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## Harming Business Clients with Zealous Advocacy: Rethinking the Attorney Advisor's Touchstone

Paula Schaefer  
0@0.com

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# FLORIDA STATE UNIVERSITY LAW REVIEW



## HARMING BUSINESS CLIENTS WITH ZEALOUS ADVOCACY: RETHINKING THE ATTORNEY ADVISOR'S TOUCHSTONE

*Paula Schaefer*

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# HARMING BUSINESS CLIENTS WITH ZEALOUS ADVOCACY: RETHINKING THE ATTORNEY ADVISOR'S TOUCHSTONE

PAULA SCHAEFER\*

I.	THE ZEALOUS ADVOCACY MANTRA .....	253
II.	ZEALOUS ADVISING AND ITS HARM TO BUSINESS CLIENTS.....	258
	<i>A. Zealous Encouragement of Business Clients' Goals Within the Technical     Bounds of the Law</i> .....	258
	<i>B. Zealous Advocates do not Judge the Morality of a Client's Proposed     Conduct</i> .....	264
	<i>C. Zealous Pursuit of the Business Organization Client's Goals as Declared     by Company Management</i> .....	269
III.	FAILINGS OF THE CURRENT PROFESSIONAL CONDUCT RULES TO GUIDE NONLITIGATORS IN ADVISING CLIENTS .....	275
	<i>A. Scant Direction about How to Advise in the Advisor Rule</i> .....	275
	<i>B. Rules that Tell Attorneys When to Say No to Clients</i> .....	276
IV.	IN SEARCH OF A NEW TOUCHSTONE: FIDUCIARY DUTY TO THE CLIENT .....	281
	<i>A. Defining the Fiduciary Duty Touchstone</i> .....	282
	<i>B. Benefits of Fiduciary Duty over Zealous Advocacy as Professional     Decisionmaking Touchstone</i> .....	286
	<i>C. Challenges of Making Fiduciary Duty a Touchstone for Professional     Decisionmaking</i> .....	288
V.	A MODEST PROPOSAL FOR INCORPORATING A FIDUCIARY DUTY-FOCUSED VISION OF ADVISING INTO PROFESSIONAL CONDUCT RULES .....	291
	<i>A. Preamble to the Model Rules of Professional Conduct: Fiduciary Duty as     Touchstone</i> .....	292
	<i>B. Model Rule 1.13, Organization as Client</i> .....	293
	<i>C. Counselor Model Rules</i> .....	294
	1. <i>Proposed Model Rule 2.1, Advisor</i> .....	294
	2. <i>Proposed Model Rule 2.2, Up the Ladder Reporting by Advisor to         Organizational Client</i> .....	295
	3. <i>Proposed Model Rule 2.3, Loyal Disclosure of Information to Protect         an Organizational Client from Agent's Conduct</i> .....	296
VI.	CONCLUSION .....	298

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\* Associate Professor of Law, University of Tennessee College of Law. I am indebted to Benjamin Barton, Benjamin Cooper, Joan Heminway, Brian Krumm, Alex Long, Thomas Metzloff, and John Steele for their insight and suggestions for this Article. I also appreciate the feedback and constructive comments I received when I presented earlier versions of this paper at the University of Tennessee College of Law Faculty Forum, the Southeast Association of Law Schools Annual Conference, and at the Washington University College of Law Junior Scholars Workshop. This work was completed with research assistance provided by Jamey E. Ayers and research support provided by the University of Tennessee College of Law. I dedicate this Article to the memory of my father, Leonard V. Hicks, Jr.

*“[L]awyers . . . want clear rules to follow. Into the resulting vacuum of silence about lawyers’ aspirational ideals has rushed the only consistent ideal left: the ethic of unswerving zeal and loyalty to clients.”<sup>1</sup>*

*“I have a duty to represent my client zealously.”  
—Testimony of convicted business attorney Joseph Collins.<sup>2</sup>*

Convicted attorney Joseph Collins’ client is an empty shell today. Collins and his law firm helped Refco, Inc.’s executives conceal hundreds of millions of dollars in uncollectable debt.<sup>3</sup> Without the staggering debt on its books, the client was able to satisfy its lenders and raise millions of dollars from investors.<sup>4</sup> But only weeks after Refco’s initial public offering, the company announced discovery of the hidden debt and admitted that its financial statements could not be relied upon.<sup>5</sup> Within a week of that announcement, the company filed for bankruptcy.<sup>6</sup>

A malpractice suit filed by the appointed litigation trustee following Refco’s bankruptcy highlights an issue considered in this Article<sup>7</sup>: Did Collins *harm* his own client? Collins helped perpetrate a fraud for which the client, but for its destruction, would have faced substantial liability. Despite any short-term benefits, it seems obvious that the company was damaged.

Based on his testimony at the criminal trial, Collins did not believe he was harming his client, or anyone else for that matter.<sup>8</sup> Collins and his firm prepared documents for seventeen “round-trip” loans at a Refco executive’s direction,<sup>9</sup> without asking or understanding the purpose of the transactions.<sup>10</sup> Collins, again at management’s direction, made technical arguments for withholding certain documents from a purchaser during due diligence; the documents would have revealed the company’s staggering debt.<sup>11</sup> By his conduct,

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1. Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1198 (2009) [hereinafter Gordon, *Citizen Lawyer*].

2. See Trial Transcript at 4497, United States v. Collins, No. S1 07 Cr. 1170 (RPP) (S.D.N.Y. 2010) (cited transcript excerpts on file with author); see *infra* note 129 and accompanying text (describing Collins’ conviction).

3. *In re Refco, Inc. Sec. Litig.*, 609 F. Supp. 2d 304, 306-07 (S.D.N.Y. 2009).

4. See *id.* at 307-08.

5. *Id.* at 308 n.7.

6. *Id.*

7. See Complaint at 107-12, Kirschner v. Grant Thornton LLP, No. 07 Civ. 11604 (Cook Cnty. Ct. Sept. 19, 2007) (alleging claims on behalf of three Refco entities against Collins’ firm Mayer, Brown, Rowe & Maw, LLP for malpractice, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and aiding and abetting fraud).

8. See, e.g., Trial Transcript, *supra* note 2, at 3494.

9. *In re Refco, Inc. Sec. Litig.*, 609 F. Supp. 2d 304, 307 (S.D.N.Y. 2009).

10. See, e.g., Trial Transcript, *supra* note 2, at 3494.

11. See, e.g., *id.* at 3494-95.

Collins participated in a fraud. But he claims that he would not have continued the representation if he had known that the conduct was fraudulent.<sup>12</sup>

In this Article I argue that this style of lawyering bears the hallmarks of zealous advocacy, that it is particularly harmful to business clients, and that the Bar contributes to the problem by not articulating a viable alternative. Although Collins and other business lawyers discussed in this Article also injured third parties, my focus is on the harm they caused their own clients. My position is contrary to the more common conception of *Refco* and similar cases—that the business lawyer was *too loyal* to the client.<sup>13</sup> I argue that these lawyers were not loyal enough.

I present my argument in the first three parts. In Part I, I discuss the American lawyer's conception of self as zealous advocate and the belief that zealous advocacy is loyal to the client. In Part II, I explore the connection between business lawyer zealous advocacy and injury to the lawyer's own client. My discussion considers both individual clients engaged in business and business entity clients. Then in Part III, I explain the incomplete and often confusing messages found in professional conduct rules about the business advisor's role and how these failings contribute to attorneys turning to zealous advocacy.

In the remaining Parts, I explore fiduciary duty as a preferable touchstone for the profession and a superior guide for the Bar to explain the advisor's role. While it is true lawyers are already fiduciaries, fiduciary duty is not the focus for most lawyers. In Part IV, I explain why it should be, considering both the advantages and challenges of this approach. Thereafter, in Part V, using fiduciary duty as a framework, I propose revisions to several professional conduct rules that address the advisor's role. I explain why each change contributes to a new touchstone for the business lawyer that is more consistent with the client's interests.

## I. THE ZEALOUS ADVOCACY MANTRA

In the United States, lawyers, commentators, and courts understand “zealous advocacy” to be the lawyer's highest duty<sup>14</sup> and believe

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12. See, e.g., *id.* at 3617.

13. See Chad Bray, *Refco Lawyer Gets 7-Year Sentence*, WALL ST. J., Jan. 15, 2010, at C6 (quoting U.S. District Court Judge Robert P. Paterson who stated at Collins' sentencing, “I think this is a case of excessive loyalty to his client”), available at <http://online.wsj.com/article/SB10001424052748704363504575003200481973346.html>.

14. See Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687, 687-88 nn.1-2 (1991) (citing multiple authorities for the proposition that attorneys have an ethical duty to represent their clients “zealously” while proceeding within the bounds of the law); Sylvia Stevens, *Whither Zeal? Defining 'Zealous Representation'*, OR. ST. B. BULL., July 2005, at 27, 27 (“I suspect, if asked to describe in one word the primary responsibility of lawyers, most of us would say it is

it to be synonymous with client loyalty.<sup>15</sup> Zealous advocacy has been described as the narrative that conveys the ideal of the American legal profession: to be a champion of “a client threatened with loss of life and liberty.”<sup>16</sup> The complaint that is most frequently lodged against zealous advocacy is not that it harms the lawyer’s own client, but that lawyers use zealous advocacy as an excuse for incivility.<sup>17</sup>

Since 1908, U.S. attorney conduct rules have described the only limit on an attorney’s zealous advocacy as “the bounds of the law.”<sup>18</sup> Attorneys have interpreted this limitation as meaning that they must avoid black letter violations of law or attorney conduct rules, but they should otherwise vigorously pursue their clients’ goals through any arguably legal means.<sup>19</sup>

Zealous advocacy is understood to require the attorney to be a partisan of the client, even to the detriment of others. Henry Brougham,

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zealousness.”); *see also* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2556 (2009) (Kennedy, J., dissenting) (discussing criminal defense counsel’s duty to be a zealous advocate).

15. *See* United States v. Stewart, 590 F.3d 93, 99 (2d Cir. 2009) (Convicted attorney argued that her conduct—which included filing false affirmations—was undertaken not with criminal intent but in an effort to zealously represent her client’s interests.).

16. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1243 (1991) [hereinafter Hazard, *Future*].

17. *See, e.g.*, John Conlon, *It’s Time to Get Rid of the ‘Z’ Words*, RES GESTAE, Feb. 2001, at 50, 50 (arguing that zealous advocacy is not viewed as an ethical responsibility, but as an excuse for rude and offensive behavior at depositions and in courtrooms).

18. CANONS OF PROF’L ETHICS Canon 15 (1908) (explaining the lawyer’s zeal in pursuing the client’s interests extends “to the end that nothing be taken or be withheld from [the client], *save by the rules of law*” (emphasis added)); MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1980) (titled “A Lawyer Should Represent a Client Zealously Within the Bounds of the Law”); *id.* at EC 7-1 (“The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . .” (footnotes omitted)); MODEL RULES OF PROF’L CONDUCT pmb. ¶ 9 (2009) (providing that when different interests conflict and the Model Rules do not provide an answer, a lawyer should be guided by the “obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law”), *available at* <http://www.abanet.org/cpr/mrpc/preamble.html>; *see also infra* notes 27-29 and accompanying text (discussing other references to zeal in the Model Rules).

19. Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1166 (2006) (“Zeal, from the start accompanied by its prissy tag-along caution ‘within . . . the bounds of the law,’ joined an expansive vision of what it meant to be a good lawyer.” (footnote and citation omitted)); Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771, 774 (2006); Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1194 (2003) [hereinafter Gordon, *New Role*] (asserting that the corporate lawyer views himself as an advocate whose job it is “to help [clients] pursue their interests and put the best construction on their conduct that the law and facts will support . . . , so as to enable them to pursue any arguably-legal ends by any arguably-legal means”); Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1014 (2005) [hereinafter Kim, *Banality of Fraud*] (describing the traditional conception of lawyering as zealous advocacy focused on aggressive and single-minded pursuit of client goals not only “within, but all the way up to, the limits of the law”).

the father of zealous advocacy by most accounts, described it as the route “[t]o save that client” even though it might cause “the alarm, the torments, [and] the destruction” of others.<sup>20</sup> Modern proponents of zealous advocacy have a similar regard for the concept—a zealous advocate is committed to partisanship.<sup>21</sup> Practicing attorneys and commentators envision zealous advocacy as essential to a client-centered representation.<sup>22</sup>

Another popular conception of zealous advocacy is that it obligates an attorney to suspend personal morality in favor of zealously pursuing the client’s agenda.<sup>23</sup> Adherents to this view believe that lawyers must act with unmitigated zeal on behalf of their clients regardless of any personal moral issues with the client’s aims.<sup>24</sup> As Professor Michael Hatfield puts it, “Beginning in law school . . . [w]e are taught to accept a division between lawyers’ morality and clients’ morality, and the primary principle of zealous advocacy. . . .”<sup>25</sup> This has been

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20. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 54-55 (1988). In the Trial of Queen Caroline, Henry Brougham described zealous advocacy in the House of Lords:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

*Id.*; see also GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 150 (1978).

21. MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* 71 (3d ed. 2004) (“The ethic of zeal is . . . pervasive in lawyers’ professional responsibilities because it informs all of the lawyer’s other ethical obligations with entire devotion to the interest of the client.” (internal quotation marks omitted)); *id.* at 72 (describing a zealous advocate as a partisan); Hazard, *Future, supra* note 16, at 1244 (explaining that the zealous advocacy narrative “pictures the lawyer as a partisan agent”).

22. Katherine S. Broderick, *Understanding Lawyers’ Ethics: Zealous Advocacy in a Time of Uncertainty*, 8 D.C. L. REV. 219, 220 (2004).

23. W. Bradley Wendel, *Lawyers and Butlers: The Remains of Amoral Ethics*, 9 GEO. J. LEGAL ETHICS 161, 161 (1995) [hereinafter Wendel, *Butlers*] (“The notion that one should feel no shame or regret on one’s own account [when our clients require us to do distasteful things] is the principle of nonaccountability, also known as the *amoral* role of professionals.”); see also *id.* at 165 (citing DAVID LUBAN, *LAWYERS & JUSTICE: AN ETHICAL STUDY* xix-xxi (1988)) (asserting that the dominant picture of legal ethics is that lawyers may be required to do things that seem immoral).

24. Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629, 1629 (2002).

25. Michael Hatfield, *Professionalizing Moral Deference*, 104 NW. U. L. REV. COLLOQUY 1, 4-5 (2009). Professor Suchman asserts that a majority of litigators interviewed saw themselves as passive “agent[s] of their client’s will” and that they passed moral responsibility along to the client. Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837, 867 (1998); see also ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 276-89 (1988) (asserting that partners at large law firms have a financial incentive not to “check” their clients’ desires, but rather to act as agents of their clients);

described as “role morality”: a lawyer’s role requires zealous advocacy while universal moral principles might require something else.<sup>26</sup>

The Model Rules of Professional Conduct (Model Rules) do not provide a clear answer about whether business advisors should be guided by zealous advocacy. The preamble to the Model Rules refers generally to a lawyer’s duty “zealously” to protect and pursue the client’s interests within the bounds of the law; this description is not limited to litigators.<sup>27</sup> Other provisions of the preamble seem to describe litigators when referencing zealous advocacy.<sup>28</sup> A comment to the diligence Model Rule states that a lawyer should act with “zeal in advocacy on the client’s behalf.”<sup>29</sup>

Despite debate about whether nonlitigators *should* act as “zealous advocates,”<sup>30</sup> there is reason to believe that many do. Business law-

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Wendel, *Butlers*, *supra* note 23, at 165 (citing Scott Turow’s description of lawyers and morality in the book *One L*: “A lawyer may do his job very well, but he does not set the moral agenda. The ends are established by the client . . . . It is the lawyer’s obligation to carry those goals forward, within the limits of law . . . .” SCOTT TUROW, *ONE L* 309 (1988)).

26. See Wendel, *Butlers*, *supra* note 23, at 163-64.

27. MODEL RULES OF PROF’L CONDUCT pmb. ¶ 9 (2009), *available at* <http://www.abanet.org/cpr/mrpc/preamble.html>; *id.* at R. 1.3 cmt. (The diligence rule’s comments do not distinguish between litigators and nonlitigators.).

28. Paragraph 8 of the Preamble provides that when both sides are well represented, “a lawyer can be a zealous advocate on behalf of a client and . . . assume that justice is being done.” *Id.* at pmb. ¶ 8. Paragraph 2 of the Preamble notes that lawyers play roles of advisor, advocate, negotiator, and evaluator, and describes that the advocate’s role is to “zealously assert[] the client’s position under the rules of the adversary system.” *Id.* at pmb. ¶ 2. Here, the Preamble provides that the advisor “provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications.” *Id.*

29. *Id.* at R. 1.3 cmt. 1 (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”).

30. See, e.g., Bernstein, *supra* note 19, at 1193 (“[C]ommentators have divided on the question of whether, or to what extent, zeal applies to lawyers outside the context of litigation and similar settings where the client faces an adversary.”); FREEDMAN & SMITH, *supra* note 21, at 72 (arguing that when counseling clients, the partisanship of a zealous advocate is achieved by keeping in mind a potential future adversary and that the lawyer should give advice that will strengthen the client’s position against that future adversary); Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 *FORDHAM L. REV.* 327, 359 & n.144 (1998) [hereinafter Green, *Criminal Regulation*] (asserting many nonlitigators undoubtedly believe that they should be agnostic about the truth of the client’s account and that this view derives from “the obligations of loyalty, confidentiality and zealous representation” which are “not limited to courtroom lawyers”); Hazard, *Future*, *supra* note 16, at 1244-45 (asserting that in practice lawyers’ clients are more likely to be businesses than individuals and the client’s matter is more likely to be a civil or regulatory “transaction or proceeding” rather than a criminal matter, but nonetheless, the partisanship principle of zealous advocacy “remains at the core of the profession’s soul”); Brent J. Horton, *How Corporate Lawyers Escaped Sarbanes-Oxley: Disparate Treatment in the Legislative Process*, 60 *S.C. L. REV.* 149, 157 (2008) (“Every lawyer works at the behest of his client, and the client is entitled to zealous representation—the most aggressive business structure that the law supports.”); Stevens, *supra* note 14, at 27 (“[I]t is not clear how zealousness applies in so-called nonadversarial situations, such as office advice and transactional work.”); Christopher J. Whelan, *Some Realism About Professionalism: Core*



yer anecdotes reflect that they embrace the view of self as zealous advocate.<sup>31</sup> Recent cases provide examples consistent with corporate lawyers acting as zealous advocates.<sup>32</sup> The zealous-advocacy mindset is not without consequence. There is scientific support for the proposition that a lawyer's view of his or her role impacts the advice provided to clients.<sup>33</sup> Professor Sung Hui Kim notes the Bar's "tremendous longstanding" support of zealous advocacy as a role ideology and explains that zealous advocacy strengthens the business lawyer's alignment with the managers of a business entity client.<sup>34</sup> Professor Kim concludes that business lawyers' identification as zealous advocates has a strong ex ante influence on how they advise their clients.<sup>35</sup> Professor Cassandra Burke Robertson argues that when lawyers are "motivated to zealously represent their clients, a partisan bias may shade and distort their legal advice."<sup>36</sup>

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*Values, Legality, and Corporate Law Practice*, 54 BUFF. L. REV. 1067, 1069-70 (2007) (describing zealousness as central to a libertarian ideal of the lawyer's role, but noting the debate about whether this model is applicable to corporate transactional lawyers).

