WHOM (OR WHAT) DOES THE ORGANIZATION'S LAWYER REPRESENT?: An Anatomy of Intra-client Conflict

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Professional responsibility issues involving organizational clients are distinctively difficult because organizations consist of constituents with conflicting interests. Doctrine has only recently begun to address the effect of internal conflict on a lawyer's responsibilities to an organizational client. The results have been inconsistent and often implausible. This article surveys current approaches and offers recommendations for improvement. It analyzes the distinction between "joint" representation and "entity" representation and argues that the differences between them should not be as great as conventional discussion assumes. With respect to the notion of "entity" representation, it criticizes a prominent tendency in the cases to conflate the interests of the organization as an "entity" with the goals of its incumbent management. It also criticizes the approach of the Model Rules of Professional Conduct and the Restatement of the Law Governing Lawyers, which identifies the "entity" with its authority structure. These approaches suffer from the influence of anachronistic corporate law doctrine that implies that the interests that constitute a corporation's identity do not include norms of fair distribution among its constituents. An adequate understanding of organizational representation requires a view of the corporation as a Framework of Dealing that includes both procedural and distributive norms. The analysis focuses primarily on corporations, but a concluding section suggests that it also applies to other organizational forms.

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ORGANIZATIONAL LAWYERING

I. Introduction

A large fraction of the bar spends most of its time representing organizations. The law tends to characterize these organizations as unitary "entities" or "legal persons" and to suggest that lawyers' duties to such clients are analogous to their duties to individual clients. In fact, however, these organizations are constituted by multiple individuals with potentially differing interests and hence are prone to internal conflict of a kind that cannot occur with individual clients.

For most of the bar's history, there was little discussion of such conflicts, but a substantial body of authority has emerged in recent years applying both substantive business doctrine and professional responsibility norms to lawyers in situations of what might be called <u>intra-client conflict</u>. For the most part, this authority responds to three broad categories of claim:

-- The lawyer is charged with <u>breach of duty</u>, as a matter of either professional discipline or tort liability, for assisting or acquiescing in conduct by one group of organizational constituents that allegedly wrongfully injures another; for example, a dominant shareholder group expropriates the interests of a minority.

-- Either the organization or a constituent argues that the lawyer is subject to <u>disqualification</u> on conflict-of-interest grounds.

-- An organizational constituent alleging management wrongdoing seeks access to <u>privileged</u> communications between management and counsel.

Doctrinal responses to these issues have been incoherent and implausible. This essay offers some suggestions designed to clarify thinking about organizational representation and some specific suggestions for current controversies. It criticizes a quite common tendency to invoke the idea of entity representation in an unreflective and question-begging way. Often the interests of the organization are conflated with those of management. A more sophisticated approach, exemplified by the Model Rules of Professional Conduct and the Restatement of the Law Governing Lawyers, treats the organization as a structure of authority. Even this approach is inadequate in many situations, however. The essay argues that a satisfactory approach would understand the corporation as a Framework of Dealing, a set of procedural and substantive terms grounded in the understandings of the organization's constituents and supplemented by publicly provided default and mandatory terms.

The Framework-of-Dealing perspective reflects the most plausible jurisprudential understanding of the nature of organizations. However, it entails revision of some anachronistic corporate doctrine, such as the distinction between "direct" and "derivative" constituent claims, that has had an unfortunate influence on professional responsibility. This doctrine implies a conception of organizational identity in which the organization is indifferent to the integrity of its distributive arrangements. A more plausible understanding of organizations can be seen in a variety of recent developments that conventional analysis portrays as anomalous.

I begin with a hypothetical to illustrate the issues. The hypothetical uses a close corporation because the problems with present doctrine are most easily seen in this context, but I will later suggest that the analysis developed in response to this situation applies as well to larger organizations. I proceed to contrast joint representation of individuals with organizational representation and to consider suggestions that joint representation norms should be applied to some clients that are at least in form organizations. I then consider three interpretations of the idea of organizational or "entity" representation. The first identifies the corporation with its Control Group; the second, with its Authority Structure, and the third, with a comprehensive Framework-of-Dealing. I argue that the latter perspective is most promising. The analysis is developed for the most part with reference to business corporations. Toward the end, I consider authority on a variety of other types of organizations -- partnerships, trusts, charitable organiztions, and informal associations -- and conclude that the Framework of Dealing perspective fits these contexts as well.

II. A False Start -- Doctrinal Circularity

THE FOUNDER FREEZE-OUT

Founder is the principal entrepreneur and technical spirit in a hi-tech corporation. He is an engineer who developed a new kind of gizmo -- a critical component of various electronics products. Shortly after Founder set up the corporation, Investor, a venture capital partnership, became a major shareholder. Investor owns preferred stock, and under relevant terms of the Articles of Organization, it is entitled to take control of the board if specified financial milestones are not met, including one regarding revenues.

Product development and marketing efforts have exceeded expectations, but the enterprise encountered some unanticipated production problems. Soon thereafter, Investor asserted that the revenue milestone had not been met, and with Founder's acquiescence, assumed control. The Investor-controlled board then informed Founder that his services as an employee were no longer needed by the firm. The board exercised the firm's option to repurchase Founder's stock on his departure from the firm. Half of these shares were unvested and hence were subject to repurchase at the price Founder paid for them, which was a small fraction of their market value. The Board majority also voted to remove Founder as a director.

One of the Investor directors has told corporate counsel that, according to the firm's accountant, the judgment that the milestone has not been met -- the basis for Investor's assumption of control of the Board -- rests on a debatable accounting judgment (about, say, when orders should be booked). "It could have gone either way," the accountant said. Founder is unaware of this, and neither the accountant nor the directors have any intention of telling him of it. What should corporate counsel do?

Perhaps the most strongly supported position is that counsel has no duty to inform Founder and may have a duty not to do so. There is also ample support for the proposition that counsel may represent the corporation in litigation with Founder over his separation. And there is authority that the board will be able to invoke attorney-client privilege to preclude Founder from deposing counsel in the litigation. As we will see, there is also differing authority with respect to each of these issues, and indeed the last position on attorney-client privilege appears to be a minority one. But few cases or commentators have confronted the flawed logic that pervades this body of doctrine.

The holdings against the shareholder are usually supported with the claim that "corporate counsel represents the corporation, not its constituents." This precept is typically invoked without elaboration as if it were sufficient on its face to dispose of the shareholders claim. In fact, this precept merely raises the question of what the corporation's interests are in the circumstances of the case, and the implicit answer the cases give is often highly implausible.

To take an extreme, but far from unique, case, consider Skarbrevik v. Cohen, England & Whitfield, in which the plaintiff was one of four shareholders in an insurance brokerage corporation. He had a falling-out with his colleagues, and they agreed to repurchase his shares. After his departure, they reneged on the repurchase agreement and instead "deliberately embarked on a scheme to diminish [his]interest in the corporation by diluting his stock in violation of their fiduciary duties." [1] The scheme included the filing articles of amendment eliminating the plaintiff's pre-emptive rights to new shares with a declaration falsely reciting that the amendment had been duly approved at a shareholder meeting. Although the court's factual recitation suggested that the

[1] Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627, 637 (Cal. App. 2d Dist. 1991).

lawyer may have engaged in affirmatively fraudulent acts, the plaintiff apparently argued only that he had a duty to make timely disclosures to him of the officers' conduct. This the appeal court denied, opining that the lawyer's duty was to the corporation and not to Skarbrevik, whom it characterized as someone "dealing with the corporation at arm's length" with interests "adverse" to those of the corporation.[2]

In this and similar cases, the Court, after invoking the principle that counsel's duty is to the corporation, never proceeds to consider what that duty requires, and in particular, how it could be consistent with that duty to facilitate the expropriation of interests that the corporate structure allocates to the plaintiff.[3]

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[2] 282 Cal. Rptr. at 637, 638. This was a direct action, but the case gives no indication that the court would have looked more favorably on the claim had the action been derivative. The Court's characterization of the plaintiff's interest as "adverse" to the corporation would seem to preclude derivative claims. In any event, the distinction between direct and derivative is pointless in a case where the plaintiff sues for conduct in which all the other shareholders participated. See the discussion below at .

[3] A case with facts, analysis, and conclusion remarkably similar to Skarbrevik is Felty v. Hartweg, 523 N.E.2d 555 (Ill. App. 4 Dist. 1988).

The best known case of this sort is Fasihi v. Sommers, Schwartz, Silver, Schwartz and Tyler, 309 N.W. 2d 645 (Mich. 1981). The case is sometimes treated as more nuanced than Skarbrevik and Felty, but the thrust is similar. Fasihi involved a corporation owned by two doctors, both of whom were on the board. Corporate counsel helped the corporation's chief executive, Dr. Lopez, oust the plaintiff, Fasihi, as a corporate employee. Unknown to Fasihi, corporate counsel had simultaneously represented Lopez in negotiating a contract between Lopez and a hospital making employment by the corporation a condition of admitting privileges in the hospital. In consequence of this private agreement, Fasihi's expulsion from the corporation led to his loss of hospital privileges. The issues considered in the opinion were whether corporate counsel had a duty to inform Fasihi of (a) his separate individual representation of Lopez, or (b) Lopez's agreement with the hospital.

The court held that the lawyer should have informed Fasihi of the separate indidividual representation but not of the contract. It suggested that lawyers have a limited duty to nonclients who repose "trust and confidence" in them and that this duty extends to the disclosure of conflicting representations. The holding could be interpreted to recognize limited but ambiguous fiduciary duties of corporate counsel to constituents. There is, however, a cleaner

The same tendency can be found in discussions of disqualification of corporate counsel in shareholder litigation. Most lawyers think it uncontroversial that corporate counsel can represent the corporation in a dispute with a constituent such as Founder, assuming that she has never represented him individually. If the only client has been the corporation, then Founder is neither a present nor a former client, and there is no conflict that might disqualify.[4]

This analysis involves two assumptions. First, it assumes that representing the corporation when Founder is its only shareholder, prior to Investor's investment, is fundamentally different from representing Founder. Lawyers representing start-up companies looking for venture financing routinely ask the founders to sign letters acknowledging that counsel represents the corporation and not the founders individually and suggesting that the founders consider seeking separate individual representation. In fact, the founders never seek separate representation, and were they to do so, no one has any idea what the additional lawyer would do. At this stage, it seems impossible to draw any distinction between individual and corporate interests. Lawyers' insistence on the distinction seems to have little function other than to preserve their ability to align themselves against the founders should a dispute arise after the outside investment.

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explanation for it than the one the court gives. Model Rule 4.3 creates a duty to unrepresented nonclients, even complete strangers, "[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter … to make reasonable efforts to correct the misunderstanding."

The rest of the opinion has the same cavalier and conclusory tone of Skarbrevik. The court rules that counsel rightly failed to disclose the hospital contract because of his duty of confidentiality to Lopez as an individual client without even acknowledging the issue of whether his duty to his corporate client required disclosure Fasihi, as a shareholder and board member.

4 See Seifert v. Dumatic Industries, 413 Pa. 395, 197 A.2d 454 (1964) (counsel for two-person corporation not disqualified from representing corporation against one of the shareholders).

The second assumption is that at the time of the dispute incumbent management represents the interests of the corporation. This is a normal presumption, but the purpose of a claim such as Founder's is to challenge it. Almost any shareholder suit challenges management's authority, and in a derivative suit, the constituent purports explicitly to speak for the corporation. But the conventional treatment simply conflates the corporation's interests with the views of incumbent management.

To be sure, a prevalent view holds that, while corporate counsel may be able to represent the corporation, it should not jointly represent the corporation and the managers individually if the suit accuses the latter of individual wrongdoing.[5] Under this view, Investor would have to get separate counsel for itself as an individual. But some authority rejects even this qualification and holds that, not only can counsel represent the corporation, it can jointly represent the officers personally, at least if the current board "consents" on behalf of the corporation to the joint representation. This is the conclusion of an opinion of the California State Bar ethics committee in a case involving, like our hypothetical, litigation between the only two stakeholders of a corporation. The committee concludes that the shareholder-CEO (the counterpart of Investor in our scenario) can consent to joint representation. "To conclude otherwise," it says, "would permit … the Corporation's adversary in the lawsuit to dictate how the Corporation would be represented in that proceeding."[6] Again, we get no explanation of why the plaintiff should be regarded as the corporation's "adversary."

Courts that allow the corporation to invoke attorney-client privilege against a derivative plaintiff follow the same logic. For example, the California Supreme Court explained that it lacked the

[5] See the authority cited in notes , below.

[6] California State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion 1999-153. (In the opinion, the shareholder in control of the corporation, to whom the opinion ascribes the right to consent to joint representation, is identified as "A".) For more authority on the role of corporate counsel in derivative suits, see below .

authority to create an "exception" to an evidentiary privilege enacted by the legislature.[7] Even without an exception, however, the question of who speaks for the corporation in deciding whether to invoke the privilege remained, but the court felt no need to explain its decision against the plaintiff on this matter.

In all these cases, then, the court treats the principle of corporate representation as conclusive against the constituent's claim by tacitly conflating the interests of the corporation with those of its senior incumbent officers. Once articulated, this view becomes considerably harder to defend, but it does have a legitimate role to play in specifying the meaning of corporate representation. It is, however, only one of at least three important interpretations of entity representation, and it is less useful for dealing with cases such as the Founder Freeze-Out than the other two. Before we consider the alternative conceptions of entity representation, however, we must consider an alternative approach to some issues of organizational representation that dispenses with the entity concept entirely.

III. Organizational Representation as Joint Representation

A. Joint v. Entity Representation

Suppose in the Freeze-Out case Founder and Investor had come to the lawyer as individuals and asked the lawyer to assist them in conducting their activities without any organization.

The lawyer's activities would thus have been joint representation of Founder and Investor. If that had been the case, then her obligations to Founder once the dispute with Investor arose would have been as follows:

-- Conflicts. (1) Prior to undertaking to represent them jointly, she should have warned Founder of the dangers of conflict with Investor, to the extent they were foreseeable. (2) She should

[7] Dickerson v. Superior Court, 185 Cal. Rptr. 97, (1982).

have withdrawn from at least one, and probably, both representations when conflict became manifest.[8]

-- Confidentiality. No confidentiality duty to Investor would prevent her giving material information to Founder. And in fact:

-- Fiduciary Duty. She would have a duty to inform Founder of the accountant's statement.[9]

The lawyer's duties to joint clients are clearer than those to organizations, and insofar as we can determine the latter, they are nearly the opposite of those suggested by the cases on organizational representation discussed in the last section.

Why should joint and organizational representation be treated so differently? The doctrine offers no ready answer, and it is surprisingly difficult to formulate one from scratch.

One explanation that can be dismissed is the practical limits on lawyer attention to multiple individuals. There's a tendency to assume that organizations involve large numbers of constituents, most of whom have no direct contact with the organization's lawyers, while joint representation involves small numbers of people in direct contact with the lawyer. It might seem that, once the numbers get large enough, it would become impossible to give each constituent the kind of attention that the joint representation model contemplates. Obviously, however, these assumptions are often inapplicable. Our Founder Freeze-out scenario is an example of a large classs of small business clients who take the form of

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[8] Model Rule 1.9, which prohibits representing someone against a former client in a matter "substantially related" to the former representation, implies that, when a joint representation breaks down, the lawyer must cease representing both clients (unless both will consent to the continued representation of one). See Brennan's, Inc. v. Brennan's Restaurants', Inc., 590 F.2d 168 (5th Cir. 1979). Some cases, however, take a less strict approach, emphasizing that continued representation of one client does not threaten any confidentiality interest, since joint clients waive confidentiality between themselves. E.g., American Special Risk Insurance Co. v. Delta America Insurance Co., 634 F.Sup. 112, 121 (S.D.N.Y.1986).

