBLEMS OF PROFESSIONAL RESPONSIBILITY

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*The ethics rules that lawyers live by order behavior and provide an architecture through which they perceive issues and problems. In this article, Professor Cohen addresses an area of professional responsibility that has thus far received inadequate attention from either the Model Rules or the Model Code and was not improved upon significantly by the Ethics 2000 revisions. Specifically, Professor Cohen posits that a “general blind spot in the ethics rule architecture” exists by virtue of the failure of the ethics rules to deal in a comprehensive and systematic way with the problem of multiple lawyers representing, or owing some fiduciary obligations to, a client in a particular matter.*

*The article begins by laying the foundation to think about multi-lawyered problems. Professor Cohen introduces a taxonomy based on the variety of structural and legal relationships among lawyers and the client. He then proceeds to examine how, in a situation where multiple lawyers are present, the multiple lawyer relationship affects, and is affected by, the professional responsibilities of the lawyers and the fundamental concerns of the law of lawyering—competence, confidentiality, and conflicts of interest. Professor Cohen applies an approach he previously developed based on the potential for collusive behavior in agency relationships to illustrate how the presence of multiple lawyers can exacerbate problems already inherent in this situation. Professor Cohen concludes with the hope that with the architecture developed in this article, multilawyered problems can receive the examination and coverage not accomplished by the Ethics 2000 revisions.*

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Architecture matters in the legal world just as it does in the physical realm. It both responds to and shapes human perceptions and needs. Though its effects may not be dominant, to ignore architecture is often to miss an important part of who we are and how and why we do what we do.

In the world of lawyering, ethics rules provide an architecture in which lawyers live and through which they perceive issues and problems. Wholesale revisions to the ethics rules, such as the proposals of the Ethics 2000 Commission recently approved by the American Bar Association (ABA) House of Delegates, provide a unique opportunity to examine and evaluate this architecture. As is by now well known, the Ethics 2000 Commission early on made a conscious decision to keep the basic structure of the Model Rules. Working within this structure, the Commission proposed many changes that are merely aesthetic or clarifying, elaborations of previously implicit understandings, or endorsements of prior interpretations.<sup>1</sup> The three new rules added by the Commission (for a net gain of two), though responding to real problems, hardly seem to address the core issues of professional life for most lawyers.<sup>2</sup> And no dominant theme emerges from the genuine substantive changes to the existing rules and comments. In short, the clear message the Ethics 2000 revisions communicate is that everything is basically fine with the way lawyers perceive, think about, and act on professional norms.

That may be, though Enron, class action practice, and other problems suggest otherwise. I want to focus, however, on a more general blind spot in the ethics rule architecture, one that the Ethics 2000 revisions do little to address. The blind spot is the failure of the ethics rules to deal in any kind of general way with the problem of multiple lawyers representing, or owing some fiduciary obligations to, a client in a particu-

1. Steven C. Krane, *Ethics 2000: What Might Have Been*, 19 N. ILL. U. L. REV. 323, 326 (1999) (“The Model Rules of Professional Conduct can perhaps be analogized to a modest house built in the early 1960s. The kitchen and bathroom were updated in the late 1970s, and the garage was converted into an extra room, but otherwise the house has remained unchanged. By the late 1990s, however, it became apparent that the occupants of the house had—along with their neighborhood—changed dramatically. The house no longer met their needs. Clearly, what is needed is for the Commission to build a new house for the occupants to live in. Instead, the Commission is redecorating.”).

2. The new rules are Rule 1.18: Duties to Prospective Client; Rule 2.4: Lawyer Serving as Third-Party Neutral; and Rule 6.5: Nonprofit and Court-Annexed Limited Legal Services Programs. The deleted rule is Rule 2.2: Intermediary. *See generally* MODEL RULES OF PROF'L CONDUCT (2002).

lar matter. Lawyers have, of course, been aware of the multilayered problems of professional responsibility for some time, and scholars have begun to catch up.<sup>3</sup> But the Model Rules have little to say about these problems,<sup>4</sup> and the Ethics 2000 revisions have little to add.<sup>5</sup> This failure is perhaps all the more surprising because some of the most important innovations of the Model Rules compared with the Model Code included a more conscious alignment with agency law principles, a greater recognition of the problems of multiple and complex clients,<sup>6</sup> and the inclusion of rules addressing problems arising in law firm practice (the most common example of the multiple-lawyer phenomenon).<sup>7</sup> So one might have thought that multilayered problems would be a logical next innovation. Outside of law firms, however, the Model Rules actually have *less* to say (at least explicitly) about multilayered problems than the Model Code.<sup>8</sup> And even given the fact that a number of recent ABA ethics opinions address multilayered problems,<sup>9</sup> the Ethics 2000 Commission did not take up the mantle. Thus, one cannot say that the failure to address multilayered problems is due to a failure to recognize them. Nor is there any obvious political impediment comparable to the controversies surrounding client fraud or multidisciplinary practice. Nevertheless, al-

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3. See Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000); John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825 (1992); Thomas D. Morgan, *Conflicts of Interest and the New Forms of Professional Associations*, 39 S. TEX. L. REV. 215 (1998); Mary Twitchell, *The Ethical Dilemmas of Lawyers on Teams*, 72 MINN. L. REV. 697 (1988).

4. See Krane, *supra* note 1, at 329 ("The Model Rules are premised on the fallacy of the monolithic attorney-client relationship.")

5. I will discuss the Ethics 2000 changes relevant to multiple lawyers in Part V.

6. See MODEL RULES R. 1.7 (multiple clients); *id.* R. 1.13 (organizational clients).

7. See *id.* R. 5.1-7.

8. Actually the Model Code did not have much to say either. Most of the references to multilayered problems occur in the Ethical Considerations, and the general thrust of many of these is to discourage the use of multiple lawyers. See MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110(C)(3) (1983) (withdrawal due to inability to work with co-counsel); *id.* DR 6-101(A)(1) (stating that duty of competence may require association with other lawyer); *id.* EC 2-22, 2-30, 2-32, 4-2, 5-11, 5-12, 6-3; see also CANONS OF PROFESSIONAL ETHICS 7 (1969). By contrast, the term "co-counsel" appears in no Model Rule and is the subject of only one fleeting reference in a comment newly added by the Ethics 2000 revisions. See MODEL RULES R. 1.17 cmt. 5 ("If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e).").

9. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 424 (2001) (concluding that a former in-house lawyer may pursue a wrongful discharge claim against her former employer and client as long as the client's confidential information properly is protected); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 420 (2000) (discussing a surcharge to client for use of a contract lawyer); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 411 (1998) (lawyer-to-lawyer consultation); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 407 (1997) (discussing a lawyer as expert witness or expert consultant); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 406 (1997) (lawyer as lawyer for a client of another lawyer); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 388 (1994) (discussing relationships among law firms); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 357 (1990) (discussing the use of designation "Of Counsel"); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 356 (1988) (discussing temporary lawyers).

though we have become accustomed to thinking about complex clients by asking “Who Is the Client?,” we do not seem to ask the parallel question in multiple-lawyer situations: “Who Is the Lawyer?”

There are several possible reasons why the Model Rules and the Ethics 2000 revisions largely ignore multilayered problems. The problems may not be different enough from single-lawyered problems, or problems within law firms, to merit separate treatment. The problems may be different, but too diffuse and fact-specific to be easily susceptible of inclusion in separate rules or comments. Similarly, the rule drafters may have avoided the problems because they could not achieve the “perfection” of resolving all the dilemmas created.<sup>10</sup> Or the rule drafters may have viewed the problems as lying more in the realm of general agency or organizational law rather than ethics or the law of lawyering.<sup>11</sup> Although all of these reasons have some validity, none is completely convincing. Part of the difficulty may be that we have not yet developed a satisfactory way to think about multilayered problems generally. Scholars who have thought about these problems have tended to focus on particular relationships or particular ethical problems. We do not yet have the right architecture.

This essay attempts to start building a foundation for thinking about multilayered problems, building on previous scholars’ analyses as well as agency and partnership law and the economics of the firm. I describe three different, but related, architectural approaches to multilayered problems. First, I present a taxonomy based on the variety of structural and legal relationships among lawyers and the client.<sup>12</sup> Second, I examine how the presence of multiple lawyers affects the professional responsibilities of these lawyers, focusing on the core concerns of the law of lawyering.<sup>13</sup> Third, I apply an approach I previously developed based on the potential for collusive behavior in agency relationships to show how the presence of multiple lawyers complicates these problems.<sup>14</sup> I then discuss briefly how the Ethics 2000 revisions deal with multilayered

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10. Fred C. Zacharias, *Foreword: The Quest for a Perfect Code*, 11 GEO. J. LEGAL ETHICS 787, 791 (1998) (“At root, the almost religious search for the holy code leads drafters and the bar to expect perfect regulation. The products of regulatory efforts in the second half of this century try to incorporate all relevant values and resolve, or help lawyers resolve, all moral issues. This grand ambition often has caused the drafters to avoid addressing particular dilemmas, except to note that a conflict of values exists.”).

11. This position seems to be the one largely taken by the drafters of the *Restatement of the Law Governing Lawyers*, which also does not deal in a general way with multiple-lawyer problems. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 9(2) (2000) (“A lawyer employed by an entity . . . is subject to applicable law governing the creation, operation, management, and dissolution of the entity.”); *id.* cmt. a (“Most questions of organizational structure and operation are determined by reference to law that applies generally to lawyers and others who practice in the particular form . . .”).

12. See *infra* Part II.

13. See *infra* Part III.

14. See *infra* Part IV.

problems.<sup>15</sup> I cannot offer in this essay a full analysis of the many multi-lawyered problems of professional responsibility. Nor do I offer any particular suggestions for new ethics rules or comments. My hope instead is to sketch out some possibilities and stimulate further work in this area.

#### I. WHAT ARE MULTILAWYERED PROBLEMS AND WHY DO THEY MATTER?

The first step in creating an architectural structure is to define the project's scope. By multilawyered problems, I mean problems arising from two or more lawyers who have some relationship to each other and/or to the same client in a particular matter, and who each owe ethical and legal obligations to that client arising from that matter.<sup>16</sup> The question I want to ask is how the addition of a second lawyer in different contexts affects, and is affected by, both lawyers' professional obligations. This approach is somewhat unusual. Legal theorists who study organizational law tend to focus on the legal consequences of different organizational forms generally rather than the legal consequences of multiple agents owing obligations to a single principal in a particular matter.<sup>17</sup> Economic theorists tend to focus on the economic, as opposed to legal, reasons parties choose one organizational form over another, in particular the choice between contract and firm.<sup>18</sup> My hope is that shifting the focus slightly will yield insights that are relevant to the more traditional approaches.

To keep the analysis relatively simple, I will adopt several limitations. First, I will mostly limit the inquiry to multiple lawyers owing obligations to a single client in a single matter. Second, I will focus mainly on the case of only two lawyers, *L1* and *L2* (*L1* and *L2* could also be understood as law firms), with the convention that *L1* is primary in either time or importance in the *L1-L2* relationship. The lawyers may each have the same client, *C*, or either or both lawyers may simply owe some fiduciary duties to *C* in a particular matter. In addition, there may be some third party, *T*, who is not a client of both *L1* and *L2*, but who may be a client of *L2*, or an adversary of *C*, or an agent of *C* whose interests diverge from *C*'s interests, or a court or other governmental body. Professional responsibility is concerned with the obligations of *L1* and *L2* to *C* and to *T*. The question is how the addition of *L2* affects the obligations of both lawyers. Obviously, many multilawyered problems involve

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15. See *infra* Part V.

16. My focus will be on lawyers in the private sector rather than government or public interest lawyers, though some of the analysis will certainly be relevant to these lawyers.

17. See, e.g., RESTATEMENT (SECOND) OF AGENCY (1958).

18. See, e.g., HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE (1996); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985); Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937), reprinted in *THE NATURE OF THE FIRM: ORIGINS, EVOLUTION, AND DEVELOPMENT* (D. Williamson & S. Winter eds., 1991).

multiple or complex clients, multiple matters, multiple third parties, or more than two lawyers. I will refer to some of these problems.<sup>19</sup> Nevertheless, for analytical purposes, I want to isolate what is important and unique about the presence of multiple lawyers in a particular representation of a particular client.

Before turning to the possible architectural approaches to multiple lawyer relationships, we should identify some of the benefits of these relationships and explain their growing importance. Multiple-lawyer relationships potentially benefit clients in a number of ways. Most commonly, multiple lawyers offer efficiencies resulting from scale, expertise, specialization, and the division of labor.<sup>20</sup> Many matters are too large to be handled effectively by single lawyers. Not only do multiple lawyers provide more manpower, but they also offer more and superior information, which lawyers may be reluctant or unable simply to sell to other lawyers.<sup>21</sup> In addition, clients often use some lawyers to protect them from the incompetence, incapacity, or misbehavior of other lawyers, whether through competition between lawyers, monitoring of one lawyer by another, independent evaluation by different lawyers, or successive representation. Multiple-lawyer relationships may also satisfy the needs of lawyers themselves, who may require legal representation arising out of the client's matter, or of third parties, who may themselves want to regulate lawyer behavior in a particular matter.

To be sure, multiple lawyers may be used for questionable strategic purposes.<sup>22</sup> And some of the purported benefits may be "second-best" to the extent that they are created by regulatory restrictions, or permissions, that some argue do not serve clients' interests.<sup>23</sup> On the regulatory restriction side, for example, the ethics rules on competence or conflicts of interest, or pro hac vice regulations may require "too much" quality or loyalty, and so more lawyers than clients would prefer.<sup>24</sup> On the regulatory permission side, allowing class action lawyers to file mass tort class actions in which clients are already represented by their own lawyers may give clients more lawyers than they might want. Or allowing law

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19. Some of these problems raise issues very similar to the issues raised by multiple lawyers. See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 395 (1995) (discussing the obligations of a lawyer who formerly represented a client in connection with a joint defense consortium).

20. See, e.g., Milton C. Regan, Jr., *Forward: Professional Responsibility and the Corporate Lawyer*, 13 GEO. J. LEGAL ETHICS 197, 199 (2000) ("Legal work now tends to be performed by teams of specialists who require coordination, rather than by individual lawyers who control all aspects of the relationship with the client.").

21. See, e.g., Erichson, *supra* note 3, at 388-90.

22. An example of such strategic purpose is C's hiring of L2, not for the purpose of assisting L1, but for the purpose of making sure L2 does not represent C's adversary. For a case in which such an allegation was made, see *In re Am. Airlines, Inc.*, 972 F.2d 605 (5th Cir. 1992).

23. See, e.g., Charles W. Wolfram, *Former-Client Conflicts*, 10 GEO. J. LEGAL ETHICS 677, 689 (1997) (arguing that "[o]n some occasions, the rule will deprive clients of the right to lawyers whom they trust from prior representations").

24. See, e.g., David A. Hyman & Charles Silver, *And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Trade-off*, 11 GEO. J. LEGAL ETHICS 959 (1998).

firms to organize as limited liability partnerships might encourage those firms to use outside law firms to monitor their lawyers rather than use other lawyers within the firm for fear of triggering supervisory liability.<sup>25</sup> For purposes of this essay, however, I will take these regulations as given and assume that they themselves benefit clients, so the multiple lawyers at least potentially do as well.

Regardless of whether all of these benefits are genuine, the use of multiple lawyers has likely been increasing since the adoption of the Model Rules, and is likely to continue to increase due to several well-known phenomena. Globalization, technology, and legal complexity—everyone’s favorite buzzwords—increase the needs for human capital. In addition to lawyers associating with other lawyers, we now have firms associating with other firms or clients hiring multiple firms.<sup>26</sup> And to some extent, multiple lawyers beget more lawyers, as the greater cost results in greater client cost consciousness and monitoring, and increased lawyer liability results in the need for still more lawyers to advise the original lawyers, or to clean up the mess. Naturally, the greater use of multiple lawyers inevitably leads to more problems arising from these relationships. Thus, multiple-lawyer relationships merit a general theoretical treatment. I turn to such treatment next.

## II. A STRUCTURAL TAXONOMY OF MULTILAWYERED RELATIONSHIPS

One reason multilayered situations may be hard to analyze is that there are so many different ways that multiple lawyers can appear in a single matter on behalf of a single client, and so many different ways to organize the inquiry. One architectural framework, used in this part, focuses on the nature of the relationships among the lawyers and the client. I start by separating these relationships into two—the lawyer-lawyer relationship and the lawyer-client relationship—and then further break down these categories into subcategories.

### A. *Categories of Multilawyer Relationships*

Taking the lawyer-lawyer relationship first, we can subdivide this relationship along several dimensions. First, the lawyer-lawyer relationship can fall under a variety of legal categories, each of which has implications for the law and ethics of lawyering. The legal relationship be-

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25. Robert W. Hillman, *The Impact of Partnership Law on the Legal Profession*, 67 *FORDHAM L. REV.* 393, 407–08 (1998). Professor Hillman in fact argues that in-house monitoring by law firms will continue despite the use of the limited liability partnership form, because clients will demand such monitoring. *Id.* at 411–12.

26. See, e.g., Ted Schneyer, *Reputational Bonding, Ethics Rules, and Law Firm Structure: The Economist as Storyteller*, 84 *VA. L. REV.* 1777, 1787 (1998) (noting that “most large companies no longer retain one law firm to do their outside legal work, as they once did. Instead, general counsel retain many firms, assigning discrete tasks to each.”).



tween the lawyers can range from no relationship at all to a contractual relationship, an agency relationship, and ultimately a joint ownership relationship. The rights and obligations entailed in these categories are not mutually exclusive, but rather each more complex relationship generally subsumes the rights and obligations of the preceding ones and adds new rights and obligations.<sup>27</sup> Each category regulates the rights and obligations of *L1* and *L2* to each other, to *C*, and sometimes to *T*.

A second way we may break down the lawyer-lawyer relationship is to focus on the structural relationship between the lawyers, which depends on the roles the client or the lawyers expect the lawyers to play in the representation. The structural relationship between the lawyers partially but imperfectly tracks the legal relationship. One way to divide lawyer relationships structurally is to distinguish *horizontal* from *vertical* relationships. In horizontal relationships, the lawyers work on the same client matter, typically as coequals. The lawyers may work on the same task (overlapping representation) or separate tasks (segregated representation). We may further divide horizontal relationships temporally by distinguishing *concurrent* representation, in which lawyers work simultaneously as a team,<sup>28</sup> from *successive* representation, in which the second lawyer replaces the first in the matter. Some matters may involve both concurrent and successive elements, as when the second lawyer has been brought in after a period of time to help the first lawyer, or when the second lawyer departs from the first lawyer's firm, taking the client and the matter with him, or when two firms merge. An additional horizontal lawyer-lawyer relationship that deserves separate treatment is the *adversarial* relationship, in which the lawyers represent different clients with opposing interests in litigation or a transaction, but in which one or more lawyers may owe obligations to the client of the adversary lawyer or even to the adversary lawyer himself.

In contrast to horizontal relationships, vertical relationships involve one lawyer having some kind of right to control or monitor the other. The classic vertical relationship is *hierarchical*, in which the second lawyer has the right to control or monitor the first lawyer's representation of the client in a particular matter. A second vertical relationship is *representational*, in which one lawyer hires the other to represent him in a matter related to the first lawyer's representation of the client. A third vertical relationship is *regulatory*, in which the second lawyer has the right to control or monitor the first lawyer's performance in a matter, not as part of the second lawyer's own representation of the client in that

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27. This is not necessarily the case. For example, not all agency relationships are contractual. RESTATEMENT (SECOND) OF AGENCY § 16 (1958) ("The relation of principal and agent can be created although neither party receives consideration."). *L1* could act as *L2*'s agent for certain purposes (such as notice or making a special appearance in litigation) even if there is no contractual relationship between *L1* and *L2*.

28. See Twitchell, *supra* note 3, at 699 n.2 (defining "task-sharing team" as one that "works on a particular assignment for a specified client or client group").

matter, but because of the interest of some third party regulator, which may be public or private. A final vertical relationship is *independent*, in which the second lawyer represents the client in a second matter in which the first lawyer is involved in, but not as the client's lawyer, such as a transaction between the client and the first lawyer.

The lawyer-client relationship can be equally complicated, but because of my focus on multiple lawyer relationships, I will limit the possibilities to two. First, the client may have a full-fledged lawyer-client relationship with both lawyers, which I will call a *multiagency* lawyer-client relationship. In multiagency situations, the client controls, or at least has the right to control, both lawyer-client relationships. Alternatively, the client may have an attorney-client relationship with only one of the two lawyers, but the second lawyer owes the client some kind of fiduciary and ethical obligations related to the first lawyer's representation. I will call this a *single-agency* lawyer-client relationship.

### B. Examples

Having laid out the various organizational structures, I will provide some examples under each category. I organize the discussion around the possible legal relationships between the lawyers, and discuss the different structural relationships between the lawyers as well as the two types of lawyer-client relationships within each type of legal relationship. Not all combinations of lawyer-lawyer relationship and lawyer-client relationship are possible. For example, successive representation cannot occur in a single-agency lawyer-client relationship because successive representation by definition requires the client to have a lawyer-client relationship with each lawyer sequentially. In addition, vertical lawyer-lawyer relationships in the multiagency lawyer-client relationship are generally hierarchical or independent, because both lawyers in such a relationship must have a full-fledged lawyer-client relationship with the client. Vertical lawyer-lawyer relationships in the single-agency context, by contrast, are generally representational or regulatory, because in these relationships the second lawyer does not have a full-fledged lawyer-client relationship with the first lawyer's client.

#### 1. No Legal Lawyer-Lawyer Relationship

The simplest scenario is one in which there is no legal relationship between the lawyers. Within this scenario, we may have either a multiagency or a single-agency lawyer-client relationship, as well a variety of the lawyer-lawyer functional relationships. First, consider the multiagency lawyer-client relationship, perhaps the most common situation involving no legal lawyer-lawyer relationship. An example of a horizontal concurrent representation in this category occurs when the client separately hires the two lawyers to work as co-counsel on a particular

transaction or litigation, with either overlapping or segregated responsibilities. Similarly, a corporation or other entity may hire a team of in-house lawyers, who work on multiple matters over an extended period of time.<sup>29</sup> Or *L1* may be local counsel and *L2* may be an out-of-state specialist.<sup>30</sup> Successive representation in the multiagency context often involves situations in which the successor lawyer has no legal relationship to his predecessor. Examples include situations in which *C* fires *L1*, or *L1* declines the representation, withdraws, or dies, and *C* hires *L2* (perhaps on *L1*'s recommendation) to complete the transaction or litigation.

Vertical representation in the multiagency context, as noted above, is limited to hierarchical and independent lawyer-lawyer relationships. Hierarchical representation with no lawyer-lawyer relationship includes *C* hiring *L2* specifically to monitor, check, reinforce, or evaluate the work of *L1* in the same matter.<sup>31</sup> Another example involves a corporate client whose general counsel *L1* supervises another in-house lawyer *L2* or outside counsel *L2*.<sup>32</sup> If *C* hires *L2* to advise *C* about whether to give informed consent to a potential conflict of interest arising out of a transaction with *L1*, or to settle a potential claim against *L1*, then the *L2* representation involves a separate matter from the *L1* representation, and the relationship between the lawyers is independent rather than hierarchical. *L2* serves as a kind of monitor of *L1* in that case, but has no ability to control *L1*'s behavior.

A multiple-lawyer relationship with no legal relationship between *L1* and *L2* can occur in the single-agency context as well as in the multi-agency lawyer-client relationship context. Examples of a horizontal concurrent representation in the single-agency context include *L1* informally consulting *L2* unilaterally about *C*'s matter,<sup>33</sup> informally exchanging information with *L2* relevant to *L1*'s case, or simply considering the formation of a more formal relationship with *L2*.<sup>34</sup> Or *L1* might ask *L2*, who represents a party seeking to contract with *C*, to provide an opinion letter or other information for the benefit of *C*.<sup>35</sup>

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29. There is no legal relationship between in-house lawyers: they do not contract with each other, are not agents of each other, and are not co-owners. Rather, they are coagents of the corporate client. Nevertheless, the ethics rules consider them to be members of a "firm." MODEL RULES OF PROF'L CONDUCT R. 1.0(c) (2002).

30. See generally GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 1054-56 (3d ed. 1999) (discussing admission *pro hac vice*).

31. See generally Michael Klausner, Geoffrey Miller & Richard Painter, *Second Opinions in Litigation*, 84 VA. L. REV. 1411 (1998). For a comment on this article, see David A. Hyman, *A Second Opinion on Second Opinions*, 84 VA. L. REV. 1439 (1998).

32. The relationship, like the relationship between in-house counsel discussed above, is one of coagency.

33. See generally ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 411 (1998) (discussing ethical issues in lawyer-to-lawyer consultation).