31. See, e.g., *supra* note 2 and accompanying text; *infra* notes 74-77, 176 and accompanying text.

32. See *infra* notes 51-64, 88-111, 117-39 and accompanying text.

33. See generally Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 437 (2008) [hereinafter Kim, *Gatekeepers*] (explaining that social psychology teaches that behavior is the product of "cognitive processes guided by the situation and the roles we inhabit in those situations"); Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 101-05 (1993) (describing how the cognitive process suppresses information that is inconsistent with a lawyer's commitment to the client's position); Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 451-52 (2007) (explaining the pressure of junior lawyers to be obedient to the senior lawyers in their firms); Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 3-30 (2009) (explaining the cognitive and behavioral sciences that support an argument that lawyers make biased judgments and drawing on identity theory to explain situations that prompt lawyers to offer less than independent advice).

34. Kim, *Banality of Fraud*, *supra* note 19, at 1014 (describing zealous advocacy as one of two agency-centered conceptions of lawyering); see also Gordon, *New Role*, *supra* note 19, at 1194 ("The classic defense of the corporate lawyer's role, both most often advanced and held in reserve if other defenses fail, is of course that we are advocates, whose duty is zealous representation of clients."); Kath Hall, *Why Good Intentions are Often Not Enough: The Potential for Ethical Blindness in Legal Decision-Making*, in REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS 210, 216 (Kieran Tranter et al. eds., 2010) (citing authorities for the proposition "that lawyers' conception of their role is fundamental to their willingness to rationalize ethical misconduct").

35. Kim, *Banality of Fraud*, *supra* note 19, at 1012.

36. Robertson, *supra* note 33, at 40. It is of note that Professor Robertson provides in-depth analysis of biases that exist when an in-house attorney identifies more as an employee of the organization than as a legal professional. *Id.* at 13-17. In the research she cites, study participants were not asked to explain what it means to act as a lawyer (i.e., they were not asked if they understand the role to mean "zealous advocate" or "provider of independent legal advice"), though most who identified primarily as a lawyer were more inclined to provide independent advice. *Id.* Nonetheless, I do not believe the research can be read so broadly as to suggest that lawyers generally understand the role of lawyer as being synonymous with provider of independent legal advice.

This discussion leads to the question addressed in the following Part: Is it in the business client's interest for nonlitigation counsel to act as a zealous advocate?

## II. ZEALOUS ADVISING AND ITS HARM TO BUSINESS CLIENTS

In this Part, I argue that the qualities of zealous advocacy—a representation by a nonjudgmental lawyer who pursues the client's goals within the arguable bounds of the law—are incompatible with the needs of business clients seeking advice about future conduct. In each part of my discussion, I consider an example of a business representation that bears the hallmarks of zealous advocacy. Though the lawyers in my discussion did not declare, "My advice is based on the principles of zealous advocacy,"<sup>37</sup> and they may have been influenced by additional factors, their conduct is consistent with the tenets of zealous advocacy.

### A. *Zealous Encouragement of Business Clients' Goals Within the Technical Bounds of the Law*

A key characteristic of zealous advocacy is that the lawyer is limited by the "bounds of the law."<sup>38</sup> But what is illegal for a business client? Attorneys are likely to search for a rule that prohibits or permits the conduct in question.<sup>39</sup> That rule might be a statute, regulation, contract provision, or clear standard articulated in case law. Unless the rule flatly prohibits the behavior, then zealous advocacy is appropriate.<sup>40</sup> This technical vision of "the bounds of law" encourages

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37. Convicted attorney Joseph Collins made a statement that comes close, though. He testified on cross examination that it was his obligation to represent his client zealously. See *supra* note 2 and accompanying text.

38. See *supra* note 18 and accompanying text.

39. Considering how lawyers analyze their own compliance with the "law" under the Model Rules of Professional Conduct, Professor Hazard explains: "As a member of an institution whose character is defined by law, the lawyer's first thought is more likely to be: 'Does Rule Y prohibit/require doing *x*?' " Hazard, *Future*, *supra* note 16, at 1255. Similarly, if the lawyer considers the limits of the client's behavior to be "the law," the lawyer will be inclined to search for a rule that prohibits or permits the desired conduct. See Gordon, *New Role*, *supra* note 19, at 1194 (asserting that to the zealous advocate, law "is binding if the rules and facts are clear and there is no plausible basis for spinning them"); William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 *FORDHAM L. REV.* 1453, 1454 (2006) [hereinafter Simon, *Confidentiality*] (discussing the Bar's embrace of "formalism—the doctrine that only the letter of the law and not its spirit is binding"); Whelan, *supra* note 30, at 1080-81 (discussing how Enron used legal opinion letters as a means of justifying that accounting treatment was "technically correct" rather than as a tool to assist them in decisionmaking).

40. See Simon, *Confidentiality*, *supra* note 39, at 1457 (quoting Professor Stephen Gillers' assertion that the lawyer's job "is to figure out how to accomplish the client's objectives within the law and if that can be done only through a technicality, that is not the lawyer's fault"); see also Whelan, *supra* note 30, at 1124-25 (arguing that current professional regulation creates a framework in which: (1) the lawyer pursues the objectives

business lawyers to ignore entire bodies of law as they advise and pursue a client's agenda. A search for a black letter rule will rarely lead counsel to advise against conduct because it is fraudulent, a breach of fiduciary duty, or an obstruction of justice.<sup>41</sup> Such violations are seldom black and white. Indeed, the more complex the transaction, the less likely the attorney is to detect a clear violation of law.<sup>42</sup>

This is where the zealous advocate feels most at home: finding a way to achieve the client's stated goals in a way that is legally defensible.<sup>43</sup> Short of a client's plan to run a red light (illegal) or commit murder (illegal), the zealous advocate will likely be able to articulate an argument that the conduct is within the bounds of law.<sup>44</sup> The zealous advocate may even facilitate the client's desired conduct, drafting documents or making representations to third parties, believing that this is the attorney's proper role when the conduct in

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as defined by the client; (2) the lawyer may continue to represent the client even when the client acts against the lawyer's advice; and (3) the client alone is allowed to decide whether to pursue or forego "legally available objectives or methods").

41. Tort and criminal liability for fraud may be described in somewhat different ways depending on the case law or the statute at issue, but in general, a false statement of material fact, intentionally made to a victim that reasonably relies and is thereby injured, is fraud. See Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL'Y 195, 197 (2003) [hereinafter Koniak, *Corporate Fraud*] ("Fraud is, in plain English, lying to someone to get them to give you their stuff."); see also Geoffrey C. Hazard, Jr., *The Client Fraud Problem as a Justinian Quartet: An Extended Analysis*, 25 HOFSTRA L. REV. 1041, 1044 (1997) [hereinafter Hazard, *Client Fraud*] (discussing the close relationship between tort and criminal fraud liability).

42. See, e.g., Whelan, *supra* note 30, at 1091-97 (discussing the complexity of the transactions upon which Enron's attorneys issued opinion letters; Enron's outside counsel was concerned that the "true issuance" opinions—rather than "true sale" opinions—were not sufficient for the FAS rules and that the transactions might need to be restructured, but ultimately deferred to Arthur Andersen's "technical people" who said the true issuance opinions were satisfactory for their purposes); see also *id.* at 1101 (In Vinson & Elkins' investigation of Sherron Watkins' whistleblower letter, the firm concluded, "Enron and Andersen acknowledge that the accounting treatment is aggressive, but no reason to believe inappropriate from a *technical standpoint*." (emphasis added)).

43. See *supra* notes 18-19 and accompanying text.

44. See Gordon, *New Role*, *supra* note 19, at 1204 (arguing that the most often invoked image of the corporate lawyer's role is that of adversary-advocate who "is entitled to make use of any colorable justification for the client's conduct that he could use to defend it in future adversary proceedings"); Koniak, *Corporate Fraud*, *supra* note 41, at 214 ("Most talented lawyers can weave an interpretation to justify anything, as long as no adversary is present to challenge it and no umpire [is] around to throw out the bizarre interpretation.").

question is arguably or technically legal.<sup>45</sup> Rather than advising, the lawyer acts as an instrument.<sup>46</sup>

While many have discussed how such advocacy harms third parties,<sup>47</sup> it is equally true that such advocacy can harm the attorney's own client by encouraging liability-creating conduct.<sup>48</sup> While lawyers defend this technical approach to legal compliance in the wake of a scandal,<sup>49</sup> their clients are often the casualty that lies in the background. The argument seems to be that this is what the client wanted and that the lawyer had no choice but to oblige. What the argument misses is that the client may not have been made aware of the risk of liability for pursuing the course of conduct.<sup>50</sup> Rather, the lawyer zealously pursued the client's stated agenda in a manner that

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45. See Whelan, *supra* note 30, at 1113 (describing attorneys' hyper-technical "creative compliance" with regulations, and explaining that the claim that conduct is "perfectly legal is a powerful tool of resistance and a substantial challenge to regulators"). Professor Whelan asserts that "[c]reative compliance advances the interests of the client but, if it results in legal policy failing, then it is, on the face of it, against the public interest." *Id.* at 1131-32.

46. See Roger C. Cramton, *Counseling Organizational Clients "Within the Bounds of the Law"*, 34 HOFSTRA L. REV. 1043, 1055 (2006) [hereinafter Cramton, *Organizational Clients*] (asserting that lawyers will not avoid liability for participating in client crime and fraud by framing their role as "legal technicians" or "scriveners" rather than what they really are: "professionals with a broad responsibility"); Whelan, *supra* note 30, at 1069 (describing a lawyer's zeal as a slippery slope that can lead to "uncontrolled instrumentalism").

47. See, e.g., Harvey L. Pitt, Chairman, Sec. & Exch. Comm'n, Public Statement by SEC Chairman: Remarks at the SEC Speaks Conference (Feb. 22, 2002), available at <http://www.sec.gov/news/speech/spch540.htm> ("Lawyers are paid, and are professionally obligated, to advocate legitimate views and interests of their clients, with emphasis on the word 'legitimate.' . . . [I]t is inappropriate for corporate lawyers to assist clients in finding ways to evade legal requirements, or disserve the public interest, even if those results can be achieved in a manner arguably within the literal letter of the law. . . . Helping a company fall within very literal legal prescriptions, even when doing so flies in the face of what the particular legal prescriptions were obviously intended to accomplish, endangers public confidence . . .").

48. Cramton, *Organizational Clients*, *supra* note 46, at 1054-55 ("The business lawyer is a counselor and advisor, not a litigator, and the goal is a sound result that will advance the interests of the client 'within the bounds of the law.' Wise counseling involves a prudent awareness of the existence of legal risk and not an effort in every situation to test how far the envelope of the law may be pushed. *Lawyers who take the latter approach run a grave risk of assisting illegal conduct.*" (emphasis added)); Stephen Gillers, *Is Law (Still) an Honorable Profession?*, 19 PROF. LAW. 23, 25 (2009) ("A lawyer who uses his or her legal education and skills to distort the law, to destroy the rule of law, because he or she is adept at manipulating language, and no judge, no adversary is watching, is as blameworthy as the client.").

49. See, e.g., Simon, *Confidentiality*, *supra* note 39, at 1456 (asserting that Enron attorneys defended the transactions they facilitated by asserting that they complied with the literal terms of the law, but that this literal compliance overlooked "very broad definitions of fraud and other prohibited practices [in securities laws] that seem to call for purposive interpretation").

50. See Kim, *Banality of Fraud*, *supra* note 19, at 1063 (arguing that many assume company executives are making "explicit, conscious choices" to trade ethics for profit, when "motivated reasoning, rather than any explicit calculation, is the driving mechanism"). When the "motivated reasoning" Kim discusses is provided by a lawyer, this is a problem that the legal profession should address.

technically complied with some aspect of the law, but nonetheless created liability that a knowledgeable client might have chosen to avoid.

Legal advice that fits this description might have been provided in the case *Thornwood, Inc. v. Jenner & Block*.<sup>51</sup> Law firm Jenner & Block represented general partner James Follensbee in negotiations with Follensbee's limited partner, Thomas Thornton.<sup>52</sup> Thornton and Follensbee's limited partnership had been developing a residential community and golf course.<sup>53</sup> Unbeknownst to Thornton, Follensbee had obtained a conditional agreement with PGA Tour Golf Course Properties, Inc. (PGA) and another entity to develop the course as a lucrative PGA Tournament Players Course.<sup>54</sup>

When Thornton expressed frustration about the lack of profitability of the partnership, Follensbee retained law firm Jenner & Block to represent him in acquiring Thornton's interest.<sup>55</sup> Jenner & Block also participated in the PGA Tournament Players Course negotiations.<sup>56</sup> Neither Follensbee nor his lawyers informed Thornton of the conditional agreement with PGA.<sup>57</sup> Thornton agreed upon a price for Follensbee to purchase Thornton's interest and signed two documents drafted by Jenner & Block: one contained a release of all claims against Follensbee, specifically referencing claims for breach of fiduciary duty;<sup>58</sup> the other included a release of all claims against Jenner & Block.<sup>59</sup>

Upon learning of the PGA agreement four years later,<sup>60</sup> Thornton sued, alleging that Jenner & Block had aided and abetted Follensbee's fraud and breach of fiduciary duty<sup>61</sup> and seeking rescission against Follensbee.<sup>62</sup> The court explained the conduct that is required of a fiduciary, here the general partner in a limited partnership.<sup>63</sup> In allowing the aiding and abetting claims to proceed against

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51. 799 N.E.2d 756 (Ill. App. Ct. 2003).

52. *Id.* at 761.

53. *Id.* at 760.

54. *Id.* at 761-62. PGA and Potomac Sports Properties, Inc. (Potomac) had reached an agreement with Follensbee regarding course layout and division of profits and duties between the PGA, Potomac, and the partnership. *Id.*

55. *Id.* at 761.

56. *Id.* It is not clear from the court's opinion when that representation commenced and whether the firm was hired (and paid) by the partnership or by Follensbee. *Id.*

57. *Id.* at 761-62.

58. *Id.* at 761.

59. *Id.*

60. *Id.* at 762.

61. *Id.* at 763 (noting that "Thornton's claims of aiding and abetting a breach of fiduciary duty, a scheme to defraud, and fraudulent inducement" are all based on "alleged breaches of fiduciary duty perpetrated by Follensbee with the assistance of Jenner & Block").

62. *Id.* at 767 ("The same month that he discovered the alleged fraud, Thornton brought a claim against Follensbee seeking to rescind the settlement agreement.").

63. *Id.* at 765-66.

Jenner & Block despite the release, the court noted Jenner & Block's active participation in Follensbee's misconduct and the lawyers' acknowledgement of that misconduct by specifically listing breach of fiduciary duty in the release.<sup>64</sup>

The Jenner & Block attorneys' conduct reflects the characteristics of zealous advocacy. They acted as if anything that was arguably within the bounds of the law was appropriate. Accordingly, they focused on technical legal issues (obtaining a release of all claims) rather than the substantive steps that the client should take to avoid liability (disclosing the conditional agreement). The lawyers drafted the release with the hope of cleansing the transaction. And while they recognized that they were playing an active role in the fraudulent scheme, they set out to accomplish the client's goals and hoped to protect the client with the first release and themselves with the second.

*Thornwood* also exemplifies the problem that no one is watching when a zealous advisor is at work. It is "the watching" that makes zealous advocacy work in a courtroom.<sup>65</sup> In litigation, counsel argues the best version of the facts and law (after the alleged misconduct has already occurred), and that argument is "checked" by the presence of the judge or jury.<sup>66</sup> The lawyer will not usually prevail if the argument is too outlandish.<sup>67</sup> There is no such check on the business

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64. *Id.* at 766-67 ("Instead, Jenner & Block was involved in the drafting of the releases in question and, allegedly, in the acts underlying Follensbee's fraud. The very insertion of the clause in the settlement agreement that purports to release certain fiduciary duties between Follensbee and Thornton from October 1, 1994, until the date the release was signed indicates an awareness that breaches of fiduciary duties might have occurred during that time.").

65. Gillers, *supra* note 48, at 24 (When courtroom advocacy is used outside of the courtroom, "there is no judge and no adversary. No one is watching. And there may never be anyone watching. Then, the temptation is to push the limits, sift the language of the law, [and] find hidden meanings.").

66. See Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 770 (2004) (explaining the protections in litigation that guard against abuse of the litigator's "license to manipulate fact and law"); Gillers, *supra* note 48, at 24 (explaining that the advocacy model of the lawyer's role "envisions a trial lawyer, usually a criminal defense lawyer, whose arguments can be challenged by an opposing lawyer and will be exposed to the ruling of a judge"); Hatfield, *supra* note 25, at 6 ("[B]iased zealousness is justified by an appeal to the adversarial American legal system. Each side has a lawyer, and each lawyer is devoted to one side. . . . We are told to suspend our personal moral instincts and to have faith that the legal system accomplishes a greater moral good . . . ." (footnote omitted)); Fred C. Zacharias, *Fitting Lying to the Court into the Central Moral Tradition of Lawyering*, 58 CASE W. RES. L. REV. 491, 497 (2008) [hereinafter Zacharias, *Lying*] (asserting that however strong the justification for a single ethic of devotion to the client may be in criminal cases, "for lawyers who serve as advisors, counselors, negotiators, and facilitators of cooperative ventures, the ethic often seems out of place").

