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The Ethics of Representing Founders

Paul R. Tremblay

THE ETHICS OF REPRESENTING FOUNDERS

PAUL R. TREMBLAY*

ABSTRACT

Lawyers assisting entrepreneurial startups frequently work with individual founders before any formal organizational client materializes. In advising founders about such legal matters as whether to establish an entity, and if so, which entity best fits the needs of the enterprise, as well as how to arrange the owners' relationships within the business, the lawyer necessarily has an attorney-client relationship with someone. The prevailing scholarship about startup representation pays surprisingly little attention to the posture of the lawyer and her founder-clients in the pre-organization context. This Article investigates the lawyer's responsibilities and commitments in depth.

A lawyer working with a solo founder faces few inherent ethical challenges in that role. By contrast, a lawyer assisting multiple founders—likely the most common startup arrangement—encounters critical ethical choices. She may represent each of the founders individually and jointly, or she may represent the collectivity as a de facto partnership. That mutually exclusive distinction driven, the Article argues, by the nature of the startup's business activity, affects the lawyer's responsibilities and the founders' duties to one another. The founders' counsel also must account for the fact that the startup world in practice can be quite fluid, with a team of founders shifting over time, as some participants drift away and are replaced by new team members. The departing founders will then qualify either as former clients or as former partners, and in either instance the lawyer must be transparent about her duties to the remaining founders. Finally, in those settings where the founders intend to

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*Clinical Professor of Law and Law School Fund Distinguished Scholar, Boston College Law School. I thank Mary Ann Chirba, Charlene Luke, Judy McMorrow, Lynnise Pantin, and the participants at the Boston College Law School summer colloquium series for comments and feedback on earlier versions of this Article. Janelle Peiczarka, Leila Souhail, and Vania Aksentijevich provided helpful research assistance. Any errors are mine.

establish a charitable organization—one that will not have owners—the lawyer's duties to the founders are further complicated.

This Article examines the ethical responsibilities of the founders' lawyer in each of those contexts in light of the best reading of available substantive law teachings.

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INTRODUCTION

Most new businesses are founded by individuals.[1] Those individuals, if the business continues beyond the conception stage, most often will establish some entity, such as a corporation or an LLC, through which to operate the enterprise.[2] And, quite frequently the entity choice and creation take place with the assistance of counsel.[3] When a lawyer assists the individuals to establish an entity and to address other startup-related legal matters, the lawyer represents *someone*—perhaps the individuals, perhaps an inchoate group, or perhaps an actual partnership. This Article explores and articulates the nature of the lawyer's relationship with the founders of such businesses prior to the emergence of a separate, cognizable organization.

If the founder of the new business is a solo individual (or an organization), the representational strategies are straightforward and need no guidance here.[4] If the founders are multiple individuals, the representational strategies are hardly straightforward, and this Article will attempt to clarify their components. This topic has received insufficient attention in the legal ethics and entrepreneurship literature up to now, notwithstanding the substantial attention paid to the role of the lawyer representing organizations,[5] including

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[1] WHO STARTED NEW BUSINESSES IN 2013?, KAUFFMAN FOUND. & LEGALZOOM, at 1–5 (Jan. 2014), http://www.kauffman.org/~/media/Kauffman_org/research%20reports%20and%20covers/2014/01/who_started_new_business_in_2013.pdf [https://perma.cc/D8YT-QGWT] (treating founders as individuals by polling about age, gender, and levels of education). In 2015, 679,072 businesses in the United States were less than one year old. *Entrepreneurship and the U.S. Economy*, BUREAU OF LAB. STAT. (Apr. 28, 2016), http://www.bls.gov/bdm/entrepreneurship/bdm_chart1.htm [https://perma.cc/SJ5E-YFFM].

[2] *See* Ann MacDonald, *Is It Time to Convert Your Sole Proprietorship to a Corporation or LLC?*, LEGALZOOM, https://www.legalzoom.com/articles/is-it-time-to-convert-your-sole-proprietorship-to-a-corporation-or-llc [https://perma.cc/ZTZ3-UDTS] (stating that business owners incorporate only after knowing the business is viable).

[3] *See* Richard A. Mann et al., *Starting from Scratch: A Lawyer's Guide to Representing a Start-Up Company*, 56 ARK. L. REV. 773, 773–75 (2004) (stating that counsel assists entrepreneurs to clear legal hurdles such as entity choice).

[4] For a discussion of the types of issues that counsel for an entrepreneur ought to address, see generally Abraham J.B. Cable, *Startup Lawyers at the Outskirts*, 50 WILLAMETTE L. REV. 163 (2014); Mann et al., *supra* note 3.

[5] *See, e.g.*, John M. Burman, *Ethical Considerations When Representing Organizations*, 3 WYO. L. REV. 581 (2003) [hereinafter Burman, *Ethical Considerations*]; James M. Fischer, *Representing Partnerships: Who Is/Are the Client(s)?*, 26 PAC.

small organizations and startups.[6] The lawyer's role in working with multiple founders is complicated by three considerations, each of which serves as a central theme of this Article. First, even if the advice to the lawyer is that prudence and best practices would urge her to develop a transparent and comprehensive engagement agreement identifying the client(s) and reviewing all of the critical complications that the representation is likely to entail, that advice must be preceded by a well-grounded understanding of the default principles around which the engagement agreement will be crafted. Second, and as a significant example of the first theme, some instances of multiple founder representation will involve a collection of individuals, while other instances will involve a partnership by operation of law, whether the founders know it or desire it.[7] The lawyer's responsibilities will differ depending on which context applies, and therefore the lawyer must be able to reliably recognize when partnership principles apply and when they do not.

Finally, virtually none of the commentary addresses the lawyer's duties amid the reality of what I will call "founder drift."[8] In many

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L.J. 961 (1995); Burnet Maybank III & Cathy Black, *Ethical Considerations for Transactional Lawyers*, S.C. LAW., July/Aug. 1994, at 37; Lawrence E. Mitchell, *Professional Responsibility and the Close Corporation: Toward a Realistic Ethic*, 74 CORNELL L. REV. 466 (1989); D. Ryan Nayar, *Almost Clients: A Closer Look at Attorney Responsibility in the Context of Entity Representation*, 41 TEX. J. BUS. L. 313 (2006); Thomas E. Rutledge, *When Your Client Is an Organization—Some of the Problems Not Resolved by Rule 1.13*, 40 N. KY. L. REV. 357 (2013); William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CALIF. L. REV. 57 (2003); Note, *An Expectations Approach to Client Identity*, 106 HARV. L. REV. 687 (1993).

[6] *See generally* Edna Selan Epstein, *Who Is the Client in the Closely Held Corporation?*, 40 LITIG. 8 (2013); Darian M. Ibrahim, *Solving the Everyday Problem of Client Identity in the Context of Closely Held Businesses*, 56 ALA. L. REV. 181 (2004); Robert R. Keatinge, *The Implications of Fiduciary Relationships in Representing Limited Liability Companies and Other Unincorporated Associations and Their Partners or Members*, 25 STETSON L. REV. 389 (1995); Bryan J. Pechersky, Note, *Representing General Partnerships and Close Corporations: A Situational Analysis of Professional Responsibility*, 73 TEX. L. REV. 919 (1995); John M. Burman, *Forming the Lawyer-Client Relationship, Part III Special Considerations When Representing a New Organization*, WYO. LAW., Dec. 2012, at 46 [hereinafter Burman, *Forming the Lawyer-Client Relationship*].

[7] *See* Richard A. Booth, *Partnership Law and the Single Entity Defense*, 18 STAN. J.L. BUS. & FIN. 1, 4 (2012) ("There is no need for a written agreement. Partnership happens."). *See infra* notes 169–80 and accompanying text.

[8] *See* John C. Ale & Buck McKinney, *Stumbling into Partnerships: How Bands, Business Owners and Strategic Allies Find Themselves in Inadvertent Partnerships*, 43 TEX. J. BUS. L. 465 (2009); Robert W. Hillman & Donald J. Weidner, *Partners*

settings, and especially so in high-tech enterprises with little capital investment required, the collectivity of founders will manifest as a shifting array, with some "helpers" present when the lawyer first encounters the business—only to drift away later, and often be replaced by new helpers. Closely connected to the drift phenomenon is the lawyer's responsibility to discern who among the array of helpers qualifies as a "founder," assuming, as is likely, that capacity matters to the legal engagement questions and the resulting duties of the lawyer.

The questions just described apply to the lawyer's work with for-profit enterprises owned by some founders, but they apply as well, if in a quite different fashion, to nonprofit social enterprises whose founders have no ownership rights. This Article will explore both of those contexts. The lawyer's responsibilities may also differ, or at least her strategic considerations will vary, depending on whether the lawyer charges fees for the legal work provided, or whether she represents the founders on a pro bono basis. The discussion here will address that factor as well.

Part I briefly examines why these issues matter, given that most practitioners will define the relationship with founder-clients through an engagement letter or retainer agreement articulating the client's identity and the lawyer's expectations.[9] As we shall see, understanding the substantive duties that exist outside of such an agreement is critical not just for those (presumably few) lawyers who will engage in representation without a clear writing, but for all such lawyers, as the permissible permutations of the representational contours will depend on the lawyer's appreciation of the available choices.[10] The Article then begins its substantive discussion with for-profit enterprises in the private practice context, with the lawyer expecting to be paid for the representation. In the for-profit world, much turns on whether the collectivity qualifies as a partnership.[11] Part II begins with "inchoate" enterprises, which this Article argues do not constitute partnerships. If the lawyer represents a collection of founders who are not partners,

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Without Partners: The Legal Status of Single Person Partnerships, 17 FORDHAM J. CORP. & FIN. L. 449 (2012).

[9] *See* Burman, *Forming the Lawyer-Client Relationship*, *supra* note 6, at 47; *see also* Fischer, *supra* note 5, at 962.

[10] *See* Burman, *Forming the Lawyer-Client Relationship*, *supra* note 6, at 47.

[11] *See* Fischer, *supra* note 5, at 961.

she necessarily represents the individuals,[12] and Part II addresses her duties in that joint representation context, along with her choice to represent just one of the founders. Part II includes how those ordinary joint representation dynamics are affected by the founder drift phenomenon, as well as the challenge of identifying which of the initial (or later) collective ought to serve as the lawyer's joint clients. Part III then addresses "active" for-profit businesses, which most will agree are in fact partnerships by operation of law.[13] In this setting, the lawyer most likely represents the partnership as an entity and not the individual founders,[14] although Part III examines whether that is a legal truism or whether the parties have a choice to proceed in a different fashion. Once again, this discussion must account for the coming and going of founders who might qualify as partners.

Part IV turns to the context of nonprofit or charitable organizations. Perhaps unfortunately for the lawyer's understanding of her duties as well as for the analytical simplicity of this Part, the distinction at the founder stage between "for-profit" and "nonprofit" enterprises will sometimes not be clear, as the founders may have a choice about how to structure a particular business.[15] But for those enterprises that will eventually be established as charitable and/or tax-exempt organizations, which cannot include an ownership element, the lawyer's responsibilities to the founders are, as Part IV shows, even less clear than within the for-profit world. Founders of charitable or community organizations have lessened rights to determine the mission and strategic visions of the organization. The client base in those settings is likely to be more fluid and more ambiguous than in an enterprise owned by some identifiable persons.[16] Finally, lawyers offering guidance to nonprofit entities will operate amid what might be termed a "thicker theory of the good,"[17] a quality absent from the private enterprise universe and therefore altering some of the lawyer's representational responsibilities.

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[12] *See* Burman, *Ethical Considerations*, *supra* note 5, at 589.

[13] *See* STEPHEN M. BAINBRIDGE, AGENCY, PARTNERSHIPS & LLCS 101 (2004); Booth, *supra* note 7, at 4.

[14] *See* BAINBRIDGE, *supra* note 13, at 115–16.

[15] *See* Paul R. Tremblay, *Counseling Community Groups*, 17 CLINICAL L. REV. 389, 390 (2010).

[16] *Id.*

[17] *Id.* at 389 (stating that nonprofit lawyers represent "the dispossessed, the exploited, and the powerless").

I. DEFAULT UNDERSTANDINGS OF FOUNDER REPRESENTATION

A "best practices" standard of prudent transactional lawyering will recommend that a lawyer representing startup founders establish the contours of his representation through a written retainer agreement or engagement letter.[18] In some jurisdictions, a written agreement is required, at least when the lawyer charges a fee.[19] In light of that reality, it is fair to inquire why lawyers need to understand the default nature of the attorney-client relationship where no such agreement is in place. Of course, *sometimes*, whether consistent with the applicable ethics rules or not, lawyers will proceed to work with founders without such a clear articulation, and those lawyers will benefit (if perhaps in hindsight, after something went amiss) in understanding what the default arrangements seem to be.[20] But a moment's reflection illustrates why all lawyers working with startup founders need to appreciate the permissible possibilities of the agreement.

A lawyer offering to represent a group of founders must, at the time the retainer has been negotiated or determined (but not before then), elect whether to identify the "client" (either the individuals or an entity) as either a partnership or, perhaps, a prospective formal organization such as a corporation.[21] The lawyer might also choose to offer joint representation to both the individuals *and* the entity.[22] The lawyer's judgment and his negotiation with the individual founders will guide that decision. However, in order to craft such an engagement agreement, the lawyer must understand the available choices, and it is not clear that every choice will be available in every setting. The default substantive doctrine will limit some choices or perhaps require some.

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[18] Unsurprisingly, many observers note the importance of a written client agreement. *See, e.g.*, STEPHEN F. REED & ESTHER S. BARRON, ENTREPRENEURSHIP LAW: CASES AND MATERIALS 89 (2013); *see also* Fischer, *supra* note 5, at 962.

[19] The Model Rules recommend, but do not require, a written fee agreement. *See* MODEL RULES OF PROF'L CONDUCT r. 1.5(b) (2013). Some states, however, require that fee agreements be in writing, subject to some minor exceptions. *See, e.g.*, MASS. RULES OF PROF'L CONDUCT r. 1.5(b)(1) (2016).

[20] *See* Fischer, *supra* note 5, at 963 (noting that the default rules are useful for those without agreements).

[21] *See infra* notes 149–52 and accompanying text (discussing authorities allowing for retroactive entity client representation).

[22] *See* Fischer, *supra* note 5, at 963 (noting that under an "aggregate theory" a lawyer represents both individuals and entity).

For instance, as the proceeding discussion will show, a critical pivot point for the lawyer to navigate is whether the several founders are already a partnership or not.[23] It is not an answer to assert that the lawyer should simply decide, along with his client, which designation they prefer. If the participants are not partners, and if the default substantive doctrine would not by operation of law deem their enterprise as a partnership, the lawyer may not have the authority to declare that he will treat the group as partners.[24] With partnership comes many responsibilities and possibly unforeseen liabilities.[25] If the lawyer's designation of the group as a partnership for purposes of the retainer agreement serves to establish a partnership that otherwise would not exist, that choice may have profound consequences. Alternatively, if the lawyer's designation of the group as a partnership has no such effect—if, in other words, the absence of required partnership elements cannot be overcome by the lawyer's having chosen that designation in an engagement letter, which seems likely[26]—then different complications ensue, as the lawyer's client then has no actual existence.

Similarly, and conversely, if the default designation were to deem the enterprise a partnership, but the lawyer's engagement letter opts instead for individual representation of the partners (without, of course, a recognition that they are partners), that choice seemingly may always be available. However, it leaves the enterprise itself (the partnership) without counsel, and any conflicts arising from partnership duties and benefits will not have been sorted out at this early stage of the representation.

One response might be to recommend that the lawyer ought to use his legal skill to assist the founders in choosing the best available representational designation. That is possibly wise advice, but, of course, the lawyer's client or clients for purposes of that version of the choice-of-entity counseling will be subject to the default considerations that this project will seek to articulate.

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[23] *See infra* notes 169–80 and accompanying text.

[24] *See* Burman, *Ethical Considerations*, *supra* note 5, at 596.

[25] *See* BAINBRIDGE, *supra* note 13, at 125–33.

[26] In order for a partnership by default to come into existence, the venture must include the necessary elements. The absence of the elements will not overcome an agreement among the participants to consider their arrangement a partnership. *See* Truck Ins. Exch. v. Indus. Indem. Co., 688 P.2d 1243, 1245 (Mont. 1984) (noting "what the parties call their arrangement or intend their arrangement to be is irrelevant" if the elements determine a different result).

One final consideration warrants a mention here. Even with a clear engagement agreement, the phenomenon of founder drift, if and when it occurs, will prompt some adjustments to the relationship between the lawyer and the remaining founders, and the default understandings will matter there as well.

For these reasons, this Article proceeds as though the lawyer has no express agreement resolving the issues explored here. As the analysis addresses differing permutations, keep in mind that most lawyers will have better clarity in practice because of the terms of the agreement chosen with any particular group of founders. But, the default arrangements will continue to influence the available choices and strategies.

II. INCHOATE BUSINESS ENTERPRISES

Not every group of entrepreneurs assembled to carry out a new business will qualify as a partnership.[27] Some will, of course, but many will not. In what can be termed "inchoate" businesses, no entity exists to serve as the client until the founders have chosen and then established some such entity. In that setting, the lawyer's client will be one or more of the founders.[28] This Part examines the toggle point that triggers partnership status, and then proceeds to identify the lawyer's responsibilities when that toggle point has not been reached, including how the lawyer in that universe responds to founder drift. It then addresses those minority jurisdictions that permit the lawyer to treat the collection of founders as a single group client notwithstanding the absence of a partnership.