34. See, e.g., RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 125 cmt. d (2000) (conflict of interest may arise when a lawyer seeks to discuss the possibility of the lawyer's future employment with an adversary's law firm).

35. See, e.g., *Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987); MODEL RULES OF PROF'L CONDUCT R. 2.3 (2003).

In other horizontal concurrent representation situations in the single-agency context, the second lawyer's purpose is not primarily to further the aims of the first lawyer's client. For example, *L1* may represent an individual client, and *L2* may represent a collective of which the client is a member or constituent, for example a class in a class action,<sup>36</sup> a creditors committee in a bankruptcy proceeding,<sup>37</sup> or a corporation in a derivative suit.<sup>38</sup> *L2* may owe fiduciary obligations to *C* even though *L2* has neither a full-fledged lawyer-client relationship with *C* nor a formal legal relationship with *L1*.<sup>39</sup> Alternatively, *L2* may not have a purpose to further the interests of *L1*'s client even indirectly, but nevertheless has some relationship to *L1*, as when *L1* and *L2* are related by birth or marriage,<sup>40</sup> or simply involved in the same transaction or litigation, whether on the same side or on opposite sides.<sup>41</sup>

The relevant vertical relationships in the single-agency context are, as noted above, either representational or regulatory. A representational relationship is possible even absent some legal relationship between *L1* and *L2*, as in the case where *L1* informally consults *L2* about an ethics matter, or *L1* participates in a lawyer assistance program in which *L2* is a lawyer.<sup>42</sup> A regulatory relationship is also possible; for example, *L1* may be subject to probation by *L2* as part of a disciplinary sanction against *L1*.<sup>43</sup> A regulatory relationship can also occur in the pri-

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36. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). In small claims class actions, as opposed to mass tort class actions, class members typically do not have their own lawyers.

37. See, e.g., *In re Dow Corning Corp.*, 255 B.R. 445 (E.D. Mich. 2000).

38. See, e.g., *Cannon v. United States Acoustics Corp.*, 398 F. Supp. 209 (N.D. Ill. 1975).

39. With respect to class actions, see, e.g., *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 (3d Cir. 1973) (duty of counsel and the court to ensure class members receive proper notice of settlement); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 14 cmt. f (2000) (“[C]lass members who are not named representatives . . . have some characteristics of clients.”); *id.* § 99 cmt. 1 (“[M]embers of the class are considered clients of the lawyer for the class” for purposes of applying the no-contact rule.); *cf.* MODEL RULES R. 1.7 cmt. 25 (“When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule.”).

40. See, e.g., MODEL RULES R. 1.7 cmt. 11 (stating that “a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent”).

41. See, e.g., *In re Nitla S.A. de C.V.*, No. 01-0512, 2002 Tex. LEXIS 40, at \*10 (Apr. 11, 2002) (holding that law firm should not be disqualified for reviewing litigation opponent's confidential documents that are released by trial court but are later found to be privileged by reviewing court unless party seeking disqualification shows that document review caused actual harm that cannot be remedied by less restrictive means); MODEL RULES R. 4.4(b).

42. See, e.g., RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 14 cmt. e, illus. 2 (2000): As part of a bar-association peer-support program, lawyer A consults lawyer B in confidence about an issue relating to lawyer A's representation of a client. This does not create a client-lawyer relationship between A's client and B. Whether a client-lawyer relationship exists between A and B depends on the foregoing and additional circumstances, including the nature of the program, the subject matter of the consultation, and the nature of prior dealings, if any, between them.

43. See, e.g., *In re Joyner*, 494 N.W.2d 483, 484 (Minn. 1993) (establishing conditions of probation for neglect of two client matters and unauthorized settlement of one of them that included super-

vate setting. For example, lawyers hired by an insurance company to represent insureds have a contractual relationship with the insurance company, and as a result are subject to regulation by lawyers for the insurer, with whom the lawyers for the insureds have no legal relationship.<sup>44</sup>

## 2. *Contractual Relationship Between the Lawyers*

In the remaining scenarios, *L1* has some type of legal association with *L2*. Generally that means greater lawyer control over the *L1-L2* relationship, and generally this greater control leads to greater professional responsibilities of the lawyers. This subpart considers a simple contractual relationship between *L1* and *L2*, in which there is no more than a contractual relationship between the lawyers. This limitation generally rules out vertical relationships between the lawyers in the multiagency context, because if those relationships are contractual, they are also usually agency or co-ownership relationships. Similarly, horizontal concurrent representation in the multiagency lawyer-client situation, such as the co-counsel relationship, often involves either an agency relationship or a joint venture or other co-ownership between the lawyers.<sup>45</sup> On the other hand, successive representation, such as a fee division upon termination of a firm relationship,<sup>46</sup> or the sale of a law practice,<sup>47</sup> may involve simply a contractual relationship between lawyers. Co-counsel arrangements involving referral fees create the most difficult problems of classification.<sup>48</sup> To the extent *L1* essentially drops out of the representation once *L2* appears, the relationship is successive. In many cases, however, *L1*

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vision by lawyer appointed by disciplinary counsel, quarterly meetings with him, monthly submission to him of inventory of active files, and establishment of office procedures ensuring timely attention to all communications and paperwork pursuant to written plan to be submitted to supervisor and disciplinary counsel).

44. See, e.g., *Shaffery v. Wilson, Elser, Moskowitz, Edelman & Dicker LLP*, 98 Cal. Rptr. 2d 419, 420 (Cal. Ct. App. 2000) (holding that when attorney, whose fees are paid by client's insurer, is sued by insurer for malpractice, attorney may not file cross-complaint for indemnity against other lawyers who were hired by insurer to act as "monitoring counsel"). One could also describe a lawyer's ethical duty to report another's misconduct, see MODEL RULES R. 8.3, as a kind of regulatory multilawyer relationship, though there is not really a "relationship" between the lawyers, or even between the second lawyer and the client, in that case.

45. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 9 cmt. h (2000).

46. See, e.g., *Romanek v. Connelly*, 753 N.E.2d 1062 (Ill. App. Ct. 2001).

47. See generally MODEL RULES R. 1.17.

48. See generally MODEL RULES R. 1.5(e) & cmts. 7-8 (division of fees between lawyers not in same firm). For a case finding a referral fee arrangement to be a contract rather than a joint venture, see *Canel & Hale, Ltd. v. Tobin*, 710 N.E.2d 861, 870-71 (Ill. App. Ct. 1999). Purely contractual referral arrangements between lawyers may run afoul of MODEL RULES R. 7.2(c) (stating that "[a] lawyer shall not give anything of value to a person for recommending the lawyer's services," with some exceptions). Note that the ABA Standing Committee on Ethics and Professional Responsibility has recently proposed revising Model Rule 7.2 to clarify that lawyers may enter into referral arrangements with other lawyers so long as the referral agreements are nonexclusive and are revealed to the affected clients. ABA, STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, REPORT TO THE HOUSE OF DELEGATES, available at <http://www.ethicsandlawyering.com/Issues/files/ABA7275.pdf> (last visited Mar. 8, 2003). This proposal was developed outside of the Ethics 2000 revisions.

has some continuing, though often minor role, in which case, the relationship could be viewed as concurrent. As we will see, one consequence of these borderline cases is uncertainty over *L1*'s responsibilities for *L2*'s conduct.<sup>49</sup>

In the single-agency lawyer-client relationship case, there are several ways that lawyers might enter into a contractual relationship resulting in a horizontal concurrent representation. For example, *L1* might hire *L2* as an expert witness in the client's case.<sup>50</sup> Or *L1* and *L2* might enter into a joint defense agreement or a joint plaintiff's consortium for their respective clients.<sup>51</sup> Although successive representation, as I have defined it, is not possible in a single-agency context, a similar situation exists when a lawyer contracts with an authorized legal service plan or lawyer referral service. This situation creates only single agency because neither the plan nor the service establishes a lawyer-client relationship with the client.<sup>52</sup>

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49. See *infra* notes 104–18 and accompanying text.

50. See, e.g., *Copp v. Breskin*, 782 P.2d 1104, 1107 (Wash. Ct. App. 1989) (holding that “an attorney owes an expert . . . an express disclaimer of responsibility if the attorney intends not to be bound by a contract for litigation services”). See generally RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 30(2)(b); Joseph M. Perillo, *The Law of Lawyers' Contracts Is Different*, 67 FORDHAM L. REV. 443, 472–73 (1998); Carl M. Selinger, *The Problematical Role of the Legal Ethics Expert Witness*, 13 GEO. J. LEGAL ETHICS 405 (2000) (discussing the justifications and ethical issues of legal expert testimony). The conclusion that in the expert witness situation, the *L1-L2* relationship is contractual is somewhat controversial. Lawyers who hire experts often think that they have no legal relationship to the expert lawyer (and other expert witnesses). In this view, accepted by some jurisdictions, the lawyer hires the expert to be a coagent of the client (similar to an in-house counsel hiring outside counsel for the corporate client); thus, the contract is between the client and the expert, and the lawyer is not bound on the client's contracts under agency law. See, e.g., *Free v. Wilmar J. Helric Co.*, 688 P.2d 117, 120 (Or. Ct. App. 1984). On the other hand, a recent ABA ethics opinion characterizes a lawyer who serves as a testifying expert witness as an agent of the hiring lawyer and a subagent of the client; that is, according to the ABA opinion, the lawyer-lawyer relationship is more than contractual. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 407 (1997). Professor DeMott has criticized the characterization of the expert as a subagent on the ground that the hiring lawyer has no right to control the testifying expert and should not be liable for expert's negligence “because the lawyer, in undertaking to represent the client, does not undertake to testify as an integral part of the lawyer's own work.” Deborah A. DeMott, *The Lawyer as Agent*, 67 FORDHAM L. REV. 301, 321 (1998). This criticism is correct as a matter of agency law, and so I include expert witnesses in the contractual lawyer-lawyer relationship category rather than in the agency category. Nevertheless, the ABA opinion correctly views the lawyer-lawyer relationship as somewhat hierarchical (though I have put it in the “horizontal” category), even if not an agency relationship, because the hiring lawyer “manages the role to be played by the testifying expert in discovery, preparation and trial.” ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 407 (1997). Moreover, the ABA opinion is also correct that the testifying expert (as distinct from a consulting expert) is not in a full-fledged lawyer-client relationship with the client, though the testifying expert may be in a contractual relationship with the client, and owes some fiduciary duties to the client. That is why I put the testifying expert in the single-agency lawyer-client relationship category. Thus, the expert witness situation opinion provides a good example of why the taxonomy offered here is both useful and difficult.

51. See generally Erichson, *supra* note 3, at 403–08 (discussing aggregation of defendant lawyers). The joint defense agreement may not involve a contractual relationship among the lawyers if only the defendants sign the agreement. On putting these situations in the single-agency category rather than the multiagency category, see *id.* at 418 (stating that “most authorities expressly reject the idea that group effort forges a new attorney-client relationship”).

52. MODEL RULES R. 7.2(b)(2) & cmt. 6.

The *L1-L2* contract may not even directly involve *C*'s matter at all. For example, *L1* and *L2* might form a mutual malpractice insurance company (such as the Attorneys' Liability Assurance Society), or have some other contractual relationship (such as debtor-creditor), unrelated to the client's matter.<sup>53</sup> In the case of the mutual malpractice insurer, the relationship is best described as a vertical regulatory one, with the regulation being private rather than public.<sup>54</sup>

### 3. *Agency Relationship Between the Lawyers*

Moving along the continuum toward greater lawyer control of and responsibility for other lawyers, we next come to an agency relationship between the lawyers. Agency is a vertical relationship in which one party acts on behalf of, and subject to the control of, the other.<sup>55</sup> Thus, in this category we need not consider horizontal relationships between the lawyers, which will return when we discuss co-ownership. Agency relationships are usually contractual as well, though they need not be. One important difference between an agency relationship and a mere contractual relationship is that agents owe fiduciary duties to their principals, including duties of care, loyalty, and disclosure,<sup>56</sup> and principals owe duties to their agents, including duties of compensation, indemnity, and good faith.<sup>57</sup> That means *L1* and *L2* owe two sets of obligations: to the client, *C*, and to each other.

Within our framework, we can again distinguish agency relationships between the lawyers in the multiagency and single-agency lawyer-client situations. In the multiagency situation, an agency relationship between lawyers is invariably hierarchical. The most common example is the partner-associate relationship, which is essentially an employer-employee relationship. The employee lawyer, *L2*, need not be a permanent employee of *L1* or *L1*'s firm, but may be a "temporary lawyer"<sup>58</sup> or "contract lawyer,"<sup>59</sup> or "of counsel"<sup>60</sup> to *L1* or *L1*'s firm, or even part of a

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53. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 388 (1994) (discussing relationships among law firms).

54. See generally George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 339-41 (1997).

55. RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

56. *Id.* §§ 379, 381, 387.

57. *Id.* §§ 432-453.

58. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 356 n.1 (1988) (defining temporary lawyer as "a lawyer engaged by a firm for a limited period, either directly or through a lawyer placement agency") (emphasis added); see also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 9 cmt. g. (1998) ("A contract or temporary lawyer who performs legal services for or on behalf of clients of the firm is subject to duties to the firm's clients similar to those of lawyers generally . . .").

59. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 420 (2000) (defining contract lawyer as "any lawyer retained by a lawyer or law firm who is not employed permanently for general assignment by the lawyer or a law firm engaged by the client") (emphasis added). The reason for distinguishing between temporary lawyers and contract lawyers is not apparent, but under the

“secondment” arrangement,<sup>61</sup> as long as *L2* is subject to *L1*’s control and *L2* is not a co-owner with *L1*.<sup>62</sup> In the single-agency lawyer-client situation, an agency relationship between lawyers is generally representational. For example, *L1* hires *L2* to defend a malpractice suit brought by the client, or *L1* hires *L2* to provide ethics guidance to *L1* with respect to the client’s matter.<sup>63</sup>

One further complication of agency law deserves mention here. *L2* may be not only an agent of *L1*, but a subagent of *C*.<sup>64</sup> Not all lawyer-lawyer agency relationships involve subagency, however. In the single-agency situation, such as the representational relationship between the lawyers, the first lawyer’s agent by definition is not a subagent of the client because *L1* is not hiring *L2* to further *C*’s interests. In the multi-agency situation, by contrast, a subagency relationship will generally exist if *L2* is an associate of *L1* assigned to work on *C*’s case<sup>65</sup> and may exist in other hierarchical lawyer-lawyer relationships depending on the understanding of the parties.<sup>66</sup> But the mere fact that *L1* hires *L2* to work on behalf of *C* does not automatically create a subagency relationship; instead, the lawyers may simply be coagents of the same client.<sup>67</sup>

An interesting question of classification involving subagency concerns *L1*’s temporary use of *L2* to make a “special appearance” in court on *C*’s behalf on a day when *L1* cannot be there (note this is also an example of a noncontractual agency relationship between the lawyers). We

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ABA’s definitions, contract lawyers can be employed by a lawyer or lawyers outside of a “firm” and can be hired for more than a “limited period.”

60. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 357 (1990); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 9 cmt. f (2000); Morgan, *supra* note 3, at 229 (“A lawyer who is of counsel to a firm is typically, by definition, not sharing in the profits or management of [the] firm.”).

61. See, e.g., Bruce R. Raines Assocs., Inc. v. Whitman & Ransom, 530 N.Y.S.2d 571, 572 (N.Y. App. Div. 1988) (describing proposed “secondment” arrangement in which a lawyer would be temporarily “loaned” by a placement service to a law firm).

62. For a case discussing the difference between an employer-employee relationship and a joint venture relationship between lawyers, see Bunn v. Lucas, Pino & Lucas, 342 P.2d 508, 516 (Cal. Ct. App. 1959) (holding that the relationship was employer-employee because of a fixed-fee agreement). A recent state ethics opinion discussed an interesting arrangement on the border between agency and co-ownership relationships. See Md. State Bar Ass’n Comm. on Ethics, Op. 16 (Apr. 19, 2001). The inquiring law firm wanted to associate as “special litigation counsel” with another firm representing a corporate client. Under the proposed arrangement, the inquiring firm would get a percentage of the contingency fee recovery as well as hourly compensation paid by the other firm as an “expense of litigation.” The inquiring firm proposed characterizing the relationship between the two firms as one in which the other firm would be a “client” of the inquiring firm. The ethics opinion allowed the arrangement as long as the rules on fee splitting and third party payment were followed. *Id.*

63. See generally Stephen C. Krane, *When Lawyers Represent Their Adversaries: Conflicts of Interest Arising Out of the Lawyer-Lawyer Relationship*, 23 HOFSTRA L. REV. 791, 792–93 (1995).

64. See generally RESTATEMENT (SECOND) OF AGENCY § 5 (1958).

65. *Id.* § 5 cmt. c.

66. *Id.* § 5 illus. 2 (stating that *L1* who hires *L2* to collect a debt in a foreign state may create subagency relationship depending on the understanding of the parties).

67. See *id.* § 5 cmt. b (stating that in the case of coagency, the “appointing agent’s function is merely to appoint a person to act for the principal . . . and the fact that he was appointed by a superior agent rather than by the principal becomes immaterial”).



could categorize this hierarchical lawyer-lawyer relationship as a multi-agency situation because the special appearance (if authorized) necessarily creates some kind of attorney-client relationship between *L2* and *C*. Alternatively, we could characterize the relationship as a single-agency situation because *L2* has only the most minimal attorney-client relationship with *C*. Functionally, not much may turn on which box we put this case in, since in any event, *L2* at least owes fiduciary duties to *C*, including, as one court has recently held, a duty of care.<sup>68</sup>

#### 4. *Lawyers as Co-Owners*

The last possible relationship between *L1* and *L2* is co-ownership. Co-ownership usually involves shared profits and losses, shared control of the business, and shared responsibilities.<sup>69</sup> The simplest form of co-ownership is a partnership.<sup>70</sup> More recent forms of co-ownership that lawyers have used include the professional corporation, limited liability company, and limited liability partnership. One important variation on the partnership for lawyers is the “joint venture,” which is simply co-ownership limited to a single matter.<sup>71</sup> The lawyer joint venture usually involves a concurrent relationship, such as co-counsel,<sup>72</sup> though in some cases courts have held a successive relationship involving referral fees to be a joint venture.<sup>73</sup> The sometimes difficult distinction between a joint venture and a contractual relationship has important implications, most notably vicarious liability, as I will discuss below.

Co-ownership is the most complex lawyer-lawyer relationship, and the taxonomy developed here helps to explain why. Co-ownership can encompass all of the possible organizational categories we have been discussing. Consider the law firm. If two partners corepresent a client, that

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68. *Streit v. Covington & Crowe*, 98 Cal. Rptr. 2d 193 (Cal. Ct. App. 2000). The specially appearing lawyer argued that he was merely an agent of *L1*, not a subagent of *C*, presumably on the ground that *C* neither consented to nor controlled *L2*. Although the court reserved judgment on the subagency question, *id.* at 197 n.3, the court’s holding that *C* had an attorney-client relationship with *L2* necessarily means that *L1* had implied authority to make *L2* at least a limited subagent. *Cf. infra* note 86 and accompanying text. The real question is how far *L2*’s obligations to *C* extend.

69. *See generally* REVISED UNIFORM PARTNERSHIP ACT § 401 (1997) (describing rights and duties of partners).

70. *Id.* § 202(a) (defining partnership as an “association of two or more persons to carry on as co-owners a business for profit”); UNIFORM PARTNERSHIP ACT § 6 (1914) (similar definition).

71. A joint venture is generally defined as a “business relationship[], where the parties have a joint interest in a business undertaking, an understanding as to the sharing of its profits and losses, and a right of joint control.” J. DENNIS HYNES, *AGENCY, PARTNERSHIP, AND THE LLC* 262, 546–47 (5th ed. 1998). Courts generally apply partnership law to joint ventures, including lawyer joint ventures. *See, e.g., In re Johnson*, 552 N.E.2d 703, 707–08 (Ill. 1989).

72. *See, e.g., Fitzgibbon v. Carey*, 688 P.2d 1367, 1371 (Or. App. Ct. 1984); *cf. In re Wells Fargo Sec. Lit.*, 156 F.R.D. 223, 227 (N.D. Cal. 1994) (holding that a steering committee of plaintiff’s lawyers in a class action may also be a joint venture rather than merely a contractual relationship, though there appears to be no case explicitly so holding). For a discussion of aggregation of plaintiff’s lawyers, see *Erichson, supra* note 3, at 386–401.

73. *See Holstein v. Grossman*, 616 N.E.2d 1224, 1236–38 (Ill. App. Ct. 1993) (holding that repeated referral fee arrangement might be a joint venture).

TABLE 1  
A STRUCTURAL TAXONOMY OF MULTILAWYER RELATIONSHIPS  
Lawyer-Client Relationships

	Multi-Agency		Single-Agency	
	Horizontal	Vertical	Horizontal	Vertical
<i>None</i>	<u>Concurrent</u> : client separately hires lawyers <u>Successive</u> : termination, withdrawal, death	<u>Hierarchical</u> : in-house/outside counsel, second opinion <u>Independent</u> : consent counsel	<u>Concurrent</u> : lawyer-lawyer consultation, class counsel/lawyer for class member, opinion letter	<u>Representational</u> : informal ethics advice <u>Regulatory</u> : probation
<i>Contract</i>	<u>Concurrent</u> : cocounsel <u>Successive</u> : referral with fee splitting, sale of business	None	<u>Concurrent</u> : expert witness, joint defense agreement, joint plaintiff consortium	<u>Regulatory</u> : malpractice insurer
<i>Agency</i>	None	<u>Hierarchical</u> : partner/associate, temporary lawyer, contract lawyer, of counsel	None	<u>Representational</u> : ethics counsel
<i>Co-Ownership</i>	<u>Concurrent</u> : cocounsel (joint venture), partnership <u>Successive</u> : departing partner	<u>Hierarchical</u> : managing partner <u>Representational</u> : in-house firm counsel, firm ethics committee	None	None

is a horizontal concurrent representation. If one partner dies or retires, the representation by the remaining partner is successive. One partner may have managerial responsibilities over the other, making the relationship partly hierarchical.<sup>74</sup> If only one of the two partners directly represents the client, the relationship remains a horizontal concurrent one, but there is a question of whether the lawyer-client relationship should be considered multiagency or single-agency. Generally, the firm is considered a multiagency lawyer-client relationship; that is, the client is considered a client of the firm and is deemed to have a lawyer-client relationship with each lawyer in the firm.<sup>75</sup> Although this characterization is true for certain purposes, most notably vicarious liability, there are some ways in which the nonactive partner owes fewer obligations to the client, as well as ways in which the partner actively representing the client may have greater rights in the representation than does the firm.<sup>76</sup> Finally, it is even possible to have representational relationships,<sup>77</sup> and even perhaps regulatory relationships between partners.

##### 5. Summary

We may draw several conclusions from this taxonomy of multi-lawyer relationships, which Table 1 summarizes. Most important, there are a bewildering variety of multilawyer relationships. I have presented these roughly in order from lawyer-lawyer relationships involving the least mutual responsibility and control by the lawyers to those involving the most. There are, of course, other possible ways to describe and order these relationships; for example, one could distinguish *LI-L2* relationships designed primarily to further the client's interests from those designed primarily to further the lawyers' interests. For my purposes, the important point is simply to identify the variety of structures as a prelude to considering how the lawyers' professional responsibilities affect and are affected by these structures. To the extent that the ethics rules treat the only relevant multiple-lawyer situation as the firm, they may miss the sometimes complex ways that the structural relationships between law-

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74. See, e.g., Hillman, *supra* note 25, at 397.

75. Kilpatrick v. Wiley, Rein & Fielding, 37 P.3d 1130, 1147 (Utah 2001); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §§ 9 cmt. i, 14 cmt. h (2000).