67. See Gordon, *New Role*, *supra* note 19, at 1204-05 (asserting that for corporate lawyers, there are none of the "bothersome conditions" of the courtroom, leaving them to "stretch the rules and facts very extravagantly in their clients' favor without risking contradiction by adversaries, or the annoyed reactions of judges or regulators"); W. Bradley

advisor's monologue justifying the client's desired conduct.<sup>68</sup> When zealous advocacy is a lawyer's guide outside of the courtroom, the lawyer misses what a competent lawyer is obligated to see: The client has an interest in knowing when proposed conduct *may* create legal liability.<sup>69</sup> If a lawyer zealously advocates the client's agenda—and no one is there to check that advocacy—the client may not understand that the plan leaves him or her vulnerable to liability for breach of fiduciary duty<sup>70</sup> or fraud,<sup>71</sup> for example.

Counsel's advice in the *Thornwood* matter was not only bad for the client, but it was also bad for the advisors who faced aiding and abetting liability.<sup>72</sup> Though the issue of lawyer liability to third parties is beyond the scope of this Article, the Bar's arguments against

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Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1182 (2005) (arguing that “transactional lawyering lacks the essential elements of litigation” such that they should not be analogized to one another, noting that in litigation there is “an impartial referee, orderly procedures, rules for obtaining, introducing, and excluding evidence, and a competent opposing party”).

68. SUSAN R. MARTYN & LAWRENCE J. FOX, *TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY* 230 (2d ed. 2008) (explaining Professor Deborah Rhode's argument that when lawyers counsel clients rather than litigate on their behalf, the lawyer is “deal[ing] with ongoing and future behavior, which provides an opportunity and obligation to prevent, rather than justify” misconduct); Cramton et al., *supra* note 66, at 770 (asserting that the attorney advisor should not give a client advice in the style of a zealous advocate—such that the client “can act based on some unprecedented vision of what the law requires or some barely plausible interpretation of facts”); Gillers, *supra* note 48, at 24 (asserting that the advocacy model, when used by legal advisors, can undermine the rule of law itself).

69. See MARTYN & FOX, *supra* note 68, at 226 (arguing that when lawyers put too much emphasis on following client instructions about the client's goals, then lawyers become “instruments”; then they “disserve the client by failing to share their independent view of the merits of the course of action and they open their clients to potential liability”); Koniak, *Corporate Fraud*, *supra* note 41, at 213-14 (“Whatever justification the adversarial process provides for litigators, pushing the limits of law to justify client conduct that is contemplated . . . is another matter altogether. When passing on the legality of contemplated or ongoing client conduct, there is no adversary present to challenge stretched legal interpretations, and there is no umpire available to judge between competing visions of what the law allows.”).

70. See Lyman P.Q. Johnson & Robert V. Ricca, (*Not*) *Advising Corporate Officers About Fiduciary Duties*, 42 WAKE FOREST L. REV. 663, 663 (2007) (quoting deposition testimony of Stephen Bollenbach, Chief Financial Officer and Director of the Walt Disney Company who testified, “I was not aware that it was a breach of the duty of loyalty to place one's own interests ahead of the interests of shareholders.”). Johnson and Ricca assert that virtually no attention has been paid to lawyers properly advising corporate officers as to the scope and thrust of their fiduciary duties. See *id.* at 683 (“Lawyers must not simply assume either that officers understand these duties or that it is someone else's responsibility to advise them concerning those duties.”).

71. See Patrick E. Longan, *Teaching Professionalism*, 60 MERCER L. REV. 659, 671 (2009) (“Some clients undoubtedly want to take actions that would constitute fraud, either on others or on a court. However, a lawyer who refuses to assist these activities actually serves the client well . . . [M]any of these clients want to take these actions without the knowledge that they are illegal. Lawyers are experts in the boundaries of the law, and most clients surely want to conform their conduct to the law. The lawyer who counsels a client about a proposed course of action helps the client do so.”).

72. See *supra* note 61 and accompanying text.

such liability reflect the belief that lawyer-advisors are obligated to be zealous advocates.<sup>73</sup> One commentator argues that the result of aiding and abetting liability is that “[a]ttorneys will constantly try to balance their duty to zealously represent their clients with the fears of potential exposure to liability in instances when their legal advice may disregard the interests of the third parties.”<sup>74</sup> Other arguments against aiding and abetting liability include that it punishes the lawyer for doing his or her job,<sup>75</sup> it may cause the lawyer to take self-protective measures,<sup>76</sup> and it is inconsistent with having an undivided responsibility to the client.<sup>77</sup>

What these critics miss is that zealous advocacy in the advising context is counter to the client’s interests. Dissuading lawyers of zealous advocacy outside litigation would be good for clients and for the profession because when the zeal is gone, it might be replaced by substantive advice about how to avoid legal liability. Moreover, the purportedly “self-protective” measures that a lawyer may take are entirely consistent with the client’s interests: advising against conduct that is inconsistent with a client’s fiduciary duty.

### *B. Zealous Advocates do not Judge the Morality of a Client’s Proposed Conduct*

Zealous advocacy is also the rationale for lawyers ignoring their conceptions of right and wrong as they assist a client in reaching his or her goal.<sup>78</sup> Professor Stephen Gillers notes that lawyers usually justify their conduct by explaining that “[t]he client calls the shots.”<sup>79</sup> Lawyers are not to decide if client goals are worthy but only whether they are legal.<sup>80</sup>

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73. See *supra* note 34 and accompanying text.

74. Katerina P. Lewinbuk, *Let’s Sue All the Lawyers: The Rise of Claims Against Lawyers for Aiding and Abetting a Client’s Breach of Fiduciary Duty*, 40 ARIZ. ST. L.J. 135, 169 (2008); see also Jessica Palvino, *Aiding-and-Abetting Liability: Is Privity Making a Comeback?*, 70 TEX. B.J. 52, 52 (2007) (arguing that the threat of aiding and abetting liability “is enough to create pause in an attorney’s zealous representation of her client and force her to consider her own self-interests”).

75. Palvino, *supra* note 74, at 53 (“Aiding-and-abetting claims are particularly appealing to plaintiffs’ attorneys because, in theory, a lawyer can be liable *for doing nothing more than representing his or her clients’ interests successfully*.” (emphasis added)).

76. Lewinbuk, *supra* note 74, at 169 (asserting that aiding and abetting breach of fiduciary duty liability “might diminish the quality of legal services, since it would impose ‘self protective reservations’ in the attorney-client relationship” (quoting *Chem-Age Indus. v. Glover*, 652 N.W.2d 756, 774 (S.D. 2002))).

77. *Id.* at 136 (asserting that a lawyer was traditionally viewed as owing an undivided responsibility to her client, which “led to the legal doctrine that only the client could bring a legal action against her lawyer if she was dissatisfied with the rendered professional service,” but that the doctrine is changing to allow nonclients to sue lawyers).

78. See *supra* notes 23-26 and accompanying text (discussing role morality and zealous advocacy).

79. Gillers, *supra* note 48, at 24.

80. *Id.*



The problem with business lawyers separating morality from legality is that morality often bears upon legal liability.<sup>81</sup> Ignoring moral intuitions about a business client's plan often means ignoring the basis for liability, such as a lack of good faith or fraudulent intent.<sup>82</sup> Similarly, a fiduciary's obligations of loyalty and trust are inextricably intertwined with doing what is "right."<sup>83</sup> Professors Johnson and Ricca assert that the "absence of . . . moral-sounding language" about fiduciary duty from the company lawyer may lead an entity client's constituents to believe they can act in their own self-interest.<sup>84</sup> Competent lawyers cannot ignore morality in these contexts, and doing so disservices their clients who may not understand the connection between legal liability and morally questionable conduct.<sup>85</sup> Ironically, the need for lawyers to focus on the connection between ethics and legality is undercut by arguments that encourage lawyers to focus on morality for morality's sake. Commentators urge lawyers to make decisions (such as to withdraw from a representa-

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81. See Charles W. Murdock, *Fairness and Good Faith as a Precept in the Law of Corporations and Other Business Organizations*, 36 LOY. U. CHI. L.J. 551, 551 (2005) ("Matters like fairness, good faith, loyalty, conflicts of interest, and other fiduciary duty concerns implicate ethical values."). Professor Hatfield describes his conception of the problem with lawyers' moral deference to the client and the legal system:

The lawyer defers to the client's conclusions about the morality of the objective. The lawyer defers to the legal system's conclusion that the client, rather than the lawyer, is morally responsible for the objective. This moral passivity, moral silence, moral deference, is what we associate with lynch mobs, Nazis, those who shock patients because they are told to, and those who conclude torture is permissible because experts tell them it should be. And, I fear, most lawyers have accepted moral deference as justified, as if it were essential to being a good lawyer, and without considering how it affects the capacity to be a good person.

Hatfield, *supra* note 25, at 9. My point (which is slightly different from Professor Hatfield's) is that moral deference leads to poor legal advice. The examples cited by Hatfield all raise issues not just of morality but also of legality. Lawyers who do not consider the moral questions posed here ignore the obligation to help clients make judgments about legality that is impacted by morality. A lawyer who defers in such areas does so at the client's peril.

82. See *supra* note 81.

83. Johnson & Ricca, *supra* note 70, at 686 ("We believe that persons who, in strong language, are told by a respected figure, such as legal counsel, that they owe a special responsibility to protect and advance the interests of others are more likely to refrain from negative conduct and engage in positive conduct than are people who believe they can solely advance their own interest. To advise someone that they have been 'entrusted' with responsibility for others' money and that they must be 'loyal' to those persons' interests . . . is likely . . . to lead the listener . . . to perform at a higher level." (footnotes omitted)); *id.* at 686-87 ("Fiduciary obligations flow from a principle within the moral sense that sensitizes us to the use of power when others come into view. Fiduciary thinking gives us a morality for decision making, an ethics of character, and wisdom. Fiduciary thinking makes us trustworthy, enhancing thereby the moral quality of that society in which we live and work." (quoting STEPHEN YOUNG, MORAL CAPITALISM: RECONCILING PRIVATE INTEREST WITH THE PUBLIC GOOD 59 (2003))).

84. *Id.* at 687.

85. See *id.*

tion) based on ethics, even if the conduct in question is “technically” legal.<sup>86</sup> Even the Model Rules imply that advice about what is “moral” is different from advice about the “law.”<sup>87</sup> These positions further the misimpression that doing the right thing is different from doing the legal thing.

The case *Anderson v. Wilder*<sup>88</sup> exemplifies the repercussions of not counseling about the connection between unethical conduct and the prospect of legal liability. Brett Wilder was the president of FuturePoint Administrative Services, LLC, a member-managed LLC.<sup>89</sup> Wilder consulted some of his fellow members about expelling other members so that those expelled members’ ownership units could be sold to an interested purchaser at a substantial profit.<sup>90</sup> Wilder pointed to the expulsion provision, which allowed expulsion without cause by a majority vote and provided that expelled members would receive only the return of their original capital contribution (\$150 per ownership unit).<sup>91</sup>

Member Charles Quade told Wilder that he would not expel the other members and sell their interest for a profit because he did not “think it was ethical”;<sup>92</sup> Quade suggested that the offer be revealed to all FuturePoint owners.<sup>93</sup> Thereafter, the full membership discussed the offer and whether selling members would be entitled to their share of \$63,000 in profits held in the company’s operating account.<sup>94</sup> Wilder introduced a motion that would permit willing members to

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86. Gillers, *supra* note 48, at 25. Professor Gillers asserts that lawyers should not distort the law with clever arguments influenced by the client’s desires, but then he explains that “[l]oyalty [to the client] does not require [lawyers] to aid morally offensive goals, even if they are legal.” *Id.* While I agree with Professor Gillers’ assertion that loyalty does not require assistance in morally offensive goals, his argument may further the misimpression that there is a divide between what is legal and what is morally right. I would frame the issue in this way: Distorting the law with clever arguments often *results in* the client’s illegal conduct because those clever, technical arguments actually ignore the prospect of legal liability. When the lawyer’s arguments further the client’s illegal conduct, this is assuredly not loyal to the client.

87. See MODEL RULES OF PROF’L CONDUCT R. 2.1 (2009) (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer *may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.*” (emphasis added)).

88. No. E2006-02647-COA-R3-CV, 2007 WL 2700068 (Tenn. Ct. App. Sept. 17, 2007).

89. *Id.* at \*1-4. Pursuant to the company’s operating agreement, the management committee had “the power and authority to contract on behalf of the company by a majority vote. [The] management committee was comprised of Plaintiffs Michael Atkins, Charles Quade, and Bill Thompson, and Defendants Lamarr Stout and Brett Wilder.” *Anderson v. Wilder*, No. E2003-00460-COA-R3-CV, 2003 WL 22768666, at \*1 (Tenn. Ct. App. Nov. 21, 2003).

90. *Wilder*, 2007 WL 2700068, at \*4.

91. *Id.* at \*3-4. Thereafter, Wilder prepared a chart showing which members could be expelled, how much it would cost to pay each their capital contribution, and how much the remaining members would make when those interests were sold to the purchaser. *Id.* at \*5.

92. *Id.*

93. *Id.*

94. *Id.*

sell up to 499 ownership units to the prospective purchaser for \$250 per unit.<sup>95</sup> The motion failed,<sup>96</sup> and the owners agreed that the management committee would have a meeting to discuss the \$63,000 in profits the following Wednesday.<sup>97</sup>

After the vote failed, Wilder consulted attorney Lewis Howard, Jr. about the expulsion of minority owners.<sup>98</sup> Howard testified that he “read the entire operating agreement” and had “fairly lengthy discussions with Mr. Wilder about what was going on [and] who all the people were.”<sup>99</sup> He concluded that the majority and minority owners were “diametrically opposed” and that “under the operating agreement, [Wilder’s majority] had the ability to vote to expel members, and I advised them that they could do that under this agreement.”<sup>100</sup>

Days later, Wilder organized a majority of members to vote to expel the owners of 47% of the company, paying them \$150 per unit.<sup>101</sup> Voting with the majority were owners of a 3% interest in the company who were paid (later that same day) \$333 for their ownership units.<sup>102</sup> Thereafter the majority sold 499 membership units to a purchaser for \$250 per unit.<sup>103</sup>

The expelled members sued, alleging that defendant members breached fiduciary duties, including a duty of good faith.<sup>104</sup> At a jury trial, the defendants argued that they acted in accordance with the operating agreement and that the expulsion had been necessitated by the fear that the management committee would disburse the

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95. *Id.* Pursuant to the operating agreement, any voluntary transfer of a member’s ownership interest had to be offered first to the other owners. *Id.* at \*3.

96. *Id.* at \*5.

97. *Id.*

98. *Id.* at \*13.

99. *Id.*

100. *Id.*

101. *Id.* at \*1-2.

102. *Id.* at \*1, \*6. One of the 3% co-owners, Mr. Freeman, testified that he thought the expelled members would receive a fair return on their investment and that he was surprised when he saw the allegations in the complaint: “I guess this was the first clue that there was probably not good faith within this committee.” *Id.* at \*11.

103. *Id.* at \*3.

104. *Id.* The plaintiffs relied upon Tennessee case law regarding corporations and partnerships, as well as the Tennessee limited liability company (LLC) statute. *Anderson v. Wilder*, No. E2003-00460-COA-R3-CV, 2003 WL 22768666, at \*3 (Tenn. Ct. App. Nov. 21, 2003). Years earlier, the trial court had granted the Defendants’ motion for summary judgment, but the Tennessee Court of Appeals reversed that judgment and remanded the matter to the trial court to determine if the expulsion had been in good faith or in violation of fiduciary duty. *Id.* at \*11. In that 2003 decision, the court explained that a majority member of an LLC owes the minority a fiduciary duty just as a majority shareholder does in a corporation (as stated in previous Tennessee precedent) and that its holding was consistent with the Tennessee LLC statute which provides that members of an LLC must discharge their duties in good faith and with care and loyalty. *Id.* at \*6.

\$63,000.<sup>105</sup> After years of litigation, including two appeals, a mistrial, and a jury verdict,<sup>106</sup> the Tennessee Court of Appeals affirmed the trial court's judgment entered in accordance with the jury's verdict, awarding plaintiffs \$76,624 and prejudgment interest of \$22,271.36, for a total judgment of \$98,895.36.<sup>107</sup>

While attorney Howard, like Quade, may have questioned the ethics of the expulsion plan, he apparently suppressed any such thoughts in the model of zealous advocacy. Instead, he focused on the technical language of the operating agreement.<sup>108</sup> Howard's testimony does not reflect that he provided any advice about fiduciary duty or regarding the facts a jury might consider if a post-expulsion lawsuit were filed.<sup>109</sup> In turn, Howard's clients did not try to justify the expulsion decision as being the product of good faith, much less actually attempt to act in good faith. At least two defendants asserted that they had expelled the other members simply because they could under the terms of the operating agreement.<sup>110</sup>

Of course, this conclusion is one the majority members could have reached without consulting an attorney. The operating agreement's terms appeared to permit expulsion by a vote of the majority.<sup>111</sup> One might wonder, then, why the majority owners (through Wilder) consulted an attorney. One possibility is that they suspected the ouster of their co-owners for \$150 per unit in order to immediately sell the

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105. *Anderson*, 2007 WL 2700068, at \*6. The plaintiffs countered that the expulsion had included members who were not on the management committee, that even the disbursement of the entire \$63,000 would not have harmed the company, and that the management committee could have been (and was) disbanded without the expulsion. *Id.* at \*6, \*9-10. When asked why he expelled Cherry Zimmerman, a person who was not on the management committee, Wilder testified, "I made a decision based on-upon [sic] what I thought was in the best interest of the company." *Id.* at \*7.

106. *Id.* at \*3-4.

107. *Id.* at \*13, \*16.

