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LAW FIRM MALPRACTICE DISCLOSURE: ILLUSTRATIONS AND GUIDELINES

*Anthony V. Alfieri**

I. INTRODUCTION

Lawyers err every day, in hard and easy cases, in trials and transactions, and in large and small firms. By turns commonplace and noteworthy, the errors fall in both the private shadow and the public light of for-profit, nonprofit, and government practice. The literature of lawyer and, by extension, law firm error spans common law doctrines,¹ state ethics rules and opinions,² federal rules,³ practitioner treatises,⁴ restatements,⁵ and academic casebooks⁶ and commentaries.⁷ Despite the breadth of this literature, the intertwined problems of lawyer or law firm

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1. *See infra* note 94 and accompanying text.
2. *See infra* note 93 and accompanying text.
3. *See, e.g.*, FED. R. CIV. P. 11(b), 60(a)-(b).
4. *See, e.g.*, *Lawyer's Interests Adverse to Client*, 20 *Laws. Man. on Prof. Conduct (ABA/BNA)* 401, 411-13 (Apr. 21, 2004) (discussing lawyer's interest adverse to client); *see also* 1 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 8 (2012).
5. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 48-52 (2000).
6. *See generally, e.g.*, SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION* (2008).
7. *See, e.g.*, 1 GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* § 7.3 n.2 (3d ed. 2013); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 5.6 (1986).

error and client malpractice disclosure remain unresolved⁸ and surprisingly underappreciated.⁹

Against the backdrop of widening debates over the ethical culture and infrastructure of law firms,¹⁰ this Article recasts the originating problem of lawyer and law firm error narrowly in terms of client malpractice disclosure.¹¹ Framing the problem of professional error in the limited terms of client disclosure focuses the inquiry more closely on lawyer and law firm acts of delay in communicating information to clients and acts of declination in withholding information from clients.¹² Thus tailored, two questions stand out. First, when may a lawyer or law firm permissibly *delay* disclosure of information to a client about an error-related incident of malpractice? And second, when may a lawyer or law firm permissibly *withhold* information from a client about such an incident and its consequences? Like the instant Symposium, the *Conference on the Ethical Infrastructure and Culture of Law Firms*, both questions implicate considerations of law firm culture¹³ and

8. See Benjamin P. Cooper, *Attorney Self-Disclosure*, 79 U. CIN. L. REV. 697, 713, 717-20 (2010); Benjamin P. Cooper, *The Lawyer's Duty to Inform His Client of His Own Malpractice*, 61 BAYLOR L. REV. 174, 180-87, 192-203 (2009); Vincent R. Johnson, *Legal Malpractice Litigation and the Duty to Report Misconduct*, 1 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 40, 52-54 (2011); Frances Patricia Solari, *Malpractice and Ethical Considerations*, 19 N.C. CENT. L.J. 165, 174-75 (1991); Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 789-90 (2008) [hereinafter Wald, *Attorney-Client Communications*].

9. See John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 80-82 (2013) (discussing individual and institutional accountability in law practice); Susan Saab Fortney, *Law as a Profession: Examining the Role of Accountability*, 40 FORDHAM URB. L.J. 177, 209 (2012).

10. See RICHARD L. ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* 198-205 (2008) (analyzing attorney misconduct); Elizabeth Chambliss, *Whose Ethics? The Benchmark Problem in Legal Ethics Research*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 47, 47-58 (Leslie C. Levin & Lynn Mather eds., 2012); see also Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909, 1913 (2006); Leslie C. Levin, *Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock*, 22 GEO. J. LEGAL ETHICS 1549, 1573-90 (2009) (book review).

11. See *infra* Part II.

12. This focus distinguishes acts of delay and declination from acts of dishonesty and fraud, though both sets of acts entail elements of deliberation and intent. For discussions of lawyer deception in counseling and negotiation, see Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 686-87 (1990); Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761, 774-76 (1990); see generally James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926 (analyzing Model Rules 4.1-3).

13. See Elizabeth Chambliss, *Measuring Law Firm Culture*, in 52 *STUDIES IN LAW, POLITICS, AND SOCIETY* 1, 20-21 (Austin Sarat ed., 2010); Milton C. Regan Jr., *Nested Ethics: A Tale of Two Cultures*, 42 HOFSTRA L. REV. 143, 144-48 (2013); Ted Schneyer, *The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for U.S. Lawyers*, 42

infrastructure,¹⁴ ethical regulation,¹⁵ professional liability,¹⁶ and risk management policy¹⁷ and procedure.¹⁸

To address these fundamental, yet often overlooked questions, this Article proceeds in three additional Parts. Part II situates the problems of law firm error and client malpractice disclosure in the broader framework of lawyer regulation and law firm ethical culture.¹⁹ Part III summarizes the general law and rule framework governing law firm malpractice disclosure, and illustrates the interplay of common law and rule-based claims and defenses in malpractice disputes.²⁰ Part IV examines the content of contemporary best practice guidelines for malpractice disclosure in the field of lawyer and law firm regulation.²¹ More instrumental than aspirational or normative, the guidelines draw substance from the professional liability insurance mandates of loss prevention and risk management.

Taken together, these Parts construct a conventional, generalizable account of law firm malpractice disclosure disputes familiar to practitioners, regulators, and academics alike. Chronicled through a series of interwoven case Illustrations, the account depicts the standard

HOFSTRA L. REV. 233, 248-49 (2013).

14. See Douglas R. Richmond, *Law Firm Management and Professional Responsibility*, 9 ROGER WILLIAMS U. L. REV. 187, 199 (2003).

15. See Russell G. Pearce & Eli Wald, *The Relational Infrastructure of Law Firm Culture and Regulation: The Exaggerated Death of Big Law*, 42 HOFSTRA L. REV. 109, 139-40 (2013); see also Ronald D. Rotunda, *Applying the Revised ABA Model Rules in the Age of the Internet: The Problem of Metadata*, 42 HOFSTRA L. REV. 175, 192-202 (2013) (discussing the treatment of inadvertently disclosed computer documents).

16. See Anthony V. Alfieri, *Big Law and Risk Management: Case Studies of Litigation, Deals, and Diversity*, 24 GEO. J. LEGAL ETHICS 991, 1005 (2011); Diane L. Karpman, *Risk Management: Beware of the Inadvertent Smoking Gun*, A.B.A. J., Dec. 2008, at 57, 57-58.

17. See Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. COLO. L. REV. 329, 345 (1995); Susan Saab Fortney, *Law Firm Risk Management and Peer Review*, 51 CONSUMER FIN. L. Q. REP. 98, 99 (1997); William H. Fortune & Dulaney O'Roark, *Risk Management for Lawyers*, 45 S.C. L. REV. 617, 631 (1994); William H. Simon, *Where Is the "Quality Movement" in Law Practice?*, 2012 WIS. L. REV. 387, 405.

18. See Christine Parker et al., *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, 37 J.L. & SOC'Y 466, 471 (2010); Ronald D. Rotunda, *Why Lawyers Are Different and Why We Are the Same: Creating Structural Incentives in Large Law Firms to Promote Ethical Behavior—In-House Ethics Counsel, Bill Padding, and In-House Ethics Training*, 44 AKRON L. REV. 679, 709 (2011); Ted Schneyer, *On Further Reflection: How "Professional Self-Regulation" Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 604 (2011).

19. See *infra* Part II.

20. See *infra* Part III.

21. See *infra* Part IV; see also, e.g., CNA PROF'L COUNSEL, TO ERR IS HUMAN: MANAGING THE DISCLOSURE OF MISTAKES TO CLIENTS 3-5 (2011) [hereinafter CNA], available at http://www.cna.com/vcm_content/CNA/internet/Static%20File%20for%20Download/ProfessionalServices/ProfArticleManagingDisclosureOfMistakesToClients_CNA.pdf.

progression of malpractice disclosure disputes from the formation of the client-lawyer relationship (Illustration A);²² to the lawyer's commission and the law firm's discovery of a harmful performance error (Illustration B);²³ to the law firm's delay and omission in communicating information of the error to the client (Illustration C);²⁴ to the undisclosed sharing of client information with the law firm's in-house general counsel, malpractice insurance carrier, and outside professional liability counsel (Illustration D);²⁵ and finally, to the law firm's internal investigation of client-lawyer conflicts of interest and the ultimate decision to withdraw from the representation (Illustration E).²⁶

II. THE LAWS AND RULES OF MALPRACTICE DISCLOSURE

The laws and rules of lawyer and law firm malpractice disclosure stem from the law of agency and its principal fiduciary duties,²⁷ the law of contract,²⁸ the law of professional negligence and intentional tort,²⁹ and the rules of professional conduct promulgated by the American Bar Association ("ABA"), state bar associations, and federal and state courts.³⁰ The predicate for the application of these duties and obligations

22. See *infra* Part II.A.1.

23. See *infra* Part II.B.1.

24. See *infra* Part II.C.1.

25. See *infra* Part II.D.1.

26. See *infra* Part II.E.1.

27. See RESTATEMENT (THIRD) OF AGENCY §§ 8.01, 8.08–11 (2006); Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 ST. MARY'S L.J. 909, 924–25 (2009) [hereinafter Wald, *Loyalty in Limbo*]; Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 704 (2006) (analyzing fiduciary breach as an alternative remedy to lawyer misconduct).

28. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18 (2000).

29. See *id.* §§ 48–52.

30. For the ABA and the majority of states, the Model Rules serve as "rules of reason." See MODEL RULES OF PROF'L CONDUCT pmbl. (2012). Cast in the imperative terms, "shall" or "shall not," the text of the Rules is "authoritative," defining "proper conduct for purposes of professional discipline." *Id.* scope ("Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process."). Alternatively cast in the discretionary term, "may," the text of the Rules is "permissive," defining areas of lawyer "professional judgment." *Id.* ("No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion."). The Comments accompanying the Rules serve as "guides to interpretation" and "compliance," explaining and illustrating their "meaning and purpose" without adding further obligations. *Id.* By design, the Rules "provide a framework for the ethical practice of law" predicated on "a larger legal context" of court rules and statutes, fiduciary laws of obligation, and substantive and procedural law. *Id.* Because the Rules "are not designed to be a basis for civil liability," a Rule violation "should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." *Id.* Moreover, "violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation." *Id.* At the same time, the ABA makes plain that the Rules "do not . . . exhaust the moral and ethical considerations that should inform a lawyer." *Id.*

is the formation of a client-lawyer relationship and its specified scope of representation. In many cases, the formation and scope of representation are the start and end points for evaluating malpractice disclosure disputes.

A. Fiduciary Duties and the Formation of the Client-Lawyer Relationship

Typically, the formation and scope of the client-lawyer relationship are determined by state common law principles³¹ and rules of professional conduct.³² Under the common law of agency, all who assent

Indeed, “the Rules do establish standards of conduct by lawyers,” and as a consequence, “a lawyer’s violation of a Rule may be evidence of a breach of the applicable standard of conduct.” *Id.*; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(2) cmt. f (2000).

31. In addition to the law of agency, equitable principles of estoppel may give rise to an implied client-lawyer relationship, for example, in circumstances of detrimental reliance where a client’s subjective state of mind may have been reasonably induced by a lawyer. See MALLEN & SMITH, *supra* note 4, § 8.2. To the extent that a client may be defined constructively as a constituent member of one or more corporate entities represented by a law firm, an attorney-client relationship may be implied under entity-constituent theory. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 92-365 (1992). An implied duty derives from fiduciary obligations of care and protection, including anticipating reasonably foreseeable risks of harm to a client. *Id.* In many malpractice disclosure cases, the risk of harm to a client may be reasonably apparent to a lawyer or law firm, triggering the obligation to alert the client to any purported limitations on the scope of legal representation, and, similarly, to apprise the client of the possible need for, and importance of, representation by independent counsel. The phrase, “reasonably should know,” when, as here, used in reference to individual lawyers, “denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.” MODEL RULES OF PROF’L CONDUCT 1.0 (2012) (“A person’s knowledge may be inferred from circumstances.”). Often, the evidentiary record in malpractice disclosure disputes shows no such cautionary communications by the lawyer or law firm, no implied, express, or otherwise apparent limitations on the scope of legal representation, no declination or termination of the relationship, and no referral for alternate, independent representation.

