

# Fordham Law Review

---

Volume 67 | Issue 2

Article 4

---

1998

## The Lawyer as Agent

Deborah A. DeMott

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Deborah A. DeMott, *The Lawyer as Agent*, 67 Fordham L. Rev. 301 (1998).

Available at: <https://ir.lawnet.fordham.edu/flr/vol67/iss2/4>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## The Lawyer as Agent

### Cover Page Footnote

Professor of Law, Duke University School of Law. For their thoughtful comments on an earlier draft, I am grateful to Paul D. Carrington, James D. Cox, John Leubsdorf, and Thomas B. Metzloff. In November 1995, I became the Reporter for the Restatement (Third) of Agency, but of course I do not represent the American Law Institute as the author of this essay.

# THE LAWYER AS AGENT

*Deborah A. DeMott\**

## INTRODUCTION

**T**HE law of agency provides the foundational structure for many of the legal consequences that follow from the relationship between a lawyer and a client, as well as the relationship between an individual lawyer and a law firm. Definitional precision in the law aside, the lawyer-client relationship is a commonsensical illustration of agency. A lawyer acts on behalf of the client, representing the client, with consequences that bind the client. Lawyers act as clients' agents in transactional settings as well as in litigation. Moreover, a lawyer who is a member of a law firm acts as an agent of the firm in firm-related activity, as does an associate employed by a law firm and in-house counsel for a client organization. It is unsurprising, then, that the legal consequences of these relationships parallel the legal consequences of agency generally, even when they are not identical. In any agency relationship, for example, the agent's loyalty to the interests of the principal is a dominant concern, as is the loyalty of a lawyer to the client.

Despite its foundational significance, the law of agency does not by itself capture all of the legal consequences of relationships between lawyers and clients and between lawyers and others to whom the lawyer owes duties. In this context, agency is roughly comparable to the structural steel members that support a building and define its size and basic shape but do not govern how the building functions and looks. Lawyers are agents, but lawyers perform functions that distinguish them from most other agents. That a lawyer is an agent is sometimes irrelevant to the legal consequences of what the lawyer has done or has failed to do, making an unswerving focus on agency misleading. It is not surprising, then, that courts on occasion differentiate among agency's consequences, rather than according agency a monolithic or inexorable set of consequences.

Lawyers are more than their clients' agents. Lawyers are officers of the court, thus subjecting themselves to the court's supervision and to duties geared to protect the vigor, fairness, and integrity of processes of litigation. Furthermore, as members of a profession, lawyers are subject to duties not neatly captured by the consequences of agency.

---

\* Professor of Law, Duke University School of Law. For their thoughtful comments on an earlier draft, I am grateful to Paul D. Carrington, James D. Cox, John Leubsdorf, and Thomas B. Metzloff. In November 1995, I became the Reporter for the Restatement (Third) of Agency, but of course I do not represent the American Law Institute as the author of this essay.

Although this essay is far from comprehensive, its objective is to illustrate both the significance of agency and its limitations. A helpful starting point is to clarify the content and legal consequences of agency. Courts and commentators at times use the language of agency but do not fully address the consequences that agency concepts may carry. Moreover, the widespread use of agency terminology in academic disciplines like economics, philosophy, and literary studies does not necessarily parallel the content of the common law of agency. I undertake first to survey the definition and basic legal consequences of agency to illustrate its foundational significance as applied to lawyers. I turn next to a few illustrations of divergence between the general law of agency and the duties of lawyers. I conclude with an analysis of the circumstances under which a lawyer might be liable in connection with fraud perpetrated by the lawyer's client. This illustration brings to bear principles of agency law to test their applicability and meaning as applied to relationships that involve lawyers.

## I. DEFINITION AND LEGAL CONSEQUENCES

### A. *Agency Defined*

It is important to distinguish between the elements that must be present in a relationship to characterize it as one of agency and the legal consequences that follow from this characterization. Confusion and circularity result if analysis proceeds in the opposite direction.<sup>1</sup> As defined by the Restatement (Second) of Agency, "[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."<sup>2</sup> Thus, the defining elements of the relationship are mutual manifestation of consent, the agent's undertaking to act on behalf of the principal,<sup>3</sup> and the princi-

---

1. In contrast, it is not helpful to examine whether a specific legal consequence of agency is present in a particular relationship to determine whether it is a relationship of agency. The principal consequence of agency is that the agent has power "to alter the legal relations between the principal and third persons and between the principal and himself." Restatement (Second) of Agency § 12 (1958). It is circular to argue that a given actor is not an agent because the actor lacks such a power. For a further discussion of this point, see *infra* notes 89-90 and accompanying text.

2. Restatement (Second) of Agency § 1 (1958). The relationship between a lawyer and a client can also arise from circumstances not encompassed by this definition. See Restatement (Third) of the Law Governing Lawyers § 26 (Proposed Final Draft No. 1, 1996) (stating that lawyer-client relationships may be created by estoppel or by court appointment).

3. It is arguable that the "fiduciary" label in the Restatement definition is not a definitional element but instead connotes legal consequences. "Fiduciary" may have work to do in the definition to the extent that it helps to distinguish agency from other situations in which one person acts on behalf of another and is subject to the other's control. For example, a supervisory employee has immediate control over lower-level employees, who work "for" the supervisor. The lower-level employees, though, do not owe a duty of loyalty to their supervisor. These employees, along with the supervisor, are co-employees and co-agents of their common employer. Thus the "fiduci-

pal's right to control the agent. The relationship between a lawyer and a client is generally assumed by courts<sup>4</sup> and commentators<sup>5</sup> to be an agency relationship and therefore a relationship in which these defining elements are present.

It is worth considering whether the third element—the principal's right to control the agent—reflects the reality of many relationships between lawyers and their clients. Many lawyers, especially in litigation settings, make decisions with significant consequences for the client without the client's knowledge or assent. In addition, many clients lack the expertise to supervise the lawyer's actions because the client will not understand their import and will be unable to detect errors made by the lawyer.<sup>6</sup>

An important starting point is the realization that the law of agency contains its own definition of control. The concept of control as defined by agency is not the same as a generalized capacity to monitor or the actual exercise of influence. In agency, "control" means prescribing on an ongoing basis what the agent shall or shall not do. Much in the common law of agency turns on the distinction between a right of control and the actual exercise of control. For example, a shareholder who owns all of the stock in a corporation, and thus has the power to elect all of the corporation's directors, is not simply by virtue of that fact a principal in an agency relationship with the corporation or with

---

ary" language may help narrow the meaning of other language in the definition. The language is also used in the long-established definition of a trust:

[A trust is] a fiduciary relationship with respect to property, arising as a result of a manifestation of an intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.

Restatement (Third) of Trusts § 2 (Tentative Draft No. 1, 1996).

4. See *Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962) (affirming the district court's dismissal of the action when petitioner's lawyer failed without reasonable excuse to appear for pretrial conference and noting that "[p]etitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent").

5. See Restatement (Second) of Agency § 14 cmt. b (1958) (characterizing lawyers as "recognized agents"); Restatement (Third) of the Law Governing Lawyers ch. 2, Introductory Note (Proposed Final Draft No. 1, 1996) (stating that the lawyer-client relationship is "from one point of view, derived from the law of agency," although the nature of the relationship warrants safeguards beyond those generally provided to principals); Stephen Gillers, *Regulation of Lawyers* 60 (5th ed. 1998) ("Lawyers are their clients' agents. The law of agency therefore applies to the client-lawyer relationship.").