108. *See supra* notes 98-100 and accompanying text.

109. *See Anderson*, 2007 WL 2700068, at \*13. Though the issue of whether majority members of a member-managed LLC owe the minority a fiduciary duty was an issue of first impression in Tennessee, there was ample legal authority suggesting that co-owners owe one another a fiduciary duty. *See Anderson*, 2003 WL 22768666, at \*4-6. One relevant authority was a statute that provided that members of a member-managed LLC shall discharge their duties in good faith, with the care of an ordinarily prudent person, and in the best interest of the LLC. *Id.* at \*6 (citing TENN. CODE ANN. § 48-240-102 (West 2010)). A client would want to know about such authority—and the relevance of arguably unethical behavior to the question of good faith—even if the precise issue of fiduciary duty owed to individual members had never been addressed by a Tennessee court.

110. When asked why he had voted to expel the plaintiffs, defendant Stout testified, "I didn't have a cause. I had Wheaties that morning. It didn't matter. We didn't want them in the organization." *Anderson*, 2007 WL 2700068, at \*10. Another defendant, Tim Welles, testified that he voted for expulsion because he understood the expelled members would distribute all or a part of the company's cash and that he considered that information "to be a certain degree valid and made a decision based on that, which again, according to the operating agreement, I can do. The members—the majority can vote to do things with or without cause." *Id.* at \*11.

111. *Id.* at \*3.

same units for \$250 each (while paying some remaining members \$333 for their units) was somehow prohibited by law.<sup>112</sup> Unfortunately, their attorney did not provide them with the advice that would have supported this fear and might have helped them avoid a substantial judgment against them.

*C. Zealous Pursuit of the Business Organization Client's Goals as Declared by Company Management*

Zealous advocacy by a business lawyer is especially dangerous when the client is an organization. The organization does not necessarily share identity with company managers who are setting its agenda. When the company lawyer zealously advocates every scheme developed by those managers, the company stands to lose.<sup>113</sup> While client autonomy may justify allowing a natural person to make a self-destructive, liability-creating decision, that same justification is not present for the entity client.<sup>114</sup> The entity client, more than any other client, needs a legal advisor to make judgments about what conduct may create legal liability and to protect it from such decisions.<sup>115</sup>

The results of zealous advocacy by the organization's lawyer are evident in the Refco matter addressed in the opening paragraphs of this Article.<sup>116</sup> Attorney Joseph Collins and attorneys under his supervision at the Mayer Brown firm played a significant role in helping company management hide millions of dollars in uncollectable debt.<sup>117</sup> Central to the scheme were seventeen round-trip loan trans-

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112. Another possibility is that they simply wanted an attorney to rubber-stamp their decision to expel the minority, perhaps believing that an attorney's approval would insulate them from liability. Even if that was the goal, the defendants were incorrect that the attorney's agreement would protect them from liability. And again, the attorney would have better served his clients by advising about possible bases for liability.

113. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2009); Cramton, *Organizational Clients*, *supra* note 46, at 1054 ("All corporate frauds start with lawyers treating senior management as the client and failing to communicate with higher authority within management . . ."); Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1237 (2003) [hereinafter Koniak, *Hurlyburly*] (describing lawyer participation in corporate fraud and asserting that the lawyers thought they were going all out for their clients, but in reality they were working for "the reckless and dishonest cowboys in control of their clients"); William H. Simon, *Whom (Or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57, 64-65 (2003) (asserting that in house counsel may wrongly equate management's interests as those of the company).

114. See *infra* note 198 and accompanying text.

115. See *infra* notes 171-74, 200-204 and accompanying text (discussing the goal of Model Rule 1.13 as encouraging lawyers to protect their organizational clients from legal liability created by constituent misconduct).

116. See *supra* notes 2-13 and accompanying text.

117. *In re Refco, Inc. Sec. Litig.*, 609 F. Supp. 2d 304, 305-09 (S.D.N.Y. 2009). To provide factual background here (and at the opening of this Article), I cite this order from the putative securities fraud class action because it contains a comprehensive statement of the facts in a reported case. The court dismissed the claims against Collins and his firm,

actions between 2000 and 2005, always at the end of a fiscal year or quarter (and reversed shortly after).<sup>118</sup> Mayer Brown lawyers prepared loan documents whereby one Refco entity loaned money to third parties, who in turn loaned the money to a second Refco entity, so that the second Refco entity could pay off a debt it would otherwise be unable to pay to the first Refco entity.<sup>119</sup> This temporarily removed hundreds of millions of dollars in uncollectable related-party debt from the company's books and replaced it with what appeared to be a collectable debt from an unrelated party.<sup>120</sup> The only money that actually changed hands in these transactions was the money paid as "interest" to the unrelated third parties who facilitated the bad debt's temporary removal from the books.<sup>121</sup>

In 2004, Thomas H. Lee Partners (THL) purchased a majority interest in Refco through a leveraged buyout financed with \$507 million in cash from THL, \$600 million in bonds issued by Refco to investors, and \$800 million Refco borrowed from a syndicate of banks.<sup>122</sup> One year later, Refco conducted a \$670 million initial public offering (IPO).<sup>123</sup> All the while, Refco's CEO and other executives were selling their stock, pocketing tens of millions of dollars.<sup>124</sup> Mayer Brown lawyers, under Collins' supervision, represented Refco in all of these transactions.<sup>125</sup> Only two months after the IPO, on October 10, 2005, Refco announced that it had discovered the related party receivable and that its financial statements could not be relied upon for the preceding four years.<sup>126</sup> The company collapsed and filed for bankruptcy on October 17, 2005.<sup>127</sup>

Like key Refco executives,<sup>128</sup> attorney Collins was indicted, tried, and convicted for his role in the massive fraud.<sup>129</sup> If his testimony in

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concluding the plaintiff-investors failed to state a claim under Rule 10b-5 and Section 20(a) of the Securities Exchange Act of 1934. *Id.* at 311-19.

118. *Id.* at 307-08.

119. *Id.* at 307.

120. *Id.*

121. *Id.* at 307 n.4.

122. *Kirschner v. KPMG LLP*, 590 F.3d 186, 189 (2d Cir. 2009).

123. *In re Refco Inc. Sec. Litig.*, 609 F. Supp. 2d at 308.

124. *Id.*

125. *Id.* at 308-09.

126. *Id.* at 308 n.7.

127. *Id.*

128. Refco executives Phillip Bennett, Robert Trosten, Tone Grant, and Santo Maggio were all indicted and each either pleaded guilty or was convicted. Press Release, U.S. Att'y S. Dist. of N.Y., Refco's Principal Outside Attorney Sentenced in Manhattan Federal Court to Seven Years in Prison for \$2.4 Billion Fraud 3 (Jan. 14, 2010) [hereinafter Press Release, U.S. Att'y].

129. Collins was indicted on charges of aiding and abetting securities fraud, wire fraud, bank fraud, false filing with the SEC, and conspiracy to commit these and other crimes. See Indictment, *United States v. Collins*, No. S1 07 Cr. 1170 (LBS) (S.D.N.Y. Dec. 18, 2007). In July 2009, a jury convicted Collins of conspiracy, two counts of securities fraud, and two counts of wire fraud. Press Release, U.S. Att'y, *supra* note 128, at 1. On January 14, 2010,

the criminal trial is believed,<sup>130</sup> what he described is behavior consistent with zealous advocacy. Collins repeatedly asserted that he did not know that he or company executives were engaged in anything “fraudulent” or “criminal.”<sup>131</sup> Prior to trial, Collins passed a polygraph test in which he was asked if he had been told there was over one billion dollars in intercompany debt or if he was aware that it was being concealed from purchaser THL.<sup>132</sup> He answered in the negative to these questions.<sup>133</sup> In other words, Collins asserted (and apparently may have even believed) that he did not knowingly act outside the bounds of the law—the line that cannot be crossed by a zealous advocate.

Similarly, when describing why he did not reveal a Proceeds Participation Agreement and related documents during due diligence with purchaser THL (documents that prosecutors argued would have revealed guarantees related to the staggering intercompany debt),<sup>134</sup> Collins testified to a number of technical reasons that supported the documents’ nondisclosure and repeatedly asserted that such deci-

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Collins was sentenced to seven years in prison. *Id.* at 1; Bray, *supra* note 13, at C6; see also Ameet Sachdev, *Former Mayer Brown Partner Sentenced to 7 Years*, CHI. TRIB., Jan. 15, 2010, at 23.

130. I rely upon the criminal trial testimony because Collins did not testify in the malpractice case, which admittedly is a case more closely related to the subject of this Article. I acknowledge that his testimony was framed to respond to the criminal charges and not to respond to the issue of whether his conduct harmed his client. I also concede that his testimony was likely not believed by the jury, given his conviction. My point is simply that even his self-interested account provides an unflattering portrait of zealous advocacy.

131. See, e.g., Trial Transcript, *supra* note 2, at 3493 (testifying that he did not commit fraud on behalf of Refco); *id.* at 3520 (testifying that no one at Refco ever confided that they were engaged in any fraud or crime); *id.* at 3876 (He did not understand that a \$500 million distribution was “associated with any kind of fraud.”); *id.* at 4008 (testifying that he did not do anything to deceive investors in the 2004 bond offering in 2004 or in the initial public offering in 2005); *id.* at 4065 (asserting that he “certainly would have remembered if Refco executive Maggio [had] told [him] that he wanted to commit a crime”).

132. See Memorandum of Law in Support of Defendant Joseph P. Collins’ Pre-Trial Motions at 12-13, *United States v. Collins*, No. 07 Cr. 1170 (LBS) (S.D.N.Y. 2010 June 27, 2008). The three questions that Collins was asked and answered in the negative were these:

1. At the time of the sale of Refco stock to Thomas Lee, were you aware that the inter-company debt was being concealed from him?
2. At the time of the sale of Refco stock to Thomas Lee, had you been told there was over a billion dollars in inter-company debt?
3. At the time of the sale of Refco stock to Thomas Lee, did you tell anyone that there was over a billion dollars in inter-company debt?

*Id.* at 13.

133. *Id.*

134. See Press Release, U.S. Att’y, *supra* note 128, at 2 (explaining that the document would have revealed Refco’s guarantees of performance of Refco’s related company “in amounts totaling billions of dollars”).

sions were made with the client.<sup>135</sup> Again, this focus on the technical and acting at the direction of company executives, rather than making an effort to protect the client from legal liability, is consistent with zealous advocacy.<sup>136</sup>

In yet another example, Collins claimed that he was never told the purpose of the quarterly round-trip loans that were central to the fraud.<sup>137</sup> He simply followed client instructions and directed firm attorneys to prepare the loan documents.<sup>138</sup> Collins claimed that if he had been told the loans' fraudulent purpose, he "would have resigned the representation at that point."<sup>139</sup> Even if Collins never asked about the purpose of the loans, his failure to do so fundamentally failed his client. Reticence to ask too many questions for fear of learning the answer is often a tactic of the courtroom advocate,<sup>140</sup> but the

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135. See, e.g., Trial Transcript, *supra* note 2, at 3677-79 (describing the side letter to the Proceeds Participation Agreement as an "upstream" agreement that did not need to be disclosed and that no one at Refco told him that payments made under the Proceeds Participation Agreement would be hidden from auditors or potential buyers like Thomas H. Lee); *id.* at 3712-14 (explaining that Bennett told Collins that Collins should not turn over "upstream" agreements in response to due diligence requests from Thomas H. Lee's attorneys because "Lee was buying Refco Group [Ltd.] and that they didn't need to know anything about [Refco Group Holdings, Inc.]"); *id.* at 3714-18 (explaining his understanding of the basis for not disclosing upstream agreements, including a covenant signed by Bennett); *id.* at 3720-23 (asserting that nondisclosure of the upstream agreement would not foreclose the purchaser from learning financial information it needed to do the transaction); *id.* at 3848-49 (asserting that obligations under the Proceeds Participation Agreement were rendered effectively meaningless by signing a reversion rights agreement, which justified nondisclosure); *id.* at 4006-08 (explaining that he considered section 6.2(a) of the contract and that it gave him "additional comfort" that he did not have to disclose the Proceeds Participation Agreement); *id.* at 4046-48 (summarizing the reasons for not disclosing the document, including discussions with Mr. Bennett); *id.* at 4435 (agreeing on cross-examination that the Proceeds Participation Agreement was on his mind during due diligence, he knew it would not be disclosed, and that he talked to Bennett about not disclosing it).

136. See *supra* notes 43-46 and accompanying text.

137. See, e.g., Trial Transcript, *supra* note 2, at 3494 (testifying that no one told him the purpose of the loans was to move debt off of Refco's books and to pay down hidden intercompany debt); *id.* at 4161 (stating that he believed the loans were a continuation of a previous relationship with a customer). Collins bolstered his argument that he did not know that the round-trip loans were being used fraudulently by asserting that he delegated the duty to document the loans to other attorneys in his firm and that he had only limited involvement with the loans. See, e.g., *id.* at 3607 (explaining the associates' primary role); *id.* at 3616-17 (explaining the lack of work he did on the loans and that he did not think of the loans in the course of due diligence in the 2004 Lee transaction or during meetings with Chase Bank regarding Refco's credit agreement); *id.* at 3618-19 (asserting that he was not part of a scheme to defraud Chase by not revealing the round-trip loan guarantees); *id.* at 3731-32 (explaining that he did not reveal the round-trip loans to Lee's representatives because he did not remember them); *id.* at 3849 (explaining that the round-trip loans should have been disclosed, but he had "no abiding memory of them," and the client did not remind him of the loans); *id.* at 4163-64 (admitting that he knew about the round-trip loans and worked on them in 2000 to 2005, but no longer remembers them).

138. See testimony described in *supra* note 137.

139. See, e.g., Trial Transcript, *supra* note 2, at 3617.

140. Green, *Criminal Regulation*, *supra* note 30, at 356 (discussing attorney conduct rules that require action by attorneys with knowledge of client wrongdoing and noting that



business advisor does not assist his client in adopting this approach. Unlike the courtroom advocate whose client's conduct occurred in the past, a business advisor still has the ability to advise against liability-creating conduct. Further, if unsuccessful in persuading management to take corrective action, the advisor also has the ability to take other steps to protect the client from liability. If attorneys simply perform any task assigned by an entity client's constituents without finding out the reason, they are leaving the company—the actual client—unprotected.

As briefly discussed in the introduction of this Article, the malpractice case filed against Collins' law firm by the litigation trustee highlights the differing views on whether Collins helped or hurt his client.<sup>141</sup> The trustee asserted that the law firm's conduct harmed the company, in violation of a lawyer's obligations as the company's attorney.<sup>142</sup> Ruling on the lawyers' motion to dismiss, then-U.S. District Court Judge Gerard Lynch concluded that the alleged fraud benefited Refco—at least in the short run—thus depriving the bankruptcy trustee standing to sue for malpractice under the *Wagoner* rule.<sup>143</sup> The court engaged in a two-part analysis: (1) since management participated in the misconduct, the trustee does not have standing to bring the cause of action under *Wagoner*;<sup>144</sup> and (2) the adverse interest exception does not apply because the company benefitted in the short term from management's conduct (i.e., the agents did not totally abandon the company's interests, thus it is appropriate for the agents' conduct to be imputed to the company).<sup>145</sup> The justification for the *Wagoner* rule and similar unclean hands and *in pari delicto* rules in other jurisdictions is that a company (or its successor, such as a bankruptcy trustee) cannot sue to recover for a wrong that the company took part in.<sup>146</sup>

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“[m]any lawyers understand that some degree of conscious avoidance is permitted, if not essential to effective advocacy”).

141. See *supra* Introduction.

142. Complaint, *supra* note 7; see also Final Report of Examiner at 230-281, *In re Refco Inc.*, No. 05-60006 (RDD) (Bankr. S.D.N.Y. July 11, 2007); *id.* app. A at 7-9 (court-appointed examiner describes cause of action against Refco's attorneys and explains that damages from professional negligence include “increased liability caused by the defendant's deficient services”).

143. *Kirschner v. Grant Thornton LLP*, No. 07 Civ. 11604 (GEL), 2009 WL 1286326, at \*10 (S.D.N.Y. May 6, 2009).

144. *Id.* at \*5 (citing *Shearson Lehman Hutton v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991) (noting that a bankruptcy trustee lacked standing to recover on behalf of a debtor against third parties for injuries incurred by the misconduct of the debtor's controlling managers)).

145. *Id.* at \*6-8 (analyzing the alleged facts under cases including *In re Wedtech Corp.*, 81 B.R. 240, 242 (S.D.N.Y. 1987) (explaining that for the adverse interest exception to the *Wagoner* rule to apply, company officers must have “totally abandoned” the corporation's interests and that the exception does not apply if there was any “short term benefit” to the corporation)).

146. See *id.* at \*5 & n.13 (explaining that the *Wagoner* rule and *in pari delicto* rule derive from agency law and have the same purpose of preventing the company or its successor in bankruptcy from recovering for a wrong management took part in, but that

Undoubtedly, the *Wagoner*, *in pari delicto*, and unclean hands doctrines have some logical appeal. But these rules may encourage zealous advocacy that is harmful to business clients. If a lawyer can ward off a professional negligence claim when company executives participated in the misconduct and there was some short term benefit to the company, the lawyer can feel reasonably secure in acting as a zealous advocate of management's agenda.<sup>147</sup> Unless an exception to the doctrine applies, the lawyer is not answerable to the company—the true client—for not protecting it from the executives who would create substantial liability or perhaps even destroy it.<sup>148</sup>

Despite this seeming encouragement for zealous advocacy in the substantive law of some jurisdictions, the Model Rules pursue a different approach for lawyers advising organizational clients. Model Rule 1.13 explicitly, though perhaps confusingly, outlines steps that lawyers should take to protect entity clients from management misconduct.<sup>149</sup> The following Part considers how this rule and other professional conduct rules fail to guide advisors in employing a skill set other than zealous advocacy.

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*Wagoner* is a standing rule and *in pari delicto* is a defense); see also 3 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 22:4 (2009 ed.) (explaining application of *in pari delicto* and unclean hands doctrines as a defense against claims of attorney malpractice for advising the client to engage in or failing to dissuade a client from engaging in intentional misconduct).