32. The Model Rules explain that the purpose of the relationship may depend on relevant circumstances and may pose a question of fact. MODEL RULES OF PROF’L CONDUCT pmb1. (2012). The long-standing test for determining the formation of a client-lawyer relationship, here in Florida and in states elsewhere, rests on a subjective measure of a client’s belief that he is consulting a lawyer in a professional capacity and on evidence of his manifested intention to seek professional legal advice. See *Fla. Bar v. Beach*, 675 So. 2d 106, 109 (Fla. 1996) (stating that the client’s subjective belief in formation must be reasonable); see also *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1281-82 (11th Cir. 2004) (adopting “subjective but reasonable belief” test); *Dean v. Dean*, 607 So. 2d 494, 497 (Fla. Dist. Ct. App. 1992) (approving “common law focus on subjective considerations”). Under the Model Rules, the term belief or believes “denotes that the person involved actually supposed the fact in question to be true.” MODEL RULES OF PROF’L CONDUCT 1.0(a) (2012) (“A person’s belief may be inferred from circumstances.”). Courts examine the facts and circumstances of formation from the perspective of the client. See *Broin v. Phillip Morris Cos.*, 84 So. 3d 1107, 1110 (Fla. Dist. Ct. App. 2012); see also *United States v. Abbell*, 900 F. Supp. 449, 452 (S.D. Fla. 1995); *In re Lentek Int’l, Inc.*, 377 B.R. 396, 399-401 (Bankr. M.D. Fla. 2007), *aff’d*, 346 F. App’x. 430, 433 (11th Cir. 2009). Circumstances evincing a reasonable, factual basis for reliance are sufficient to establish valid grounds for formation, as noted in the Restatement:

to act on behalf of another person, and voluntarily stand subject to that person's control, constitute common law agents.³³ Lawyers, as common law agents, are subject to the general fiduciary principle governing the agency relationship.³⁴ This principle dictates that an agent's fiduciary obligation is owed to the principal, defined as an individual or an organizational entity.³⁵ That fiduciary obligation may extend beyond the termination of the agency relationship.³⁶ Post-termination duties may apply to the agent's use of confidential information provided by the principal or acquired through the agency relationship.³⁷ Those duties "may prohibit the agent's communication to third parties of information that the principal has confidentially provided to the agent."³⁸

Because the relationship between a principal and an agent is a fiduciary one in which an agent assents to act subject to the principal's control and on the principal's behalf, numerous states employ a general fiduciary principle that requires the agent to "subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship."³⁹ Predicated on the designation of the agent as a fiduciary, this overarching principle imposes a duty "to act loyally for the principal's benefit."⁴⁰ Implied at common law, the duty of loyalty "supplements manifestations that a principal makes to an agent," for example, in an engagement letter or a retainer agreement, "making it unnecessary for the principal to graft explicit qualifications and prohibitions onto the principal's statements of authorization to the agent."⁴¹ In this respect, the general fiduciary principle of agency "unifies the more specific rules of loyalty" created

A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services . . .

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000).

33. RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. c (2006).

34. *Id.*; see Wolfram, *supra* note 27, at 705.

35. RESTATEMENT (THIRD) OF AGENCY § 8.01 cmts. b–c (2006) ("When a principal is an organizational entity, an agent has a fiduciary obligation to the entity.")

36. *Id.* § 8.01 cmt. c.

37. *Id.*

38. *Id.* ("An agent may be subject to duties of confidentiality to a principal that limit the agent's duty to reveal information to third parties."); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 61–67 (2000) (discussing lawyers' duties in handling and using confidential client information).

39. See RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (2006).

40. *Id.* § 8.01 cmt. a.

41. *Id.* § 8.01 cmt. b; see also *id.* § 8.01 cmt. b, illus. 1, 3; *id.* § 8.07; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14(1)(b) (2000) (discussing implied formation of the client-lawyer relationship).

by statute, regulation, and contract.⁴² Rooted in standards of good faith⁴³ and best interest,⁴⁴ these rules of loyalty protect against the “risk of self-interested action” by an agent in attempting “to exploit gaps in the principal’s manifestations” for the benefit or enhancement of the agent.⁴⁵

Formulated broadly, the fiduciary duty of loyalty serves the prophylactic purpose of protecting the interests of the principal, for example, interests in preserving confidential information.⁴⁶ The duty of loyalty prohibits direct and indirect efforts by an agent to use or to disclose confidential information⁴⁷ arising out of the agent’s position.⁴⁸ The same duty prohibits an agent’s use of the principal’s confidential information without the consent of the principal.⁴⁹ Bound by this duty, an agent may neither use nor communicate the confidential information (for example, nonpublic financial statements) of the principal for the agent’s own purposes.⁵⁰ Because an agent’s duty of confidentiality continues after the agency relationship terminates, it bars a former agent from using confidential information, acquired during the agent’s employment with the principal, to later disadvantage or harm the principal.⁵¹ From a fiduciary standpoint, an agent plainly is in no position “disinterestedly to assess” whether harm to the principal reasonably attributable to the use of confidential information may occur as a result of the agent’s actions.⁵²

Fiduciary norms lay the foundation for ethics rules governing the scope and objectives of client representation.⁵³ From the outset of the client-lawyer relationship, a lawyer is obliged to “abide by a client’s

42. RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (2006); *see also id.* § 8.02 cmts. d–e; *id.* § 8.04 cmt. b.

43. Standards of good faith derive, in part, from the duty of good conduct. *See id.* § 8.10 (“An agent has a duty, within the scope of the agency relationship, to act reasonably and to refrain from conduct that is likely to damage the principal’s enterprise.”); *Airgas, Inc. v. Cravath, Swaine & Moore LLP*, No. 10-612, 2010 WL 3046586, at *4 (E.D. Pa. Aug. 3, 2010).

44. *See Schock v. Nash*, 732 A.2d 217, 225-26 (Del. 1999) (observing that “[a]n attorney-in-fact, under the duty of loyalty, always has the obligation to act in the best interest of the principal unless the principal voluntarily consents to the attorney-in-fact engaging in an interested transaction after full disclosure”).

45. RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (2006).

46. *See id.* §§ 8.02 cmt. b, 8.03 cmt. b, 8.04 cmt. a, 8.05 cmt. c.

47. *See id.* §§ 8.04 cmt. c, 8.05 cmt. c (“A former agent remains subject to duties concerning confidential information and property of the principal.”).

48. *See id.* § 8.02 cmt. c.

49. *See id.* § 8.02 cmt. d.

50. *See id.* § 8.05; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 (2000).

51. RESTATEMENT (THIRD) OF AGENCY § 8.05 reporter’s n. c (2006).

52. In general, the principal, rather than the agent, is in the best position to assess the potential adverse impact of the agent’s use of such confidential information on the principal’s interests. *See id.* § 8.04 cmt. b.

53. *See MODEL RULES OF PROF’L CONDUCT R. 1.2* (2012).

decisions concerning the objectives of representation” and to consult reasonably with the client as to the means of their implementation.⁵⁴ The Model Rules of Professional Conduct (“Model Rules” or “Rules”) explicitly confer upon a client the ultimate authority to determine the purposes to be served by legal representation, and the right to consult with a lawyer about the means (for example, advocacy, counseling, or negotiation) to be used in achieving appropriate litigation or transactional objectives.⁵⁵ Absent termination of the relationship, the Rules direct a lawyer to “carry through to conclusion all matters undertaken for a client.”⁵⁶ When “a lawyer has served a client over a substantial period in a variety of matters,” the Model Rules note that “the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal.”⁵⁷ The Rules also dictate, for reasons of client detrimental reliance, that any “[d]oubt about whether a client-lawyer relationship still exists” on a continuing basis “should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client’s affairs when the lawyer has ceased to do so.”⁵⁸ Consider the formation and scope of the client-lawyer relationship in the following Illustration of the initial stage of a malpractice disclosure dispute.

1. Illustration A

An international generic drug manufacturer with ownership interests in numerous subsidiary and affiliated entities governed by partially overlapping boards, directors, and officers, and involved across a spectrum of litigated and non-litigated matters,⁵⁹ engages the corporate

54. *Id.* R. 1.2(a). Debates over the specific means of representation may occur in both trial and appellate contexts. See David H. Tennant & Lauren M. Michals, *Mixing Business with Ethics: The Duty to Report Malpractice by Trial Counsel*, 20 PROF. LAW., no. 1, 2010, at 3, 5-6.

55. MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 1 (2012). The Rules permit lawyers and clients to place limitations on the objectives and scope of representation, provided such limitations are reasonable under the circumstances and the client gives informed consent. *Id.* R. 1.2(c). The Comments accompanying the Model Rules highlight the fact that “an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation,” hence “all agreements concerning a lawyer’s representation of a client must accord with the Rules of Professional Conduct,” as well as obligations and duties under other law (for example, decisional, constitutional, and statutory laws). *Id.* R. 1.2 cmts. 7–8.

56. *Id.* R. 1.3 cmt. 4.

57. *Id.*

58. *Id.*

59. For this Illustration, assume that neither the law firm’s engagement letter nor subsequent correspondence, including billing records, between the firm and the client clearly and consistently distinguish among the relevant parent, subsidiary, and affiliated entities.

and intellectual property groups of a multinational law firm⁶⁰ to advise it in obtaining U.S. Food and Drug Administration (“FDA”) approval to market a generic version of a patented brand name drug product prior to expiration of the patent, and also to assist it in acquiring a domestic generic drug manufacturer owned by another pharmaceutical corporation, in order to expand the U.S. market for its new generic and brand name products.⁶¹ Prior and, in some instances, ongoing engagements of the law firm by the client involve its parent, subsidiary, and affiliated entities.

2. Formation Disputes

The resolution of formation and scope disputes under Illustration A centers on whether the client entity formed a client-lawyer relationship with the law firm, and, moreover, operated on the well-grounded belief that it was consulting the firm’s corporate and intellectual property groups in their capacity as legal advisors with the intention of seeking professional legal advice within the scope of the corporate and intellectual property transactions at issue. The reasonableness of the client’s subjective belief, both from its perspective and from any objective agency perspective, is crucial to this inquiry. Evidence bearing on that belief may include a prior engagement letter or the payment of fees to the firm.⁶² If proven to be well founded, the client’s belief

60. For this Illustration, assume that the intellectual property group, like intellectual property groups at many modern large law firms, includes a healthcare team that serves the pharmaceutical industry in the United States and international markets. On the ethics of modern large firm practice, see generally Bruce A. Green, *Foreword: Professional Challenges in Large Firm Practices*, 33 *FORDHAM URB. L.J.* 7 (2005); Milton C. Regan, Jr., *Corporate Norms and Contemporary Law Firm Practice*, 70 *GEO. WASH. L. REV.* 931 (2002); Milton C. Regan, Jr., *Foreword: Professional Responsibility and the Corporate Lawyer*, 13 *GEO. J. LEGAL ETHICS* 197 (2000); Robert K. Vischer, *Big Law and the Marginalization of Trust*, 25 *GEO. J. LEGAL ETHICS* 165 (2012).

61. For this Illustration, assume that the healthcare team, comprised chiefly of intellectual property litigators and patent attorneys, specialized in FDA regulatory compliance and FDA-related intellectual property matters, especially litigation under the federal Hatch-Waxman Act. On the history of the Hatch-Waxman Act (that is, the Drug Price Competition and Patent Term Restoration Act) and its impact on the manufacture and regulation of generic drugs by the pharmaceutical industry, see generally Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (codified as amended at 21 U.S.C. § 355 (2006), and 35 U.S.C. § 271(e) (1994)); Daiichi Pharm. Co. v. Apotex, Inc., 441 F. Supp. 2d 672 (D.N.J. 2006), *rev’d sub nom.*, Daiichi Sankyo Co. v. Apotex, Inc., 501 F.3d 1254 (2007); SmithKline Beecham Corp. v. Geneva Pharm., Inc., 287 F. Supp. 2d 576 (E.D. Pa. 2002); Phillip B.C. Jones, *Navigating the Hatch-Waxman Act’s Safe Harbor*, 57 *FOOD & DRUG L.J.* 475 (2002); David C. McPhie, *Old Drugs, New Uses: Solving a Hatch-Waxman Patent Predicament*, 59 *FOOD & DRUG L.J.* 155 (2004); Elizabeth Stotland Weiswasser & Scott D. Danzis, *The Hatch-Waxman Act: History, Structure, and Legacy*, 71 *ANTITRUST L.J.* 585 (2003).