76. See MODEL RULES OF PROF'L CONDUCT R. 5.6(a) (2002) (containing prohibitions on covenants not to compete).

77. See, e.g., United States v. Rowe, 96 F.3d 1294, 1296-97 (9th Cir. 1996) (discussing in context of an internal investigation of law firm partner by fellow partner and associates, and holding that communications between investigating associates and partner were protected by the attorney-client privilege against disclosure to third party); Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am., 850 F. Supp. 255, 255 (S.D.N.Y. 1994) (noting that attorney-client privilege applies to law partnership using a partner or associate as counsel of record in a litigated matter, so long as that person is acting solely as a lawyer for the partnership); Farrington v. Law Firm of Sessions, Fishman et al., 687 So. 2d 997, 1002 (La. 1997) (holding that it is ethically permissible for law firm to represent itself in malpractice action).

yers (and between law firms) relate to the lawyers' professional responsibilities.<sup>78</sup>

### III. THE ETHICAL AND LEGAL PROBLEMS CREATED BY MULTILAWYER RELATIONSHIPS

Having set out the variety of formal and functional structures that multiple-lawyer relationships can take, I turn to the question of how multiple lawyer structures affect, and are affected by, the ethical and legal responsibilities of the lawyers involved. The core concerns of the law of lawyering are the three "C's": competence, confidentiality, and conflicts of interest.<sup>79</sup> I will take these concerns up in that order to see how the presence of multiple lawyers affects them. This approach provides a second type of architectural structure for thinking about the multilayered problems of the law of lawyering, as well as a vehicle for using the structural taxonomy developed in the last part. In general, in multiagency situations, the key question is what extra professional obligations the first lawyer incurs by associating with the second. In single-agency situations, the key question is which obligations of the lawyer-client relationship the second lawyer incurs by associating with the first. Finally, we need to ask how, in both situations, the lawyer-client relationship affects the lawyer-lawyer relationship.

#### A. *Competence*

Multiple lawyer situations raise numerous questions of competence. The duty of competent representation arises out of the asymmetry of information between the lawyer and client.<sup>80</sup> The lawyer not only has expertise that the client lacks, but the lawyer knows his ability and level of effort while the client knows neither and can observe only the outcome. Thus, the lawyer has an incentive to exaggerate his ability and take insufficient care to protect the client's interests. Although in theory the lawyer and client can contract to avoid these problems, in reality such contracts are costly to draft and enforce. Implying a "duty of care" higher than an ordinary contractual duty saves the client from either having to spell out all the actions that the lawyer should take on the client's behalf, or having to take other costly self-protective measures to guard against

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78. In fact, of the Model Rules that specifically regulate "Law Firms and Associations," only one of these rules, Rule 5.1(a), is expressly limited in its application to a "firm." Several other rules apply to some *L1-L2* relationships outside of the firm, but deal with only a limited subset of multilawyer relationships and problems. See MODEL RULES R. 5.1, 5.2, 5.5(b), 5.6(a).

79. The other core concern, prohibited assistance, I will take up in Part IV. I will for the most part not address questions concerning fees, which arise often in multiple-lawyer situations, other than situations in which fee rules are related to the core concerns (as in the fee splitting rule).

80. See generally Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991); Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993).

the lawyer taking an unfair advantage.<sup>81</sup> The use of multiple lawyers may either exacerbate or ameliorate this problem, or even have no effect, depending on the context in which the lawyers operate. On the one hand, the more lawyers a client has, the more competent the representation is likely to be. On the other hand, the more lawyers a client has, the harder for the client to monitor all of the lawyers' activities.

The purposes behind the duty of competence help us to understand the effect the duty has on different multilawyer relationships. In the multiagency situation, *L1*'s duties regarding *L2* increase as *L1*'s control over the lawyer-lawyer relationship increases, particularly in vertical relationships involving agency or co-ownership. By contrast, client control tends to be greater, and the lawyers' duties of competence correspondingly less, in successive representation cases or when there is no legal relationship between the lawyers. In the single-agency situation, vertical relationships tend to involve *L2*s whose primary purpose is not to increase the level of competence available to the client, but rather to assist or regulate *L1* for *L1*'s own purposes or the purposes of a third party. Thus, the competency obligations of the two lawyers to the client arising out of the lawyer-lawyer relationship are minimal in this situation. In single-agency horizontal relationships, *L2* will often have competence obligations to the client, but these tend to be limited by the specific role assigned to *L2*. The following subparts provide examples of the effect of multilawyer relationships on the duty of competence.

### 1. *Authority to Form the Multilawyer Relationship*

One set of issues that implicates the duty of competence concerns the formation of the multilawyer relationship. When *C* hires only *L1* at the outset, one important question is who is authorized to form a multilawyer relationship. In the multiagency context, the client always has the right to unilaterally bring in *L2*, whether as co-counsel (concurrent) or as a replacement for *L1* (successive). In the successive case, however, the client may breach his contract with *L1* by terminating the relationship,<sup>82</sup> and *L2* may be subject to liability in tort for intentional interference with contractual relations in certain cases.<sup>83</sup> A third party, such as a court,

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81. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 126 (5th ed. 1998).

82. See MODEL RULES R. 1.16 cmt. 4 ("The client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services."); RESTATEMENT (SECOND) OF AGENCY § 118 (1958).

83. RESTATEMENT (SECOND) OF AGENCY. § 374(3) ("A servant or other agent has a cause of action against one who, without privilege, purposely causes the principal not to perform his contract of employment or not to continue the employment."); see *infra* note 249. *But cf.* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 57(3) (2000) ("A lawyer who advises or assists a client to make or break a contract, to enter or dissolve a legal relationship, or to enter or not enter a contractual relation, is not liable to a nonclient for interference with contract or with prospective contractual relations or with a legal relationship, if the lawyer acts to advance the client's objectives without using wrongful means."); see also *infra* note 249.

may also be authorized to create a successive relationship if the court appointed *L1* but *C* terminates the representation.<sup>84</sup>

In contrast, *L1* generally does not have the right to associate with *L2* without the client's consent in the multiagency context, or even in the single-agency context if the primary purpose of the second lawyer is to further the representation of the client.<sup>85</sup> Because *L1*'s contract with *C* is for personal services and involves the exercise of skill and discretion, *L1* may not delegate his obligations under that contract to *L2* unless *C* agrees.<sup>86</sup> These rules generally comport with the reasons underlying the duty of competence: the informational disadvantage to the client is greatest when the client does not even know of the multilawyer relationship. *C*'s consent to a multilawyer relationship may, however, be implied from the circumstances.<sup>87</sup> For example, *L1* may unilaterally associate with *L2* in a case such as the "special appearance," in which *L1* asks *L2* to make a special appearance in court on a day *L1* cannot be there.<sup>88</sup> In this case, *C*'s consent to the use of *L2* as a subagent would be implied even though *C* does not specifically approve (or even know of) *L2*.

In the single-agency context, however, *L1* often has the right to unilaterally associate with *L2*. The obvious example is the vertical represen-

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84. Cf. MODEL RULES R. 1.16 cmt. 5 (stating that if a client is allowed to terminate appointed counsel, the appointing authority may decide that "appointment of successor counsel is unjustified"). This comment is the only time successor counsel is mentioned in the Model Rules.

85. See CANONS OF PROFESSIONAL ETHICS 7 (1969) ("A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client."); MODEL CODE OF PROF'L RESPONSIBILITY EC 2-22 (1983) ("Without the consent of his client, a lawyer should not associate in a particular matter another lawyer outside his firm."); *id.* EC 4-2 (stating that "in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter"); *id.* EC 6-3 (stating that a lawyer "with the consent of his client," may associate another lawyer to provide competent representation).

86. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 14 cmt. h (2000) (stating that a "client's retention of a lawyer or firm ordinarily does not permit the lawyer or firm, without further authorization from the client, to retain a lawyer outside the firm at the client's expense to represent the client"); see also RESTATEMENT (SECOND) OF AGENCY § 18 ("Unless otherwise agreed, an agent cannot properly delegate to another the exercise of discretion in the use of a power held for the benefit of the principal."); *id.* § 78 ("Unless otherwise agreed, authority to conduct a transaction does not include authority to delegate to another the performance of acts incidental thereto which involve discretion or the agent's special skill . . ."); RESTATEMENT (SECOND) OF CONTRACTS § 318(2) & cmt. c (1979); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 356 (1988) (stating that "where the temporary lawyer is performing independent work for a client without the close supervision of a lawyer associated with the law firm, the client must be advised of the fact that the temporary lawyer will work on the client's matter and the consent of the client must be obtained . . . because the client, by retaining the firm, cannot reasonably be deemed to have consented to the involvement of an independent lawyer"). See generally Perillo, *supra* note 50.

87. See *Freedman v. Horton, Schwartz & Perse*, 383 So. 2d 659, 662 (Fla. Dist. Ct. App. 1980) (holding that client who knew but did not object when *L1* retained *L2* is liable for *L2*'s fees under implied contract theory); see also RESTATEMENT (SECOND) OF AGENCY § 79 (recognizing authority of agent to appoint a coagent if business custom allows it, if it is reasonable, or in case of an emergency); *id.* § 80 (recognizing authority of agent to appoint subagent if the agent cannot lawfully or practically perform the required task, the agent is an organization, the appointment of subagents is customary, or in case of an emergency).

88. *Streit v. Covington & Crowe*, 98 Cal. Rptr. 2d 193 (Cal. Ct. App. 2000).

tational relationship, such as when *L1* hires *L2* to defend against a malpractice suit by the client, to bring suit against the client for payment of *L1*'s fee, or to receive ethical guidance in the course of the representation. In these cases, *L1* is often not seeking to provide more competent representation to the client, but rather to protect himself from the client, or to ensure that the client's goals do not conflict with the lawyer's ethical obligations. Thus, the client has less of a legitimate interest in controlling the hiring of *L2*. In still other cases involving a single-agency situation, such as the regulatory context, a third party such as a disciplinary authority may create the multilawyer situation without the consent of either *L1* or the client, again because the purpose is to serve interests other than the client's.

An important example of a situation in which a lawyer has a right to unilaterally associate with other lawyers is the class action. The problem here is that the class client is largely a creation of the class lawyer to begin with, and class members typically have no ability to exercise any control over the class counsel. So class counsel may affiliate with as many lawyers as he or she chooses, though courts sometimes regulate these choices.<sup>89</sup> In fact, multiple lawyers are often present at the inception of the class action, and decide to associate before the class action is filed, or after the lawyers file their own competing class actions.<sup>90</sup>

## 2. *Formation of Multilawyer Relationship as an Obligation of Competence*

A related question of competence arising out of the formation of a multiple-lawyer relationship is whether *L1* has an obligation to recommend or see to it that a relationship with *L2* is formed (or not formed). This duty can exist, of course, only when the primary purpose of bringing in *L2* is to further *C*'s interests. Thus, the duty does not arise in the single-agency context, either with vertical representational or regulatory relationships between the lawyers, or even with some horizontal relationships between the lawyers.

In the multiagency context, and in some horizontal representations in the single-agency context, the fact that *L1* owes duties of competence in deciding whether to associate with *L2* should not be a surprise, because the need for a second lawyer to further *L1*'s representation of *C* is certainly an area in which *L1* often has an informational advantage. In horizontal concurrent representation, *L1*'s ethical and legal duty of competent representation may require that *L1* associate with, or recommend

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89. See, e.g., *Amchem Prods. v. Windsor*, 521 U.S. 591, 607–08 (1997).

90. For a discussion of some of the issues arising out of these combinations of lawyers, including the potential for antitrust liability, see Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1089–1102 (1996).

C's association with L2,<sup>91</sup> or in some cases that L1 or C not associate with L2.<sup>92</sup> For example, if L1 is not a specialist in a particular area of law involved in the representation, or if L1 is licensed in a jurisdiction other than the one in which the client's case will be litigated, L1 may be required to see to it that C brings L2 into the case.<sup>93</sup> In successive representation, L1's duty of competence may require L1 to make reasonable efforts to provide for a successor, either at the time of L1's hiring (because, for example, L1 is not competent or permitted to handle the representation),<sup>94</sup> or at the end of L1's representation,<sup>95</sup> or L1 may have a duty to remain as the client's lawyer until a successor is found.<sup>96</sup> In the vertical context in which there is no legal relationship between the lawyers, L1 may be required to give the client the option to seek out a second lawyer to monitor L1, such as in lawyer-client business transactions<sup>97</sup> or the settlement of lawyer-client disputes.<sup>98</sup> Or L1 may recommend L2

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91. See generally RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 52 cmt. c (1998) ("Circumstances might make it necessary to provide more than one lawyer for a client's matter . . ."). The first comment to the first substantive rule in the Model Rules encourages the use of multiple lawyers when necessary to satisfy the duty of competent representation. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 1 (2002) (stating that competence depends in part on "whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question") (emphasis added); *id.* cmt. 2 ("Competent representation can also be provided through the association of a lawyer of established competence in the field in question."); see also MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101(A)(1) (1983) ("A lawyer shall not . . . [h]andle a matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it."); *id.* EC 5-11 (stating that a lawyer "should be alert to the desirability of recommending additional counsel when, in his judgment, the proper representation of his client requires it"); *id.* EC 6-3 ("A lawyer offered employment in a matter in which he is not and does not expect to become . . . qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.").

92. See MODEL CODE EC 5-11 (stating that "a lawyer should advise his client not to employ additional counsel suggested by the client if the lawyer believes that such employment would be a disservice to the client, and he should disclose the reasons for his belief").

93. A related question is whether L2 can initiate the contact with L1. There is no problem under the no-contact rule, with lawyer-lawyer contact, or even with L2 contacting C, as long as L2 is not "representing a client" in the matter when he makes the contact. MODEL RULES R. 4.2 cmt. 4. There may be a problem under the advertising rules, see *id.* R. 7.3, but if the contact is with a lawyer rather than the client, the concerns of overreaching that motivate the advertising rules are mitigated. For a recent state ethics opinion allowing such contacts by L2, see Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 2002-6 (June 14, 2002).

94. See, e.g., *Norton v. Hughes*, 5 P.3d 588, 592 (Okla. 2000) (finding lawyers who could not file client's suit in foreign jurisdiction not liable for failing to procure lawyer from that jurisdiction to file it for them after making reasonable efforts to do so).

95. See MODEL CODE EC 2-32 ("Even when he justifiably withdraws, a lawyer should protect the welfare of his client by . . . suggesting employment of other counsel . . .").

96. MODEL RULES R. 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . allowing time for employment of other counsel . . .").

97. *Id.* R. 1.8(a)(2); see also *Petit-Clair v. Nelson*, 782 A.2d 960, 963 (N.J. Super. Ct. App. Div. 2001) (holding that mortgage that corporate officers gave to lawyer to secure lawyer's fees is void in light of lawyer's failure to advise officers to consult independent counsel before entering into transaction).

98. MODEL RULES R. 1.8(h). If the settlement is *ex ante*, that is, "an agreement prospectively limiting the lawyer's liability to the client for malpractice," the ethics rules require the client be "independently represented in making the agreement." *Id.* R. 1.8(h)(1).



to provide a second opinion when *LI*'s conclusion is controversial or contested.<sup>99</sup>

Formation questions may involve not only whether a multilawyer relationship may be formed or whether it should be formed, but how it should be formed. For example, *LI*'s duty of competence includes at least a limited duty of care in selecting an appropriately qualified and competent *L2*.<sup>100</sup> Although the duty of competence does not encompass an obligation to use a particular organizational form, or to provide clients a particular degree of control over multilawyer relationships,<sup>101</sup> the duty may include an obligation to inform the client of the existence of a particular organizational form,<sup>102</sup> or the consequences of a particular lawyer-lawyer relationship.<sup>103</sup>

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99. See, e.g., *id.* R. 1.13(b)(2) (listing, as one of the permissible responses to wrongdoing by an organizational client, "advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization"); see also *id.* cmt. 3 ("At some point it may be useful or essential to obtain an independent legal opinion."). It is probably no accident, however, that neither the rule nor the comment specifically refers to an independent lawyer.

100. See generally *Tormo v. Yormark*, 398 F. Supp. 1159, 1169-70 (D.N.J. 1975) (noting that attorney who transfers client's case to another counsel is under duty to exercise due care to ensure retained counsel is competent and trustworthy); MODEL RULES R. 1.5 cmt. 7 ("A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter."); *id.* R. 1.17 cmt. 11 (noting that seller of a law practice has an "obligation to exercise competence in identifying a purchaser qualified to assume the practice"); RESTATEMENT (SECOND) OF AGENCY § 405(2) (1958) (noting liability of agent to principal for fault in appointing other agents); Barry R. Temkin, *Can Negligent Referral to Another Attorney Constitute Legal Malpractice?*, 17 *TOURO L. REV.* 639, 642 (2001); Note, *Liability for Referral of Attorneys*, 24 *J. LEGAL PROF.* 465 (2000); cf. *Bourke v. Kazaras*, 746 A.2d 642, 643 (Pa. Super. Ct. 2000) (holding that local bar referral service owed no duty to client to use adequate care when referring client to lawyer).

101. MODEL RULES R. 1.2(a) & cmt. 2 ("Clients normally defer to the special knowledge and skill of their lawyer with respect to technical, legal and tactical matters.")

102. *Id.* R. 1.4(a)(2) ("A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished . . ."); see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 420 (2000) (stating that the "role of contract lawyers retained to work on a client's matter(s) should be disclosed to the client"); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 407 (1997) (stating that under Model Rule 1.4, firm hiring expert has obligation "to assure that its client is fully informed as to the nature of the testifying expert's role," and that if lawyer hired as expert becomes a consultant as well, "[t]he lawyer expert then must exercise special care to assure that the law firm and the client are fully informed and expressly consent to the lawyer continuing to serve as a testifying expert, reminding them that his testifying may require the disclosure of confidences and may adversely affect the lawyer's expert testimony by undermining its objectivity"); cf. RESTATEMENT (SECOND) OF AGENCY § 80 cmt. a (stating that although attorneys are normally "authorized to delegate to their employees the performance of the principal's business, this is not true if they have reason to know that the principal is not aware of their business organization"). In addition, the Model Rules concerning advertising impose some restrictions on what lawyers may affirmatively say about lawyer-lawyer relationships. MODEL RULES R. 7.1 (general prohibition on false or misleading advertising); *id.* R. 7.5(a) (prohibition on false or misleading firm name, letterhead, or other professional designation); *id.* R. 7.5(d) ("Lawyers may state or imply that they practice in a partnership or other organization only when that is a fact."). One ABA opinion reads a greater disclosure obligation into Rule 7.5(d). See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 356 (1988) (stating that Rule 7.5(d) embodies the "policy that a client is entitled to know who or what entity is representing the client").

103. The Model Rules do not require that a law firm disclose its limited liability status, though one new comment reminds lawyers that other law may require such a disclosure. MODEL RULES R. 1.8 cmt. 14.

### 3. *Duty of Competence in Managing the Multilawyer Relationship*

Competence questions may arise not only from the birth of a lawyer-lawyer relationship, but also from the relationship's life and death. During the life of the lawyer-lawyer relationship, there are at least three types of competence questions raised by multilawyer relationships: the division of responsibility between the lawyers, the allocation of decision-making authority, and the monitoring by one lawyer of the other lawyer's performance. As with formation questions, these problems are generally limited to the multiagency context, in which client control of the lawyer-lawyer relationship is greater. It turns out that, depending on the context, the presence of *L2* may contract or expand *L1*'s duties of competence, and may even do both simultaneously.

In the multiagency context, problems of division of responsibility, allocation of decision-making authority, and monitoring all arise in horizontal concurrent relationships, and some of the problems arise in successive and hierarchical relationships as well. Consider horizontal concurrent relationships first. With respect to dividing responsibility, the question is how much of *L1*'s duty of competence can *L1* pass off to *L2*. In general, the greater *L1*'s control over the lawyer-lawyer relationship, the less *L1* can limit his responsibilities. Lawyers who have no legal relationship to each other may limit their responsibilities with the client's consent and *L1*'s competence obligations are certainly defined by the scope of *L1*'s representation.<sup>104</sup> But these limits do not relieve *L1* of his own ethical obligations,<sup>105</sup> and in particular may not relieve *L1* of competence obligations, including coordinating responsibilities with *L2*.<sup>106</sup> At the other end of the spectrum, if *L1* and *L2* are in a co-ownership relationship, *L1* is generally vicariously liable for *L2*'s misconduct;<sup>107</sup> thus, *L1*'s ability to relieve himself of responsibility is obviously limited.

Whereas the division of responsibility concerns the question of how lawyers mete out tasks and consequences, the allocation of authority concerns the question of how lawyers resolve disputes among themselves

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104. *Id.* R. 1.2(c) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

105. *Id.* R. 1.2 cmts. 7-8; *Marcano v. Litman & Litman, P.C.*, 741 N.Y.S.2d 522, 523 (N.Y. App. Div. 2002) (stating that even if *L1* referred client in worker's compensation matter to *L2* and consulted with *L2* about potential personal injury claims against third parties, *L1* may nevertheless be liable to client in malpractice if *L1* failed to dispel the client's apparent misunderstanding about the scope of *L1*'s representation); *cf. Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128 (9th Cir. 1995), *cert. denied*, 516 U.S. 1158 (1996). In this case, the general counsel of the defendant was aware of evidentiary fraud committed by the client. *Id.* at 1131. The court held that the general counsel, as an "officer of the court," committed fraud on the court, thereby justifying a new trial under Federal Rules of Civil Procedure 60(b), even though the in-house counsel did not specifically participate in litigation or sign any litigation documents, though he did attend the trial and was involved in discovery. *Id.* at 1130-31, 1133-34. Local counsel, who handled the litigation, was unaware of the fraud. *See id.* at 1131.

106. *See Twitchell, supra* note 3, at 756-61 (noting that in the context of multiple lawyers, the notion of limiting representation is in some tension with notion of responsibility for other lawyers).

107. *See infra* Part III.A.6.

and make decisions. Of course, the client has the ultimate authority to resolve disputes between the lawyers concerning the client's matter, for example, a disagreement between in-house and outside counsel about how to handle a particular matter.<sup>108</sup> But as lawyer control over the lawyer-lawyer relationship increases, the lawyers are more likely to allocate authority among themselves. And once the lawyers are in a co-ownership relationship, they may resolve intralawyer disputes without the client even knowing that such disputes existed. The problem is that in the intermediate situations involving multiagency concurrent representation, the client may not exercise sufficient control, and the lawyers may not have a sufficiently cohesive organization to determine clear lines of authority.<sup>109</sup> It is also important to note that regardless of how the client and the lawyers resolve questions of authority among themselves, doctrines of apparent authority and the like protect third parties if the horizontal relationship involves co-ownership or a joint venture.<sup>110</sup>

Monitoring is closely connected to responsibility, because the ability and the obligation to monitor can be a basis for imposing liability, whether direct or vicarious.<sup>111</sup> Once again, greater lawyer control over the lawyer-lawyer relationship entails greater monitoring obligations, with the greatest obligations occurring in the co-ownership relationship. Under the ethics rules, for example, co-owner *L1* has an obligation to ensure that procedures are in place to provide reasonable assurance of co-owner *L2*'s compliance with the ethics rules,<sup>112</sup> and to avoid or mitigate known misconduct by *L2*.<sup>113</sup> The difficult questions again occur in situations in which both *L1* and the client exercise little control over *L2*. In

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108. See MODEL CODE OF PROF'L RESPONSIBILITY EC 5-12 (1983) ("Inability of co-counsel to agree on a matter vital to the representation of their client requires that their disagreement be submitted by them jointly to their client for his resolution, and the decision of the client shall control the action to be taken."); see also CANONS OF PROFESSIONAL ETHICS 7 (1969) ("When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination."); RESTATEMENT (SECOND) OF AGENCY § 41(2) (1958) ("Unless otherwise agreed, authority given in one authorization to two or more persons to act as agents includes only authority to act jointly, except in the execution of a properly delegable authority.");

109. See Twitchell, *supra* note 3, at 724 ("Diffusion of authority among several lawyers is the gravest drawback of team lawyering.");

110. See, e.g., UNIFORM PARTNERSHIP ACT § 9 (1914); REVISED UNIFORM PARTNERSHIP ACT § 301 (1997).

111. MODEL RULES R. 5.1; Temkin, *supra* note 100, at 661.

112. See MODEL RULES R. 5.1(a) ("A partner in a law firm, and a lawyer who individually or together with other lawyers possesses managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."); see also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 11(1), (2) (2000).