A. When Does a Partnership Arise?

It is an elementary principle of business organizations doctrine that a partnership arises by default, through an "association of two or more persons to carry on as co-owners a business for profit ... whether or not the persons intend to form a partnership."[29] Four elements must be present for a business to qualify as a partnership:

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[27] *Small Business Encyclopedia: Partnership*, ENTREPRENEUR, https://www.entrepreneur.com/encyclopedia/partnership [https://perma.cc/2Q9T-S3ZU].

[28] Merri A. Baldwin, *Lawyers Representing Startups: Managing Ethical Obligations and Risks*, CAL. BAR J. (Dec. 2013), http://apps.calbar.ca.gov/mcle-selfstudy/mcle_home.aspx?testID=80 [https://perma.cc/5JLA-6ZC8].

[29] UNIF. P'SHIP ACT § 202(a) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997) [hereinafter RUPA].

(1) two or more persons; (2) associated; (3) to carry on a business for profit; and (4) as co-owners.[30] With those four elements in place, a partnership exists, "whether or not the persons intend[ed] to form a partnership."[31] A shared intention or plan among several founders to establish a business, without any actual business activity or enterprise to control or to own, will not constitute a partnership.[32]

The available common law on when a partnership actually begins to exist is remarkably opaque. Courts have held that no partnership results when two or more persons actively plan to go into business together, but the terms of the resulting business deal are too vague to be identified or relied upon.[33] At the same time, courts have also held that the element of "carrying on a business for profit" can cover plans for future business activity: "[I]t is not essential to the existence of a partnership that business have actually been carried on. An agreement to carry it on creates the partnership[.]"[34] The critical considerations appear to be shared ownership of the business with accompanying management control, and sufficient clarity about the terms of the enterprise and the substance of the products or services to be marketed, even if the business has not yet begun to operate.[35] Some beginning businesses will lack those qualities.[36]

Scores of reported cases have resolved disputes with a finding that no partnership exists in settings with no formal entity in place, but those cases typically involve questions of whether a participant ought

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[30] CHRISTINE HURT ET AL., BROMBERG AND RIBSTEIN ON PARTNERSHIP § 2.01 (2d ed. Supp. 2015).

[31] RUPA § 202(a).

[32] *See, e.g.*, Ramone v. Lang, No. Civ. A. 1592-N, 2006 WL 905347, at *13 (Del. Ch. 2006) (finding when "[t]he relationship between [the participants] was still inchoate," no partnership existed); HURT ET AL., *supra* note 30, § 2.04(c).

[33] *Ramone*, 2006 WL 905347, at *13 (holding that agreeing to negotiate does not create a partnership if there are no terms or agreed-upon relationship); Dreyfuss v. Dreyfuss, 701 So. 2d 437, 438–39 (Fla. Dist. Ct. App. 1997) (holding that a father and son did not have a partnership when terms such as payments and splitting profits had not been discussed); Maloney v. Pihera, 573 N.E.2d 1379, 1388 (Ill. App. Ct. 1991) ("While the parties' intended goal *may* have been to form a partnership, we agree with the trial court that no partnership was established.").

[34] Curley Elec., Inc. v. Bills, 121 P.3d 106, 109 (Wash. Ct. App. 2005) (quoting ALAN R. BROMBERG, CRANE AND BLOOMBERG ON PARTNERSHIP 59 (1968)).

[35] *See Ramone*, 2006 WL 905347, at *13; *see also* RUPA § 202(a).

[36] Some, although limited, commentary acknowledges that some founders ought to be treated as individuals. *See, e.g.*, Carl A. Pierce, *Representing One Client at a Time in Connection with the Formation and Organization of a Corporation*, 8 TRANSACTIONS: TENN. J. BUS. L. 327, 347, 353 (2007).

to be treated as an employee[37] or a lender[38] rather than a partner of the other participant. Those cases are of little to no use to the present inquiry, as they always involve ongoing business enterprises with debts or profits worth wrangling over, and, in concluding that no partnership exists, the courts find that the true owner is a sole proprietor.[39] That line of cases does serve as a useful reminder that the lawyer working with what appears to be multiple founders does need to attend to the possibility that only one of those founders is the owner of the business, with the other participants deserving of a status as something other than a founder or an owner.[40]

In light of the available doctrine, it appears likely that most startups seeking legal advice will either qualify as partnerships or as sole proprietorships that have employees. But, not every startup will fit the requirements of Revised Uniform Partnership Act (RUPA). Here is an example of a startup where the participants likely do not qualify as partners—a story we may use for the discussion of the lawyer's duties:

> Janelle, Arjun, and Netia are all post-docs working at University Hospital in its mental health department. Janelle has been puzzling through an idea for the past year or so for a software program, or perhaps a mobile device app, that could assist social service agencies to track opioid addicts and their outpatient care as well as their interactions with the law enforcement community. Janelle believes that this invention, if it can work, will be valuable to medical professionals around the country. She persuaded Arjun and Netia to work with her to craft the mechanics, the coding, and the possible marketing and business plan for this invention. The trio also has been discussing with Sami, a former roommate of Netia who is an expert coder, the possibility of his assisting on a part-time basis with the technical components of the software program.
>
> Arjun has imagined a provisional name for the device—AddicTrak. The group has received some technical assistance and

[37] *See, e.g.*, Simpson v. Ernst & Young, 100 F.3d 436, 439, 441–42 (6th Cir. 1996) (holding that the party was an employee, not a partner); BAINBRIDGE, *supra* note 13, at 104–05.

[38] *See, e.g.*, TIFD III-E, Inc. v. United States, 459 F.3d 220, 231 (2d Cir. 2006) (holding that the party was a lender, not a partner); BAINBRIDGE, *supra* note 13, at 108–12.

[39] *See, e.g.*, Fenwick v. Unemp. Compensation Comm'n, 44 A.2d 172, 174–75 (N.J. 1945); Elizabeth R. Darby, Comment, *Relations Between Attorneys: When Does a Partnership Exist?*, 18 J. LEGAL PROF. 319, 322 (1993).

[40] *See* HURT ET AL., *supra* note 30, at § 2.01 (citing examples).

> workspace from a local incubator, and has been promised informally a small amount of seed funding from what is known in the entrepreneurship world as "the three Fs."[41] Janelle and Netia have each spent about $300 on software peripherals useful to the work. The advisors at the startup incubator have urged the group to seek some legal assistance earlier rather than later, and so Janelle contacted Sofia Schendel, a partner in a three-member law firm catering to small business transactional work. Sofia meets with Janelle and Arjun (Netia could not attend the meeting given her work schedule at the hospital) to discuss the possible legal needs of this startup enterprise.

The collection of participants in the AddicTrak enterprise most likely, at the time that Sofia meets with representatives of the group, would not qualify as a partnership. Its business ideas are manifestly "inchoate." The app or computer program has not yet been developed—it is, for now, simply a vision. There has been virtually no capital investment, and there is nothing yet to own collectively. Sofia, the lawyer, cannot in good faith treat the founders as partners, at least not yet. She needs another representational vehicle. That vehicle is, most likely, joint founder representation.

B. Joint Founder Representation

1. Whom Will the Law Firm Represent?

In the AddicTrak example, Sofia's law firm would represent the founders as joint clients, most often with an explicit understanding that the firm would later represent any resulting business entity formed as part of the representation.[42] The only other plausible alternative would be for the law firm to represent only one of the founders.[43] Since solo representation is presumably less risky than multiple representation,[44] that alternative cannot be dismissed outright, and at least one commentator has implied that this option

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[41] *See* Martin Zwilling, *8 Best Practices to Seek Funding From Friends, Family and Fools*, ENTREPRENEUR (May 22, 2015), https://www.entrepreneur.com/article/246404 [https://perma.cc/CDJ7-3FXR].

[42] *See* Burman, *Ethical Considerations*, *supra* note 5, at 590, 593–98.

[43] The remaining alternative—that the lawyer would represent two of the three founders—seems implausible, and its implications would be effectively addressed by the ethical analysis on the lawyer's work for all three founders. *See infra* note 44.

[44] Representing one client will on occasion trigger worries about conflicts of interest, but representing multiple clients simultaneously always triggers that worry. At least one observer sees those worries as significant enough to justify

ought to be favored by founders' lawyers.[45] With single representation, the unrepresented founders either remain without counsel, or choose, or perhaps are nudged, to retain their own lawyers.[46]

The attraction of choosing to represent one founder and not the remaining founders arises from the fact that the lawyer for the represented founder (let us assume this would mean Janelle) in the inchoate setting *does not owe duties to the other founders*.[47] If the law imposed a duty on the law firm to treat all three founders equally regardless of the arrangement, then this alternative would not be worth considering at all. Absent the application of partnership principles and the accompanying fiduciary duties among the partners, no source of authority imposes on the participants, and therefore *possibly* on the lawyer,[48] any fiduciary duties to one another in an inchoate business setting.[49]

Nevertheless, representing just one of the three founders is likely less common in practice than forming a relationship with all of

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a ban on multiple representation. *See* Debra Lyn Bassett, *Three's a Crowd: A Proposal to Abolish Joint Representation*, 32 RUTGERS L.J. 387, 458 (2001).

[45] *See* Pierce, *supra* note 36, at 344–47.

[46] *Id.* at 340.

[47] The duties owed among the participants arises from partnership law. *See infra* note 49. In some limited contexts, where the participants have operated collectively in such a way as to invite reliance on the good faith of one another, courts have imposed fiduciary-like duties even in the absence of a true partnership. *See, e.g.*, Zaki Kulaibee Est. v. McFliker, 771 F.3d 1301, 1310–11, 1316 (11th Cir. 2014) (consignment relationship); *see also* Shain Inv. Co. v. Cohen, 443 N.E.2d 126, 130–31 (Mass. App. Ct. 1982) (joint venture missing one necessary element); Cusick v. Phillippi, 709 P.2d 1226, 1228, 1230 (Wash. Ct. App. 1985) (commission merchant); HURT ET AL., *supra* note 30, at 2–12.

[48] This discussion assumes for the sake of argument that a lawyer representing a fiduciary will be forbidden to assist that client in a breach of his fiduciary duty. There is substantial authority asserting that it is not professional misconduct for a lawyer to participate in that activity, but contrary authority does exist. *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 361 (1991); Pierce, *supra* note 36, at 353–54. This topic receives more discussion in the next section, where the business is not inchoate and therefore a partnership likely exists as a matter of law. *See infra* Part III.

[49] The source of authority for some duties among the participants is partnership law as well as the law of joint venture, which tracks partnership law. *See* RICHARD D. HARROCH, 1 PARTNERSHIP & JOINT VENTURE AGREEMENTS § 2.09 (1992); George W. Dent, Jr., *Gap Fillers and Fiduciary Duties in Strategic Alliances*, 57 BUS. LAW. 55, 55, 71, 104 (2001); Zenichi Shishido, *Conflicts of Interest and Fiduciary Duties in the Operation of a Joint Venture*, 39 HASTINGS L.J. 63, 64, 122 (1987).

them—and for good reason. The choice to represent just one founder means that the other founders either remain without counsel (the far more likely course) or retain their own counsel, with the same joint-versus-individual choice point for a different law firm.[50] The latter is problematic in a number of ways,[51] apart from the obvious added expense. Two or more law firms looking after their separate clients' interests in a co-owned business invites fractiousness. It is not the way that most advisors recommend that a collaborative, risk-sharing, soon-to-be jointly owned enterprise ought to form.[52]

If the other founders do not get counsel, the potential for fractiousness is minimized, but not eliminated. Putting aside the fact that the lawyer would need to find some system through which to identify which founder receives the legal services,[53] once that choice has been made the lawyer ordinarily must put the interests of that founder ahead of those of the unrepresented founders.[54] Typically, the represented founder (Janelle) will desire to treat Arjun and Netia with the utmost care and fairness. Arjun and Netia, however, will likely be uncertain either of the reliability of that sentiment, or whether Janelle's counsel will nurture it.[55] Put another

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[50] Pierce, *supra* note 36, at 340.

[51] The prospect of separating collaborators in a new enterprise with little initial investment into three discrete represented parties to negotiate and arrange their respective and collective interests is not very attractive, and it is not likely to nurture the success of the relationship. For an insightful development of this concern in the family law context, see Rebecca Aviel, *Counsel for the Divorce*, 55 B.C. L. REV. 1099, 1099, 1147 (2014).

[52] *See* GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 682–83 (2d ed. 1994); Ibrahim, *supra* note 6, at 197 (implying that founders need separate counsel from the company, but not stating that each founder needs his or her own lawyer); Anne M. Tucker, *Teaching LLCs by Design*, 71 WASH. & LEE L. REV. 525, 551 (2014). *But see* Alexander Muse, *Founders, Your Startup Lawyer Doesn't Represent You*, STARTUPMUSE (Jan. 9, 2016), http://startupmuse.com/23617-2/ [https://perma.cc/6BDT-RZ9F] (implying that founders need separate counsel from the company, but not stating that each founder needs his or her own lawyer).

[53] *See* Pierce, *supra* note 36, at 338–40.

[54] *See*, *e.g.*, *id.* at 342.

[55] *See*, *e.g.*, Naomi Cahn & Robert Tuttle, *Dependency and Delegation: The Ethics of Marital Representation*, 22 SEATTLE U. L. REV. 97, 101 n.13 (1998) (discussing a similar arrangement with spouses and stating "[w]hile this model may be economically efficient, it may result in a set of additional problems in which the unrepresented spouse does not understand the lawyer's role").

way, a promise by the lawyer to Arjun and Netia that their interests will be respected deeply during the representation of Janelle is not as powerful or effective as the lawyer's explicit commitment to represent the interests of all founders as joint clients.[56]

Because of its seeming prevalence among founders and their lawyers, and because it most robustly nurtures the community of interests within the emerging business,[57] the proceeding discussion will accept the premise that the law firm will represent each of the founders jointly and individually. The joint representation of the three founders is presumptively proper, subject to the conditions explored below.[58]

2. Who Qualifies as a "Founder"?

To proceed with joint representation, the law firm needs to identify who among the group of individuals working within the inchoate business ought to be treated as a "founder," and thereafter likely one of the joint clients.[59] Especially for high-tech businesses that do not need significant infusions of capital in order to generate the business model and a prototype of the platform or application, the collectivity of founders may have a rather fluid quality.[60] A few buddies may work on the project for a while, but

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[56] Professor Pierce notes that Arjun and Netia would qualify as prospective clients of the law firm, triggering some confidentiality and limited loyalty duties on the part of the law firm to them. Pierce, *supra* note 36, at 338–40 (referencing MODEL RULES OF PROF'L CONDUCT r. 1.18). That fact offers little comfort to the unrepresented founders, as the law firm is unlikely to counsel the unrepresented individuals about those commitments.

[57] *See* Aviel, *supra* note 51, at 1143 (explicating the importance of the shared commitments when compared to individual interests); Patricia M. Batt, *The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 GEO. J. LEGAL ETHICS 319, 337–41 (1992) (comparing family members to organizational constituents whose shared interests supersede individual interests); Nancy J. Moore, *Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659, 687–95 (1994).

[58] *See generally* Tremblay, *supra* note 15.

[59] *See* Burman, *Ethical Considerations*, *supra* note 5, at 588–98 (discussing the difficulties in identifying clients during the formation of new organizations).

[60] *See, e.g.*, Tremblay, *supra* note 15 (discussing the counseling of loosely structured fluid groups); Richard A. Booth, *Give Me Equity or Give Me Death—The Role of Competition and Compensation in Silicon Valley*, 1 ENTREPRENEURIAL

if income generation is not quickly forthcoming they may return to day jobs or other attractive endeavors with other technology entrepreneurs. The fluidity issue is especially pronounced in pro bono, inchoate contexts, since the availability of free legal services means that anyone on the team could agree to be a founder/client without any major commitment.[61]

The law firm, and especially a firm providing services on a pro bono basis, needs to be intentional and prudent in identifying which of the entrepreneurial "buddies" will become formal clients of the firm. That decision belongs to the firm, which always has the discretion about which clients it will choose to represent and to whom it will offer its services.[62] Those who receive an offer to become clients of the firm most often will be the individuals who the team expects will become equity holders or members of the resulting organization—in other words, those who would by default be partners once the business has begun to operate.[63] Employees, even those compensated with stock for their services, are not partners, according to partnership doctrine.[64] Representing

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BUS. L. J. 265 (2006) (discussing equity compensation and the tendency of Silicon Valley employees to job hop).

[61] *See* Pierce, *supra* note 36, at 343–44 (discussing the attorney-client relationship in the pro bono context).

[62] It is fundamental that, except in inadvertent representation contexts or court-appointments, a law firm may choose its clients. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 6.03 n.4 (4th ed. 2014) ("Although lawyers are entirely free to accept such a representation [of a client who has engaged in criminal or illicit conduct], no individual lawyer is legally required to accept any particular matter, except upon court appointment."); RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 14 (2000) (discussing consent as an essential component of an attorney-client relationship). A lawyer may not discriminate in her choice of clients. *See* Nathanson v. Mass. Comm'n Against Discrimination, No. 199901657, 2003 WL 22480688, at *1 (Mass. Super. Ct. 2003) (discussing allegedly discriminatory practices by a female attorney who refused to represent men in her legal practice). And, many argue that lawyers have a moral (if not legal) obligation to represent those who cannot locate representation elsewhere. *See, e.g.*, Teresa Stanton Collett, *The Common Good and the Duty to Represent: Must the Last Lawyer in Town Take Any Case?*, 40 S. TEX. L. REV. 137, 138, 154 (1999).

[63] Recall that a partnership requires ownership and operations. *See* CRANE AND BLOOMBERG ON PARTNERSHIP, *supra* note 34, at 59; *see supra* note 35 and accompanying text.