62. In the context of this Illustration, even if an agreement stipulating reasonable limitations had been reached, the firm owed the client all the ethical obligations and duties of care, competence,

may oblige the firm to carry through to conclusion all corporate and intellectual property matters undertaken unless or until the firm formally withdraws.⁶³

To be sure, a law firm may challenge the contention that its lawyers knew or should have known that their actions during the period in controversy would induce the client reasonably to believe, and detrimentally rely on the belief, that it had entered into a client-lawyer relationship. In fact, a firm may question whether a client's detrimental reliance and risk of harm were reasonably foreseeable and were sufficient to give rise to the firm's obligation to promptly alert the client of any implied or express limitations in the scope of legal representation, or to apprise the client of the possible need for, and importance of, representation by independent counsel. Presuming evidence of timely cautionary communications by the firm, timely termination of the client-lawyer relationship, and timely referral for alternate representation by independent counsel, a firm may be able to maintain that the client understood or reasonably should have understood that limited entity services would be rendered.

Often in the corporate family context of Illustration A, the client's understanding of the nature of the representation at stake may evolve over time as the retention expands from a single entity into multiple subsidiary and affiliated entities.⁶⁴ In situations of this kind, a law firm, in an effort to anticipate conflict of interest charges related to incompletely documented situations of concurrent representation, may concede that multiple entity clients effectively formed a client-lawyer relationship with the firm as a single, unified group. To this point, commentators remark that large modern law firms increasingly "have tried to encourage clients to see themselves as clients of the firm rather

and communication with respect to the intellectual property evaluation and the corporate transaction negotiation.

63. Doubt surrounding the formation of the attorney-client relationship should be promptly clarified or eliminated by a law firm, preferably in writing. In such circumstances, under Model Rule 1.16, a "lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests." MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 7 (2012). Upon actual termination of representation, pursuant to subdivision (d) of the Rule, a lawyer must "take steps to the extent reasonably practicable to protect a client's interest," and to mitigate adverse consequences to the client, "such as giving reasonable notice to the client and allowing time for employment of other counsel." *Id.* R. 1.16(d). Where, as here, a "future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances." *Id.* R. 1.16 cmt. 4.

64. For this reason, the engagement letter and subsequent correspondence, including billing records, between a law firm and a client should be careful to distinguish among affiliated client entities.

than clients of any particular lawyer.”⁶⁵ Next, consider the duties of care, competence, and diligence.

B. Care, Competence, and Diligence

The client-lawyer relationship gives rise to lawyer fiduciary duties of care, competence, and diligence.⁶⁶ The duties encompass individual lawyers and law firms as a whole. Both ABA⁶⁷ and American Law Institute (“ALI”)⁶⁸ ethical guidelines are in accord with these elemental duties. To carry out those guidelines, courts require lawyers and law firms to meet minimum thresholds of legal knowledge, investigative care and effort, and skill.⁶⁹ The Model Rules also require lawyer and law firm care and competence.⁷⁰ Under the Rules, an individual lawyer must provide competent representation to a client.⁷¹ The requirements of competent representation similarly include “the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”⁷² The accompanying Comments link thorough and adequate preparation of a particular matter to “inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.”⁷³

65. THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 141 (2010); see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 31 cmt. f (2000) (“When a client retains a lawyer who practices with a firm, the presumption is that both the lawyer and the firm have been retained.”). On the content of law firm organizational culture, see Susan Saab Fortney, *Are Law Firm Partners Islands unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 308-09 (1996); Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 985 (2007).

66. See MODEL RULES OF PROF’L CONDUCT pmb1. (2012) (“In all professional functions a lawyer should be competent, prompt and diligent.”).

67. See *id.* R. 1.1, 1.3.

68. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmts. d-e (2000); *id.* §§ 49, 50, 52; RESTATEMENT (THIRD) OF AGENCY §§ 8.08 cmts. c-d, 8.11 cmt. b (2006).

69. See, e.g., Fla. Bar v. Lecznar, 690 So. 2d 1284, 1285-88 (Fla. 1997); Fla. Bar v. Sandstrom, 609 So. 2d 583, 584 (Fla. 1992) (per curiam); McAbee v. Edwards, 340 So. 2d 1167, 1169-70 (Fla. Dist. Ct. App. 1976).

70. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2012).

71. *Id.*

72. *Id.* The Comments to Rule 1.1 explain that the “relevant factors” to “determin[e] whether a lawyer employs the requisite knowledge and skill in a particular matter,” as in the Illustrations here:

[I]nclude the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

Id. R. 1.1 cmt. 1.

73. *Id.* R. 1.1 cmt. 5.

Requisite levels of “attention and preparation are determined in part by what is at stake”—complex corporate and intellectual property transactions of the sort at issue in Illustration A “ordinarily require more extensive treatment.”⁷⁴

Courts and ethics rules enlarge the mandate of lawyer care and competence to encompass law firms and their organizational structures of supervision.⁷⁵ The Model Rules regulate the responsibilities of partners, managers, and supervisory lawyers, commanding firm-wide, institutional adherence to accepted standards of professional conduct.⁷⁶ Under this command, law firm partners and other lawyers possessing comparable firm managerial authority must “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers” properly conform to applicable ethics rules.⁷⁷ Bolstering this command, the Comments direct “lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance” of such firm-wide conformity, particularly policies and procedures “designed to detect and resolve conflicts of interest,” and, equally imperative, to “ensure that inexperienced lawyers are properly supervised.”⁷⁸ The Rules assign institutional responsibility for another lawyer’s ethical violation, not only if “the lawyer orders, or with knowledge of the specific conduct, ratifies the conduct involved,” but also if:

[T]he lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.⁷⁹

This organizational sense of managerial and supervisory diligence is also expressed in terms of adequate preparation and performance.⁸⁰

74. *Id.*

75. See *O’Keefe v. Darnell*, 192 F. Supp. 2d 1351, 1361 (M.D. Fla. 2002) (discussing evidentiary requirement of active involvement in misconduct); see also *Young v. Becker & Poliakoff*, 88 So. 3d 1002, 1009 (Fla. Dist. Ct. App. 2012).

76. MODEL RULES OF PROF’L CONDUCT R. 5.1(a) (2012); see Douglas R. Richmond, *Law Firm Partners as Their Brothers’ Keepers*, 96 KY. L.J. 231, 236-38 (2007-2008).

77. MODEL RULES OF PROF’L CONDUCT R. 5.1(a) (2012).

78. *Id.* R. 5.1 cmt. 2.

79. *Id.* R. 5.1(c)(1)–(2). Appropriate remedial action by a partner or managing lawyer, according to the Comments, “would depend on the immediacy of that lawyer’s involvement and the seriousness of the misconduct.” *Id.* R. 5.1 cmt. 5.

80. See *Fla. Bar v. Barcus*, 697 So. 2d 71, 73-74 (Fla. 1997); *Fla. Bar v. Kinney*, 606 So. 2d 367, 368 (Fla. 1992) (per curiam).

The Model Rules declare that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”⁸¹ Comments to the Rules emphasize that “[a] lawyer should pursue a matter on behalf of a client despite . . . personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”⁸² In this sense, the lawyer serving as agent must “act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”⁸³ Consider care, competence, and diligence in the following Illustration of the error and discovery stage of a malpractice disclosure dispute.

1. Illustration B

For Illustration B, consider the same facts as in Illustration A, except that the law firm’s intellectual property group, in advising the client whether the generic version of the drug product, when marketed, would constitute an act of patent infringement under the Hatch-Waxman Act,⁸⁴ assigns a healthcare team partner with limited experience in FDA-related regulatory affairs. After completing his due diligence search, the partner concludes, albeit with certain reservations, that the generic drug would not infringe on the branded drug patent, and notifies the patent holder of the client’s plan to seek federal approval of its generic drug application. Soon after, the firm advises the client to acquire the second generic drug manufacturer to broaden the domestic and international markets for its new and existing drug products. Subsequently, the firm receives communications from the brand name drug maker, objecting to its patent notice letter and threatening suit to enjoin the statutory approval process. In response to the brand name drug maker’s continuing objections, the head of the intellectual property group, a senior partner, reviews the healthcare team’s due diligence documents and concludes not only that the patent on the branded drug appears to be valid, but also that the generic drug seems to infringe on the patent.

2. Care, Competence, and Diligence Disputes

The resolution of care, competence, and diligence disputes under Illustration B hinges on whether the law firm discharged its fiduciary duties of legal knowledge, skill, thoroughness, and preparation

81. MODEL RULES OF PROF’L CONDUCT R. 1.3 (2012).

82. *Id.* R. 1.3 cmt. 1.

83. *Id.*

84. Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (codified as amended at 21 U.S.C. § 355 (2006), and 35 U.S.C. § 271(E) (1994)).

reasonably necessary for the representation.⁸⁵ Here, the client may assert that the firm neglected to conduct the necessary due diligence inquiry into and analysis of the factual and legal elements of the patent, and neglected to use methods and procedures meeting the standards of competent FDA and corporate practitioners. Moreover, it may claim that the work of the firm lacked the requisite levels of attention and preparation warranted by the magnitude of the transactions at stake, even though complex transactions ordinarily require more extensive treatment. The client may also contend that it was feasible to refer the transactions to, or associate or consult with, other lawyers at the firm or elsewhere of established competence in the field of FDA regulation and corporate acquisitions.

More broadly, the client may argue that the firm breached its institutional duties of care and competence by failing in its responsibilities through the inaction of partners, managers, and supervisory lawyers. It may find deficiencies in the firm's internal policies and procedures designed to provide reasonable assurance that all firm-affiliated lawyers fulfilled their fiduciary duties and conformed to the Model Rules, particularly in ensuring the proper supervision of less experienced lawyers.⁸⁶ Equally significant, the client may allege that the firm's lawyers with managerial authority or with direct supervisory authority over the matter, as well as other lawyers advising the transactions, knew or reasonably should have known of the lack of care, competence, and diligence at a time when damaging consequences could have been avoided or mitigated.

To counter these claims, the law firm in this Illustration may seek to show that its lawyers gave their continuing attention to the needs of the representation precisely in order to assure that there was no neglect of the client's rights and interests. Likewise, the firm may endeavor to show that its lawyers in no way engaged in intentional efforts to prejudice the client's interests or to disadvantage the client during the course of the relationship. Accordingly, the firm may work to adduce evidence that its lawyers labored to vindicate the client's cause in the transactions and advanced its best interests throughout the representation

85. See MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3-4 (2012).

86. For this Illustration, assume that the partners, managers, and supervisory lawyers approved the specific transactional conduct in controversy or, with knowledge thereof, ratified the conduct involved.

in compliance with the firm's fiduciary duties.⁸⁷ Next, consider candor, communication, and consultation.

C. Candor, Communication, and Consultation

The client-lawyer relationship also generates lawyer duties of candor,⁸⁸ communication, and consultation.⁸⁹ These fiduciary duties demand prompt communication and full and fair material disclosure.⁹⁰ Both ABA⁹¹ and ALI⁹² ethical guidelines buttress such disclosure principles. Court and ethics rules, and associated state bar opinions, mandate lawyer candor,⁹³ as well as fair and honest dealing.⁹⁴ Under the

87. In this Illustration, if firm partners knew or reasonably should have known of any lack of care, competence, and diligence at a time when damaging consequences to the client could have been avoided or mitigated, yet declined to take reasonable remedial action, their compliance defense will likely falter.