[9] E.g., Model Rule 1.4 (lawyer to provide client with information necessary for "informed" decisions).

organizations but involve small numbers of people. There is no practical obstacle to the lawyer considering their interests individually.

Moreover, it would be wrong to assume that, even where the lawyer must be concerned with numbers of people too large for detailed individual attention, treating them as an "entity" in the manner we are discussing is the only plausible option. There is a model of joint representation that has been applied often to large groups -- the class action. Classes can number in the thousands. Although procedure makes adjustments to take account of the large numbers and the distance of the lawyer from most of her clients, in general, it applies the conflict-of-interest, confidentiality, and fiduciary norms associated with joint representation, rather than those associated with organizational representation.[10] Lawyers cannot continue to represent an entire class once conflict develops among its members; confidentiality does not limit the lawyer's ability to disclose material information material to members of a class, and lawyers have affirmative fiduciary duties to individual class members.

Another explanation for differential treatment of joint and organizational representation is implied consent. By formally associating themselves in an organization, such as a corporation, constituents indicate that they desire and expect to submerge their individual interests in an entity. Legal representation in accordance with the entity model is one of the entailments of formal organization that constituents embrace when they organize formally. But this explanation, too, has deficiencies.

It misapprehends the psychological reality of, at least, many small business organizations. Legally, incorporation typically occurs through the filing of papers that most constituents may not even be aware of. More than likely they think of incorporation primarily as a means of limiting liability, and they may not think of it as affecting internal relationships at all. Constituents who deal directly with business counsel may think of

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10 See generally, Deborah L. Rhode, "Class Conflicts in Class Actions," 34 Stanford Law Review 1183 (1982).

him as "their" lawyer in precisely the way that jointly represented individuals do. Such concerns have led several courts in suits between constituents of close corporation constituents to apply partnership norms of mutual fiduciary duty. Cases like Wilkes v. Springside Nursing Home[11] ignore corporate formality in defining internal duties among constituents and hold them to strong duties of loyalty to each other as individual collaborators.

Another problem with the consent rationale is that formal consent, the only kind of consent that can be presumed in the organizational context, is emphatically not sufficient for joint representation under established doctrine. Joint representation requires "informed" consent, which connotes both explicit individual manifestation of agreement and genuine understanding.[12] Even an explicit consent given after considerable advice may be held insufficient if it later appears that an important contingency was not foreseen. Yet, the implied constituent consent that suffices for organizational representation does not require either individual assent or understanding.

B. Piercing the Veil for Professional Responsibility Purposes

One possible response to the doctrinal mystery we've just considered is to deny that organizational representation should be treated differently from joint representation. A few cases treat corporate representation as tantamount to joint representation.[13]

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[11] 370 Mass. 842, 353 N.E.2d 657 (1976).

[12] Model Rule of Professional Conduct 1.7. Even informed consent is not sufficient. The Rules require, in addition, that the lawyer reasonably determine that joint representation will not adversely affect either clients' interests. The contrast to organizational representation is striking. Once constituents acquire the status of an organization, the Rules become silent about the lawyer's responsibility for constituent understanding or welfare.

[13] The practical concerns on which these cases are based are similar to those cited by cases like Wilkes for treating close corporate constituents like partners for the purposes of fiduciary duties among themselves. However, doctrinally, it doesn't follow from the fact that an enterprise is treated as a

In some cases, the issue is whether corporate counsel is disqualified from a representation adverse to a constituent of the corporation. In Woods v. Superior Court, counsel for a corporation wholly owned by a husband and wife was disqualified from representing the husband in a divorce action against the wife. The Court treated the wife as effectively a current client: "[I]n representing an ongoing family corporation, Mr. Krolawec in a very real sense continues to represent the wife."[14] Two Oregon cases arising from control contests in family corporations reach similar results. "[T]he attorney in such a situation represents the corporate owners in their individual capacities as well as the corporation unless other arrangements are clearly made," one concludes.[15] And in a case disqualifying corporate counsel from appearing in an action between its only two shareholders, the Southern District of New York wrote that "it is indeed reasonable for each shareholder to believe that corporate counsel is in effect his own individual attorney."[16]

Sometimes the issue is whether those in control of the corporation can invoke attorney-client privilege to prevent interrogation of corporate counsel in litigation with a constituent. In another husband-wife corporation case, a California court held the privilege inapplicable. The court characterized the entity as "akin to a partnership in informality."[17]

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partnership for any or all purposes that the duties of counsel should be those associated with joint representation. Partnerships are considered "entities" for most purposes, and the lawyer's duties in the partnership context are no clearer than they are in the corporate context. See below

14 Woods v. Superior Court, 197 Cal. Rptr. 185 (Cal. App. 1983).

15 In re Brownstein, 602 P.2d 655, 657 (Ore. 1979); In Re Banks 584 P.2d 284 (Ore. 1978); see also Detter v. Schreiber, 16 ABA/BNA Lawyer's Manual on Professional Conduct 228-29 (May 24, 2000).

16 Rosman v. Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987). The joint representation approach is more commonly, though not consistently, applied to partnerships. See below

17 Hecht v. Superior Court, 192 Cal. Rptr. 528 (Cal. App. 1987). Although, as we will see, there is some ambiguity about the organizational status of a partnership, the court seems to be invoking the conception of partnership as an "aggregate" of discrete individuals.

In Opdyke v. Kent Liquor Mart[18], the Delaware Chancellor applied the joint representation approach where corporate counsel took a business opportunity for himself at the expense of a shareholder. The lawyer purchased the shares of two of the entity's three shareholders, knowing that the third wanted to buy them. Clearly, the lawyer's fiduciary duties to the corporation precluded him from taking a "corporate opportunity" without consent, but the court apparently considered that no interest of the corporation was harmed by the lawyer's action. The court, nevertheless, held that the lawyer owed a comparable duty to the individual shareholder. It emphasized the informality of the business and characterized the lawyer as "attorney for three joint venturers."

It is unclear to what extent these cases depend on personal contact between constituents and lawyer. To the extent they do, Skarbrevik might be distinguishable since there is no indication that the lawyer defendant there had had direct contact with the plaintiff. On the other hand, it is equally arguable that the joint representation treatment in these cases is grounded, less on personal contact between lawyer and constituents, than on the nature of the businesses, especially, on the small numbers of stakeholders and their informal relations with each other. These are the factors on which the Wilkes line of cases bases its imputation of fiduciary duties among constituents, and they would seem equally relevant to the question of attorney-constituent duties.

As the Wilkes cases emphasize, in small internally conduct businesses, small business constituents do not have much sense of

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A contrary approach was taken in Hoiles v. Superior Court, 204 Cal. Rptr. 111 (Cal. App. 4 Dist. 1984) where the court applied the corporate attorney-client privilege to bar a minority shareholder suing derivatively from discovering attorney-officer communications, even though the corporation was entirely owned and informally run by a small number of family members. The case seems especially implausible because the corporate attorney had represented some constituents in purely individual matters, and many of the allegedly privileged communications involved non-shareholder family members.

18 40 Del. Ch. 316, 181 A.2d 579 (1962).

a distinction between individual interests in the business and corporate interests (and few lawyers would be able to give them a coherent explanation of the distinction).[19] More than likely, they view incorporation as a source of limited liability and perhaps tax advantage, rather than as a means of organizing their dealings with each other. Probably each will have some sense of the danger of conflict, but they are more likely to view the lawyer as someone who, in such situations, will take an active role in trying resolve the problem on terms that are fair to everyone. They are likely to feel betrayed if the lawyer sides with other constituents against them.[20]

C. Intermediate Responses to Small Corporation Disputes

Some alternative approaches that reduce the distinction between joint and organizational representation have been suggested.

i. "Reasonable expectations" and Additional Representation

Even in large corporations, where the corporate attorney leads a constituent to believe that she is acting as the constituent's

[19] Wilkes, 353 N.E.2d at ; see also In Re Banks 584 P. 2d at 292 (in these situations, "there is no reason for [a constituent] to differentiate in his mind between his own and corporate interests").

[20] The logic of cases such as Wilkes and Donahue v. Rodd Electrotype Co., 367 Mass. 578, 328 N.E.2d 505 (1975), imputing fiduciary duties among close corporation participants supports the joint representation approach for lawyer duties to constituents, but as far as the cases are concerned, constituent duties inter se do not necessarily entail lawyer-constituent duties. For example, in all jurisdictions, general partners owe fiduciary duties to their partners, but some courts have held that partnership lawyers owe no duties to individual partners. Rice v. Strunk, 670 N.E. 2d 1280 (Ind. 1996); Richter v. Van Amberg 97 F. Supp.2d 1255 (D.N.M. 2000) While cases applying the joint representation approach to close corporations tend explain their results by describing the business as "akin to a partnership", Hecht, , at least one case applying the "entity" approach to a partnership explains its result by saying that partnerships are "analogous" to corporations. Rice v. Strunk 632 N.E. 2d 1151, 1152 (Ind. App. 3d Dist. 1994).

individual lawyer, the courts will impose professional responsibilities to the constituent. In one well known case, for example, corporate counsel accompanied an officer to an SEC hearing and said nothing when the officer identified him as his personal lawyer. When the corporation subsequently sued the officer over the same matter, the court treated the officer as a former client and disqualified the lawyer from appearing for the corporation.[21]

These cases do not, as the "piercing" ones do, speak of joint constituent representation as corporate representation. Rather they speak of constituent representation in addition to corporate representation. The cases are a plausible response to two special situations -- where the corporation agrees to provide representation to a constituent and where corporate counsel carelessly leads a constituent to misunderstand the limits of the lawyer's undertaking. In the former case, the constituent duty arises from the agreement; in the latter, it arises from the lawyer's carelessness, which is attributable to the organization as the lawyer's principal.

However, this doctrine has also been interpreted more broadly as a general approach to the issue of constituent duties in organizational representation. Under this approach, whether the organization's lawyer owes duties to a constituent depends solely on the "reasonable expectations" of the constituent based on the constituent's dealings with the lawyer (or perhaps other agents of the organization). Some opinions involving partnerships and trade associations could be read to take a view like this, and one commentator has suggested that this doctrine should be applied to organizations generally.[22]

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[21] E.F. Hutton v. Brown, 305 F. Supp. 371 (S.D.Tex. 1969); see also Meehan v. Hopps, 301 P.2d 10 (Cal. App. 1956).

[22] E.g., ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion No. 91-361 (July 12, 1991) (partnership lawyer does not "represent" individual partners for conflicts purposes unless factors such as "partner's expectations of personal representation" indicate additional undertaking); Security Bank v. Klicker, 142 Wis.2d 289, 418 N.W.2d 27, (Wis. App. 1987) (partnership lawyer owed no duty to individual partner where no evidence he "believed that Klicker represented him individually"); ABA

The "reasonable expectations" approach would support constituent duties only in a limited range of situations. First, it depends on direct reliance-inducing conduct by the lawyer. The constituents in Skarbrevik or our Freeze-Out hypothetical would have no claim if they had not dealt personally with corporate counsel.

Second, it would tend to deny constituent duties in situations of manifest intra-organizational conflict. The requirement that the "expectations" be "reasonable" will be most readily established in situations where conflict is either not perceived or seems remote at the time the expectations are formed. Where conflict is clear and strong at the outset, it seems likely that the constituent's expectations will be held unreasonable. (Consider a version of the Founder Freeze-Out in which the Founder first encounters the lawyer after Investor-dominated board is seeking his removal.) Doctrine generally declines to base duties on a plaintiff's reliance on someone whose interests are manifestly "adverse" to hers.[23] Thus, a proponent of the "expectations approach to client identity" argues that the minority shareholder in Felty v. Hartwig, one of the freeze-out cases resembling our hypothetical, could not reasonably have expected assistance from corporate counsel because his interests were "adverse to the corporation."[24]

Standing Committee on Ethics and Professional Responsibility Formal Op. 92-365 (July 6, 1992) (applying something like the "reasonable expectations approach to whether a trade association lawyer owes duty to members); Note, "An Expectations Approach to Client Identity," 106 Harvard Law Review 687 (1993) (generalizing expectations approach as a response to questions of constituent duty). Further pertinent authority is reviewed and discussed in Nancy J. Moore, "Expanding Duties of Attorneys to 'Non-Clients': Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations," 45 South Carolina Law Review 659, 687-95 (1994)..

23 See, e.g., Garcia v. Rodey, Dickason, Sloan, Akin & Robb, 750 P.2d 118 (N.M 1988) (reliance on statement of opposing party in litigation not reasonable).

24 "Expectations Approach," cited in note 22, at

However, since it offers no understanding of the interests of the organization, the "expectations" approach yields no explanation for either of these limitations. Without some understanding of the organization's interests, we have no basis for rejecting the claim of the constituent who had no expectation of individual representation but who claims that the lawyer's duty to the organization required the lawyer to protect some interest of his. Similarly, without some understanding of what the organization's interests are, there is no way to make a judgment as to whether the constituent's interests are "adverse." and hence whether the expectations are "reasonable.[25]

The expectations approach is thus either incomplete or implausible. It is incomplete to the extent it only purports to address the question of whether the lawyer owes duties to the constituent in addition to the organization but leaves unanswered whether she owes duties to the constituent by virtue of her duties to the organization. The approach is implausible to the extent it incorporates the tacit identification of organizational and managerial interests of cases such as Skarbrevik.

b. Aiding and Abetting Liability.

Some cases have held that a lawyer who assists management in conduct that breaches managers' fiduciary duties to constituents is liable to the constituents for "aiding and abetting" the management breach.[26] For example, the Oregon Supreme

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[25] There are similar problems with the claim that corporate counsel owes a duty to constituents because constituents are "third-party beneficiaries" of the contract to provide legal services to the organization. Where the corporation contracts explicitly for counsel to provide legal services to constituents, there is no reason not to enforce the contract. E.g., Kelly, Kruse, Landa, Zimmerman & Maycock 1991 U.S. App. LEXIS 19742, at 7 (10th Cir. 1991) (unpublished). However, courts routinely refuse to imply third-party beneficiary status merely from the claimants status as a corporate constituent on the ground that the corporation's purposes are too ambiguous. E.g., Skarbrevik , at

[26] Granewich v. Harding, 985 P.2d 788 (Or. 1999); see also Thornton v. Evans, 692 F.2d 1064 (7th Cir. 1064, 1082 (7th Cir. 1982) (attomey who prepared documents facilitating fraudulent fund transfer liable for aiding and

Court in Granewich v. Harding approved an aiding and abetting theory on allegations of a wrongful freeze-out resembling those in Skarbrevik. One of three principals in a close corporation alleged that the other two breached fiduciary duties in diluting his ownership through share issuances to themselves, removing him without cause from the board, and terminating his employment without cause. The Court indicated that corporate counsel could by liable both for providing strategic advice to the two manager defendants and for failing to inform the plaintiff of their activities.

As far as it goes, this approach seems strongly supported. Longstanding tort principles prescribe liability for one who knowingly provides substantial support to another's breach of a tort duty.[27] There is no reason to exclude lawyer duties from the reach of this principle. The objection that fiduciary duty is often unclear can be met by interpreting the requirement that the support be provided "knowingly" to entail that the primary actor's breach be a clear one. Skarbrevik and Granewich are examples; the courts treated the managers' conduct in both cases as obvious breaches.