[64] Employees of an unincorporated business do not qualify as partners unless they also possess an ownership interest in the enterprise along with indicia of control. BAINBRIDGE, *supra* note 13, at 107; David B. Wilkins, *Partner,*

only future partners and not future employees minimizes the potential conflicts of interest for the firm. Those assertions—that the firm should offer its legal services to the future owners and not to the future employees, and that the firm makes that determination—are rather easy to state, but mask at least two complications that the firm must confront in practice.

First, with technology startups especially, the participant founders may not be able easily or confidently to determine who qualifies as a future owner and who ought to be seen as a future employee. Indeed, since employees in technology startups are often compensated by stock options or their equivalent,[65] the ownership criterion may not be sufficiently salient to serve the purpose the law firm needs. Because in representing those individuals the firm must minimize potential conflicts of interest, the choice of identified clients becomes a critical strategic judgment. The second complication follows from the first. The earlier analysis suggested that a firm is typically better off representing founders as joint clients rather than choosing one founder to serve as the client, with the expectation that the law firm would provide meaningful business-wide legal assistance while having legal duties solely to that one founder.[66] The recognition that "founder" is a more slippery concept than one might desire reintroduces at least part of that worry. A firm committing to represent the founders as joint clients often will still have to identify some members of the startup team as "non-founders"—that is to say employees, or perhaps consultants,

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Shmartner! EEOC v. Sidley Austin Brown & Wood, 120 HARV. L. REV. 1264, 1264, 1268, 1271 (2007); Simpson v. Ernst & Young, 850 F. Supp. 648 (S.D. Ohio 1994) (upholding trial court's findings that the plaintiff was an employee, not a partner).

[65] It is common that employees of cash-poor startup businesses work not for wages, but for stock options and similar promises of equity in the business. *See, e.g.*, Booth, *supra* note 60, at 272 ("[I]t is perfectly easy to devise an option plan or other system of equity compensation in a startup firm. Indeed, it is quite common in small firms for an employee to work (in part) for an ownership share."); Meghan Casserly, *Understanding Employee Equity: Every Startup's Secret Weapon*, FORBES (Mar. 8, 2013, 5:30 PM), http://www.forbes.com/sites/meghancasserly/2013/03/08/understanding-employee-equity-bill-harris-sxsw/#62d657ff3e05 [https://perma.cc/P9QV-3WFK]. Whether that arrangement satisfies the applicable minimum wage laws is a question beyond the scope of this Article. For a discussion of that tension, see Adam Lang, *A Hidden Danger for Businesses in Nevada*, 14 NEV. EMP. L. LETTER 1 (2009).

[66] *See supra* note 52 and accompanying text.

and therefore not entitled to free representation.[67] That process itself will, at times, occur with some of the non-clients present, as the lawyer investigates which participants best fit the "founder" requirements. And, since investment may be small in many technology startups, that factor may not serve as the most reliable proxy for ownership, as it would in other settings.[68]

In the end, the law firm will exercise its discretion about to whom to offer joint representation in light of these considerations, with special attention to the possible conflicts of interest should the firm end up with a mix of founders and employees. In the example above, Sofia will likely offer joint representation to Janelle, Arjun, and Netia; she is unlikely to offer representation to Sami, who does not yet appear to qualify as a founder. Nothing prohibits the firm from including Sami if the team requested that Sami also be included, as long as the joint representation conflicts questions are addressed expressly and adequately.[69]

3. Formation of the Joint Client Relationship: Informed Consent

Every joint representation presents the potential for a conflict of interest and invites a discussion of the special confidentiality rules that apply in joint representation.

a. Consent to the Shared Representation

Model Rule 1.7 requires informed consent, "confirmed in writing," if a waivable[70] conflict of interest arises.[71] A conflict of interest

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[67] *See* Wilkins, *supra* note 64, at 1264, 1268, 1271.

[68] The inherent lack of clarity about which of the participants in a technology startup business qualify as "founders" has created complications for some law firms in the past. *See, e.g.*, Robbins v. Payne, 55 S.W.3d 740, 746 (Tex. App. 2001) (determining whether partnership existed and what fiduciary duties were between two founders in starting an internet services corporation).

[69] *See generally* Pierce, *supra* note 36; Wilkins, *supra* note 64.

[70] This Article will refer to a client's consent to a conflict of interest as a "waiver," even though that term may not represent accurately the process of the lawyer's proceeding notwithstanding the conflict, especially since waivers in other contexts (but not here) may be implied. The "waiver" term is well-established. *See*, *e.g.*, Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 409 (1998).

[71] MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(4) (2015).

exists if "there is a substantial risk that the lawyer's representation of one or more of the clients would be materially and adversely affected by the lawyer's duties to one or more of the other clients."[72] The Rule does not require such informed consent and written confirmation in instances of purely *potential* conflicts,[73] but the Rule's Comments suggest that in common representation of founders, a lawyer ought to obtain explicit consent from each client.[74]

Not every joint client engagement setting creates the "significant risk" identified in Rule 1.7(a)(2) or requires informed consent. For example, if a husband and wife in a seemingly stable marriage retain a lawyer to purchase a home together, that common representation typically would not trigger a "significant risk" that the lawyer's advocacy on behalf of either spouse would be impaired in any way, so informed consent ordinarily would not be required.[75] Joint representation of founders, however, presents a different set of circumstances, and would inevitably generate the "significant risk" that a lawyer must address.[76] Questions of ownership interests, decision making, control, vision, and exit all invite differences

[72] The Restatement of the Law Governing Lawyers uses founders as its example of this possibility. *See* RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 130 (2000).

[73] Rule 1.7, Comment 8 notes that the "mere possibility of subsequent harm" does not require informed consent and written confirmation. MODEL RULES OF PROF'L CONDUCT, r. 1.7 cmt. 8. Some observers have recommended that counsel keep clients informed, and obtain consent, when such possibilities exist. *See, e.g.*, Brad Andrews, *Informed Consent to Multiple Representation Under Rule 1.7*, ADVOCATE, Feb. 2008, at 8. Other commentators have expressed deeper reservation about the shared representation model itself. *See* Bassett, *supra* note 44, at 390; Ibrahim, *supra* note 6, at 186–87.

[74] MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 8 ("[A] lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client.").

[75] Cahn & Tuttle, *supra* note 55, at 100–01 ("In ... contexts, such as a married couple's purchase of a home, joint representation seems perfectly normal. Indeed, one would hardly think of suggesting a different form of representation where the spouses' interests are so closely aligned.").

[76] The Restatement implies the opposite. *See* RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 130 (2000) (stating that joint representation of multiple founders ordinarily does not require informed consent).

of opinion and of preference among the founders. One lawyer might not be able to accommodate all founders' different interests adequately in creating the structure of a business.[77] At the same time, one lawyer may—and individual lawyers or law firms regularly do[78]—assist three founders in a sufficiently meaningful way, notwithstanding those inherent differences in interests to justify the use of one counsel.[79] Because the risks are significant but are not disabling, the conflict may be waived, and the conflict must be waived if the law firm will engage the three founders.[80]

In seeking informed consent, the lawyer must explain that the interests of the three clients may diverge in the future and the importance of accounting for that possibility at the formation stage.[81] At a minimum, a lawyer representing the founders must ensure that the clients know of that potential eventuality, even if the founders choose not to engage with it in any deep way right now.[82] Because separate lawyers would more easily advocate to protect the longer-term interests of each founder to the exclusion of the others, and because the joint lawyer must not do so for any one of the founders, this representation warrants a Rule 1.7 discussion and requires a written waiver.[83]

With three or more founders, one potentially significant downstream worry for each member of the group is that of the minority squeeze out after an entity has been formed.[84] Until a new entity becomes public or otherwise has some recognizable market value, each shareholder or member has very limited exit rights.[85] Since

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[77] *See* Mitchell, *supra* note 5, at 472–74.

[78] *See id.* at 474; Rutledge, *supra* note 5, at 362–63.

[79] *See* Mitchell, *supra* note 5, at 474.

[80] For a discussion of the counseling process involved in obtaining informed consent, see Tremblay, *supra* note 15, at 408.

[81] *See* Rutledge, *supra* note 5, at 363.

[82] *Id.* at 363–64.

[83] MODEL RULES OF PROF'L CONDUCT r. 1.7(b) (2015); Rutledge, *supra* note 5, at 363–64.

[84] Benjamin Means, *A Contractual Approach to Shareholder Oppression Law*, 79 FORDHAM L. REV. 1161, 1167–68 (2010) (discussing "freeze-out" and "squeeze-out" of minority shareholders); *see also* Michael K. Molitor, *Eat Your Vegetables (or at Least Understand Why You Should): Can Better Warning and Education of Prospective Minority Owners Reduce Oppression in Closely Held Businesses?*, 14 FORDHAM J. CORP. & FIN. L. 491, 493 (2009) (describing the squeeze-out possibilities); Simon, *supra* note 5, at 61–65.

[85] Means, *supra* note 84, at 1208; *see also* Molitor, *supra* note 84, at 512–13, 549.

profiting by a sale of their interest is not likely in the short term, founders often expect to gain some return from the enterprise by working in the business for a salary or obtaining dividends from the operating profits.[86] If two of the three founders choose to conspire against the third, they can terminate his employment and cease issuing dividends without the third owner having any ability to prevent that action.[87] The minority owner, being unable to sell his interests except to the squeezing majority owners, stands to lose much of his investment whether in capital or in labor spent developing the business. While that kind of maneuvering would only occur after the entity exists, any anticipation of it will occur while the founders remain joint clients. Since no one knows at formation which of the founders might conspire against the others, all three clients face precisely the same risk.[88] It is in the interests of all three joint clients to address the worries by accounting for these possibilities in any partnership agreement or the later corporate or LLC documents.[89]

b. Consent to Sharing Information

If there is any uncertainty surrounding the scope of the informed consent on the conflicts question, there is no uncertainty about the lawyer's obligation to obtain informed consent from the founders as to the operation of the confidentiality duties.[90] Under ordinary circumstances, a lawyer will explain to her individual client the protections afforded to him by the operation of Rule 1.6, which protects "information related to the representation" unless some exception applies.[91] With individual representation, the world is simple: the

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[86] Molitor, *supra* note 84, at 516–17.

[87] *Id.* at 515.

[88] *Id.* at 492. One can imagine a particularly vulnerable third client, say a stranger joining two business partners who already work closely together. In that setting, the lawyer needs to be more careful with joint representation duties.

[89] *See id.* at 592 (describing provisions to address these concerns).

[90] MODEL RULES OF PROF'L CONDUCT r. 1.6(a), (b)(7), (c) (2015).

[91] *Id.* r. 1.6(b). While Rule 1.6(b) offers seven discrete bases on which a lawyer may justify disclosure of otherwise confidential client information, those exceptions are rarely employed. *See* Ria A. Tabacco, Note, *Defensible Ethics: A Proposal to Revise the ABA Model Rules for Criminal Defense Lawyer-Authors,* 83 N.Y.U. L. REV. 568, 577–78 (2008); Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension Between Confidentiality Requirements and Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199, 203–04 (2007); John K. Villa,

lawyer keeps everything confidential, generally speaking.[92] In common representation, that assurance must be adjusted in a critical way, and that adjustment requires a conversation and confirmation. Rule 1.7 in its comments explains that counsel must "advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other."[93]

The lawyer therefore will explain the absence of confidentiality among the three founders and, in those unusual circumstances, negotiate any special arrangement chosen by the founders to withhold some information belonging to one founder from the others.[94]

4. Decision Making Within the Attorney-Client Relationship

Having established a joint relationship with three individual clients, the law firm may proceed to develop counseling strategies through which the founders will choose the form of entity to establish and the content of that entity's organizational documents and filings.[95] By virtue of the firm having three separate retainer agreements with three separate (if joint) clients, the lawyer must honor the preferences of all three founders.[96] The arrangement must be clear to the three clients that their decision making must be collective and by consensus—or, if the founders so agree, by the group's own chosen matrix.[97] That component of the representation

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What Can You Ethically Do When You Don't Know What Ethically to Do?, 27 ACC DOCKET 106, 107 (2009) (on file with author).

[92] MODEL RULES OF PROF'L CONDUCT r. 1.6(a).

[93] *Id.* r. 1.7 cmt. 31.

[94] As Comment 31 to Rule 1.7 describes, in unusual circumstances, the jointly represented clients will, and may, agree with the lawyer that certain identified information—the Comment uses trade secrets as an example—will not be available to the team once the lawyer has learned it from one team member. In most instances, that condition will make joint representation unworkable, but the lawyer has discretion if the facts warrant it to continue with the representation despite that compromised position. For a discussion of that complication in the setting of aggregate settlements, see Carol A. Needham, *Advance Consent to Aggregate Settlements: Reflections on Attorneys' Fiduciary Obligations and Professional Responsibility Duties*, 44 LOY. U. CHI. L.J. 511, 524 (2012).

[95] That "entity" could, of course, include a partnership, should the founders opt not to establish a more formal, publicly filed organization. Tremblay, *supra* note 15, at 438.

[96] *Id.* at 407–08.

[97] *Id.* at 408.

must be explicit.[98] So, for example, if two of the three founders prefer establishing an LLC, and the third strongly prefers creation of a C corporation, the lawyer will be at an impasse, unless the client group has itself chosen a decision-making method (e.g., majority rule) to which it will adhere.[99]

Two implications follow from this fundamental reality of any joint representation arrangement. First, the lawyer's commitment to neutrality becomes both more critical and more difficult to sustain. In representing single clients, whether individuals or organizations, lawyers will typically proceed in a client-centered fashion.[100] That means, as many have described,[101] that the lawyer's preferences are effectively irrelevant except to the extent that those preferences emerge from legal obligations about which the clients have no choice.[102] Since lawyers always will have preferences, which are not always based upon the legal principles involved but instead arise from their own values and business judgments, the client-centered model discourages the lawyer from influencing the client's decision-making.[103] When founders disagree among themselves, the common lawyer must actively assist the group to understand all of the competing considerations, and the lawyer must be especially sensitive not to support one founder's views over another's.[104]

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[98] *Id.* at 413.

[99] A law firm jointly representing two founders will face greater difficulties if the founders do not agree on a chosen course.

[100] Tremblay, *supra* note 15, at 397–98.

[101] *See* ALICIA ALVAREZ & PAUL R. TREMBLAY, INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE 1–10 (2013); DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 2–9 (3d ed. 2011); STEPHEN ELLMANN ET AL., LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING 72–105 (2009) (describing an "engaged" and collaborative approach to client decision making).

[102] *See* David Binder, Paul Bergman & Susan Price, *Lawyers as Counselors: A Client-Centered Approach*, 35 N.Y. L. SCH. L. REV. 29, 67–69 (1990). *But see* Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 593 (1990).

[103] ALVAREZ & TREMBLAY, *supra* note 101, at 113–14.

[104] *See, e.g.*, GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 76–86 (1978) (discussing the challenges when representing multiple clients); Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 216–18 (1982); John A. Walton, *Conflicts for Sports*

The second implication arises from the malleability of the group's chosen decision-making methods. As long as the group remains an "aggregate" of three clients, and not an entity,[105] any agreement among the three about how they will make decisions down the road will have a tentative, at best, functionality. Here is the worry: imagine that the three founders agree at the very beginning of the representation, at the lawyer's request and with a dose of a Rawlsian veil of ignorance,[106] that a founder will acquiesce in a decision if two of the three members of the group favor it. And, imagine further that the retainer agreement or a separate writing confirms that commitment.[107] If an outvoted founder feels strongly about an issue that he had not previously encountered, and refuses to acknowledge the ongoing validity of his previous agreement, where does that leave the lawyer?

There are but two answers to that question. The most likely result is that the attorney will mediate among her three clients to arrive at some consensus to allow the business planning to proceed.[108] Comment 32 to Model Rule 1.7 refers to the lawyer's efforts to "adjust a relationship between [joint] clients"[109] without

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and Entertainment Attorneys: The Good News, the Bad News, and the Ugly Consequences, 5 VILL. SPORTS & ENT. L. J. 259, 280–81 (1998) (addressing the issue in context).

[105] If the three founders were an organization, the client would most likely be the entity, and the lawyer would follow its decision-making systems and protocols. *See In re* Wise, 740 N.E.2d 946, 950–51, 955 (Mass. 2000) (lawyer disciplined for taking action ostensibly on behalf of a nonprofit organization, but without the consent of the duly authorized constituents).

[106] Professor Vermeule describes "[a] veil of ignorance rule … [as] a rule that suppresses self-interested behavior on the part of decisionmakers; it does so by subjecting the decisionmakers to uncertainty about the distribution of benefits and burdens that will result from a decision." Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 399 (2001) (citing JOHN RAWLS, A THEORY OF JUSTICE 118–23 (rev. ed. 1999)).

[107] *See* Rutledge, *supra* note 5, at 363.

[108] An earlier iteration of the Model Rules of Professional Conduct included a rule that anticipated a lawyer's mediating among clients with common, but not identical, interests. *See* MODEL RULES OF PROF'L CONDUCT r. 2.2 (1983) (eliminated in the 2002 revision of the Model Rules); *see also* Walton, *supra* note 104, at 268–73 (discussing intermediation among joint clients).

[109] MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 32 (2015); *see also* John S. Dzienkowski, *Lawyers As Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 763 (1992); Carl A. Pierce, *ABA Model Rule 2.2: Once Applauded and Widely Adopted, Then*

being a partisan for any one of them. With transparency, open dialogue, and clear written explanation detailing the role of the attorney, mediation among clients in this manner is ethically appropriate and likely quite common.[110]

If the mediation does not succeed, and the founders do not reach consensus, then the lawyer may not represent the three common clients any longer (assuming that the issue on which the clients disagree may not be postponed or deferred).[111] This is the fundamental risk of common representation: that the clients will develop a conflict that cannot be resolved, and the lawyer will have to withdraw from the multiple representation.[112] The critical question upon the dissolution of the common representation is whether the lawyer may continue to represent the remaining two founders without the informed consent of the unhappy founder,[113] for there is no doubt that the law firm may continue to represent the remaining founders with the informed consent of the departing founder.[114] That question introduces generally the question of founder mobility and "drift," to which we now turn.