6. Cf. William R. Mureiko, *The Agency Theory of the Attorney-Client Relationship: An Improper Justification for Holding Clients Responsible for Their Attorneys' Procedural Errors*, 1988 Duke L.J. 733, 734 (criticizing, in particular, *Link v. Wabash R.R.*, 370 U.S. 626 (1962), for the Court's use of the agency theory to hold clients responsible for the procedural errors of their attorneys). Mureiko distinguishes between procedural and substantive conduct and proposes that courts hold clients accountable for litigation-related sanctions only after pinpointing fault and evaluating relevant policy concerns. See *id.*

its directors, nor is an employee of the corporation an agent of the shareholder simply as a consequence of the shareholding. A right to exercise control is not the same as the capacity to exercise influence or dominance. Moreover, the shareholder has the right to exercise control only through the indirect mechanism of electing and removing the corporation's directors, or threatening removal if directors do not accede to the shareholder's wishes. Similarly, the fact that a right of control is not exercised does not mean that it does not exist. Indeed, under the common law of agency, a principal who has agreed not to exercise control nonetheless retains the power to do so. Unless the agent resigns, the agent has a duty to obey a reasonable instruction from the principal.<sup>7</sup>

In many agency relationships, the principal's expertise is inferior to that of the agent and the principal exercises control by selecting a particular agent, defining the scope and objectives of the agent's retention, and determining how to compensate the agent. Lawyer-client relationships thus are not unique. What calls the client's right of control into question is a conception of the role or status of the lawyer that accords a lawyer, once retained, with autonomous discretion over all important aspects of the matter, completely beyond client direction.<sup>8</sup> For starters, this conception is not an accurate depiction of the texture of many contemporary lawyers' relationships with their clients. An aggressive general counsel of a corporation, for example, may retain outside law firms and subsequently keep them on the tightest of leashes. In circumstances in which the conception is more accu-

---

7. See Restatement (Second) of Agency § 14 cmt. b (1958). The principal's assertion of directions breaches the principal's agreement with the agent. To recover in an action against the principal for breach of contract, the agent would need to show damage or succeed in characterizing the principal's conduct as a constructive discharge. In a nonagency relationship, in which no right of control is present, one party does not have the right to give interim instructions to the other. Thus, one who contracts to sell goods or services to a purchaser in a nonagency relationship may ignore interim directions from the purchaser and may sue the purchaser for breach of contract if the purchaser refuses to pay for goods or services that conform to the terms of the contract. In contrast, if an agent ignores interim instructions, then the principal has the power to terminate the agency. *See id.* § 118. The principal's termination may constitute a breach of contract if the parties' agreement assures the agent of continued employment. *See id.* § 118 cmt. c. The termination is privileged, however, and not a breach of contract if the agent commits a serious breach of the agent's duty of loyalty or of a duty of obedience. *See id.* § 409.

8. See Restatement (Third) of the Law Governing Lawyers ch. 2, Topic 3, Introductory Note (Proposed Final Draft No. 1, 1996) ("Traditionally, some lawyers considered that a client put affairs in the lawyer's hands, who then managed them as the lawyer thought would best advance the client's interests."). For a discussion of the traditional conception and empirical tests of its consequences, see Douglas E. Rosenthal, *Lawyer and Client: Who's In Charge?* (1977). If the lawyer's exercise of discretion is totally beyond client direction, then the lawyer's position is in effect comparable to that of a trustee and not an agent. Technically, of course, the lawyer is not a trustee unless the lawyer holds title to property for the client. *See* Restatement (Second) of Agency § 14B (1958).

rate—for example, the relationship between an illiterate and naive injured person and a lawyer representing the person on a contingent fee basis—control is exercised as an initial matter when the client retains the lawyer and defines the scope of the representation. Thereafter, the lawyer has a duty, grounded in both the law of agency and professional norms, to keep the client informed about the status of the matter and to consult with the client to best determine the course of action that serves the client's interests.<sup>9</sup> And some decisions—whether to settle and whether to appeal, how a criminal defendant should plead, and whether a criminal defendant should testify or waive jury trial—are the client's to make unless the client has authorized the lawyer to make the particular decision, regardless of any prior or general grant of authority from the client to the lawyer.<sup>10</sup>

To be sure, the client's right of control does not trump the consequences of the lawyer's position as an officer of the court and a professional subject to profession-defined norms and discipline. To some extent, lawyers are no different from other agents in this respect. Acting as an agent is not a privilege to commit torts, crimes, and other forms of misconduct. That is, all agents are subject to legal limits on acts that may be done rightfully on behalf of a principal. Particular types of agents are subject to legal and professional constraints specific to defined agency roles. Lawyers are comparable in this respect to securities brokers and real estate agents, agents who act on behalf of clients subject to significant regulatory and legal constraints.

What is open to serious dispute is the import of the duties a lawyer owes to the court, coupled with the consequences of the court's power to supervise and sanction lawyers. In contrast to regulatory regimes applicable to other types of agents, like securities brokers and real estate agents, in the litigation context the relationship between a lawyer and the court is direct and immediate. Concurrently with the lawyer's representation of the client, the lawyer owes duties directly to the court, such as the duty to disclose controlling authority directly adverse to the client's position that is not disclosed by opposing coun-

---

9. See Model Rules of Professional Conduct Rule 1.4 (1995); Restatement (Third) of the Law Governing Lawyers § 31 (Proposed Final Draft No. 1, 1996). The Restatement and the Model Rules diverge somewhat. Model Rule 1.2(a) seems to give the lawyer control over the "means" with which to fulfill the objectives of representation as determined by the client, subject to a duty to consult with the client. The Restatement narrows control over "means" by recognizing that the lawyer and the client may strike an agreement allocating authority. See Restatement (Third) of the Law Governing Lawyers § 32(1) & cmt. c.

10. See Restatement (Third) of the Law Governing Lawyers § 33. This essay does not address the questions that arise when an insurer designates a lawyer to represent its insured under a liability insurance policy obliging the insurer to indemnify and provide a defense to the insured. For a treatment of these relationships, in which it is often the insurer who controls the defense, selects and instructs counsel, and determines whether to settle, see Restatement (Third) of the Law Governing Lawyers § 215 cmt. f (Proposed Final Draft No. 2, 1998).

sel.<sup>11</sup> This dimension of the lawyer's position is beyond the explanatory framework that agency supplies. Moreover, although the lawyer owes duties to both the client and the court, the lawyer is not a dual agent. The lawyer is not the court's agent, even metaphorically, because the lawyer's acts do not bind the court. Additionally, much of the justification for the duties any agent owes the principal stems from the mutual consent of the parties to the relationship. In contrast, the duties the lawyer owes the court, as well as the court's inherent sanctioning powers, are grounded in the nature of judicial institutions.<sup>12</sup>

Furthermore, lawyers are distinctive as agents as a consequence of the robust professional culture and standards that define a lawyer's professional identity. Professional standards create duties that are not necessarily enforceable by the lawyer's client.<sup>13</sup> Additionally, the self-regulatory nature of the legal profession distinguishes lawyers from many other types of agents because it situates significant monitoring within institutions constituted by the profession, distinct from state-created regulatory bodies, and distinct from courts.<sup>14</sup> Like the lawyer's relationship to the court, the lawyer's membership in a self-regulating profession limits the reach of the lawyer's agency relationship with the client as the source of the client's rights and the lawyer's obligations. In any event, most of the time, the lawyer's responsibilities are harmonious regardless of their source.<sup>15</sup>

### B. *Legal Consequences of Agency*

Any agency relationship carries legal consequences that are inward-looking and applicable to the rights and duties as between the agent and the principal, as well as outward-looking consequences applicable to the agent's interactions with third parties. On both fronts, the consequences are limited to the scope of the relationship. Agency defines

---

11. See Model Rules of Professional Conduct Rule 3.3(a)(3).

12. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (discussing the nature of judicial institutions). The court's view of its responsibility may extend to the conduct of lawyers not admitted to practice before the court. See *Paramount Communications Inc. v. QVC Network, Inc.*, 637 A.2d 34, 52-57 (Del. 1993) (ordering that the misconduct at a deposition of a lawyer not admitted to the Delaware bar, and not admitted *pro hac vice*, would prohibit the lawyer's future appearance in a Delaware proceeding unless the lawyer voluntarily appeared before the court to explain his misconduct).

13. This disjunction is especially striking in a few jurisdictions that do not permit reference to professional rules in testimony in legal malpractice actions. See *Hizey v. Carpenter*, 830 P.2d 646 (Wash. 1992). Even such jurisdictions may be influenced by professional rules in determining what duties a lawyer owes a client.

14. Lawyers' professional duties include those geared to further the efficacy of professional self-regulation, such as the duty to report knowledge of another lawyer's professional misconduct that raises a substantial question as to the lawyer's "honesty, trustworthiness or fitness as a lawyer." Model Rules of Professional Conduct Rule 8.3(a). Even court action to impose discipline involves the decisions of lawyers—the judges—and the rules promulgated by the court are influenced by the American Bar Association's Model Rules.

15. See *id.* pmbi. ¶ 7.



the concept of scope through doctrines of actual authority, apparent authority, and ratification.

The inward-looking consequences of agency are, of course, to a great extent specified by agreement between the agent and the principal. But agency also carries consequences that go beyond express and implied-in-fact agreements. As a fiduciary, an agent owes duties of loyalty to the principal, which encompass more specific constraints on self-dealing, representation of adverse interests, competition, and the use of information acquired in connection with the agency. The agent's fiduciary position, moreover, obliges the agent to interpret the principal's instructions reasonably, in light of facts that the agent knows or should know at the time the agent acts, and consistently with the principal's interests and objectives made known to the agent. It will often be reasonable for the agent to ask the principal to clarify instructions that are ambiguous or incomplete. This aspect of the agent's fiduciary position facilitates the principal's exercise of the right to control the agent. An agency relationship also creates rights of indemnity that may be asserted by the agent against the principal, or the principal against the agent, in circumstances in which a loss is suffered as a consequence of the relationship.