113. See MODEL RULES R. 5.1(c)(2) ("A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if . . . the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, . . . and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."); *id.* R. 5.1(c)(1) ("A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if . . . the lawyer . . . , with knowledge of the specific conduct, ratifies the conduct involved."); see also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 11(3).

the co-counsel situation in which *L2* is a specialist in a particular jurisdiction or area of law, courts have been reluctant to impose any duty on *L1* to monitor successor *L2* because such monitoring would go beyond predecessor *L1*'s expertise.<sup>114</sup>

In successive relationships, two of the issues of managerial competence are easy to resolve. The authority question is determined by which lawyer is representing the client at the relevant time.<sup>115</sup> As for monitoring, because the lawyers are not involved in the representation at the same time, *L2* cannot monitor *L1*, and it would generally make little sense to require *L1* to monitor *L2*. The responsibility question, however, is more complicated. Although *L1* usually does not have any responsibility to *C* for *L2*'s conduct after *L2* takes over (unless the successive relationship results from a failed concurrent relationship), *L1* has a duty to cooperate with *L2* after *L1* departs from the representation.<sup>116</sup> More important, the fact that *L1* drops out of the representation does not in general relieve *L1* from any malpractice occurring during *L1*'s representation.<sup>117</sup> This rule gives *L1* a continuing incentive to correct any subsequently discovered malpractice, even if the discovery occurs after *L1*'s representation ends. The rule is also consistent with the informational asymmetry justification of the duty of competence: if the client cannot easily judge lawyer quality, the client will not always be able to

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114. See *Wilderman v. Wachtell*, 267 N.Y.S. 840, 842 (N.Y. Sup. Ct. 1933), *aff'd*, 271 N.Y.S. 954 (N.Y. App. Div. 1934) (holding that to impose a duty to monitor on *L1* would subject *L1* to "hazards which he is not qualified either to anticipate or to prevent"); *Broadway Maint. Corp. v. Tunstead & Schecter*, 487 N.Y.S.2d 799, 801 (N.Y. App. Div. 1985) (finding no duty on outside general counsel to supervise local counsel, even though general counsel occasionally acted as liaison to client); *Temkin*, *supra* note 100, at 655-62. *But cf.* *Tormo v. Yormark*, 398 F. Supp. 1159, 1173 (D.N.J. 1975) (holding that *L1* could be liable for breach of duty to supervise co-counsel *L2* if *L1* made representations to client about the progress of the case being handled by *L2* and then failed to monitor progress of case).

115. See *Temkin*, *supra* note 100, at 650-51.

116. See MODEL CODE OF PROF'L RESPONSIBILITY EC 2-32 (1983) ("Even when he justifiably withdraws, a lawyer should protect the welfare of his client by . . . cooperating with counsel subsequently employed . . ."); MODEL RULES R. 1.16(d); RESTATEMENT (THIRD) LAW GOVERNING LAWYERS § 33; Meegan B. Nelson, *When Clients Become "Ex-Clients": The Duties Owed After Discharge*, 26 J. LEGAL PROF. 233, 241 (2002) (finding duty to cooperate implicit in Model Rule 1.16(d) and citing cases interpreting duty to include transfer of files and promptly signing stipulation for substitution of counsel).

117. See *Royal Ins. Co. v. Miles & Stockbridge, P.C.*, 133 F. Supp. 2d 747, 758 (D. Md. 2001); *Cline v. Watkins*, 135 Cal. Rptr. 838, 841 (Cal. Ct. App. 1977); *Stone v. Satriana*, 41 P.3d 705, 712 (Colo. 2002) (holding that "there is no duty for a legal malpractice plaintiff's counsel to ameliorate the injury effected by predecessor counsel"); *Wimsatt v. Haydon Oil Co.*, 414 S.W.2d 908 (Ky. Ct. App. 1967); *Villarreal v. Cooper*, 673 S.W.2d 631, 634 (Tex. Ct. App. 1984); RESTATEMENT (SECOND) OF TORTS § 452(1) (1965) ("Except as stated in Subsection (2), the failure of a third person to prevent harm to another threatened by the actor's negligent conduct is not a superseding cause of such harm."). *But see* *Mitchell v. Schain, Firsell & Burney Ltd.*, 773 N.E.2d 1192, 1195 (Ill. App. Ct. 2002) (holding that successor lawyer's failure to reinstate client's lapsed claim within statutory grace period broke proximate cause link between predecessor firm's alleged negligence and client's loss); RESTATEMENT (SECOND) OF TORTS § 452(2) ("Where, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause.").

recognize the first lawyer's incompetence, and neither will the successor lawyer if he turns out to be incompetent as well.<sup>118</sup>

In vertical hierarchical relationships, a supervisor *L1* generally has ultimate decision-making authority over subordinate *L2*, as well as a duty of reasonable supervision.<sup>119</sup> Thus, *L1*'s responsibilities in this context are relatively straightforward. Even where they are not, vicarious liability, which part III.A.6 will discuss, provides extra protection to the client.

Finally, in the single-agency context, the questions of division of responsibility and authority are less important, and arise only in horizontal lawyer-lawyer relationships. In horizontal single-agency relationships, the lawyer who has the full-fledged lawyer-client relationship with the client, *L1*, generally has full responsibility for the representation and the ultimate authority to make decisions on the client's behalf.<sup>120</sup> Moreover, although *L1* has some monitoring responsibilities over *L2* in the horizontal single-agency context, *L1*'s ability to monitor *L2* may be limited. For example, in the opinion letter situation, *L1* has neither an ongoing relationship with *L2* nor any ability to control *L2*.

The division of responsibility and allocation of authority between lawyers becomes difficult in the single-agency context only when there is uncertainty about the client's own responsibility and authority, which generally occurs in cases involving entity clients.<sup>121</sup> An important example of this problem is the class action, in which the class is a creature of

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118. *Cline*, 135 Cal. Rptr. at 841 ("A member of the public seeking the services of a lawyer thus has no real means of determining his capability. Nor has a member of the public engaging the services of a lawyer any real means of gauging the quality of service performed. Where a lawyer originally retained is relieved and another substituted, the client is likely to have some general dissatisfaction with the quality of service of the original lawyer but is unlikely to be aware of any specific reason for the dissatisfaction although a legitimate reason exists. The same lack of means to assess lawyer quality, which results in the retention of a negligent lawyer in the first instance, may well result in his being replaced by another negligent lawyer when the client acquires the vague uneasiness that the first is not doing what he should.").

119. See MODEL RULES R. 5.1(b) ("A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."); *id.* R. 5.1(c) ("A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders . . . the conduct involved; or (2) the lawyer . . . has supervisory direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."); RESTATEMENT (SECOND) OF AGENCY § 405(2) (1958) (noting liability of agent to principal for failure to exercise care in supervising other agents); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 11(2), (3)(b), & cmt. a ("Failure to supervise . . . may in an appropriate instance constitute a violation of the duty of care that the individual lawyer with supervisory responsibility owes to a firm client.").

120. Thus, for example, if the constituent of an organization is represented in this matter by his own lawyer, consent of that lawyer is sufficient to satisfy no-contact rule; there is no need to also get the consent of the organizational lawyer. MODEL RULES R. 4.2 cmt. 7. Indeed, the organizational lawyer himself could violate Rule 4.2 by communicating about a matter with a constituent he knew was represented by his own lawyer in that matter.

121. See generally Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15 (1987); Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129 (2001).

class counsel and class counsel often define the interests of the class as well. The Supreme Court has recently recognized that subclasses with independent legal representation might be needed to overcome conflicts of interest among class members as well as between the class and class members.<sup>122</sup> But the authority and division of responsibility between class counsel and counsel for the various subclasses is underexplored.<sup>123</sup> Similarly, in the derivative suit context, lawyers for the corporation commonly enter into a joint defense agreement with lawyers for the officers and directors who are the real defendants. May the lawyers for the corporation allow the lawyers for the officers and directors to take a leadership role in the joint defense if there is some risk that the interests of the corporation may at some point diverge from the interests of the officers and directors? And who is supposed to make that judgment?

#### 4. *Duty of Competence in Ending the Multilawyer Relationship*

As with formation and management, the effect of the duty of competence on the termination of the multilawyer relationship depends a great deal on the particular lawyer-lawyer and lawyer-client relationships and on the degree of lawyer control over the lawyer-lawyer relationship. If neither lawyer controls the formation or management of the lawyer-lawyer relationship, as in the regulatory situation, or if the client hires co-counsel separately, the lawyers will obviously not control termination either. If *L1* controls the lawyer-lawyer relationship, most notably in the vertical hierarchical or representational scenarios, *L1* generally has the right to end the relationship with *L2*, though in the multiagency context, *L1* is responsible to the client for any adverse consequences resulting from the termination.<sup>124</sup> In addition, in the multiagency context, the departure of *L2* or *L1* may be required as part of *L1*'s duty of competence, which parallels the question of competence in formation. *L1* may owe a duty not to negligently retain the services of *L2* when *L1* discovers that *L2* is incompetent.<sup>125</sup> And the inability of co-counsel to work together effectively may require the departure of one, resulting in a successive relationship.<sup>126</sup>

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122. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–27 (1997).

123. Similar problems in class actions arise with overlapping class actions, in which competing class counsel seek to represent the same class members in different arenas. *See generally* Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461 (2000). Another related example involves a group of plaintiff's counsel getting together to select a "lead counsel." *See generally* Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 654–57 (2002). The difference is that these examples arguably involve multiagency rather than single-agency representations because all the lawyers are purporting to represent the same class client.

124. *See* RESTATEMENT (SECOND) OF AGENCY §§ 213, 405.

125. *Id.* §§ 213(d), 406.

126. *See, e.g.*, MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110(c)(3) (1983) (permitting withdrawal if lawyer's "inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal").

### 5. *The Second Lawyer's Duty of Competence to the Client*

So far, I have focused on *L1*'s extra duties of competence arising out of multilawyer relationships. But an additional question is what, if any, duties of competence *L2* owes to the client. Of course, in the multi-agency context, the second lawyer by definition is in a lawyer-client relationship with the client, and so owes ordinary duties of competence arising out of that relationship. In particular, in the successive representation situation, the second lawyer owes full duties of competence. These duties may be expanded by the former representation of *L1* if *L1* leaves messes that *L2* must clean up,<sup>127</sup> or may be limited if *L1*'s successful performance leaves less for *L2* to do. In concurrent representation cases, *L2*'s duties of competence, like *L1*'s, may be limited by the scope of the representation. On the other hand, if the client brings in *L2* to monitor or evaluate *L1*'s work, *L2*'s duties are expanded by the presence of *L1*.

In the vertical hierarchical relationship, a subordinate *L2* is generally not absolved of personal responsibility for his own conduct by virtue of this supervision.<sup>128</sup> The ethics rules contain a controversial and questionable exception to disciplinary liability for a situation in which the subordinate lawyer "acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."<sup>129</sup> Not only is this exception inconsistent with general agency law, it conflates

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127. See, e.g., *Nissenson v. Bradley (Olson)*, 738 N.E.2d 586, 590 (Ill. App. Ct. 2000) (holding that a lawyer who takes over as counsel in a pending court case must take corrective action once the lawyer realizes that documents filed by client's prior counsel are inaccurate); *In re Anonymous*, 724 N.E.2d 1101 (Ind. 2000) (disciplining lawyer under Rule 5.1 for failing to prosecute client's case after partner left the firm; disciplined lawyer had cosigned pleadings and discovery requests but had not otherwise been involved in the case). But see *Kates v. Robinson*, 786 So. 2d 61, 65 (Fla. Dist. Ct. App. 2001) (per curiam) (successor lawyer hired to collect a consent judgment arranged by *L1* in personal injury action has no duty to discover and collect from anyone else who might be liable, even if *L2* is a personal injury lawyer).

128. See MODEL RULES R. 5.2; RESTATEMENT (SECOND) OF AGENCY § 343 ("An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal," with several exceptions.); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 12 (2000). In an interesting recent case involving two overlapping multi-lawyer relationships, a subordinate government attorney declined a work assignment involving the investigation of a landowner because the lawyer representing the landowner was a member of a law firm that the government attorney had previously consulted in a personal legal matter. *McCurdy v. Kan. Dep't of Transp.*, 898 P.2d 650, 651-52 (Kan. Ct. App. 1995). The supervising government attorney demanded further information from the subordinate about the potential conflict, but the subordinate declined and was suspended. *Id.* at 652. The trial court reversed the suspension, and the appellate court affirmed, holding that Model Rule 5.2 does not require the subordinate lawyer to submit all ethical questions to the superior lawyer. *Id.* at 652-53. In effect, the court held that the subordinate lawyer's representational relationship with her own lawyer combined with her personal ethical obligation to the government client trumped any obligation of obedience under the hierarchical vertical relationship with her superior lawyer. See *id.*

129. MODEL RULES R. 5.2(b).

the question of which lawyer has authority to make the decision, and the question of which lawyer or lawyers should bear responsibility.<sup>130</sup>

In the single-agency context, the relevant question is usually whether *L2* owes the client any duty of competence at all.<sup>131</sup> The key to whether *L2* owes the client a duty is generally whether the purpose of the multilawyer relationship is primarily to serve the client's interests, and whether *L1* invites the client to rely on *L2*'s services.<sup>132</sup> These are the situations in which the client is most vulnerable to advantage taking by *L2*. The requirements are met only in horizontal single-agency relationships, not in vertical single-agency relationships, which are either representational or regulatory. In the horizontal single-agency situation, such as the opinion letter, courts have recognized the second lawyer's duty of competence to the client.<sup>133</sup> In related areas, such as the joint defense agreement, the case law is sparse. In other horizontal single-agency situations, *L2*'s duties of competence are limited by *L2*'s role, such as "expert"<sup>134</sup> or "consultant."<sup>135</sup>

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130. See *id.* cmt. 2; see also Twitchell, *supra* note 3, at 761 n.255 (criticizing Rule 5.2(b) because the subordinate lawyer often has better information about the issue, and because "the Rule may discourage associates from confronting their own responsibility for their acts or discourage them from challenging the instructions of their supervisors"); Rachel Reiland, Note, *The Duty to Supervise and Vicarious Liability: Why Law Firms, Supervising Attorneys and Associates Might Want to Take a Closer Look at Model Rules 5.1, 5.2 and 5.3*, 14 GEO. J. LEGAL ETHICS 1151, 1159 n.51 (2001). A recent ethics opinion may suggest some of the difficulty. The opinion states that a lawyer litigating a case is not excused from his ethical duty to communicate a settlement to the client merely because the lawyer was hired by the firm on an independent contractor basis and was given instructions not to discuss settlement with the client. Rule 5.2 protects the subordinate lawyer only if the lawyer is reasonably certain that the law firm has conveyed the offer to the client or that the client has authorized the firm to reject the offer. Philadelphia Bar Op. 2000-8 (Sept. 2000).

131. See generally Erichson, *supra* note 3, at 441-45.

132. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 51(2) (stating that a lawyer owes a duty of care to a nonclient if "the lawyer . . . invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and . . . the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection").

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

134. The recent ABA opinion on the subject defines the duties of the testifying expert as follows: To be sure, the testifying expert may review selected discovery materials, suggest factual support for his expected testimony and exchange with the law firm legal authority applicable to his testimony. The testifying expert may also help the law firm to define potential areas for further inquiry, and he is expected to present his testimony in the most favorable way to support the law firm's side of the case. He nevertheless is presented as objective and must provide opinions adverse to the party for whom he expects to testify if frankness so dictates.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 407 (1997). For a criticism of this description, see Selinger, *supra* note 50, at 416 (arguing that the statement contradicts idea of expert as "objective" because a kind of loyalty is expected, and expert can become involved in the case); *id.* at 422-24 (arguing that relying on facts provided by hiring lawyer without some verification of these facts is risky).

135. See *Glantz v. Rosenberg*, 633 N.Y.S.2d 77 (N.Y. 1995) (finding *L2* hired as consulting attorney in bankruptcy matter not responsible for attorney of record *L1*'s failure to respond to summons and notice of trial); see also *David B. Lilly Co. v. Fisher*, 18 F.3d 1112, 1122 (3d Cir. 1994) (raising question of the liability of a consulted lawyer to a client of the consulting lawyer, but resolving the case on other grounds).



### 6. *Vicarious Liability and Multiple Lawyers*

Perhaps the most important competence question raised by multiple-lawyer situations is when one lawyer is vicariously responsible for breaches of duty by the other lawyer. Vicarious liability is distinguished from direct liability for breaches of the duty of competence associated with another's actions, such as negligent hiring, supervision, or retention, because the liability is strict. The justifications for vicarious liability thus involve arguments that the due care standard of direct liability is inadequate, whether for legal or practical reasons. From an economic perspective, the main justifications for vicarious liability are that it encourages the strictly liable party to exercise greater control over how the other party does his job, what kinds of jobs the other party does, and how often he does them (activity level).<sup>136</sup> Vicarious liability also reduces the incentive to associate with judgment proof parties.<sup>137</sup> Thus, as we have seen in other areas of competence, vicarious liability makes the most sense when lawyers exercise the greatest control over the lawyer-lawyer relationship. On the other hand, the more the lawyers control how to structure the lawyer-lawyer relationship, the more vicarious liability can push them to form relationships that reduce the chances that such liability will attach.

Vicarious liability occurs almost entirely in the multiagency context, most commonly in co-ownership and agency relationships. For example, if *L1* and *L2* are partners in a law firm, the most common form of co-ownership among lawyers, then each is vicariously liable for breaches of the duty of competence by the other, and the firm itself is vicariously liable.<sup>138</sup> If *L1* and *L2* are co-owners of a limited liability entity, the entity itself is vicariously liable for the malpractice of either lawyer, but the lawyers are not personally liable for each other's malpractice unless they are personally involved in the representation.<sup>139</sup> If *L1* and *L2* are in an agency (that is, vertical hierarchical) relationship, then a principal *L1* is liable for the malpractice of an agent *L2* if either the agency relationship

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136. See, e.g., POSNER, *supra* note 81, at 192–95.

137. See, e.g., *id.* at 204–05. The problem of judgment proof agents and partners is also relevant to the goal of compensation. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 58 cmt. b (2000) (“Because many law firms are thinly capitalized, the vicarious liability of principals helps to assure compensation to those who may have claims against principals of a firm.”).

138. See generally RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 58 (2000); REVISED UNIFORM PARTNERSHIP ACT §§ 305, 306(a) (1997); UNIFORM PARTNERSHIP ACT §§ 13, 15 (1914); *cf.* FED. R. CIV. P. 11(c) (imposing vicarious responsibility on firms for failing to comply with obligations in filing papers in litigation). The Model Rules do not provide for vicarious liability for violations of the rules. *But see* N.J. RULES OF PROF'L CONDUCT R. 5.1 (2002) (allowing for vicarious responsibility of law firm for ethics violations); N.Y. CODE OF PROF'L RESPONSIBILITY DR 1-104 (2003).

139. See, e.g., RUPA § 306(c) (“An obligation of a partnership while the partnership is a limited liability partnership, whether arising in contract, tort, or otherwise is solely the obligation of the partnership. A partner is not personally liable . . . for such a partnership obligation solely by reason of being or so acting as a partner.”); UNIFORM LIMITED LIABILITY COMPANY ACT § 303(a) (1996).

is one of master-servant, and *L2* acts within the scope of employment,<sup>140</sup> or *L2* makes a misrepresentation while acting with actual or apparent authority.<sup>141</sup> Vicarious liability in an agency relationship between lawyers occurs most commonly where *L2* is an associate of *L1*, but may also occur when *L2* is a temporary “contract” lawyer of *L1*, or “of counsel” to *L1*’s firm.<sup>142</sup> Lawyers who are simply coemployees within a firm and not owners or supervisors are, by contrast, not vicariously liable for each other’s malpractice, because the client, rather than the lawyers, has ultimate control over the lawyer-lawyer relationship.<sup>143</sup>

Vicarious liability continues for partners even after the partnership dissolves, and the representation becomes successive rather than concurrent, so long as the malpractice occurred while the partners were part of the firm.<sup>144</sup> Even if the malpractice occurs after the departure of a partner, one court has held that the departed partner may nevertheless be vicariously liable if the representation of the client in the matter started while the partner was still at the firm.<sup>145</sup> Such liability encourages the departing partner, who is still entitled to share in the fee from the representation,<sup>146</sup> to take client interests into account in deciding on the timing of the departure, as well as to consider the increased malpractice and credit risks to the client that might result from the departure. On the other hand, these problems may be minimal, and the departing partner’s ability to exercise control over the remaining partners is obviously weak. The

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140. See RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

141. See *id.* § 257.

142. See, e.g., *Staron v. Weinstein*, 701 A.2d 1325 (N.J. Super. Ct. App. Div. 1997) (finding vicarious liability for “of counsel” lawyer who had apparent authority to bind firm to representation); *cf.* *Homa v. Friendly Mobile Manor, Inc.*, 612 A.2d 322 (Md. Ct. Spec. App. 1992) (holding firm not liable for lawyer’s fraud on client when lawyer was “of counsel” and lawyer, but not firm, represented client).

143. Thus, for example, lawyers in a corporate law department are not vicariously liable for each other’s malpractice. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 58 cmt. c. It is not always easy to tell when lawyers are “employees.” In a recent case, a group of lawyers practiced as part of a professional corporation, but there was a dispute about whether all the lawyers were shareholders in the corporation or whether only one lawyer was the shareholder and the rest were employees of the corporation. Under the governing statute, the court held that if they were shareholders, they were vicariously liable, but if they were employees of the corporation, they were not. To make matters even more complicated, the court found evidence that the lawyers were in fact acting as a partnership with the professional corporation acting simply as one of the partners, in which case the lawyers again would be vicariously liable. See *Monon Corp. v. Townsend, Yosha, Cline & Price*, 678 N.E.2d 807 (Ind. Ct. App. 1997).

144. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 58 cmt. i; RUPA § 703(a) (“A partner’s dissociation does not of itself discharge the partner’s liability for a partnership obligation incurred before dissociation.”); UNIFORM PARTNERSHIP ACT § 36(1) (1914) (“The dissolution of the partnership does not of itself discharge the existing liability of any partner.”).

145. *Redman v. Walters*, 152 Cal. Rptr. 42 (Cal. Ct. App. 1979). *But see* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 58 cmt. i (limiting liability to situations in which departing partner gives inadequate notice of departure).

146. See, e.g., *Hillman*, *supra* note 25, at 401–04; *cf.* MODEL RULES OF PROF’L CONDUCT R. 1.5 cmt. 8 (2002) (noting that Rule 1.5(e) “does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm”).

departing lawyer may, however, protect himself by contracting for a release or indemnification at the time of departure or earlier.

Outside of firm and agency relationships between the lawyers, the scope of vicarious liability to the client is more limited. In most single-agency situations, either *L2* owes no duty of competence to *C* or *L2* owes some duties of competence to *C* but the lawyers do not control the lawyer-lawyer relationship. In either case, vicarious liability is not appropriate. The more interesting cases involve horizontal lawyer-lawyer relationships in the multiagency context other than co-ownership. In general, *L1* is not vicariously liable for *L2*'s breaches of duty merely by virtue of a horizontal relationship between *L1* and *L2*, such as co-counsel,<sup>147</sup> a contractual referral relationship,<sup>148</sup> or the sale of a law practice.<sup>149</sup> Under the doctrine of partnership by estoppel, however, lawyers who are not in fact partners may be held vicariously liable for each other's malpractice if they hold themselves out to the public as partners, for example by sharing office space.<sup>150</sup>

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147. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 58 cmt. e (2000). In agency law, the key distinction is between subagency, in which the original agent (*L1*) becomes a second principal to the subagent (*L2*) (resulting in a vertical, hierarchical relationship between the lawyer agents), and coagency, in which the second agent (*L2*) is merely another agent of the principal (the client) and not an agent of the first agent (*L1*) (resulting in a horizontal relationship between the lawyer agents). An agent who is the immediate principal of a subagent is vicariously liable to the remote principal for the subagent's misconduct. See RESTATEMENT (SECOND) OF AGENCY § 406 (1958). An agent who is merely a coagent, however, is not vicariously liable to the remote principal for the other coagent's misconduct. *Id.* § 405. Although the difference between subagency and coagency is not always obvious, in general the more *L2* reports directly to the client and takes orders directly from the client, the more likely *L2* is a coagent rather than a subagent. Thus, for example, in-house counsel is not vicariously liable for the malpractice of outside counsel because in this case, the "appointing agent's function is merely to appoint a person to act for the principal, . . . and the fact that he was appointed by a superior agent rather than by the principal becomes immaterial." *Id.* § 5 cmt. b; see also *id.* § 406 cmt. a. In either case, however, *L2* is liable for his own torts, *L1* is directly liable for negligent hiring or supervision of *L2*, *id.* § 405(2); and *C* may be vicariously liable to a third party (*T*) for *L2*'s misconduct; see *Marchman v. NCNB Tex. Nat'l Bank*, 898 P.2d 709 (N.M. 1995) (holding that client was responsible for court sanctions resulting from intimidation of witness by local lawyer hired by client's lawyer to interview witnesses in deposition).

148. Model Rule 1.5(e)(1) contemplates, but does not require, vicarious liability in the contractual referral context. It requires that lawyers not in the same firm who split fees either "assume[] joint responsibility for the representation," defined as vicarious liability, *id.* cmt. 7, or that the lawyers divide the fee "in proportion to the services performed by each." Accord RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 47 & cmt. d (2000).