Criticized, Ignored or Evaded, Now Sentenced to Death With Few Mourners, But Not in Tennessee, 2 TRANSACTIONS: TENN. J. BUS. L. 9, 17 (2000).

[110] *See* Walton, *supra* note 104, at 259, 271, 276–77, 285, 288. Failing to be neutral while representing multiple clients may trigger liability for the lawyer. *See* Nelson Bros. Prof'l Real Estate, LLC v. Freeborn & Peters, LLP, 773 F.3d 853, 857–58 (7th Cir. 2014) (holding that, where a lawyer structured a joint venture agreement allowing one client to outvote the second client without informing the second client, the firm was liable for malpractice); Crest Inv. Trust, Inc. v. Comstock, 327 A.2d 891, 901, 904 (Md. Ct. Spec. App. 1974) (holding that fiduciary duties were breached when the lawyer, representing the bank and farmers in investment and business formation, allowed farmers to enter into investment that favored the bank without recommending that farmers seek independent counsel).

[111] *See* MODEL RULES OF PROF'L CONDUCT r. 1.7; *see also infra* notes 125–26 and accompanying text.

[112] *See* Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253, 1265–66 (1994) (recommending better clarity within the rules); Stephen Doherty, Comment, *Joint Representation Conflicts of Interests: Toward a More Balanced Approach*, 65 TEMP. L. REV. 561, 581–82 (1992) (describing the interplay between Rules 1.7 and 1.9).

[113] *See, e.g.*, Bruce Alan Mann & Marcus D. Wilkinson, *The Role of Counsel in Venture Capital Transactions if Disputes Arise*, 46 BUS. LAW. 759, 767 (1991).

[114] *See* MODEL RULES OF PROF'L CONDUCT r. 1.9(a) (2015).

C. Founder Drift

Whether a founder leaves the original group prior to the establishment of a structured, formal organization because of disagreement, a loss of interest, or the emergence of a better project elsewhere, the attorney representing the group of founders faces the same decision point: may she remain with the enterprise absent one of the founders without that leaving founder's permission?

1. The Propriety of Continuing Representation

Before we reach that question, a preliminary consideration warrants our attention. One might suggest that whenever the group of founders reconstitutes, or whenever one of its members drifts away, the law firm ought to withdraw from representation and refer the enterprise to new counsel.[115] This inquiry will resurface when we reach the setting of an active business, with the founders as partners opting to leave.[116] It is seemingly safer and more conservative for a law firm to refrain from representing the group of founders after the membership within the group has changed. That strategy will not always be the best alternative, however.

There are three considerations that might support a law firm's remaining as counsel to the inchoate enterprise after a founder departs. First, with startup businesses, it is not infrequently the case that the founder group is fluid, with some entrepreneurs joining a team for a while and then reassessing the best use of their scarce time, especially in light of the lack of wages or salary in this early stage of the inchoate business.[117] If the law firm desires to stay with the business, and the remaining founders desire to continue, it is not fair to the emerging business to require its locating new counsel and a reprise of the informed consent dance. Second, if the law firm is offering its services pro bono, which is

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[115] Some participants suggested this remedy during the Boston College Law School summer colloquium discussion of this paper.

[116] *See infra* notes 217–53 and accompanying text.

[117] "It is an unfortunate truth, but very often the team that first embarks on a startup concept is not the same team to finish." Matt Faustman, *Founders Leaving the Startup*, UPCOUNSEL: BLOG, https://www.upcounsel.com/blog/founders-leaving-the-startup [https://perma.cc/SDS3-EL5Y].

not uncommon with inchoate startup businesses,[118] there may not be other counsel available.

Third, many law firms offer services to cash-strapped startup enterprises through an arrangement of deferred fee payments[119] or a promised share in the equity of the later business.[120] In those settings, a shift in the array of founders that does not appear to alter the scope of the ongoing business plan would leave the firm anxious to remain as counsel. If that incentive is not shared by the founders, a conflict of interest would appear to arise between the interests of the firm and the interest of the founder clients[121]—a conflict that the law firm needs to address in a transparent way.[122] But, often the remaining founders are more than happy not to have to change firms,[123] so the interests of the firm and the remaining clients would align.

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[118] Pro bono legal services for transactional clients, most often startups, is more prevalent than in the past. *See* James L. Baillie, *Fulfilling the Promise of Business Law Pro Bono*, 28 WM. MITCHELL L. REV. 1543, 1544, 1568 (2002); Thomas H. Morsch, *Discovering Transactional Pro Bono*, 72 UMKC L. REV. 423, 425, 431 (2003).

[119] *See* Sarah Boulden, Note, *The Business of StartUp Law: Alternative Fee Arrangements and Agency Costs in Entrepreneurial Law*, 11 J. TELECOMM. & HIGH TECH. L. 279, 294 (2013) (reporting that the Cooley and Moye White law firms employ that practice).

[120] For a discussion of the practice of law firms taking equity in startup clients, see generally John S. Dzienkowski & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients*, 81 TEX. L. REV. 405 (2002); Jason M. Klein, *No Fool for a Client: The Finance and Incentives Behind Stock-Based Compensation for Corporate Attorneys*, 1999 COLUM. BUS. L. REV. 329 (1999); Casey Perrino, *Between a Rock and a Hard Place: What to Do When One Must Take Equity in a Client*, 28 GEO. J. LEGAL ETHICS 825 (2015); Poonam Puri, *Taking Stock of Taking Stock*, 87 CORNELL L. REV. 99 (2001); Gwyneth E. McAlpine, Comment, *Getting a Piece of the Action: Should Lawyers Be Allowed to Invest in Their Clients' Stock?*, 47 UCLA L. REV. 549 (1999); Thomas E. Przybylski, Note, *The Ethics of Accepting Stock in a Client as Payment for Legal Services*, 47 WAYNE L. REV. 1431 (2002).

[121] *See* Donald C. Langevoort, *When Lawyers and Law Firms Invest in Their Corporate Clients' Stock*, 80 WASH. U. L.Q. 569, 574 (2002) (describing the sometimes distorted perceptions of lawyers in assessing those risks); Perrino, *supra* note 120, at 834–35 (discussing the conflicts that arise when taking equity).

[122] *See supra* notes 76–83 and accompanying text.

[123] *See* Mann & Wilkinson, *supra* note 113, at 775.

For these reasons, we should acknowledge that at times the firm and the remaining founders will hope to continue to work together, and assess the ethical and logistical complications of their doing so.

2. Founder Mobility Resulting from Conflict

Let us return to our original story and introduce founder mobility. Imagine that after the law firm has accepted the joint representation of Janelle, Arjun, and Netia, the team encounters serious internal conflict about how the enterprise will proceed, with Janelle and Arjun disagreeing with the strategic visions of Netia. The efforts of Sofia Schendel, the joint clients' counsel, to mediate their differences do not succeed, and she concludes that she cannot continue to represent the group of three clients. However, she hopes to continue to work with Janelle and Arjun as they continue with the business ideas. Imagine further that Netia ignores Sofia's requests for explicit permission for Sofia to continue to work with the other two original founders.

Once Netia is no longer a client, she becomes a former client of the law firm, and the question of any proceeding representation is addressed by Model Rule 1.9.[124] Rule 1.9 would prohibit the representation by the law firm of clients (here, Janelle and Arjun) if that representation is substantially related to that of a former client (here, Netia) and is adverse to the interests of the now-former client.[125] If those conditions are met, the law firm may proceed only if Netia provides informed consent to the continued representation, confirmed in writing.[126]

In this story, the ongoing representation is substantially related to the firm's work for Netia; indeed, it is the same work as that performed by the law firm for Netia, and the firm likely obtained material confidential information from Netia while acting as her lawyer.[127] The critical question is whether continued representation of the "business" through Janelle and Arjun would be

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[124] MODEL RULES OF PROF'L CONDUCT r. 1.9(a) (2015).

[125] *See id.*

[126] *Id.*; *see also* RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 132 cmt. d(iii) (2000).

[127] It is not implausible to imagine that the law firm, while representing Janelle, Arjun, and Netia, learned virtually nothing from Netia, having had most

considered *adverse* to Netia. "Material adversity," as the Rule 1.9 requirement has come to be known,[128] tests the degree to which the current representation may result in legal, financial, or other identifiable detriment to the former client.[129] There can be no blanket application of the adversity condition, as it is entirely fact-driven.[130] If, after the law firm withdraws from its common representation of Janelle, Arjun, and Netia, Netia does not pursue the enterprise for which the group formed, then the law firm seems quite safe in accepting a retainer from Janelle and Arjun to continue the business.

If, on the other hand, the law firm learns that Netia will pursue a similar enterprise on her own or with new collaborators, the law firm's predicament is more delicate if it hopes to continue with Janelle and Arjun. There is no direct authority on which the law firm may rely,[131] but some principles provide guidance. First, even the more strict concurrent representation conflict of interest authority, Model Rule 1.7,[132] permits a law firm to represent competitors

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communications with Janelle and Arjun. If that were true, is the law firm nevertheless forbidden by Rule 1.9 from proceeding without the consent of Netia because of the absence of any protected confidences? The answer appears to be yes—the bar to representation remains. The "substantial relationship" test within Rule 1.9 presumes the receipt of relevant information if the two matters are substantially related. *See* DEBORAH L. RHODE ET AL., LEGAL ETHICS 532 (7th ed. 2016); Doherty, *supra* note 112, at 582.

[128] RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 132 (2000); LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 492 (3d ed. 2012).

[129] *See* ABA & BUREAU OF NAT'L AFFAIRS, INC., 18 LAWYERS' MANUAL ON PROF'L CONDUCT 205, 220–21 (2002).

[130] MODEL RULES OF PROF'L CONDUCT r. 1.9 cmt. 2 (2015).

[131] Authority supports the proposition that founders have fiduciary relationships to one another and the yet-to-be-formed business entity, but these authorities do not specifically address the application of these duties if Netia competes with Janelle and Arjun, or how an attorney should ethically handle these situations. *See* ALAN S. GUTTERMAN, BUSINESS COUNSELOR'S LAW AND COMPLIANCE PRACTICE MANUAL § 9:6 (2014); ALAN S. GUTTERMAN & JEAN L. BATMAN, 1 CAL. TRANSACTIONS FORMS—BUS. ENTITIES § 3.2 (2016).

[132] Rule 1.7 is stricter in its limitation on conflicts of interest in that, unlike Rule 1.9, it forbids opposing a second client even if the matters are entirely unrelated. *See* Kristi N. Saylors, *Conflicts of Interest in Family Law*, 28 FAM. L.Q. 451, 472 (1994) ("Model Rule 1.7 applies a stricter standard to conflicts with current clients than to conflicts with former clients (Model Rule 1.9)").

within the same industry "whose interests are only economically adverse."[133] Therefore, the fact that a former client enters the same field as a competitor should not demand the law firm refrain from representation of the remaining founders.[134] On the other hand, if Netia competes with Janelle and Arjun, and if the law firm concludes that Janelle and Arjun will employ in a significant fashion the confidential insights from Netia in their business model, a different result seems appropriate. Exploiting the former client's confidential information to that client's detriment is exactly what Rule 1.9(a) intends to prevent.[135] That would suggest that Sofia decline further representation of Janelle and Arjun (and any other founder joining them to replace Netia).

That conclusion, while prudent, nevertheless remains a little puzzling. The purpose of Rule 1.9 is to protect Netia's *confidences*. While labeled most often as a conflicts rule, Rule 1.9 serves most directly to protect the confidences of former clients.[136] That is the driving rationale for the application of the substantial relationship test. While it may be the case that Janelle and Arjun have used information belonging to Netia in the crafting of their business model, that sharing does not preclude Janelle and Arjun from locating a new, separate law firm and proceeding with their conception of the business.[137] If that is true, and if it also happens to be true that the current law firm has no personal information from Netia that Janelle and Arjun do not have available to them (again, quite likely), why should Janelle and Arjun change firms?

The only rationale justifying the firm's disqualification from continuing to represent Janelle and Arjun would be what we

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[133] MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 6.

[134] *Id.* r. 1.7 cmt. 8.

[135] *See id.* r. 1.9 cmts. 1, 9; *see also* Douglas R. Richmond, *Choosing Sides: Issue or Positional Conflicts of Interest*, 51 FLA. L. REV. 383, 395–96 (1999); John W. Allen, *Conflicts of Interest—The Basics*, 78 MICH. B.J. 180, 181 (1999).

[136] *See* RHODE ET AL., *supra* note 127, at 472; Richmond, *supra* note 135, at 396; Neil W. Hamilton & Kevin R. Coan, *Are We a Profession or Merely a Business?: The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls*, 27 HOFSTRA L. REV. 57, 71 (1998).

[137] This conclusion seems inescapable. If Janelle and Arjun, after the common representation we have been considering here has concluded, approach a new law firm for representation of their emerging business, that new law firm may certainly accept that representation, having no connection at all to Netia.

might call the *Brennan's, Inc.* theory, and that justification, while weak, is not necessarily incoherent. In the well-known *Brennan's, Inc.* case, a law firm simultaneously represented two restaurateur brothers, each with a separate business organization, within the Brennan family in New Orleans.[138] When the collaboration ended after one brother established a competing restaurant using the family logo, the law firm remained as counsel to that brother.[139] In responding to a motion to disqualify the law firm, based on doctrine that later emerged as Rule 1.9, the firm argued that it was in no more advantageous posture than any new law firm would be, and therefore should not be disqualified.[140] Because any confidential client information the former counsel had access to would be available to the successor firm, given that joint clients regularly share information, the former counsel had obtained no advantage that could conceivably cause harm to the former client.[141] The Fifth Circuit acknowledged that argument but disqualified the firm nevertheless, reading a *loyalty* component into the Rule 1.9 doctrine along with a confidentiality component.[142] Because the two brothers' restaurants were competitors, and, because each wanted to use the Brennan's logo, it was impermissibly disloyal for the firm to choose which of the family factions—that is to say which of its former clients—it would support.[143]

The *Brennan's, Inc.* ruling remains good law, despite its questionable logic.[144] That doctrine would deny Sofia the opportunity to work with Janelle and Arjun after Netia leaves without waiving any former client conflict if the adversity condition was satisfied.

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[138] Brennan's, Inc. v. Brennan's Rests., Inc., 590 F.2d 168, 170–71 (5th Cir. 1979). *Brennan's, Inc.* appears in several law school Professional Responsibility textbooks; *see generally*, GEOFFREY C. HAZARD ET AL., LAW AND ETHICS OF LAWYERING 457 (5th ed. 2010); ANDREW L. KAUFMAN & DAVID B. WILKINS, PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION 95–98 (4th ed. 2002); LERMAN & SCHRAG, *supra* note 128, at 502.

[139] *Brennan's, Inc.*, 590 F.2d at 171.

[140] *Id.* at 174.

[141] *Id.* at 173.

[142] *Id.* at 172.

[143] *Id.*

[144] The result in *Brennan's, Inc.* follows from a direct application of the substantial relationship test of Rule 1.9. The Restatement also relies on the *Brennan's, Inc.* opinion in support of its interpretation of former client conflicts of interest. *See* RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 132 cmt. g (2000).

The adversity factor is essential.[145] In *Brennan's, Inc.*, the two formerly represented brothers' businesses competed directly, and each wanted access to the logo in question, so adversity was strongly evident.[146] In the scenario considered here, no business activity exists yet with any of the founders, and Netia may or may not succeed in establishing an ongoing enterprise. Perhaps that difference would permit the firm to continue representing the remaining founders even without the waiver, but little reported substantive authority is available to support that proposition.[147]

One last observation warrants a brief discussion here before the analysis moves on to consideration of a less contentious change of client personnel. The above discussion assumes that the jurisdiction in question does not adhere to the rather quirky *Jesse v. Danforth* doctrine. In *Jesse*, the Wisconsin Supreme Court held that a group of founders working with a law firm to establish a business entity, while apparently individual joint clients during the formation stage, retroactively convert to constituents of the entity—instead of former clients of the firm—after the entity has been established.[148] Therefore, as occurred in *Jesse*, the firm may represent another client on a substantially related matter contrary to the interests of one of the founders without that founder's consent.[149] *Jesse* is not followed in all states,[150] and its holding

[145] *See id.*; *see also Brennan's, Inc.*, 590 F.2d at 172 ("A client would feel wronged if an opponent prevailed against him with the aid of an attorney who formally represented the client in the same matter.").

[146] *See Brennan's, Inc.*, 590 F.2d at 170.

[147] *See generally* Lemaire v. Texaco, Inc., 496 F. Supp. 1308 (1980) (holding that plaintiff's counsel was not disqualified by hiring a new attorney who previously worked for defendant's law firm since the new attorney refused to discuss the case with firm members, and the difficult nature of the case would make it hard to locate other qualified counsel); Rohm & Haas Co. v. American Cyanamid Co., 187 F. Supp. 2d 221 (D.N.J. 2001) (finding that although adversity existed between the parties, a significant delay in moving for disqualification constituted waiver); *In re* Texas Windstorm Ins. Ass'n, 417 S.W.3d 119 (Tex. App. 2013) (holding that no adversity existed between association and former client of attorney since former client was not a current party to consolidated lawsuit).