88. See Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 209, 239-43 (2006); Vincent R. Johnson, "Absolute and Perfect Candor" to Clients, 34 ST. MARY'S L.J. 737, 770-73 (2003).

89. See Gary A. Munneke & Theresa E. Loscalzo, *The Lawyer's Duty to Keep Clients Informed: Establishing a Standard of Care in Professional Liability Actions*, 9 PACE L. REV. 391, 426-27 (1989); see also Kimberlee K. Kovach, *The Duty to Disclose Litigation Risks and Opportunities for Settlement: The Essence of Informed Decision-Making*, 33 U. LA VERNE L. REV. 71, 93-94 (2011); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 67-69 (1979).

90. See *Herbin v. Hoefel*, 806 A.2d 186, 197 (D.C. Cir. 2002); *FDIC v. Martin*, 801 F. Supp. 617, 620 (M.D. Fla. 1992); *David Welch Co. v. Erskine & Tulley*, 250 Cal. Rptr. 339, 341 & n.2 (Ct. App. 1988); *Fla. Bar v. Nowacki*, 697 So. 2d 828, 830, 832 (Fla. 1997); *Gerlach v. Donnelly*, 98 So. 2d 493, 498 (Fla. 1957); *Smyrna Developers, Inc. v. Bornstein*, 177 So. 2d 16, 18 (Fla. Dist. Ct. App. 1965); see also *Resolution Trust Corp. v. H—, P.C.*, 128 F.R.D. 647, 648-49 (N.D. Tex. 1989) ("The relationship between a client and an attorney has been held by Texas courts to be one of '[t]he most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight.'"); *Iowa Supreme Court Att'y Disciplinary Bd. v. Gottschalk*, 729 N.W.2d 812, 820 (Iowa 2007) ("Attorneys are in a fiduciary relationship with their clients requiring open and honest communication to ensure effective representation.").

91. See MODEL RULES OF PROF'L CONDUCT R. 1.4 cmts. 1-4 (2012); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-453 (2008) (opining on the ethical implications of in-house ethics consultation); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 02-425 (2002) (describing the duty to explain the law and the benefits and risks of alternate courses of action).

92. See RESTATEMENT (THIRD) OF AGENCY § 8.11 cmt. b (describing the duty to provide information) (2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000) (describing the duty to inform and consult with a client).

93. For a survey of relevant ABA and state bar opinions, see ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1010 (1967) (stating that a lawyer who failed to present his personal injury client's claim to the state's "Unsatisfied Claim and Judgment Fund" was required to provide a "full disclosure" to his client); see also Colo. Bar Ass'n Ethics Comm., Formal Op. 113 (2005), available at http://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion_113_2011.pdf ("[A] lawyer has an ethical duty to make prompt and specific disclosure to a client of the lawyer's error if the error is material, meaning that it will likely result in prejudice to a client's right or claim."); Minn. Lawyers Prof'l Responsibility, Op. 21 (2009), available at

Model Rules, a lawyer must “exercise independent professional judgment and render candid advice” in representing a client.⁹⁵ The Comments accompanying the Rule stress that “[a] client is entitled to straightforward advice expressing the lawyer’s honest assessment.”⁹⁶

Candor involves effective communication informing the client of the status of representation and adequately explaining matters appropriate to the circumstances.⁹⁷ A lawyer in litigation and nonlitigation situations, the Model Rules recommend, “should maintain

https://www.revisor.leg.state.mn.us/court_rules/rule.php?name=prlawy-21 (discussing a lawyer’s duty to act under the Minnesota Rules of Professional Conduct when the lawyer “knows that lawyer’s conduct could reasonably be the basis for a non-frivolous malpractice claim by a current client that materially affects the client’s interests”); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 789 (2005), available at <http://www.nysba.org/CustomTemplates/Content.aspx?id=5371>. Further, New York State Bar Ethics Opinion 734 states that:

Ordinarily, since lawyers have an obligation to keep their clients reasonably informed about the matter and to provide information that their clients need to make decisions relating to the representation, the [Legal Aid] Society’s lawyer would have an obligation to disclose to the client the possibility that they have made a significant error or omission.

N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 734 (2000). New York State Bar Ethics Opinion 275 states:

[A] lawyer who fails to act where he has undertaken to do so, thereby causing his client’s claim to be barred by limitations, has a professional duty promptly to notify his client of his failure to act and of the possible claim that the client may thus have against him for damages.

N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 275 (1972).

94. See Fla. Bar v. Varner, 780 So. 2d 1, 5-6 (Fla. 2001) (per curiam); Fla. Bar v. Williams, 753 So. 2d 1258, 1261-62 (Fla. 2000) (per curiam); Fla. Bar v. Robinson, 654 So. 2d 554, 555 (Fla. 1995) (per curiam); Fla. Bar v. Gaskin, 403 So. 2d 425, 426 (Fla. 1981) (per curiam); see also Hendrickson v. Sears, 310 N.E.2d 131, 135 (Mass. 1974) (“The attorney owes his client a duty of full and fair disclosure of facts material to the client’s interests.”); Grunwald v. Bronkesh, 621 A.2d 459, 464 (N.J. 1993) (“Inherent in the attorney-client relationship is the fiduciary duty to render full and fair disclosure of all material facts to the client.”); Palmer v. N.Y. State Bar Ass’n, 359 N.Y.S.2d 128, 129-30 (App. Div. 1974) (per curiam) (finding two-year suspension appropriate where, in addition to other misconduct, attorney “showed a complete lack of candor and honesty in his dealings with his clients”); Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988) (“As a fiduciary, an attorney is obligated to render a full and fair disclosure of facts material to the client’s representation.”).

95. MODEL RULES OF PROF’L CONDUCT R. 2.1 (2012).

96. *Id.* R. 2.1 cmt. 1.

97. See N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 789 (2005), available at <http://www.nysba.org/CustomTemplates/Content.aspx?id=5371> (reiterating that “the firm’s duty is to provide the affected client(s) with all the information material to the client’s decision whether to establish or continue the attorney-client relationship”); MODEL RULES OF PROF’L CONDUCT R. 1.4 & cmts. 1-4, 2.1, 4.1; RESTATEMENT (THIRD) OF AGENCY § 8.11 cmt. b (2006) (describing the duty to provide information); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000) (describing the duty to inform and consult with a client); see also ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-453 (2008) (recommending consultation and explanation of possible unethical consequences of proposed action); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 02-425 (2002) (noting the duty to explain the law and the benefits and risks of alternate courses of action).

communication with a client concerning the representation.”⁹⁸ Under the Rules, a lawyer must “promptly inform the client of any decision or circumstance with respect to which the client’s informed consent . . . is required.”⁹⁹ The lawyer must also “reasonably consult with the client about the means by which the client’s objectives are to be accomplished” and “keep the client reasonably informed about the status of the matter,” for instance, with respect to “significant developments affecting the timing or the substance of the representation.”¹⁰⁰ The lawyer as well must “promptly comply with reasonable requests for information.”¹⁰¹ Further, the lawyer must “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”¹⁰²

The Comments to the Model Rules explain that “[r]easonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.”¹⁰³ Indeed, a “client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.”¹⁰⁴ The principle animating the Rules “is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.”¹⁰⁵ Consonant with these guidelines, a “lawyer may not withhold information to serve the lawyer’s own interest or convenience or the interests or convenience of another person.”¹⁰⁶

Candor also entails truthfulness in statements to others.¹⁰⁷ The Model Rules mandate that a lawyer “shall not knowingly . . . make a false statement of material fact or law to a third person” in the course of representing a client.¹⁰⁸ On the same logic, the Rules prohibit lawyer

98. MODEL RULES OF PROF’L CONDUCT pmb1. (2012).

99. *Id.* R. 1.4 (a).

100. *Id.* R. 1.4 (a)(2)–(3) & cmt. 3.

101. *Id.* R. 1.4 (a)(4).

102. *Id.* R. 1.4 (b).

103. *Id.* R. 1.4 cmt. 1.

104. *Id.* R. 1.4 cmt. 5.

105. *Id.*

106. *Id.* R. 1.4 cmt. 7.

107. *See id.* R. 4.1 cmt. 1 (“A lawyer is required to be truthful when dealing with others on a client’s behalf.”).

108. *Id.* R. 4.1(a); *see also* *Brown v. Cnty. of Genesee*, 872 F.2d 169, 174 (6th Cir. 1989) (requiring actual knowledge of fact in question); *State ex rel. Okla. Bar Ass’n v. Bolusky*, 23 P.3d 268, 275-76 (Okla. 2001) (holding the Oklahoma equivalent to Model Rule 4.1(a) inapposite to lawyer-client statements); *In re Merkel*, 138 P.3d 847, 853 (Or. 2006) (*per curiam*) (finding information material if it “would or could significantly influence the hearer’s decision-making process”).

misrepresentation, for example, when “the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.”¹⁰⁹ Additional misrepresentations can “occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.”¹¹⁰ Certain state ethics opinions acknowledge that the exact timing and extent of a firm’s malpractice disclosure obligations may vary with the circumstances.¹¹¹ Thus, in New York, notwithstanding contextual variation, a firm is duty bound “to provide the affected client(s) with all the information material to the client’s decision whether to establish or continue the attorney-client relationship.”¹¹² For some, the lawyer duty of explanation inscribed by the Model Rules¹¹³ “calls for a dialogue between lawyer and client” more far reaching than ordinary counseling.¹¹⁴ Consider candor, communication, and consultation in the following Illustration of the communication stage of a malpractice disclosure dispute.

1. Illustration C

For Illustration C, consider the same facts as in Illustrations A and B, except that the head of the law firm’s intellectual property group, a senior partner motivated by dual regulatory compliance and professional liability concerns, reports his conclusion regarding the continuing validity of the branded drug patent and the generic drug patent infringement to the firm’s in-house general counsel.¹¹⁵ Neither

109. MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. 1 (2012).

110. *Id.*

111. *See, e.g.*, N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 789 (2005), available at <http://www.nysba.org/CustomTemplates/Content.aspx?id=5371> (“Nothing in this opinion is intended to alter the lawyer’s duty to advise a client of circumstances requiring a client to act.”).

112. *Id.*

113. MODEL RULES OF PROF’L CONDUCT R. 1.4(b) (2012).

114. Thomas D. Morgan, “*The Client(s) of a Corporate Lawyer*,” 33 CAP. U. L. REV. 17, 31 (2004); *see* Thomas D. Morgan, *Toward Abandoning Organized Professionalism*, 30 HOFSTRA L. REV. 947, 971 (2002); *see also* Robert J. Condlin, “*What’s Love Got to Do with It?*”—“*It’s Not Like They’re Your Friends for Christ’s Sake*”: *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211, 306-308 (2003); Russell G. Pearce & Eli Wald, *Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles*, 2012 MICH. ST. L. REV. 513, 534-35; Wald, *Attorney-Client Communications*, *supra* note 8, at 789-90.

115. On the role of in-house general counsel, *see* Susan Saab Fortney, *Law Firm General Counsel as Sherpa: Challenges Facing the In-Firm Lawyer’s Lawyer*, 53 U. KAN. L. REV. 835, 840-41 (2005); Douglas R. Richmond, *Essential Principles for Law Firm General Counsel*, 53 U. KAN. L. REV. 805, 813-14 (2005). The role of a law firm’s in-house general counsel is to advise the firm in the areas of professional responsibility and risk management, including conflicts, legal ethics, loss prevention, and litigation. *See* Richmond, *supra*, at 813-14; *see also* Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 565-67 (2002); Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for*

the senior partner nor the general counsel immediately informs the client of this revised opinion or the firm's attendant risk of malpractice liability arising from its earlier opinion.¹¹⁶ Instead, after considerable delay, the partner advises the client that the disputed patent appears, upon closer scrutiny, to be valid and offers to continue the firm's representation of the client in this and other matters.¹¹⁷

2. Candor, Communication, and Consultation Disputes

Resolution of candor, communication, and consultation disputes under Illustration C rests on whether the law firm breached its fiduciary duties and violated the Model Rules by neglecting to render candid, prompt, and effective advice. Here, the client may contend that the firm declined to give it straightforward advice expressing an honest legal assessment of its rights in negotiating and in potentially litigating the transactions, including information on the status of the controverted patent and the circumstances of the firm's possible negligence and malpractice. The client may assert that the lack of reasonable communication, complete information, and a thorough explanation of all of the circumstances and considerations at hand deprived it of the ability to participate effectively in the representation and to participate intelligently in decisions concerning the objectives of the representation and its aftermath. The client may point out that the firm had ample time to explain the transactions, to review all important provisions of the corporate and intellectual property documents with the client before, during, and after the transactions consistent with the duty to act in the client's best interests, and, if necessary, to refer the client to independent counsel. Most important, the client may suggest that the firm withheld information of its own negligence to serve its institutional interest and convenience and knowingly misrepresented material facts by making partially true but misleading statements and omissions to the client.