On the other hand, the outward-looking consequences of agency are linked to the agent's agreement with the principal but range well beyond it. The outward-looking consequences of agency begin with imputation to the principal of knowledge the agent receives or notifications given to the agent by third parties. The agent's knowledge imputes to the principal when the agent acquires it while acting within the scope of the agent's actual authority—that is, when the agent reasonably understands the act to have been authorized by the principal. This is also true when the agent acts with apparent authority—that is, when a third party reasonably believes the principal has authorized the agent to act in a particular way. Significantly, imputation works only upward in an agency chain. That is, the principal's knowledge does not impute downward to the agent. Although the agent has a duty to impart knowledge to the principal, the principal does not owe a counterpart duty to the agent. As the active party in the relationship, the agent is obliged to act on the basis of knowledge that the agent has. The state of the agent's knowledge, not the principal's direct knowledge, shapes the agent's interactions with third parties, whether the agent is diligent and alert or slothful and lazy. The absence of downward imputation means that an agent may be the innocent dupe of a principal who is minded to defraud a third party because the principal's knowledge and culpable state of mind do not impute downward to the agent.<sup>16</sup>

---

16. See *Ago v. Begg, Inc.*, 705 F. Supp. 613, 617-18 (D.D.C. 1988) (concluding that the knowledge of a real estate purchaser is not imputed to the purchaser's agent).

Within the scope of the agent's actual and apparent authority, the agent's acts bind the principal. Negligent acts of the agent bind the principal, as does speech by an agent authorized or apparently authorized to speak on the principal's behalf. Disputes over the extent of lawyers' authority arise in connection with litigation as well as transactionally-oriented activity. Whether a lawyer had authority to bind the client to a settlement negotiated by the lawyer is often in dispute. Courts differentiate between authority to negotiate and authority to commit to or execute a settlement agreement. For example, that a lawyer has authority to negotiate a settlement does not create implied authority to execute the settlement on the client's behalf or to commit the client to do so.<sup>17</sup> A third party's belief that the lawyer had authority to commit or execute is not protected by the doctrine of apparent authority unless the belief is traceable to expressive conduct attributable to the client. Contemporary cases recognize the wide variety of ways in which a principal may make a manifestation to a third party regarding an agent's authority. Thus, direct statements to third parties are not the only way in which a client might create apparent authority. For example, in *Carr v. Runyan*, the Seventh Circuit held that by sending a lawyer to a court-ordered mediation requiring parties to appear in person or by a representative with full settlement authority, the client caused the other parties to believe that the lawyer had authority to agree to a settlement.<sup>18</sup> Disputes over settlement aside, lawyers commonly bind their clients through statements made in litigation<sup>19</sup> and in transactional settings.<sup>20</sup>

These basic propositions obviously encompass many of the legal consequences of the lawyer-client relationship. Within the scope of the representation, what the lawyer knows the client is deemed to know, and the lawyer's acts bind the client so long as the lawyer acts with actual or apparent authority. The lawyer's duties to the client, like the client's to the lawyer, are grounded in agency. Agency principles also reach the relationship between an individual lawyer and a law firm, specifying when the lawyer's acts bind the firm and underlying the lawyer's duties to the firm.

Agency questions become especially intriguing when more than one agency relationship is afoot, a common circumstance for lawyers. Multiple agencies, focused on the same agent, create multiple chains of imputation, attribution, and duties. Multiple agency chains may

---

17. See *Auvil v. Grafton Homes, Inc.*, 92 F.3d 226, 230 (4th Cir. 1996) (applying West Virginia law).

18. 89 F.3d 327, 332 (7th Cir. 1996).

19. See, e.g., *People v. Cruz*, 643 N.E.2d 636, 665 (Ill. 1994) (holding that a lawyer may make an evidentiary admission against a client during trial).

20. See, e.g., *Diversified Dev. & Inv., Inc. v. Heil*, 889 P.2d 1212, 1221 (N.M. 1995) (concluding that a lawyer negotiating on behalf of a property owner had apparent authority to communicate the owner's position on a proposed extension of option, even though the lawyer lacked authority to decide whether to grant the extension).

run parallel or may intersect and create conflicting duties to one degree or another. A lawyer with more than one client, either at the same time or sequentially, is an agent with multiple principals, each owed distinct duties, which the lawyer may or may not be able to fulfill. Separately, a lawyer who is a member or an associate in a firm is the firm's agent as well as the client's agent. Most of the time, duties owed to the firm do not conflict with those owed to the client. The firm, after all, is responsible for the quality of its member or associate's work in serving clients. Indeed, in *Kramer v. Nowak*, the Eastern District of Pennsylvania held that a law firm had a cause of action against its associate for losses the firm sustained due to the associate's malpractice.<sup>21</sup> The associate's position as an agent of the firm, which triggered the associate's duty to indemnify the firm,<sup>22</sup> did not conflict with the associate's duty to the client.<sup>23</sup> If anything, the prospect of being sued by the firm should augment the associate's performance of duties owed to clients.

It is well within the reach of imagination that the duties might conflict. Consider the plight of A, an associate in a law firm, who is directed by the firm to reallocate energies away from A's low-revenue clients toward high-revenue clients, thereby compromising the quality of A's work to the low-revenue clients' detriment.<sup>24</sup> Assuming that A's clients are the firm's clients as well, the firm has traded off its reputational and financial interest in the quality of work done under its auspices in order to maximize profit in the immediate term. As the law firm's agent, A has a duty of obedience to comply with its instructions. As the clients' agent, though, A also has a duty to use reasonable care in representing them.<sup>25</sup> The law firm may foolishly misperceive its long-term interests, as well as its duties, but at the time of its directive to A, the firm's perception of its interests does not coincide with the interests of A's clients. The time of the directive is also the time for A to leave the firm if the directive remains in effect and is enforced, for complying with the firm's directive is not a defense to A's malpractice<sup>26</sup> or to professional sanctions against A.<sup>27</sup>

---

21. 908 F. Supp. 1281, 1292 (E.D. Pa. 1995).

22. See Restatement (Second) of Agency § 401 (1958) (stating that an agent is liable to a principal for any losses that the agent's breach of duty may cause the principal).

23. See *Nowak*, 908 F. Supp. at 1289-92.

24. For the *Nowak* court's outline of this scenario, see *id.* at 1292.

25. A's professionally-defined duties begin with an obligation of competent representation. See Model Rules of Professional Conduct Rule 1.1 (1995).

26. See Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 Wm. & Mary L. Rev. 259, 304 (1985).

27. See Model Rules of Professional Conduct Rule 5.2. The example presupposes that the law firm's directive to the associate is not arguably correct in its import for the associate's ability to fulfill the associate's—and the firm's—duties owed to clients. In contrast, the Model Rules also state that the subordinate lawyer is not subject to professional discipline if the violation occurs as a result of obedience to "a supervisory

Within agency generally, a subordinate agent within a hierarchical chain of agents who breaches a duty the agent owes to a third party is not shielded from liability to the third party because the agent complied with instructions from a superior agent.<sup>28</sup> A further illustration of this general principle in the law firm context is the employee who accedes to a partner's request to notarize a signature without taking steps reasonably calculated to insure its genuineness.<sup>29</sup> It is no defense to the notary's negligence that it resulted from following an order or request within a hierarchical work environment. One point of reconciliation among these conflicting duties is of particular salience in the employment context but not necessarily limited to it. Jurisdictions generally accept the proposition that, even if an employee is an employee at will, an employer still does not have the right to terminate an employee simply because the employee refuses to commit a crime or to violate a regulatory requirement.<sup>30</sup> In the law firm context, *Wieder v. Skala*<sup>31</sup> characterized the associate's duty to comply with professional norms as an implied term in the associate's contract of employment with the law firm.<sup>32</sup> In *Wieder*, the New York Court of Appeals held that the firm would breach its employment contract with the associate by terminating the associate for complying with a professional norm.<sup>33</sup> *Wieder* is consistent with the general principle of

---

lawyer's reasonable resolution of an arguable question of professional duty." *Id.* Rule 5.2(b).