149. Unlike Model Rule 1.5(e) (fee splitting), Model Rule 1.17 (sale of law practice) does not require that the selling lawyer ever assume vicarious responsibility for the buying lawyer's subsequent representation. This is somewhat surprising in light of the fact that one might think the reputational constraints on a lawyer selling a practice would be lower than a lawyer simply referring cases, and so the selling lawyer might be more tempted to sell his practice to an incompetent buyer who bids top dollar. The seller is always subject to direct liability for negligence, however. And if the buyer buys the selling lawyer's entire practice, as Rule 1.17 requires, then to the extent the assets of the practice are significant (a perhaps dubious assumption given that the main assets of the firm are likely to be goodwill and human capital), the client would be somewhat protected against the risk of a transfer to a more judgment proof lawyer, in contrast to the referral situation, which provides no such protection.

150. See *Gosselin v. Webb*, 242 F.3d 412 (1st Cir. 2001) (concluding that office-sharing lawyers practicing under trade name who also let another lawyer use their offices and name may be held vicariously liable for the other lawyer's malpractice under the doctrine of partnership by estoppel); *Estate of Holmes v. Ludeman*, No. L-00-1294, 2001 Ohio App. LEXIS 4501 (Oct. 5, 2001) (indicating

The co-counsel cases finding no vicarious liability tend to involve referral fee situations in which *L2* is licensed in a different jurisdiction than *L1*,<sup>151</sup> or in which *L1*'s sole or primary involvement in the matter was to recommend *L2*.<sup>152</sup> In these cases, courts are obviously responding to situations in which *L1* seems to have little ability to control *L2*, either in the way *L2* does his job or in the use of *L2* at all.

Nevertheless, there are good arguments for vicarious liability in referral fee situations. First, *L1* may be tempted to select *L2* on the basis of the size of the fee paid to *L1* rather than *L2*'s qualifications.<sup>153</sup> Second, *L1* may pay too little attention to *L2*'s solvency. If *L1* is too tempted to associate with an incompetent or judgment proof *L2*, unbeknownst to the client, the client may be seriously disadvantaged.<sup>154</sup> Courts could, of course, address some of these problems through the standard of care imposed on *L1*. For example, *L1* could have a duty to inquire (or advise the client to inquire) into whether *L2* carries malpractice insurance.<sup>155</sup> In many cases, however, negligence may be difficult to prove. Moreover, given the ability of *L1* to contract for and seek indemnity from *L2*, the consequences of vicarious liability are not as great as

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that office-sharing lawyers who practiced under firm name and conducted their business affairs in way that suggested they were partners may face vicarious liability under partnership by estoppel doctrine); REVISED UNIFORM PARTNERSHIP ACT § 308 (1997); UNIFORM PARTNERSHIP ACT § 16 (1914).

151. See *Macawber Eng'g, Inc. v. Robson & Miller*, 47 F.3d 253 (8th Cir. 1995) (holding that local counsel with limited functions operating under direction of other firm is not liable for other firm's negligence unknown to counsel); *Wildermann v. Wachtell*, 267 N.Y.S. 840 (N.Y. Sup. Ct. 1933), *aff'd*, 271 N.Y.S. 954 (N.Y. App. Div. 1934) (holding that lawyer is not liable for negligence of co-counsel in another state when lawyer, without negligence recommended retention of foreign lawyer and relied on that lawyer); *Ortiz v. Barrett*, 278 S.E.2d 833, 838 (Va. 1981) (holding that appearance as counsel of record does not make associate local counsel liable for out-of-state attorney's appearance when associated counsel's services were clearly intended by both attorneys to be of limited scope, and the counsel of record is paid only a fixed fee); *Armor v. Lantz*, 535 S.E.2d 737 (W. Va. 2000) (holding that local counsel is not vicariously liable for outside counsel's negligence where there is no evidence of profit sharing, no control exercised by local counsel, and local counsel rules did not require assumption of vicarious liability).

152. *Broadway Maint. Corp. v. Tunstead & Schechter*, 487 N.Y.S.2d 799 (N.Y. Sup. Ct. 1985) (holding that a firm that served as general counsel, but not litigation counsel, is not liable for negligence of second firm that it recommended to client but did not supervise).

153. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 47 cmt. b.

154. One way that *L2* may be effectively judgment proof is that *L2* may be beyond the jurisdictional reach of the client, making it difficult for the client to sue *L2* directly for malpractice. In several recent cases, however, courts have held that contacts with a lawyer in another jurisdiction may be sufficient to justify personal jurisdiction over the out-of-state lawyer in the client's home state. *Keefe v. Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267 (Colo. 2002) (holding contacts between client and out-of-state lawyer sufficient to satisfy personal jurisdiction in legal malpractice case); *cf. Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42 (1st Cir. 2002) (holding that a law professor's advice and counsel to an out-of-state firm is sufficient to establish personal jurisdiction in fee dispute case), *cert. denied*, 123 S. Ct. 558 (2002). *But see Elliott v. Van Kleef*, 830 So. 2d 726 (Ala. 2002) (holding that co-counsel had insufficient contacts with state to support personal jurisdiction). The more courts are willing to relax personal jurisdictional requirements that make it easier for *C* to sue *L2*, the less they may need to protect the client further with vicarious liability of *L1*.

155. Several states (Alabama, New Hampshire, Ohio, South Dakota, and Virginia) have amended their ethics rules to require that a lawyer disclose to the client whether the lawyer carries malpractice insurance and, in some cases, the amount of insurance. The Model Rules do not address lawyer-lawyer disclosure.

might be initially supposed, though the right of indemnity does impose costs. The availability of indemnity also makes less likely the fear expressed by some that the potential for vicarious liability would discourage *L1* from making referrals to *L2*.<sup>156</sup>

In part because of these problems, a number of courts have held one co-counsel vicariously liable for the malpractice of the other.<sup>157</sup> One important way courts have done this is by deeming *L1* and *L2* to be in a “joint venture,” which means each is vicariously liable for the torts of the other.<sup>158</sup> The problem is determining when a joint venture exists. Under partnership law, which the law of joint ventures usually follows, sharing in “gross returns” is not sufficient to establish a partnership,<sup>159</sup> which suggests that for lawyers, sharing fees would not be sufficient without also sharing costs or responsibilities. In many “fee splitting” cases, however, lawyers do share more than the fee, if only in an informal way. In fact, they must do more than share the fee to conform to Model Rule 1.5(e)(1), though the “services” of *L1* might be limited to procuring *L2* and nothing more.<sup>160</sup> Moreover, even if the lawyers in fact do no more than share fees, the partnership by estoppel doctrine may protect reasonable client expectations that more is going on.

In fact, because of reasonable client expectations, even if the relationship between *L1* and *L2* is deemed merely contractual, vicarious liability may attach. If *L1* and *L2* are parties to the same contract with *C*, that is, *C* is not merely a third party to the *L1-L2* contract, then *L1* and *L2* usually have joint obligations for the entire performance unless they specify otherwise.<sup>161</sup> In addition, if *L1*'s duty to *C* is deemed nondelegable, then *L1* is vicariously responsible for *L2*'s misconduct.<sup>162</sup> Finally, even if *L1* and *L2* are not in a contractual relationship, if *L1* contracts to

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156. See, e.g., Temkin, *supra* note 100, at 674–75.

157. See, e.g., Noris v. Silver, 701 So. 2d 1238 (Fla. Dist. Ct. App. 1997).

158. See, e.g., Floro v. Lawton, 10 Cal. Rptr. 98, 106 (Cal. Dist. Ct. App. 1960) (indicating that there is “no doubt” that a lawyer who lets another lawyer try his case in return for splitting the fee is liable for second lawyer’s negligence); Duggins v. Guardianship of Washington, 632 So. 2d 420 (Miss. 1993) (holding that when two lawyers handled case, splitting work and fees, each was joint venturer liable for other’s conversion). With respect to termination of co-counsel relationships, the requirements of Model Rule 1.5(e) may apply, which could result in vicarious liability posttermination if fees continue to be split. Cf. Sandler v. Gossick, 622 N.E.2d 389 (Ohio Ct. App. 1993) (holding that a lawyer who withdrew voluntarily and without just cause had no claim against client or remaining counsel for fees).

159. REVISED UNIFORM PARTNERSHIP ACT § 202(c)(2) (1997); UNIFORM PARTNERSHIP ACT § 7(3) (1914).

160. Under the Ethics 2000 revisions to the Model Rules, if the lawyers agree to a fee splitting arrangement, each lawyer must assume “joint responsibility,” defined essentially as vicarious liability, unless the lawyers agree to divide the fee in proportion to the services rendered by each. MODEL RULES OF PROF’L CONDUCT R. 1.5(e) & cmt. 7 (2002).

161. RESTATEMENT (SECOND) OF AGENCY § 405(3) (1958) (“An agent is subject to liability to a principal for the failure of another agent to perform a service which he and such other have jointly contracted to perform for the principal.”); RESTATEMENT (SECOND) OF CONTRACTS §§ 288–289 (1981).

162. Cf. Kleeman v. Rheingold, 614 N.E.2d 712, 716–17 (N.Y. 1993) (law firm held liable for negligent failure of independent contractor process server to properly serve process).

represent *C* with respect to the entire matter, the fact that *C* later consents to *L1*'s delegating some of the responsibility to *L2*, whether concurrently or successively, does not in and of itself discharge *L1* from responsibility for the entire representation; the client must separately agree to discharge *L1*'s obligations.<sup>163</sup> In all of these cases, the client would have a legitimate concern that *L1* choose a competent and solvent *L2* and monitor *L2*'s performance. Courts, however, have not yet specifically applied these doctrines to *L1-L2* relationships.

### 7. *Summary of Competence*

Most of the difficult issues of competence arise in multiagency, horizontal relationships between the lawyers in which there is either no legal relationship between the lawyers or merely a contractual relationship. In these cases, lawyers are unlikely to exercise significant control over each other, and so limiting their competence responsibilities by their division of labor makes sense. On the other hand, the client may be severely disadvantaged by the failure of the lawyers to clearly demarcate lines of responsibility and authority, or by the lawyers structuring their relationship in ways that benefit the lawyers more than the client. In particular, the vicarious liability rules, combined with minimal obligations on the form of the lawyer-lawyer relationship, may encourage excessive formation of loosely coordinated lawyer-lawyer relationships to minimize the likelihood of vicarious liability applying. In some cases, client control over the relationship mitigates these problems, but in other cases, clients will not be in a good position to understand the lawyer-lawyer relationship and exercise control over it. Although expanding liability, whether direct or vicarious, is one possible solution to these problems, excessive liability may unduly discourage lawyer combinations that offer great efficiency and pose little risk. Thus, there is some room for the ethics rules to step in and provide prophylactic protection for clients.

#### *B. Confidentiality*

The second core concern of the law of lawyering is the duty of confidentiality.<sup>164</sup> The duty of confidentiality is in part an extension of the duty of competence. For example, in the multilawyer context, the duty of confidentiality entails the duty to ensure that other lawyers with whom one is associated do not divulge confidential information.<sup>165</sup> But the duty

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163. RESTATEMENT (SECOND) OF CONTRACTS § 318(3) & cmt. d, § 323 cmt. c.

164. See generally MODEL RULES R. 1.6; RESTATEMENT (SECOND) OF AGENCY § 395; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 60 (2000).

165. MODEL RULES R. 1.6(a) cmt. 15 ("A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision."); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 60(1)(b) & cmt. d (2000).

of confidentiality is mostly about loyalty rather than competence: the duty aims to deter lawyers from using client information to the client's disadvantage.<sup>166</sup> Thus, the scope of the duty should correspond to the strength of the lawyer's incentive and opportunity to misuse client information. In this subpart, I focus on three ways in which multiple lawyers can impact the loyalty aspect of the duty of confidentiality. First, there is the question of what confidential information *L1* and *L2* may disclose to each other. Second, there is the question of what information *L1* or *L2* may disclose to *T* because of the *L1-L2* relationship. Third, there is the question of what confidential information of *C* may *L2* disclose to *T* despite the *L1-L2* relationship; that is, when in the single-agency context does *L1*'s duty of confidentiality get imputed to *L2*.

1. *Lawyer-Lawyer Disclosure: The Scope of Implied Authorization*

The question of what confidential information one lawyer may disclose to another essentially involves the scope of the exception to the duty of confidentiality for disclosures that are "impliedly authorized in order to carry out the representation."<sup>167</sup> At first glance, it might seem that *L1* should always be allowed to disclose confidential information to *L2* involved in a client's matter, at least in the multiagency situation, since in that case both lawyers by definition owe a duty of confidentiality to the client. As long as the duty is enforced against both lawyers, it seems unlikely that the client would be disadvantaged by any intralawyer disclosure. Even in the single-agency situation, it might seem that, so long as a duty of confidentiality were imposed on *L2*, there would ordinarily be no additional risk in allowing *L1* to disclose confidential information to *L2*, despite the lack of a full-fledged lawyer-client relationship between *L2* and the client. But enforcement of any duty is costly and imperfect, and a client may legitimately fear that the more people who know information—even if they are lawyers—the greater the risk that the information will be misused. A similar fear grounds the presumptions of conflict of interest rules. On the other hand, as with competence, the more lawyers who know information, the greater their ability to facilitate the representation, and to monitor other lawyers' compliance with their ethical and legal duties, including the duty of confidentiality.

Thus, we should expect to find, and we do, that the more likely the disclosure is to facilitate the representation and intralawyer monitoring, the more likely the lawyer-lawyer disclosure is impliedly authorized. The broadest implied authorization exists for lawyers within a firm, who may generally disclose information to other lawyers in the firm, whether those

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166. See George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 *FORDHAM L. REV.* 273, 292–97 (1998) for a discussion of this justification for the duty of confidentiality and a comparison with the more traditional justification based on the client's incentive to seek legal advice.

167. MODEL RULES R. 1.6(a).

lawyers are in an agency (vertical hierarchical) or co-owner (horizontal) relationship, unless the client instructs otherwise.<sup>168</sup> Even outside the firm, *L1* generally has implied authority to divulge confidential client information to *L2* for the purpose of assisting *L1* in the representation of *C*,<sup>169</sup> though the scope of permitted disclosure will often be limited by the narrow responsibility of *L2* in these situations. For example, in the case of informal lawyer-lawyer consultation, a recent ABA ethics opinion concludes that on the one hand, disclosures to further client interests are allowed, but on the other hand, disclosures of information protected by the attorney-client privilege or information that might foreseeably harm the client are not allowed absent client consent.<sup>170</sup>

The greatest controversy occurs in situations in which the lawyer-lawyer disclosure is made to protect *L1*'s own interests, or to protect *L1* or some third party from the client, that is, in the single-agency vertical relationship. The disclosure right in these cases is generally grounded not in implied authority but is closer to the right to make disclosures in self-defense or to comply with other law. With respect to regulatory lawyer-lawyer relationships, there has been some uncertainty about whether *L1* may reveal confidential client information to *L2*, though the right to disclose in the representational context is now accepted.<sup>171</sup>

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168. *Id.* R. 1.6 cmt. 5; accord MODEL CODE OF PROF'L RESPONSIBILITY EC 4-2 (1983). To compensate in part for this broad authorization, the ethics rules make clear that the duty not to use or reveal the client's confidences continues after a lawyer leaves a firm, even if the lawyer did not directly "represent" the client (which is another example of why the firm should be considered a multiagency relationship). MODEL RULES R. 1.9(c).

169. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 60 cmt. f.

170. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 411 (1998). In contrast, the Model Code seems to take a stronger position against disclosure to *L2* in this situation, even suggesting that the danger of revealing such information indirectly may counsel against such consultations in the first place. See MODEL CODE EC 4-2 (stating that a lawyer should not, absent client consent, "seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer"). The case for nondisclosure is of course strongest when *L1* is not seeking *L2*'s assistance in furthering the representation of *C*.

171. In the regulatory relationship area, compare *Allen County Bar Ass'n v. Williams*, 766 N.E.2d 973 (Ohio 2002) (holding that a lawyer appointed to monitor a disciplined lawyer may not review materials protected by the attorney-client privilege between the disciplined lawyer and his client absent client consent), with *In re Joyner*, 494 N.W.2d 483 (Minn. 1993) (requiring disciplined lawyer put on probation to submit files to lawyer appointed by disciplinary counsel). Cf. *Baker v. David Alan Dorfman, P.L.L.C.*, 232 F.3d 121 (2d Cir. 2000), *remanded*, No. 99 Civ. 9385, 2001 U.S. Dist. LEXIS 378 (S.D.N.Y. Jan. 23, 2001) (ordering lawyer for malpractice plaintiff be appointed receiver of malpractice defendant's successor firm for purposes of collecting judgment, but limiting receiver's responsibilities to only business management so exposure to confidences of lawyer defendant's client is minimized). The Restatement allows disclosure of confidential client information "for the purpose of facilitating the lawyer's law practice, where no reasonable prospect of harm to the client is thereby created and where appropriate safeguards against impermissible use or disclosure are taken," and includes among the permitted situations disclosures to "law-practice consultants." RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 60 cmt. g; see also *id.* § 134 cmt. f (stating that "communications between counsel retained by an insurer to coordinate the efforts of multiple counsel for insureds in multiple suits and such coordinating counsel are subject to the [attorney-client] privilege," and thus implicitly recognizing an exception to the duty of confidentiality for such communications). The Ethics 2000 revisions address the representational and regulatory situations by creating separate exceptions to the duty of confidentiality in Model Rule 1.6(b)(2) (allowing a lawyer to reveal confidential



In addition, limited authority suggests that the scope of permissive disclosure is narrower in the multiagency case of successive representation.<sup>172</sup> As long as the client knows of and approves the successor lawyer,<sup>173</sup> the resistance to allowing the predecessor lawyer (*L1*) to make disclosures to the successor lawyer (*L2*) is somewhat surprising, however. Not only is the client's legitimate interest in preventing disclosure often weak in this situation, but the professional obligations of *L2* who is now representing the client make it unlikely that *L2* will misuse the information. In fact, in the successive representation context, *L2* may have a duty to acquire the information from *L1*.<sup>174</sup> On the other hand, there is generally no need for *L2* to make disclosures to *L1*, especially because the reason for *L2* is often discord between the client and *L1*.<sup>175</sup>

## 2. *Lawyer Disclosure to Third Parties: The Scope of Self-Defense*

The concerns animating the duty of confidentiality seem more applicable to lawyer disclosure to third parties than to lawyer-lawyer disclosure. The question is under what circumstances the lawyer-lawyer relationship allows greater disclosure to third parties by *L1* or *L2*. The question of lawyers' permissible disclosure to *T* as a result of the *L1-L2* relationship often arises under the "self-defense" exception to the duty

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information "to secure legal advice about the lawyer's compliance with these rules"), and Model Rule 1.6(b)(4) (allowing a lawyer to reveal confidential information "to comply with other law or a court order"). These exceptions do not cover all the possible cases, however. For example, Rule 1.6(b)(2) by its terms does not apply to *L1* seeking advice about law other than the ethics rules, though advice about other law may be required by the Rules themselves. See, e.g., MODEL RULES R. 1.2(d), 8.4(e), 3.4(a). And Rule 1.6(b)(4) does not apply to private regulatory situations, such as the coordination of lawyers representing insureds by the general counsel of an insurer, or an audit by a malpractice insurer of insured lawyers. It is also not clear whether malpractice insurers would fall within the Restatement's category of "law-practice consultants."

172. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 268 (1945) (stating that *L1* cannot disclose client's intent to commit perjury to successor counsel *L2*). For criticism of this opinion (justified, in my view), see George Rutherglen, *Dilemmas and Disclosures: A Comment on Client Perjury*, 19 AM. J. CRIM. L. 267 (1992).

173. When the successive relationship is prospective only, such as a proposed sale of a law practice, the predecessor lawyer's right to disclose to the potential successor is limited. MODEL RULES R. 1.17 cmt. 7 ("Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent."). Interestingly, the Ethics 2000 revisions add a new provision dealing with prospective clients, MODEL RULE 1.18, but the comment to Rule 1.17 is one of only two references in the Rules to prospective multilawyer relationships. The other is Model Rule 1.7 cmt. 10.

174. See *FDIC v. O'Melveny & Meyers*, 969 F.2d 744 (9th Cir. 1992) (successor lawyer had duty to investigate, including contacting prior law firm); *Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, No. 99 Civ. 10175 (JSM), 2002 U.S. Dist. LEXIS 491 (S.D.N.Y. Jan. 16, 2002) (Rule 11 violation by successor counsel, allowing client to commit perjury in deposition).

175. Cf. *Fischel & Kahn Ltd. v. Van Straaten Gallery*, 727 N.E.2d 240 (Ill. 2000) (holding that client's assertion of malpractice claim against predecessor lawyer does not waive attorney-client privilege protecting client's communication with successor counsel).

of confidentiality.<sup>176</sup> The question also arises in situations involving client fraud, which I defer to part IV. To the extent that the presence of *L2* increases the competence duties, and hence the liability exposure, of *L1*, whether through vicarious or direct liability, the self-defense exception concomitantly expands, and extends straightforwardly to suits by *C* or *T* against *L1*. As for *L2*, in the multiagency context, where *L2* has a full-fledged lawyer-client relationship with *C*, *L2*'s right to disclose information under the self-defense exception depends on *L2*'s competence duties to *C*, including any duties to monitor or cooperate with *L1*.

But may *L1* make disclosures if the suit is against only *L2*, and *L1* is not exposed to potential liability or discipline as the result of the suit? Either the client or third parties could bring such suits, though if the client brings the suit the client would of course consent to *L1*'s disclosures if those disclosures helped the client's case. The Model Rules are not clear on whether *L1* may make such a disclosure;<sup>177</sup> the Restatement comes down in favor of permitting disclosure,<sup>178</sup> apparently without regard to the nature of the *L1-L2* relationship. But the argument based on the self-defense exception is weaker if there really is no risk that *L1* is directly or vicariously responsible for *L2*'s conduct, which as we have seen may, but need not, be the case when there is no legal relationship or only a contractual relationship between the lawyers.

Finally, what if a controversy occurs between *L1* and *L2*? In the multiagency context, if the suit involves the quality of the representation of *C* by one or both lawyers, the self-defense exception straightforwardly applies. For example, the self-defense exception would allow an associate to make disclosures pursuant to a retaliatory discharge claim against

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176. MODEL RULES R. 1.6(b)(3) (permitting disclosure "to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client"); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 64 (2000) ("A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to defend the lawyer or the lawyer's associate or agent against a charge or threatened charge by any person that the lawyer or such associate or agent acted wrongfully in the course of representing a client.").

177. The question is whether under Model Rule 1.6(b)(3), the suit against *L2* would involve "allegations . . . concerning [*L1*'s] representation of the client," and whether *L1* could reasonably believe it necessary to respond to such allegations if *L1* were not exposed to liability or other sanction.

178. The Restatement (Third) of Law Governing Lawyers § 64 allows *L1* to disclose to defend "the lawyer's *associate* or agent against a charge or threatened charge by any person that the . . . *associate* or agent acted wrongfully in the course of representing a client." RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 64 (emphasis added); *id.* cmt. d ("The lawyer also may provide information in an effort to exonerate the *associate* or agent from charges against that person.") (emphasis added); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(4) (1983) (stating that lawyer may disclose "confidences or secrets necessary . . . to defend . . . his employees or *associates* against an accusation of wrongful conduct") (emphasis added). I am assuming that the word "associates" in these rules is not being used in the narrow law firm sense.

her law firm based on the associate's allegation that she refused to obey the firm's order that she engage in unethical behavior.<sup>179</sup>

On the other hand, if the suit concerns the lawyer-lawyer relationship itself, the lawyers' right to make disclosures in *L1-L2* disputes is more controversial. For example, if the dispute is over the division of the fee in *C*'s matter, the authorities are sharply divided.<sup>180</sup> In some cases, there may not be much need for disclosing confidential information, because the dispute involves simply the existence of the lawyer-lawyer agreement or the meaning of a term in the agreement. Or client confidential information may be disclosed anyway if the client is part of the dispute. But if the dispute involves what work each lawyer did for the client, each lawyer might want to reveal or have the other lawyer reveal confidential information as part of the case. Although the client's interest in confidentiality is legitimate, a blanket prohibition on the use of confidential information in intralawyer disputes might simply lead lawyers to either forego beneficial co-counsel relationships, draft unduly broad confidentiality waivers in their retainers, or drag clients into the disputes to take advantage of the self-defense exception. Moreover, because much of the relevant information will already be known to both lawyers, the client could often be protected by court orders restricting the disclosures to the outside world.