For its rejoinder, the law firm may deny that its lawyers misrepresented their own negligence in advising and negotiating the corporate and intellectual property transactions through either deliberately misleading statements or calculated omissions. The firm

Research and Reporting, 30 HOFSTRA L. REV. 691, 704-06 (2002).

116. On the elements of malpractice liability, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 48-54 (2000); FORTNEY & JOHNSON, *supra* note 6, at 35-100; see also Wald, *Attorney-Client Communications*, *supra* note 8, at 792-97 (discussing lawyer disclosure of malpractice liability coverage).

117. For this Illustration, assume that the firm declines to disclose its own possible negligence and potential conflict of interest in proposing its continued representation of the client.

may seek to show that it provided the client with reasonable communication, complete information, and a thorough explanation of all the relevant circumstances and considerations at stake in the transactions, enabling the client to participate in the representation and in decisions concerning the objectives of the representation. Moreover, it may altogether disagree that applicable ethics rules require the firm to inform the client of its right to sue the firm for malpractice.¹¹⁸ Next, consider confidentiality.

D. Confidentiality

The client-lawyer relationship imposes a duty of confidentiality upon a lawyer.¹¹⁹ Both ABA¹²⁰ and ALI¹²¹ ethical guidelines approve this essential fiduciary principle. Courts have recognized that the disclosure of confidential information obtained from a fiduciary relationship may state a cause of action,¹²² and, thus, have assigned liability to lawyers for disclosure of confidential information from a client.¹²³ Under the Model Rules, “in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation,” unless otherwise permitted or required by the Rules or

118. *But see* Fla. Bar v. Varner, 780 So. 2d 1, 5-6 (Fla. 2001) (per curiam) (stating that the “decision to go forward with a deception rather than honestly admitting to his mistake [was] so contrary to the most basic requirement of candor”); Fla. Bar v. Morse, 587 So. 2d 1120, 1120-21 (Fla. 1991) (per curiam) (sanctioning lawyer-led conspiracy to hide his partner’s malpractice from their client and to conceal the fact that the firm had committed possible malpractice, as well as failure to advise the client to seek other legal counsel due to conflict of interest); Rosenberg v. Levin, 409 So. 2d 1016, 1021 (Fla. 1982) (“The client must rely entirely on the good faith efforts of the attorney in representing his interests. This reliance requires that the client have complete confidence in the integrity and ability of the attorney and that absolute fairness and candor characterize all dealings between them.”); Fla. Bar v. Gaskin, 403 So. 2d 425, 426 (Fla. 1981) (per curiam) (“Absolute candor to a client by a lawyer is mandated because the very foundation of an effective attorney-client relationship is predicated upon mutual trust. Lawyers should never mislead their clients.”).

119. *See* McClure v. Thompson, 323 F.3d 1233, 1242 (9th Cir. 2003); *In re Gonzalez*, 773 A.2d 1026, 1029-31 (D.C. Cir. 2001); *United States v. Falzone*, 766 F. Supp. 1265, 1269-71 (W.D.N.Y. 1991); *Dietz v. Meisenheimer & Herron*, 99 Cal. Rptr. 3d 464, 475-76 (Ct. App. 2009); *Gracey v. Eaker*, 837 So. 2d 348, 352-54 (Fla. 2002); *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850, 862 (W. Va. 1995).

120. *See* MODEL RULES OF PROF’L CONDUCT R. 1.6 (2012).

121. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 (2000).

122. *See* Chrysler Corp. v. Carey, 5 F. Supp. 2d 1023, 1031-32 (E.D. Mo. 1998); *Barnett Bank of Marion Cnty., N.A. v. Shirey*, 655 So. 2d 1156, 1158-59 (Fla. Dist. Ct. App. 1995); *Shaw Res. Ltd. v. Pruitt, Gushee & Bachtell, P.C.*, 142 P.3d 560, 567 (Utah Ct. App. 2006); *Bevan v. Fix*, 42 P.3d 1013, 1029-30 (Wyo. 2002).

123. *See* Diversified Grp. v. Daugerdas, 139 F. Supp. 2d 445, 455-56 (S.D.N.Y. 2001); *Carey*, 5 F. Supp. 2d at 1032-33; *Elkind v. Bennett*, 958 So. 2d 1088, 1090-92 (Fla. Dist. Ct. App. 2007); *USA Power, LLC v. PacificCorp*, 235 P.3d 749, 763 (Utah 2010).

by law.¹²⁴ The principle of confidentiality “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”¹²⁵ Ethical standards, according to well-worn commentary, “require that lawyers not disclose any information they receive from any source—not simply the client—if it is related to the representation of the client.”¹²⁶ Even when certain documents may not stand confidential, the precept of confidential communication applies to safeguard all information, again from whatever source, relating to the representation.¹²⁷ When practicing in a firm, a lawyer may confine particular information to specified lawyers if expected or understood to do so by the client.¹²⁸

At the same time, a lawyer may reveal confidential information “to the extent the lawyer reasonably believes necessary . . . to secure legal advice about the lawyer’s compliance with [the] Rules,” or “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client,” or “to respond to allegations in any proceeding concerning the lawyer’s representation of the client,” or simply “to comply with other law or a court order.”¹²⁹ Whether such disclosure is mandated or permitted, the ABA supports not only “the growing presence in law firms of in-house counsel,” but also the broad preservation of the attorney-client privilege and work product doctrine recognized by state jurisdictions.¹³⁰ Indeed, the ABA publically “urges

124. MODEL RULES OF PROF’L CONDUCT pmbl. (2012) (“A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.”).

125. *Id.* R. 1.6 cmt. 3.

126. MORGAN, *supra* note 65, at 57.

127. MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 3 (2012).

128. *Id.* R. 1.6 cmt. 5.

129. *Id.* R. 1.6(b). The Comments observe: “A lawyer’s confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer’s personal responsibility to comply with these Rules.” *Id.* R. 1.6 cmt. 9. Where a client’s legal claim, a state disciplinary charge, or other cause of action alleges “misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense.” *Id.* R. 1.6 cmt. 10. However, “the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.” *Id.* R. 1.6 cmt. 14.

130. Brief of Am. Bar Ass’n as Amicus Curiae at 1, 7, *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98 (Ga. 2013) (No. S12G1924) [hereinafter Brief of Am. Bar Ass’n]; see, e.g., *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98, 102 (Ga. 2013) (holding that “the same basic analysis that is conducted to assess privilege and work product in every other variation of the attorney-client relationship should also be applied to the law firm in-house counsel situation”); *RFF Family P’ship, L.P. v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 1067-69 (Mass. 2013); see also Mark Curriden, *Inside Story*, A.B.A. J., May 2013, at 22, 23; Samson Habte, *Georgia Recognizes Intrafirm Privilege for Internal Talks*

that the privilege and work product doctrine should be protected unless there is compelling cause for a legal exception.”¹³¹ To the extent that questions relating to the attorney-client privilege or work product doctrine require factual development, according to the ABA, such questions “should be decided by the trial court.”¹³² Consider confidentiality questions in the following Illustration of the undisclosed sharing of client information with a law firm’s in-house general counsel, malpractice insurance carrier, and outside professional liability counsel in a malpractice disclosure dispute.

1. Illustration D

For Illustration D, consider the same facts as in Illustrations A, B, and C, except that the law firm’s healthcare team asks the client to

About Client’s Concerns, 29 Law. Man. on Prof. Conduct (ABA/BNA), 424, 456 (July 7, 2013); Samson Habte, *Law Firms Are Hopeful About Pending Rulings in Closely Watched ‘Intrafirm Privilege’ Cases*, 29 Law. Man. on Prof. Conduct (ABA/BNA), 7, 7-8 (June 5, 2013); Joan C. Rogers, *ABA Formally Backs Attorney-Client Privilege for Consults with Law Firms’ Inside Counsel*, 29 Law. Manual on Prof. Conduct (ABA/BNA), 553, 553 (Aug. 28 2013); Joan C. Rogers, *Massachusetts High Court Backs Privilege For Consults With Firm’s In-House Counsel*, 29 Law. Manual on Prof. Conduct (ABA/BNA), 422, 422 (July 17, 2013); Martha Neil, *Privilege Protects In-House Law Firm Communications About Malpractice Claim from Client Discovery*, A.B.A. J. (July 11, 2013, 6:30 AM), http://www.abajournal.com/news/article/law_firm_communication_about_clients_possible_malpractice_claim_is_privileg.

Of note, *RFF Family Partnership, L.P. v. Burns & Levinson, LLP* found confidential communications between law firm attorneys and firm in-house counsel concerning a malpractice claim asserted by a current client of the firm to be protected from disclosure to the client by the attorney-client privilege under four specific conditions:

- (1) the law firm has designated an attorney or attorneys within the firm to represent the firm as in-house counsel, (2) the in-house counsel has not performed any work on the client matter at issue or a substantially related matter, (3) the time spent by the attorneys in these communications with in-house counsel is not billed to a client, and (4) the communications are made in confidence and kept confidential.

991 N.E.2d at 1067-69.

131. Brief of Am. Bar Ass’n, *supra* note 130, at 1 (announcing that “ABA policy does not address the scope and effect of the privilege and work product doctrine when lawyers consult in-house counsel regarding a client’s actual or potential claims of malpractice”).

132. *Id.* at 7. In its amicus brief, the ABA argues that the attorney-client “privilege should not be abrogated or limited except for compelling reasons.” *Id.* The ABA reasons that “the fiduciary duty exception does not provide such a basis because it was not intended to apply to an in-house counsel’s communications with a firm lawyer where the in-house counsel has no fiduciary duty to the outside client.” *Id.* Further, the ABA explains, “a lawyer’s consultation with the firm’s in-house counsel for the purposes of determining the lawyer’s ethical obligations involves no inherent conflict of interest and is encouraged under the Model Rules.” *Id.* Still, the ABA cautions that:

[T]his analysis changes if it is concluded that the client may have a malpractice claim against the lawyer: whether the privilege as to further in-house consultations is abrogated or limited during a continuing representation might become a question of fact for the trial court as to whether the client were promptly and adequately informed of the potential claim.

Id.

produce supplemental confidential information related to the transactions under review in order to assess possible litigation or alternative dispute resolution options. Without notice to or consent of the client, the team transmits this information to the firm's in-house general counsel,¹³³ who then forwards the information to the firm's malpractice insurance carrier and to its outside professional liability counsel.

2. Confidentiality Disputes

Resolution of confidentiality disputes under Illustration D depends on whether the law firm breached its fiduciary duty and violated the Model Rules by disclosing the client's confidential information to unauthorized third persons or by using that information to the disadvantage of the client without its informed consent. This inquiry gains complexity if the firm expressly agreed, and the client expressly relied, that all representation-related information would be held inviolate without regard to the nature or source of the information or the fact that others shared that knowledge.¹³⁴ Here, even without such added complexity, the client may contend that the firm's disclosure of protected information to its in-house general counsel, malpractice insurance carrier, and outside professional liability counsel knowingly revealed the client's confidences to its disadvantage and to the comparative advantage of the firm and its lawyers in anticipating and mounting a defense to potential charges of malpractice.