Lawyer liability to nonclients for assisting client fraud has occasionally been resisted on the ground it might interfere with the client trust and willingness to confide.[28] The argument seems both parochial and obtuse even where the person who invokes it is a stranger. Doubtless every profession likes to believe that its distinctive purposes are so important that its members should be exempt from ordinary tort duties, but such claims should be viewed with skepticism when they come from within the profession in question. Moreover, in order to do their jobs, lawyers require, not just the confidence of their clients, but the willingness of others to trust them not to lie or take lawless

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abetting breach of fiduciary duty under federal labor law). Contra, Weingarten v. Warren, 753 F. Supp. 491, 496-97 (S.D.N.Y. 1990) ("Illinois has never recognized the tort of aiding and abetting a breach of fiduciary duty").

27 Restatement (Second) of Torts sec.876(b); Restatement (Second) of Agency sec. 348.

28 E.g., Schatz v. Rosenberg, 943 F.2d 485 (4th Cir. 1991), cert. denied, 503 U.S. 936 (1992).

advantage. Otherwise, they would be unable to make credible representations and commitments on behalf of their clients. Howevermuch we credit arguments for lawyer exemption in the third party context, they are irrelevant or circular in our context, where the question is not the relative importance of client loyalty, but rather who embodies the client for the purposes of this loyalty.

Granewich seems right in imposing liability for aiding and abetting, but it goes only part of the way toward answering our questions. It is concerned with liability and does not directly address confidentiality and disqualification issues. Moreover, it is not clear that it speaks even to liability when the claim, like the one in our hypothetical, alleges only passive nondisclosure rather than active deception or facilitation. The "substantial assistance" requirement of the established tort principle has often been interpreted to require more than silence.[29] (Skarbrevik is, again, an easy case for liability on this point. It appears that the lawyer, in addition to giving advice, was active in preparing and filing fraudulent documents.[30]) It is a general tort principle that silence alone does not confer liability unless there is a particular duty to

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29 See Reves v. Ernst & Young, 507 U.S. 170 (1993) (accountants who gave passive professional advice did not "participate" in firm's fraudulent activities for purposes of RICO liability).

Skarbrevik rejected aiding and abetting liability by invoking the doctrine that liability for aiding and abetting a fiduciary breach arises only when the defendant acted "for personal gain." cite ; see Doctors' Co. v. Superior Court, 775 P.2d 508, 513 (1989). The holding is subject to criticism on two grounds. The strongest rationale for it would be to protect good faith (but mistaken) legal advice. However, the general requirement that the defendant have "knowledge/scienter" that the primary actor's conduct is wrongful should largely accomplish this purpose without inquiry into gain. Moreover, the Skarbrevik lawyers were being compensated by hourly fees and were probably acting in the hope of preserving a relation that would generate fees in the future. This ought to constitute "personal gain." See Weingarten v. Warren, 753 F. Supp. 491, 496 (S.D.N.Y. 1990) (receipt of fees from breaching trustee warrants inference that lawyer acted for personal gain).

30 See Skarbrevik,

speak.[31] This simply raises anew the question we turned to the doctrine in the hope of answering.

To the extent that the founder's claim against the lawyer in our hypothetical rests on the latter's failure to report the accountant's statement, it seems viable under the joint representation approach, which gives the lawyer himself a fiduciary duty to the founder, but not under an "aiding and abetting" theory, which would require active assistance to management wrongdoing.

c. Retroactively Imposing the Corporate Veil

Instead of extending the joint representation approach into the traditional realm of organization, we could do the opposite. In Jess v. Danforth, the Wisconsin Supreme Court took this route for disqualification issues arising from representations involving organizational formation. In that case, 23 participants in a business asked the lawyer to incorporate the business and represent it. A partner of the lawyer subsequently represented a plaintiff in a medical malpractice suit against Dr. Danforth, one of the twenty-three, who had become an officer in the corporation. The defendant sought to disqualify the firm on the ground that Dr. Danforth was either a present client, by virtue of his corporate office, or a former client, as a member of the pre-incorporation group. The court declined to depart from the conventional view that being an officer of a corporate client does not make one a client. It then broke new ground by applying the "entity rule" retroactively to the pre-incorporation group, holding that a member of a business group that seeks assistance in incorporation is not to be treated as an individual client for conflicts purposes.[32]

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31 E.g., Restatement (Second) of Torts 551.

32 Jess v. Danforth, 169 Wis. 2d 229, 485 N.W. 2d 63, (1992):

> [W]here (1) a person retains a lawyer for the purpose of organizing an entity and (2) the lawyer's involvement with that person is directly related to that incorporation and (3) such entity is eventually incorporated, the entity rule applies retroactively such that the lawyer's pre-incorporation involvement with the person is deemed to be representation of the entity, not the person.

The holding seems appropriate to the facts of the case. The group may have been too large and its dealings too formal to make the joint representation approach appropriate. Moreover, it appears that the malpractice claim arose from activities unrelated to the business that the firm had represented; so even if Dr. Danforth had been deemed a former client, there might have been no basis for disqualification.[33]

On the other hand, the court's broad formulation, which would ostensibly apply the retroactive entity rule even to intra-business disputes among constituents in smaller, more informal organizations, seems dubious. The court apparently relies on the fact that individuals seeking incorporation expect and desire to be dealt with on a more formal basis. But, as we have noted, the overwhelmingly salient reasons for small business incorporation concern dealings with outsiders, such as liability protection or ease of contracting or holding property. There is no reason to assume that the consequences such individuals desire include a transformation in their internal relationships.

No one has suggested applying the retroactive approach to liability and confidentiality issues. There is an obvious difficulty in doing so. Given the absence of an organizational structure at this point, it would be hard to determine to whom among the constituents the lawyer should be accountable for fiduciary purposes and who should control the privilege. As noted above, such obstacles aren't categorically preclusive. There might be a discernible informal authority structure. However, informality does increase the difficulty of applying an "entity" perspective.

Moreover, in the disqualification context involved in that case, the approach seems either superfluous or unsatisfactory. It is superfluous where the conflict arises between a constituent and some third party. There the "substantial relation" test will usually produce the same result whether or not the entity approach is used. It is unsatisfactory where, as in the Founder Freeze-Out, the

[33] Model Rule 1.9(a) (requirement of consent for representation adverse to former client applies where matter is “the same or substantially related” to substance of prior representation).

dispute is between constituents. Applying the retroactive entity approach in that situation yields an immediate clear answer only if we conflate corporate interests with those of the current control group, and I have argued that this is improper.[34]

C. Conclusion

Some may find the arguments for the joint representation approach implausible. Moreover, the ones I've presented are not applicable to large, impersonal businesses. To the extent that we find the joint representation approach inadequate, we will be inclined to consider the entity approach either as an alternative or a supplement to joint representation. We have yet to see what the entity approach involves. In fact, there is no single understanding of the entity approach. There are at least three variations. An adequate analysis of intracorporate conflicts needs to draw on all three. Once formulated plausibly, the entity approach turns out to

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[34] Still another alternative is a proposal by Lawrence Mitchell, "Professional Responsibility and the Close Corporation: Toward a Realistic Ethic," 74 Cornell Law Review 466 (1989). Mitchell would treat "close corporation" representation as joint representation of the shareholders, but he would apply a strict conflict-of-interest rule that would require separate representation in a broad range of cases.[34] Under this rule, there could be no joint (or entity) representation of constituents unless certain conditions reducing the likelihood of conflict were satisfied. Either the shareholders must all have inherited their shares from a single founder, or there must be a majority shareholder and the articles must clearly define the rights of all share classes.

This seems far too strict. Having pointed out the arbitrariness of the conventional distinction between joint and organizational representation, Mitchell reintroduces it in a less expansive but equally arbitrary form. Outside the organizational context, the bar's joint representation rules provide a good deal of flexibility in taking account of the costs and benefits of joint representation. A lawyer can jointly represent even interests in open conflict if she gets informed consent and reasonably believes it's in the interests of the parties. And it is often reasonable to so believe. In addition to reducing lawyer fees, joint representation can often dampen conflict, by strengthening trust, facilitating the exchange of information, and precluding bluffing and aggressive posturing. Mitchell's rule would often preclude constituents from choosing this option even when there is no actual or anticipated conflict among them.

be considerably less different from the joint representation approach than conventional rhetoric presumes.

III. Entity Representation I: The Organization as Control Group

The first interpretation of entity representation conflates the corporation with those who have de facto control of it and the corporation's interests with the interests of the control group. The control group will usually be the group of officer/inside directors with whom the lawyer routinely deals.

The Control Group view gives definite answers to most of the questions in the Founder Freeze-Out scenario. After Founder has been squeezed out, Investor is in control. Its interests are thus the corporation's interests. It is in Investor's interests for the lawyer to defend against any claims Founder might make, so the lawyer is not disqualified. It is against Investor's interests for Founder to find out about the accountant's statements, so confidentiality forbids disclosure. And the Investor-controlled board can invoke the attorney-client privilege against Founder.[35]

Although few lawyers will recognize or embrace this model as an explicit principle, we have seen that it is the tacit premise of cases that hold the corporate lawyer violates no professional duty in assisting managers in flagrantly ultra vires conduct that injures noncontrolling shareholders or that management may invoke the attorney-client privilege against a derivative plaintiff. When courts characterize constituents alleging unlawful conduct on the part of

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[35] Prior to the time Investor becomes a shareholder, Founder has control. At this point, it is in Founder's interests for the lawyer to discuss the future dangers of a squeeze-out, so lawyer should do this.

I have heard lawyers suggest it is not in the corporation's interest for Founder to get this advice, even when he is the only officer/shareholder. They appear to be anticipating Investor's control, or including them as informal constituents prior to their stock acquisition. This seems implausible.

the Control Group as "adverse" to the corporation, they are conflating the corporation with incumbent management.[36]

A case that comes close to explicit espousal of the Control Group model is Bell v. Clark, in which the Indiana Supreme Court held that a lawyer for a limited partnership had no duty to inform limited partners of wrongdoing by the general partner. The court held that a partnership lawyer is answerable only to the partners who have managerial authority:

> To the extent that a partnership agreement places responsibility for the management of the partnership in the hands of less than all of the partners, the partners to whom management authority has been given become the 'duly authorized constituents' [entitled to instruct the lawyer].[37]

Since both the agreement and the statute gave managerial responsibility to the general partner, the lawyer was answerable only to him. The opinion is indifferent to the fact that the general partner allegedly violated limitations on his conduct imposed by both the agreement and the statute. Its use of the word "authorized" is thus a term of art. Holding office, rather than authority, constitutes the organization in this view.

This view is grounded in powerful psychological forces. An organizational lawyer can only deal with her client through agents. If she has recurring dealings with particular agents, she is likely to develop personal relations with them. In contrast to these relations, the client as an "entity" remains a remote and ambiguous abstraction. Other corporate constituents are faceless and silent. Relations with particular managers will be the most concrete, vivid, and emotionally engaging dimension of the lawyer's work

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36 E.g., Skarbrevik, 282 Cal. Rptr. 627, 637 (the plaintiff was a "potential adverse party whose interests could not be, and were not, represented by his adversaries' chosen counsel [i.e., corporate counsel], whose duty of loyalty was to his own client [sic]); Felty, 523 N.E.2d at 557.

37 Bell v. Clark, 670 N.E.2d 1290 (Ind. 1996).

for the client. There is probably a natural psychological tendency to identify the client with these personal relations.

This psychological disposition will be reinforced by other factors. If the managers are senior officers, they will have broad authority over corporate affairs, so the psychological identification will overlaps the legal one substantially. More than likely, these officers will have chosen to employ the lawyer and will make decisions about lawyers future employment; so self-interest encourages the lawyer to identify them as the entity. And finally, professional responsibility rhetoric tends to speak of clients as persons and, even when it distinguishes organizational clients, to speak of them as unitary entities, thus encouraging the overlooking of conflict.

This tendency is also reinforced by the fact that personifying the corporation in terms of its agents is a useful cognitive and legal device across a broad range of situations. These are situations in which the lawyers assist managers in dealing on behalf of the corporation with outsiders. In these situations, the legal fiction that treats the corporation as a unified, organic entity rests in part on the shared interest of its constituents in enhancing its value. There is good reason to presume in this situation that those in control will act in good faith on behalf of this interest. To be sure, there may be differences among constituents about the best way to pursue their shared interest, and some constituents may sometimes have unshared interests that may bias their judgments, but where there is no manifest disagreement and no apparent conflict of interest, it is reasonable to presume that those in control are serving the shared interest. The same considerations that underpin the "business judgment rule" which prescribes deference to disinterested managerial judgments in derivative suits, supports the lawyer's tendency to identify the corporation with management in considering her professional responsibilities.

However, the grounds for the identification erode when the managers are dealing, not with an outsider on behalf of an ostensibly unified group of constituents, but with or on behalf of insiders in situations of conflict. Managerial self-interest is less likely here to coincide with legitimate constituent interests.

In the intracorporate situation, the Control Group perspective is subject to the obvious objection that it confuses power with right. It is unreasonable to view the interests of those with de facto control as those of the corporation without regard to how they attained control or how they are using it. The approach resembles those versions of Legal Positivism that identify law with the pronouncements a Sovereign, a view that H. L. A. Hart conceded would make law indistinguishable from the commands of a well-armed thug.[38]

Decisions in conflict cases that invoke the Control Group principle are often either insupportable (like Skarbrevik) or supportable only on some other principle (like the Authority Structure principle to be considered momentarily).

There may, however, be a range of situations involving conflict where something like the Control Group principle could survive analysis. Perhaps the most important candidates involve control contests in public corporations. -- either proxy battles or takeovers through stock purchases. Corporate counsel routinely assist managers in fighting proxy challenges and hostile takeovers. It seems to be taken for granted that such practice serves corporate interests.[39] It is just as commonly assumed that it would be improper for corporate counsel to assist the challenger, even if she felt that the corporation would be better off if the challenge succeeded.[40] These assumptions are debatable. In all such

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38 H.L.A. Hart, The Concept of Law 20-25 (1960).

39 For a rare explicit discussion, see ABA Informal Opinion 1056 (1968) which approves assisting management in a proxy contest, but then adds the familiar question-begging qualification "except in situations where … the giving of the advice would be adverse to the interests of the corporation."

40 Compare Financial General Bankshares v. Metzger, 523 F. Supp. 744 (D.D.C. 1981), rev'd for lack of jurisdiction, 680 F.2d 768 (D.C.Cir. 1982) (corporate counsel breached duty by collaborating with dissident shareholders: "…Metzger's duty of undivided loyalty to his client corporation should have been directed toward the advancement of the goals articulated by Middendorf as the incumbent manager"). with In re Wise, 433 Mass. 80, (2000) (approving

situations, the challengers assert that the corporation would be better off if the management were defeated. (Or if counsel is assisting management in defending against an anticipated future challenge -- for example, by installing anti-takeover defenses, management has a strong conflict of interest that raises questions about its ability to speak, even without contradiction, for the corporation.) To be sure, counsel will rarely be in a position to make a reliable judgment on the merits. That limitation, however, does not necessarily suggest commitment to management as a default position. As a matter of logic, it would seem to lead more directly to neutrality.

Perhaps the pro-management default position might be grounded on a corporate law presumption that continuity of management serves corporate interests. One might infer such a presumption from numerous features that advantage incumbents, including privileged access to relevant information, discretion over voting procedures, the ability to finance proxy campaigns from the corporate treasury, and the constraints in securities, banking and insurance law on large shareholder activism.