28. In the scenario discussed in the text, it is important to note that the subordinate agent—A, the associate—owes both the duties of an agent to the client and the duties of an agent to the law firm. An agent is generally not liable for economic loss suffered by third parties as a consequence of the agent's breach of duties owed to the principal. See *Coker v. Dollar*, 846 F.2d 1302 (11th Cir. 1988); Restatement (Second) of Agency § 357 (1958). An agent is liable for physical harm to third persons and their possessions when there is reliance on the agent's performance of duties owed to the principal. See Restatement (Second) of Agency §§ 353-54. Within a law firm context, a client of the firm becomes the client of an associate if the associate does work on the client's behalf, knowing the client's identity. The associate is the law firm's subagent. See *id.* § 428(1) (stating that a subagent who knows the identity of the ultimate principal owes the same duties to the principal that the agent owes). Moreover, it is arguable that any client is the client of all lawyers in the firm, at least in the absence of a negotiated agreement of limited representation. See John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 Cornell L. Rev. 825, 833 (1992).

29. See *Villanueva v. Brown*, 103 F.3d 1128, 1137 (3d Cir. 1997).

30. See, e.g., *Sides v. Duke Hosp.*, 328 S.E.2d 818, 828 (N.C. Ct. App. 1985) (holding that the complaint stated a cause of action alleging that a nurse-anesthetist was fired following her refusal to commit perjury).

31. 609 N.E.2d 105 (N.Y. 1992).

32. See *id.* at 108; see also *Jacobson v. Knepper & Moga, P.C.*, 688 N.E.2d 813 (Ill. App. Ct. 1997) (holding that an attorney may sue his law firm employer for retaliatory discharge), *appeal allowed*, 698 N.E.2d 543 (Ill. 1998). But see *Bohatch v. Butler & Binion*, No. 95-0934, 1998 WL 19482 (Tex. Jan. 22, 1998) (holding that a law firm breached neither its partnership agreement nor its fiduciary duty in expelling a partner who in good faith accused a fellow partner of overbilling a client).

33. See *Wieder*, 609 N.E.2d at 110. In *Wieder*, the termination followed the associate's demand that the firm report to disciplinary authorities the negligence of a fellow associate who did personal legal work for the terminated associate. *Id.* at 106.

agency that, although a principal always has the power to terminate the agent's authority, the principal is liable to the terminated agent for breach of contract if the termination contravenes a contract between the principal and the agent.<sup>34</sup>

## II. LAWYERS AS DISTINCTIVE AGENTS

The law of agency generally has sufficient flexibility to acknowledge that agents are not identically situated. Lawyers are distinct from other agents in the duties applicable to them, given the lawyer's position as an officer of the court and as a member of a self-regulating profession. In this portion of the essay I explore three illustrations of this general point. Lawyers owe significant duties to a larger cast of characters than do many other agents, for whom the law of agency more crisply delimits duty. Separately, the content of the duty a lawyer owes a client differs from the content of the duty owed principals by nonlawyer agents. In particular, the lawyer's duty of loyalty is less susceptible to variation or reduction through the mechanism of the client's consent, and the lawyer bears greater responsibility to identify and protect the client's interests than do agents generally. Finally, the public context of litigation implicates values beyond those reflected in the law of agency more generally, unleashing as it does the coercive power of the state. More is at stake than in many relationships governed by the general law of agency.

### A. *The Wider Cast of Characters*

As noted above, agency does not furnish a protective shield for an agent who commits a tort or a crime, even if so instructed or authorized by the agent's principal.<sup>35</sup> Moreover, in a transactional setting, an agent who acts outside of the scope of authority conferred by the principal and purports to bind the principal impliedly warrants that the agent has authority to bind the principal.<sup>36</sup> An unauthorized transaction breaches the warranty, thereby creating liability for the agent.<sup>37</sup> And an agent who transacts on behalf of an undisclosed principal—that is, an agent who appears to be a principal—is a party to any contract with the third party.<sup>38</sup> Thus, all agents owe duties in addition to, or beyond, the duties owed to principals.

What differentiates lawyers from the general run of agents is the nature of the duties a lawyer owes to nonclients. To some extent this

---

34. See Restatement (Second) of Agency § 118 cmt. c (1958).

35. See *id.* § 343.

36. See *id.* § 329.

37. See *id.* The agent's liability includes the third party's expectation losses as well as out-of-pocket loss. See *id.* § 329 cmt. j. If the agent tortiously misrepresented authority, then the third party who relies on the misrepresentation has a tort claim against the agent. See *id.* § 330.

38. See *id.* § 322.

difference is the consequence of the breadth of circumstances, many of them ambiguous, in which a lawyer-client relationship may arise. A lawyer who negligently renders advice is liable to an advisee who seeks legal advice when it should be reasonably foreseeable to the lawyer that negligently-given advice will injure the advisee, even if the lawyer is not paid for the advice and the parties have no retention agreement.<sup>39</sup> Additionally, a lawyer's duties extend to persons who eventually become clients and encompass the preceding relationship when the client is still a prospective client.

The distinctiveness of lawyers' duties is also a consequence of the lawyer's receipt of confidential information from prospective clients as well as from persons who never become clients. A lawyer's duties to a prospective client—a person who discusses the prospect of forming a lawyer-client relationship with the lawyer—include a duty to protect confidential information revealed to the lawyer.<sup>40</sup> The lawyer's fiduciary obligation also protects a person who reveals confidential information to a lawyer in the reasonable belief that the lawyer acts on the person's behalf, even when the application of agency principles would dictate the conclusion that no lawyer-client relationship resulted.

For example, in *Westinghouse Electric Corp. v. Kerr-McGee Corp.*,<sup>41</sup> the Seventh Circuit disqualified a law firm from representing a plaintiff in an antitrust action against oil company defendants because the defendants, as members of a trade association, had revealed confidential information to the same law firm, which represented the trade association in lobbying activity.<sup>42</sup> *Westinghouse* thus recognizes that a lawyer may owe a fiduciary obligation to a person in the absence of a formal or express lawyer-client relationship.<sup>43</sup> On the facts of *Westinghouse* itself, the oil companies did not request that the firm act as their lawyer and the law firm did not consent to do so. But if the oil companies reasonably believed the law firm represented both them and their trade association, then an implied lawyer-client relationship may have arisen.<sup>44</sup> Whether circumstances nurture the creation of such an implied relationship, or for that matter a fiduciary obligation, depends on the reasonableness of the nonlawyer's belief, itself a function of more generalized assumptions about and expectations of a member of a profession.

In contrast, the general law of agency draws a sharper line between the interests of principals and other third parties and delineates with

---

39. See *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980).

40. See Restatement (Third) of the Law Governing Lawyers § 27 (Tentative Draft No. 5, 1992).

41. 580 F.2d 1311 (7th Cir. 1978).

42. See *id.* at 1311.

43. See *id.* at 1317.

44. See *id.* at 1321.

greater precision and restrictiveness the circumstances under which an agency relationship is formed. The prospective principal's consent to the relationship is requisite, while, as noted above, a lawyer's lack of consent is not fatal to the formation of a lawyer-client relationship. The general law of agency also draws a sharper starting line for the inception of an agent's duties. As a general matter, a prospective agent does not owe a fiduciary duty to a prospective principal. A major implication is that the prospective agent is not subject to a fiduciary duty of loyalty to the prospective principal in negotiating the terms of the agent's compensation.<sup>45</sup> If the prospective principal reveals confidential information, then the prospective agent has the same duties as an actual agent regarding the protection and use of the information.<sup>46</sup> There is some support for the proposition that the agent's fiduciary duty should under some circumstances encompass pre-agency negotiations.<sup>47</sup> Outside of relationships generally recognized to be confidential, like the lawyer-client relationship, it would be unusual to widen the focal points of the prospective agent's duties.

---

45. See Restatement (Second) of Agency § 390 cmt. e (1958). A lawyer, in contrast, has a professional duty to charge only a "reasonable" fee. See Model Rules of Professional Conduct Rule 1.5(a) (1995).

46. See Restatement (Second) of Agency § 395 cmt. d. Authority conflicts over whether client-lawyer agreements reached prior to representation should be treated as arms-length transactions. See Restatement (Third) of the Law Governing Lawyers § 29A cmt. d, Reporter's Note (Proposed Final Draft No. 1, 1996).