In reply, the law firm may contend that it revealed the client's confidential information to the extent reasonably necessary to establish a defense on behalf of the firm, to respond to allegations concerning the firm's representation of the client, and to secure legal advice about the firm's compliance with relevant laws and ethics rules. This argument presupposes that, at the time of the disclosure to the firm's in-house general counsel, malpractice insurance carrier, and outside professional liability counsel, either a disciplinary charge or a civil claim had been formally instituted against the firm and its lawyers, or a specific allegation by the client or third party disciplinary authorities had been made concerning the firm's representation in the transactions at issue.

133. On the contrasting role of corporate in-house counsel, see Susan Hackett, *Corporate Counsel and the Evolution of Practical Ethical Navigation: An Overview of the Changing Dynamics of Professional Responsibility in In-House Practice*, 25 GEO. J. LEGAL ETHICS 317, 319 (2012).

134. To this point, the ABA observes: "Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers." MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 5 (2012).

Insofar as compliance-driven disclosure to the firm's in-house general counsel, malpractice insurance carrier, and outside professional liability counsel was permissible, the firm may do well to ensure that the disclosure was made in a manner that limited access to the information or instituted formal arrangements (for example, fire walls and screens), minimizing the risk of open-ended disclosure. To the extent that consultation with and disclosure to outside counsel for the purpose of obtaining ethics advice about the firm's compliance duties may be initially protected,¹³⁵ such consultation may run afoul of ethics rules if it becomes materially adverse to the client or impermissibly exploits the confidences for the firm's own benefit and to the disadvantage, and without the informed consent, of the client. The same protection, the firm may claim, extends to the notification of its malpractice insurance carrier, especially if the information disclosed was limited, if the disclosure was authorized by the client, or if the disclosure was of benefit to the client. Next, consider loyalty and honest dealing.

E. Loyalty and Honest Dealing

The client-lawyer relationship engenders lawyer fiduciary duties of loyalty and honest dealing.¹³⁶ Both the ABA¹³⁷ and the ALI¹³⁸ follow these settled principles. Like communication and consultation, loyalty and independent judgment "are essential elements in the lawyer's relationship to a client."¹³⁹ Read jointly, academic and practice

135. See *id.* R. 1.6(b)(4) (permitting revelation of information relating to client representation to the extent the lawyer reasonably believes necessary "to secure legal advice about the lawyer's compliance with [ethics rules]").

136. See Wald, *Loyalty in Limbo*, *supra* note 27, at 924-25; see also *People ex rel. Dep't of Corps. v. Speedee Oil Change Sys., Inc.*, 980 P.2d 371, 378-79 (Cal. 1999); *Fla. Bar v. Dunagan*, 731 So. 2d 1237, 1242 (Fla. 1999) (per curiam); *Fla. Bar v. Morse*, 587 So. 2d 1120, 1120-21 (Fla. 1991) (per curiam); *Resolution Trust Corp. v. Holland & Knight*, 832 F. Supp. 1528, 1530-31 (S.D. Fla. 1993); *Duggan v. Gonsalves*, 838 N.E.2d 614, 618-20 (Mass. App. Ct. 2005) (per curiam); *In re Cooperman*, 633 N.E.2d 1069, 1071 (N.Y. 1994); *In re Tanella*, 957 N.Y.S.2d 399, 406 (App. Div. 2013) (per curiam); *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 865 N.Y.S.2d 14, 20-21 (App. Div. 2008); *Grosser-Samuels v. Jacquelin Designs Enters.*, 448 F. Supp. 2d 772, 779 (N.D. Tex. 2006).

137. See MODEL RULES OF PROF'L CONDUCT R. 1.4 & cmt. 2, 1.7 & cmt. 1, 8.4 (2012).

138. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 20, 121, 125 (2000) (describing lawyer's duty to inform and consult with a client and conflicts of interest).

139. *Morse v. Clark*, 890 So. 2d 496, 498 (Fla. Dist. Ct. App. 2004) (holding that "a lawyer should act with undivided loyalty for his client and not place himself or herself in a position where a conflicting interest may affect the obligations of an ongoing professional relationship"); MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2012); see also *Blue Water Sunset, LLC v. Markowitz*, 122 Cal. Rptr. 3d 641, 647 (Ct. App. 2011); *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft, LLP*, 81 Cal. Rptr. 2d 425, 429-30 (Ct. App. 1999); *Country Club Partners, LLC v. Goldman*, 913 N.Y.S.2d 803, 805 (App. Div. 2010); *Schlanger v. Flaton*, 631 N.Y.S.2d 293, 296

commentary in the field links the fiduciary duties of loyalty, honest dealing, and communication, noting that an “important occasion for communication with a client is advising the client that the lawyer has acted (or failed to act) in a way that might expose the lawyer to malpractice liability.”¹⁴⁰ In such circumstances, the lawyer labors under a duty to provide such information.¹⁴¹

To ensure loyalty and honest dealing in transactional situations, as illustrated here, the Model Rules regulate conflicts of interest regarding the representation of adverse interests.¹⁴² The Rules prohibit representation of a client if there is a significant risk that the representation of one or more clients will be materially limited by a personal interest of the lawyer.¹⁴³ In malpractice disclosure-related disputes, the personal or professional interest at play is the lawyer or law firm’s own self-defense.¹⁴⁴ By now it is axiomatic that “[a] conflict

(App. Div. 1995).

140. HAZARD ET AL., *supra* note 7, § 7.3 n.2; *see also* *Lawyer’s Interests Adverse to Client*, *supra* note 4, at 411-13 (noting the lawyer’s obligation when his or her interest is adverse to the client’s interest).

141. HAZARD ET AL., *supra* note 7, § 7.3 n.2; *see, e.g.*, *Beal Bank, SSB v. Arter & Hadden, LLP*, 167 P.3d 666, 673 (Cal. 2007) (“[A]ttorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice.”); *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 491 P.3d 421, 429 (Cal. 1971) (en banc) (“[T]he fact that a client lacks awareness of a practitioner’s malpractice implies, in many cases, a second breach of duty by the fiduciary, namely, a failure to disclose material facts to his client.”); *see also* *In re Gibson*, 991 P.2d 277, 278-79 (Colo. 1999) (en banc) (per curiam) (ordering thirty day suspension where attorney failed to inform his client that claim had been dismissed and instead created fictitious settlement documents and disbursed funds to the client); *Fla. Bar v. Bazley*, 597 So. 2d 796, 796 (Fla. 1992) (per curiam) (ordering an eight-month suspension of attorney who failed to inform his client that claim was barred by worker’s compensation statute and instead falsely represented that the claim was successful and advanced the client payments out of his own funds); *In re Mays*, 495 S.E.2d 30, 30-31 (Ga. 1998) (per curiam) (finding disbarment appropriate where, among other acts of misconduct, the attorney allowed statute of limitations to run but advised client that case had been settled and paid her out of his own funds); *Estate of Watkins v. Hedman, Hileman & Lacosta*, 91 P.3d 1264, 1265 (Mont. 2004) (tolling the three-year statute of limitations for legal malpractice where the defendant-attorney had concealed her negligence). In *RFF Family Partnership, L.P. v. Burns & Levinson, LLP*, the court remarked:

Although no reported Massachusetts case has squarely confronted the question of tort liability for a lawyer’s concealment of his own mistake, this hardly seems a stretch: surely, a lawyer’s discovery that he or his firm has mishandled a matter in a way that is likely to damage the client’s interests meets any reasonable definition of materiality, and must be disclosed.

30 Mass. L. Rptr. 502, 505 (Super. Ct. 2012); *see also* *Estate of Watkins*, 91 P.3d at 1271; *In re Tallon*, 447 N.Y.S.2d 50, 51 (App. Div. 1982) (“An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him.”); *Waggoner v. Caruso*, No. 602192-2007, 2008 WL 4274491, at *7 (N.Y. Sup. Ct. Sept. 10, 2008) (“Attorneys do have an obligation to disclose their own acts of malpractice to their clients.”).

142. MODEL RULES OF PROF’L CONDUCT R. 1.7 (2012).

143. *Id.* R. 1.7(a).

144. *Lawyer’s Interests Adverse to Client*, *supra* note 4, at 411.

between an attorney's self-interest and a client's interest is generally presented whenever the lawyer's own conduct in the client's matter is questioned."¹⁴⁵ That self-interest conflict, a hazard presented here, "occurs most often when a lawyer is accused of unethical conduct or malpractice in the client's matter."¹⁴⁶ The majority treatment of such conflicts among state jurisdictions is to "require the lawyer's withdrawal."¹⁴⁷

The Comments to the Model Rules underscore that a "lawyer's own interests should not be permitted to have an adverse effect on representation of a client."¹⁴⁸ The logic behind this prohibition is straightforward: "[I]f the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."¹⁴⁹ The Comments reason that "a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests."¹⁵⁰ Critical to conflicts of interest analysis is a risk assessment tied to "the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."¹⁵¹

Despite the existence of a conflict of interest, a law firm may permissibly represent a client given the reasonable belief that it will be able to provide competent and diligent representation and given the informed consent of the client,¹⁵² confirmed in writing.¹⁵³ Significantly,

145. *Id.* at 411-12 (noting "the difficulty in such circumstances of giving detached advice").

146. *Id.*

147. *Id.*

148. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 10 (2012); *see also* *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1155 (8th Cir. 1999) (noting that family ties and personal relationships can create a material limitation conflict).

149. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 10 (2012).

150. *Id.* R. 1.7 cmt. 8.

151. *Id.*

152. Under the Model Rules, the "informed consent" of a client "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." *Id.* R. 1.0(e). The Comments add: "The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision." *Id.* R. 1.0 cmt. 6. At a minimum:

[T]his will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and

the Comments mention that, “some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent,” indeed, such “representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.”¹⁵⁴ Accordingly, there may be litigation or transactional circumstances where it may prove impossible for a firm to make the disclosure necessary to obtain full and informed client consent.¹⁵⁵ Unsurprisingly, when a law firm declines to make the full disclosure necessary to permit a client to reach an informed decision on whether or not to continue its retention, the firm may be unable to ask the client to consent to continued representation or to consent to a release from malpractice liability.¹⁵⁶ In such event, the firm is likely to have breached its fiduciary obligations and violated its ethical duties by declining to withdraw.¹⁵⁷ Consider loyalty and honest

alternatives.

Id. Where necessary, “it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel.” *Id.* A lawyer, to be sure, “need not inform a client or other person of facts or implications already known to the client or other person.” *Id.*

153. See *id.* R. 1.7 cmt. 20, mentioning that:

The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns.

Id. R. 1.7 cmt. 20.

154. *Id.* R. 1.7 cmts. 14–15 (“When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.”).

155. *Id.* R. 1.7 cmt. 14.

156. As illustrated here, concurrent client and institutional representation in the context of lawyer or law firm self-defense oftentimes presents a materially adverse, nonconsentable conflict in breach of the duties of loyalty and honest fair dealing whether or not the client knows of such a conflict. See *Lawyer’s Interests Adverse to Client*, *supra* note 4, at 411 (noting “the difficulty in such circumstances of giving detached advice”); see also MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 1 (2012).

157. The client-lawyer relationship spawns lawyer fiduciary duties of withdrawal and client protection. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-450 (2008) (“If the continued representation of any client would cause the lawyer to violate a Rule, including participation in any fraud, withdrawal from that representation will be required.”). Both the ABA and the ALI back this vital principle of client protection. See MODEL RULES OF PROF’L CONDUCT R. 1.16 (2012); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. e (2000). The Model Rules specifically address the termination of lawyer representation. MODEL RULES OF PROF’L CONDUCT R. 1.16 (2012). Under the Model Rules, where representation has commenced, a lawyer must withdraw if the representation itself will result in violation of the Model Rules or other law. *Id.* R. 1.16(a). The Comments add: “A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion.” *Id.* R. 1.16 cmt. 1. Moreover, under the Rules, “a lawyer may withdraw from representing a client if . . . withdrawal can be accomplished without material adverse effect on the interests of the client . . . or . . . other good cause for withdrawal exists.” *Id.* R. 1.16(b)(1).

dealing in the following illustration of a law firm's internal investigation of client-lawyer conflicts of interest and its decision to withdraw from the underlying representation in a malpractice disclosure dispute.