147. Exceptions to both the *Wagoner* and *in pari delicto* doctrines should give the zealous advisor pause. In some jurisdictions, *in pari delicto* is interpreted literally to mean that the client must be at least “equally” at fault in order for the defense to apply. See, e.g., *McKinley v. Weidner*, 698 P.2d 983, 986 (Or. Ct. App. 1985). Also, like *Wagoner*, there is an adverse interest exception to the *in pari delicto* doctrine, allowing a cause of action when the agent preferred his own interests and acted adversely to the principal. See, e.g., *Sender v. Mann*, 423 F. Supp. 2d 1155, 1174 (D. Colo. 2006). Likewise, under *Wagoner*, the client has standing to sue if the adverse interest exception applies (discussed in *supra* note 145 and accompanying text) or if all of the company's decisionmakers were not involved in the fraud. See *Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld, L.L.P.*, 212 B.R. 34, 36 (S.D.N.Y. 1997). If the latter exception were interpreted broadly, it would be consistent with the up the ladder reporting regime outlined in Model Rule 1.13(b), which arguably discourages zealous advocacy and encourages reporting serious concerns about possible legal liability to higher authorities in a company. See MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2009).

148. The applicability of the adverse interest exception to *Wagoner* is currently the basis of the trustee's appeal in the *Refco* malpractice case against Mayer Brown. The Second Circuit certified eight questions regarding the adverse interest exception's proper interpretation to the New York Court of Appeals. *Kirschner v. KPMG LLP*, 590 F.3d 186, 194-95 (2d Cir. 2009). The New York Court of Appeals accepted the certified questions but has not yet issued its opinion. *Kirschner v. KPMG LLP*, 922 N.E.2d 898 (N.Y. 2010).

149. MODEL RULES OF PROF'L CONDUCT R. 1.13(b), (c) (2009); see also *infra* notes 160-67, 170-85 and accompanying text (discussing the text of these rules and how it is interpreted by lawyers).

### III. FAILINGS OF THE CURRENT PROFESSIONAL CONDUCT RULES TO GUIDE NONLITIGATORS IN ADVISING CLIENTS

The concept of zealous advocacy is barely visible in today's professional conduct rules.<sup>150</sup> So it may seem illogical that professional conduct rules contribute to business lawyers relying upon zealous advocacy. But there is reason to believe that is the case. While professional conduct rules provide a great deal of direction to litigators about what conduct is required or prohibited in interactions with clients, courts, and third parties,<sup>151</sup> such comprehensive, consistent guidance is not provided for nonlitigators. In this Part, I consider the failings of professional conduct rules to give direction to the lawyer-advisor and explain how this contributes to lawyers relying on traditional notions of zealous advocacy.

#### A. *Scant Direction about How to Advise in the Advisor Rule*

A single rule, Model Rule 2.1, explains the role of the advisor. It provides that the attorney should “exercise independent professional judgment and render candid advice.”<sup>152</sup> The rule goes on to explain that attorneys can refer to nonlegal considerations in providing advice.<sup>153</sup> Further, comments to the rule encourage attorneys to provide more than “technical” legal advice, such as when technical advice is inadequate because other nonlegal factors predominate or when the client is inexperienced in legal matters.<sup>154</sup> Comment two mentions, almost in passing, that there can be a connection between ethics and law: “Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions *and may decisively influence how the law will be applied.*”<sup>155</sup> Another comment provides that even when advice is not requested, if a lawyer “knows” that the client proposes conduct “likely to result in substantial adverse legal consequences to the client” then the lawyer “may” have an obligation to communicate advice.<sup>156</sup>

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150. See *supra* notes 27-28 and accompanying text.

151. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2009) (forbidding counsel from obstructing another party's access to evidence or altering, destroying, or concealing a document with evidentiary value); *id.* at R. 3.4(b) (prohibiting, inter alia, counseling a witness to testify falsely); *id.* at R. 3.5(a) (attorney cannot seek to influence a judge or juror by a means prohibited by law); *id.* at R. 3.3(a)(1) (lawyers shall not make a false statement to the court); *id.* at R. 3.3(a)(4) (lawyer shall not offer false evidence).

152. *Id.* at R. 2.1.

153. *Id.* (“In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.”).

154. *Id.* at R. 2.1 cmt. 2-3.

155. *Id.* at R. 2.1 cmt. 2 (emphasis added).

156. *Id.* at R. 2.1, cmt. 5.

Model Rule 2.1 could be fairly characterized as imposing few real requirements.<sup>157</sup> Moreover, the rule's limited instructions may be counter-productive. By framing *morality* as a nonlegal consideration, lawyers may be less inclined to discuss the issues that sound like moral judgments, but actually have a bearing on issues of legal liability.<sup>158</sup> Further, consistent with this rule and comments, a client who requests *technical* legal advice will likely receive it,<sup>159</sup> even when liability may arise despite technical compliance with some aspect of the law.

Some might argue that a competent lawyer would provide more than technical advice when necessary to fully inform the client of the risk of liability. And that is correct, but Model Rule 2.1 does nothing to encourage this approach. The rule does not provide any guidance as to how a competent lawyer should advise. The rule does nothing to encourage advisors to think beyond the narrow legal issue as presented or to appreciate their clients' interest in understanding possible bases of liability.

### B. Rules that Tell Attorneys When to Say No to Clients

There are a number of professional conduct rules that tell attorneys when to say "no" to conduct that will create liability for their clients. In theory, these rules could play a role in preventing the harm to clients discussed in this Article. This Part considers why the rules as currently written are unlikely to help in this regard.

Scattered throughout the rules of professional conduct, various provisions permit or require lawyers to refuse to participate in fraudulent conduct, criminal conduct, violations of law, or various

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157. See John Steele, *DOJ Report on Torture Is Finally Out*, LEGAL ETHICS FORUM (Feb. 19, 2010, 8:39 PM), <http://www.legalethicsforum.com/blog/2010/02/doj-report-on-torture-memos-is-finally-out.html> (commenting on the difficulty of disciplining a lawyer-author of the torture memos for violating a state version of Model Rule 2.1 if the lawyer's advice was based on truly held beliefs, but noting that one could discipline the lawyer under a state version of Model Rule 1.1 if the lawyer acted incompetently in providing the advice); Brad Wendel, *The Ethics of Advising: Are We All Formalists Now?*, LEGAL ETHICS FORUM (Feb. 20, 2010, 11:32 AM), <http://www.legalethicsforum.com/blog/2010/02/the-ethics-of-advising-are-we-all-formalists-now.html> [hereinafter Wendel, *Ethics of Advising*] (noting that Model Rule 2.1 "doesn't say much" but arguing that discipline should be appropriate for a lawyer whose advice is objectively wrong).

158. See *supra* notes 79-87 and accompanying text (discussing results of lack of moral-sounding advice). *But see supra* note 155 and accompanying text (quoting a portion of comment 2 to Model Rule 2.1 which acknowledges that moral issues may impact how the law will be applied). Despite this light encouragement for moral-sounding advice in the comment, a lawyer is more likely to consider the text of the rule which merely mentions that a lawyer "may" refer to moral considerations.

159. See *supra* notes 38-50, 65-71, and accompanying text (discussing examples of the negative implications of technical advice).

other forms of illegal client conduct.<sup>160</sup> Attorneys view the rules skeptically, though, perhaps because the rules seem to describe something that is contrary to the client's interest.<sup>161</sup> Indeed, some of the rules are written for the purpose of protecting the attorney from liability and not for the purpose of describing the lawyer's duties to clients.<sup>162</sup> The view that the rules are against the client's interest is likely further cemented by the fact that the rules require that the lawyer have a high level of certainty that the conduct is fraudulent, criminal, a violation of law, and so forth, before any obligation to say "no" arises.<sup>163</sup>

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160. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2009) ("If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a *violation of law* that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, *then the lawyer shall proceed as is reasonably necessary in the best interest of the organization*. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer *shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.*" (emphasis added)); *id.* at R. 1.13(c) ("Except as provided in paragraph (d), if (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is *clearly a violation of law*, and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then *the lawyer may reveal information* relating to the representation whether or not Rule 1.6 permits such disclosure, *but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.*" (emphasis added)); *id.* at R. 1.16(a)(1) ("[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation *will result in violation of the rules of professional conduct or other law . . .*" (emphasis added)); *id.* at R. 1.16(b) ("[A] lawyer may withdraw from representing a client if: . . . (2) the client persists in a course of action involving the lawyer's services that *the lawyer reasonably believes is criminal or fraudulent*; (3) the client has used the lawyer's services *to perpetrate a crime or fraud . . .*" (emphasis added)); *id.* at R. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that *the lawyer knows is criminal or fraudulent*, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." (emphasis added)).

161. *See id.*

162. *See Green, Criminal Regulation, supra* note 30, at 347-48 (explaining that "[i]n response to concern about lawyers' potential criminal liability," provisions of the lawyer professional responsibility codes encourage or at least make it possible for lawyers to comply with criminal laws that are likely to bear on their professional conduct and citing Model Rule 1.16(a)(1) (1995) as an example of such a provision); *id.* at 349 (asserting that Model Rule 1.16's provisions permitting withdrawal when the client persists in a course of conduct that the lawyer "reasonably believes is criminal" or fraudulent is a rule that "authorize[s] lawyers to avoid assisting . . . a client's criminal conduct, *even at the expense of the client's interests.*" (emphasis added)); Fred C. Zacharias, *The Images of Lawyers*, 20 GEO. J. LEGAL ETHICS 73, 81 (2007) [hereinafter Zacharias, *Images*] (explaining that other rules have an image of a lawyer as an independent, objective monitor of the legal system who can "express moral and political beliefs to clients," protect third parties, and "withdraw from representation[s] that [are] repugnant to them").

163. *See* text of rules cited in *supra* note 160.

Brimming with subjective standards, these rules are like food to zealous advocates.<sup>164</sup> Professor Susan Koniak explains transactional lawyers' inability to "know" fraud as a "product of the litigation mentality."<sup>165</sup> Professor Koniak notes that even though a lawyer would be able to identify fraud that others are perpetrating, a lawyer's mindset is to make any plausible argument that his or her own client's conduct is not fraudulent.<sup>166</sup> She concludes that this mindset is justifiable in litigation, but is misused to "free[] corporate clients from the law that would constrain them."<sup>167</sup>

There are two things that the zealous advocate misses with this analysis. First, the rules presume that the lawyer has *already* competently advised the client about the prospect of liability and that the client has knowingly chosen the ill-advised course of conduct. But as discussed in the foregoing Parts, if the client does not receive advice about the prospect of legal liability (rather than zealous advocacy) then the client is not making an educated, informed choice to engage in the liability-creating conduct.<sup>168</sup> Reading the "when to say no" rules (like Model Rule 1.16) narrowly may be acceptable as long as the lawyer has appropriately advised the client about the risks of liability,<sup>169</sup> something that likely has not happened if the lawyer is acting as a zealous advocate.

Second, all rules are not created with the same purpose. While some of the "when to say no" rules are contrary to the autonomous client's interests, one of the rules is written with the purpose of telling lawyers how to protect their clients.<sup>170</sup> Model Rule 1.13—the Or-

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164. See Kim, *Banality of Fraud*, *supra* note 19, at 1049 (explaining that "complex and ambiguous" questions such as those found in Model Rule 1.13 "can serve as a fertile breeding ground for motivated reasoning"—reasoning that is motivated by a desired outcome). Kim hypothesizes that what is motivating the reasoning is the lawyer's self-interest, *see id.*, but I posit that another motivating factor is the lawyer's perception that his or her role is to advocate the client's desires.

165. Koniak, *Corporate Fraud*, *supra* note 41, at 212-13.

166. *Id.* at 213.

167. *Id.* at 214; *see also* Kim, *Banality of Fraud*, *supra* note 19, at 1052 (describing the post-Sarbanes-Oxley Act amendments to Model Rule 1.13 as including "confusing or high triggering standards, . . . copious qualifications, and . . . cautionary language, as well as [no] coherent theory of a co-agent's authority, [which] make it difficult for any lawyer to be confident in her decisions to report up the ladder or report out . . .").

168. *See also* Longan, *supra* note 71, at 671 (describing the client's interest in learning from its attorney when conduct may result in legal liability).

169. The other wrinkle is that a narrow reading may be against the interest of the lawyer, who might be interested in knowing that he or she is subjecting himself or herself to liability for failing to withdraw rather than participate in fraudulent conduct. Though it is beyond the scope of this Article, there would be value in revising Model Rules 1.16 and 1.2(d) to clarify the purpose of the rules and to consistently describe the level of certainty and the type of illegality (fraud, crime, breach of fiduciary duty, etc.) that should cause a lawyer to withdraw, refuse a representation, or refuse to provide advice.

170. See Kim, *Banality of Fraud*, *supra* note 19, at 1047-48, 1052 (noting the confusing incongruity between Model Rules 1.6 and 1.13 and explaining that Model Rule 1.6 is drafted from the perspective of the individual client who has no interest in adverse

ganization as Client Rule—is drafted to describe the steps attorneys must take to protect an organizational client from an agent’s liability-creating conduct.<sup>171</sup> The rule provides that counsel must act in the client’s “best interest[s]” when company constituents are planning or are engaged in “a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization,” but only if the conduct is “likely to result in substantial injury to the organization.”<sup>172</sup> Acting in the company’s best interest is described as ordinarily requiring counsel to take concerns “up the ladder” to higher authorities in the company.<sup>173</sup> When up the ladder reporting does not work to address the misconduct, subsection (c) of the rule permits the lawyer to report confidential information outside of the company if doing so will protect the organization from substantial injury caused by constituent conduct that is “clearly a violation of law,” but only if “the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization” and the lawyer “reasonably believes” disclosure is “necessary to prevent substantial injury to the organization.”<sup>174</sup>

Despite considerable evidence that these provisions of Model Rule 1.13 were intended to guide attorneys in protecting their organizational clients from legal liability,<sup>175</sup> many attorneys have argued against the rule (and a similar SEC rule) as contrary to the obligation of zealous advocacy.<sup>176</sup> Attorney skepticism that the rule is in the

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disclosure, which is confusing when contrasted to Model Rule 1.13 or when Model Rule 1.6 is applied to organizational clients); Zacharias, *Images*, *supra* note 162, at 75-85 (explaining that professional conduct rule drafters have different images of lawyers in mind when they draft rules, and that the “most commonly relied upon, and [the] most heartily defended” is the image of lawyers as client protectors which lies at the core of the client-centered rules).

171. See Robert B. Robbins, *Ethics and Professional Responsibility for Attorneys in Securities Transactions*, ALI-ABA Course of Study 489, 493 (2009) (“The premise of Model Rule 1.13 is that, when a lawyer represents an organization. . . , the lawyer owes the organization a duty of protection from harm.”); Paula Schaefer, *Overcoming Noneconomic Barriers to Loyal Disclosure*, 44 AM. BUS. L.J. 417, 435-68 (2007) (explaining that the purpose of Model Rule 1.13 is to allow attorneys to protect organizational clients from constituent misconduct, including the ability to disclose confidences when doing so will protect the organization).

172. MODEL RULES OF PROF’L CONDUCT R. 1.13(b) (2009).

173. *Id.* at R. 1.13(c).

174. *Id.*

175. See *supra* note 171 and accompanying text.

176. See Herrick K. Lidstone, Jr., *Am I My Brother’s Keeper? Redefining the Attorney-Client Relationship*, COLO. LAW., Apr. 2003, at 11, 14 (quoting Pfizer general counsel Jeffrey Kindler as arguing that the attorney conduct provisions of the Sarbanes-Oxley Act “wrongly put[] corporate attorneys in the role of judge rather than *advocate*.” (emphasis added)); Christin M. Stephens, Comment, *Sarbanes-Oxley and Regulation of Lawyers’ Conduct: Pushing the Boundaries of the Duty of Confidentiality*, 24 ST. LOUIS U. PUB. L. REV. 271, 296 (2005) (asserting that the most frequently stated objection to such a disclosure rule is that it “would harm the attorney’s ability to zealously represent the client”); Symposium, *Lessons from Enron: A Symposium on Corporate Governance*, 54 MERCER L. REV. 683, 710 (2003) (comments of Bill Ide) (Former American Bar Association

client's interest is understandable. This is the only rule that requires an attorney to believe that the client is interested in avoiding legal liability and that the attorney should protect the client from liability.<sup>177</sup> The professional conduct rules do not provide clear signposts for lawyers, alerting them of the purpose of each rule.<sup>178</sup> As a result, lawyers likely read all of the "when to say no" professional conduct rules consistently—always viewing the client's interest as pushing the limits of the law and the lawyer's role as avoiding the rule's limitations if possible.<sup>179</sup>

A zealous advocate who believes Model Rule 1.13 is contrary to his or her client's interests would have little trouble justifying doing nothing to protect the client. The rule is complex<sup>180</sup> and includes numerous subjective, and perhaps ambiguous, standards that the lawyer must satisfy before taking action.<sup>181</sup> Some have interpreted the rule as requiring lawyers to do nothing if the agent's misconduct will benefit the client or if the lawyer's disclosure would reveal the otherwise hidden misconduct, thus harming the client.<sup>182</sup> Implicit in these interpretations is a concern that disclosure to someone cannot *protect* the organizational client. Others read the rule's "violation of law" language narrowly to address only violations of statutes and regula-

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President Bill Ide stated, "Some of us have a strong concern that if you erode the [attorney-client] privilege too far, we will turn lawyers into auditors. . . . The result would be destruction of a critical component of our justice system—the lawyer as an advocate.").

177. See Zacharias, *Images*, *supra* note 162, at 87-88 (explaining that when professional conduct rules are written from different paradigms, the result can be to "undermine lawyers' understanding of what role truly governs their practice").

178. See *id.*

179. See also Simon, *Confidentiality*, *supra* note 39, at 1454 (arguing that even though lawyers understand that organizational clients are different from their managers, the Bar has given them no other "clear conception" of the organizational client's identity and interests, so "in spite of themselves, lawyers instinctively fall back on views that conflate the organization and its personnel").

180. See MODEL RULES OF PROF'L CONDUCT R. 1.13 (2009); see *supra* note 160 for full text of sections (b) and (c) of Model Rule 1.13; see also *infra* note 244 and accompanying text (describing other subjects of the rule).