47. Outside of the context of a recognized confidential relationship like a lawyer-client relationship, a few cases to date accept this proposition. In *Martin v. Heinold Commodities, Inc.*, 510 N.E.2d 840 (Ill. 1987), a commodities investor claimed that information about commissions received from a broker did not fully reveal how fees were to be used and allocated. See *id.* at 844. The court held that it was an issue of fact whether a pre-agency duty attached. See *id.* The plaintiff prevailed on remand, and the Illinois Supreme Court affirmed on the basis that a pre-agency fiduciary duty applied when "the creation of the agency relationship involve[s] peculiar trust and confidence, with reliance by the principal on the fair dealing by the agent." *Martin v. Heinold Commodities, Inc.*, 643 N.E.2d 734, 741 (Ill. 1994). Such a finding was not against the weight of the evidence, the court held, given the complexity of the underlying transactions. See *id.* *Martin* relies on the Second Restatement of Agency, which uses only the relationship between a prospective client and a lawyer as the sole illustration of the "peculiar trust and confidence" implicit in the creation of an agency relationship, such that "the agent is under a duty to deal fairly with the principal in arranging the terms of the employment." Restatement (Second) of Agency § 390 cmt. e; see also *Kirkruff v. Wisegarver*, 697 N.E.2d 406, 410-11 (Ill. App. Ct. 1998) (holding that the evidence supported a jury finding of a fiduciary relationship between a real estate broker and the trustee of a land trust (citing *Martin*, 643 N.E.2d at 741)). In *General Acquisition, Inc. v. GenCorp Inc.*, 766 F. Supp. 1460 (S.D. Ohio 1990), the plaintiff sued following a collapsed stock acquisition deal, and the defendant interposed a counterclaim alleging breach of fiduciary duty on the part of its financial advisors, including breach of duties owed a prospective principal by a prospective agent. The court denied the counterclaim defendants' motion to dismiss, stating that "under certain circumstances, Ohio courts would recognize that a prospective agent might owe a fiduciary duty to a prospective principal." *Id.* at 1474 (relying on the Restatement (Second) of Agency §§ 390 cmt. e, 395 cmt. d).

In any event, agency's focus is the interests of the principal, not those of parties outside an agency relationship.<sup>48</sup>

The distinctiveness of the lawyer's position comes into sharper focus when contrasted with other professions. Consider the legal framework applicable to the investment bank sued in *Walton v. Morgan Stanley & Co.*<sup>49</sup> Corporation A retained the bank to represent it in locating an acquisition target. Corporation B fit the bill and, attracted by the prospect of a friendly takeover by A, B supplied the bank with confidential information. B directed that the information be returned if the transaction with A did not occur. A never made a bid for B. Instead, Corporation C made a public offer for B. Following C's bid, the bank's arbitrage department bought shares in B for the bank's own account. The bank also revealed the confidential information to another client, Corporation D, to induce D to make a bid at a higher price than C's price, which D did. The Seventh Circuit held that the bank owed no fiduciary duty to Corporation B, reasoning that the bank's client was A, its task was to obtain information with which to advise A, B never retained the bank, and the bank never had the task of acting on B's behalf. The court stated that management of the bank and B "must be presumed to have dealt, absent evidence of an extraordinary relationship, at arm's length."<sup>50</sup> B's entrusting confidential information to the bank in itself created no duty to observe the confidence,<sup>51</sup> for B neglected to insist on a written confidentiality agreement. In contrast, the *Westinghouse* court noted that the size of

---

48. *The Restatement (Second) of Agency* does not appear to discuss duties that a prospective agent might owe to a prospective principal if an agency relationship never results.

49. 623 F.2d 796 (2d Cir. 1980).

50. *Id.* at 798.

51. *See id.* at 799. The activities of the investment bank's risk arbitrage department also warrant comment. If the firm's client, A, had an agency relationship with the firm at the time it bought B shares for the firm's own account, then the firm would not be free without A's consent to use confidential information it acquired because of the agency on its own account or to benefit a party other than A. *See Restatement (Second) of Agency* § 395. The Supreme Court's recent articulation of principles rationalizing the law of insider trading relies heavily on this point of agency doctrine. *See United States v. O'Hagan*, 117 S. Ct. 2199, 2208-11 (1997). In particular, *O'Hagan* makes it clear that the prohibition on trading extends to information that, as in *Walton*, concerns a corporation other than the client. *See id.* at 2218-19. Once the agency terminates, the former agent remains under the same duty regarding use of confidential information. *See Restatement (Second) of Agency* § 396(c). If challenged on this score, the bank might argue that the risk arbitrage purchases are explicable other than by using confidential information acquired in connection with an agency relationship. A separate agency doctrine prohibits the agent from competing with the principal "concerning the subject matter of his agency" unless the principal agrees. *Id.* § 393. It could be argued that the risk arbitrage purchases compete with the client's purchasing plans for the same security. To the extent the risk arbitrage transactions are large enough to move the market price upward, the client pays more and, thus, suffers an identifiable economic injury. The principal's consent to the agent's competition may be shown through, among other things, a course of dealing indicating that the principal understood the agent would compete. *See id.* § 393 cmt. a.



the law firm and its reputation "would tend to comfort any apprehensions and open the lines of communication,"<sup>52</sup> and neither the law firm nor its litigation client appears to have emphasized the absence of a written assurance of confidentiality as a factor legitimating the representations.

The contrast between *Walton* and *Westinghouse* suggests that reasonable people have different baseline expectations about what may happen when confidence is entrusted in a lawyer and in an investment bank. These generalized expectations shape the reasonableness of believing that the agent will respect the confidence in the absence of a formal retention or confidentiality agreement. Courts protect these expectations even when the lawyer in question is directly retained by an investment bank. In the *Walton* scenario, if the investment bank retained a law firm to assist its work for Corporation A and Corporation B furnished confidential information to the law firm, then the absence of a formal confidentiality agreement would not likely allow the firm to represent interests adverse to B or to trade in securities based on the information. In *Jack Eckerd Corp. v. Dart Group Corp.*,<sup>53</sup> Corporation A, in connection with an attempted acquisition of Corporation B, hired an investment bank, which in turn retained a law firm as counsel. The law firm prepared a memorandum, using confidential information furnished by A, analyzing the unattractive situation if A were characterized as an investment company under the Investment Company Act of 1940.<sup>54</sup> The memorandum was sent to the investment bank, not to A. A abandoned its interest in B, terminated its relationship with the investment bank, and two months later filed a Schedule 13D disclosing that it had purchased more than five percent of the shares of Corporation C. Shortly before the filing, C retained the law firm previously retained by A's investment bank. On C's behalf, the law firm brought suit challenging the accuracy of A's disclosure concerning its intentions in investing in C as stated in the Schedule 13D. C supported its contention by referring to A's difficult position under the Investment Company Act, which was of course the focal point of the law firm's work during its earlier retention by A's investment bank. The court disqualified the law firm from representing C in the disclosure litigation, holding that an attorney-client relationship could be formed, and could subsequently be the basis for disqualifying the lawyer from an adverse representation, when confidential information is furnished to the lawyer in the reasonable belief that the lawyer is acting as one's attorney. Additionally, the invest-

---

52. *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir. 1978). In addition, the oil companies reasonably believed in *Westinghouse* that the law firm worked for them through the vehicle of the trade association, while *Walton's* facts do not suggest a fully comparable belief on the part of Corporation B.

53. 621 F. Supp. 725 (D. Del. 1985).

54. *See id.* at 728.

ment bank, in retaining the law firm initially, might have been acting as Corporation A's agent, which would have created a lawyer-client relationship directly between the law firm and A, the investment bank's client.

### B. *The Mandatory Quality of Loyalty*

Within the general law of agency, much of the agent's duty of loyalty to the principal is subject to contrary agreement between the agent and the principal. With the principal's consent, for example, the agent may self-deal,<sup>55</sup> act on behalf of parties with interests adverse to the principal,<sup>56</sup> profit from transactions conducted on behalf of the principal,<sup>57</sup> use the principal's confidential information,<sup>58</sup> and compete with the principal.<sup>59</sup> The scope of this flexibility is not unlimited.<sup>60</sup> If the agent acts on behalf of two principals in a transaction between them and with their knowledge, then the agent has a duty to "act with fairness to each" and to disclose information that would reasonably affect the principals' judgment to permit dual agency.<sup>61</sup> Likewise, an

55. Restatement (Second) of Agency § 389.

56. *See id.* § 391.

57. *See id.* § 388.

58. *See id.* § 395.

59. *See id.* § 393.

60. An additional limitation stems from uncertainty concerning the effect a court may give to generalized consents given well in advance of conduct that would otherwise constitute a breach of the agent's duty of loyalty. *See, e.g.,* *Labovitz v. Dolan*, 545 N.E.2d 304 (Ill. App. Ct. 1989) (holding that the general partner's fiduciary duties exist concurrently with obligations as defined by a partnership agreement where a provision in the agreement giving the general partner "sole discretion" to make distributions of cash to limited partners did not waive fiduciary constraints on the general partner's discretion).