1. Illustration E

For Illustration E, consider the same facts as in Illustrations A, B, C, and D, except that the law firm's corporate and intellectual property groups and in-house general counsel record billable time¹⁵⁸ and create numerous documents¹⁵⁹ in consultation with its malpractice insurance carrier and outside professional liability counsel in an internal investigative effort to determine whether it may continue representation of the client in unrelated litigation and transactional matters.¹⁶⁰ After initially soliciting and obtaining the client's consent to such continuing representation without disclosure of its conflict of interest and malpractice concerns, the firm reverses course and issues withdrawal and termination of representation notices to the client.

2. Loyalty and Honest Dealing Disputes

Resolution of loyalty and honest dealing disputes under Illustration E turns on whether the law firm breached its fiduciary duties by placing the firm and its lawyers in a position where their conflicting individual and institutional self-defense interests materially impaired their professional obligations to the client. On this inquiry, the firm's responsibility to safeguard its own institutional self-interest likely creates a substantial risk that the representation of the client's corporate and intellectual property interests might be materially impaired or limited.¹⁶¹ Here, the client may contend that the firm's loyalty was

Additional client protection provisions address malpractice liability waiver and settlement. See *id.* R. 1.8(h) (2012).

158. For a discussion of modern billing practices, see Douglas R. Richmond, *For a Few Dollars More: The Perplexing Problem of Unethical Billings Practices by Lawyers*, 60 S.C. L. REV. 63, 71-72, 81 (2008); Douglas R. Richmond, *The New Law Firm Economy, Billable Hours, and Professional Responsibility*, 29 HOFSTRA L. REV. 207, 221-22 (2000); see also Deborah Rhode, *Profits and Professionalism*, 33 FORDHAM URB. L.J. 49, 49-50 (2005).

159. On law firm in-house privilege, see William T. Barker, *Law Firm In-House Attorney-Client Privilege Vis-à-Vis Current Clients*, 70 DEF. COUNS. J. 467, 469-70 (2003); Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1753-54 (2005); Peter R. Jarvis & Mark J. Fucile, *Inside an In-House Legal Ethics Practice*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 103, 111-12 (2000).

160. For a discussion of law firm internal investigations, see Brendan F. Quigley, *The Need to Know: Law Firm Internal Investigations and the Intra-Firm Dissemination of Privileged Communications*, 20 GEO. J. LEGAL ETHICS 889, 891-96 (2007); Douglas R. Richmond, *Law Firm Internal Investigations: Principles and Perils*, 54 SYRACUSE L. REV. 69, 77-82 (2004).

161. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-453 (2008) ("[W]hen the principal purpose of the [in-house ethics counsel] consultation is to protect the interests of the

impaired because it could no longer consider, recommend, or carry out an appropriate litigation or transactional course of action as a result of its own self-defense interests. Along this line, the client may observe that it is highly doubtful that the firm could reasonably hold an objective, disinterested belief in its own professional effectiveness given its allegedly negligent transactional performance and its self-defense interests in withholding information of its negligence, or even make the disclosure necessary to obtain proper consent from the client.¹⁶²

From the client's standpoint, when the financial interests of the law firm might be affected by the representation, full and informed client consent requires disclosure of anything bearing on the representation that might affect the client's continuing litigation or transactional interests.¹⁶³ Only by having disclosed all relevant considerations to the transactions, so the argument goes, could the firm safeguard the client's opportunity to be the judge of its own interests.¹⁶⁴ Adequate disclosure in this situation, the client may add, required information specific to the firm's adverse interests and positions sufficient to enable the client to make a fully informed decision whether to continue with the representation.¹⁶⁵ Where the firm's self-interest may have precluded making full disclosure, the client may assert that the circumstances demanded withdrawal and precluded undertaking further representation in ongoing entity transactions or in related litigation precisely because the firm knew or reasonably should have known that the representation could not be performed competently, without improper conflict of interest, and to completion.

In response, the firm may cast the instant conflict in potential, rather than disqualifying, terms, allowing it to contend that it fully complied with the fiduciary duties of loyalty and honest dealing.¹⁶⁶ The firm may point to the absence of a conflict of interest during the underlying Hatch-Waxman due diligence investigation and the consequent negotiation of the

consulting lawyer or the firm (typically for action already taken), the risk that the consulting lawyer's representation of the firm's client will be materially limited may be significant.”).

162. *See id.*

163. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 10 (2012).

164. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-453 (2008).

165. *Id.* (“In the absence of the client's informed consent confirmed in writing, a lawyer may not represent the client if there is a significant risk that the representation will be materially limited by a conflicting interest of the lawyer.” (citing MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2012))).

166. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4, 1.7 (2012); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 20, 121, 125 (2000) (describing lawyers' duty to inform and consult with a client and conflicts of interest); HAZARD ET AL., *supra* note 7, § 7.3 n. 2; *Lawyer's Interests Adverse to Client*, *supra* note 4, at 411-13.

underlying transactions.¹⁶⁷ Implicit in that contention is the suggestion that a conflict will not ripen into a disqualifying controversy when a firm believes that a malpractice problem may be resolved in a manner that does not put the interests of the client and the firm in significant conflict. The firm may also contend that it was appropriate to represent the client at the same time that the firm's corporate and intellectual property groups were consulting with in-house general counsel, the malpractice insurance carrier, and outside professional liability counsel because of the absence of evidence that the firm's internal investigation in any way prejudiced the client. Lacking a finding of prejudice, this contention may mitigate a conflict of interest risk resulting from the firm's internal consultations among its lawyers, in-house general counsel, the malpractice insurance carrier, and outside professional liability counsel, while continuing to represent the client, because the actions of the firm were at all times consistent with the interests of the client.

Having surveyed the standard progression of malpractice disclosure disputes from the formation of the client-lawyer relationship to the lawyer's commission and the law firm's discovery of a harmful performance error;¹⁶⁸ then to the law firm's delay and omission in communicating information of the error to the client;¹⁶⁹ next to the undisclosed sharing of client information with the law firm's in-house general counsel, malpractice insurance carrier, and outside professional liability counsel;¹⁷⁰ and finally to the law firm's internal investigation of client-lawyer conflicts of interest and the ultimate decision to withdraw from the representation,¹⁷¹ consider the content of contemporary best practice guidelines for malpractice disclosure disputes in the field of lawyer and law firm regulation.¹⁷²

III. BEST PRACTICE GUIDELINES

This Part considers the formulation of best practice guidelines applicable to law firm malpractice disclosure disputes of the kind illustrated here.¹⁷³ In assessing law firm-wide incidents of malpractice and misconduct, commentators increasingly urge that "discipline be imposed on law firms, not exclusively individual lawyers," arguing that "focus should be on creating a regulatory regime that gives law firms a

167. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmts. 3, 5 (2012).

168. See *supra* Part II.A-B.

169. See *supra* Part II.C.

170. See *supra* Part II.D.

171. See *supra* Part II.E.

172. See *infra* Part III.

173. See *infra* notes 174-212 and accompanying text.

stake in producing quality work and building their reputations.”¹⁷⁴ They stress that “the Model Rules impose personal duties on law firm managers to establish rules designed to help assure that individual firm lawyers and non-lawyers adhere to the standards of lawyer conduct.”¹⁷⁵ Calling for “sanctioning practice organizations, not just individual lawyers,” they reason that, “while we should continue to require lawyers individually to adhere to standards of integrity and confidentiality, conduct standards also should be imposed on practice organizations themselves.”¹⁷⁶

To ensure the discharge of these obligations, many recommend institutional risk management programs and systems, firm- or practice-wide policies and procedures, and leadership structures designed to minimize liability risk to the firm and its lawyers.¹⁷⁷ Bolstered by the lawyers’ professional liability insurance industry, these recommendations lay the groundwork for national best practice guidelines in malpractice disclosure disputes.¹⁷⁸ Resting on a primarily instrumental, rather than an aspirational or a normative foundation, the guidelines reflect the liability insurance mandates of loss prevention and risk management. That groundwork acknowledges law firm economic self-interest, yet echoes the widespread concern that “the financial pressures in the practice of law today,” particularly the “premium on bringing in the hours, and bringing in the clients,” pose “the very real risk of losing a sense that lawyers are trustees of a tradition”¹⁷⁹ embedded in notions of civic and republican citizenship.¹⁸⁰ Those financial pressures and

174. Thomas D. Morgan, *On the Declining Importance of Legal Institutions*, 2012 MICH. ST. L. REV. 255, 278; see also Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 338 (2003); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 14 (1991); Ted Schneyer, *Professional Discipline in 2050: A Look Back*, 60 FORDHAM L. REV. 125, 129 (1991); cf. *Coquina Invs. v. Rothstein*, No. 10-60786-Civ, 2012 WL 3202273, at *11 (S.D. Fla. Aug. 3, 2012) (declining, via omnibus order, to issue law firm-wide sanction on finding that misconduct was disaggregated among individual lawyers and litigation teams).

175. Thomas D. Morgan, *The Rise of Institutional Law Practice*, 40 HOFSTRA L. REV. 1005, 1007 (2012).

176. *Id.* at 1012-13 (noting that New York and New Jersey have adopted forms of this proposal).

177. *Id.* at 1016.

178. On the need for systemic guidelines, see Jennifer Knauth, *Legal Malpractice: When the Legal System Turns on the Lawyer*, 35 ST. MARY’S L.J. 963, 970-73 (2004); Manuel R. Ramos, *Legal Malpractice: The Profession’s Dirty Little Secret*, 47 VAND. L. REV. 1657, 1732-33 (1994); see generally Robert E. O’Malley et al., *Preventing Legal Malpractice in Large Law Firms*, C641 ALI-ABA 133 (1991).

179. Thomas D. Morgan, *The Fall and Rise of Professionalism*, 19 U. RICH. L. REV. 451, 460 (1985).

180. See Russell G. Pearce, *Lawyers as America’s Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer’s Role*, 8 U. CHI. L. SCH.

attendant professional strains embolden the risk-taking conduct of law firm malpractice non-disclosure seen in the commonly reported failure to communicate negligent performance promptly, to explain the consequences of that negligence fully, to withdraw from nonconsentable conflicts of interest regarding continued representation of a client's best interests, to mitigate or remedy the adverse consequences of negligent conduct, and to protect a client's interests in confidentiality and independent representation. For law firms, this cascade of errors may signal a systemic failure of supervision, a failure which may result in malpractice reporting disputes, whether or not a client appeared sophisticated, benefited from in-house or successor counsel, or suffered prejudice.¹⁸¹

Predicated on the loss prevention duty to report errors and potential malpractice claims to represented clients, uniform industry-wide compliance guidelines address particular types of errors requiring client reporting, the timing of the reporting, the informational content of the reporting (that is, the nature of the error only or the error plus reference to a potential malpractice action), and the post-disclosure conflicts of interest likely to limit continued representation of the affected client.¹⁸² In this way, the risk management guidelines comport with the core belief in the lawyer's professional obligation "to make the interests of the client paramount, even at some personal risk, loss or inconvenience to himself."¹⁸³ Both academics and practitioners searching for prescriptive individual and institutional remedies for malpractice disputes recognize situations in which a lawyer's own interests may very well conflict with a client's interests. Because the interests of the client deserve primacy under

ROUNDTABLE 381, 410-12 (2001); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 276-77 (1992).

181. Systemic institutional failure may carry grave consequences for law firms. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 1 (2012) (discussing misconduct); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. h (2000) (discussing intentional or reckless misconduct). Under subdivision (c) of Model Rule 8.4, it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2012). The Comments add that a lawyer "should be professionally answerable" for offenses involving "dishonesty" or "breach of trust." *Id.* R. 8.4 cmt. 2. In addition to economic damages for such offenses, applicable remedies may include the disgorgement of fees paid to the law firm. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000).