The single-agency context involving a representational relationship between the lawyers presents an interesting variation on this problem. If a dispute arises between *L1* (as client) and his own lawyer, *L2*, and if the dispute involves the quality of *L2*'s advice about *L1*'s problem with his own client, *C*, then *L1*'s right of self-defense straightforwardly applies if *C* sues *L1* as a result of *L2*'s bad advice. But *L2*'s advice may have been designed to protect *L1* from *C*. In this case, if *L2*'s advice is incompetent, it would wind up harming *L1* instead of *C*. But if *L1* could make self-protective disclosures to *L2* originally to protect himself from *C*,

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179. See *Wieder v. Skala*, 609 N.E.2d 105, 110 (N.Y. 1992) (allowing wrongful discharge suit by associate because there is an implied obligation that both firm and associate will carry out employment contract in compliance with ethical obligations). Wrongful discharge suits and the self-defense exception are also relevant to lawyer-lawyer disclosures in the representational context. See *Fox Searchlight Pictures v. Paladino*, 106 Cal. Rptr. 2d 906, 923 (Cal. Ct. App. 2001) (noting that former in-house counsel suing her employer for wrongful termination may disclose client confidences to her own attorneys to the extent that the confidences may be relevant to preparing and prosecuting her claim).

180. See, e.g., *Lightbody v. Rust*, 739 N.E.2d 840, 845 (Ohio Ct. App. 2000) (holding that lawyer suing a law firm for breach of co-counsel fee agreement may not be compelled, without express waiver from client, to divulge client confidences). Model Rule 1.6(b)(3) precludes disclosure in such a case because it allows disclosure only in fee disputes that involve a "controversy between the lawyer and the client." MODEL RULES R. 1.6(b)(3). The Restatement (Third) of Law Governing Lawyers § 65 similarly limits the "fee dispute" exception to "dispute[s] with the client," though an accompanying comment somewhat ambiguously states that a lawyer may make a disclosure in a suit against a third person because client consent "can normally be inferred from the fact that the client retained the lawyer," but the lawyer may not make such a disclosure if it would "adversely affect a material interest of the client." RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 65 cmt. e. Model Code DR 4-101(c)(4) seems to allow disclosure in any suit by a lawyer to "collect his fee," without limiting such suits to suits against the client. MODEL CODE DR 4-101(c)(4).

then why should *L1* not be able to make similar self-protective disclosures to protect himself from *L2*'s negligence? The problem is that although *L1*'s initial disclosure to *L2* is a kind of "self-defense," it is not technically within the self-defense exception (hence the creation in the Ethics 2000 revisions of a new and separate exception), and so one might argue that the right of disclosure stops at *L2* because further disclosures create too great a risk for the client. Nevertheless, if the point of the self-defense exception is to prevent the client from taking advantage of his lawyer, allowing *L1* to use confidential information to sue *L2* would be consistent with that purpose. Otherwise we allow *L1* to be doubly harmed: by the client initially and by *L2*. If, on the other hand, the dispute involves simply the *L1-L2* relationship (for example, a fee dispute), as in the multiagency case, the need for disclosing confidential information may be less.<sup>181</sup>

### 3. *L2's Imputed Confidentiality Obligations to C*

The question of *L2*'s confidentiality obligations in the multiagency situation is straightforward. *L2* has a lawyer-client relationship with *C*, and so owes *C* a duty of confidentiality.<sup>182</sup> In the single-agency situation, by contrast, the question arises whether *L1*'s duty of confidentiality to *C* gets imputed to *L2* as a result of the *L1-L2* relationship.<sup>183</sup> According to one scholar, the current answer is "no" as a matter of the ethics rules alone, but "maybe" as a result of a legal relationship between the lawyers.<sup>184</sup> But perhaps the relevant question should be whether *C*'s legitimate interest in confidential information is likely to be protected against misuse by *L2*. The answer is almost surely "yes," whether or not that protection takes the form of a duty of confidentiality by *L2* to *C*.

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181. For a troubling recent case in this area that amply demonstrates some of these problems, see *Solin v. O'Melveny & Myers LLP*, 107 Cal. Rptr. 2d 456, 468 (Cal. Ct. App. 2001). In *Solin*, the court held that *L1* could not sue his own lawyer, *L2*, for malpractice because such a suit would involve the disclosure of confidential information of *L1*'s client, *C*. *L1* had sought advice from *L2* on several subjects: *L1*'s exposure to personal criminal liability arising out of his continuing representation of *C*, a fee dispute between *L1* and *C* about past fees paid, and how to structure a new contract with *C*. *L1* claimed that *L2* committed malpractice by giving incompetent advice about the new contract, which would involve no confidential information of *C*. *L2* argued, and the court agreed, that to respond effectively to this claim, he would have to discuss the other advice provided as well, including revealing confidential information about *C*'s alleged criminal conduct. *Id.* at 464. The court rather cavalierly faulted *L1* for failing to present *L2* with a "hypothetical scenario that would have permitted him to obtain the legal advice he sought without disclosing client confidences," while ignoring the possibility that *C*'s original misconduct (which led *L1* to seek self-protective advice) as well as *L2*'s negligence contributed equally if not more to the problem. *Id.*

182. For example, subagents of a client owe a duty of confidentiality to the remote principal client. RESTATEMENT (SECOND) OF AGENCY § 428(1) (1958).

183. Cf. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 60 cmt. m (discussing a lawyer's confidentiality obligations with respect to information of a nonclient).

184. See Erichson, *supra* note 3, at 420 (noting that "most authorities stop short of identifying any ethical duty of confidentiality running from a coordinating lawyer to another lawyer's client, relying instead on the lawyer's ethical duty to her own client, or on contractual or agency-based duties owed to the other lawyer or client").

One way to achieve that protection is through *L1*'s duties. If *L1*'s right to disclose information to *L2* is relatively narrow, then *L2* should not have much information to misuse because *L1* will be deterred by his own duty of confidentiality from making the disclosure to *L2*. Or *L1* will get *C*'s consent to disclose the information, and *C* will insist on *L2*'s agreeing to a duty of confidentiality as a condition. For example, in the lawyer-lawyer consultation situation, a horizontal relationship in the single-agency context, a recent ABA ethics opinion concludes that consulting lawyer *L2* does not automatically owe a duty of confidentiality to *L1*'s client, but may expressly or impliedly agree to such a duty.<sup>185</sup> This conclusion is based on the opinion's prior conclusion that before *L1* discloses significant information to *L2* in the first place, *L1* may have to get *C*'s consent.<sup>186</sup>

But we have already seen that in many single-agency situations, *L1* has broad rights to make disclosures to *L2*. One could argue that the broader the scope for *L1*'s unilateral disclosure of information to *L2*, the greater the need for a duty of confidentiality running from *L2* to *C*. Alternatively, we could argue that a condition of *L1*'s broad rights of disclosure is that *L1* must be strictly liable for any misuse of confidential information by *L2* that harms *C*. But again, even in these situations, there is good reason to think that *L2* will protect *C*'s confidentiality interests whether or not *L2* is deemed to owe a direct duty to *C*. In some situations, such as the lawyer as expert witness, confidentiality is less of an issue because expert witnesses must disclose any information on which their opinion is based.<sup>187</sup> In the representational context, *L2* will owe confidentiality obligations to *L1*, which will necessarily incorporate *L1*'s confidentiality obligations to *C*. In still other situations, such as the joint defense agreement, *L1* will contract with *L2* for a duty of confidentiality concerning *C*'s information. Finally, other law besides the ethics rules on confidentiality may operate to deter the misuse of information. For example, the law of agency may prevent *L2* from disclosing the information,<sup>188</sup> insider-trading laws may apply to *L2*, or the law of disqualification based on conflicts of interest may prevent *L2* from using the information.<sup>189</sup>

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185. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 411 (1998).

186. *Id.*

187. FED. R. CIV. P. 26(a)(2), (b).

188. RESTATEMENT (SECOND) OF AGENCY § 312 cmt. c (1958) ("A person who, with notice that an agent is thereby violating his duty to his principal, receives confidential information from the agent, may be enjoined from disclosing it," if the agent violates his duty to the principal by disclosing the information.).

189. See, e.g., *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190 (2d Cir. 1974).

#### 4. *Summary of Confidentiality*

Although multiple-lawyer relationships increase the risk that client confidential information will be disclosed to the client's disadvantage, the existing confidentiality rule and exceptions handle many of the problems fairly well. Implied authorization permits many lawyer-lawyer disclosures, so long as they are intended to further the representation of the client. Self-defense and its variations permit many other lawyer-lawyer disclosures that protect the lawyer's legitimate interests in complying with ethical and legal obligations. Contractual relations between lawyers give the first lawyer the means to protect client confidentiality even if the second lawyer owes no direct duties to the client. Several areas of uncertainty remain, however, and ethics rules could be used to clear some of these up. First, there is the question of lawyer-lawyer disclosure when there is no legal relationship between the lawyers, particularly in the successive representation and regulatory cases. Second, there is the question of third party disclosure in disputes against the other lawyer or between the lawyers when the traditional self-defense exception is not available.

#### C. *Conflicts of Interest*

The third core concern of the law of lawyering is the duty to avoid conflicts of interest. Multilawyer problems affect this duty in at least three general ways. First, the lawyer-lawyer relationship itself may involve a conflict between the personal interests of the lawyers in the relationship and the interests of their clients.<sup>190</sup> Second, the lawyer-lawyer relationship may limit the second lawyer's ability to represent clients outside of the relationship, even if the second lawyer has no lawyer-client relationship with the first lawyer's client, because of the second lawyer's exposure to confidential information.<sup>191</sup> Third, the existence of the lawyer-lawyer relationship may result in one lawyer's conflict of interest,

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190. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2002) ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer.") (formerly MODEL RULES R. 1.7(b) (1983) (amended 2002)); see also MODEL CODE OF PROF'L RESPONSIBILITY DR 5-101(A) (1983); *id.* EC 5-11 ("A lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed. In like manner, his personal interests should not deter him from suggesting that additional counsel be employed . . ."); RESTATEMENT (SECOND) OF AGENCY § 391 cmt. c ("[A]n agent . . . must not enter into transactions with agents of other principals, the effect of which may give the agent a self-interest in improperly advising his principal."); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 125 (2000) ("Unless the affected client consents, . . . a lawyer may not represent a client if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's financial or other personal interests.").

191. MODEL RULES R. 1.7(a)(2), 1.9(b), 1.10(b).

arising independently of the lawyer-lawyer relationship, being imputed to the other lawyer.<sup>192</sup>

1. *Personal Interest Conflict Resulting from the Multilawyer Relationship*

The multilawyer relationship itself may create the possibility of a concurrent conflict of interest between the personal interests of the lawyers in the multilawyer relationship and the interests of their clients. The seriousness of the personal interest conflict from the multilawyer relationship depends largely on the likelihood that the lawyer-lawyer relationship will adversely affect the duty of loyalty of one or both lawyers to their clients. One way to think about this risk is to focus on the degree of the lawyers' financial stake in the joint lawyer-lawyer enterprise. If the client controls the relationship, the client controls the relevant stakes, and thus the lawyers' financial incentives.<sup>193</sup> Even if the lawyers control the lawyer-lawyer relationship, if the client has a full-fledged relationship with both lawyers (that is, a multiagency situation exists), the likelihood of a personal interest conflict is often low because both lawyers have an interest in furthering the client's goals, and the mere fact of a lawyer-lawyer relationship does not of itself diminish this mutual interest.<sup>194</sup> Low likelihood does not mean nonexistent risk, however. For example, lawyers in a concurrent representation of a client may have a contractual relationship that extends beyond the representation of that client, and that contractual relationship may be more important to the lawyers than the joint representation of the client.<sup>195</sup>

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192. See *id.* 1.8(k), 1.10(a), 1.18(c); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 123 (2000). The second and third questions may arise simultaneously. See MODEL RULES R. 1.10(a) (stating that imputed disqualification does not apply if the conflict is "based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm"); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 125 cmt. g. For a discussion of some imputed disqualification issues relevant to multilawyer situations, see Morgan, *supra* note 3, at 225–29.

193. This control may cause the lawyers to assist the client (or the client's agents), in causing harm to third parties (or the client, in the case of improperly acting agents), but in this Part I am addressing only the harm to the client from an excessive lawyer stake in the lawyer-lawyer relationship.

194. In *Jaggers v. Shake*, 37 S.W.3d 737, 740 (Ky. 2001), a law firm associate (*L1*) represented plaintiff in a malpractice action against *L3* at the same time that *L2*, another lawyer in *L1*'s firm, was representing *L4* in an unrelated practice action. *L3* moved to disqualify *L1* on the ground that *L4* previously worked for *L3* and *L3* would call *L4* as a witness in *L3*'s case. The court denied the motion, finding no reason to think that either of the firm's representations would be adversely affected. In fact, if anything, *L1* and *L2* would have an incentive to encourage *L4* to help the firm in its case against *L3*. But that is not a conflict of interest problem.

195. Cf. *State v. Bryan*, No. M1999-00854-CCA-R9-CD, 2000 WL 1131890, at \*8 (Tenn. Ct. App. Aug. 4, 2000) (concluding that appearance of impropriety precludes continued representation of criminal defendant by lawyer who shares office space and advertises practices with lawyer who, in his prior capacity as chief prosecutor, signed defendant's indictment). It is reasonable to presume that a criminal defense lawyer's loyalty might be compromised by an incentive to preserve the conviction rate or reputation of his office mate.

Once we turn to the single-agency situation, the risk of a personal interest conflict increases because the main purpose of the *L1-L2* relationship is not to further the goals of the client. Thus, there is often a real possibility that the lawyers' interest in the lawyer-lawyer relationship might interfere with the representation of *L1's* client or even *L2's* client. Suppose *L1* represents *C1* in litigation against *C2*, who is represented by *L2*. The question is whether the adversarial relationship between the lawyers with respect to their clients' case should preclude the lawyers from entering into a relationship between themselves in an unrelated matter (if the matter is unrelated, loyalty rather than confidentiality is paramount). For example, *L1* might ask *L2* to represent him in some other case. The danger is that the financial and professional interest of *L1* and *L2* in furthering the goals of their representational relationship might interfere with their interest in furthering the goals of *C1* and *C2* in the *C1-C2* litigation.<sup>196</sup> The problem could also arise even before the lawyer-lawyer relationship is formed; for example, *L1* may inquire about the possibility of employment with *L2*.<sup>197</sup>

An interesting example of a personal interest conflict arising out of a representational relationship is *Hull v. Celanese Corp.*<sup>198</sup> In *Hull*, an in-house lawyer, *L1*, worked for *C1* in defending a sex discrimination suit by *C2*, who was represented by *L2*.<sup>199</sup> *L1* then asked *L2* to represent her in her own sex discrimination suit against *C1*, and to intervene in "exactly the same litigation."<sup>200</sup> The court disqualified *L2*,<sup>201</sup> and the result makes sense. If the court had not disqualified *L2*, an in-house counsel like *L1* might find it to her advantage to collect information for *L2* relevant only to *L2's* representation of *C2* against *L1's* client, *C1*, or otherwise to harm *C1's* interests while representing *C1*, in anticipation of joining *C2's* suit against *C1*. *L1* might then "sell" the information to *L2*, for example by getting a discount on *L2's* fee in *L1's* own case against *C1*.

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196. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 406 (1997). This opinion finds that in general, there is no conflict under Model Rule 1.7(a) (now Model Rule 1.7(a)(1)) because *L2's* two clients, *C2* and *L1*, are not directly adverse unless *L2* must attack *L1's* credibility or integrity in the *C1-C2* litigation. On the other hand, there may be a conflict under Model Rule 1.7(b) (now Model Rule 1.7(a)(2)) because *L2's* personal interest in the *L1* representation may materially limit *L2's* representation of *C2*. The opinion concludes that a per se ban on the *L1-L2* representation is not appropriate, however.

197. See *Ogden Allied Abatement & Decontamination Servs., Inc. v. Consol. Edison Co. of N.Y., Inc.*, No. 606301-96-004, slip op. at 5-6 (N.Y. Sup. Ct. Sept 12, 2000) (holding that law firm's misconduct in secretly interviewing and offering to hire opposing counsel during litigation between the clients does not warrant firm's disqualification where opposing counsel never actually joined the firm or disclosed confidential information to it); MODEL RULES R. 1.7 cmt. 10 ("[W]hen a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client."); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 125 cmt. d & illus. 4 (client consent required once there is mutually expressed interest in the possibility of *L1* joining *L2*).

198. 513 F.2d 568 (2d Cir. 1975).

199. *Id.* at 569.

200. *Id.* at 571.

201. *Id.* at 572.



Of course, if *CI* proved that *LI* had in fact disclosed information relevant only to *C2*'s suit and not to her own, disqualification would have been justified because of the direct violation of the duty of confidentiality's self-defense exception. *Hull* goes further, however, and holds that *LI*'s violation of the duty of loyalty justified a presumptive rule of disqualification, even if no specific breach of the duty of confidentiality was shown.<sup>202</sup> On the other hand, the court was careful to hold that it was not prohibiting *LI* from pursuing her suit entirely.<sup>203</sup> If *LI* simply brought a separate sex discrimination suit based on her own experiences, a loyalty problem would not arise, or would be much more attenuated, because she would get a much less obvious advantage from harming *CI* while serving as in-house counsel. One possible advantage she could still get would be if she hurt *CI*'s ability to win the sex discrimination case against *C2*, and that victory somehow helped her in her own subsequent case. But the proper solution to that problem, as the court implicitly recognized, would be to wait for the subsequent case to see if the problem is a genuine rather than a speculative one, not to ban *LI* from ever suing *CI* for sex discrimination.

2. *Conflict of Interest for Second Lawyer Due to Exposure to Confidential Information of First Lawyer's Client in the Multilawyer Relationship*

The second conflict of interest problem arises because *L2*'s participation in the *LI-L2* relationship exposes *L2* to confidential information of *LI*'s client, *C*. The question is whether this exposure creates potential conflict problems when *L2* represents other clients. In the multiagency context, *L2* has a lawyer-client relationship with the client, so the ordinary conflict rules generally apply. The primary exception involves the departure of a lawyer from a firm, which may effectively end, for conflicts purposes, the treatment of all lawyers within the firm as lawyers of the client and substitutes a conflict rule based on exposure to confidential information.<sup>204</sup> In the single-agency context, however, *L2* does not have a full-fledged lawyer-client relationship with *LI*'s client, so the ap-

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202. *Id.*

203. *Id.*

204. See MODEL RULES R. 1.9(b) (stating that a lawyer who leaves his firm is not bound by the ordinary successive conflicts rule unless lawyer acquired material confidential information concerning the representation of client); *id.* R. 1.10(b) (stating that a firm that a lawyer leaves is not bound by the ordinary successive conflicts rule unless another lawyer in the firm has material confidential information concerning the representation of the client). In Rule 1.9(b) situations, *LI* is the firm, which primarily represented the client, and *L2* the departing lawyer, who did not directly represent the client. In Rule 1.10(b) situations, *LI* is the departing lawyer, who directly represented the client, and *L2* is the departing lawyer's former firm. The Rule 1.10(b) situation is contained in the imputed disqualification rule because one could view the failure to disqualify the firm as an exception to the ordinary imputation rule rather than as an exception to the ordinary rule that all lawyers in the firm represent the firm's clients. The Restatement treats both situations as exceptions to the imputation rule. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 124(1) (2000).

plication of the conflicts rules is less obvious. As part III.B.3 demonstrated, there are various ways in which *L2* may be obligated to protect *C*'s confidential information even if *L2* does not have a lawyer-client relationship with *C* and even if *L2* does not owe a strict duty of confidentiality to *C*. Rule 1.7(a)(2) [former Rule 1.7(b)], which governs conflicts based on a lawyer's personal interests, or obligations to a third person, requires neither such a relationship nor such a duty. Thus, Rule 1.7(a)(2) provides a vehicle for protecting *C*'s confidential information from inappropriate disclosure by *L2*.

For example, the recent ABA opinion on lawyer expert witnesses concludes that a lawyer expert witness *L2*, involved in a case in which *L1* represents *C1*, may be precluded under the personal interest conflict rules from both concurrent and successive representations of *C2*, despite the fact that *C1* is not *L2*'s client.<sup>205</sup> Similarly, the ethics opinion on lawyer consultants concludes that a consultant lawyer *L2* may be disqualified from representing *C2* if *L2* had agreed to keep *C1*'s information confidential.<sup>206</sup> A similar conclusion would likely be reached in the representational context because of *L2*'s duty of confidentiality to client *L1*, which would encompass *L1*'s duty of confidentiality to *C1*. Finally, *L2*'s obligations to existing or former clients may create a conflict preventing *L2* from associating with *L1* or limiting the scope of the association.<sup>207</sup>

### 3. *Vicarious Disqualification*

Like the conflicts problem discussed in the last subpart, vicarious disqualification implicates confidentiality rather than loyalty concerns. The difference is that in vicarious disqualification cases, the question is whether *L2* should be presumed to have been exposed to the confidential information of *L1*'s client because of the *L1-L2* relationship, rather than whether *L1*'s client should be treated effectively as *L2*'s client for conflicts purposes because of *L2*'s exposure to confidential information as a result of the *L1-L2* relationship. The imputation rule in conflict of interest law derives from the benefits and costs of multilawyer relationships already discussed. To achieve the benefits of multilawyer relationships, lawyers must communicate with each other, and such communication necessarily entails confidential client information. In theory, the

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205. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 407 (1997); cf. Commonwealth Ins. Co. v. Stone Container Corp., 178 F. Supp. 2d 938, 949 (N.D. Ill. 2001) (refusing to disqualify lawyer from serving as a testifying expert witness against a current client of the lawyer's firm in a prior, unrelated matter).

206. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 411 (1998) (discussing ethical issues in lawyer-to-lawyer consultation).

207. See, e.g., *id.* (concluding that consulted lawyer must preserve loyalty to existing client who might be adversely affected by consultation); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 407 (1997) (noting that if testifying expert previously represented a client, he may be prohibited from serving as an expert under Model Rules 1.8(b) and 1.9(c)).

client could contract to limit the transfer of information, but it is difficult for the client to monitor compliance with such a contract.<sup>208</sup> The imputation rule thus establishes a presumption that *L2* has received confidential information. The question is when such a presumption makes sense. In general, the presumption makes sense when *L1* has an incentive to provide confidential client information to *L2*, when *L2* has an incentive to acquire confidential client information from *L1* or the client, when the client has an incentive to provide confidential information to *L2*, or when there is circumstantial evidence that *L2* has in fact received information.<sup>209</sup>

In vertical lawyer-lawyer relationships, whether in the multiagency or single-agency context, a presumption that confidential information passes between the lawyers is reasonable when the subject matter scope of *L2*'s responsibilities overlaps with *L1*'s responsibilities. In particular, in hierarchical vertical relationships involving agency, *L2*, as agent of *L1*, has a fiduciary duty to provide relevant information to *L1*,<sup>210</sup> and *L1*, as principal, has a more limited duty to communicate with *L2* about "risks of . . . pecuniary loss."<sup>211</sup>

In horizontal relationships, the situations are more varied. In the partnership or other firm situation, the co-owners have duties of disclosure similar to agency, which helps to justify a broad imputation rule.<sup>212</sup> In the contractual lawyer-lawyer relationship, in the horizontal case with no lawyer-lawyer relationship, and in the case of successive representation,<sup>213</sup> the case for imputation depends on the scope of the lawyers'

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208. See Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965, 977-78 (1997).

209. Cf. Paul R. Taskier & Alan H. Casper, *Vicarious Disqualification of Co-Counsel Because of "Taint,"* 1 GEO. J. LEGAL ETHICS 155, 189 (1987) ("A presumption of taint is created when the party seeking disqualification has made a preliminary showing of one of the following: substantive discussions between co-counsel, joint preparation of litigation for trial, or the apparent receipt of confidential information.").

210. RESTATEMENT (SECOND) OF AGENCY § 381 (1958).

211. *Id.* § 435.

212. See, e.g., UNIFORM PARTNERSHIP ACT § 20 (1914) ("Partners shall render on demand true and full information of all things affecting the partnership to any partner . . ."); see also REVISED UNIFORM PARTNERSHIP ACT § 403(c) (1997).