In the basic formulation in the Restatement (Second) of Agency, "[u]nless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." Restatement (Second) of Agency § 387. This statement leaves open the requisites of an effective agreement. One basic question is whether such an agreement should only be effective if made after the agent's conduct, so that the principal knows with complete particularity what is being agreed to. This parallels a requirement for effective ratification. Ratification, a more fully defined concept, requires the principal to know the material facts at the time of a purported ratification of an agent's unauthorized act. *See id.* § 91. The broader and less precise formulation, "unless otherwise agreed," suggests a concept somewhat distinct from ratification. *Id.* § 387. It is noteworthy that the Restatement Second's specific sections dealing with fiduciary duty are prefaced by an introductory note stating:

[A]lthough the agency relation normally involves a contract between the parties, it is a special kind of contract, since an agent is not merely a promisor or promisee but is also a fiduciary. Because he is a fiduciary and is subject to the directions of the principal, the rules as to his duties to the principal are unique.

*Id.* ch. 13, introductory note. This appears to place the fiduciary character of the agent's relation to the principal outside the parties' agreement as an initial matter and to restrict the impact of the agreement on that character thereafter.

61. *Id.* § 392.

agent who self-deals with the principal's knowledge has duties of fairness and disclosure to the principal.<sup>62</sup> Any agent, moreover, must interpret statements of authority and instructions from the principal reasonably and in a manner that serves the principal's interests.

In contrast, the relationship between the lawyer and the client is less susceptible to an agreement that varies the lawyer's duty of loyalty to the client. The lawyer's professional duties cast the lawyer in many respects as the guardian of the relationship, requiring the lawyer to use reasonable judgment to identify the client's interests and to educate the client as a prelude to the client's consent to otherwise problematic conduct. In contrast, agency law generally does not particularize what should constitute or precede the principal's agreement and does not require agents to educate the principal or to assure that the principal fully understands the import of the agreement.

Consider first the basic question of compensation. A lawyer may not charge a fee that is not reasonable in the circumstances,<sup>63</sup> whereas outside of confidential relationships, the compensation of an agent is governed by the terms of the agent's agreement with the principal.<sup>64</sup> In the lawyer-client relationship, some fee arrangements are categorically forbidden, including a lawyer's acquisition of a proprietary interest in the client's cause of action<sup>65</sup> and an outcome-contingent fee to represent a defendant in a criminal case.<sup>66</sup> In agency relationships more generally, however, it is often desirable for the agent to be compensated with a distinct proprietary interest to better align the agent's interests with those of the principal, a practice exemplified by the common use of stock options as an employee compensation device.

Separately, when a lawyer has a conflict of interest, a client's ability to consent to representation is subject to specific limitations. For example, two clients may not consent to representation by the same lawyer when the consequence would be that one client asserts a claim against the other in the same litigation.<sup>67</sup> In such a scenario, the lawyer as a dual agent would, as noted above, have a duty to "act with fairness" toward each client, which to some degree recasts the lawyer as a judge of the respective deserts of the two clients.<sup>68</sup> Conflicts may not be consented to when the lawyer will unlikely be able to provide

---

62. See *id.* § 390.

63. See Model Rules of Professional Conduct Rule 1.5(a) (1995); Restatement (Third) of the Law Governing Lawyers § 46 (Proposed Final Draft No. 1, 1996).

64. See Restatement (Second) of Agency § 390 cmt. e.

65. See Restatement (Third) of the Law Governing Lawyers § 48(1). Because contingent fees are permissible in most civil litigation, the significance of this prohibition may be primarily formal. See *id.* § 47.

66. See Model Rules of Professional Conduct Rule 1.5(d)(2).

67. See Restatement (Third) of the Law Governing Lawyers § 202(2)(b).

68. A separate rationale for the prohibition is "the institutional interest in vigorous development of each client's position . . ." *Id.* § 202 cmt. g(iii).

adequate representation to one of the clients.<sup>69</sup> This limit protects the client, to be sure, but it also disables a prospective client from trading off the value of adequate representation against other interests and objectives the client may have, such as currying the favor of the other more advantaged client.<sup>70</sup>

Additionally, in conflict scenarios the lawyer's professional duties require the lawyer to make an initial reasonable determination that the conflicting representation will not adversely affect the relationship with the client.<sup>71</sup> Even if the client consents to the conflicting representation, the lawyer may not undertake it unless the lawyer has fulfilled the lawyer's duty to protect the client from adverse consequences of the relationship. In contrast, agency generally does not impose a comparable limit on an agent's right to propose dual or conflicting agency relationships. Although an agent who proposes to undertake an additional agency relationship must disclose information to the present and prospective principals that would reasonably affect their judgment to permit the dual agency,<sup>72</sup> the general law of agency does not condition the agent's right to propose a dual agency on an initial reasonable determination of its impact on the principal's interests.

These limits on client consent appear to serve a number of distinct interests. Protecting clients, especially unsophisticated or desperate ones, against aggressive overreaching is an obvious effect of the "reasonableness" limit on fees. Such clients are also protected by the specification of nonconsentable conflicts, given the likelihood of disparities in information and problems in monitoring the lawyer. Furthermore, the limits tend to keep the cast of characters in their assigned roles. A lawyer with a proprietary interest in the "client's" cause of action is transformed into a holder of a residual interest equivalent in economic form to the client's that threatens the client's basis for exercising control over the lawyer.<sup>73</sup> A lawyer representing direct adversaries becomes a judge. Additionally, some restrictions on the effect of client consent serve to protect the integrity of judicial institutions. Prohibiting contingent fee representation of criminal defendants is an obvious example of such restrictions. Limiting the effect of client consent also strengthens the profession's distinct claims

---

69. *See id.* § 202(2)(c).

70. One of the illustrations to section 202 of the Restatement posits a buyer and a seller in a complex transaction in real estate. Although the parties disagree sharply on important terms and distrust each other, they ask the same lawyer to represent both of them in negotiating and documenting their transaction. *See id.* § 202 cmt. g(iv), illus. 10. An explanation for the request, apart from ignorance or lack of sophistication, is that the party more eager to conclude the deal has acquiesced in the other party's choice of counsel. The more eager party may distrust the other, but it perceives acquiescence as a useful means toward the desired end.

71. *See* Model Rules of Professional Conduct Rule 1.7(a)(1), (b)(1).

72. *See* Restatement (Second) of Agency § 392 (1958).

73. *See* Restatement (Third) of the Law Governing Lawyers § 48 cmt. b.

on the lawyer. A conflicted lawyer who represents a client when inadequate representation is likely, even with the client's fully informed consent, is subverting the quality of professional services to serve whatever agenda may have led the client to consent to the conflicted representation.

### C. *Mitigating Agency*

The nature of legal institutions, together with the distinctive role of lawyers within legal institutions, dictates caution in applying agency principles. For example, despite the general wisdom of binding a client to the consequences of representation in litigation, the client's ability to supervise the lawyer and to assess the lawyer's competence may be limited, while the lawyer may disregard the client's express instructions. Suing the lawyer for malpractice is not a complete remedy, given the immediacy of consequences that the initial litigation or other matter inflicts upon the client.<sup>74</sup> Thus, it is not surprising that in at least some circumstances courts consider whether the lawyer's competence and obedience to the client's instructions should mitigate consequences for the client, despite the client's agency relationship with the lawyer.<sup>75</sup>

Legal institutions, moreover, perform functions that on occasion trump or countermand the implications of agency principles. Consider the position of a lawyer, retained by a client to defend the client in a lawsuit, who hires an expert witness. Distinguished authority has

---

74. Additionally, to recover in a malpractice action, the client must establish causation. See Restatement (Third) of the Law Governing Lawyers § 75 (Proposed Final Draft No. 2, 1998). This burden is often difficult to meet and, in some circumstances, generates unusual difficulties. For example, suppose the lawyer is widely believed to have performed poorly in a court of last resort, such as the United States Supreme Court. The client's malpractice action would be before a lower court, perhaps a state rather than a federal court, that would be placed in the position of second-guessing the impact of written briefs and oral argument on the appellate court's disposition. A curious side feature of a current dispute involving this scenario was the attempt of most, but not all, of a lawyer's clients to disavow him as their representative prior to oral argument before the Court. The Court's clerk used a coin toss to resolve the dispute between that lawyer and another who represented clients on the same side of the dispute. See Tony Mauro, *Calling a Bad Day in Court Malpractice*, Legal Times, July 20, 1998, at 7. Viewed from the perspective of agency law, it is disconcerting that clients remain at jeopardy due to the actions of a lawyer whose authority they are known to have terminated. See Restatement (Third) of the Law Governing Lawyers §§ 43, 45 (Proposed Final Draft No. 1, 1996); see also Case C-78/95, *Hendrikman v. Magenta Druck & Verlag G.m.b.H.*, 1996 E.C.R. 1-4960 (Ct. First Instance) (holding that a party named as a defendant is not bound by the appearance of a lawyer who purported to represent the defendant but had never been retained by the defendant). One might consider that, once the lawyer has been terminated, the lawyer breaches the agency-grounded duty of obedience to the clients by continuing to purport to represent them. See Restatement (Second) of Agency § 38 cmt. b.