182. See CNA, *supra* note 21; see also Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175, 199-200 (1999); see generally Charles E. Lundberg, *Self-Reporting Malpractice or Ethics Problems*, BENCH & B. MINN., Sept. 2003, at 24; Timothy J. Pierce & Sally E. Anderson, *What to Do After Making a Serious Error*, WIS. LAW., Feb. 2010, at 6.

183. Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 705 (1977).

conventional views of the lawyering process, for many, “[a] lawyer’s professional judgment and advice to a client should reflect the empathy, respect, and practical wisdom that the lawyer would offer a good friend.”¹⁸⁴ Although distinct from standard risk management calibrations, the long-held aspirational view of the lawyer-as-friend strives to rejuvenate the role of the lawyer as counselor and to refashion the client-lawyer relationship “as an intrinsically valuable personal relation.”¹⁸⁵

Building on these fiduciary norms and professional traditions, legal services industry best practice guidelines for malpractice disclosure embrace an objective standard of the disinterested lawyer in classifying the types of errors that may warrant reporting.¹⁸⁶ Applied here, the standard operates to determine the possible breach of a lawyer’s fiduciary duties of care, competence, and diligence due to a lack of legal knowledge, investigative care and effort, or skill, thoroughness, and preparation.¹⁸⁷ Of necessity, this determination entails an analysis of the factual and legal elements of the underlying litigation or transaction at issue.¹⁸⁸ The same standard helps to determine whether the error “would likely result in prejudice to a client’s rights or claims.”¹⁸⁹ If so, the best practice guidelines tilt toward candid, open reporting to the client.¹⁹⁰ To an important extent, the duty to report “depends on facts and circumstances known to the lawyer at the time the error is discovered,” rather than on any error-infected facts and circumstances “revealed as part of a subsequent investigation or recognized in hindsight.”¹⁹¹ To be sure, this “case-by-case” approach poses familiar analytic and regulatory difficulties.¹⁹² Yet, according to the recommended liability guidelines, “a lawyer should be given an opportunity to correct the error or omission before having to disclose the error to the client.”¹⁹³ In this respect, the guidelines prudently contemplate the

184. *Id.*; Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439, 445 (1990).

185. Compare WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* 19 (1998), with Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1071 (1976).

186. See CNA, *supra* note 21, at 2.

187. See *id.* at 3.

188. See *id.*

189. *Id.*

190. *Id.*

191. *Id.* at 4.

192. Colo. Bar Ass’n Ethics Comm., Formal Op. 113 (2005), available at http://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion_113_2011.pdf.

193. CNA, *supra* note 21, at 4.

need both to communicate with a firm's in-house counsel¹⁹⁴ and "to consult with outside counsel to receive a disinterested attorney's opinion before deciding whether or not to disclose the information."¹⁹⁵ For the ABA, "consultation with a law firm's in-house counsel about a lawyer's ethical obligations in connection with a current representation involves no inherent conflict of interest."¹⁹⁶

On the timing of the reporting, the insurance industry guidelines urge the lawyer to "report the error to the client 'promptly.'"¹⁹⁷ Prompt reporting envisions disclosure "as soon as the attorney knows of the error and has determined that the error cannot be rectified."¹⁹⁸ This directive is consonant with the duties of candor, communication, and consultation, and the corresponding obligations of full and fair material disclosure. These fairness duties and performance obligations reinforce the import of independent professional judgment and straightforward advice in rendering an honest assessment of lawyer and law firm error, informing the client of the substantive impact of that error, and explaining matters adequately enough to enable the client to grant informed consent to the representation on a current or a continuing basis. By definition, the responsibilities of reasonable communication, informed decision making, truthfulness, and best interest representation seem irreconcilable with the asserted rights to withhold information to serve the lawyer's own interest and convenience or, more troubling, to misrepresent information by making partially true but misleading statements or omissions that fall equivalent to affirmative false statements.

Across state jurisdictions, similar rules of practice rising out of efforts to mediate such rights-duties clashes sometimes concede the lawyer-based requirement "to disclose material facts about the representation as well as the significance of those facts," yet nonetheless maintain that the lawyer "is not required to advise the client that the client has a malpractice claim against [him]."¹⁹⁹ This competing rule set

194. Brief of Am. Bar Ass'n, *supra* note 130, at 14-15 (remarking that "whether communications with a firm's in-house counsel should be protected by the privilege may depend on factual determinations, e.g., as to the role played by the in-house counsel and not . . . on the fiduciary duty exception or other implication of conflict theory").

195. CNA, *supra* note 21, at 4.

196. Brief of Am. Bar Ass'n, *supra* note 130, at 18, 20 ("[O]btaining legal advice from other lawyers within the law firm does not automatically create a conflict with the representation of the existing client."); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-453 (2008).

197. CNA, *supra* note 21, at 4 ("The client needs to be reasonably informed about the status of the matter in order to make informed decisions regarding the representation.").

198. *Id.*

199. Thomas P. McGarry & Thomas P. Sukowicz, *Ethics: Disclosing Malpractice to Clients*, CHI. LAW. (Dec. 15, 2011), <http://www.chicagolawyer magazine.com/Archives/2011/12/McGarry->

distinguishes supplying “material facts and their legal significance” to a client from “inform[ing] the client of the legal conclusion” of malpractice.²⁰⁰ Thus cabined, the narrowed duty to disclose evidence of malpractice or a potential claim of malpractice surfaces “only when there is an ongoing, attorney-client relationship and the actual or potential malpractice claim could interfere with the lawyer’s exercise of judgment on behalf of the client.”²⁰¹ On this alternative valence, limiting the duty of malpractice disclosure to conflict of interest situations arising out of continued representation renders certain disclosure statements improper, not only because the lawyer, rather than an independent counsel, would be giving legal advice to the client about a potential malpractice claim against himself, but also because such statements would constitute “an admission against interest that could be used against the lawyer in the malpractice litigation” itself.²⁰² This truncated duty derives from the general insurance industry rule that “lawyers who have malpractice insurance have a duty under their policies to cooperate in the defense of any malpractice claim.”²⁰³ Under the force of that rule, “unnecessary admissions of liability” pronounced in statements of disclosure or warning “could be considered a violation of the duty of cooperation and could affect coverage.”²⁰⁴

In contrast, on the informational content of the reporting contemplated here, the instant best practice guidelines adopt the majority state view, joined by Minnesota, New Jersey, New York, and Wisconsin, announcing the lawyer’s “ethical obligation to promptly notify the client of both the failure to act and of the possible malpractice claim against the attorney.”²⁰⁵ Notification of this kind effectively informs the client of the “facts surrounding the error” and furnishes “the client an opportunity to seek out the advice of independent counsel as to whether or not malpractice occurred.”²⁰⁶ Information concerning the responsibilities of law firm partners, managers, and supervisory lawyers and their efforts to ensure that the firm properly conformed to the commands of applicable ethics rules, especially internal policies and procedures designed to detect and resolve conflicts of interest and to ensure the effective supervision of

Sukowicz-Ethics.aspx.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. CNA, *supra* note 21, at 4.

206. *Id.* at 4-5. The guidelines recommend that “an attempt should be made to initially disclose the error in a face-to-face meeting.” *Id.* at 5.

less experienced lawyers, may prove useful to this process of reporting.²⁰⁷ Likewise, lawyer-ratifying instructions or orders issued at a time when the adverse consequences of the challenged conduct may have been avoided or mitigated, and any intervening lawyer efforts to take reasonable remedial action on behalf of the client, may prove equally helpful to the reporting process. The duty of confidentiality, though safeguarding all information relating to the representation, is unlikely to bar such disclosure in as much as the information at stake pertains to law firm self-governing internal compliance efforts, rather than firm self-regarding external efforts to secure legal advice about ethical compliance, to establish a defense, or to respond to disciplinary allegations.²⁰⁸

On post-disclosure conflicts of interest and continued representation of the affected client, the industry guidelines wisely recognize the “strong possibility that a conflict has developed because the attorney and client will soon be direct adversaries,” rendering it “difficult for the attorney to render impartial advice.”²⁰⁹ Consequently, as a best practice, malpractice conflict analysis concentrates on risk assessment—“the greater the risk that the lawyer will face a substantial malpractice claim due to the error, the greater the likelihood the attorney’s personal interest and ability to provide impartial advice will become compromised and the representation of that client will be materially limited.”²¹⁰ In the same way, risk assessment is pivotal to the operation and enforcement of the fiduciary duties of loyalty and honest dealing in the lawyer’s relationship to a client. Together with communication obligations, loyalty and honest dealing norms compel client disclosure that the lawyer has acted (or failed to act) in a way that may expose him to malpractice liability. The presence of such malpractice liability exposure carries a significant risk that the representation of one or more clients will be materially limited by the personal interest of the lawyer in his own self-defense.

Likewise, the Model Rules acknowledge the risk of an individual or institutional self-interest conflict when a lawyer or law firm is accused of unethical conduct or malpractice in the client’s underlying matter.²¹¹

207. On the risks and rewards of intra-firm communication, see Jeremy A. Gogel, *Intra-Firm Communications About Potential Legal Malpractice Claims: An Exception to Attorney-Client Privilege*, FOR DEF., Apr. 2012, at 66, 66-67, 72; Brian Pollack, *Surviving a Screwup*, LITIG., Winter 2008, at 19, 25.

208. See MODEL RULES OF PROF’L CONDUCT R. 1.6 (2012).

209. CNA, *supra* note 21, at 5.

210. *Id.* at 6.

211. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-453 (2008) (observing

By express purpose, the Rules seek to regulate the adverse effect of lawyer self-interest conflicts on the representation of a client.²¹² Regulation focuses on the probity of a lawyer's own conduct, constraints on his ability to give a client detached advice, and limitations on his ability to consider, recommend, or carry out an appropriate course of action for the client. Risk regulation of this sort attempts to assess the likelihood that a difference in client-lawyer interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued in advancing the client's best interests. When conflicts stand nonconsentable, that is, when the lawyer involved cannot properly seek client agreement to the representation or provide representation on the basis of the client's consent, such assessments will inexorably result in the conclusion that continued representation is prohibited because it is impossible to make the disclosure necessary to obtain full and informed client consent, and also because it is impossible to provide competent and diligent representation.

Viewed against the background of aspirational standards and professional traditions regulating lawyer conduct in malpractice disclosure disputes, the best practice guidelines, deduced here from insurance industry standards, state ethics opinions, and common law fiduciary principles, establish instructive baseline norms for reporting law firm error, for timing and framing the content of that reporting, and for evaluating the impact of post-disclosure conflicts of interest on the client-lawyer relationship and the quality of lawyer representation in both litigation and transactional cases. As applied here, these insurance liability norms serve more instrumental purposes tailored toward loss prevention and risk management imperatives, rather than overarching ethical or moral considerations.

IV. CONCLUSION

This Article addresses the interwoven problems of law firm error and client malpractice disclosure.²¹³ Although frequently overshadowed by larger debates pertaining to the ethical culture and infrastructure of

that "a personal interest conflict will arise if the principal goal of the ethics consultation is to protect the interest of the consulting lawyer or law firm from the consequences of a firm lawyer's misconduct").

212. *Id.*

213. *See supra* Part II.

law firms, the ongoing problem of error disclosure, or, more frequently, non-disclosure, and its varied methods of resolution, capture important considerations of law firm culture and infrastructure, ethical regulation, professional liability, and risk management policy and procedure. In an effort to unpack the problem of law firm error disclosure, this Article narrows the inquiry to law firms' acts of delay in communicating information to clients and acts of declination in withholding information from clients.²¹⁴ Two questions come out of this abridged inquiry and still remain open to debate. When may a law firm permissibly delay the disclosure of information to a client about individual lawyer or firm-wide incidents of malpractice? And, when may a law firm permissibly withhold information from a client about such incidents and their consequences to the client? Both questions implicate the field of lawyer regulation and law firm ethical culture, the general law governing lawyer and law firm malpractice, and evolving best practice industry guidelines of disclosure.²¹⁵ Both also pose fundamental challenges to the aspirational traditions of the profession and the highest standards of law practice.

214. *See supra* Part II.

215. *See supra* Part III.