213. Successive representation gives rise to two questions of vicarious disqualification. First, does the conflict of predecessor counsel *L1* taint successor counsel *L2*? See, e.g., *First Wis. Mortgage Trust v. First Wis. Corp.*, 584 F.2d 201, 204-05 (7th Cir. 1978) (en banc) (questioning the use of disqualified lawyer's work by successor counsel); *Bank of Am. v. Cal. Cannery & Growers*, 74 B.R. 336, 342 (Bankr. N.D. Cal. 1987) (concluding that successor counsel tainted by former counsel's conflict of interest); *In re George*, 28 S.W.3d 511, 518 (Tex. 2000) (developing the standard that disqualification of counsel for representing adverse party in prior, substantially related matter gives rise to rebuttable presumption that disqualified counsel's work product relating to current client contains confidential information about former client that cannot be disclosed to successor counsel). Second, does the conflict of successor counsel *L2* taint predecessor counsel *L1*? For example, if *L2* leaves his old firm to work for new firm *L1*, then *L2*'s conflicts as "successor lawyer" to *L1*'s client may get imputed to *L1* and disqualify *L1* from the representation if the matters of the two clients are substantially related. See MODEL RULES OF PROF'L CONDUCT R. 1.9(b) (2002) (defining when *L2* has a conflict); *id.* R. 1.10(a) (applying the imputation rule to Rule 1.9 conflicts); cf. *Nemours Found. v. Gilbane*, 632 F. Supp. 418, 430 (D. Del. 1986) (disqualifying transferred lawyer but not his new law firm). A related

tasks, and generally the courts avoid broad imputation in these contexts. The more the lawyers' tasks overlap, or the more the second lawyer's task relates to the information giving rise to the conflict, the more likely the conflict will be imputed.<sup>214</sup> On the other hand, the more the lawyers' tasks are segregated and the less control each exercises over the other, the less likely the conflict will be imputed.<sup>215</sup> In addition, if the lawyers' contractual arrangements or fiduciary or ethical obligations provide incentives for the lawyers to withhold information from each other, courts correctly hesitate to impute conflicts based on presumed disclosure of confidential information.<sup>216</sup>

#### 4. *Summary of Conflict of Interest*

Multilawyer relationships exacerbate conflicts of interest problems in three ways. First, they create an independent personal interest for the lawyer participants that may compete for the loyalty of the participant lawyers with the lawyers' duties to their clients. Second, they expose the lawyer participants to confidential information. Actual exposure to a cli-

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question involves not successive representation, but whether imputation survives the termination of a concurrent representation. If *L1* is a member of firm *L2*, and *L1* leaves, does *L1*'s taint continue to be imputed to *L2* even if no other lawyer in *L2* was involved in the representation? See MODEL RULES R. 1.10(b).

214. See, e.g., *NCK Org. Ltd. v. Bregman*, 542 F.2d 128 (2d Cir. 1976). The court in *NCK* upheld the disqualification of a law firm representing an officer of a corporation in a suit against the corporation when the law firm had previously conferred and temporarily acted as co-counsel with a former in-house counsel for the corporation. The corporation's former in-house counsel had originally acted as the officer's lawyer in the matter and had helped draft the contract at issue in the case. Under these circumstances, the court found that the transfer of confidential information by the former in-house counsel to the law firm was highly likely, despite the fact that the corporate officer argued that he already had all the confidential information the in-house counsel had. The point is, one must question why the law firm would bring in the former in-house counsel as co-counsel if the former in-house counsel were not bringing confidential information to the table.

215. Many of the cases involve co-counsel, a multiagency relationship. See, e.g., *Brennan's, Inc. v. Brennan's Rests., Inc.*, 590 F.2d 168 (5th Cir. 1979) (disqualifying primary lawyer who had jointly represented both sides in a trademark registration disqualified from representing one side in subsequent trademark dispute, on loyalty rather than confidentiality grounds, but finding co-counsel, a subject matter specialist, not automatically disqualified); *Akerly v. Red Barn Sys., Inc.*, 551 F.2d 539 (3d Cir. 1977) (disqualifying local counsel for plaintiff disqualified based on work for defendant at prior firm, but main counsel for plaintiff not disqualified); *Frazier v. Superior Court (Ames)*, 118 Cal. Rptr. 2d 129 (Cal. Ct. App. 2002) (imputing lawyer's conflict to his firm, but no "double imputation" of that lawyer's conflict to co-counsel's firm). But cf. *Brown v. Eighth Judicial Dist. Court*, 14 P.3d 1266 (Nev. 2000) (imputing a law firm's disqualification based on hiring a paralegal who previously worked for opposing counsel in the same matter not extended to co-counsel even though co-counsel was extensively involved in preparing case for trial). For a case in the single-agency context, see *Essex Chem. Corp. v. Hartford Accident & Indem. Co.*, 993 F. Supp. 241, 251 (D.N.J. 1998) (holding conflict of interest of one member of joint defense agreement not imputed to other members).

216. See, e.g., *Clark Capital Mgmt. Group, Inc. v. Annuity Investors Life Ins. Co.*, 149 F. Supp. 2d 193, 197 (E.D. Pa. 2001) (refusing to disqualify lawyer who had conversations with defendant's lawyer about prospect of becoming co-counsel not disqualified from later representing plaintiff in the litigation, in part because defendant's lawyer had obligations not to reveal confidential information during preliminary discussions with potential co-counsel); *Gray v. Mem'l Med. Ctr., Inc.*, 855 F. Supp. 377, 380 (S.D. Ga. 1994) (refusing to impute disqualification in "of counsel" representation because no incentive for firm to get information or "of counsel" lawyer to give it).

ent's confidential information will generally result in restricting the participating lawyers from representations adverse to the client even if the client is not the client of one or more of the participant lawyers. Third, the potential for exposure to a client's confidential information may result in vicarious disqualification of an associated lawyer if the nature of the lawyer-lawyer relationship makes reasonable a presumption that the information was transferred. The first two problems are more acute in single-agency relationships; the last problem is more likely to arise in multiagency relationships with at most a contractual relationship between the lawyers. Like vicarious liability, vicarious disqualification if too broadly applied may have the undesirable effect of encouraging more loosely organized multiple-lawyer relationships than may be optimal. Finally, although the ethics rules on conflicts generally lead to sensible results, their focus on multiple "clients" and imputation within "firms" makes the interpretation leading to these results more difficult than it needs to be.

*D. The Effect of the Lawyers' Professional Responsibilities on Lawyer-Lawyer Relationships*

We have already seen how the *L1-L2* relationship affects the lawyers' professional responsibilities. In this subpart, I briefly discuss the problem from the opposite direction: how the lawyers' professional responsibilities affect the *L1-L2* relationship.<sup>217</sup> Of course, this problem generally arises only when the lawyers have some kind of legal relationship to each other. Although the ethics rules do not directly regulate many aspects of the lawyer-lawyer relationship,<sup>218</sup> they may indirectly impact the relationship.

Some courts and commentators take the view that *L1* and *L2*'s professional obligations to *C*, and sometimes to *T*, must always take precedence over any obligations *L1* and *L2* owe to each other.<sup>219</sup> This ap-

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217. The interconnection between professional obligation and obligations arising out of the lawyer-lawyer relationship may also be more complex. For example, in *Madden v. Aldrich*, 58 S.W.3d 342, 349 (Ark. 2001), the court held that a statute barring a nonclient from recovery against a lawyer with whom the nonclient was not in privity did not apply to a claim for negligent supervision against such a lawyer. The supervising lawyer employed another lawyer who defrauded the nonclients. The court held that the statute did not apply because in failing to exercise due care in supervision, the supervising lawyer was not providing "professional services," as required by the statute.

218. See, e.g., Erichson, *supra* note 3, at 430 ("Especially in the absence of any formal aggregation mechanism, it remains unclear whether and to what extent coordinating lawyers owe each other and each other's clients a responsibility to inform and advise and, if so, whether this responsibility is an ethical duty, enforceable under the rules of professional conduct."); Twitchell, *supra* note 3, at 764-66 (arguing that fiduciary duties among associated lawyers are generally governed by agency and partnership law, not ethics rules).

219. See, e.g., Beck v. Wecht, 48 P.3d 417, 423 (Cal. 2002) (adopting per se rule that co-counsel do not owe any fiduciary duties to each other to preserve undivided loyalty to client).

proach finds some support in the ethics rules.<sup>220</sup> It also finds some support in the other law governing lawyer-lawyer relationships.<sup>221</sup> Contract law, for example, generally allows contracting parties to structure their relationship as they see fit, but not when third party interests exist.<sup>222</sup> With respect to the lawyer-lawyer relationship, at least in a multiagency context, the client is a classic third party whose interests restrict the lawyers' contractual freedom, whether the client is viewed as a joint contractor with the lawyers, or as a third party beneficiary of the lawyer-lawyer contract.<sup>223</sup> A key feature of the agency relationship as well is that the obligations of a principal and agent to each other may be trumped by either party's obligations to some third party.<sup>224</sup> The same is true of partnership and related law of co-ownership.<sup>225</sup>

But the idea that the lawyers' professional obligations to the client or third parties always trump *LI-L2* obligations is overly simplistic and an inaccurate description of the law.<sup>226</sup> In many cases, there is no conflict between the two sets of obligations, especially when the purpose of the *LI-L2* relationship is primarily to further the client's interests.<sup>227</sup> The ethics rules specifically regulating *LI-L2* relationships are relatively limited in scope.<sup>228</sup> The lawyers' obligations against each other may be con-

220. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.5(e), 1.7(a)(2) & cmt. 9 (2002) (noting that "a lawyer's duties of loyalty and independence may be materially limited by . . . the lawyer's responsibilities to other persons, such as fiduciary duties"); see also *id.* R. 1.8(f)(2), 2.1, 5.4(c), 5.6(a).

221. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 56 cmt. b (2000) ("Thus, courts considering the civil liability of lawyers must consider how a ruling that affirms or precludes liability would affect the vigorous representation of clients within the limits of the law, . . . [and] must also take care, in construing liability provisions and professional rules, to avoid subjecting lawyers to inconsistent obligations.").

222. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981).

223. *Id.* § 302.

224. See, e.g., RESTATEMENT (SECOND) OF AGENCY § 8 (1958) (apparent authority); *id.* § 219 (vicarious liability).

225. See ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 2 (1st ed. 1988).

226. See generally RESTATEMENT (SECOND) OF AGENCY § 343 (stating that an agent who commits a tort is generally not relieved from liability because he acted on behalf of the principal in doing so unless the principal is privileged to do so); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 9(2) ("A lawyer employed by an entity . . . is subject to applicable law governing the creation, operation, management, and dissolution of the entity."); *id.* § 56 (stating that a lawyer is liable to a nonclient "when a nonlawyer would be in similar circumstances"). With respect to the *LI-L2* employment relationship, see *id.* § 56 cmt. k (2000). With respect to *LI-L2* fiduciary relationships, such as agency and partnership, see *id.* cmt. h.

227. Cf. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 9 cmt. b ("Documents establishing and regulating a law-firm partnership, professional corporation, or similar entity should be interpreted, to the extent reasonably possible, in a manner that would make them consistent with the duties provided in the lawyer code of the applicable jurisdiction.").

228. Model Rule 5.1(a) and (b) simply require partners in a firm or supervising lawyer to make "reasonable efforts to ensure" that other lawyers conform to the ethics rules. See MODEL RULES OF PROF'L CONDUCT R. 5.1(a), (b) (2002). Rule 5.2 allows a subordinate lawyer to defer to a "supervisory lawyer's reasonable resolution of an arguable question of professional duty." *Id.* R. 5.2. Model Rule 1.17(a) imposes practice restrictions on a lawyer who sells a practice, for the purpose of facilitating the sale of the practice's good will and to prevent lawyers from disguising referral arrangements as "sales of a practice." *Id.* R. 1.17(a).

sistent with the client's interests.<sup>229</sup> Or the client's interests may be illegitimate. Even if there is a conflict, so long as both lawyers owe fiduciary duties to the client, it is not clear why the lawyers' rights against each other should be automatically restricted, absent a particular claim that one or both lawyers have in fact acted or are likely to act against the client's interests.<sup>230</sup> In addition, many ethics rules subordinate or tie lawyers' ethical obligations to the requirements of other law.<sup>231</sup> For example, Model Rule 8.4(c) allows lawyers to be disciplined for "conduct involving dishonesty, fraud, deceit or misrepresentation,"<sup>232</sup> even if lawyers commit these acts against other lawyers.<sup>233</sup> On the other hand, most of the rules' references to "other law" concern mandatory restrictions on

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229. DeMott, *supra* note 50, at 309. Professor DeMott gives as an example *Kramer v. Nowak*, 908 F. Supp. 1281 (E.D. Pa. 1995), in which a law firm (*L1*) was allowed to seek indemnity from an associate (*L2*) whose malpractice had resulted in losses to the firm. As DeMott argues, allowing *L1* to pursue its rights against *L2* in this situation does not harm *C*'s interests; in fact, it furthers them since future *L2*s are more likely to be deterred from committing malpractice. Courts have also allowed indemnity suits between lawyers in other lawyer-lawyer relationships, both in the multiagency context, *see, e.g.*, *Musser v. Provencher*, 48 P.3d 408 (Cal. 2002) (concurrent counsel may sue one another for indemnity); and the single-agency context, *see, e.g.*, *Hansen v. Anderson, Wilmarth & Van der Maaten*, 630 N.W.2d 818 (Iowa 2001) (law firm facing malpractice liability for allegedly mishandling business deal may seek indemnity from lawyer who represented other party in transaction and who allegedly knowingly supplied false documents). In the successor relationship context, courts are split on whether to allow predecessor *L1* to seek indemnity from successor counsel *L2* or vice versa. *See, e.g.*, *Parler & Wobber v. Miles & Stockbridge, P.C.*, 756 A.2d 526 (Md. 2000) (defendant lawyer in malpractice action may seek indemnity or contribution from client's successor counsel) (collecting cases on both sides); *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 547 S.E.2d 256, 266-71 (W. Va. 2001) (successor counsel may seek contribution from predecessor counsel on theory that predecessor counsel's poor advice set stage for a litigation catastrophe).

230. The ban on covenants not to compete, as seen in Model Rule 5.6(a) and the Restatement (Third) of Law Governing Lawyers § 13(1), has come under recent criticism in part because the rule may not be necessary to protect the "freedom of clients to choose a lawyer," MODEL RULES R. 5.6 cmt. 1, by allowing both *C* and *L2* to escape an association with *L1* that may be harmful to the interests of both. *See generally* Hillman, *supra* note 25, at 399-400; Perillo, *supra* note 50, at 477-80; Larry E. Ribstein, *Ethics Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1730-41 (1998). If covenants not to compete were allowed, *L2* might be more likely to remain associated with *L1* (which might in fact benefit the client, especially if *L2* were willing to invest more in the *L1-L2* relationship, as proponents of restrictive covenants assert), or *L2* might breach the covenant not to compete and pay damages to protect the client's interest in hiring *L2* (assuming injunctive relief against *L2* would not be allowed), or *L2* might demand that *L1* waive the covenant based on *L1*'s fiduciary duties to the client. The treatment of covenants not to compete stands in stark contrast to the treatment courts have given to the so-called grabbing and leaving problem of a departing lawyer luring clients away from his or her former firm. *See generally* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 9(3) & cmt. i (2000). Courts have been more willing to impose ordinary fiduciary obligations based on agency and partnership law on departing lawyers, at least prior to their departure, despite the potential interference with "client choice." *See* Hillman, *supra* note 25, at 399-400; Perillo, *supra* note 50, at 480-83.

231. *See, e.g.*, MODEL RULES preamble cmt. 15; *see also, e.g., id.* R. 1.2(d), 1.4(a)(5), 1.6(b)(4), 1.7(b)(2), 1.16(a)(1), 3.4(a), 8.4(e).

232. *Id.* R. 8.4(c)

233. *See, e.g., In re Siegel*, 627 A.2d 156 (N.J. 1993) (disbarring lawyer after he made numerous false requests for disbursements from his firm); *In re Curran*, 509 N.W.2d 429 (Wis. 1994) (disciplining lawyer who misappropriated funds from his firm while overseeing firm's construction of new office building); *In re Casey*, 496 N.W.2d 94 (Wis. 1993) (disciplining lawyer when he appropriated client retainers rather than turning them over to his firm).

or prohibitions of certain acts, whereas many of the rules of contract, agency, and partnership law are default rules.

The effect of the lawyers' professional obligations on the *L1-L2* relationship also depends on the relationship between each lawyer and *C*. In the multiagency case, because both *L1* and *L2* owe full ethical and legal duties to *C*, the effect of these duties on the lawyers' rights against each other are relatively strong. The ethics rule providing a just-following-orders defense to a subordinate lawyer in a hierarchical relationship, discussed above,<sup>234</sup> is a questionable exception to this general tendency. In the single-agency context, however, because only one lawyer has a full-fledged lawyer-client relationship with the client, the effect of duties owed to *C* on the *L1-L2* relationship will generally be much less. In fact, in the vertical representational and regulatory contexts, the *L1-L2* obligations may if anything take priority over *L1*'s obligations to *C*. For example, *L2*'s ethical duty to report misconduct of *L1* does not apply if *L2* is hired to represent *L1*, or if *L2* discovers the misconduct as part of *L1*'s participation in a lawyers assistance program.<sup>235</sup>

In sum, it is difficult to make general statements of how much the lawyers' obligations to the client affect their responsibilities to each other. Sometimes the professional obligations trump; sometimes they accommodate. One possible role for ethics rules specifically addressed to multilawyer situations would be to provide guidance in particular situations.

#### IV. AN AGENCY-COLLUSION THEORY APPROACH TO MULTILAWYERED PROBLEMS

So far I have developed two different architectures for analyzing multilawyer problems: one based on the structural and legal relationships among the lawyers and the clients, and a second based on how multilawyer relationships affect and are affected by three of the core concerns of professional responsibility. In this part, I briefly develop a third and more general architectural approach that focuses on one way we might begin to think about resolving multilawyer problems. In a previous article, I argued that from an economic perspective, the law of lawyering can be understood as addressing three basic agency problems: the traditional agency problem of the lawyer acting against the client's interests, either alone or in conjunction with a third party (*L-T* collusion); the lawyer-client collusion problem of unreasonably harming third party interests (*L-C* collusion); and the less common client-third party

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234. See *supra* notes 128-30 and accompanying text.

235. MODEL RULES R. 8.3 cmt. 4 & 8.3(c); cf. Phila. Bar Op. 2002-9 (Nov. 2002) (stating that *L1* who is former partner of law firm is not forbidden to report misconduct of *L2* whom firm now represents in a matter unrelated to alleged misconduct, because *L2* is not *L1*'s current client). In contrast, the duty to report does apply to lawyers in the same firm, a multiagency relationship. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 5 cmt. i (2000).



collusion problem of undermining the lawyer-client relationship (*C-T* collusion).<sup>236</sup> The focus of the law of lawyering (and the law of agency more generally) is not necessarily on actual collusion, but on what we might call presumed collusion. That is, the law helps to identify both situations in which the incentives to collude are strongest, because financial self-interest is a crucial force pressing against ethical and legal constraints; and situations in which the opportunities to collude are greatest, because institutional or structural checks on collusion are weak. I also do not mean to suggest that multilawyer problems caused by unilateral action are unimportant.<sup>237</sup> Rather, my point is that focusing on the potential for collusive behavior may help illuminate certain features that we might otherwise miss or underemphasize.

Although in the previous article I recognized the fact of multiple or complex client and multiple lawyer complications, I did not develop either point in any detail. In this part, I will elaborate briefly on the multiple lawyer situation. In even our simple model of four relevant characters, *L1*, *L2*, *C*, and *T*, the possible two-party collusive possibilities increase from three to six if one does not differentiate the target of the collusive act, and to twelve if one does.<sup>238</sup> As I have done throughout this article, however, I want to emphasize the ways in which the addition of a second lawyer enhances the traditional professional responsibility concerns, in this case the various forms of collusion. Given this restriction, we can narrow down the relevant categories. First, the multiple lawyers may collude with each other against the client (with or without the help of third parties), or against the third party (with or without the help of the client). Second, the client may collude with one lawyer against the other or against third parties. Third, one lawyer may collude with a third party against the client or the other lawyer. I will not discuss client-third party collusion against one or both of the lawyers because the presence of a second lawyer does not significantly change the analysis in that case.

#### A. *Lawyer-Lawyer Collusion*

First, consider potential collusion between the two lawyers, *L1* and *L2*. The presence of a second lawyer may facilitate the ability of the lawyers to collude either against the client's interests, or with the client against the interests of third parties, or with some third parties against the interests of both the client and other third parties. The opportunities

236. Cohen, *supra* note 166, at 283–84.

237. For example, in-house counsel may hire multiple law firms to “prevent outside firms from gaining influence with company management which rivals their own.” Schneyer, *supra* note 26, at 1787 n.51. If this arrangement harms the corporate client, it is an example of a lawyer unilaterally misusing a multilawyer relationship.

238. For those who like completeness, the possibilities are: *L1-L2 • C* (meaning *L1-L2* collusion against *C*); *L1-L2 • T*; *L1-C • L2*; *L1-C • T*; *L1-T • L2*; *L1-T • C*; *L2-C • L1*; *L2-C • T*; *L2-T • L1*; *L2-T • C*; *C-T • L1*; *C-T • L2*.

and incentives to collude against the client are of course stronger in situations where client control over the lawyer-lawyer relationship is relatively weak. Where client control is stronger, the bigger danger is collusion against third parties.

### 1. *Collusion Against the Client*

Lawyers colluding to act against the interests of their client is a classic agency problem of disloyalty. The presence of a second lawyer may make disloyalty more profitable for the lawyers and more difficult to monitor for the client. Many of the multilawyer problems discussed in part III raise the issue of this type of collusion. Collusion against the client is, naturally, least likely to occur when there is no legal relationship between the lawyers, especially when the client or a third party controls the hiring and supervising of the second lawyer—but it could happen. For example, in-house counsel could act together with outside counsel in ways that could benefit both (greater influence for in-house counsel, high fees for outside counsel) to the detriment of the corporate client.

Once the lawyers are in at least a contractual relationship, however, a number of collusive possibilities arise. One such possibility is that *L2* may compensate *L1* in return for *L1*'s acquiescing in actions that benefit *L2* rather than the client. For example, *L1* might be tempted to associate with, and assign ultimate responsibility to, an *L2* who is judgment proof, less competent, or unlicensed.<sup>239</sup> Or, as we have seen, *L1* might be tempted to associate with *L2* who has interests adverse to *C*.<sup>240</sup> When the temptations become too great, the law may impose vicarious liability or disqualification rules, as previously discussed in parts III.A.6 and III.C.3.<sup>241</sup> Not only the legal rules, but the structure of the lawyer-lawyer relationship may affect the risks of collusive behavior. For example, the ongoing relationship of a law firm helps to mitigate the temptation for the firm's lawyers by providing a reputational stake in the joint enterprise and a sharing of benefits and costs. Similarly, in the single-agency, representational context, the represented lawyer, *L1*, has his own personal reasons for associating with a competent, insured *L2*.

Lawyer-lawyer collusion against the client need not involve explicit payment from one lawyer to another in return for acquiescence in disloyalty. Instead, it could involve increasing monitoring costs to the client. Simply adding a lawyer to a representation increases the client's costs of monitoring, not only because there is now an extra body to keep

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239. See, e.g., MODEL RULES R. 1.5(e), 1.17, 5.5(b) ("A lawyer shall not . . . assist a person who is not a member of the bar in the performance of activity that constitute the unauthorized practice of law."); *id.* R. 8.4(a) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the rules of professional conduct, knowingly assist another to do so, or do so through the acts of another.").

240. See *id.* R. 1.7(a)(2).

241. See *supra* notes 136–63, 208–16 and accompanying text.

track of, but because the client must also keep track of the interaction and allocation of responsibility between the two lawyers. For example, *L1* and *L2* could deliberately obfuscate their division of responsibilities, making it difficult for the client to discover who was to blame for a particular act. The risk of such behavior provides an additional justification for vicarious liability and imputation rules. The presence of an additional lawyer might also enable the associated lawyers to do too much rather than too little by overlawying a problem.<sup>242</sup> Even an “independent” *L2* hired to monitor *L1* creates an additional monitoring problem that *L1* might be able to exploit. For example, in the current Enron bankruptcy case, the bankruptcy court refused to disqualify a law firm with potentially conflicting interests, in part because the law firm proposed addressing these conflicts by the use of separate “conflicts counsel” which would handle conflicts matters as they arose.<sup>243</sup> The problem is that if the primary lawyer has control over whether “conflicts counsel” is needed in a particular case, or what information the “conflicts counsel” has access to, the purported monitoring could be a sham.

Lawyer-lawyer collusion against the client can also occur in the co-ownership relationship. For example, the temptation for *L1* within a firm representing *C1* to share information with *L2* in the same firm representing *C2* with interests adverse to *C1* is precisely the justification for the imputation rule in conflicts of interest. Lawyer co-owners might also act together against the client’s interests when the lawyers’ interest in the firm conflicts with the client’s interests, such as in disputes between the firm and client over billing or malpractice.<sup>244</sup>

## 2. *Collusion Against Third Parties*

If the client controls the multilawyer relationship, the client may be able to exploit a lawyer-lawyer relationship to act against third parties. Similarly, *L1* and *L2* could act on their own to facilitate client wrongdoing against third parties. The collusive problems here generally fall under the category of prohibited assistance.<sup>245</sup> For example, *L1* and *L2* could create an organizational structure that shields each lawyer from

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242. Cf. *McCotis v. Home Ins. Co. of Ind.*, 31 F.3d 110, 111 (2d Cir. 1994) (illustrating collusion between lawyers in different firms to overbill client and split proceeds).