75. See Restatement (Third) of the Law Governing Lawyers § 41. It is, of course, relevant whether the lawyer's conduct prejudiced an opposing party or the judicial system. See *id.* § 41 cmt. d.

opined that, as the lawyer is the client's agent, the expert witness is the lawyer's agent and thus the client's subagent.<sup>76</sup> As a consequence, a continuous chain of agency links the client, the expert witness, and the lawyer. While some implications of the chain are sensible, others are disconcerting. The implications should reflect the function to be served by retaining the expert. If the expert serves as a consultant who advises the lawyer, then the attorney-client privilege protects confidential information that the client reveals to the expert for evaluation so that the lawyer may better prepare the case on behalf of the client.<sup>77</sup> The privilege also extends to confidential communications between the lawyer and the expert regarding the client.<sup>78</sup> Like a lawyer, moreover, a consulting expert has a loyalty-based duty to the client that prohibits the expert from switching sides once a confidential relationship has been created.<sup>79</sup> The client's expectations of confidentiality preclude the consulting expert from serving as a testifying witness on behalf of an adverse party. In contrast, if the expert's role is solely to testify, then communications to the expert ordinarily are not protected by the privilege.<sup>80</sup> The testifying expert is a witness, providing evidence that lies within the witness's special training and expertise. The expert witness's duty requires frank answers to questions, even answers adverse to the interests of the client on whose behalf the witness was retained.<sup>81</sup>

It is commonly assumed that a testifying expert is an agent of the lawyer who retains the expert and a subagent of the client.<sup>82</sup> This assumption, if accepted without qualification, is treacherous. A defining element of the common law relationship of agency is the principal's right to control the agent. As discussed at some length above,<sup>83</sup> "control" within agency includes the right to give interim instructions and directions to the agent. The presence of such a right is incompatible with the institutional expectations of witnesses, including expert witnesses. Characterizing a testifying expert as the retaining lawyer's agent implies that the lawyer has the right to control the witness's testimony, perhaps by instructing the witness how to answer questions and whether to answer questions asked by the adversary's lawyer.

---

76. See *City & County of San Francisco v. Superior Court*, 231 P.2d 26, 31 (Cal. 1951); ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 97-407 (1997).

77. See *Conforti & Eisele, Inc. v. Division of Bldg. & Constr.*, 405 A.2d 487, 490 (N.J. Super. Ct. Law Div. 1979). Likewise, opinions generated by consulting experts are conditionally protected as lawyer work product from discovery. See *id.* at 492.

78. See *id.* at 490.

79. See *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 280-81 (S.D. Ohio 1988).

80. See ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 97-407 (1997).

81. See *id.*

82. See *id.*

83. See *supra* notes 1-15 and accompanying text.

This right is inconsistent with the witness's duty to testify truthfully as to the witness's own opinions and knowledge. At a minimum, the witness assumes duties to the court, articulated in the oath the witness takes, that supersede the claims of agency on the witness.

Separately, the common assumption carries liability implications for the lawyer. If the expert is the lawyer's agent, then the lawyer is responsible for the quality of the expert's performance to the client.<sup>84</sup> Even if the witness is not the lawyer's agent, an aggrieved client may argue that the lawyer owed the client a nondelegable duty of care in connection with the expert's testimony, such that the lawyer is liable for the expert's negligence, comparable to a lawyer's nondelegable duty to assure that legal process is properly served on behalf of a client.<sup>85</sup> This argument should fail because the lawyer, in undertaking to represent the client, does not undertake to testify as an integral part of the lawyer's own work. The lawyer's duty should be limited to the exercise of care in selecting and preparing the expert.

### III. THE AUTHOR, THE TOUT, AND THE SCRIVENER

Within agency relationships, liability, like knowledge, imputes upward from the agent to the principal. When wrongful conduct toward a third party occurs in connection with an agency relationship, the dispute often focuses on whether a principal is liable for the agent's wrongful conduct. In contrast, consider circumstances under which an agent might in some sense be accountable for a wrong committed at least in part by the principal. These circumstances are relatively unusual. Suppose the agent innocently repeats a defamatory statement made to the agent by the principal, a statement that the principal knows to be false. Suppose that the agent is not a lawyer and, in any event, does not repeat the principal's statement as a witness or a party in a judicial or quasi-judicial proceeding. As noted above, agency does not impute the principal's knowledge downward to the agent. The agent is the instrument of the principal's defamation, but lacks the requisite state of mind that is a defining element of the tort. When the question is the agent's individual liability for wrongful conduct,

---

84. See Restatement (Second) of Agency § 5(1) (1958) (defining subagency and its consequences for agent). A separate question is whether the lawyer is liable for the expert's fee. The lawyer might characterize the role played as merely that of an agent for a disclosed principal who did not separately agree to become liable on the contract with the expert. The expert would argue that the retention was accepted in reliance on the lawyer's credit. See Restatement (Third) of the Law Governing Lawyers § 42(2)(b) (Proposed Final Draft No. 1, 1996). For a thorough discussion, see John H. Minan & William H. Lawrence, *The Personal Liability of an Attorney for Expert Witness Fees in California: Understanding Contract Principles and Agency Theory*, 34 San Diego L. Rev. 541 (1997).

85. See *Kleeman v. Rheingold*, 614 N.E.2d 712, 717 (N.Y. 1993) (holding that the firm had a nondelegable duty to client to exercise care in assuring proper service of legal process).

the law of agency itself does not fully answer the question, except by making it clear that the agent's position as an agent does not constitute a defense to conduct that is tortious or criminal.<sup>86</sup> An agent who repeats the principal's defamatory statement, knowing it to be false, is not immune from liability for defamation simply by virtue of being an agent.<sup>87</sup> In addition, the agent does not acquire immunity by acting in a relatively ministerial capacity, such as serving as a secretary or scrivener to the principal.<sup>88</sup>

It is important to have these basic points in mind in assessing the circumstances under which lawyers are accountable for their clients' fraudulent misrepresentations. Current controversy focuses on the accountability of securities lawyers in this connection. One basis of considerable confusion is the belief that the securities lawyer who drafts offering documents is not liable even if the lawyer knows they misstate material facts, so long as the lawyer can be characterized as not functioning as an agent of the lawyer's client. The argument might be that the lawyer is not an agent because the client has authorized the lawyer only to draft the documents, not to represent the client in litigation or to commit the client in transactions with third parties.<sup>89</sup> This argument mistakenly treats one of the legal consequences of agency as a defining element in the relationship of agent to principal. Additionally, it ignores the breadth of agency's legal consequences. Suppose the lawyer's work encompasses drafting a registration statement and a prospectus on behalf of an issuer of securities for an offering subject to the Securities Act of 1933. If the registration statement misstates or omits material facts, then section 11 of the statute imposes strict liability on the issuer, regardless of the identity of the person who drafted the registration statement and regardless of that person's state of mind or moral culpability. Thus, the lawyer's lack of authority to commit the client to contracts, or to negotiate with third parties on the client's behalf, does not mean that the lawyer's acts carry no legal consequences for the client. Moreover, information or knowledge that a lawyer acquires in connection with a representation imputes to the

---

86. See Restatement (Second) of Agency §§ 343, 359A.

87. See *Park Knoll Assocs. v. Schmidt*, 451 N.E.2d 182, 184-85 (N.Y. 1983). To be sure, the speech of a lawyer-agent in a judicial or quasi-judicial proceeding may be immune. See *id.* at 184.

88. See *id.*

89. One author writes:

Clients hire securities attorneys for their knowledge of complex securities laws, especially the copious rules regarding how a prospectus must be constructed. But, because the attorney who drafts the prospectus is not generally given the authority to alter legal relations with third parties, the prospectus is not the product of an "agency" relationship in any meaningful sense of the word.