181. For example, to make a disclosure to protect the client, the rule directs an attorney to determine that the conduct is "clearly a violation of law," that the highest authority's response was not appropriate, that the attorney "reasonably believes" that the clear violation is "reasonably certain to result in substantial injury" and that the lawyer "reasonably believes" that disclosure is "necessary" to prevent substantial injury to the organization. MODEL RULES OF PROF'L CONDUCT R. 1.13(c); see also Cramton, *Organizational Clients*, *supra* note 46, at 1051 (arguing that Model Rule 1.13's ambiguous terms, including "clearly," "certain," and "necessary" create unnecessary interpretive problems).

182. See Monroe H. Freedman, *The "Corporate Watch Dogs" That Can't Bark: How the New ABA Ethical Rules Protect Corporate Fraud*, 8 UDC/DCSL L. REV. 225, 231 (2004) (arguing that the lawyer's disclosure of misconduct would *cause* substantial injury to the client); David McGowan, *Why Not Try the Carrot? A Modest Proposal to Grant Immunity to Lawyers Who Disclose Client Financial Misconduct*, 92 CALIF. L. REV. 1825, 1830 (2004) (explaining that lawyers might reason that allowing a fraud to continue might benefit the company, and that disclosure of it might ultimately harm the company).



tions, but not common forms of business misconduct like fraud.<sup>183</sup> These interpretations are consistent with zealous advocacy,<sup>184</sup> but they are inconsistent with the rule's intent and the organizational client's interests.<sup>185</sup>

#### IV. IN SEARCH OF A NEW TOUCHSTONE: FIDUCIARY DUTY TO THE CLIENT

Acknowledging the role zealous advocacy can play for business lawyers complicates common conceptions of why lawyers facilitate business misconduct. Many assume that a lack of morality explains lawyers' (and managers') involvement in business scandals.<sup>186</sup> Others argue that business lawyers are rational actors who make calculated decisions that the possible rewards of misconduct outweigh the risks.<sup>187</sup> But most lawyers (including the lawyers discussed in this Article) are more complex than a simple label like "unethical" or "rational economic actor" portrays.<sup>188</sup> They may be influenced in part by their personal ethics or by a conscious cost-benefit analysis, but also

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183. See Simon, *Confidentiality*, *supra* note 39, at 1465 (asserting that attorneys read the provisions of Model Rule 1.13 concerning misconduct by managers as meaning "either breach of criminal or regulatory law on the one hand or explicit conflict of interest situations on the other," leaving unchecked "a range of decisions that were potentially breaches of fiduciary duty but not violations of specific legal commands or explicit conflicts").

184. See Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 717 (2005) ("[L]awyers have elevated the duty to zealously represent their clients over other competing obligations, and the procedural and ethical rules that constrain lawyers' conduct are just another set of rules to be gamed, interpreted, and argued in the effort to advance the client's interests.").

185. Schaefer, *supra* note 171, at 435-68 (explaining that attorneys will not act as permitted by Model Rule 1.13(c) even when appropriate to protect the client because of a belief that disclosure is not in the client's interest and based on their interpretations of the language of the rule).

186. See Leonard Bucklin, *More Preaching, Fewer Rules: A Process for the Corporate Lawyer's Maintenance of Corporate Ethics*, 35 OHIO N.U. L. REV. 887, 888 (2009) (arguing that corporate attorneys "should rely less on rules and more on open and earnest advocacy of moral values"); Langevoort, *supra* note 33, at 77 (asserting that many people believe attorney complicity in corporate misconduct can be attributed to "greed and moral corruption").

187. See Kim, *Gatekeepers*, *supra* note 33, at 418 (asserting that gatekeeping theory has adopted the "rational choice theory" (RCT) as its model for expected human behavior and explaining that RCT assumes that lawyers (and other gatekeepers) are rational actors who will act in accordance with whether the gains of corruption or acquiescence outweigh the expected costs).

188. *Id.* at 419 (explaining that a behavioral realist approach "calls forth on the law to adopt the most accurate model of human decisionmaking and behavior," and that the behavioral realist considers "insights from modern social psychology: that the situation is a better predictor of human behavior than an individual's personal characteristics or views"); Langevoort, *supra* note 33, at 79 ("While moral dispositions do vary, situations are apt to have an even greater influence on behavior . . .").

by a myriad of other factors, including a belief that their role is to be a zealous advocate.<sup>189</sup>

Because many factors contribute to how lawyers represent their business clients, I acknowledge that a shift in thinking away from zealous advocacy is not a panacea. Nonetheless, adopting a new touchstone that is more consistent with a nonlitigation client's interests could contribute to better legal advice. And because "zealous advocate" is a consciously held bias of many lawyers, the profession is capable of making a conscious shift to something better.<sup>190</sup>

It is against this backdrop that I propose a new touchstone for the legal profession: fiduciary duty to the client. This Part considers the advantage of this approach, the most significant being that the framework remains client-centered, but jettisons zealous advocacy's harmful baggage. The primary disadvantage of fiduciary duty is that all attorneys may not readily grasp what it means as an analytical framework. This Part concludes by explaining how that disadvantage may lead to an opportunity for professional conduct rule makers.

#### A. *Defining the Fiduciary Duty Touchstone*

While there are various ways to describe the attorney-fiduciary's obligations,<sup>191</sup> it may be simplest to organize the duties in two cate-

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189. See generally *supra* notes 14-26 and accompanying text (discussing lawyer's conscious understanding that lawyers are to act as zealous advocates).

190. See Kim, *Banality of Fraud*, *supra* note 19, at 1008 ("Lawyers can be professionally molded to accommodate various conceptions of lawyering, with some conceptions creating greater alignment pressures toward clients than others."); Robertson, *supra* note 33, at 43-47 (arguing that there are steps that can be taken to facilitate "a more salient professional identity" (i.e., understanding the lawyer's role as providing independent legal advice) for attorneys, including focusing time on the role, making connections with others committed to the same role, and consciously taking a skeptical approach to one's own legal advice). Professor Robertson asserts that "debiasing strategies," such as education, are not particularly effective in combating attorneys' unconscious partisan biases. *Id.* at 34. But if the zealous advocacy mindset is a conscious bias, as I assert in this Article, it could be combated by reeducating business lawyers through efforts such as revising the professional conduct rules.

191. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (2000) ("To the extent consistent with the lawyer's other legal duties . . . a lawyer must, in matters within the scope of the representation: (1) proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation; (2) act with reasonable competence and diligence; (3) comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and (4) fulfill valid contractual obligations to the client."); *id.* § 16 cmt. b ("Rationale. A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of a fiduciary. Assurances of the lawyer's competence, diligence, and loyalty are therefore vital." (emphasis added)); MARTYN & FOX, *supra* note 68, at 57 (describing the five C's of attorney fiduciary duty: "client control concerning the goals of the representation, communication, competence, confidentiality, and conflict of interest resolution"); see also *infra* note 226 and accompanying text (explaining the appeal of describing all attorney duties as "fiduciary duties").

gories: (1) a duty of care and (2) a duty of loyalty. The duty of care is generally described as encompassing the obligation to act as a competent, diligent attorney.<sup>192</sup> The duty of loyalty requires the attorney to put the client's interests first, including keeping the client's confidences, avoiding conflicts of interest, not employing advantages arising from the relationship to harm the client, and dealing with the client honestly and in good faith.<sup>193</sup>

Fiduciary duty provides a better answer to the key question posed by this Article: How should lawyers advise their clients about the potential for legal liability? Zealous advocacy views "illegal" as a line that cannot be crossed but otherwise endorses lawyers zealously advocating their clients' plans. Fiduciary duty provides the framework for a different approach.<sup>194</sup> Fiduciary duty views the issue as this: How should a *competent* attorney advise her client about the potential for legal liability?<sup>195</sup> The answer is that competent lawyers must provide guidance not only about black and white violations of law but also fully explain the risks of legal liability for a client's desired

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192. The Restatement of the Law Governing Lawyers provides that a lawyer has liability for professional negligence if the lawyer breaches the duty of care to the client. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 50 (2000) ("For purposes of liability under § 48 [Professional Negligence], a lawyer owes a client the duty to exercise care within the meaning of § 52 in pursuing the client's lawful objectives in matters covered by the representation."). Section 52 provides that for purposes of establishing professional negligence, the "lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances." *Id.* § 52; *see also* RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 8.08 (2006) (providing in part that "[i]f an agent claims to possess special skills or knowledge, the agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents with such skills or knowledge").

193. The Restatement of the Law Governing Lawyers states that a lawyer has liability for breach of fiduciary duty if the lawyer breaches one of the duties listed in § 16(3). RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (2000). The § 16(3) duties are to "comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client." *Id.* § 16(3); *see also* RESTATEMENT (THIRD) OF THE LAW OF AGENCY §§ 8.02-8.06 (describing the duty of loyalty as encompassing the duty not to take a material benefit arising from the relationship, not to act as or on behalf of an adverse party, not to compete, and not to use the principal's property or confidences, absent principal consent).

194. *See* Wendel, *Ethics of Advising*, *supra* note 157 (arguing that lawyer conduct rules should be interpreted as consistent with the broader law governing lawyers, including case law holding that lawyer-advisors have liability for failing to act objectively in the best interests of their clients).

195. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 (2000) (stating that lawyers who counsel or assist clients "to engage in conduct that violates the rights of a third person [are] subject to liability" to the clients to the extent that doing so violates the duty to exercise competence and diligence normally exercised by lawyers in similar circumstances.). Unfortunately, the Restatement does not explain *how* a competent, diligent lawyer advises but only that there is liability if the lawyer does not provide competent, diligent advice and the client is thereby damaged. *Id.*; *see also supra* note 157 (citing authorities for the proposition that the advisor rule, Model Rule 2.1, provides less guidance to advisors than the competence rule, Model Rule 1.1).

course of conduct.<sup>196</sup> The uncertainty of legal liability does not diminish the fact that the client is paying for and is owed professional guidance.<sup>197</sup>

Competently providing guidance about the potential for liability does not detract from client autonomy. In most cases, a client is allowed to make a bad choice, even one that will create legal liability.<sup>198</sup> But that does not mean that the client's lawyer must participate in the misconduct. Lawyers have the choice (and sometimes the obligation) to withdraw rather than participate in client misconduct.<sup>199</sup> Zealous advocacy exacerbates the conflict between client will and the attorney's withdrawal dilemma; fiduciary duty, though, could lessen it. A lawyer who views herself as a zealous advocate of the client's agenda will not dissuade the client of questionable conduct—she will instead find an argument to support the client's desires. That attorney will be more likely to encounter situations where she must decide whether to participate in legally questionable conduct. If instead the

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196. See, e.g., *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin*, 717 A.2d 724, 728-29 (Conn. 1998) (defendant lawyers did not dispute on appeal that they were negligent in failing to advise client that it was violating Connecticut law and instead advising client that its conduct was in a "gray area" of the law); *Bellino v. McGrath North Mullin & Kratz, PC LLO*, 738 N.W.2d 434, 445-47 (Neb. 2007) (client stated a claim for malpractice when he alleged that attorneys failed to advise him that he could be liable for breach of fiduciary duty if he engaged in his planned conduct); *Plymouth Org., Inc. v. Silverman, Collura & Chernis, P.C.*, 799 N.Y.S.2d 813, 814 (N.Y. App. Div. 2005) (plaintiff stated a cause of action for malpractice by alleging that it was damaged by lawyers' failure to advise it that "finders" it hired must be licensed brokers and by failing to explain other potential improprieties in using the finders to solicit investors, which resulted in the plaintiff receiving from various states letters ordering it to "cease and desist sales, questioning the legality of the investment offering, and commencing investigations"); see also *infra* note 202 (listing cases in which lawyers had liability for failing to competently advise their business organization clients).

197. Though some courts have prohibited malpractice claims to proceed against lawyers who failed to warn clients of potential liability, those cases are—perhaps surprisingly—consistent with my assertions about the fiduciary duties of advisors. Malpractice claims are barred in this context not because the lawyers competently advised their clients, but because the client engaged in the misconduct the lawyer failed to advise against. See, e.g., *Blain v. Doctor's Co.*, 272 Cal. Rptr. 250, 253-55 (Cal. Ct. App. 1990) (doctrine of unclean hands precludes physician's legal malpractice claim against his lawyer who advised the physician to lie in a deposition); *Stratton v. Miller*, 113 B.R. 205 (D. Md. 1989), *aff'd*, 900 F.2d 255 (4th Cir. 1990) and 900 F.2d 251 (4th Cir. 1990) (law firm failed to inform board of president's fraud, but contributory negligence and doctrine of *in pari delicto* prohibited company's bankruptcy trustee from bringing the claim); see also MALLEEN & SMITH, *supra* note 146, § 22:4 ("Although the correctness of attorney's advice concerning a course of action does not depend on the client's motives, those motives may invoke policy considerations about whether the attorney should be liable for negligent advice."). The availability of a defense to a malpractice claim based on negligent advice does not detract from the lawyer's obligation to competently advise clients about potential for liability.

198. See *Zacharias, Images*, *supra* note 162, at 87 (explaining that an essential assumption of lawyer conduct rules is that client autonomy is important and the lawyer's role is to enhance client autonomy). *But see infra* notes 200-202 and accompanying text (explaining that for entity clients, the lawyer's fiduciary duties of loyalty and care require the lawyer to protect the client from liability).

199. MODEL RULES OF PROF'L CONDUCT R. 1.16(a), (b) (2009).

attorney's focus is on competently advising a client about the risks of legal liability, clients will retain their autonomy and be better equipped to make decisions. The result of more information might be less risk-taking and fewer situations where lawyers must decide whether they should withdraw.

For the organizational client, there is an additional wrinkle that is also answered by fiduciary duty. The attorney's loyalty and care are owed to the organization itself, not the company's managers.<sup>200</sup> These obligations have been interpreted to require lawyers to advise against liability-creating conduct and take other affirmative steps to protect the company from liability.<sup>201</sup> Attorney-advisors have faced liability for failing to fulfill these duties.<sup>202</sup> The organization's attorney's fiduciary obligations in this regard are already embodied in Model Rule 1.13,<sup>203</sup> a rule that (as previously discussed) has been re-

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200. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96(1) (2000).

201. *See id.* § 96(2) (explaining that additional steps must be taken in "the best interests of the organization" if constituents are engaged in conduct that will cause substantial injury to the organization); Rutheford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 RUTGERS L. REV. 9, 23 (2003) ("[T]he lawyer's loyalty to the entity client logically mandates some action to protect it from the harm occurring through or threatened by the constituent's actions."). Liability in this context has been interpreted to encompass the agent's liability to the organization (i.e., agent breached a duty to the organization) and agent conduct that creates liability for the organization (i.e., organization is held responsible for agent misconduct); Cramton et al., *supra* note 66, at 737 ("[A]s part of the duties of care, competence and diligence that an organization's lawyer owes to the organization, the lawyer is required to exercise reasonable care to prevent an organization's constituent from violating a legal obligation to the organization or causing harm to the organization by performing acts on behalf of the organization that will cause injury to it, such as by exposing the organization to criminal or civil liability.").

202. *See, e.g.*, *Fed. Deposit Ins. Corp. v. Clark*, 978 F.2d 1541, 1545-46 (10th Cir. 1992) (affirming a jury's verdict that bank's attorneys were negligent based on evidence that attorneys did not fully investigate and report to the board of directors allegations of fraudulent activities by bank officers); *Fed. Deposit Ins. Corp. v. O'Melveny & Meyers*, 969 F.2d 744, 749 (9th Cir. 1992) (holding that the duty of care to the client includes "protect[ing] the client from the liability which may flow from promulgating a false or misleading offering to investors"), *rev'd on other grounds*, 512 U.S. 79 (1994), *on remand*, 61 F.3d 17 (9th Cir. 1995); *In re Fuzion Tech. Grp., Inc.* 332 B.R. 225, 229 (S.D. Fla. 2005) (allowing a claim to proceed against outside counsel who failed to bring facts to the attention of the board that would have revealed the CEO-Chairman's misappropriation of millions of dollars); *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1453 (D. Ariz. 1992) (allowing a cause of action against attorneys who allegedly failed to take steps to prevent corporation's regulatory violations); *Sec. & Exch. Comm'n v. Nat'l Student Mktg. Corp.*, 457 F. Supp. 682, 713 (D.D.C. 1978) (holding that an attorney's duty to the corporate client obligated attorneys to take action to interfere with the consummation of a merger of corporations when attorneys knew that financial statements relied upon by shareholders in the merger were inaccurate); *see also* Longan, *supra* note 71, at 671 (explaining that even though a lawyer's fidelity to law may seem inconsistent with the client's interest when the client wants to engage in fraudulent conduct, it is actually in the client's interest for the lawyer to advise against and refuse to help the client engage in fraudulent conduct).

203. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2009) (organization is the client); *id.* at R. 1.13(b) (lawyer has an up the ladder reporting obligation); *id.* at R. 1.13(c) (lawyer

sisted and misunderstood by zealous advocates.<sup>204</sup> The challenge is rewriting the rule for clarity so that lawyers understand that protecting the organizational client from liability is consistent with a client-centered representation.

*B. Benefits of Fiduciary Duty over Zealous Advocacy as Professional Decisionmaking Touchstone*

While other frameworks for understanding the lawyer's role may be workable,<sup>205</sup> fiduciary duty has the advantage of being consistent with existing law. Lawyers are fiduciaries.<sup>206</sup> It is sensible for this broad legal obligation to be in the forefront of attorneys' minds as they make decisions about how to advise their clients<sup>207</sup> and to be embodied in the professional conduct rules where lawyers may turn for guidance.<sup>208</sup> But even if fiduciary duty is never incorporated into a single state's professional conduct rules, there is no harm in attorneys adopting fiduciary duty as their personal professional mantra. It is entirely consistent with their legal obligations.

A positive aspect of the touchstone shift is that fiduciary duty already has much in common with zealous advocacy: both frameworks require lawyers to make decisions in the interests of their own clients.<sup>209</sup> Proponents of zealous advocacy's client-centered focus should be equally willing to embrace fiduciary duty as a guiding principle.