243. See Terry Brennan, *Enron Judge OK's Counsel*, THE DAILY DEAL (May 24, 2002), available at <http://www.thedeal.com>.

244. In a recent case, a court rejected (properly, in my view) an attempt by a law firm to use the firm’s internal investigation into conflicts problems (a representational relationship within the co-ownership context) as well as the firm’s representation of the client generally (a hierarchical relationship) to assert the firm’s own attorney-client privilege *against* the client. *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 220 F. Supp. 2d 283, 288–89 (S.D.N.Y. 2002); see also *Koen Book Distribs. v. Powell*, 212 F.R.D. 283 (E.D. Pa. 2002) (internal law firm e-mails in which lawyers consulted with their colleagues in the firm about threat from dissatisfied clients to sue the firm held not protected by attorney-client privilege or work product doctrine because firm continued to represent clients while seeking internal advice and so had conflict of interest).

245. See generally MODEL RULES R. 1.2(d).

certain information, thus giving each plausible deniability that he knew of client fraud or perjury. They could create a team culture that makes each member reluctant to raise issues of client impropriety.<sup>246</sup> Or they could set up a compensation structure that makes one lawyer overly financially dependent on a risky client, thus making that lawyer reluctant to resist the client's illicit demands.<sup>247</sup> All of these schemes involve using a second lawyer to make collusive behavior more difficult to detect, and therefore more likely to succeed.<sup>248</sup>

### B. Lawyer-Client Collusion

The next group of collusive possibilities involves one lawyer colluding with the client against the interests of the other lawyer or against a third party.

#### 1. Collusion Against the Other Lawyer

The risk of lawyer-client collusion against the other lawyer makes impossible a blanket rule that obligations arising out of the lawyer-client relationship always trump the obligations arising out of the lawyer-lawyer relationship. For example, either lawyer could act unreasonably with the client to oust the other from the representation,<sup>249</sup> otherwise undermine the other's relationship with the client,<sup>250</sup> or harm the other law-

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246. See Twitchell, *supra* note 3, at 729 ("The danger is . . . that closeness and mutual dependence among team lawyers, and between lawyer and between lawyer and client, will lead team members to forget the competing demands of their independent duty as officers of the court.")

247. Schneyer, *supra* note 26, at 1790 (arguing that when a firm partner has a large stake of his practice built around one client, he may block the firm from withdrawing from the case in which the client is engaged in wrongdoing, thus undermining the large firm's ability to act as gatekeeper).

248. Another example of lawyer-lawyer collusion that does not necessarily involve client fraud would be if *L1*, who is disqualified from representing *C2* because of a conflict with *L1*'s client *C1*, enters into a referral arrangement with *L2* under which *L2* would represent *C2*. A recent New York bar opinion stated that such a referral arrangement was unethical. State of N.Y. State Ethics Comm'n Op. 745 (July 18, 2001). We would not want to encourage *L1*s to accept representations they know they cannot undertake for conflicts reasons simply to earn a referral fee; that would be subsidizing unethical behavior rather than deterring it.

249. See, e.g., *Remick v. Manfredy*, 238 F.3d 248, 260 (3d Cir. 2001) (finding that plaintiff lawyer's complaint was sufficient to put successor counsel on notice of tortious interference claim, where plaintiff alleged that successor counsel set him up to fail in negotiations on behalf of boxer client); *Anderson v. Anchor Org. for Health Maint.*, 654 N.E.2d 675, 685 (Ill. App. Ct. 1995) (upholding cause of action for tortious interference with contractual relations by discharged attorney against co-counsel); cf. CANONS OF PROFESSIONAL ETHICS 7 (1969) ("A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case."); MODEL CODE OF PROF'L RESPONSIBILITY EC 2-30 (1983) ("If a lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other counsel approves or withdraws, or the client terminates the prior employment."). The problem is distinguishing illegitimate interference from legitimate legal advice that leads to the termination of the first lawyer. See Nassau County (NY) Bar Ass'n Comm. on Prof. Ethics Op. 02-02 (ethics rules do not prevent, and may require, attorney to inform client about doubts concerning co-counsel's ability to represent client effectively); Perillo, *supra* note 50, at 484 & n.285.

250. Model Rule 4.2 in conjunction with the tort law of interference with contractual relations protects a lawyer from undermining another lawyer's relationship with a different client. See Cohen,

yer's personal interests, such as his pursuit of fees.<sup>251</sup> Or one lawyer could simply seek to take some advantage for himself that the other has a legitimate interest in sharing in.<sup>252</sup> A common occurrence of this sort is the so-called grabbing and leaving scenario when a lawyer leaves his law firm.<sup>253</sup>

The lawyer-client collusion problem can also occur when there is no concurrent lawyer-lawyer relationship. For example, a successor lawyer could team up with the client to blackmail the prior lawyer as a result of the prior lawyer's misconduct.<sup>254</sup> Lawyer-client collusion can also occur when there is no legal relationship between the two lawyers. For example, the client and *L1* may pursue a strategy of associating with *L2* for the purpose of disqualifying *L2* from representing or otherwise working with *C*'s adversary.<sup>255</sup>

## 2. Collusion Against Third Parties

The collusion of one lawyer with the client against a third party is not much different than the collusion of both lawyers on behalf of the client against the third party. Recognizing this form of collusion does, however, help explain why rules that extend the duty of confidentiality to

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*supra* note 166, at 283. Rule 4.2 does not by its terms apply to the situation in which both lawyers represent the same client. See, e.g., *In re Grievance Proceeding*, No. 3:01GPG (SRU), 2002 U.S. Dist. LEXIS 18417 (D. Conn. July 19, 2002) (holding that lawyer does not violate Rule 4.2 by communicating with in-house general counsel of an opposing party in litigation in which that party is represented in the litigation by outside counsel). Rule 4.2 also does not apply to the situation in which one lawyer represents the client and the contacting lawyer does not represent anyone in the matter. See MODEL RULES R. 4.2 cmt. 8. In contrast, Rule 4.2 does by its terms apply to the situation in which one lawyer represents the client individually and the other represents an entity of which the client is a constituent, such as a corporation or a class. *Id.*

251. Some courts seem to overlook this problem or perhaps view the client as having the right to collude with one lawyer against the other. For example, in the recently decided case *Beck v. Wecht*, 48 P.3d 417, 418 (Cal. 2002), the Supreme Court of California unanimously held that one co-counsel has no fiduciary duty to another to protect the other's interests in a contingency fee on the rationale that finding such a duty would interfere with the undivided loyalty each co-counsel owes to the client. The court made no mention of the fact that if the client has a lawyer-client relationship with both lawyers, the client also owes duties to each lawyer, including the duty to pay compensation, see RESTATEMENT (SECOND) OF AGENCY § 441 (1958), and not to interfere with the work of either lawyer, see *id.* § 434. Thus, the opinion seems to allow the possibility that if the basis of one co-counsel's breach of fiduciary duty suit against the other was that the other lawyer helped the client breach the client's duties against the first lawyer, no recovery would be allowed. My guess is that if California courts are faced with a case that raises that possibility, they will retreat from *Beck*.

252. See, e.g., *Johnson v. Brewer & Pritchard*, 73 S.W.3d 193, 201-02 (Tex. 2002) (holding that an associate who steered client to a lawyer outside the associate's firm with whom the associate later combined breached the associate's fiduciary duty to his firm).

253. See, e.g., *Rosenfeld, Meyer & Susman v. Cohen*, 194 Cal. Rptr. 180, 191-92 (Cal. Ct. App. 1994) (finding that a departing lawyer breached the fiduciary duties owed to partners by renegotiating lower fees with clients after leaving the firm).

254. See *In re Himmel*, 533 N.E.2d 790 (Ill. 1988).

255. See, e.g., *In re Am. Airlines, Inc.*, 972 F.2d 605 (5th Cir. 1992) (recounting allegation made that a second law firm was hired for such a purpose); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 411 (1998) (stating that a consultation for such a purpose would violate Rule 8.4(c) and possibly 8.4(d)).

prevent lawyer-lawyer disclosure are troubling. The problem is that confidentiality rules may lead to the partitioning of information, which can facilitate fraud, rather than the sharing of information, which can deter fraud. For example, one of the client's lawyers may facilitate client fraud, while a second lawyer, unaware of the fraud, may give the representation an air of legitimacy.<sup>256</sup> The client could also use a successor lawyer to act against third parties, after learning enough information from the first lawyer to keep the second lawyer in the dark about the client's intentions.<sup>257</sup> Or the client could insist on working primarily with one lawyer in a firm to give that lawyer greater leverage in deterring the firm from resisting client desires. It is necessary to balance lawyer-client agency costs against lawyer-client collusion costs.

### C. *Lawyer-Third Party Collusion*

Finally, one of the lawyers could collude with a third party against the interests of the client or the other lawyer. The third party can be a different client (often a separate client of *L2*), an agent of an entity client acting against the client's interests, an adversary of the client, or a different lawyer with whom *L2* but not *L1* has a relationship. Collusion in which the third party is a separate client of *L2* is one of the biggest concerns underlying many of the cases addressing confidentiality and conflicts of interest in multiple lawyer representations, especially those in the single-agency context (of course many of these cases raise the question of *L1-L2* collusion as well). We do not want *L2* to view the *L1-L2* relationship as a valuable source of information that *L2* can exploit in his other representations. The cases discussed in the previous parts on confidentiality and conflicts of interest recognize this risk and have developed rules to protect against it.<sup>258</sup>

Lawyer-third party collusion can be a quite serious problem when clients are entities. For example, corporate counsel may side with a corporate officer acting against the best interests of the corporation. The disloyal corporate lawyer could use other lawyers, ostensibly hired as "independent" lawyers to protect the corporation's interests, instead to provide a veneer of legitimacy over the officer's wrongdoing (again this could involve *L1-L2* collusion as well). This problem can occur in the derivative suit context, or in similar cases involving disputes over who has authority to speak for the entity.<sup>259</sup>

256. See, e.g., *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490 (7th Cir. 1986).

257. See, e.g., *United States v. Ballard*, 779 F.2d 287, 292-93 (5th Cir. 1986) (concluding that when a client used *L2* to file bankruptcy petition omitting proceeds of sale of real estate, after *L1*, who had earlier assisted client in the real estate transaction, had advised client that proceeds of sale would have to be included in the bankruptcy petition, then the testimony of *L1*'s advice was not privileged).

258. See *supra* Part III.B-C and accompanying text.

259. See, e.g., *Fairfax Properties, Inc. v. Lyons*, 806 A.2d 535, 538 n.3 (Conn. App. Ct. 2002) (holding that where competing law firms file appearances purportedly on behalf of a corporation, the lawyers are responsible for determining who has authority to act on behalf of corporation).

Finally, in the class action situation, critics have long recognized the danger of class counsel colluding with defendants against the interests of the class.<sup>260</sup> Such collusion often involves multiple-lawyer situations. Other lawyers may be attempting to bring similar class actions in other jurisdictions,<sup>261</sup> competing to be class counsel, or representing individual class members. The temptation and opportunity are often great for class counsel to strike some deal with the defendant that benefits the defendant and class counsel at the expense of the class and these other lawyers. The reason is that not only is the class client's control over the lawyer practically nonexistent, but the lawyer-lawyer relationships are generally weak as well. Even if the lawyer-lawyer relationships are strong, that may simply mean that the collusive group expands to include *L1-L2* collusion.

#### V. MULTIPLE LAWYERS IN THE ETHICS 2000 REVISIONS TO THE MODEL RULES

As I stated earlier, the Model Rules say very little, at least explicitly, about multiple lawyer relationships. In previous parts, I have referred to the Model Rules, including the Ethics 2000 revisions, in discussing the various multilawyer relationships and problems. In this part, I briefly highlight some of changes in the Ethics 2000 revisions that are most directly relevant to multilawyer problems, including some I have not previously discussed.<sup>262</sup>

One set of changes made by the Ethics 2000 revisions expands, or at least clarifies, the application of existing rules to a larger number of multilawyer situations. Perhaps the most notable example of such a change is the revision to the definition of "firm," the most significant multiple lawyer relationship addressed in the Model Rules.<sup>263</sup> The definition of firm is important in the Model Rules because the term shows up in a large number of Model Rules and comments, though many of these are simply extensions of an individual lawyer's obligations to the firm, or

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260. See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Koniak & Cohen, *supra* note 121; Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

261. See, e.g., *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996).

262. Some of the revisions are not specifically directed at multilawyer relationships, but may wind up impacting those relationships, depending on how they are interpreted. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2002) (adding the requirement that limitations on the scope of representation must be "reasonable under the circumstances"); *id.* R. 1.4(a)(2) (new rule requiring lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished").

263. *Id.* R. 1.0(c) (defining "firm" as "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or *other association* authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization) (emphasis added). A new imputation rule was added in Model Rule 1.8(k), imputing various transactional conflicts to all members of a firm. *Id.* R. 1.8(k).

rules governing the imputation of an individual lawyer's conflict of interest to the firm.<sup>264</sup> The Ethics 2000 revisions clarify that "firm" includes professional corporations and sole proprietorships, and then add the potentially expansive phrase "other associations."<sup>265</sup> Although this phrase could be read to include contractual relationships and joint ventures, the Reporter's Notes claim it simply refers to limited liability companies and limited liability partnerships.<sup>266</sup> In contrast, an expansion of the ban on covenants not to compete more definitely includes co-counsel and similar relationships.<sup>267</sup>

Other similar revisions expand or clarify the responsibility of some lawyers for other lawyers. In the general rule on supervisory responsibility, the Ethics 2000 revisions extend the reach of the rule beyond partners to any lawyer with "comparable managerial authority."<sup>268</sup> Moreover, in a new comment to the confidentiality rule explaining the previously implicit but now explicit obligation to protect against inadvertent disclosure applies to a broad range of multilawyer relationships.<sup>269</sup> Another new comment applicable to the representational context stresses (without intending any substantive change) that ordinary confidentiality rules apply.<sup>270</sup>

Several revisions to the Model Rules encourage the formation of multilawyer relationships in certain circumstances. In the successive representation context, the Ethics 2000 revisions add a new comment to the duty of diligence suggesting that sole practitioners may be required to provide for a successor lawyer in the event of their death or disability.<sup>271</sup>

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264. For example, a revision to the general rule governing imputation of conflicts of interests, eliminates imputation in cases of a "personal interest" conflict of one of the firm lawyers if there is no "significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." *Id.* R. 1.10(a).

265. Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct November 2000 Report, in *PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES* (John S. Dzienkowski ed., 2001-2002 Abridged ed., 2001).

266. This interpretation is further supported by the fact that Rule 1.5(e) specifically addresses lawyers in a contractual relationship and distinguishes that relationship from a firm. *Cf.* MODEL RULES R. 1.0 cmt. 2 (noting that the perceptions of the client, the agreement between the lawyers, and the purposes of the applicable rules all help determine whether in a particular situation the lawyers should be considered a firm).

267. *See id.* R. 5.6(a) ("A lawyer shall not participate in offering or making . . . a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement." (emphasis added)).

268. *Id.* R. 5.1(a), (c)(2). According to the Reporter's Notes, the intent was to include managing lawyers in corporate and government departments, and legal services organizations. As discussed above, these lawyers are coagents of an organizational principal, not principals themselves.

269. *Id.* R. 1.6(a) & cmt. 15 ("A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision.") (emphasis and alterations added).

270. *Id.* R. 8.1 cmt. 3 ("A lawyer representing . . . a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.") (emphasis added).

271. *Id.* R. 1.3 cmt. 5.



The revisions also now allow a practitioner to sell his law practice to multiple lawyers, which should encourage more such transactions.<sup>272</sup> In addition, the buyer of a law practice is now prohibited from raising the fee for the representation above the fee in the original contract between the selling lawyer and the client, which could also make the successive representation more likely to occur.<sup>273</sup>

In the representational context, the revisions add a new exception to the duty of confidentiality for a lawyer seeking ethical advice from another lawyer.<sup>274</sup> In addition, the revisions relax several advertising rules in cases in which the prospective client is a lawyer, which may facilitate more representational relationships.<sup>275</sup>

Several other revisions encourage concurrent representations by lawyers with no legal relationship to each other, largely for the purpose of protecting the client from one of the lawyers by hiring an independent second lawyer. With respect to lawyer-client business transactions and settlement of malpractice claims, the lawyer must, under the Ethics 2000 revisions, advise the client “in writing of the desirability of seeking” and give the client “a reasonable opportunity to seek the advice of independent legal counsel.”<sup>276</sup> A somewhat weaker form of encouragement appears in the concept of “informed consent,” one of the innovations of the Ethics 2000 revisions that now appears in numerous rules and comments.<sup>277</sup> The comment accompanying the definition of informed consent encourages (though it does not require) the use of independent counsel to ensure such consent.<sup>278</sup>

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272. *Id.* R. 1.17(b). According to the Reporter’s Note, the purpose of this change is to allow different aspects of a practice to be sold to specialists.

273. *Id.* R. 1.17(d) & cmt. 10. Although one might argue that buying lawyers will be more reluctant to buy a practice if they cannot raise the fees in the cases to their going rate, they may be able to compensate for this loss by paying a lower contract price to the selling lawyer. This may make the selling lawyer more reluctant to sell, or just more reluctant to sell to lawyers who charge significantly higher fees. In fact, the bigger danger may be that the selling lawyer has too much incentive to sell to low-fee, low-quality buyers willing to pay a high price to get access to a viable client base.

274. *Id.* R. 1.6(b)(2) & cmt. 7. For discussion of this rule, see *supra* note 171.

275. *Id.* R. 7.3(a)(1) (no restriction on in-person and other solicitation if prospective client is a lawyer), (c) (warning label stating “Advertising Material” not required if prospective client is a lawyer). Arguably, these revisions simply restore an implicit exception contained in the Model Code. See MODEL CODE OF PROF’L RESPONSIBILITY DR 2-104(A) (1983) (limiting restrictions to advice given to a “layperson”).

276. MODEL RULES R. 1.8(a)(2), (h)(2). The Ethics 2000 revisions changed both of these rules to conform with each other and to strengthen the suggestion of independent representation. See also *id.* cmt. 2, 4 (“The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.”).

277. See *id.* R. 1.0(e) (defining “informed consent”). The references to informed consent in the rules themselves include: 1.0(b), 1.2(c), 1.4(a)(1), 1.6(a), 1.7(b)(4), 1.8(a)(3), 1.8(b), 1.8(f)(1), 1.8(g), 1.9(a), 1.9(b), 1.11(a)(2), 1.11(d)(2)(I), 1.12(a), 1.18(d)(1), 2.3(b). See generally MODEL RULES.

278. See *id.* R. 1.0 cmt. 6 (“In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. . . . In determining whether the information and explanation provided are reasonably adequate, relevant factors include . . . whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is

Not all of the Ethics 2000 revisions relevant to multilawyer situations encourage such relationships. In particular, the changes to the fee-splitting rule, Rule 1.5(e), may in fact discourage some multilawyer arrangements, or at least make them more costly, to provide greater protection to the client.<sup>279</sup> Rule 1.5(e) is the most important ethics rule that regulates multilawyer relationships outside of the firm. Rule 1.5(e) is designed at least in part to address the problem of *L1-L2* collusion to mislead *C* about the quality of representation or the division of labor between the lawyers.<sup>280</sup> Old Rule 1.5(e) required the two lawyers either to divide the fee in proportion to the services performed or by written agreement to assume joint responsibility for the representation, and to advise the client of the relationship.<sup>281</sup> The Ethics 2000 revisions require the client to agree in writing in all cases, and specifically to agree to the “share each lawyer will receive.”<sup>282</sup> In addition, an accompanying revision to the comment interprets “joint responsibility” to mean vicarious liability and not simply the more limited form of joint responsibility contemplated by the Model Rules in the context of lawyers within a firm.<sup>283</sup> By giving the client more information about the fee-splitting agreement and a greater likelihood of vicarious liability, the new Rule could increase the client’s ability to protect against having his case “sold” to the highest bidder rather than the most qualified lawyer,<sup>284</sup> though the extra costs imposed by the rule could also discourage desirable fee splitting agreements in the first place. As a practical matter, however, both effects are likely to be relatively muted. Even with the increased information, clients may still have a difficult time monitoring.<sup>285</sup> And the lawyers may be able to evade the restrictions.<sup>286</sup> A bigger problem for lawyers,

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independently represented by other counsel in giving the consent should be assumed to have given informed consent.”).

279. *Id.* R. 1.5(e).

280. See Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 896 (1990) (arguing that fee splitting arrangements could lead to collusion between the referring lawyer and an inferior referee who could not get business on his own and bribes the referring lawyer to send business his way). *But see* Perillo, *supra* note 50, at 460–66 (criticizing rule’s rationale and application).

281. MODEL RULES OF PROF’L CONDUCT R. 1.5(e) (1983) (amended 2002).

282. MODEL RULES OF PROF’L CONDUCT R. 1.5(e) (2002).

283. *Id.* R. 1.5(e) cmt. 7 (“Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.”). The revision to the comment goes on to emphasize that the referring lawyer also bears some responsibility for ensuring the competence of the referred lawyer: “A lawyer *should* only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter.” *Id.* (emphasis added). Why the comment uses “should” rather than “must” is not clear, though fear of increased liability is a good bet. *Cf. id.* R. 1.17 cmt. 11.

284. A direct payment to another lawyer to compensate that lawyer for “recommending” his services would violate Rule 7.2(b). *See id.* R. 7.2(b).

285. It is interesting that, although the client consent is strengthened compared to the old Model Rules, this is one rule—perhaps the only one—in which the new “informed consent” requirement is not applied.

286. *See, e.g.*, Twitchell, *supra* note 3, at 771 n.295 (criticizing the proportionality rule of 1.5(e) as encouraging “sham participation” and leading to insufficient sharing of information between fee-splitting lawyers).

however, is that the revised rule's extra requirements may lead to more *LI-C* collusion, which could occur if *LI* offers *C* a reduction in the fee in return for *C* supporting *LI*'s challenge to *L2*'s share.

In addition to the fee-splitting rule, two other revisions attempt to limit multilawyer relationships when the lawyers are in an adversarial relationship. First, Rule 2.3(b) adds a prohibition on providing a third-person evaluation for someone other than the lawyer's client (such as an opinion letter for the client's transaction partner), absent informed consent, if "the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely."<sup>287</sup> Second, a new rule dealing with the receipt of documents inadvertently sent to a lawyer by another lawyer representing a different client requires only that the sender be notified, rather than the return of the document.<sup>288</sup> Both revisions display a traditional reluctance to create obligations of a lawyer to the adversary of the lawyer's client.

## VI. CONCLUSION

The practice of law, and the law of lawyering, have moved beyond the simple dichotomy of sole practitioner and law firm. The multilawyered problems of professional responsibility are ubiquitous, increasing, and complex. Those who regulate and write about modern lawyering need to address these problems in a systematic way. I have tried to start the process by proposing frameworks for thinking about, organizing, and resolving these problems. The structural taxonomy developed in this essay shows that multilawyer relationships can take a number of forms, depending on both the nature of the legal relationship between the lawyers, and the nature of the relationship between the lawyers and the client. I used the structural taxonomy to describe the ways in which multilawyer relationships affect the core concerns of competence, confidentiality, and conflicts of interest. The presence of multiple lawyers can help ameliorate all of these concerns, but can also exacerbate them. In particular, the addition of a second lawyer to a matter may increase the costs of monitoring competence, preventing unwanted disclosures, and preserving loyalty. From a broader perspective, the addition of a second lawyer complicates the collusive possibilities inherent in all tripartite agency relationships involving a principal, agent, and third party. The second lawyer may act with the first lawyer against the interests of the

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287. MODEL RULES R. 2.3(b).

288. *Id.* R. 4.4(b) & cmt. 2-3. The lawyer is given discretion to return document unread. The Ethics 2000 revisions declined to adopt ABA Formal Op. 92-368, which required receiving lawyer to return material unread. *See also In re Nitla S.A. de CV*, No. 01-0512, 2002 Tex. LEXIS 40 (Apr. 11, 2002) (holding that law firm should not be disqualified for reviewing litigation opponent's confidential documents that are released by trial court but are later found to be privileged by reviewing court unless party seeking disqualification shows that document review caused actual harm that cannot be remedied by less means); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 60 cmt. m (2000).

client or third parties, may act with the client against the interests of the first lawyer, or may act with third parties against the interests of the client or the first lawyer. Thinking about where the greatest collusive risks lie may help resolve multilayered problems. The Ethics 2000 Commission perceived no architecture for addressing the multilayered problems of professional responsibility, and so they for the most part ignored them. The architecture is now visible, and the problems are very real. Let's get building.