Moreover, it's not clear that any purpose would be served by requiring corporate counsel to remain passive in these situations. Management would then have to retain its own counsel to whom it would have to provide, at additional expense, all the information already possessed by corporate counsel relevant to the issues. It is also not clear what role would remain for corporate counsel.[41]

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discipline of nonprofit corporation lawyer who assistant dissidents; describing duty as "to remain neutral"). See also ABA Informal Opinion 516 (1962) (corporate counsel may not assist dissident shareholders, even if he believes their success would be in the best interests of the corporation).

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> [Requiring separate counsel for management in all situations of conflict] is both unrealistic and wasteful: unrealistic because it ignores the close working relationship between the in-house attorney and management, and wasteful because it relegates the corporate attorney to a passive or duplicative role in conflicts where no separate "entity interests" are identifiable.

The pro-management policy has limits, however. If a presumption is warranted, it has to be a rebuttable one. First, it is routinely conceded that where management is pursuing a course that is plainly unlawful counsel must not assist.[42] This is not a demanding standard in the control contest area, however, where standards are vague and management has a good deal of discretion.

Second, substantial authority requires that corporate counsel remain neutral in some derivative suits. Where the individual defendants include incumbent officers, joint representation is deemed permissible in early stages, while the nature of the claims is explored, or where the claims seem patently without merit. In other situations, however, courts have insisted on separate representation. Some have permitted corporate counsel to represent the officers, while new counsel is retained for the corporation. Others have insisted that corporate counsel represent the corporation, while new counsel is retained for the officers.[43] There are efficiencies to having corporate counsel assist management in all internal disputes. Counsel is already familiar with the issues and has an established line of communication with management. But the principle of loyalty to the entity is deemed to require the sacrifice of these efficiencies in the derivative context.

What differentiates many proxy or acquisition contests from derivative suits is that the former necessarily involves a specific allegation of breach of fiduciary duty on the part of management. Where such an allegation is not patently without merit, it suffices to overcome the pro-management presumption.

Of course, control contests often involve allegations of breach of fiduciary duty, and are often accompanied by derivative suits. Moreover, even where such allegations have not been made,

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"Developments in the Law- Conflicts of Interest," 94 Harvard Law Review 1244, 1335 (1981).

42 E.g., id., at 1337-38.

43 E.g., Yablonski v. United Mine Workers, 448 F.2d 1175 (D.C.Cir. 1971). See the further discussion of representation in derivative suits at below.

there may be other grounds for considering the presumption rebutted. If management is engaging in a clear breach of duty, the lawyer should not be permitted to wait for a derivative suit to challenge it before taking responsive action.

A harder case arises in situations like the Founder Freeze-Out where the breach is not clear, there has been no constituent claim, but there probably would be if material information were available to an affected constituent. If the Founder knew the accountant's statement, he would be likely to make a claim. If the claim would be nonfrivolous, it might be desirable from the point of view of the organization as a whole for it to be asserted, since this would trigger a more reliable process for the resolution of the issue than will otherwise occur. Current management has a strong and specific conflict-of-interest here, so it makes no sense to accord them the benefit of any presumption.

Some kind of pro-Control Group presumption may help explain why corporate counsel has broad latitude to assist incumbent management in control disputes, but the presumption is only plausible if subject to strong limits. Those limits will have to be supplied by principles of authority and fiduciary duty. These are the basis of the second and third interpretations of the entity idea. Once they have been elaborated, there will be little remaining use for the Control Group as a distinct interpretation of entity representation.

IV. Entity Representation II: The Organization as Authority Structure

The second perspective equates the corporation with its authority structure. One way in which a formal organization differs from a collection of individuals is that its constituents have adopted arrangements for allocating power and making decisions. Thus, we could say that the lawyer's duty is to this structure.

A. Model Rule 1.13

ABA Model Rule 1.13 seems to enact the Authority Structure perspective in providing, "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[44] Control is not enough; authority is the touchstone.

The Rule, however, fails to develop this idea coherently or plausibly. After asserting the general Authority Structure principle, it proceeds to an elaboration that bespeaks confusion and ambivalence. These paragraphs deal with situations in which a corporate agent engages in conduct that is a "violation of law" and is "likely to result in substantial injury to the organization." They offer some vague platitudes about acting in the "best interests of the corporation", then suggest that the lawyer "may" go over the agent's head to the "highest authority that can act in behalf of the organization," and conclude that if the "highest authority" behaves unlawfully, the lawyer "may" resign.

This formulation has some salient deficiencies:

First, one would think that it would always be in the organization's interests for the lawyer to report to an agent's superiors "unlawful" conduct likely to inflict "substantial injury" on the organization, where the agent persists after remonstrance by the lawyer. If this would be in the corporation's interests, one would think that the lawyer, on any interpretation of organizational representation, would have a duty to do it. Yet, the rule speaks of this only as something the lawyer "may" do.

Second, when the "highest authority" in the organization insists on a "clearly" illegal and injurious course of action, the only option under the Rule seems to be resignation.[45] The Rule provides this only in a roundabout way. (Here, as elsewhere, circumlocution signals ambivalence and dissensus within the bar.) It doesn't specifically preclude further disclosure; it simply says that the lawyer "may withdraw." Nevertheless, when the rule is

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44 Emphasis added.

45 And again, it's merely an option, not a duty. But see Model Rule 1.16(a)(1) (lawyer "shall withdraw" if the representation will result in a violation of law).

glossed in the light of its legislative history and the related confidentiality rule, the most likely inference is that the lawyer may not do anything else; in particular, she may not make disclosures to corporate constituents other than the "highest authority" or to public authorities.[46]

The disclosure limitation seems inconsistent with the general Authority Structure principle with which the rule begins. That principle holds that the lawyer represents the organization acting through its "duly authorized" constituents. Even the "highest authority", when it engages in an injurious and "clearly" illegal course of conduct, is not "duly authorized." If it lacks authority to engage in the conduct, then it lacks authority to instruct the lawyer to remain passive about it. Thus, the lawyer cannot look to the "highest authority" to express the corporation's interests. On what basis then do the Rules assume that passivity would be in the corporation's interests? The drafters are silent on this point.

B. Beyond the Board?

[46] The drafters of the Model Rules proposed initially to permit whatever disclosure was required by the best interests of the organization, but the House of Delegates rejected this proposal. See Stephen Gillers, "Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure," 1 Georgetown Journal of Legal Ethics 289 (1987). Four states - Maryland, Michigan, New Hampshire, and New Jersey - have enacted versions of the rule with disclosure permission resembling the initial draft. Stephen Gillers and Roy D. Simon, Regulation of Lawyers: Statutes and Standards 1998 145. The dominant view among practitioners and commentators seems to be that under the official draft disclosure is not permitted beyond the Board. Robert Tuttle, "The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation", 1994 University of Illinois Law Review 889, 924-25 and materials cited at note 190. But there have been dissents. See Geoffrey C. Hazard, Jr., and William Hodes, The Law of Lawyering 17-14-16 (3d ed. 2001) (suggesting that close corporation counsel might be warranted in disclosing control group wrongdoing to shareholder); Restatement of the Law Governing Lawyers sec. 96, comment f, at v. II, p. 44 ("view of the Reporters [is that the Rule] should not be understood to preclude controlled [outside] disclosure where … disclosure would clearly be in the interest of the entity client.").

A further issue concerns the interpretation of "highest authority." In corporations, this is usually the board. Many lawyers tend to conflate the authority structure with the board and operate on the general principle that, when they encounter intra-corporate conflict, they should look to the board for instruction. This can be a useful presumption, but it is not valid categorically. As the Comments to the Rule acknowledge, "applicable law may prescribe that under certain conditions highest authority reposes elsewhere." They mention as an example that special responsibility for some corporate decisions is conferred on independent directors.

Curiously, the Comments don't mention shareholders, although they have responsibility for some important decisions. (In nonprofit corporations, the attorney general and sometimes members have analogous roles; with trusts, the court sometimes must make or approve critical decisions.) The question thus arises whether the "highest authority" should include shareholders when the relevant course of conduct could only be authorized by shareholders.

Skarbrevik is an example. The Articles amendment eliminating pre-emptive rights required shareholder approval. The defendants were seeking to avoid this procedure. Shareholders could waive a meeting but only with notice and unanimous consent. Thus, the Authority Structure principle suggests that the lawyer should have looked to the body of shareholders to determine the corporation's interests, and as a practical matter, this required informing the fourth shareholder of the situation. This would be the best way to respect the role of shareholders, and notwithstanding the court's characterization of him as "adverse" to the corporation, there is no competing legitimate interest that would have been jeopardized by doing so.

We might thus elaborate the Authority Structure principle by suggesting that, where no one with authority is available to instruct the lawyer, her job is to facilitate the processes of authoritative decision. This would usually entail providing information to key participants that is likely to prompt them to trigger the relevant processes.

This approach would be more difficult to apply with larger corporations. Here, informing shareholders would often be tantamount to making information public, and there might be corporate interests that would weigh against this. (Perhaps the information would trigger government prosecution or damage suits by private outsiders, or perhaps it would give some advantage to competitors.) Yet, even with public corporations, going to shareholders may be an appropriate option.

SEC v. National Student Marketing, a case interpreting lawyer duties to their clients under the securities laws, illustrates the application of the Authority Structure perspective in a public corporation context. National Student Marketing and Interstate National, two public companies, agreed to a merger in which Interstate shareholders would exchange their shares for National Student Marketing shares. At the closing, the lawyers discovered that the "comfort letter" from NSM's accountants required by the merger agreement would be qualified by adjustments to the earnings figures disclosed to the Interstate shareholders in connection with the shareholder vote to approve the merger. The lawyers informed the Board, and the "consensus of the directors was that there was no need to delay the closing."

The Court held that the Board was mistaken and that the lawyers violated the antifraud norms of the securities law by proceeding with the closing. The lawyers should have insisted that proxies be re-solicited with disclosure of the new information: "In view of the obvious materiality of the information ... the attorneys' responsibilities to their corporate client required them to take steps to ensure that the information would be disclosed to shareholders."[47] The court thus adopts the Authority Structure

[47] 457 F. Supp. 652, (D.D.C. 1978).

The fact that shareholder claims under the securities acts are termed "direct" rights of shareholders, while most state law fiduciary duty claims are termed "derivative" rights of the corporation should not distinguish National Student Marketing from cases like the Founder Freeze-Out scenario. The line perspective, but unlike Model Rule 1.13, recognizes that with respect to matters requiring shareholder decision, it may entail duties to go beyond the board.

C. Limits of the Authority Structure Perspective

In a case like Skarbrevik, where the lawyer participates in violation of a specific rule allocating authority, the application of the Authority Structure perspective is fairly straightforward. However, many situations are more ambiguous, not only because authority norms can be ambiguous, but because the distinction between authority norms and other kinds of norms may not be clear. Indeed, any decision by a corporate manager that violates any norm might be called unauthorized.

To cabin the Authority Structure approach, we might focus on procedural, as opposed to substantive, norms. The distinction is often readily intelligible. Rules that say that say that pre-emptive rights can only be eliminated through Articles amendment and that Articles amendment requires a shareholder vote definitely sound procedural. Moreover, a major strategy of corporate law is to rely on procedural norms to avoid judicial resolution of difficult substantive decisions. Most important internal substantive norms are subsumed under the fiduciary duties of care and loyalty. The "business judgment" rule focuses duty-of-care review on considerations such as the extent of efforts to seek information and of deliberation. The ratification statutes focus duty-of-loyalty review on disclosure to and ratification by disinterested directors. Both tend to turn substantive issues into procedural ones. The Authority Structure approach to professional responsibility seems

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between direct and derivative shareholder actions has been drawn largely for procedural purposes and is arbitrary and anachronistic even within that sphere. There is no reason to interpret the common law and the securities statutes to ascribe different substantive concepts of corporate obligation. The courts usually interpret the two bodies as in pari materia. E.g., Dirks v. Securities and Exchange Commission, 463 U.S. 646, (1983). Note that in enforcing the securities acts the NSM court speaks of the defendants' duty to "their corporate client."

consistent with the strategy of judicial control that focuses on procedural regularity.

Nevertheless, this approach will be hard to apply to the extent that the intracorporate dispute is about authority. This is explicitly the case in the Founder Freeze-Out story. The issue is whether Investor is entitled to control the board. That, of course, depends on the merits of Investor's claim that the milestones have not been met. To assume that the current board has authority to instruct the lawyer is to assume Investor's position on the merits.

Of course, if the lawyer were to disclose the accountant's statements to Founder, Founder would be likely to raise the substantive issue in a lawsuit. Litigation is a default decisionmaking procedure when the normal corporate processes fail to achieve agreement. If we viewed shareholder litigation as an extension of the corporate processes, we might conclude that the Authority Structure would support disclosure to Founder. To decide that disclosure is warranted, the lawyer does not need to decide that Founder's claim is meritorious, simply that disclosure will enhance the decisionmaking process.

Some may find it implausible, as a formal matter, to see litigation as a kind of intra-corporate process. Moreover, functionally, it may be naive to assume that litigation oriented toward the resolution of authority disputes is always in the interests of the corporation. Litigation is costly, and it often involves pressures that are unrelated to the merits. If Founder would be likely to lose the case after imposing substantial legal costs on the corporation or if she would be likely to force a settlement for reasons unrelated to the merits, it would not be in the corporation's interests to trigger such a suit. Assessing such contingencies requires some judgment on the merits. The question cannot be answered purely in terms of procedural norms.

Moreover, even if we can somehow decide that the corporation, understood as an Authority Structure, has an interest in the litigation going forward, further issues arise as to the conduct of the litigation. For example, can the corporation's lawyer represent the Investor-nominated board members, either alone or with the corporation? If the joint representation perspective is rejected, then Founder cannot claim to be a present or former client, and there is no ground for disqualification on that ground. On the other hand, the corporation has been a client, and if joint representation with the directors is contemplated, will continue to be. Thus, its consent is necessary. The question thus arises as to how the corporation can consent in this circumstance. The Control Group approach suggests that incumbent management could consent on behalf of the corporation,[48] but this implausibly ignores management's conflict of interest

The Authority approach yields no better answer. The Investor directors should not be understood to have authority to make an important corporate decision when they have a severe conflict. On the other hand, the only other constituent - Founder - is equally conflicted. If no consent is possible, then the default position is separate representation for Founder, Investor, and the corporation. But this is would entail significant additional costs. If Investor is right on the merits, then separate representation is against the corporation's interests. Again, we cannot assess the merits solely in terms of authority norms.

In general, cases where all or most of the board has a serious conflict will pose difficulties under the Authority Structure principle. The authority of a board in this situation is often ambiguous. A decision by an interested board is usually voidable on the complaint of shareholders unless either ratified by shareholders after full disclosure or proven "fair".[49] Suppose, however, management does not seek ratification, and the shareholders do not have enough information to complain. Is such a decision "authorized"? The decision is not clearly unauthorized;

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48 See Califomia State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion 1999-153 (board dominated by one of two shareholders can consent to joint representation of dominant shareholder and corporation in derivative suit by minority shareholder). But see also the contrary authority cited in notes below.

49 See James D. Cox, Thomas Lee Hazen, and F. Hodge O'Neal, Corporations 209-15 (1997)

at least it is not per se ultra vires. Moreover, the statutes do not require shareholder authorization; they simply make that one mode of authorization. The transaction is also legitimate if it's "fair", but here authority depends, not on procedures, but on the substantive merits of the decision. It seems likely that in some situations of this type it would be desirable for managers to make disclosures to shareholders. The reasons for this, however, are not fully captured by the Authority Structure idea.