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has an obligation to disclose agent misconduct to protect the organizational client); *see also supra* note 171 and accompanying text.

204. *See supra* notes 160-67, 176-85 and accompanying text.

205. Some have questioned whether characterization of the relationship as an agency one remains accurate for attorneys and their corporate clients. *See* David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney/Client Relationship* 673-74 (Dec. 2, 2009), <http://ssrn.com/abstract=1517342>. Though there is logic in a reconceptualization of the relationship, I believe that attorneys can continue to view themselves as agents but better serve their corporate clients by embracing the fact that the entity has an interest in avoiding legal liability, and the attorney—as agent—is obligated to protect the entity client from that liability. *See supra* notes 200-202 and accompanying text.

206. The U.S. Supreme Court agrees that a lawyer, as the client's agent, is "duty-bound to act only in the interests of the principal." *Comm'r v. Banks*, 543 U.S. 426, 436 (2005). Fiduciary duty arises from this agency relationship and is consistent with the Court's view of the lawyer-client relationship as an agency one. *See supra* note 191 and accompanying text.

207. *See* Wendel, *Ethics of Advising*, *supra* note 157 (arguing that lawyer conduct rules should be interpreted consistent with other sources of law).

208. Charles E. Rounds, Jr., *Lawyer Codes are Just about Licensure, the Lawyer's Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trust, and Property Principles that Regulate the Lawyer-Client Fiduciary Relationship*, 60 BAYLOR L. REV. 771, 775-76 (2008) (opining that law students, lawyers, and jurists may look primarily to professional conduct rules rather than other sources of law governing the attorney-client relationship).

209. *See* Bernstein, *supra* note 19, at 1169 (arguing that zealous advocacy is "up there in the professional-responsibility pantheon next to loyalty and competence"); *see also* Zacharias, *Images*, *supra* note 162, at 80 (describing the paradigm of "lawyers as client protectors" as the "most commonly relied upon and most heartily defended" paradigm for client-centered professional conduct rules).

Further, fiduciary duty is less complicated and provides more predictable results than regimes that expect lawyers to balance the competing needs of the legal system, third parties, and the courts.<sup>210</sup> Fiduciary duty tells the lawyer to focus on the client's interests (emphasizing the client's interest in understanding the prospect of liability) and leaves it to other provisions of the professional conduct rules or other sources of law to define when other interests may or must prevail.<sup>211</sup>

The benefit of fiduciary duty over zealous advocacy as a touchstone, though, is that fiduciary duty captures the complexity of what it means to act in the client's interest. Fiduciary duty requires a lawyer to ask whether a competent, loyal lawyer would encourage a course of conduct likely to create legal liability for the client. Put another way, it requires a lawyer to provide legal advice—the thing the lawyer was presumably hired to provide—rather than to argue passionately for the client's desires.<sup>212</sup>

Fiduciary duty also addresses the need for a gap filler or default rule. For many attorneys, “zealous advocacy” is their current gap filler: if something is not prohibited by ethics rules or other sources of law, they zealously advocate their client's wishes. Some jurisdictions have tried to eliminate offensive, abusive lawyer tactics by removing the term “zeal” from professional conduct rules.<sup>213</sup> For example, Arizona removed all references to zeal in its rules and added rules that

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210. See Nestor M. Davidson, *Values and Value Creation in Public-Private Transactions*, 94 IOWA L. REV. 937, 974 (2009) (describing the tension between zealous advocacy “and alternative visions of attorney identity that would impose independent ethical or moral duties beyond client goals”); Gordon, *Citizen Lawyer*, *supra* note 1, at 1169 (describing the citizen lawyer as one “who acts in a significant part of his or her professional life with some plausible vision of the public good and the general welfare in mind”); Wendel, *Butlers*, *supra* note 23, at 162 (explaining the view that lawyers have an obligation to practice “whole law,” which would require lawyer to avoid loopholes and consider whether the lawyer's actions are in the public's interest and promote justice).

211. For example, under Model Rule 1.6(b), a lawyer could reveal confidential information to protect a third party (or the lawyer) even though the client may prefer the information be kept in confidence. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2009). Similarly, under Model Rule 4.4(b), the lawyer must give notice to an opponent of an inadvertent disclosure, though the client may prefer the opponent's mistake not be revealed. See MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2009).

212. See Paula A. Monopoli, *Teaching Lawyers to be More than Zealous Advocates*, 2001 WIS. L. REV. 1159, 1164 (2001) (arguing that legal education has failed to make fiduciary duty the primary focus and has instead focused almost exclusively on the role of lawyers as zealous advocates).

213. See David D. Dodge, *When Lawyers Behave Badly: The “Z” Word, Civility & the Ethical Rules*, ARIZ. ATT'Y, Apr. 2008, at 18, 19 & n.2 (noting that Arizona, Indiana, Louisiana, Montana, Nevada, New Jersey, Oregon, and Washington have no references to zeal in their professional conduct rules, preambles, and commentary); see also Arthur J. Lachman & Peter R. Jarvis, *Zeal in Client Representation – FAQs*, 2005 PROF. LAW. 81, 83-84 (2005) (ten states' rules have no reference to zeal).

prohibit “unprofessional conduct.”<sup>214</sup> While Arizona’s revision may take away the excuse for boorish behavior, it does not address the zealous advocacy problem described in this Article. Fiduciary duty can be the new governing principle that fills the void.

Finally, terminology is important. Some zeal proponents argue that supplanting “zealous advocacy” is merely a linguistic ploy.<sup>215</sup> Others attempt to attribute complex traits to the phrase.<sup>216</sup> Professor Anita Bernstein argues that attorney misconduct “may look zealous,” but if it harms the client it is improper because it violates the attorney’s fiduciary duty to the client.<sup>217</sup> Of course, I agree with Professor Bernstein that such conduct violates fiduciary duties, but I believe the simplistic zealous advocacy mantra bears a measure of the blame. Significantly, even if Professor Bernstein and I agree to disagree on the terminology, we have identified the same problem: attorneys are not living up to their fiduciary duties when they harm clients. The solution to either articulation of the problem is the same—the profession must provide lawyers with a better understanding of how to competently, loyally represent their clients.

### C. *Challenges of Making Fiduciary Duty a Touchstone for Professional Decisionmaking*

A major challenge of my suggested mantra shift is that “fiduciary duty” is not as easily accessible as “zealous advocacy.” Zealous advocacy’s great advantage is that it is simple.<sup>218</sup> It is easy to remember

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214. See Dodge, *supra* note 213, at 19-20 (describing Arizona’s elimination of all references to zeal and its new Rules 31, 41, and 53 which define unprofessional conduct, require attorneys to avoid unprofessional conduct, and make it a disciplinary offense to engage in unprofessional conduct).

215. When one commentator suggested removing the term “zeal” from the rules, Professor William Hodes responded that this would be a “linguistic ploy” and argued that such a move would be no more effective than attempting “to reduce the number of serious crimes in society by redesignating all felonies as misdemeanors.” W. William Hodes, *We Need More Zealousness, Not Less—But Within the Bounds of Law*, RES GESTAE, Mar. 2001, at 46, 46.

216. See Bernstein, *supra* note 19, at 1178 (arguing that a zealous advocacy does not require the President’s attorney to write a memo that would support the torture of enemy combatants, but that a true zealous advocate might take any number of courses including providing unwelcome advice); Stevens, *supra* note 14, at 27-28 (Arguing that zeal has two elements: “First, there must be partisanship . . . . Second, there must be a degree of independence, which allows for dispassionate judgment to prevent losing sight of legal and ethical boundaries as well as the risks of contemplated actions.”).

217. Bernstein, *supra* note 19, at 1172 (“But zeal is not the culprit in these misdeeds. As fiduciary, the lawyer has a duty not to enrich herself at her client’s expense. [Attorney conduct] may look zealous but is really just unethical if [it] hurts her client while making her richer.”).

218. Zacharias, *Lying*, *supra* note 66, at 505-06 (“If a lawyer’s ethic of zeal requires ‘entire devotion to the client’—meaning that all considerations must give way before this ‘entire devotion’—then the lawyer does not need to balance, accommodate, or choose among competing values. *Nor does the lawyer need to contextualize; he can follow the same exclusive principle in giving advice, negotiating, and engaging in cooperative transactions.*”)



and implement: if in doubt, do whatever the client asks unless the course is clearly prohibited by law. Embracing a more thoughtful, less easily accessible and understandable approach, may be a challenge for lawyers.

Adopting professional conduct rules that flesh out the lawyer's fiduciary duties would be critical to practitioners developing a common understanding of the new touchstone and replacing the zealous advocacy mantra.<sup>219</sup> The profession's governing rules should explain what it means to be a fiduciary. This explanation should be conveyed in broad rules that describe fiduciary duty generally and in narrow rules that explain how lawyers should act to uphold their fiduciary duties when advising clients. My proposed revisions are addressed in the next Part.<sup>220</sup>

Another challenge may arise because of the differing views on when lawyers can be sued for breach of fiduciary duty. Some jurisdictions do not allow a "breach of fiduciary duty" cause of action for unintentional attorney misconduct,<sup>221</sup> while others do.<sup>222</sup> Experts in this area of the law do not agree on when the cause of action for breach of fiduciary duty should be available.<sup>223</sup> Adopting fiduciary duty as a

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The lawyer's life is not that simple, however, and the legal ethics standards, including judicial regulation, have never treated it as simple." (emphasis added).

219. See *supra* note 190 and accompanying text (arguing that educating lawyers through professional conduct rules may contribute to changing the zealous advocacy bias).

220. See *infra* Part V.

221. See, e.g., *Klemme v. Best*, 941 S.W.2d 493, 496 (Mo. 1997) (en banc) (holding that in order to state a claim for breach of fiduciary duty against a lawyer, plaintiff must assert that no other recognized tort encompasses the facts alleged); *Murphy v. Gruber*, 241 S.W.3d 689, 693 (Tex. Ct. App. 2007) ("Texas courts do not allow plaintiffs to convert what are really negligence claims into claims for . . . breach of fiduciary duty . . .").

222. See Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 690 (2006) (asserting that the majority of jurisdictions and the Restatement contemplate two paths to liability for a lawyer's nonintentional act: professional negligence and breach of fiduciary duty). It should be noted that the Restatement allows a claim for breach of fiduciary duty only if the alleged conduct includes a conflict of interest, breach of confidentiality, or a situation in which the lawyer took undue advantage of the client. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (2000) (describing a breach of fiduciary duty claim and stating that the breach must be of a duty listed in § 16(3)). While such breaches could be nonintentional, in most situations the conduct encompassed in § 49 would be intentional misconduct. Accordingly, I would assert that under the Restatement ordinary negligence usually cannot give rise to a claim for breach of fiduciary duty. See also *supra* note 193 (text of cited Restatement provisions).

223. See Roy Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235, 249-50 (1994) (distinguishing breach of fiduciary duty from professional negligence by asserting that negligence is based on breach of the standard of care while breach of fiduciary duty is based on breach of the standard of conduct); Benjamin P. Cooper, *The Lawyer's Duty to Inform His Client of His Own Malpractice*, 61 BAYLOR L. REV. 174, 209-10 (2009) (asserting that plaintiffs, courts, and commentators frequently lump claims for professional negligence and breach of fiduciary duty into the category of "legal malpractice," but that it may be best to conceptualize two separate causes of action: breach of fiduciary duty reserved for breaches of the duty of loyalty and professional negligence for breaches of the

mantra may thus raise various concerns. Some may be concerned that attorneys would define fiduciary duty differently from jurisdiction to jurisdiction. Others may fear that adopting the mantra would expand attorney liability—if the professional conduct rules describe the duty of care as a fiduciary duty, then courts will allow clients to sue for breach of fiduciary duty even when the attorney acted only negligently.<sup>224</sup> Still others may be worried that if attorney conduct rules are drafted with the explicit goal of describing a lawyer's fiduciary duty, it will be difficult for courts to deny a civil cause of action based on violation of those attorney conduct rules.<sup>225</sup>

These concerns should not derail an effort to reframe an attorney's professional obligations. Even those who advocate a narrow cause of action for breach of fiduciary duty agree that the label "fiduciary duty" is a useful way for lawyers to conceptualize duties to the client.<sup>226</sup> Adoption of a broad definition of fiduciary duty in professional conduct rules does not mandate a change in the substantive law of jurisdictions with a narrow fiduciary duty cause of action.<sup>227</sup> Further, even if courts were to take a broader view of an advisor's duty of care because of a change in the professional conduct rules, the defenses to such cause of action—such as the doctrine of *in pari delicto*—would still be applicable.<sup>228</sup> Finally, professional conduct rules and other sources of law explicitly provide that there is not a cause of action for violating a professional conduct rule.<sup>229</sup> Change in this area of the law

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duty of care); Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137, 1140 (1999) (arguing that attorneys generally should not be liable for breach of fiduciary duty unless the attorney commits a criminal offense, commits fraud on the client, or causes actual harm to the client through breach of fiduciary duty); see also Wolfram, *supra* note 222, at 692 (asserting that "most fiduciary breach claims are problematic precisely because of their almost complete and useless overlap with available claims of negligence").

224. See Wolfram, *supra* note 222, at 729-30 (arguing that if negligence is called "fiduciary duty" it may be easier to prove the claim because of broad, ethical-sounding language that has been used by courts to describe the duties of a fiduciary).

225. Professor Bruce Green explains that courts decline to equate a disciplinary violation with a breach of a lawyer's fiduciary duty because attorney conduct rules were not intended to be strongly enforced at the margins, thus disciplinary violations are not necessarily violations of the duty of care. See Green, *Criminal Regulation*, *supra* note 30, at 337.

226. Wolfram, *supra* note 222, at 693 (noting that nothing in his proposed reworking of fiduciary breach doctrine should detract from the "heuristic value" of the term fiduciary and urging "that the theory of lawyer-as-fiduciary be generally recognized as a key way of describing the entire lawyer-client relationship and the duties that flow from it, even if it would not be relied upon regularly as the standard by which to measure lawyers' liability").

227. See MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 20 (2009) (no cause of action for violation of a professional conduct rule); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(2) (2000) (same). Whether the cause of action *should* be narrow is a question that should be examined more fully by courts, the Bar, and the academy.

228. See *supra* note 146 and accompanying text. Whether such defenses *should* be applicable is another issue that should be examined more fully by courts, the Bar, and the academy.

229. See *supra* note 227.

certainly should be considered and debated in light of issues raised in this Article and other pertinent factors, but does not naturally follow from a revision of the professional conduct rules.

#### V. A MODEST PROPOSAL FOR INCORPORATING A FIDUCIARY DUTY-FOCUSED VISION OF ADVISING INTO PROFESSIONAL CONDUCT RULES

This Part suggests specific amendments to the Model Rules of Professional Conduct that would emphasize fiduciary duty as the governing guidepost for attorneys. In my proposal, fiduciary duty is introduced in two ways. First, it is explained in the preamble of the Model Rules as a touchstone for all lawyers and as a gap filler when other rules do not provide guidance. Second, it is the basis of the direction provided in several proposed rules applicable to the lawyer-advisor. Those rules do not explicitly reference fiduciary duty, but they provide specific guidance regarding: (1) how a fiduciary should advise a client about liability-creating conduct and (2) how an organization's attorney should protect the organization from liability-creating conduct.

Also consistent with fiduciary duty, my proposed rules introduce lawyers to a new approach to the law (or "the bounds of the law"). My revised preamble and professional conduct rules describe the lawyer's role as serving the client by explaining when conduct may result in legal liability. This approach is consistent with fiduciary duty and it appeals to lawyers' natural instincts to act loyally to—rather than antagonistically to—the client.<sup>230</sup> The selection of the phrase legal liability over narrower terms (such as "law" in the current Model Rule 2.1 or "violation of law" in current Model Rule 1.13) also responds to the technical-compliance focus of some lawyers.<sup>231</sup> Professionalizing lawyers to believe it is their role to educate clients about possible liability could result in a real change in the way lawyers approach their representations.<sup>232</sup>

Finally, the proposed rules are aimed at clarifying terminology and rule structure so that lawyers will not be tempted to fall back on zealous advocacy in their interpretations of the rules.<sup>233</sup> I look at the intent behind complex rules like Model Rule 1.13 and attempt to restate that intent in terms that are more readily understood and in a reorganized format that is more accessible.

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230. See *supra* notes 20-22 and accompanying text.

231. See *supra* notes 38-46, 183 and accompanying text.

232. See *supra* note 190 and accompanying text.

233. See *supra* notes 176-85 and accompanying text (explaining zealous advocacy and the current Model Rule 1.13).

A. *Preamble to the Model Rules of Professional Conduct: Fiduciary Duty as Touchstone*

The preamble should introduce all attorneys (litigators and nonlitigators alike) to fiduciary duty as a framework for fulfilling their professional obligations. Irrespective of my proposal, attorneys are fiduciaries. As such, it is surprising that fiduciary duty is not referenced in the current preamble (and is currently mentioned elsewhere only in the comments to the rule governing safekeeping client property).<sup>234</sup> I propose that the preamble should be revised first to define fiduciary duty and then to explain its usefulness as a touchstone and guide for lawyers.

Addressing the need for a definition, Proposed Preamble Paragraph 2A would explain that lawyers are fiduciaries and provide a basic outline of fiduciary duties.<sup>235</sup> The paragraph would describe the duty of care as requiring “the lawyer to act as a diligent, competent attorney would under the circumstances” and the duty of loyalty as requiring “the lawyer [to] act in the interest of the client, except when these Rules or other sources of law permit or require otherwise.”<sup>236</sup>

Currently Preamble Paragraph 9 addresses zealous advocacy as a gap filler. The paragraph provides that the lawyer should resolve difficult issues of professional discretion by relying on other principles, including “the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law” while acting civilly and professionally.<sup>237</sup> My revision to this paragraph provides:

When these Rules and other sources of law do not provide adequate direction or leave matters to lawyers’ discretion, lawyers should be guided by the fiduciary duties of loyalty and care owed to their clients. These duties are consistent with counsel acting in a professional, courteous, and civil manner toward others.<sup>238</sup>

Removing references to “zeal” in this paragraph does not undercut the use of “zealous advocacy” elsewhere in the preamble to describe the litigator’s role.