[148] Jesse v. Danforth, 485 N.W.2d 63, 67 (Wis. 1992).

[149] *See id.* at 68–69.

[150] A federal court in Minnesota, ruling on a dispute involving a Florida corporation, followed *Jesse*'s retroactivity analysis. *See* Manion v. Nagin, 394 F.3d 1062, 1069–70 (8th Cir. 2005). Delaware has declined to follow the *Jesse* reasoning. *See, e.g.*, Opdyke v. Kent Liquor Mart, Inc., 181 A.2d 579, 583–85 (Del. 1962).

has not been adopted by the *Restatement of the Law Governing Lawyers*.[151] If it were the law in this firm's state, however, the above analysis might change.[152]

3. Founder Mobility Resulting from Drift

The fact that startups often begin with a loose coalition of actors developing an idea means that from time to time the constitution of the founding group will evolve, with some participants drifting away to other projects and new helpers showing up.[153] That "drift" phenomenon has important consequences for the law firm. Once the firm has identified its joint clients, and has entered into formal written retainer agreements with them, a change in the composition of the group requires a corresponding reworking of the retainers.[154] The new retainer also triggers the need to review the informed consent agreement regarding the joint representation, especially (but seemingly not solely) for any newly engaged jointly represented client.[155] The firm also ought to formally end the representation agreement with the departing member of the entrepreneurial team.[156]

With "drift," in contrast to the explicit disagreement among the founders discussed above, the firm typically has less to worry about its continued representation of the remaining founders. The absence of disagreement does not mean that the firm can simply forget about or ignore the interests of the drifting-away entrepreneur,

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[151] *See* RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 121 cmt. d (2000) (describing *Jesse* as "consistent with the Section and Comment," but not adopting the retroactivity principle).

[152] It is not self-evident that the analysis would change in a *Jesse* jurisdiction, however. The *Jesse* principle would necessarily hold that *during the pre-incorporation representation* the individuals who later, after incorporation, will retroactively become non-clients will be full clients until that time. Otherwise, if those persons never had individual client status, the "retroactivity" notion would have no meaning. *See Jesse*, 485 N.W.2d at 67–68; J. S. Nelson, *The Corporate Conspiracy Vacuum*, 37 CARDOZO L. REV. 249, 297 (2015).

[153] *See* Faustman, *supra* note 117.

[154] *See* RUPA § 801 cmt. 1 (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997) ("Even if the business of the partnership is continued by some of the partners, it is technically a new partnership.").

[155] MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 2 (2015).

[156] *Id.* r. 1.7 cmt. 4 ("If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation[.]").

however. A participant who served as a client for a period of time and then stops working with the team because of a change in plans or a loss of interest may nevertheless still have some claims to the fruits of the resulting enterprise.[157] The firm must address those possible rights, both in its communication with the departing founder and in its renewed agreement with the remaining founders.[158] The fact that the departing founder may have some claims to share in the resulting success of the enterprise does not inherently present any conflict of interest for the firm's ongoing work, as the success of the startup benefits the former client as well as the ongoing clients.[159] Therefore, no waiver of conflicts by the former or current clients would be necessary except in two circumstances: (1) the continued business would compete directly with the drifting founder,[160] or (2) the remaining founders cannot agree on the share of the enterprise to which the departing founder will later be entitled.[161]

The first of those two circumstances puts the law firm in the same posture as when the departing founder leaves because of a disagreement, as explored above. The second circumstance places the law firm in a challenging position. To appreciate that difficulty, imagine this example: Janelle, Arjun, and Netia, the three founders of the inchoate business, retain Sofia and her law firm for common representation, and the firm agrees to represent the three entrepreneurs individually. After the team has worked together for a few weeks, Netia gradually but noticeably stops participating in the group's planning and development. Efforts by the remaining team members to reengage Netia do not succeed. The team finally agrees that it ought to replace Netia with a new team member, Rica.

The law firm's response ought to be to confirm with Netia, in writing, her choice to leave the team and the consequential cessation

[157] *See* Ale & McKinney, *supra* note 8, at 479–80.

[158] MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 2.

[159] *Id.* r. 1.7(b)(3).

[160] The analysis in the text assumes that in the "drift" context the departing founder simply moves on to other activities, which contrasts with the situation discussed earlier where an irreconcilable difference arises, requiring the joint representation to cease. *See supra* note 112 and accompanying text. Of course, that assumption may not apply to some of the drift settings, so the earlier disagreement-driven analysis could apply in this setting as well.

[161] MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(4).

of the representation.[162] The firm must also counsel Rica, along with the remaining original founders, about the implications of the new joint representation agreement among Janelle, Arjun, and Rica.[163] Those two activities relate, in this way: the informed consent discussion surrounding the joint representation including Rica inevitably invites consideration of the remaining interests (if any) of Netia, the law firm's former client. Sofia, the lawyer counseling the team about the new joint representation, must not undermine her former client's interests during that deliberation. In fact, Sofia might choose, in her confirming letter or email to Netia, to explicate the rights and interests Netia continues to possess, or might continue to possess, in the team's enterprise.[164] The remaining members of the team might prefer that the lawyer not inform the departing founder of any such interests, but that preference cannot affect the lawyer's responsibilities to her former client.[165]

If the lawyer and the remaining team members disagree about the rights and interests of Netia, the lawyer's response to that disagreement will depend on the clarity and soundness of Netia's

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[162] Rule 1.16 applies whenever a lawyer stops representation prior to its natural completion, and its permissive withdrawal provisions would most likely operate here. *See* MODEL RULES OF PROF'L CONDUCT r. 1.16(b)(6) (stating that attorney withdrawal is permitted when "the representation ... has been rendered unreasonably difficult by the client"). The "drift" story resembles (but is also distinctly different from) the situation where a lawyer loses contact with a client in the middle of a matter. At least two state bar ethics committees have addressed the responsibilities of a lawyer whose client has disappeared. *See* Alaska Ethics Op. 2011-4, 2011 WL 2410520 (2011), https://www.alaskabar.org/servlet/content/11_4.html [https://perma.cc/5V9N-T4JM] (requiring a "reasonable inquiry"); Ill. St. Bar Ass'n Advisory Opinion on Prof'l Conduct No. 03-04 (2004) (advising the lawyer to "use due diligence in conducting an investigation" to locate the client or the needed facts if the representation must proceed); *see also* Karen Erger, *The Client that Got Away*, 92 ILL. B.J. 433 (2004); Allison E. Williams, *Missing Clients: What to Do When Your Client Has Vanished*, 28 J. LEGAL PROF. 247 (2004).

[163] *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 29.

[164] As the above discussion indicated, the "drift" scenario finds the law firm withdrawing, permissibly, from an ongoing representation. Rule 1.16(d) states that the "lawyer shall take steps to the extent reasonably practicable to protect [the] client's interests" upon such termination of representation. MODEL RULES OF PROF'L CONDUCT r. 1.16(d). That obligation arguably requires the lawyer to inform his client of her status as a former member of the founders' team.

[165] MODEL RULES OF PROF'L CONDUCT r. 1.16(d).

interests notwithstanding her having drifted away. If Netia's interests in the ultimate business enterprise are not clearly assured under the circumstances, which is not at all unlikely,[166] then the lawyer may proceed with her representation of the remaining founders without advising Netia that she might have some later claims to some stake in the business.[167] If Netia possesses clear interests, but the remaining founders prefer that the lawyer withhold that information from Netia, then a conflict exists that might require the joint representation to end.[168]

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[166] Netia's arguments that she is entitled to share in the success of the resulting enterprise after having participated at the earliest stages of the business's development, and having voluntarily drifted away before the business began operations, are not self-evidently strong. Her rights under partnership law (if the enterprise qualified as one, which it does not) would be limited, so her rights without partnership entitlements would be even less. Under RUPA, Netia would be entitled to a fair distribution of her share of the partnership net assets at the time she departs. *See* RUPA §§ 601(7), 603, 701, 801(1) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997). If she has departed before the partnership has any measurable value, her later claims to a share of increased value would have little chance of success. For her copyright interests, see *infra* note 284 and accompanying text.

[167] The lawyer in this story has three possible choices in her Rule 1.16–generated communication with Netia: (1) actively encourage Netia to pursue claims that might have merit; (2) advise Netia that she may, but also may not, have claims, but the lawyer may not advocate for or against Netia on that question; or (3) omit any mention of possible claims. Option (1) is simply not acceptable, as it favors one of the original joint clients over the others—a stance the lawyer committed to avoid when she accepted the common representation originally. The remaining founders prefer Option (3), of course. Sofia will also prefer Option (3) (since she continues to represent the remaining founders, but not Netia), and she will choose it if it is an ethically proper alternative. It appears to be ethically proper. Because it is not certain that Netia has any viable claims at all, and because Sofia's joint representation agreement requires that she use her best efforts to maintain a careful neutrality among her several clients, no authority would condemn the lawyer for a failure to upset the delicate balance by encouraging her now-former client to pursue claims that her current clients hope will not be pursued. *See* Marc Pilcher, Note, *"You're Killing Independent George": When Professionalism and Business Worlds Collide*, 12 GEO. J. LEGAL ETHICS 829, 834 (1999) (describing the duties owed to former clients after joint representation).

[168] Because of the usual requirement that the lawyer share information among jointly represented clients, see MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 31 (2015), the law firm may have an obligation not just to withdraw from the common representation, but to share with Rica information about the strategy learned from the remaining founders. AM. C. OF TR. & EST. COUNS. FOUND.,

III. REPRESENTING FOUNDERS OF ACTIVE FOR-PROFIT ENTERPRISES

It is surely true that in some representational contexts involving multiple founders, but not all such contexts, the group of founders will constitute a partnership.[169] The lawyer will typically encounter a mutually exclusive choice: *either her group constitutes a partnership, or not, with no intermediate alternative available*. Part III examines the ethical responsibilities of the lawyer when she concludes that the group with whom she works qualifies as a partnership. Those responsibilities will be different in some important ways from her duties in working with multiple individuals.

A. Discerning When the Group Qualifies as a Partnership

Because it matters in significant ways, the lawyer ought to be able to determine whether Janelle, Arjun, and Netia are partners, or not. We encountered this question above,[170] and that discussion concluded that while the choice may be mutually exclusive, it is not always self-evident. In some settings the partnership qualities will be clear. If the business is operational, directed by more than one founder, with contributions from those directing founders, and an agreement for shared ownership and responsibility for the profits (when they come) and losses, the lawyer ought to proceed as though she has encountered a partnership by operation of law.[171] If the business is not yet operational, but merely a brainstorm that awaits development with no intentions yet to share profits and losses, the lawyer may assume with little risk that the founders come to her as individuals.[172]

In many settings, especially with nascent startup operations, it will not be clear to the lawyer which category best fits the activity she observes. Commentators often note the lack of precision in the

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COMMENTARIES ON THE MODEL RULES OF PROF'L CONDUCT 75 (4th ed. 2006); *see also* Kevin H. Michels, *What Conflicts Can Be Waived? A Unified Understanding of Competence and Consent*, 65 RUTGERS L. REV. 109, 164 (2012).

[169] Darby, *supra* note 39, at 326 ("One must look to the intent of the parties, the facts of the association, the rights of the parties, and profit-sharing to determine on a case-by-case basis if a partnership does exist.").

[170] *See supra* notes 29–41 and accompanying text.

[171] HURT ET AL., *supra* note 30, § 2.05.

[172] *Id.* § 2.06.

substantive law regarding whether a partnership exists or not,[173] so it is no surprise that a lawyer at the early stages of an enterprise will experience that uncertainty. In the face of ambiguity, the lawyer ought to err on the side of treating the participants as individuals.

One might suggest that in those ambiguous contexts the lawyer and the founders simply should negotiate among themselves and choose the favored categorization, with a retainer agreement memorializing that choice. That suggestion fails for two reasons. First, the counseling process and the lawyering work needed to discern the best way to proceed require that the lawyer already have some client relationship with the participants,[174] so the suggestion is, in that way, question-begging. Presumably, the group will soon enough select some formal entity through which to conduct the business, so the questions we face here apply only to the earliest stages of the lawyer's work with the participants.[175] Second, it is not entirely clear that the founders may autonomously choose a category if the underlying substantive law does not support it, and such an election might introduce subtle risks to the participants if they ultimately make the wrong choice.[176]

Instead, the lawyer must discern independently, using her best legal judgment, whether to proceed as though the founders are individuals or an entity. A prudent lawyer will discuss this ontological puzzle with the founders, and she will likely explain how the group's later agreements will resolve any present ambiguities. Where she is not entirely sure which category best fits, she ought to err on the side of no partnership. One reason for this conclusion is that the substantive law of partnership presumes no partnership.[177] A participant who claims to be a partner bears the burden

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[173] *Id.* § 2.01(A); BAINBRIDGE, *supra* note 13, at 104; *see also* Anthony J. Luppino, *Fixing a Hole: Eliminating Ownership Uncertainties to Facilitate University-Generated Innovation*, 78 UMKC L. REV. 367, 404–18 (2009).

[174] *See* Burman, *Forming the Lawyer-Client Relationship*, *supra* note 6, at 46–47.

[175] *Id.* at 48–49.

[176] For instance, if the participants opt to proceed for the time being as if they constituted a partnership, but they were not in fact a partnership, some founders might have relied on commitments that may not be enforceable. *See, e.g.*, Fenwick v. Unemp. Compensation Comm'n, 44 A.2d 172, 174–75 (N.J. 1945) (holding no partnership existed despite participants using that term).

[177] HURT ET AL., *supra* note 30, § 2.02(B); *but see id.* § 2.07(A)–(C).

of proving each of the partnership elements.[178] The other reason for the lawyer to treat the founders as individual clients when she is uncertain of the application of partnership law principles is grounded in the strategic planning insight that recommends keeping as many options open as possible or, put another way, seeking to foreclose as few options as possible.[179] The individual client model does not foreclose any structuring that the participants might desire, while a partnership model imposes default obligations that might be inappropriate for the group.[180]

B. How the Partnership Identity Affects the Firm's Responsibility

Let us turn to those settings where the lawyer is sufficiently confident that the group of founders is indeed a partnership, even if the founders do not yet know that fact.[181] The next undertaking for the law firm is to articulate how representation of a partnership, at the startup level, is different in a substantive way from representation of the individual founders who possess only an inchoate business idea. We begin with an elementary legal ethics principle: the representation of a partnership does not mean representation of the individual partners, absent a separate agreement.[182] As we shall see in a moment, this fundamental precept is not as well-established or accepted as some authorities might

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178 *Id.* § 2.02(B); Woods v. Wills, 400 F. Supp. 2d 1145, 1185 (E.D. Mo. 2005). Where partnership must be established by operation of law, proof must be by "'clear, cogent and convincing evidence that the purported partners have made a definite and specific agreement.'" *Id.* (quoting Morrison v. Labor and Indus. Relations Comm'n, 23 S.W.3d 902, 909 (Mo. Ct. App. 2000)).

179 *See* GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY 298 (1978).

180 *See* BAINBRIDGE, *supra* note 13, at 125–33 (describing capital contribution requirements, division of profits and losses, and liability responsibilities that accompany default partnerships).

181 *See* Luppino, *supra* note 173, at 408 (discussing "[a]ccidental or [i]ll-[d]efined [p]artnerships" and "the possibility of accidental or inadvertent creation of a partnership").

182 The ABA treats "a lawyer who represents a partnership" as representing "the entity rather than the individual partners," stating that "[b]oth case authority and commentary support the treatment of partnerships as entities separate from their owners" for purposes of the attorney-client relationship. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 91-361 (1991); *see also* Keatinge, *supra* note 6, at 391–92.

imply, but it states a fundamental guiding principle.[183] It is the primary difference between the inchoate setting and the active business setting.[184]

If the law firm agrees to represent the partnership, and if the partnership qualifies as an entity,[185] then the firm would identify the client as the entity (the business) operating as a partnership.[186] The firm would then proceed by analogy to any other entity that it represented, using the guidance of Model Rule 1.13.[187] The individuals would not be clients of the firm (absent some separate agreement for a separate individually driven legal matter),[188] and the direction for the legal work would come from the "duly authorized constituents."[189] In theory at least, the firm could choose to oppose any of the founders in an adversary proceeding so long as that new action did not hamper the firm's work for the entity.[190] Articulating that scenario shows its unlikelihood in the context of a small startup, but conceptually it is basically a sound proposition.

Representing the partnership entity rather than the three founders as joint clients would be easier in this way: the firm would not need to obtain informed consent to the joint representation, although

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[183] *See* Keatinge, *supra* note 6, at 391–94.

[184] Unlike startups, active businesses usually retain independent counsel to represent the entire entity. *See* John M. Cunningham, *Helping Businesses Get Started*, BUS. L. TODAY, Nov.–Dec. 1995, at 9–12 (discussing unique legal challenges faced by startups).

[185] *See, e.g.*, Hopper v. Frank, 16 F.3d 92, 96 (5th Cir. 1994) ("There is no logical reason to distinguish partnerships from corporations or other legal entities in determining the client a lawyer represents.") (quoting ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 91-361 (1991)).

[186] The fact that the business may not yet have a name, or any other coherent identity beyond the founders' work together, does not matter for present purposes. The firm would need to determine how to refer to this client in its database.

[187] MODEL RULES OF PROF'L CONDUCT r. 1.13 (2015).

[188] Rule 1.13 confirms that a lawyer who represents an organization may also represent one or more of its constituents on an individual basis, as long as no disabling conflict of interest arises by virtue of the dual representation. *See id.* r. 1.13(a), (g); Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd., 197 P.3d 1051, 1059 (Nev. 2008) (finding no conflict of interest in representing corporation and majority shareholder in dissolution action); Campbell v. McKeon, 905 N.Y.S.2d 589, 591 (App. Div. 2010) (similar to the court in *Smith & Harmer*).