If the Authority Structure perspective is ambiguous where the dispute is about authority, it is incomplete in circumstances where an act that seems procedurally authorized arguably violates substantive rights. An important of cases involves constituents without control rights. Minority shareholders, for example, often lack both board representation and veto rights in a shareholder vote. Nevertheless, they have a right to fair treatment by the corporation and the board. Statutes sometimes provide mandatory supplemental control rights to protect their interests, but it sometimes happens that control rights are insufficient to protect against certain types of exploitative decisions that violate substantive fiduciary duties.[50] A legal ethic focused on procedural norms would not reach such decisions.

If nonshareholders are considered corporate constituents, than some of their claims would also not be reached. Internal control rights are presumptively accorded to shareholders, but some argue that nonshareholder groups such as creditors or workers or local communities should be considered corporate constituencies to which substantive duties are owed. To the extent that procedural norms do not provide control rights parallel to these substantive ones, the Authority Structure approach does not reach them.

A second category of cases to which the Authority Structure approach seems unresponsive includes situations where the lawyer deals with a constituent outside of the authority

50 E.g., Zahn v. Transamerica Corp., 162 F2d 36 (3d Cir. 1947); Coggins v. New England Patriots Football Club, 492 N.E.2d 1112 (Mass. 1986); Jones v. H.F. Ahmanson & Co., 81 Cal. Rptr. 592, 460 P.2d 464 (1969).

structure – the situation addressed in the Opdyke case mentioned above and the federal insider trading rules.

V. Entity Representation III: The Organization as Framework of Dealing

A. Introduction

The third understanding of entity representation identifies the corporation with its entire legal framework, including in addition to norms about authority, substantive norms. The corporation derives its unity from a legal structure designed to reconcile the interests of its constituents. The Authority Structure is only part of the full legal structure. In particular, it omits much of the range of fiduciary duties. Understood in terms of its full legal structure, the corporation's identity includes, in addition to a set of decisionmaking procedures, a commitment that its constituents be treated fairly. Thus, a corporation has an interest in the fair treatment of its constituents.

The Framework-of-Dealing approach overlaps the Authority Structure one and will often lead to the same result. Where a particular issue is clearly assigned to a particular constituent or body within the corporation, both approaches counsel deference to that constituent. But the Framework-of-Dealing approach suggests that decisions sometimes turn on substantive norms.

For example, in the Founder Freeze-Out scenario, the lawyer might resolve the conflict-of-interest issue by aligning himself with the constituent who had the more meritorious claim. If the founder's claim is valid, the lawyer should represent him; if not, he should continue to represent the incumbent board. His goal in either case is to represent the corporation. He decides which among the competing claimants speaks for the corporation by determining which claim is most consistent with the Framework of Dealing.

Similar considerations might bear on confidentiality. If the board's substantive position is consistent with the Framework of Dealing, its claim to control the attorney-client privilege is strong. If not, the attorney might feel obliged to make her own judgment as to whether confidentiality is in the corporation's interest. And the same point applies to fiduciary duties. The lawyers duties to the corporation should extend to a constituent who has a claim well grounded in the Framework of Dealing. If the founder's claim is valid and disclosure of the accountant's statement to him will facilitate its assertion, then this approach supports a duty to disclose.

Of course, in many, perhaps even most, situations, the lawyer will not be able to determine reliably the substantive merits. In these circumstances, the Framework-of-Dealing approach implies neutrality. With respect the conflict-of-interest issue, it means that the lawyer cannot speak for any of the disputing constituents. He must withdraw. This is the same result as the Joint Representation approach, but the basis for it is different. In the Joint Representation perspective, withdrawal is required because the lawyer cannot adequately represent all individuals and cannot represent any of them individually without jeopardizing duties of confidentiality and loyalty to the others. In the Framework-of-Dealing approach, withdrawal is required because the client's interests cannot be determined.[51] If the lawyer cannot determine the organization's interests, then the premise of treating its constituents as a unity is absent.

[51] A California ethics committee opinion applies the joint representation approach to a limited partnership riven by disputes. The two general partners are giving inconsistent instructions to the lawyer, and the agreement does not indicate how such deadlocks should be resolved. In addition, the limited partners seek to remove one of the general partners, but the agreement gives them the right to do so only on specified grounds, which they assert and the general partner denies are present. The opinion recommends that the lawyer withdraw. California State Bar Standing Committee on Professional Responsibility and Conduct Formal Opinion 1994-137, ABA/BNA Lawyers' Manual on Professional Conduct.

With respect to confidentiality, neutrality implies no confidentiality as among constituents. If it is not apparent which constituent speaks on behalf of the corporation, then none of them are in a position to invoke confidentiality against the others. With respect to fiduciary duties, neutrality implies no active duties to constituents, including the board. (Of course, duties of confidentiality vis-à-vis outsiders, and fiduciary duties to protect undisputed corporate interests would continue. Neutrality applies only to the intracorporate dispute.)

The Framework-of-Dealing approach has a strong affinity with Brandeis's notion of "counsel to the situation." Louis Brandeis used this phrase to describe his intervention in the famous Lennox case. The owner of a troubled tannery business and one of its creditors consulted Brandeis, who already represented another of the business's creditors. The owner insisted that he was committed to repaying all creditors in full. The creditors apparently wanted some assurance against asset stripping or further encumbrances until the debts had been discharged. Brandeis suggested that the business be assigned to one of his partners for the benefit of creditors. His role would be "to give everybody, to the best of my ability, a square deal" and "to see that everybody got his legal rights." Owner and creditors agreed, but the arrangement broke down when the owner refused to transfer some property to the trustee and the two got into a dispute over the owner's claims for compensation for assisting the trustee.[52]

In the resulting dispute, the owner accused Brandeis of violating conflict-of-interest norms. Asked whom he represented, Brandeis replied, "I should say that I was counsel for the situation."[53] The premise of this remark is precisely that of the approach to organizational representation we are considering. Brandeis's "situation" is a Framework of Dealing -- an immanent structure of converging interests constituted by express, implied, default, and mandatory legal terms. The idea has been much

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[52] See Alpheus Thomas Mason, Brandeis: A Free Man's Life 232-37 (1956) (describing the Lennox case).

[53] Id., at 236.

derided as a basis for joint representation.[54] Yet, no one objects to corporate representation on the ground of constituent conflict, and Brandeis's notion is the one that best explains how such representation is possible in circumstances of conflict.

The Framework-of-Dealing perspective thus adopts the best theoretical understanding of why the law speaks of the organization as an entity. This does not necessarily mean, however, that it has value as a practical guide to professional responsibility decisions. Some will be disturbed by the notion that the lawyer has responsibility for determining the merits of an intracorporate dispute. Some will think the she will so seldom be able to make such a judgment that the approach will require neutrality with excessive frequency. In fact, however, something like the Framework-of-Dealing approach seems already presumed by current doctrine in a variety of situations, and it seems to be workable in these and other situations.

We proceed to consider, first, the jurisprudential basis of the Framework of Dealing approach, and then turn to its practical application in current doctrine.

B. Jurisprudential Basis

1. The Framework of Dealing

[54] Seven former presidents of the American Bar Association condemned Brandeis's professional ethics in the proceedings on his Supreme Court nomination, on the basis of several episodes, including the Lennox case. Id. at 489-90. Many contemporary lawyers agree with the criticism of his conduct in this case. John Frank, for example, concludes a critical appraisal with the advice, "never be 'counsel for a situation'", explaining, "Lawyers are not retained by situations, and the adversary system assumes that they faithfully represent one interest at a time." "The Legal Ethics of Louis D. Brandeis," 17 Stanford Law Review 683, 708 (1965). But lawyers are retained by organizations, and once we recognize that it is a Framework of Dealing that makes organizational representation possible, we see that such grounding may also be available in circumstances involving formally unaffiliated individuals. See below

The Framework of Dealing approach has the virtue that it provides the most plausible formulation of the connotations of the "corporation", or more generally, "organization", as we conventionally personify it in legal discourse.

The starting point should be the recognition that the corporation is a legal fiction. It has no psychology of its own and no moral status of its own. Thus, it cannot have interests of its own. We use the fiction as convenient proxy for the interests of its constituents. We may regard these constituent interests as forming a whole that transcends its parts (an "entity" rather than an "aggregate"), but it remains the case that a corporation's interests are entirely dependent on those of its constituents.

Thus, it makes no sense to speak of corporate interests that are unrelated or contrary to shared constituent interests. It is a mistake, for example, to say, as courts have in distinguishing between derivative and direct or representative claims, "actions to compel the dissolution of a corporation [are] representative, since the corporation could not possibly benefit therefrom."[55] If a corporation were a natural person, the analogy to dissolution would be suicide, which one might plausibly think is never, or virtually never, in a natural person's interest. But when we start to think this way in the case of an organization, we have lost our moorings. The only meaningful benefit a corporation can produce is for people, and there are many situations in which the relevant people might benefit from dissolution. It makes as much sense to speak of a corporation benefiting from dissolution as it does to speak of a corporation benefiting from a tax refund. In both cases, the

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[55] Fontheim v. Walker, 141 N.Y.S.2d 62, (Sup. Cit. 1955); see also Egan v. McNamara, 467 A.2d 733 (D.C. 1983) (in a transaction between a three-shareholder corporation and its largest shareholder, corporate counsel's responsibility is to protect corporation's "continued existence"). On the other hand, some of the cases arising from the Savings and Loan crisis suggest lawyers and managers breached duties by "artificial[ly] prolong[ing]" the lives of their corporations. Schacht v. Brown. 711 F/2d 1343. 1348 (7th Cir. 1983); In re Phar-Mor, Inc. Securities Litigation, 900 F. Supp. 784, 787 (W.D. Pa. 1995). None of these cases give any meaning to the concept of corporate interests independent of the conclusions they invoke them to justify.

corporation stands as a proxy for interests of its human constituents.[56]

The second point is that, when we reify or personify the corporation, it is usually to segregate a particular sub-class of the interests associated with it. These are the interests associated with ownership. In the business corporation, ownership claims are associated with the provision of capital, but there may be other bases through which ownership status is acquired (and in some other organizational forms capital supply is rarely or never a basis for ownership claims). The critical distinction -- the one that motivates organizational personification -- is between residual claims and ordinary contact claims. Ownership claims are residual. Residual claims and ordinary contract claims can be either for financial or control rights. In the business corporation, residual financial claims tend to go with (but don't always coincide with) residual control claims.

Residual claims tend to be less specified than ordinary contract claims. Ordinary contract is more likely to specify a fixed return or a defined performance or a set of particular protective covenants. But the more important distinction is that residual claims are secondary or "junior" to contract claims. This does not mean that they are less important. It means that scope can be defined only after ordinary contract duties have been delineated. The residual rights apply to what is left over (control or economic surplus) after ordinary contract claims have been given their due.

The personified corporation is a proxy for these residual claims. We tend to speak of these residual claims as "fiduciary" and to oppose them to "contract" claims. Residual claims by their nature are harder to specify. Moreover, residual claims typically

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[56] To say that corporate "interests" are a function of constituent interests does not necessarily imply either (a) that the only relevant constituent interests are shareholder interests or (b) that all constituent interests are monetizable. In the Time-Warner take-over case, for example, the Court gave weight to a public and employee interest in Time's "corporate culture" of "journalistic integrity." <u>Paramount Communications v. Time, Inc.</u>, 571 A.2d 1140 (Del. 1989). The argument here does not depend on any position on such issues.

entail both greater risk and greater possibility of exceptional gain, and both possibilities lead those who hold such claims to look for greater trust in their collaborators than the law provides for arm's length contract relations. Thus, fiduciary or residual claim duties often require more initiative in pursuing shared ends, more forbearance in pursuing selfish ends, and more candor than ordinary contract duties.

Nevertheless, the contrast is to "ordinary contract", not to contract tout court, because the duties associated with residual claims and corporate personality are to an important extent contractual. They depend in substantial part on agreement, and they are discerned through the techniques of contractual interpretation. However, the term "nexus of contracts" favored by some economically-minded scholars of the corporation is not helpful in describing the legal significance of corporate personality. Not only is "nexus" a term without any conventional legal meaning, but the term as a whole blurs the critical distinction between the residual claim contract implied by corporate personality and the other, more conventional contractual relations in which the enterprise is involved.

2. The Importance of Distributive Norms

The residual claim contract that constitutes the corporation as an entity is a Framework of Dealing. It consists of both procedural and substantive norms. It includes specific negotiated terms, implied agreed terms, and background default and mandatory terms supplied by law. These terms appear in a variety of sources, including Articles, By-Laws, contracts, statutes, and cases.

One further distinction that can be made among the norms of the Framework of Dealing is between allocative and distributive norms. Allocative norms concern the pursuit of aggregate benefits. The ultimate allocative norm is "maximize constituent welfare", but there are a variety of subnorms that may specify the meaning of such welfare (e.g., short-term or long-term?) and the means that can be used to attain it (e.g., levels of risk, lines of business). The other type of norm is distributive. Distributive norms specify how control and financial benefits in the firm are divided among constituents.

It is possible to think of the allocative interests of constituents as converging on a continuing basis. As long as distributive norms give each constituent some interests in the corporation's net assets and income, all share an interest in maximizing these assets and income. Distributive norms, however, may converge only ex ante. At the time the constituents join together (or a later-arriving constituent joins an established organization) the distributive norms make collaboration possible. As the collaboration proceeds, a constituent will have an interest in getting a larger share than she bargained for, but like ordinary contracts, the organizational Framework of Dealing is designed both to resolve conflict and preserve the integrity of the general organizational structure by holding constituents to their distributive commitments.

There is an unfortunate tendency in corporate doctrine to speak of allocative norms as defining the "interests of the entity" and to think of distributive norms as a matter of the "personal" or "individual" interests of the constituents.[57] For example, in the shareholder suit context, it is customary to say that claims belong to the corporation (i.e., are derivative) if they concern injury "to the whole body of [the entity's] stock or property without any severance or distribution among shareholders". By contrast,

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57 There is a parallel tendency to think of fiduciary norms as duties to maximize a unitary interest, as opposed to duties to make a fair division among interests. The duty to maximize may be the most distinctive feature of fiduciary norms, but when there is more than one beneficiary, a plausible conception of fiduciary duty has to involve both types of norms. (Even with a single beneficiaries, the trustee's rights to compensation and other benefits have to be measured in terms of fairness.) See Robert Clark's helpful discussion distinguishing between fiduciary duties to be "loyal" on the one hand and "fair" on the other. Corporate Law 635-36 (1986).

claims are direct "when the shareholder suffers injury separate and distinct from that suffered by other shareholders."[58]

This mode of thought has powerful consequences when its narrow conception of corporate interests is used to define the scope of the lawyer's responsibility to an organizational client. We see this in the Restatement of the Law Governing Lawyers. The Restatement provision on organizational representation substantially tracks Model Rule 1.13, but adds some examples. According to one of them, where a corporate manager asks the lawyer to draft a document making a gift of a new car owned by the corporation to a social friend, the request is against the interests of the corporation and must be refused. On the other hand, where a controlling shareholder attempts to unlawfully dilute the value of minority shares, the injury is considered individual, and the lawyer is to remain passive.[59]

Presumably, the difference rests on the form of the actions. The sale is formally a transaction between the corporation and a third party; the dilution occurs through internal corporate action. But there is no reason of policy or principle to classify the two situations differently for the purposes professional responsibility. From the constituent's points of view, the economic effect of the two types of action is the same -- the value of her stake in the enterprise has been diminished. It is no consolation to her that in one case the wrongful act takes an intracorporate form. Nor is there any reason to think that one category of injury is more or less frequent, severe, or hard to detect than the other. Moreover, the distinction is quite manipulable. When the stakes are large, constituents with extensive control will often be able to find some intracorporate process to achieve most improper goals.[60]

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[58] 12B W. Fletcher, Cyclopedia of the Law of Private Corporations sec. 5911 (Rev. perm. ed. 1984).