Finally, the current Preamble Paragraph 2 describes the various roles that lawyers play. Here, the litigator is described as a zealous

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234. MODEL RULES OF PROF’L CONDUCT pmb. (2009); MODEL RULES OF PROF’L CONDUCT R. 1.15 cmt. 1 (2009) (“A lawyer should hold property of others with the care required of a professional fiduciary.”).

235. *Infra* Appendix A, Proposed Amendments to Preamble to the Model Rules of Professional Conduct: A Lawyer’s Responsibilities ¶ 2a [hereinafter Appendix A].

236. *Id.* This definition could also be added to the Terminology section of the Model Rules. MODEL RULES OF PROF’L CONDUCT R. 1.0 (2009).

237. MODEL RULES OF PROF’L CONDUCT pmb. ¶ 9.

238. *Infra* Appendix A ¶ 9.

advocate.<sup>239</sup> That language would remain unchanged in my proposal.<sup>240</sup> The advisor's duties are addressed next. This sentence could be revised to introduce the obligation of advisors to explain the prospect of liability. I would revise the sentence that currently reads: "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications"<sup>241</sup> to add the following phrase, "including the risk that the client's contemplated conduct may result in liability for the client."<sup>242</sup>

With this context provided in the preamble, the rules would discuss the specifics of exercising fiduciary duties in the interest of the client.

### B. Model Rule 1.13, Organization as Client

As discussed in Part IV, Model Rule 1.13 as currently written is intended to guide attorneys in fulfilling fiduciary duties to organizational clients. One of its shortcomings, though, is its complexity in the number of topics covered.<sup>243</sup> Currently, Model Rule 1.13 covers: (a) client identity: the client is the organization and not its constituents; (b) up the ladder reporting of constituent misconduct; (c) loyal disclosure of confidences to protect the organization from constituent misconduct when up the ladder reporting fails; (d) the inapplicability of the loyal disclosure rule in an investigation or in litigation; (e) attorney discharge for conduct required or permitted by the rule; (f) the need for company constituents to be informed of client identity; and (g) the lawyer's ability to represent the organization and its constituents to the extent doing so does not create a conflict.<sup>244</sup>

It is apparent that the rule covers two broad topics. The first topic is client identity. In sections (a), (f), and (g), the rule explains that the attorney represents the organization and not the constituents, except when a dual representation is specifically contemplated and does not create a conflict. The second topic is the steps an attorney should take to address constituent conduct that may create liability for the organization. This topic is addressed in sections (b), (c), (d), and (e).

The first subject has general application to all attorneys (litigators and nonlitigators) and should remain in Model Rule 1.13. The result would be a shorter rule that explains the issues of organizational client identity in three subsections. My proposed revision of Model Rule 1.13, dealing only with client identity issues applicable to all attor-

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239. MODEL RULES OF PROF'L CONDUCT pmb. ¶ 2.

240. *Infra* Appendix A ¶ 2.

241. MODEL RULES OF PROF'L CONDUCT pmb. ¶ 2.

242. *Infra* Appendix A ¶ 2.

243. *See supra* note 180 and accompanying text.

244. MODEL RULES OF PROF'L CONDUCT R. 1.13(a)-(g) (2009).

neys, can be found at Appendix B to this Article.<sup>245</sup> The second subject has a specific application to lawyer-advisors and should thus be moved to Article 2 of the Model Rules (the “Counselor” rules) discussed below.

### C. Counselor Model Rules

Appendix C reflects how the “Counselor Rules” (currently Model Rules 2.1 through 2.4) could be reconfigured and rewritten to explain how an advisor should fulfill fiduciary duties to the client. This organization is more sensible than the current configuration, because it puts all of the advisor rules in one location.<sup>246</sup> This Part discusses revisions to Model Rule 2.1 and the proposed addition of Model Rule 2.2 (a revision of the current Model Rule 1.13(b)), Model Rule 2.3 (a revision of the current Model Rule 1.13(c) and (d)), and Model Rule 2.4 (a revision of the current Model Rule 1.13(e)).<sup>247</sup>

#### 1. Proposed Model Rule 2.1, Advisor

Currently, Model Rule 2.1 briefly states a single mandate: “[A] lawyer shall exercise independent professional judgment and render candid advice.”<sup>248</sup> The rule does not suggest the aim of the advice. It only provides that the lawyer need not limit the advice to the law, but may also discuss “moral, economic, social, [or] political factors.”<sup>249</sup>

The rule should be replaced with language that better describes the attorney-advisor’s obligation to competently advise clients about the prospect of liability. I propose the following:

Lawyers should provide candid advice that will allow clients to make educated, fully informed decisions. A lawyer should advise a client not only about how the client’s objectives can be achieved, but also if the client’s contemplated conduct may create the risk of legal liability for the client. The lawyer should provide the client with a full understanding of applicable sources of law (not only statutes, rules, and regulations, but also case law) that may be the basis of legal liability. Further, it is the lawyer’s province to discuss issues of intent, good faith, and morality, particularly when such issues may have a bearing on legal liability, such as in the areas of crime, fraud, and fiduciary duty.<sup>250</sup>

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245. See *infra* Appendix B, Proposed Amendments to Model Rule 1.13, Organization as Client [hereinafter Appendix B].

246. See Zacharias, *Images*, *supra* note 162, at 100 (concluding that lawyer regulation should be “contextualized” to make explicit the rules’ conception of the lawyers’ practice or other “images” of the lawyer).

247. See *infra* Appendix C.

248. MODEL RULES OF PROF’L CONDUCT R. 2.1 (2009).

249. *Id.*

250. *Infra* Appendix C, Proposed Amendment to Model Rule 2.1, Advisor [hereinafter Appendix C, Proposed R. 2.1].

The chosen language is directed at clarifying how competent lawyers advise their clients. The rule gives specific examples of bodies of law that should be considered by the advisor in determining the prospect of legal liability. It also explains the relevancy of morality to legal liability. Further, the rule explicitly provides that the purpose of the lawyer's advice is to educate and inform the client.

*2. Proposed Model Rule 2.2, Up the Ladder Reporting by Advisor to Organizational Client*

Having addressed the advisor's role in general terms, the next rules address the additional issues involved when the lawyer represents an organizational client. This is where I would transplant subsections (b) through (e) of the current Model Rule 1.13.

Current Model Rule 1.13(b) addresses when a lawyer should take concerns of constituent misconduct up the ladder to higher authorities in the organization.<sup>251</sup> As currently written, the rule is unnecessarily complex because it attempts to address every possible contingency. The rule envisions conduct that is planned or ongoing, as well as conduct that is an action or a refusal to act. The rule also attempts to describe every possible relationship between the organization and the wrongdoer: he or she may be an officer, employee, or other person associated with the organization. The conduct in question may be a breach of duty to the company or misconduct that will be attributed to the organization. Further, section (b) contains an ambiguous phrase from prior versions of the rule (before up the ladder reporting was provided for in the text of the rule): the lawyer must act "in the best interest of the organization."<sup>252</sup> Section (b) also provides that this standard usually requires the lawyer to report the conduct to higher authorities.<sup>253</sup> Further, the rule contains a confusing double negative that allows the lawyer to not report the misconduct and provides several opportunities for lawyers to consider what they "know[]" and what is reasonable and "likely."<sup>254</sup>

But with the understanding that it is the lawyer's duty to protect the organizational client from legal liability caused by an agent's conduct,<sup>255</sup> the rule could be distilled to the following:

If a lawyer for an organization knows that an agent of the organization is engaged in or planning conduct that may result in sub-

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251. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2009).

252. *Id.*

253. *Id.*

254. *Id.* ("Unless the lawyer reasonably believes that *it is not necessary* in the best interest of the organization to do so, *the lawyer shall* refer the matter to higher authority . . ." (emphasis added)).

255. See *supra* notes 200-202 and accompanying text (describing organizational attorneys' fiduciary duty).

stantial legal liability (such as the agent's liability to the organization or the organization's liability to a third party), then the lawyer shall advise against that conduct, including taking concerns to higher authorities within the organization until either: (1) corrective action is taken; or (2) the lawyer has taken the issue to the highest authority in the organization. In deciding if agent conduct "may result in substantial liability," the lawyer should assume that the conduct will be discovered (not that it will remain hidden) and that a remedy will be pursued (not that it will be ignored by an injured party). In fulfilling these duties, the lawyer's goal should be to protect the organization from liability or other harm.<sup>256</sup>

This Proposed Model Rule 2.2 removes the confusing language and tells lawyers to report conduct that may result in substantial liability to higher authorities in the company. The proposal also addresses a common attorney misconception about the old rule: that it required attorneys to weigh the possibility that the client would get away with the misconduct.<sup>257</sup> To address this issue, the proposal explicitly provides that the attorney should assume the conduct will be discovered and that a remedy will be pursued.<sup>258</sup> Finally, the proposed language states the attorney's goal by undertaking these steps is to protect the organization. This is intended to reorient lawyers who may be inclined to read the rule narrowly, believing that it is contrary to the client's interests.<sup>259</sup>

### *3. Proposed Model Rule 2.3, Loyal Disclosure of Information to Protect an Organizational Client from Agent's Conduct*

The theme of the current Model Rule 1.13(c) is loyal disclosure. Unlike adverse disclosure, rules that allow the lawyer to disclose client confidences to protect a third party,<sup>260</sup> this rule allows the lawyer to protect the organizational client itself. The current rule provides that if, despite up the ladder reporting, the highest authority does not address conduct that is "clearly a violation of law," then the lawyer may reveal information "but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization."<sup>261</sup> Though this complex language was intended to guide attorneys in protecting their organizational clients from liabil-

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256. *Infra* Appendix C, Proposed Model Rule 2.2, Up the Ladder Reporting by Advisor to Organizational Client [hereinafter Appendix C, Proposed R. 2.2].

257. *See supra* note 182 and accompanying text.

258. *See* Schaefer, *supra* note 171, at 440-41 (explaining that it is consistent with a lawyer's fiduciary duty to assume that misconduct will be revealed).

259. *See supra* notes 164-67 and accompanying text.

260. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2009).

261. *Id.* at R. 1.13(c).



ity when the company's highest authority refused to address the problem,<sup>262</sup> zealous advocates have resisted that interpretation.<sup>263</sup>

I propose the following revision to address these problems:

If, despite the lawyer's efforts in accordance with Rule 2.2, the organization's highest authority insists upon or fails or refuses to address the matter, then the lawyer should reveal information to a third party (such as an owner not involved in the management of the organization) if the lawyer reasonably believes doing so will protect the organization, such as by preventing the agent's conduct or by limiting the extent of liability for ongoing conduct that might be stopped through the disclosure.<sup>264</sup>

The Proposed Model Rule 2.3 clarifies the obligations of a fiduciary. When the organizational client's agents are engaged in misconduct that the company's highest authority fails to address, the company lawyer should disclose information to a third party if doing so will protect the client.<sup>265</sup> The rule addresses attorney skepticism that there is no one to whom information could be disclosed to protect (rather than harm) the client,<sup>266</sup> by explicitly noting that disclosure to a nonmanagement owner might be an appropriate way to protect the client.<sup>267</sup> The rule also responds to concerns that it would not benefit the entity to disclose misconduct,<sup>268</sup> by noting that disclosure that prevents future misconduct benefits the client by limiting its liability.<sup>269</sup> The result is a rule that clarifies a lawyer's obligation to take action when doing so will protect his or her organizational clients.

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262. See *supra* notes 171-73 and accompanying text.

263. See *supra* notes 176-79 and accompanying text.

264. See *infra* Appendix C, Proposed Model Rule 2.3(a). The remainder of the proposed rule is the current Model Rule 1.13(d), which explains that the rule is not applicable to a nonadvising context, including in the course of an investigation and when defending a claim against the client. See *infra* Appendix C, Proposed Model Rule 2.3(b). The current Model Rule 1.13(e) is revised only to make reference to the provisions that are newly renumbered as Model Rules 2.2 and 2.3; it would become the new Model Rule 2.4. See *infra* Appendix C, Proposed Model Rule 2.4, Lawyer's Duty to Notify Organization of Discharge or Withdrawal.

265. Even though the current Model Rule 1.13(c) provides that the lawyer "may" disclose, when the rule is reduced to its essence, it becomes apparent that the rule must *require* disclosure. To keep the agents' confidences in this situation and remain silent—when the lawyer has determined that disclosure would protect the client from substantial liability—would be disloyal to the true client. See *supra* notes 201-202 and accompanying text (describing the entity's lawyer's obligations to protect the client from agent misconduct).

266. See *supra* note 182 and accompanying text.

267. See Schaefer, *supra* note 171, at 461-64 (explaining that disclosure to an owner could serve to protect a client under Model Rule 1.13(c)).

268. See *supra* note 182 and accompanying text.

269. See Schaefer, *supra* note 171, at 436-37 (explaining that disclosure that prevents future misconduct is in the client's interest).

## VI. CONCLUSION

This Article opened with a quote that lawyers want direction about how to act, and when they do not receive it, they are guided by “unswerving zeal and loyalty to clients.”<sup>270</sup> The cases considered in this Article reflect that in the absence of guidance, business lawyers are acting with zeal, but that zeal is *not* loyal to their clients. Zealous business lawyers are encouraging the liability-creating conduct they should be advising against. We should expect more from lawyers. *Clients* should expect more from their own lawyers.

It is time for the legal profession to articulate meaningful guidance for nonlitigators. Lawyers are fiduciaries, so it is logical that this fiduciary obligation should be lawyers’ touchstone. Rather than zealously advocating every client scheme, attorneys should be guided by their obligations of competence and loyalty to their clients.

Professional conduct rules should introduce all lawyers to fiduciary duty as a new mantra for decisionmaking. Further, fiduciary duty should guide the revision of rules that govern the conduct of legal advisors. This article demonstrates that a focus on fiduciary duty can transform rules that are currently meaningless (Model Rule 2.1) or overly complex and confusing (Model Rule 1.13). In their new form, my proposed rules give real direction to nonlitigators: Lawyers should advise business clients about the prospect of legal liability and protect entity clients from agents who risk substantial legal liability. My proposed rules would require more than zealous advocacy, all for the benefit of the business advisor’s clients.

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270. Gordon, *Citizen Lawyer*, *supra* note 1 and accompanying text.

## APPENDIX A

**Proposed Amendments to Preamble to the Model Rules of Professional Conduct: A Lawyer's Responsibilities.**

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications, including the risk that the client's contemplated conduct may result in liability for the client. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[2A] In performing all of these functions, the lawyer should be mindful of the lawyer's obligations as a fiduciary. As a fiduciary, the lawyer owes the client duties of care and loyalty. The duty of care requires the lawyer to act as a diligent, competent attorney would under the circumstances. The duty of loyalty requires the lawyer act in the interest of the client, except when these Rules or other sources of law permit or require otherwise.

**Sections [3] through [8] would remain as written.**

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. ~~Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system. When these Rules and other sources of law do not provide adequate direction or leave matters to lawyers' discretion, lawyers should be guided by the fiduciary duties of loyalty and care owed to their clients. These duties are consistent with counsel acting in a professional, courteous, and civil manner toward others.~~ **Sections [10]-[13] would remain as written**

## APPENDIX B

**Proposed Amendments to Model Rule 1.13, Organization as Client**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

**Text of current sections (b) through (e) has been moved (and then revised) within subsections of Rule 2. Remaining sections have been reorganized as shown, but text has not been changed.**

~~(b)~~ (b) In dealing with an organization's organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

~~(c)~~ (c) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

## APPENDIX C

**Proposed Amendment to Model Rule 2.1, Advisor**

~~In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.~~

The lawyer should provide candid advice that will allow clients to make educated, fully informed decisions. A lawyer should advise a client not only about how the client's objectives can be achieved, but also if the client's contemplated conduct may create the risk of legal liability for the client. The lawyer should provide the client with a full understanding of applicable sources of law (not only statutes, rules, and regulations, but also case law) that may be the basis of legal liability. Further, it is the lawyer's province to discuss issues of intent, good faith, and morality, particularly when such issues may have a bearing on legal liability, such as in the areas of crime, fraud, and fiduciary duty.

**Proposed Model Rule 2.2, Up the Ladder Reporting by Advisor to Organizational Client**

~~Rule 1.13 (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, an agent of the organization is engaged in or planning conduct that may result in substantial legal liability (such as the agent's liability to the organization or the organization's liability to a third party), then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law. advise against that conduct, including taking concerns to higher authorities within the organization until either: (1) corrective action is taken; or (2) the lawyer has taken the issue to the highest authority in the organization. In deciding if agent conduct "may result in substantial legal liability" the lawyer should assume that the conduct will be discovered (not that it will remain hidden) and that a remedy will be pursued (not that it will be ignored by an injured party). In fulfilling these duties, the lawyer's goal should be to protect the organization from liability or other harm.~~

### **Proposed Model Rule 2.3, Loyal Disclosure of Information to Protect an Organizational Client from Agent's Conduct**

~~Rule 1.13 (c) Except as provided in paragraph (d), if (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.~~

(a) If, despite the lawyer's efforts in accordance with Rule 2.2, the organization's highest authority insists upon or fails or refuses to address the matter, then the lawyer should reveal information to a third party (such as an owner not involved in the management of the organization) if the lawyer reasonably believes doing so will protect the organization, such as by preventing the agent's conduct or by limiting the extent of liability for ongoing conduct that might be stopped through the disclosure.

~~(b) Subsection (a) (Rule 1.13(d) Paragraph (c)) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.~~

### **Proposed Model Rule 2.4, Lawyer's Duty to Notify Organization of Discharge or Withdrawal**

~~1.13 (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), Rules 2.2 or 2.3 or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, Rules 2.3 or 2.4 shall proceed as the lawyer reasonably believes necessary to assure that the inform the organization's highest authority is informed of the lawyer's discharge or withdrawal.~~

**Currently, there is not a Model Rule 2.2.**

**Current Model Rule 2.3 (Evaluation for Use by Third Persons) would be renumbered as Model Rule 2.5.**

**Current Model Rule 2.4 (Lawyer Serving as Third-Party Neutral) would be renumbered as Model Rule 2.6.**