[189] MODEL RULES OF PROF'L CONDUCT r. 1.13(a).

[190] *See* Responsible Citizens v. Super. Ct. of Fresno, 20 Cal. Rptr. 2d 756, 766–67 (1993).

the firm would have a duty to share information with all of the founders if the entity were a true partnership, as this discussion assumes it is.[191] The firm would need to explain to the partners the distinction between individual representation and entity representation, with any "corporate Miranda warnings" contemplated by Rule 1.13(f),[192] as well as the need for information-sharing among the partners.[193] But the responsibility would be to *inform* the constituents, and not to obtain any consent from them as a condition of proceeding.[194] If any constituent did not like what she or he heard, the only remedy would be for the entity to decline the representation—but, of course, any other lawyer would be in precisely the same situation, so the entity does not have a "choice" between these conditions.[195]

A second significant difference between joint representation and entity representation appears in consideration of decision-making protocols. If the firm represented all three founders as joint clients, the firm could not implement a legal strategy if one of the

[191] A lawyer for a general partnership ordinarily has a duty to share relevant information with the partners, even if she does not represent the partners personally. *See* RUPA § 403(c) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997); *see also* Wortham & Van Liew v. Super. Ct. of San Diego, 223 Cal. Rptr. 725, 728–29 (1987) (holding the lawyer must disclose to third partner all information regarding the partnership, when lawyer represented a three-member partnership); Birmingham Bar Ass'n Comm'n on Prof'l Ethics, Op. 87-7 (1987); Thomas E. Rutledge & Phuc H. Lu, *No Good Deed Goes Unpunished: Pitfalls for Counsel to a Business Organization About to Be Governed by a New Law*, 45 BRANDEIS L.J. 755, 777–78 (2007).

[192] Rule 1.13(f) requires that a lawyer representing an organization "explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." MODEL RULES OF PROF'L CONDUCT r. 1.13(f); *see also* United States v. Ruehle, 583 F.3d 600, 604–05 (9th Cir. 2009) (describing this as a "so-called Upjohn or corporate Miranda warning").

[193] Nothing in Rule 1.13(f) requires, by that rule's language, an explanation about the lawyer's responsibility to share partnership information with all partners, but the analogy to that similar duty with joint clients is plain. *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 31; *see also supra* notes 90–94 and accompanying text (explaining that a lawyer who did not give notice to the partners of the plan to share information would not have acted as a prudent representative of the entity client).

[194] MODEL RULES OF PROF'L CONDUCT r. 1.7 cmts. 18, 19, 31 (discussing informed consent).

[195] *Id.*

clients opposed that strategy, because of the firm's unalloyed loyalty to each client.[196] In representation of an entity, by contrast, a firm may implement a strategy over the objections of one of the constituents, as long as the entity's "duly authorized constituents" approve the strategy.[197] In this way, entity representation is, conceptually at least, easier for the law firm than joint representation because the lawyers need not worry about having to withdraw from all representations if the founders disagree. But "easier" is not the same as "easy." With partnerships by default, discerning a decision-making structure is not self-evident.[198] Nor is determining who serves as the entity's "duly authorized constituents."[199] According to RUPA, management of a partnership operates through majority rule of the partners.[200] Therefore, absent an agreement otherwise (and in the settings we consider here, by default there is unlikely to be any such agreement), the firm has the authority and the duty to implement the decisions of two of the three partners notwithstanding the disagreement of the third.[201]

C. Partner Mobility: Drift and Breakdown

With founders who are deemed to be partners, just as with those who are an aggregate of individuals, the prospect of fluidity remains real.[202] The lawyer's response to a partner leaving, either

[196] *See supra* notes 76–80 and accompanying text. This hypothetical assumes there is no binding, articulated agreement among the founders for a decision-making protocol.

[197] MODEL RULES OF PROF'L CONDUCT r. 1.13(a).

[198] Because default partnerships arise without any planning or necessary forethought by the partners, the chances are high that no decision-making protocol will have been chosen by the team members. *See* Rutledge & Lu, *supra* note 191, at 772–75 (describing the client in a partnership).

[199] *Id.* at 770–72 (quoting MODEL RULES OF PROF'L CONDUCT r. 1.13 (1982, amended 1989)).

[200] RUPA § 407(j) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997) ("A difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners."); *see generally* Claudia M. Landeo & Kathryn E. Spier, *Shotguns and Deadlocks*, 31 YALE J. REG. 143 (2014).

[201] *See* Casey Ranch Ltd. P'ship v. Casey, 773 N.W.2d 816, 821 (S.D. 2009) (acknowledging that the default rule is that a majority controls); Covalt v. High, 675 P.2d 999, 1002 (N.M. 1983) (finding made under the New Mexico Uniform Partnership Act).

[202] *See generally* Ale & McKinney, *supra* note 8.

because of drift or because of active disagreement, will be different when the representation involves a partnership.

While the departure of one joint client participating in an emerging startup creates complications for the firm, and may deny the firm the privilege of continuing with the remaining founders, the departure of an entity constituent does not so directly affect the representation, assuming (and this is a critical assumption) that the partnership continues its enterprise through the remaining partners. That conclusion follows from the essential understanding of representing an entity. The departure of a shareholder from an established corporation does not affect the firm's continued representation of the corporation if the board so chooses.[203] Similarly, the departure of a member from an LLC has no direct effect on any ongoing legal work if the managers desire the continued representation.[204] Therefore, entity representation would appear to offer the firm a more stable basis for uninterrupted production of assigned legal work from the business.

With a general partnership, however, the matter is considerably more complicated. The older Uniform Partnership Act held that the departure of any partner dissolved the partnership.[205] RUPA changed that doctrine, introducing the concept of "dissociation" to address those scenarios where one partner departs but the partnership business continues through the remaining partners.[206] When a partner dissociates under RUPA, most often the partnership will continue, and the dissociating partner will leave with her share of the partnership assets, arranged effectively as a buyout.[207] Unfortunately, for the lawyer working with startup founders, RUPA's

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[203] A change in ownership of a corporation does not affect the organization's lawyer's duty to the organizational client. *See, e.g.*, Bryan Corp. v. Abrano, 52 N.E.3d 95, 100–02 (Mass. 2016) (disqualifying a corporation's lawyer after suing corporation when new board took control); Goodrich v. Goodrich, 960 A.2d 1275, 1285 (N.H. 2008) (holding that a corporation with new ownership gained attorney-client privilege with the law firm that represented corporation previously); Christopher C. Wang, Comment, *Breaking Up Is Hard to Do: Allocating Fees from the Unfinished Business of a Professional Corporation*, 64 U. CHI. L. REV. 1367, 1374 (1997).

[204] *See* Feeley v. NHAOCG, LLC, 62 A.3d 649, 674–75 (Del. Ch. 2012) (holding LLC member did not have unilateral right to force a cessation of business).

[205] *See* UPA § 29 (CONF. OF COMM'RS ON UNIF. ST. LAWS 1914).

[206] RUPA § 801(1) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997).

[207] *Id.* § 701; *see also* Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1391 (2006).

dissociation option will not easily apply, as explained below,[208] which means that the partnership would often dissolve when a partner leaves the enterprise through drift or disagreement.[209]

RUPA distinguishes between "at-will"[210] and "term"[211] partnerships. The partnership established by operation of law by the activity of a group of startup founders will inevitably be an at-will partnership, as no separate agreement would have been established.[212] The dissociation option does not apply to an at-will partnership except where the dissociated partner has been expelled by the other partners for various identified reasons or in identified circumstances.[213] A partner simply leaving an at-will partnership does not trigger RUPA's dissociation alternative, which means that the partnership must dissolve, just as under the older UPA doctrine.[214] Only if all of the parties agree, including the departing partner, may the original partnership continue.[215]

Let us apply this to the AddicTrak example introduced above,[216] starting with the "drift" scenario and then comparing that to the disagreement scenario.

1. Partner Drift

As we saw when the founders were not yet a partnership, after the team has worked together for several weeks after the first meeting with counsel (and before any final action has occurred to create a formal entity), Netia gradually but noticeably stops participating in the group's planning and development. Efforts by the remaining team members to re-engage Netia do not succeed. The

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[208] RUPA § 101 cmt. (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997).

[209] *Id.* § 801(1).

[210] *Id.* § 101(8) ("'Partnership at will' means a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking.").

[211] *Id.* (explaining that RUPA does not expressly define term partnerships, but its definition of at-will partnerships identifies the concept by implication.).

[212] *Id.* § 101 cmt. ("Presumptively, every partnership is an at-will partnership.").

[213] *Id.* § 801(1).

[214] *Id. See* Val Ricks, *Self-Help in the Break-Up of Informal Partnerships*, 12 DEPAUL BUS. & COM. L.J. 259, 262–63 (2014).

[215] BAINBRIDGE, *supra* note 13, at 170; Ricks, *supra* note 214, at 265–66.

[216] *See supra* notes 40–41 and accompanying text.

team finally agrees that it ought to replace Netia with a new team member, Rica. Sofia, the team's lawyer, must now reassess her representational responsibilities.

The partnership that Sofia represents is an at-will partnership, because it has no term.[217] Netia's having left the team may reasonably be seen as her withdrawal from the partnership,[218] and not because of an expulsion under circumstances addressed by RUPA.[219] Her departure therefore dissolves the partnership, and Sofia now represents a dissolving, winding-up entity.[220] The remaining partners have two options, assuming, as is quite likely, that they want to continue their nascent and emerging business, albeit without Netia. One option is to obtain Netia's express agreement to continue the partnership, an option permitted by RUPA.[221] In the "drift" scenario, Netia likely has no objection to the remaining partners continuing with AddicTrak,[222] but her silence seemingly

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[217] *See* Bendalin v. Youngblood & Assocs., 381 S.W.3d 719, 740 (Tex. App. 2012); BAINBRIDGE, *supra* note 13, at 167.

[218] Netia's dissociation would be based on her partners' "having notice of [Netia's] express will to withdraw as a partner." RUPA § 601(1) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997). That notice need not be in writing. *See* Robert W. Hillman, *RUPA and Former Partners: Cutting the Gordian Knot with Continuing Partnership Entities*, 58 L. & CONTEMP. PROBS. 7, 15–16 (1995) (analyzing this question under RUPA). According to RUPA, a person has notice of a fact when the person "knows of it; has received a notification of it; or has reason to know it exists from all of the facts known to the person at the time in question." RUPA § 102(b) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997). Partners may require that notice be in writing in their partnership agreement if they choose. *Id.* § 103(b)(6).

[219] RUPA permits dissociation to occur rather than dissolution if the partners expel the departing partner for reasons expressed in the partnership agreement or through a judicial order based on the departing partner's "material breach of ... a duty owed to the partnership." *Id.* § 601(2)–(3), 601(5). Because the setting discussed in the text involves a default partnership with no written agreement, the former expulsion option does not apply. And the partners are very unlikely to seek a court order because of one of their group members drifted away, so the latter option is equally inapplicable.

[220] *Id.* § 803 (explaining that partners participate in winding-up process); *see also* Rutledge & Lu, *supra* note 191, at 770–71.

[221] RUPA § 802(b) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997).

[222] In the informal, pre-entity startup setting, it is quite likely that Netia does not know that she is (or was) a partner or what the dissolution or dissociation implications are of her new lack of engagement.

is not sufficient.[223] She needs to agree that the business will continue without her.[224] An email from Netia should suffice.[225]

A cautious lawyer might consider the option of communicating to Netia, after she has stopped participating in the enterprise, to confirm in writing the firm's conclusion that Netia has left the first partnership voluntarily, that the remaining partners wish to continue to pursue the enterprise's business model, and that the firm intends to remain as counsel to the partnership. Sofia might perceive such a letter or email as providing the necessary hindsight clarity should a dispute about the departure arise in the future, after the business has become prominent or profitable. Whether such a writing serves the strategic purposes of the firm is a question that will turn on the facts and circumstances of the enterprise and the firm's relationship with Netia. For purposes of this discussion about the lawyer's responsibilities, the ethics question is whether Sofia has any right to communicate with Netia without the permission of Janelle and Arjun. The answer to that question appears to be probably yes.

Netia has never been a client of Sofia, but only a constituent of Sofia's organizational client, the partnership. She is therefore not a former client.[226] Model Rule 1.6(a) limits what Sofia may disclose to others outside of the organization.[227] While Netia was a partner, Sofia could communicate with her about partnership matters without any consent of the other partners, as she did have a right under partnership law to information about the partnership business during her time as a partner.[228] She is now no longer a partner. After Netia ceases to be a partner, the ordinary application of the confidentiality rule would conclude that Sofia may not communicate about the enterprise's business affairs

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[223] RUPA § 802(b) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997).

[224] *Id.*

[225] All of the partners must waive the rights to have the partnership terminated to avoid dissolution. *Id.* That provision does not require that the waiver be in writing. *Id.* Even if that is a fair reading of the law, it is common to accept email as sufficient written notice. *See, e.g.*, Fresno Motors, LLC v. Mercedes Benz USA, LLC, 771 F.3d 1119, 1129–30 (9th Cir. 2014).

[226] *See supra* notes 124–26 and accompanying text.

[227] MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (2012) (Information may not be disclosed outside of the client relationship without client consent.).

[228] *See* RUPA § 403(b), (c) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997).

without the informed consent of the management of the client.[229] But Sofia has no "client" except for the dissolving partnership, which, according to RUPA, "continues after dissolution only for the purpose of winding up its business."[230] And all partners, except those who have wrongfully dissociated, "may participate in winding up the partnership's business."[231] Therefore, Sofia may communicate with Netia about partnership affairs just as she does with Janelle and Arjun, at least to the extent that Netia needs to know partnership information or have access to the partnership's books and records.[232]

The second option, if Netia does not agree to the continuation of the partnership, is for Sofia to recognize the reconstituted group of founders as a new partnership, with Janelle, Arjun, and Rica as the partners.[233] Nothing prevents Janelle and Arjun from starting a new partnership, of course,[234] but that would be a new entity. The firm must acknowledge, though, that the dissolved partnership is now a former client, and the successor partnership is a new client, requiring a new retainer in writing.[235] The critical point is that the dissolution of the partnership leaves the law firm *without any client at all*, until it establishes a relationship with one or more of the original partners.[236] Presumably, in the "drift" scenario, Netia will neither be competing directly with her former team members, nor have any objection to a new partnership arising. But, of course, she may. To appreciate Netia's rights as a former

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[229] MODEL RULES OF PROF'L CONDUCT r. 1.6(a).

[230] RUPA § 802(a) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997); *see also* Arnold M. Wensinger, *The Revised Uniform Partnership Act Breakup Provisions: Stability or Headache?,* 50 WASH. & LEE L. REV. 905, 928 (1993).

[231] RUPA § 803(a) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997).

[232] It is true that partnerships by default operate by majority rule. *Id.* § 401(j). However, a majority of partners may not vote to deny a minority partner access to information or the partnership's books. *Id.* § 103(b)(2) (partners may not "unreasonably restrict the right of access to books and records under Section 403(b)"); Landeo & Spier, *supra* note 200, at 154.

[233] *See* Clay B. Wortham, *Revised Uniform Partnership Act: Anomalies of a Simplified, Modernized Partnership Law*, 92 KY. L.J. 1083, 1089–90 (2004).

[234] *See id.*

[235] *See* MODEL RULES OF PROF'L CONDUCT r. 1.5 (2002); *supra* note 19 and accompanying text.

[236] RUPA permits the dissolving partnership to continue to operate during the winding-up period. *See* RUPA § 803 (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997). But, no entity exists after the dissolution has been effected. *Id.*

partner while the other founders establish a new partnership, let us turn to the question of partner fluidity through disagreement, for which the potential conflicts between Netia and her other partners are more apparent.

2. Partner Disagreement

Imagine, similar to the above discussion in which the participants were individual joint clients,[237] that after the law firm has accepted the representation of the partnership of Janelle, Arjun, and Netia, the team encounters serious internal conflict about how the enterprise will proceed, with Janelle and Arjun disagreeing with the strategic visions of Netia. The efforts of Sofia, the partnership's counsel, to mediate the differences among the partners do not succeed. Whereas in the joint representation context that disagreement required the withdrawal of the law firm from continued representation, in the partnership setting Sofia may proceed while taking direction from the majority of partners.[238] But let us assume now that Netia announces that she will leave the partnership.

The same analysis applies as described above when Netia drifted away, in that the partnership cannot remain in place without Netia's express permission,[239] which in the conflict setting is even less likely. Therefore, the option for Janelle and Arjun, with Rica now joining the team, is to form a new partnership, which Sofia would presumptively represent. Similarly, nothing prevents Netia from starting a new business in any fashion, including with Rashad as a partner, forming a new partnership.[240] Those two partnerships (Janelle, Arjun, and Rica; Netia and Rashad) could compete directly, as long as the competition was "fair, meaning in large part that it does not involve use of confidential information and trade secrets."[241] The duty of loyalty that all partners possessed during the

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[237] *See supra* notes 70–83 and accompanying text.

[238] RUPA § 401(j). Recall that the startup story here assumes no written partnership agreement that would alter the common or statutory law governing partnership management.

[239] *Id.*

[240] J. DENNIS HYNES & MARK J. LOEWENSTEIN, AGENCY, PARTNERSHIP, AND THE LLC IN A NUTSHELL 251 (3d ed. 2005).