[59] Restatement of the Law Governing Lawyers sec. 96, Illustration 1 at 179-80, Illustration 2, at v. 2, pp. 183-84.

[60] For example, instead of having management sell corporate assets to herself at bargain prices (thereby triggering corporate injury and counsel duty), she can cause the corporation to be merged with a controlled entity under terms in which the minority receives less than fair value for its shares (thereby

Virtually all intracorporate disputes are distributive. This is literally so in the sense that the distribution of control is always in issue in a dispute among corporate constituents. It is virtually true in the sense that nearly all tenacious disputes involve economic conflicts of interests. Corporate disagreements rarely become disputes and almost never reach the courts when they are simply matters of disinterested differences of opinion over how to maximize aggregate benefits to residual claimants. Thus, to identify the organizational interests solely with allocative norms is to suggest these norms are largely irrelevant to constituent disputes.

From the perspective of both client and lawyer, the organization can only be regarded as a unity if appears to reconcile the interests of its participants. No one would become a corporate constituent if he did not envision arrangements that promised both an aggregate return to the group and a fair share of it for him. Professional responsibility doctrine could not permit simultaneous representation of the constituents if there were not some set of norms under which collaboration would be mutually beneficial. From both perspectives, the distinction between allocative and distributive norms is unimportant. Both are fundamental to the Framework of Dealing that constitutes the organization.

It is dangerous to think of this framework of dealing as a contract because the word has connotations of arm's length relations and literalistic interpretation that are inappropriate here. But the techniques through which the framework of dealing is elaborated and applied are contractual. These techniques are illustrated in a broad range of judicial opinions, but the illustrations are often misleading because the interests involved are mischaracterized.

Consider, for example, two well-known cases about dividends. Sinclair v. Levien involved the Venezuelan subsidiary

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triggering merely individual injury and excusing counsel of responsibility). In theory, this could be done for particular assets by transferring them to a subsidiary, distributing the subsidiary stock to the parent shareholders, and then merging the subsidiary with a controlled entity.

of a multinational oil company.[61] The parent owned 97 percent of its shares; public shareholders held the remaining three percent. The parent-controlled board stopped new investments in Venezuela and began paying out the large revenues from past investments there as dividends. Minority shareholders claimed that Sinclair and the board breached fiduciary duties by failing to reinvest. They noted that Sinclair had made large investments through other subsidiaries in Alaska, Canada, and Paraguay that could have been made through Sinven. The Delaware Chancellor had characterized the board's actions as interested-director transactions and had put the burden on the defendants to show that they were fair. The appellate court disagreed, holding that so long as all shareholders received dividends pro rata, there was no conflict of interest, and hence the decisions were protected as business judgments.

Smith v. Atlantic Properties[62] involved a close corporation in which three of four shareholder-directors charged the fourth with breach of fiduciary duty for refusing to permit the payment of a dividend. Under the Articles, board action could be taken only with the agreement of all four directors. For several years, they deadlocked, 3-1, over whether to reinvest earnings, as the defendant desired, or pay them out, as the plaintiffs desired. Unfortunately, the deadlock prevented the firm from taking either course and caused it to incur tax penalties for unnecessary accumulation of income. The court held that the defendant had breached a fiduciary duty by deadlocking the board, and held it liable for these penalties. The court seemed influenced by the suggestion that the defendant, who was wealthier than the plaintiffs, was motivated by a desire to avoid personal income taxes he would have had to pay on dividends.

In both cases, the court speaks as if the controversy among shareholders is to be resolved in terms of some corporate interest that transcends constituent interests. It finds that the parent in Sinclair had no conflict of interest in the dividend decision, and it

[61] 280 A.2d 717 (1971).
[62] 422 N.E.2d 798 (Mass. App. 1981).

holds that the Smith defendant was wrong to consider his conflicting individual interest. But in both cases, if we put distributive norms aside, there is no corporate interest independent of the constituent interests. A rational dividend decision should take account of the opportunity costs and tax positions of the constituents. In each of the two cases, we have separate groups of shareholders with differing opportunity costs or tax positions, and hence, different interests. The Sinven court was wrong to deny that Sinclair had a conflict of interest. Since its opportunities were broader than those of the public shareholders, its interests were different. Similarly, the Smith court was wrong to suggest that it was per se illegitimate for the defendant to consider his personal tax position. The decision had to be based on at least some constituents' personal interests because there were no other relevant interests. A decision for the majority was a decision that their interests were entitled to precedence.

When constituent interests conflict as they do in these cases, we have to look to distributive norms to resolve the conflict. When the norms are not explicit, we can use contractual techniques of implicit interpretation. While neither case makes an effort to articulate the relevant distributive norm, each indicates some relevant evidence.

In Sinven, the salient fact is the unusual shareholder structure. Why would the multinational sell only a three percent interest in the Venezuelan subsidiary? This move could not have yielded significant capital. The most salient explanation is that the offering was designed to facilitate some local shareholding for regulatory or political purposes. If that was the purpose, it would be relevant only to Venezuelan investments. This suggests that the public shareholders had no reasonable expectation that Sinven would be a vehicle for them to participate in non-Venezuelan investments.

In Smith, the salient fact is the unanimity voting rule, which the case tells us was agreed to at the insistence of the defendant and apparently in the knowledge that he was more affluent than the others. The question then is whether the tax contingency that prompted the defendant's vetoes was within the range of issues that the parties should have expected the veto to be available for. If, as the facts recited by the court suggest, everyone should have understood that this was one of the defendant's reasons for bargaining for the veto, then they should not now be permitted to object.

From a distributive point of view, the Sinven decision for the defendants seems right; the Smith decision for the plaintiffs seems wrong. Perhaps if we had more facts, these conclusions might change. The key point is that each case should be decided, not through a search for transcendent corporate interests, but by recognizing that the relevant stakeholder interests conflict and trying to find a distributive norm that indicates which ones should prevail.

The Delaware and Massachusetts courts resisted acknowledging the distributive nature of the conflicts in these cases because of the conventional tendency to see fiduciary duties as not embracing distributive issues. They were right to assume that the norms that constitute the "entities" involved in the cases should speak to issues as basic as the ones raised. But corporate norms can only address such issues plausibly if they include distributive as well as allocative ones.

As a further example of consequences of personifying the corporation in a way that treats distributive norms as external, return to one of the Restatement hypotheticals.[63] We are asked to suppose a lawyer representing a close corporation with a dominant shareholder. The dominant shareholder has asked the board, consisting entirely of its designees, to adopt a plan to repurchase shares under terms that a minority shareholder protests will substantially reduce the value of his stock. The hypothetical tells us that under state law a dominant shareholder owes a fiduciary duty to a minority not to cause directors to take action that substantially reduces the value of the latter's stock. It concludes that the lawyer is "not obliged to advise against or otherwise seek

[63] Restatement of the Law Governing Lawyers, sec. 96, Illustration 2, at 38-39.

to prevent action that is consistent with the board's duty to the client."

While the text is written with the circumlocution that is a hallmark of the bar's treatment of such issues, it seems to assume that a board action induced by a dominant shareholder in breach of a shareholder's duties to a minority could somehow be "consistent with the board's duty to" the corporation. The language is ambiguous as to whether it assumes this will always be the case or only sometimes. It offers no authority and suggests no analysis as to how one might go about determining whether and when it might be the case. It seems to rest on simply the conventional assumption that a violation of distributive norms is not an injury to the corporation.

The implausibility of this premise is magnified in a further factual variation.[64] We are now asked to assume that the repurchase plan is not disclosed to the minority, but that the minority will probably learn of it and challenge it successfully in a "suit against the Client, and that Client will likely incur substantial expense as a result." In these circumstances, the drafters assert, the lawyer "owes a duty to protect the Client." (How much of a duty is unclear, since the only action mentioned is "advising the Client's board against adopting the plan.")

Many will find difficult to square with any recognizable concept of ethics the negative implication that, if the minority never learns of the unlawful conduct and is thus unable to challenge it successfully, the lawyer's duty to oppose it does not arise. The Restatement seems to say that the lawyer must oppose the unlawful conduct only if it seems unlikely that the wrongdoers are going to get away from it. Although preposterous as ethics, this position follows from an understanding of corporate personality that excludes distributive norms. Note also the further bizarre implication that the injury to the corporation, in the event the wrongdoing is blocked, arises only from having to bear litigation expense. If the wrongdoer commits to reimburse such

[64] Id., Illustration 3, at v.2, pp. 39.

expenses in the event of discovery and loss, does that obviate the lawyer's duty?

The conventional view, in a largely tacit and unreflective way, sees the corporation as a set of norms that promote a collaborative effort to maximize joint gains but invite a Hobbesian free-for-all with respect to how they are divided. But distributive norms are just as fundamental and integral as allocative ones to the coherence and viability of the organization.

3. The Irrelevance of the Direct/Derivative Distinction

The strongest corporate law influence on professional responsibility is the practice of distinguishing entity from individual constituent interests that persists today largely in connection with derivative suits. A breach of duty to corporate interests is supposed to be litigated as a derivative suit; a breach of duty to constituent interests is supposed to be litigated as an individual suit or a class action. The distinctions between corporate and individual are incoherent and anachronistic. They have no strong connection even to the procedural purposes for which they are primarily invoked, much less to professional responsibility values.

As we've noted, derivative suit doctrine purports to draws the line between corporate and individual in terms of harm to all shareholders/harm to some shareholders. But this and related distinctions have not been applied meaningfully or consistently. A suit to compel a dividend or to enjoin an unauthorized act is usually considered direct, even though all shares are affected equally. A challenge to self-dealing by an officer who holds a majority of shares is treated as derivative, even though as a practical matter, only the minority shares have a stake in it. A challenge to a dilutive merger might be considered derivative if the complaint emphasizes the harm to share price; it might be considered individual if the complaint emphasizes the diminution of voting rights.[65] A claim that a controlling shareholder has impaired the value of minority shares by excluding them from a holding company is direct; a claim that the same actions represent the usurpation of a corporate opportunity might be derivative.[66]

The cases disagree about the proper categorization of disputes over dividends, merger prices, dissolution, rejection of acquisition bids, and unauthorized acts.[67]

Moreover, the distinctions do not serve the relevant practical goals of litigation procedure. The practical issues at stake are whether the plaintiff will have to post security for the defendant's expenses, whether corporate management's judgment that the suit should not proceed will be given weight by the court, whether the recovery will go to the corporation or the individual plaintiffs, and whether a judgment will bind all shareholders. Traditionally, in a derivative suit, the plaintiff must post security, the board gets deference, recovery goes to the corporation, and all shareholders are bound. The opposite consequences follow from characterization as direct. However, the class action device has made it possible to bind all shareholders in a direct suit in most situations where it is desirable to do so, and for years, the courts have been recognizing that the other consequences produced by the traditional doctrine often don't make sense. Thus, they have created exceptions. For example, even if a suit is derivative, the recommendation to dismiss of a severely conflicted board will not get deference. And if wrongdoers are in control of the corporation, recovery, even if deemed derivative, will go to the plaintiffs. This process by which the court determines the procedural incidents of the lawsuit by referring directly to the relevant values will in all likelihood continue.

There is a useful role for the distinction between allocative and distributive norms in determining the scope of constituent

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65 Eisenberg v. Flying Tiger Line, 451 F.2d 267 (2d Cir. 1971).

66 Note, "Jones v. Ahmanson: The Fiduciary Obligations of Majority Shareholders," 70 Columbia Law Review 1079, 1089-90 (1970).

67 For an overview with citations, see Cox et al., cited in note , at 400-06.

discretion to bring suits over corporate policy. A purely allocative dispute involves no economic conflict of interest; it is just a disagreement over business policy. A presumption against judicial intervention in such cases makes sense. The "business judgment rule" expresses such a presumption as a matter of substantive law. A disinterested decision by management not to assert a potential corporate claim against a stranger to the corporation, for example, ought to carry a stronger presumption of non-reviewability than a decision with internal distributive consequences. If the derivative/direct distinction had been employed simply to limit judicial review of allocative disputes, it might serve some purpose. But it has not been. As we've noted, most disputes that reach litigation are distributive, and the doctrine characterizes many of them as derivative.

If the direct/derivative distinction has very little connection to the procedural issues at stake in corporate litigation, it has nothing to do at all with most issues of corporate professional responsibility. The tendency to define the scope of the corporate lawyer's obligations in terms of the norms associated with derivative suits is fruitless and arbitrary.

B. Doctrinal Applications

Although the Framework-of-Dealing perspective is a departure from the dominant doctrinal tendencies on organizational representation, it does seem to be presupposed in a few specific doctrinal areas. These areas seem anomalies in the dominant terms. The Framework-of-Dealing perspective gives a better explanation of them than conventional doctrine can offer.

1. <u>Insider Trading</u>.

As applied to lawyers, the insider trading prohibition illustrates a duty to a corporate client that depends on substantive fiduciary notions, rather than the factors emphasized by the Control Group and Authority Structure models. Neither officers nor the board, nor perhaps any corporate body, could authorize the trading prohibited by this norm. The norm also illustrates the inadequacy of the conception of corporate interest that professional responsibility has inherited from traditional corporate law.

The insider trading prohibition is a mandatory term supplied by federal securities law, but it has been explicitly derived from and elaborated in terms of fiduciary duty.[68] Yet, prior to the advent of the federal doctrine, state cases found liability in only some of the circumstances covered by the current prohibition. If the insider affirmatively misled, liability to the party with whom she traded might be supported by conventional misrepresentation doctrine. Where the trading caused some tangible loss to the corporation -- for example, by causing premature disclosure of a business strategy -- liability to the corporation might be based on this harm. But in the core situation where the insider simply trades anonymously without disclosing material information, the courts tended to reject liability. They would say that the insider's duty was to the corporation not to the shareholder she traded with and that, since the only effect of the trade was to shift wealth around among the shareholders, there was no corporate harm.[69]

The federal doctrine, which extended liability to the core case, gained broad public acceptance, and some state courts incorporated its principles into state doctrine. However, when economics came to the fore in business law scholarship in the 1970s, the core case once again seemed problematic, at least for academics. Law-and-economics scholars thought corporate law should be based on efficiency considerations, and they had difficulty finding any that supported the prohibition. Eventually, they came up with some. For example, the prohibition makes for more explicit forms of executive compensation which tend to be more certain, and hence more efficient; it eliminates the incentive for managers to increase firm volatility in order to maximize trading opportunities.[70] These rationales are, however, quite

68 Chiarella v. United States, 445 U.S. 222, (1980).

69 E.g., Goodwin v. Agassiz, 283 Mass. 358, 186 N.E. 659 (Mass. 1933).

70 See Clark, cited in note , at 265-77

speculative and do not seem to be the ones that most strongly motivate public support for the prohibition. The economists' preoccupations with efficiency parallels traditional corporate doctrine's tendency to define distributive concerns as external to the corporation.

Yet, the reasons that most strongly motivate public support seem to be distributive. Information gained in corporate service is considered a collective asset in which constituents should share in proportion to their stakes. Moreover, it is generally regarded incompatible with fiduciary loyalty to profit secretly on information gained in a position of trust. This principle is a traditional one in the law of trusts.[71] It seems to be equally grounded in lay opinion. On the Framework-of-Dealing perspective, these distributive convictions provide ample ground for interpreting the corporate residual claim contract to include the prohibition. Thus, the insider trading approach is consistent with the contractual methodology of the Framework-of-Dealing approach, and it confirms the premise that a corporation should be understood to have interests in the integrity of its distributive structure.