Ben D. Orlanski, Comment, *Whose Representations Are These Anyway? Attorney Prospectus Liability After Central Bank*, 42 UCLA L. Rev. 885, 933-34 (1995) (footnotes omitted).



client for many, if not all, purposes, even when the lawyer lacks authority to commit the client to contracts.<sup>90</sup>

The infirmities of this argument aside, it would not support the conclusion that a nonagent lawyer cannot be liable for fraudulent misrepresentations that appear in the lawyer's written work product. The lawyer's liability, that is, does not turn on whether the lawyer is an agent, but on whether the lawyer's conduct and state of mind suffice to constitute fraud. What the constituent elements might be for fraud under the federal securities laws is open to some question after the Supreme Court's opinion in *Central Bank v. First Interstate Bank*.<sup>91</sup> In *Central Bank*, the Court held that neither the language of section 10(b) of the Securities Exchange Act nor the overall legislative scheme supported liability in private actions for collateral participants in fraud whose role was characterized as simply aiding and abetting the acts of the primary violator. The court emphasized "that the statute prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act."<sup>92</sup>

Recent cases illustrate the variety of scenarios in which the dispositive question is whether a lawyer's conduct should be characterized as making a misrepresentation for purposes of liability in a private action for securities fraud. In *Klein v. Boyd*, the lawyer had a significant role in drafting offering documents, determining what to include and what to exclude, and knew that the documents did not contain information that would be important to prospective investors.<sup>93</sup> The investor-plaintiffs, however, were unaware of the lawyer's role because the lawyer did not sign or endorse the documents. *Klein* thus raises the question of how visible the lawyer's role must be to constitute a misrepresentation that the lawyer makes to investors. Otherwise, *Klein* illustrates a lawyer in an authorial role, deciding what the client's statement to investors shall contain.

Lawyers' efforts in securities transactions are not necessarily confined to generating written documentation. In *Rubin v. Schottenstein*,

---

90. See Restatement (Third) of the Law Governing Lawyers § 40(1) (Proposed Final Draft No. 1, 1996). The Second Restatement of Agency provides another example:

A is employed by P to report upon the title to Blackacre and to tell him of any secret equities which he may discover. A discovers that T has an equity in Blackacre, but negligently fails to report this to P, who accordingly buys Blackacre from B. P is affected by A's knowledge.

Restatement (Second) of Agency § 272, illus. 4.

91. 511 U.S. 164 (1994). For an insightful and comprehensive treatment of this case and its implications, see James D. Cox, *Just Deserts for Accountants and Attorneys After Bank of Denver*, 38 *Ariz. L. Rev.* 519 (1996).

92. *Central Bank*, 511 U.S. at 177.

93. See *Klein v. Boyd*, [Current] *Fed. Sec. L. Rep.* (CCH) ¶ 90,136 (3d Cir. Feb. 12, 1998), *vacated on grant of reh'g en banc*, Nos. 97-1143, 97-1261, 1998 WL 55245 (3d Cir. Mar. 9, 1998).

*Zox & Dunn*,<sup>94</sup> the client referred prospective investors with questions about the client's financial stability to the lawyer, having dissuaded the prospective investors from making direct contact with the client's lender.<sup>95</sup> The lawyer assured the prospective investors that the client was financially sound and that it had no problems with the lender, which according to the lawyer would increase funding following a cash infusion from the investors.<sup>96</sup> The lawyer also dissuaded the investors from contacting the lender directly and subsequently asked the investors' lawyer not to do so, repeating assurances of the client's financial health to the investors' lawyer.<sup>97</sup> The lawyer, however, told neither the investors nor their lawyer that his client was already in default under its loan agreement with the lender and that the proposed investment would itself constitute a default under the agreement.<sup>98</sup> The court held that these omissions made the lawyer's statements misleading.<sup>99</sup> This conclusion does not conflict with the lawyer's duties of confidentiality to the client. The lawyer had no right or duty to volunteer information about his client, but once having undertaken to speak, the lawyer's duty was to provide complete and nonmisleading information. In *Rubin*, the lawyer was the author of the statements he made, functioning almost as a tout on behalf of the client.<sup>100</sup>

Securities lawyers have on occasion argued that they function, not as authors or touts, but as the client's mere scriveners, drafting the substantive content of the prospectus virtually at the client's dictation, papering the deal but not independently making statements or representations to investors. In *Schatz v. Rosenberg*,<sup>101</sup> the court endorsed the "mere scrivener" doctrine, stating that "lawyers do not vouch for the probity of their clients when they draft documents reflecting their clients' promises, statements, or warranties."<sup>102</sup> As agents, the court held, lawyers are not automatically liable for the client's misrepresentations.<sup>103</sup> *Schatz* preceded *Central Bank*, which more broadly excluded rationales for liability that did not involve direct acts of misstatement or commission by a particular defendant. In any event, whether a lawyer-as-scrivener is liable for fraud is not answered by agency principles, which establish only that an agent's position is in itself not a defense.<sup>104</sup>

---

94. 143 F.3d 263, 266 (6th Cir. 1998) (en banc).

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.* at 270.

100. *See id.* at 265-66.

101. 943 F.2d 485 (4th Cir. 1991).

102. *Id.* at 495.

103. *See id.*

104. *See* Restatement (Second) of Agency § 348 (1958).

It may be helpful to consider the other context in which the lawyer-as-scrivener argument surfaces. In *Griffith v. Taylor*,<sup>105</sup> an associate lawyer in a law firm prepared quitclaim deeds for property at the request of a grantee, A. The firm subsequently prepared deeds for the initial grantor, B, deeding the property to him. After the deeds to B were found to be invalid, the initial grantee, A, sued the firm for malpractice, alleging that its work for both A and B constituted a conflict of interest and a breach of its duty of loyalty to him.<sup>106</sup> The court held that, although the trial court erred in granting summary judgment for the firm on the point, the firm might be protected by a scrivener's exception to its general duty of loyalty to its clients.<sup>107</sup> The exception is available when a lawyer "merely fashions a statutory form of deed, or performs other clerical or ministerial tasks."<sup>108</sup> The exception becomes unavailable, however, if the lawyer furnishes any legal advice to the client, in any way makes use of legal skills, or receives any confidences from the client.<sup>109</sup> Even a narrowly-drawn scrivener's exception is vulnerable to the argument that it conflicts with the loyalty that all lawyers owe to clients, however humble the specific task that the lawyer is engaged to perform.<sup>110</sup> The exception may reflect an era of limited literacy in which lawyers commonly served as amanuenses for people who could not use language in any written form.<sup>111</sup> In the contemporary world, circumstances contemplated by the exception may be ones in which, rather than needing a lawyer, the clients need a computer and some basic software.

In contrast, the work of securities lawyers, however technical, is neither ministerial nor rote in nature. Drafting a prospectus involves making judgments and giving advice, both tasks that require access to confidential information. Nor is it the case that the lawyer has no choice other than to draft a prospectus to include statements that the lawyer knows to be false. A lawyer is not a piece of computer hardware that, functioning properly, always obeys correctly-formulated commands. Instead, recall the best-known legal scrivener, the fictional Bartleby in Herman Melville's short story. Bartleby responded to his employer's requests by stating that he "would prefer not to."<sup>112</sup>

---

105. 937 P.2d 297 (Alaska 1997).

106. *See id.* at 299-300.

107. *See id.* at 305.

108. *Id.*

109. *See id.* at 306.

110. *See* Restatement (Third) of the Law Governing Lawyers § 122 cmt. c (Tentative Draft No. 1, 1987).

111. *See id.*

112. Herman Melville, *Bartleby, the Scrivener*, in *The Writings of Herman Melville: The Piazza Tales and Other Prose Pieces 1839-1860*, at 13, 20 (Harrison Hayford et al. eds., 1987).

Sad though Bartleby's situation is revealed to be as the story plays out, he is not an automaton.<sup>113</sup>

#### CONCLUSION

Although lawyers serve their clients as agents, the general law of agency is often just a starting point for analyzing the legal consequences of lawyer-client relationships. Lawyers owe duties to a cast of characters wider than that defined by general agency principles, while the content of duties that lawyers owe their clients is distinctive. Moreover, the fact that a lawyer acts as the client's agent is irrelevant when the question is the lawyer's individual liability for the lawyer's personal participation in fraud, including fraud implicating the lawyer's client.

---

113. *Bartleby* raises numerous challenges in interpretation, insightfully explored in Robin West, *Invisible Victims: A Comparison of Susan Glaspell's Jury of Her Peers and Herman Melville's Bartleby the Scrivener*, 8 *Cardozo Stud. L. & Literature* 203 (1996).