[241] *Id.*

life of the partnership does not prevent direct competition after the partnership has dissolved.[242] RUPA states that "a partner is free to compete immediately upon an event of dissolution ... unless the partnership agreement otherwise provides."[243] Because the partnerships considered here are formed by default, no such partnership agreement will interfere with the right to compete immediately, as long as the secrets of each partner are respected.[244]

That analytic reading of the legal ethics and partnership doctrines triggers some rather complicated practical implications for Sofia and her law firm, given the fluid nature of the work occurring both within the business and in the law firm. If Netia chooses to leave and provides clear notice in advance of her intention to dissociate from the partnership,[245] then the firm will respond by preparing to lose its client (the partnership) on the date of the dissociation, subject to any wind-up, and can choose whom it will seek to represent after that date.[246] But that carefully planned dissociation is not likely to occur during the beginning stages of a startup operation, where friends and colleagues work together to see if a business idea has legs. Netia may respond to her disagreements with Janelle and Arjun by employing passive-aggressive tactics, participating less in the business, and telling another member of the team that she no longer wishes to be part of the enterprise. Determining exactly when the original client has lost

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[242] *Id.*

[243] RUPA §§ 404 cmt. 2, 603(b)(2).

[244] How one determines what information that Netia brought to the original partnership would qualify as a trade secret or confidential information is beyond the scope of this Article. For a discussion of that topic, see Robert W. Hillman, *Law Firm Risk Management in an Era of Breakups and Lawyer Mobility: Limitations and Opportunities*, 43 TEX. TECH L. REV. 449, 459–60 (2011); *see also* Luppino, *supra* note 173, at 374. Understanding the scope of any such trade secrets or confidential information would be critical for the law firm if it intends to continue to work with one of the resulting new partnerships, as its representational duties will be limited by the constraints of those secrets.

[245] Not surprisingly, RUPA's protocols contemplate a partner's explicit and overt dissociation, as its teachings tend to apply to active businesses with assets, property, debt, and so on. With startups composed of participants who may not know that they are partners, the leaving may be less formal and explicit. *See* RUPA § 801.

[246] *Id.* § 801(1).

its identity will not be easy for the firm, and avoiding giving advice to the successor partnership will be almost impossible.[247]

The firm could anticipate this eventuality in its original retainer agreement, perhaps. That agreement would identify the client as the partnership, and the three founders as general partners, unless and until a different entity has been established. Absent a written partnership agreement (which may never materialize if the founders agree rather soon to establish a different entity such as an LLC), the partners will decide matters with equal authority and own the business equally. The retainer may proceed to state that if any partner chooses to leave the enterprise, that departure will most likely dissolve the partnership, and the firm may negotiate any future retainer with the remaining partners or with the partner who has left. The retainer agreement could then include a warning to the partners that the firm will use its best efforts to determine when an automatic dissolution has occurred, and will seek to avoid offering advice, other than wind-up advice,[248] to the partners after any such dissolution has occurred, until the participants understand whom the firm will represent going forward.

The engagement letter or retainer agreement could also include notice that any advice provided by the firm to any partners after dissolution without knowledge of the dissolution may not be used by any former partner of the former client to limit the firm's choices of representation in the future.[249] It is not entirely clear

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[247] Under more conventional circumstances, winding-up the partnership "entails selling its assets, paying its debts, and distributing the net balance, if any, to the partners in cash according to their interests." *Id.* § 801 cmt. 2.

[248] For a discussion of the role of the partnership lawyer in the wind-up process, see Mark J. Fucile, *Keeping Company: Representing Start-Up Business in Good Times and Bad*, OR. ST. B. (Apr. 2002), https://www.osbar.org/publications/bulletin/02apr/company.htm [https://perma.cc/LPB4-Y5WZ] (discussing potential attorney conflicts in dissolution); 68 C.J.S. *Partnership* § 440, Westlaw (database updated September 2016) (noting that a partnership continues through dissolution as to third parties).

[249] It is important to understand that the law firm may not learn that Netia has left the partnership until several weeks after that development has occurred. The partnership may have dissolved by the default operation of RUPA without the lawyers having advised about either the dissolution or the default formation of a new partnership among the remaining founders. The intent of the language suggested in the text would be to preclude Netia from claiming that the law firm provided advice to her after she was no longer a constituent of the

that such self-protective language would have much relevant substance,[250] but it does not appear that including that warning, should the firm so choose, violates any ethical duty or common law doctrine prospectively limiting a law firm's liability for malpractice.[251] Whether the firm would choose to include in its retainer agreement such a direct treatment of future partner departures is a judgment call for the firm weighing the risks of not covering the topic and the worries generated by raising the matter so early in the relationship.[252]

Law firms representing true ground-level startups, and especially pro bono firms working with those businesses with the fewest assets and the least developed business plans, might find that "the drift" described here happens with some regularity within the loosely organized groups of entrepreneurs who come to the lawyers with their embryonic new business ideas.[253] If drift is a

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client and, therefore, that she qualified as a former client under Rule 1.9. *See* MODEL RULES OF PROF'L CONDUCT r. 1.9(a) (2002); Griva v. Davison, 637 A.2d 830, 838 (D.C. 1994) (finding the partnership lawyer had developed an attorney-client relationship with one of the partners).

[250] The language in the text resembles a form of advance waiver to a former-client conflict of interest, which under many circumstances is enforceable. For a discussion of advance waivers, see generally Michael J. DiLernia, *Advance Waivers of Conflicts of Interest in Large Law Firm Practice*, 22 GEO. J. LEGAL ETHICS 97 (2009); Elena Postnikova, Note, *Conflict Waivers that Do Not Cure Conflicts Apparent Inconsistency in the Jurisprudence Governing Advance Waivers and How These Waivers Can Become More Effective*, 28 GEO. J. LEGAL ETHICS 839 (2015).

[251] The Model Rules substantially restrict a lawyer's authority to negotiate an advance waiver of malpractice. *See* MODEL RULES OF PROF'L CONDUCT r. 1.8(h)(1) (clarifying that waiver is only effective if the client has independent representation, and not just the opportunity to seek such counsel). The language in the text does not ask for a prospective limitation on malpractice liability, but only clarifies the lawyer's role during an otherwise ambiguous period of time.

[252] *See* Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965, 974–77 (1997) (analyzing the costs and benefits to attorneys and clients based on a decision to contractually allow or prohibit conflict of interest representation).

[253] The growing availability of incubators and accelerators within the technology startup world, along with the increasing availability of free legal services to the participants in those programs, increases the likelihood that law firms will encounter the partnership by default and drift phenomena. *See generally* Ian Hathaway, *Accelerating Growth: Startup Accelerator Programs in the United States*, BROOKINGS INST. (Feb. 17, 2016), http://www.brookings.edu/research/papers/2016/02/17-startup-accelerator-programs-hathaway [https://perma.cc/4GS8-X8AR] (noting accelerator pool increased from sixteen programs

common occurrence, firms must have an intentional appreciation for the role of the firm when the partners come and go.

The foregoing considerations seem to suggest a conclusion that, from an ethical standpoint, the law firm may proceed in a fashion that is less complicated and more fluid than when the founders appear without partnership status. But before we accept that conclusion, we must explore one further consideration that, at a minimum, muddies the analytical waters and, at worst, undercuts the entity advantages just described. That consideration is the nature of the partners' fiduciary duties to one another in the operation of the partnership business.

3. The Fiduciary Responsibilities of the Partners and the Law Firm to the Other Partners

Partners owe one another some fiduciary duties.[254] The literature about partnership fiduciary duties is vast, with contractarians defending the right of partners to choose autonomously as few duties as possible,[255] and fiduciarians asserting that less sophisticated founders need strong protections established by law.[256] Different jurisdictions articulate differing strengths of the required

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in 2008 to 170 programs in 2014); Greg Bullock, *Want to Raise Growth-Stage Capital? Join an Incubator or Accelerator*, *Studies Suggest*, CENT. FOR ENTREPRENEURIAL INNOVATION (Mar. 17, 2016, 2:26 PM), http://blog.ceigateway.com/blog/want-to-raise-growth-stage-capital-join-an-incubator-or-accelerator-studies-suggest [https://perma.cc/DL9A-T3G9].

[254] *See, e.g.*, BAINBRIDGE, *supra* note 13, at 145–46; *see also* Keatinge, *supra* note 6, at 403–08; Donald J. Weidner, Cadwalader*, RUPA and Fiduciary Duty*, 54 WASH. & LEE L. REV. 877, 878–82 (1997).

[255] For a sampling of this literature, see, e.g., Richard A. Booth, *Fiduciary Duty, Contract, and Waiver in Partnerships and Limited Liability Companies*, 1 J. SMALL & EMERGING BUS. L. 55, 57 (1997); J. William Callison, *Blind Men and Elephants: Fiduciary Duties Under the Revised Uniform Partnership Act, Uniform Limited Liability Company Act, and Beyond*, 1 J. SMALL & EMERGING BUS. L. 109, 112 (1997); Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 251 (2005) (arguing that the mere status of partners does not subject them to fiduciary duties).

[256] *See* Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 B.U. L. REV. 523, 523–24 (1993); Donald J. Weidner, *Three Policy Decisions Animate Revision of Uniform Partnership Act*, 46 BUS. LAW. 427, 435 (1991).

duties within common law partnerships.[257] For present purposes, however, considering partnerships by default with no written agreements, it is clear that the founders owe each other at minimum a duty of loyalty[258] and a duty of care.[259] The duty of loyalty states that a partner may not engage in partnership business for personal gain,[260] compete with the partnership without the other partners' consent,[261] or support others who would compete with the partnership's business.[262] A partner must also account to the remaining partners for benefits received through the partnership business.[263] The duty of care simply requires that a partner make business decisions for the partnership with the care an ordinarily prudent person would exercise in similar circumstances.[264] A lawyer representing the partnership who is aware that a partner is engaged in a breach of a fiduciary duty and actively assists in that breach could possibly be liable in tort to the wronged partner(s), notwithstanding the absence of an attorney-client relationship between the lawyer and the individual partners.[265]

Therefore, while representing the founders' partnership by default during the period when partners might come and go, the lawyer must be attentive to the treatment of the less influential partners by the more powerful.[266] Unlike with close corporations,

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[257] HYNES & LOEWENSTEIN, *supra* note 240, at 244 (explaining that duties owed among partners, while fiduciary in nature, are less strict than those of trustees or guardians, who act as true fiduciaries). *Compare* Cardullo v. Landau, 105 N.E.2d 843, 845 (Mass. 1952) (discussing "utmost good faith and loyalty"), *with* Selmark Assocs., Inc. v. Ehrlich, 5 N.E.3d 923, 933–34 (Mass. 2014) (applying the same standards to close corporations); Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 512 (Mass. 1975).

[258] BAINBRIDGE, *supra* note 13, at 135–44.

[259] *Id.* at 145–46.

[260] RUPA § 404(b)(1) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997).

[261] *Id.* § 404(b)(3).

[262] *Id.* § 404(b)(2).

[263] *Id.* § 404(b)(1).

[264] *See id.* § 404(c).

[265] Fischer, *supra* note 5, at 965 n.20; *see also* Katerina P. Lewinbuk, *Let's Sue All the Lawyers: The Rise of Claims Against Lawyers for Aiding and Abetting a Client's Breach of Fiduciary Duty*, 40 ARIZ. ST. L.J. 135, 140 (2008); Rutledge, *supra* note 5, at 372; Eugene J. Schiltz, *Civil Liability for Aiding and Abetting: Should Lawyers Be "Privileged" to Assist Their Clients' Wrongdoing?*, 29 PACE L. REV. 75, 81 (2008).

[266] *See* Molitor, *supra* note 84, at 567.

majority-interest partners typically cannot squeeze out[267] or freeze out[268] partners with minority shares in the business, because the power of the minority owners to dissolve the partnership provides an exit opportunity not available to close corporation shareholders.[269] But partnerships can and do exhibit behaviors where some partners treat others wrongfully or oppressively.[270] Law firms that assist unfaithful partners risk liability to the injured partners.[271] While the ABA's Committee on Professional Ethics (the "Committee") concludes that a law firm representing a partnership

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[267] In a typical squeeze-out transaction, controlling shareholders and/or managers extract benefits from the corporation and minimize the gains of minority shareholders while they remain members of the business organization. *See* F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS: PROTECTING MINORITY RIGHTS IN SQUEEZE-OUTS AND OTHER INTRACORPORATE CONFLICTS § 1.01 (2d ed. 2003); Marco Ventoruzzo, *Freeze-Outs: Transcontinental Analysis and Reform Proposals*, 50 VA. J. INT'L L. 841, 842 (2010); Schaeffer v. Cohen, Rosenthal, Price, Mirkin, Jennings & Berg, P.C., 541 N.E.2d 997, 998 (Mass. 1989) (finding that the law firm "helped Gross in his attempts to 'squeeze out' the plaintiff from Paragon").

[268] While the terms are often used interchangeably, a freeze out differs from a squeeze out in that, in the former setting, "majority shareholders force minority shareholders to sell their shares either through a statutory provision or simply by creating *de facto*—and sometimes abusive—incentives to sell the shares." Ventoruzzo, *supra* note 267, at 842; *see also* Brent J. Horton, *The Going-Private Freeze-Out: A Unique Danger for Investors in Delaware Non-Corporate Business Associations*, 38 DEL. J. CORP. L. 53, 83–89 (2013); Arford v. Blalock, 405 S.E.2d 698, 702 (Ga. Ct. App. 1991) ("A partner may not … 'freeze out' a copartner and appropriate the business to his own use.").

[269] Paul T. Geske, Note, *Oppress Me No More: Amending the Illinois LLC Act to Provide Additional Remedies for Oppressed Minority Members*, 90 CHI-KENT L. REV. 185, 200 (2015); *but see* Franklin A. Gevurtz, *Preventing Partnership Freeze-Outs*, 40 MERCER L. REV. 535, 541–42 (1989) (claiming that partnerships do experience freeze-out scenarios).

[270] *See* Gevurtz, *supra* note 269, at 541–42; *see also* Susan J. Swinson, *Partner v. Partner, Actions at Law for Wrongdoing in a Partnership*, 9 GA. ST. U. L. REV. 905, 917–19 (1993).

[271] *See* 3 RONALD E. MALLEN, LEGAL MALPRACTICE § 26:38 (2016 ed.); *see also* Cacciola v. Nellhaus, 733 N.E.2d 133, 135 (Mass. App. Ct. 2000) (examining a claim stated against lawyer for aiding in a partner's breach of fiduciary duty); Kenny v. Murphy, No. 08-P-996, 2010 WL 46376, at *2 (Mass. App. Ct. 2010) (demonstrating claim against attorney for aiding in a joint venturer's breach of his fiduciary duty); *cf.* Christine L. Eid, Comment, *Lawyer Liability for Aiding and Abetting Squeeze-Outs*, 34 WM. MITCHELL L. REV. 1177, 1195–96 (2008) (discussing a similar theory of liability in the LLC context); Larry E. Ribstein, *The Uncorporation and Corporate Indeterminacy*, 2009 U. ILL. L. REV. 131, 146–61.

does not owe any representational duties to the individual partners[272]—a conclusion with which not all authorities concur[273]—the Committee acknowledges that a lawyer may be liable in some settings for assisting one or more partners in a breach of their fiduciary duties to the other partners.[274]

Partners with fiduciary duties to one another may manage the partnership through majority decision-making without any breach of duty, as long as the duties of loyalty and care are not contravened.[275] That result follows from a straightforward reading of RUPA.[276] Therefore, Sofia in our example above may act for her entity client when she has the consent of a majority of the three founders.

The more complicated question for Sofia is how the fiduciary obligations affect her relationship with the departing partner, after drift or after conflict. The conclusion drawn above was that, because the departing partner was not a client, the firm could continue its representation of the remaining partners in a new partnership replacing the entity, which was dissolved automatically by the departure of one of its members.[277] Given the context

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[272] ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 361 (1991).

[273] Commentators observe that in some contexts, despite the entity conception of a partnership under both RUPA and the ABA ethics opinion, courts find that a lawyer representing a partnership owes attorney-client duties to each partner. *See* Fischer, *supra* note 5, at 964; Thomas D. Morgan, *Suing a Current Client*, 9 GEO. J. LEGAL ETHICS 1157, 1191 (1996); Simon, *supra* note 5, at 110; Frederic L. Smith, Jr., Comment, *Partnership Representation: Finding the Client*, 20 J. LEGAL PROF. 355 (1996).

[274] In small partnerships, the ABA opinion observes, "the likelihood that the attorney representing the entity will be held to stand in a confidential, or fiduciary, relationship with the individual shareholders, or partners, is much greater." ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 361 (1991) (citing Fassihi v. Sommers, 309 N.W.2d 645 (Mich. Ct. App. 1981)).

[275] RUPA § 401(j) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997).

[276] Given that RUPA authorizes partnerships to proceed through majority voting of the partners and given that a partnership of more than two partners could not function if all management decisions required full consensus, it is a well-accepted conclusion that outvoting one's fellow partners does not amount to a breach of a duty to those partners. *See id.* No common law authority exists to the contrary. *Cf.* J & J Celcom v. AT&T Wireless Servs. Inc., 169 P.3d 823 (Wash. 2007) (en banc) (holding that the majority partner was not liable to minority partners for purchase of another partner's assets, as the majority partner acted in good faith, paid fair consideration, and disclosed material information).

[277] *See supra* notes 206–07 and accompanying text.

examined here, when the business is operating as a partnership by default at the initial startup phase, with little if any investment and little value to the company yet, the chances that one of the partners leaves bgecause she has been frozen or squeezed out is unlikely.[278] Obviously, if Sofia learns that Janelle and Arjun have been actively scheming to isolate and nudge Netia out of the ongoing operations, the firm ought to ensure that it does not assist the two in harming the interests of the third.[279] But that is not really the likely worry for the firm in the early stage startup context.