2. Derivative Suit Defense

It is generally held that a derivative suit alleging wrongdoing by incumbent management can present a conflict that precludes joint representation of management and the corporation.[72] In these situations, corporate counsel must either withdraw from representing the corporation in order to represent the managers, or the managers must retain separate counsel. The doctrine does not specify when separate representation is required. However, one factor that has been deemed relevant is the strength of the claim. Joint representation has been deemed appropriate when the claim is patently weak, especially if likely to be

71 Restatement (Second) of Trusts

72 Hazard and Hodes, cited in note , at

dismissed in an early proceeding.[73] In other words, the lawyer first makes a preliminary assessment of the merits; if she is unable to determine them she, or whomever else represents the corporation, must rema in neutral.

It is not clear how much practical importance these doctrines have. Whoever represents management will have full access to corporate information and will very likely be paid out of the corporate treasury. Corporate counsel will still be chosen by management, and within limits will continue to be instructed by it. (Corporate counsel may, for example, orchestrate the establishment of an ostensibly "independent" committee of directors or advisors to assess the merits of the claims on behalf of the corporation.)

Nevertheless, the doctrine is interesting because it seems to reflect the Framework-of-Dealing conception of representation. It departs from the Control Group view in refusing to identify corporate with management interests, and it departs from the Authority Structure view both in acknowledging that authority is ambiguous in this situation and in suggesting that consideration of the substantive merits of an internal dispute can sometimes enable a reliable determination of what the corporation's interests are. In deciding that joint representation is appropriate in the case of frivolous claims, the lawyer is deciding that management's position is most consistent with the Framework-of-Dealing. Where the claim is nonfrivolous, neutrality is required because the absence of a determinate Framework makes it impossible to determine what client interests are.[74]

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73 E.g., Hausman v. Buckley, 299 F.2d 696 (2d Cir. 1962).

74 The doctrine departs from the basic logic of the Framework-of-Dealing approach in one respect -- the consequences of assessing the merits are asymmetrical. If the claim is clearly without merit, corporate counsel can represent management; but there is no corresponding precept that if the claim clearly has merit, corporate counsel can align herself with the plaintiffs. At least, the weight of authority is against this precept. Doe v. A. Corp. 330 F. Supp.1352 (S.D.N.Y. 1971); Goldstein v. Lees, 46 C.A.3d 614, 120 Cal. Rptr. 253 (19); Richardson v. Hamilton, 469 F.2d 1382 (3rd Cir. 1972), cert. denied,

3. Duties to Nonshareholder Constituents: The S & L Cases

The Control Group and Authority Structure perspectives are not responsive to the interests of constituents who have neither actual control nor a role in the corporation's authority structure. Many people believe a board's fiduciary duties extend to a variety of shareholder constituencies, including employees, customers, suppliers, and the local communities in which they operate. These suggestions are controversial, though there is some support for them in "other constituency statutes" and some takeover cases. In addition, there is significant judicial support for the notion that board has fiduciary duties to creditors when the corporation is in the vicinity of insolvency.[75]

Those who deny that duties extend to nonshareholder constituencies will not be interested in pursuing the implications of these duties for corporate lawyers. Moreover, one might concede the validity of the board duties and still suggest that they are too indeterminate to yield any conclusions for lawyer responsibility. However, some of the cases recognizing possible liability for lawyers and accountants involved in the Savings and Loan failures of the 1980s might be read to suggest the contrary. Opinions in some of these cases suggested that lawyers and accountants breached duties to the corporation by failing to take actions to protect creditors from the financial improprieties of managers.[76]

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411 U.S. 986 (1973). However, one case could be read to support it. Jacuzzi v. Jacuzzi Brothers, Inc., 218 Cal. App.2d 24, 32 Cal. Rptr. 188 ( ).

[75] See Margaret M. Blair and Lynn A. Stout, "A Team Production Theory of Corporate Law," 85 Virginia Law Review 247 (1999).

[76] Schacht v. Brown, 711 F. 2d 1343 (7th Cir. 1983); In Re American Continental Corp., 794 F. Supp. 1424 (D. Ariz. 1992); F.D.I.C. v. O'Melveny & Myers, 969 F.2d 744 (9th Cir. 1992, rev'd 512 U.S. 79 (1994), 61 F.3d 17 (on remand); F.D.I.C. v. Nathan, 804 F. Supp. 888 (S.D. Tex. 1992).

For discussion of these and related cases, see George C. Harris, "Taking the Entity Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Clients Through the Disclosure of Constituent Wrongdoing", 11 Georgetown Journal of Legal Ethics 597 (1998).

The cases were brought by receivers and bankruptcy trustees. They do not explicitly suggest a lawyer duty to make disclosures to creditors, but the conduct on which the claims were based seems to have harmed creditors, not shareholders.[77]

For example, F.D.I.C. v. O'Melveny & Myers involved the fraud in sale of real estate interests by the senior managers and sole owners of the corporation. After reimbursing the purchasers, the receiver sued the lawyers, alleging that they had breached a duty to the corporation by failing to discover and take action with respect to the fraud. The lawyers argued that the corporation had "no identity separate from that" of the two owner-managers.[78] The court replied that the bank had a "corporate identity distinct from that of its wrongdoing officers"[79] and ruled for the receiver.

In F.D.I.C. v. Nathan, senior managers who owned 90 percent of the common stock engaged in fraudulent transactions. Again, the receiver sued the lawyers for breach of duty to their client in assisting and "failing to warn any nonculpable party"[80] of the misconduct. The lawyers argued that they could not be liable for conduct "ratified by at least ninety percent of Continental's shareholders."[81] The court rejected the argument.

To be sure, some cases hold that the corporation, and hence the bankruptcy trustee, is "estopped" to bring suit where the wrongdoing was the responsibility of senior management.[82] But the cases we are considering hold otherwise. To hold that suit is possible is to invoke something like the Framework-of-Dealing conception of the corporation. These cases imply that the corporation has a set of interests for which fiduciaries are responsible that is independent of its control and authority structure. The conduct in question is attributable to the control group and it is authorized in a procedural sense. In cases like

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77 See id., at 627.

78 969 F.2d at 748.

79 Id. at 751.

80 804 F.Supp. at 896.

81 Id.

82 See Harris, cited in note , at 627-32 and cases cited.

O'Melveny and Nathan, the "highest authority that can act on behalf of the corporation", to use the language of Model Rule 1.13, is responsible for it. In others, the claim is that lawyers failed to report officer conduct to the board, but in most of these cases, there appears little likelihood that such reporting would have made any difference.

One feature of the cases that has troubled the courts is that, even where the illegal conduct was not undertaken directly by shareholders, it was usually undertaken by managers attempting to benefit shareholders, and it would have benefited shareholders if it had been successful. To be sure, in hindsight things worked out badly for shareholders, but manager efforts to advance shareholder interests are usually assessed ex ante and given much deference. For this reason, the Seventh Circuit holds that professional liability for breach of duty to the corporation for internally authorized conduct requires a showing that the mangers were acting to further their own personal interests at the expense of shareholdlers.[83]

The holding makes sense if the only constituent interests that constitute the corporation's identity as a client are shareholder interests. However, there is growing authority to the effect that creditors should be considered constitutive as the corporation approaches insolvency.[84] The reasoning is consistent with the Framework-of-Dealing perspective. In that view, the corporation is an implicit contractual structure that organizes the interests of residual claimants. The creditors have a kind of contingent residual claim that may be perfected in bankruptcy. But until then, many actions potentially beneficial to shareholders would subject these contingent interests to severe risk. The closer the firm gets to insolvency, the greater the weight creditors claims should be entitled relative to shareholder claims. Thus, the S & L cases

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83 Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449, 454-56 (7th Cir.1982)

84 See Laura Lin, Shift of Fiduciary Duty Upon Corporate Insolvency: Proper Scope of Directors' Duty to Creditors, 46 Vanderbilt Law Review 1485 (1993).

finding professional liability make sense on the premise that creditors are among the relevant constituents in this situation.

VI. The Entity Approach Summarized and Compared

A. An Integrated Entity Approach

It is possible, but not defensible, to apply either the Control Group or the Authority Structure model alone as a comprehensive guide to the responsibilities of the organizational lawyer. The Framework-of-Dealing approach, however, presupposes the other two.

The Control Group view contributes a presumption that senior management and the board represent the organization. It is based in part on management's authority to make ordinary business decisions and the board's authority to make policy decisions. (To this extent, it overlaps the Authority Structure approach.) It is also based on the fact that across a broad range of decisions management's incentives are well aligned with those of other constituents, and management is likely to be better informed than any other decisionmaker. This range consists mainly of allocative decisions -- those that affect shareholders in equal proportion to their distributive shares. Finally, the presumption is based on the psychological tendency of lawyers to identify the organization with the agents with whom she works, and the fact that this tendency facilitates valuable communication and collaboration.

The Control Group presumption should not be a strong one. It clearly should not survive indications that management is violating authority or fiduciary norms. Moreover, it should be rebutted in situations involving distributive issues where management might have a conflict of interest. This should include situations of actual constituent conflict but also situations of potential constituent conflict, in particular, situations in which it seems likely that there would be conflict if material information not available to constituents were provided.

Where the presumption is not dispositive, attention should shift to procedural norms, the focus of the Authority Structure perspective. The lawyer asks to which agents the corporate legal structure confers ultimate responsibility over the issue. Where the lawyer has substantial doubts that a particular course of corporate conduct is in the interests of the organization, and the conduct has not been given informed consideration by the agents with ultimate authority, the lawyer ought not to assume that those engaged in the conduct speak for the corporation and should facilitate review by the agents with authority. In the most common case, this would involve urging management to seek board authority. In a more extreme case, it would involve by-passing management and going to the board. A still more extreme course would be to make direct contact with shareholder constituencies, and at the limit, public authorities.

Where authority is ambiguous or disputed, the Authority Structure perspective implies that the lawyer ought to try to facilitate clarification of it. This would most commonly mean assuring that all the relevant constituents have material information. It would be consistent with this principle, for example, for counsel representing the corporation in a derivative suit to oversee the corporation's response to discovery requests with a view toward insuring the availability of material information. (Whether it is realistic to expect counsel to do this in a manner independent of incumbent management is another question.)

Some cases require analysis to proceed beyond authority considerations. Although perhaps not often, it will sometimes happen that the lawyer can say confidently that the decision of the "highest authority" violates an important duty. This is most likely to occur when the duty protects interests that are not represented in the authority structure, for example, minority shareholders or creditors. Here the lawyer has to make a substantive judgment about the corporation's interests and responsibilities. Disclosure to the affected constituent or a public authority might be the most plausible remedy.

With respect to conflicts, the Framework-of-Dealing approach implies neutrality in intra-corporate disputes where the lawyer cannot confidently make a judgment on the merits. On the other hand, in situations where the lawyer can make such a decision, she probably should be authorized to take sides with the stronger claimant, whether management or dissident. Current doctrine already provides this in derivative suits where the plaintiff's claim is frivolous. It may be that an apparent lack of merit that does not rise (descend) to frivolousness should be sufficient. In any event, there is no reason why the doctrine should not be symmetrical, so that lawyers can ally with dissidents when their claims are strong. To be sure, it may be hard to police the reasonableness and good faith of lawyer judgments of merit, but there is no reason to think lawyers are more likely to be wrong when they side with dissidents than when they stick with management.

As for attorney-client privilege, the current Wolfenbarger rule seems well adapted to the Framework-of-Dealing perspective. It contemplates an assessment of organizational interests that includes the substantive merit of the claim of exactly the sort that this perspective recommends.

Finally, where the lawyer has dealings regarding corporate matters outside the authority structure, the Framework-of-Dealing perspective prescribes duties of disclosure and fair dealing to constituents. This is consistent with the specific prescriptions of current doctrine, but the Framework-of-Dealing view provides a better explanation of these prescriptions than the alternatives.

B. Joint v. Entity Representation

The Framework-of-Dealing approach thus converges with Joint Representation more often than conventional discourse assumes. In the Founder Freeze-Out, the two approaches both suggest disclosure of the accountant's information and both are likely to lead the lawyer to disqualify herself in the dispute between the Founder and the Investor-dominated board.

Nevertheless, there are important differences in both premises and operating effect. In the joint representation perspective, disclosure is required because the representation entails a commitment to provide material information to each constituent. In the entity perspective, disclosure is required because it is needed to trigger the decisionmaking processes to determine the entity's interests.

In the joint representation approach, neutrality is required because the lawyer cannot represent a client in a matter adverse to another client, and even if the lawyer were allowed to withdraw from representing the Founder, she would be forbidden to represent a client against a <u>former</u> client in a matter substantially related to the former representation. In the Framework-of-Dealing perspective, neutrality is required because, if the lawyer cannot determine, the merits of the claim, she cannot determine what the interests of the client are. For the purposes of this dispute, there is simply no client to represent.

In the Joint Representation approach interests are largely a function of the individual desires and expectations of constituents. Howevermuch they converge at the outset of the venture, they may diverge in the course of it. In the Framework-of-Dealing perspective, interests are defined in substantial part by the framework, which will have substantial definition and continuity.

The lawyer's disclosure responsibilities to constituents will be substantially limited by the framework. A decision made by officers who are acting within their authority and disinterested -- a classic "business judgment" -- normally does not raise disclosure issues within the Framework of Dealing.

Moreover, in the Framework-of-Dealing approach there will sometimes be collective interests defined by the Framework that compete with interests in disclosure. In a public corporation, if disclosure would necessarily become public and likely entail adverse consequences for the corporation, those consequences should be weighed. It is doubtful that such concerns could every justify acquiescence in clear wrongdoing, but they might warrant a higher threshold of certainty and materiality for disclosure in such situations.

For issues of attorney-client privilege, the Wolfenbarger approach mandates just this kind of balancing inquiry, but since the matter is in court, it can be performed by the judge. Wolfenbarger presupposes an entity. No issue of attorney-client privilege arises as between joint clients.

The Framework-of-Dealing will also limit client identity for conflicts purposes. Consider first conflicts among constituents. If the representation is joint, any substantial conflict will require neutrality by the lawyer. On the other hand, if the lawyer represents an entity, the lawyer need not withdraw if he can determine that the action in question is consistent with the authority and substantive norms of the Framework-of-Dealing.

With respect to conflicts between constituents and outsiders, whether representation is joint or organizational may affect the lawyer's ability to represent outsiders. Model Rule 1.7 on concurrent conflicts prevents representation of any client in a matter adverse to any other client, without both clients' consent. In a joint representation, this would preclude representing anyone with a claim adverse to any of the enterprise participants, even if the claim was unrelated to the business. In the Framework-of-Dealing approach, the lawyer represents constituents only collectively and in regard to the affairs of the business. Thus, an adverse claim against a constituent unrelated to the business would not be precluded.

The rules on successive conflicts will usually bar representation of any joint client against another over a matter relating to the enterprise. The result will be the same under the Framework-of-Dealing approach if the lawyer is unable to determine with confidence the merits of the dispute. There may, however, be situations where the lawyer can determine the merits with confidence, and there the Framework-of-Dealing supports the lawyer in siding with the meritorious claim. This constituent can plausibly claim to be speaking for the enterprise.

One area where the choice between the two characterizations should make less difference than current discourse supposes is the scope of the lawyer's duty to offer advice. There's a tendency to assume that the lawyer in a joint representation will have to advise the constituents on individual as well as collective interests, while the organizational lawyer will have duties only with respect to the latter. For example, in Security Bank v. Klicker,[85] the plaintiff was a member of a partnership in which all partners were asked to guarantee personally a partnership debt. When he ended up getting stuck with the liability, he complained that the partnership lawyer had not adequately advised him of the risks. The Court dismissed on the familiar ground that the partnership lawyer did not represent the partners individually.

However, the decision should not turn on this distinction. The opinion reflects the tendency to assume, from the organizational perspective, that the organization's interests are in maximizing its aggregate resources, while the constituent's interest in fair treatment is a purely "individual" one. I criticized this premise above with respect to cases involving internal corporate action. This case is slightly different in that it is not strictly internal. In effect, it involves a re-negotiation of the Framework-of-Dealing, rather than a move within it. The existing Framework will not dictate a particular outcome to the negotiation. On the other hand, there are general norms of fair dealing, including disclosure of material information, that could plausibly be considered part of the Framework. These norms might well include some consideration of particular interests of a constituent. We saw, for example, in considering dividend decisions that corporate decisionmaking sometimes requires consideration of individual interests, such as tax constraints. The fiduciary duties imposed by partnership law and the Wilkes cases on small business constituents incorporate such norms in the Framework for the purposes of constituent dealings inter se. And the insider trading

85 142 Wis.2d 289; 418 N.W.2d 27 (1987).

prohibition illustrates that such norms can play a role even in large businesses.

To be sure, there will be limits on the knowledge that an organization's lawyer can be expected to have about constituent interests or the degree of attention she can be expected to pay to them. In some situations, the most that can be expected of the lawyer is to suggest that the constituent should get separate representation.[86] The limits will be stricter the more idiosyncratic the interests and the more numerous the constituents. But some such limits would also apply in joint representation. Joint representation does not mean that the lawyer is responsible for every personal interest of each constituent. Professional responsibility norms authorize limitation of the scope of the representation,[87] and joint representation of constituents in connection with a business venture will usually expressly or impliedly be limited to matters related to that venture. In Klicker, the interests around a personal guarantee of business debts would be related, so the lawyer probably would have had some responsibility for advice in connection with it. But characterization of the representation as organizational should not preclude a duty to provide the same advice.

Where the distinction between joint and organizational representation does matter, two considerations bear on the choice of perspective. First, joint representation is most appropriate in situations with small numbers of constituents and informal dealings among them and with the lawyer. Second, the Framework-of-Dealing approach requires some minimal degree of structure to the constituents' dealings and plans. The structure need not be explicit, and much of it can be supplied by default and mandatory terms, but the many informal relationships will lack sufficient structure to be treated as Frameworks of Dealing.

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[86] An obligation the lawyer would sometimes owe even to a stranger. Model Rule 4.3, Comment. (lawyer has duty to clarify role to "unrepresented person" and may advise to obtain counsel).

[87] Model Rule 1.2(c).

The Founder Freeze-Out is a close case. The numbers are small. I have been discussing the case as if there were only two constituents, although one of them is an organization, a limited partnership. Most start-ups with venture financing would have considerably more than two constituents, but not so many as to make joint representation impracticable. What weighs more heavily against this approach is the degree of formality. Start-ups are noted for flexible structure and collaborative style, but they are extensively negotiated and elaborately documented. The participants are typically sophisticated about legal and business issues. In the current state of doctrine, there is some pressure to adopt the joint representation view because that would generate the best chance of establishing a disclosure duty. But we have seen that the most plausible version of the "entity" perspective supports a disclosure duty in this situation just as strongly.

C. The Limited Potential of Client Prescription

Model Rule 1.13 states that among the factors to be considered in determining duties to an organization are the organization's own policies concerning legal representation. The American Trial Lawyers' Association urges that corporate clients instruct their counsel specifically as to how to act in the face of internal conflicts.[88] No doubt it would be helpful for clients to consider such matters and try to formulate guidelines. It seems unlikely, however, that such efforts will obviate the need for judicially prescribed and enforced professional responsibility doctrine on these matters.

Organizational clients have not shown much inclination to address these issues through explicit policy, despite the fact that most have some awareness of the problems. Even if they were, to do so, their efforts would be subject to two sorts of limitations.

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[88] American Trial Lawyers' Association, <u>American Lawyers' Code of Conduct</u> 2.5.

First, as a matter of professional responsibility doctrine clients cannot waive their rights to adequate representation.[89] Moreover, any client agreement regarding representation is likely to be deemed invalid or inapplicable with respect to unanticipated future contingencies.[90] Thus, even with specific organizational policies, lawyers will have a continuing obligation to consider what the best interests of the organization are in situations of internal conflict.

Second, as a matter of corporate law, any policies adopted by management that were inconsistent with their fiduciary duties would be invalid.[91] Policies that instructed lawyers not to disclose material information to the board or other constituents who might otherwise be entitled to it or to remain passive in the face of serious wrongoing toward constituents might well be deemed incompatible with fiduciary duty.

VII. Noncorporate Organizations

The argument so far suggests the distinction between joint representation and a plausible conception of entity representation is not as great as many have assumed. It also suggests that the most important determinants in the choice of approach is, not formality or organization, but whether these relationships have sufficient structure to constitute a Framework of Dealing. Without such a framework, plausible entity treatment is not possible. With it, entity treatment will often be appropriate, though there may be cases involving small, informal collaboration, where joint representation is appropriate even with a Framework of-Dealing.

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89 See Model Rule 1.2, Comment, par. 5 (client may not be asked to waive right to competent representation).

90 See Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978); In re Boone, 83 Fed. 944, 957 (N.D.Cal. 1897).

91 Even shareholder-adopted policicies would have this problem. Although some states permit shareholders to waive managers' duty of care liability, none permits waiver of duty of loyalty liability in the broad prospective sense that would be required to moot the issues with which we are concerned.

Although never embraced explicitly and sometimes rejected implicitly, this view turns out to be surprisingly consistent with the trends in the treatment by courts and commentators of professional responsibilities in a variety of organizational contexts.

A. Partnerships

In general, the courts have found it easier to apply the joint representation perspective to support duties to constituents in the partnership than in the corporate context.[92] This may reflect the greater legal informality of partnerships, the doctrine that partners owe each other fiduciary duties, and the adoption in some states of the "aggregate" (as opposed to the "entity") characterization of partnerships.

On the other hand, other cases purport to take an "entity" perspective, typically without elaboration, and a number of these dismiss claims by partners for managerial expropriation, invoking the entity concept with the same glib circularity we have seen in close corporation cases such as Skarbrevik.[93]

There is no reason to make any strong distinction between corporate and other business forms. The Framework-of-Dealing approach seems as readily applicable to partnerships as corporations, so long as they have the requisite degree of structure.

B. Personal Trusts

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92 E.g, Johnson v. Superior Court, 45 Cal. Rptr. 312 (Cal. App., 4th Dist, 1995); Arpali v. First MSP Corp., 628 N.E. 1335 (Ohio 1994); Griva v. Davison, 637 A.2d 830 (D.C. App. 1994); Wortham v. Van Liew v. Superior Court, 188 Cal. App. 927 (1987); Pucci v. Santi, 711 F. Supp. 916 (N.D. Ill. 1989); Roberts v. Heim, 123 F.R.D. 614 (N.D.Cal. 1988); see also ABA Formal Opinion No. 91-361 (applying entity rhetoric but opining that material information "may not be withheld from the individual partners").

93 E.g., Rice v. Strunk, 670 N.E.2d 1280 (Ind. 1996); Richter v. Van Amberg, 97 F. Supp. 2d 1255 (D.N.M. 2000); Quintel Corp. v. Citibank, 589 F. Supp. 1235 (S.D.N.Y. 1984).

Several cases consider the extent to which a lawyer for a trustee is liable to the beneficiary for acquiescing in or assisting injurious conduct. Liability for active tortious conduct for which a stranger could sue is fairly uncontroversial. However, the kind of liability for passivity and silence associated with fiduciaries has been more controversial. Some courts deny liability on the ground the trustee's lawyer owes no fiduciary duty to the beneficiary. However, the recent trend has been to hold that such lawyers do have some degree of fiduciary liability to beneficiaries.[94]

Geoffrey Hazard has discussed the recent cases in terms of joint representation.[95] Both trustee and beneficiary can be considered as clients. Conceptually, however, the joint representation idea is an awkward fit because it implies client consent and control, whereas beneficiaries don't consent to their relations with trustee or lawyer or have control over them. Emphasizing this problem, Jeffrey Pennell and Robert Tuttle suggest that the lawyer should be conceived as representing a "fiduciary entity". The fiduciary role has a structure of legal rules. Pennell and Tuttle suggest it is to this structure that the lawyer should be held accountable. They note that the fact that trustee and beneficiary have conflicts of interest or that different beneficiaries may have conflicting interests does not preclude envisioning a coherent client. The lawyer's duty is not to the individual interests of the participants, but to the convergent interests identified and incorporated in the trust relationships.[96]

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[94] The cases are surveyed in Tuttle, cited in note . The best known of the cases finding duties to the beneficiary is Fickett v. Superior Court, 558 P.2d 988 (Ariz. 1976). See also Restatement of the Law Governing Lawyers 51(4) (lawyer for trustee should take actions necessary to prevent trustee from breaching duty to beneficiary, with exceptions).

[95] Geoffrey C. Hazard, Jr., "Triangular Lawyer Relationships: An Exploratory Analysis," 1 Georgetown Journal of Legal Ethics 15 (1987).

[96] "The attorney does not represent the beneficiaries' interest; she only represents their 'best interests' as that concept is objectified in the fiduciary entity." Tuttle, cited in note , at 923; Jeffrey Pennell, "Representations Involving Fiduciary Entities: Who is the Client?", 62 Fordham Law Review 13 19 (1994).

Pennell's and Tuttle's "entity" approach corresponds closely to the Framework of Dealing approach. The Authority Structure model is of relatively little use with a personal trust, since authority is usually unstructured and informal. The Control Group approach, which I suggested was of at most slight use with business corporations, is of even less use with trusts, since the trustee's control is more tightly hemmed by fiduciary obligation than that of corporate directors and officers. But trusts do share with corporations a substantive legal identity constituted by mandatory, default, and privately adopted rules (with the difference that the trust beneficiary does not participate in the adoption process). The framework-of-dealing approach draws on this structure.[97]

Privilege and conflicts doctrine associated with the framework-of-dealing approach seems generally appropriate to trust situations. The Wolfenbarger principles, which effectively give the court control over the entity's attorney-client privilege in disputes between entity and constituent seems readily adaptable to trusts.[98]

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[97] The approach of section 51(4) of the Restatement is much less satisfactory. It treats the beneficiary as a "nonclient" but gives the trustee's lawyer a duty to prevent wrongdoing by the trustee. This leads to one of those studied ambiguities so often encountered in the bar's doctrine on organizational representation:

Since disclosure to or in the interests of nonclients is normally authorized only in very limited situations, we need to know what the relation of the beneficiary duty is to the normal confidentiality rules. A remark in the Comments suggest that the normal confidentiality rules still apply (with the trustee as the "client") with the consequence that the lawyer will have very limited in his ability to make disclosures and in some jurisdictions perhaps entirely precluded from doing so. Thus, the duty apparently created by the rule erodes as the nuances are considered.

[98] Hoopes v. Carota, 543 N.E.2d 73 (N.Y. 1989) (applying Wolfenbarger to beneficiary suit against trustee). A more categorical approach is applied to trustees under the Employee Retirement Income Security Act. Becher v. Long Island Lighting Co., 129 F.3d 268, 272 (2d Cir. 1997) ("an employer acting in the capacity of ERISA fiduciary is disabled from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration"); but see

For conflicts purposes, the entity perspective would treat representation of the trustee in his official capacity as not creating conflicts where the lawyer takes a position adverse to the trustee in his personal capacity. Tuttle expresses reservations about this, suggesting that the trustee is often more personally identified with his office than the corporate officer.[99] The trustee will often be a single individual operating informally. But this is not categorically true. The trustee could be a bank, and a close corporation officer could be the only director and shareholder. Moreover, even in large corporations, we have noted that lawyers have a tendency to identify the client with the agents they work with.

C. Charitable Organizations

Charitable organizations usually take the legal forms of trusts or nonprofit corporations. The Framework-of-Dealing approach seems readily applicable here. These organizations usually have a determinate plan of goals and activities, and their managers' are subject to a structure that limits authority more than that of business organizations.

An important contrast with business organizations is that the most important beneficiaries of a charitable organization have little or no control rights. In this they resemble, beneficiaries of personal trusts, but since charitable beneficiaries are more diffuse and their interests are more ambiguous, they typically have less incentive and ability to monitor the organization. The law responds to this limitation by giving supervisory responsibilities over charities to the state Attorneys General, and if the organizations receive tax subsidies, the Internal Revenue Service and other taxing authorities. The resources of these agencies, however, seem scant relative to their responsibilities.

Given the relative weakness of monitoring, it is arguable that the professional responsibilities of lawyers are exceptionally

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United States v. Mett (9th Cir. 1999) (privilege does apply where trustee consults counsel in anticipation of charges by beneficiaries).

[99] Tuttle, cited in note , at 924.

important in this sphere. Moreover, the deficiencies of a norm, such as Model Rule 1.13 that precludes disclosure of wrongdoing outside the organization are especially severe here. We have seen that in the business corporation there are occasionally cases where an affected constituency has no participatory role in the organization's control structure, but this is the usual situation with charitable organizations. Since the Attorney General has a critical monitoring role, it is important that disclosure to him or her be possible.

D. Informal Associations

In the past, doctrine has tended to draw a sharp distinction between formally organized associations and informal ones. While formally organized ones were treated as "entities", informal ones were treated as joint individual representations. However, if entity is understood in "Framework of Dealing" terms there is often good reason to apply it in informal contexts. Where the parties have developed a sufficient authority structure and sense of common goals to permit a distinction between organizational and individual interests, it may be possible to treat their activities as a framework of dealing. To refuse to do so may impair their ability to act in a coordinated fashion.

Geoffrey Hazard and William Hodes give an example: Seventeen homeowners retain a lawyer to bring a nuisance suit against a factory. They agree in writing that the decision of twelve of them to settle will be binding on all of them.[100] If the representation is considered joint, then the lawyer cannot act to enforce the agreement if any of the seventeen reneges.[101] A

[100] Hazard and Hodes, Illustrations 5-11, 12-13, 17-2, at 5-35-36, 12-44-45, 17-12-13. The example is based on Hayes v. Eagle-Pitcher Industries, Inc., 513 F.2d 892 (10th Cir. 1975) (finding no agreement but suggesting that, even if there had been one, it would not be binding).

[101] Model Rule 1.2 (acceptance of settlement for client to decide); 3.8(f) (settlement of claims for multiple clients permissible only if each client consents).

dissenter who took a position adverse to the others might also be able to disqualify the lawyer from continuing to represent the other group members.[102] This treatment provides strong protection to anyone who changes her mind. But it also may have real costs. Some or all members of the group may not be willing to joint without some assurance that all will be effectively bound. The option of easy defection raises the expected costs of undertaking the project in the first place.

While conceding that courts would be likely to apply joint representation norms, Hazard and Hodes argue that it would be better to treat the litigants as an organization and permit the lawyer to act under Model Rule 1.13 on the instruction of twelve members (the organization's "duly authorized" constituents). This is in the spirit of Brandeis's "counsel for the situation" view. A Framework of Dealing can be inferred from common understanding and express agreement without formal organization.

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102 cites