The more common worry for the firm comes after Netia leaves, for either of the two reasons considered above. Because the law firm had no attorney-client relationship with Netia individually, she is not to be treated as a former client, but is instead a former constituent, and the movement of constituents from an organization does not affect the ongoing attorney-client relationship or the law firm's commitments to its entity client.[280] The firm has no obligation to maintain confidentiality with regard to any information it learned from Netia, except as the business requires through its duly authorized constituents.[281] But because the partners owed a fiduciary relationship to Netia as a partner, the question for the firm is whether the remaining partners owe any continuing duties to

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[278] *See, e.g.*, *Shareholder Squeeze Outs and Partnership Freeze Outs*, HOROWITZ L. OFFS., http://www.hwchicagolaw.com/practice-areas/corporatelaw/shareholder-squeeze-outs-and-partnership-freeze-outs/ [https://perma.cc/9VEW-XYVQ].

[279] *See* Eid, *supra* note 271, at 1188. Not all authorities agree that assisting, especially through the provision of conventional legal services, with activity known to breach a partner's fiduciary duty will lead to the law firm's liability. Some courts have been protective of the attorney-client relationship and discourage claims by non-clients, as the resulting duties create conflicts for the attorney. *See id.* at 1222; *see also* Pierce, *supra* note 36, at 354. A lawyer may assist in breach of fiduciary duty unless the client's conduct equates to crime or fraud. *See* Pierce, *supra* note 36, at 354.

[280] *See* Bryan Corp. v. Abrano, 52 N.E.3d 95, 102, 104 (Mass. 2016) (finding that a corporation's lawyer owed a duty to the corporation even after new board took control).

[281] Information counsel learns by representing an organization is protected by Rule 1.6's confidentiality duties, but only so far as the organization chooses. The law firm owes no confidentiality duties to the constituent other than those chosen by the client, acting through its duly authorized constituents. *See, e.g.*, RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 131 (2000); N.J. Eth. Op. 664 (1992); R.I. Ethics Op. 04 (2003).

her, duties that the law firm must seek to respect or, at minimum, to avoid assisting in their breach.

The law firm's responsibilities will depend on its assessment of who owns the property with value within the partnership's enterprise, including the intellectual property (IP), and how the partners address the property when the drifting partner leaves. Netia (whether she is aware of it or not) is entitled to an accounting and a return on her investment as the partnership dissolves.[282] Her "investment" could include her contribution of some of the partnership's beginning IP ideas.[283] The IP would most likely belong to the partnership, and would need to be transferred to some other party upon dissolution, perhaps to the remaining partners with their new partnership, with compensation paid to Netia.[284] The fiduciary duties possessed by Janelle and Arjun toward Netia presumably include the commitment to honor Netia's redemption rights. Any efforts by the continuing partners (within the newly established partnership) to deprive Netia of her entitlements would raise questions for Sofia about the propriety of her remaining as counsel for the new enterprise after Netia drifted away.[285]

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[282] *See* RUPA § 701 (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997).

[283] Mann et al., *supra* note 3, at 775 ("A business begins with an idea.").

[284] HURT ET AL., *supra* note 30, § 7.12(a); Moore v. Rawson, 85 N.E. 586, 586, 589–90 (Mass. 1908) (holding three continuing partners who used company name after dissolution accountable to fourth partner for good will of the firm in the same manner as if it had been sold in dissolution proceedings). The IP ownership question within a partnership is far too complex to address with any satisfactory detail here. If the company name or logo has been registered with the United States Patent and Trademark Office, it will be the property of the partnership. *See* Pamela S. Chestek, *Who Owns the Open Source Project Name?*, 103 TRADEMARK REP. 1240, 1252 (2013). With partnerships by default addressed in this Article, such a registration in the name of the partnership is unlikely. A successful registration of a patent in the company name is even more unlikely. The partnership more often will possess copyright interests, which arise more easily in the absence of registration. *See* Ale & McKinney, *supra* note 8, at 478–79.

[285] As noted above, if Netia were to agree, while drifting away from the enterprise, that Janelle and Arjun may continue with the business, then the partnership will not dissolve and Sofia will not have a new client entity. *See* RUPA § 802(b); *see also* HURT ET AL., *supra* note 30, § 14.11(c); Lange v. Bartlett, 360 N.W.2d 702, 704 (Wis. Ct. App. 1984). Her agreement does not eliminate the partnership's duty to provide to Netia her buy-out entitlements. *See* Hillman & Weidner, *supra* note 8, at 471.

It is a good thing for Sofia to worry about how the remaining partners intend to deal with Netia's entitlements, but disagreement about that topic does not necessarily mean that Sofia may not serve as counsel to the new partnership of Janelle, Arjun, and Rica.[286] As long as she does not actively assist the new partnership or the partners in an effort to deprive Netia of her post-dissolution entitlements, Sofia could provide legal services to the partnership on all of its other partnership business[287] (which likely would include the establishment of a formal entity which will later become the client of Sofia and her law firm).[288]

In the "drift" scenario involving the startup's partnership by default, the question of Netia's entitlements after the winding-up of the original partnership is probably not going to arise, as the new partnership, with Rica replacing Netia, will likely simply proceed in a rather seamless fashion.[289] When Netia leaves because of a disagreement about strategy or similar conflict, the question of her entitlements is more likely to arise.[290] The posture for Sofia and her law firm remains the same as in the drift scenario. As counsel to the dissolving partnership, Sofia must advise the partners about the dissolution process and the liquidation or transfer of the partnership assets.[291] If Netia actively competes with the business that would not share or adopt her strategic visions, as may be likely, that reality is not a significant worry for Sofia's continuing as counsel for the new partnership, at least under RUPA and the fiduciary duties it generates.[292] Former partners may compete with one another after the dissociation from the partnership as

[286] *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 cmts. 34–35 (2002).

[287] Sofia's only reason for not remaining as counsel to the successor partnership (aside from her or the new partners' preferences) would be to avoid assisting in a breach of the duties owed to Netia. Because Netia was never Sofia's client, the ordinary successive conflicts rules involving former clients do not apply. *See* Responsible Citizens v. Super. Ct. of Fresno, 20 Cal. Rptr. 2d 756, 766 (1993).

[288] *See* Ibrahim, *supra* note 6, at 187–88; *see also* Pierce, *supra* note 36, at 332–33.

[289] But Sofia ought to be crystal clear that she now has a new client, with a new engagement letter prepared to establish the new relationship. *See supra* note 19 and accompanying text.

[290] *See, e.g.*, Richard A. Booth, *The New Law of Freeze-Out Mergers*, 49 MO. L. REV. 517, 562 (1984).

[291] *See* RUPA § 801 (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997).

[292] *See id.* § 404 cmt. 2.

long as no partner is relying on the partnership's trade secrets or similar confidential information in the successor business.[293]

Here, then, is Sofia's role after Netia has left, whether as a result of drift or disagreement. The remaining partners who will continue with the business plan will presumably not wish to lose the company's counsel because of Netia's departure, and Sofia most likely would prefer to continue representation. With Netia's express agreement, the partnership may survive, with Sofia's assistance no doubt, after the partners address Netia's buy-out rights as a dissociated partner.[294] If the partners happen to renege on satisfying Netia's entitlements even after she agrees to a continuation of the partnership, Sofia need not withdraw as counsel for the continuing partnership so long as she does not assist the partners in what she now sees as a breach of the remaining partners' fiduciary duties to Netia.[295] If she cannot continue to work with Janelle and Arjun (and now Rica) without assisting in that breach, then she most likely must withdraw.[296]

If Netia does not agree to a continuation of the partnership, the partnership dissolves, and Janelle and Arjun (with Rica now) will form a new partnership to continue the business enterprise.[297] Sofia may accept representation of the new partnership without encountering any conflict of interest with Netia, even if Netia

[293] *Id.* (allowing for competition "immediately upon an event of dissolution").

[294] *See* Lange v. Bartlett, 360 N.W.2d 702, 704 (Wis. Ct. App. 1984).

[295] *See* Pierce, *supra* note 36, at 354.

[296] It is not entirely clear that Sofia must withdraw, but prudence dictates that she should, and will, withdraw. Model Rule 1.16(a) requires that an attorney withdraw from representation of a client if continuing the representation "will result in violation of the Rules of Professional Conduct or other law." MODEL RULES OF PROF'L CONDUCT r. 1.16(a) (2002). Rule 1.2(d) declares that Sofia may not "assist a client ... in conduct that the lawyer knows is criminal or fraudulent." *Id.* r. 1.2(d). It is not a crime or a fraud to aid in a breach of fiduciary duty, and some commentators have concluded, therefore, that the Model Rules do not prohibit a lawyer from that activity. *See, e.g.*, Fischer, *supra* note 5, at 986–87. But, as discussed earlier, Sofia may be liable in tort for assisting in the partners' breach of their fiduciary duties to Netia. *See supra* note 265 and accompanying text. Sofia thus has "other good cause" to justify permissive withdrawal under Rule 1.16, even if the mandatory withdrawal rule does not apply, and she will rely on that permission to end her representation in order to protect against tort liability. *See* MODEL RULES OF PROF'L CONDUCT r. 1.16 (b)(7).

[297] *See* RUPA § 603 (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997).

starts her own competing business.[298] But, just as above, Sofia may not assist Janelle and Arjun in any breach of their duties as members of a dissolving partnership to treat Netia fairly during the dissolution and winding-up process.[299] The fact of such a breach does not preclude Sofia's work with the new partnership so long as she does not assist in or facilitate the breach.[300]

IV. REPRESENTING FOUNDERS OF NONPROFIT ENTERPRISES

This Part addresses the ethical issues arising when a law firm agrees to represent the founders of an organization intended to serve as a charitable, tax-exempt organization but before the creation of an entity.[301] The "tax-exempt" nature may not necessarily matter for this purpose, but the "charitable" nature is of substantial concern. Because no individual may own any interest in a charitable—called here for convenience a "nonprofit"—organization,[302] the collection of founders will never morph into a partnership entity, regardless of how active the enterprise has been.[303] Precisely because the organization has no owners, its mission and decision-making protocols cannot be driven by the preferences of those who own the largest interest in the enterprise.[304] Some other device or protocol must be identified through which the law firm will take direction from the group's constituents.

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[298] *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 cmts. 34–35.

[299] *See* RUPA § 603 (NAT'L CONF. OF COMM'NS ON UNIF. ST. L. 1997).

[300] *Id.*

[301] Some, but not all, of the ethical issues arising in this setting have been explored in a prior article. *See generally* Tremblay, *supra* note 15 (exploring in some detail how a lawyer might understand when a loosely structured community group may qualify as an "entity" for purposes of having one client rather than an aggregate of clients).

[302] Every state authorizes the establishment of charitable organizations, typically corporations, which are not owned by any person or persons. *See* ALVAREZ & TREMBLAY, *supra* note 101; LESTER M. SALAMON ET AL., AMERICA'S NONPROFIT SECTOR: A PRIMER 21–25 (3d ed. 2012).

[303] *See* RUPA § 202(a)–(c), cmts. 1–3 (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1997) (stating individuals must share profits in order for their dealings to amount to a partnership).

[304] *See* MODEL NONPROFIT CORP. ACT § 8.30 (2008) (noting each member of the nonprofit's board has a fiduciary duty to act "in a manner the director reasonably believes to be in the best interest of the nonprofit corporation" as opposed to the interests of the members).

Many of the same issues discussed above will be relevant to a lawyer's work with nonprofits, but the following questions apply especially to the lawyer's work with founders of a nonprofit enterprise: (1) How ought the lawyer proceed in those settings where the founders do not know whether their proposed enterprise ought to proceed as a nonprofit or as a for-profit business?; (2) For those enterprises whose founders intend to operate as nonprofits, who serves as the lawyer's client (or clients)?; (3) Does the charitable nature of a nonprofit's mission alter the lawyer's counseling responsibilities and, if so, how? This Part addresses each of these questions in order.

A. Discerning the Charitable Nature of the Enterprise

Let us imagine new entrepreneurs for this Part of the Article. Imagine that Gilad approaches Hank, a lawyer who is a member of a small law firm, for legal assistance with a project Gilad has been developing. Gilad has been working with Lynnel and Toni on a program to provide conflict-resolution skills and protocols for use in middle and high schools in urban neighborhoods where bullying and violence have been prevalent. The program includes technology-based systems, training and classroom education, and direct mediation services. Gilad has a number of questions about licensing requirements, intellectual property, and choice of entity. The latter topic includes questions about whether the new enterprise might be established as a nonprofit, tax-exempt organization, and the advantages and disadvantages of doing so. The tentative name of the project is Resolution & Restoration (R&R).

It is apparent to Hank that the R&R project could easily proceed as a for-profit business if the founders so wished. But, it is equally apparent that R&R, if designed correctly, could qualify as a Section 501(c)(3) tax-exempt organization.[305] Hank also sees a

[305] For the sake of the discussion in the text, assume that Hank is correct. The IRS has determined that some mediation services qualify as section 501(c)(3) organizations. *See* Rev. Rul. 80-279, 19802-2 C.B. 176, 177 (stating low-cost mediation services qualify under section 501(c)(3)). *See also Nonprofit Organizations*, MEDIATE.COM, http://www.mediate.com/organizations [https://perma.cc/3WME-45J7] (listing 27 national, state, and local mediation services claiming to be nonprofit). R&R also has the quality of being educational and serving underprivileged communities, which helps its eligibility for tax exemption. *See* 26 C.F.R. § 1.501(c)(3)-1(d)(2) (2014) ("The term charitable ... includes: [r]elief of the poor and distressed or of the underprivileged[.]").

possibility of operating R&R with two affiliated organizations, one a for-profit and the other a nonprofit.[306] Gilad, Lynnel, and Toni, therefore, will benefit from Hank's careful counseling about the choice they have in the business's orientation and structure.

Hank's counseling of the three founders will, of course, precede the establishment of any entity, and for some significant period of time perhaps, as decisions about the choice of entity are difficult and critical. Because of the uncertainty of the nature of the resulting enterprise, Hank will need to proceed as though Gilad, Lynnel, and Toni will operate as owners of a for-profit business.[307] Since the business is still at the idea stage, the attributes needed for a partnership by default are missing,[308] so Hank will need to represent each of the entrepreneurs (if they remain as a group sharing one lawyer) individually and jointly. All of the considerations discussed earlier about that joint representation of a for-profit, inchoate venture will apply to Hank's work with this group.[309]

B. Representation of an Emerging Charitable Enterprise

1. Determining the Client Identity

Often, the founders of a new social enterprise have a clearer vision that the project will be a nonprofit organization, if it ends up as a reality at all.[310] Imagine, therefore, that Gilad, Lynnel, and Toni approach Hank's law firm for assistance in establishing a food pantry in a local neighborhood in need of such a service.

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[306] Organizations have developed mechanisms to operate a nonprofit, tax-exempt business with a for-profit affiliate. For a description of that strategy, see Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 572–74, 632 (1990); J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies*, 66 U. MIAMI L. REV. 1, 19–20 (2011) (discussing Mozilla Foundation's maintenance of affiliated for-profit and nonprofit organizations); Dana Brakman Reiser, *Charity Law's Essentials*, 86 NOTRE DAME L. REV. 1, 34 (2011).

[307] *See supra* Part II.A.

[308] *See supra* notes 29–41 and accompanying text.

[309] *See supra* Part II.A and accompanying text.

[310] *See generally* James Austin, Howard Stevenson & Jane Wei-Skillern, *Social and Commercial Entrepreneurship: Same, Different, or Both?*, 30 ENTREPRENEURSHIP THEORY AND PRAC. 1 (2006).

Imagine further that these founders have been meeting with a group of concerned activist residents to map out the project. This group has decided to call itself Neighbors Concerned for Nutrition, or NCN. The founders seek to retain Hank's law firm to establish a charitable organization and apply for Section 501(c)(3) tax-exempt status with the IRS.[311] Hank is prepared to accept the representation, and turns to crafting a letter of engagement or retainer agreement for the new client.

Or, perhaps, the new *clients*. In this thin story, who ought to serve as the law firm's client? It appears that three choices exist: (1) The three individuals as joint clients, like the "inchoate" entrepreneurs above; (2) all of the members of the neighborhood group as aggregate joint clients; or, finally, (3) the group NCN as one client, as an entity. That array presents two levels of questions for Hank: First, is the choice among them one for the firm to make as it so desires, or does some substantive law require a specific arrangement under these circumstances? Second, regardless of the answer to that question, what does the resulting commitment look like for Hank and his law firm? This subsection addresses the first question; the following subsection will explore the second.

Hank must determine at the outset whether he will treat NCN as an entity client or treat the three founders as individual clients. His investigation of the relevant substantive law will leave him without a clear answer, but the more prudent read of the ambiguous authority will most often favor individual representation.

If Hank were to treat NCN as his client, it would be as an informal unincorporated association, since NCN has no other status.[312] The substantive law's guidance might differ depending upon whether Hank's jurisdiction has adopted the Uniform Unincorporated Nonprofit Association Act (UUNAA),[313] which provides otherwise informal associations with rights, duties, and protections, or its successor Revised Uniform Unincorporated Nonprofit Association

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[311] *See* I.R.C. § 501(c) (2012) (detailing the requirements of federal tax-exempt status).

[312] *See* REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 2(8) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2008) [hereinafter RUUNAA]; UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 2(11) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1996) [hereinafter UUNAA].

[313] *See* UUNAA § 3 (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1996).

Act (RUUNAA).[314] Most states have adopted neither,[315] so let us first proceed on the assumption that no such statutory guidance exists for Hank.

The prevailing authority holds that "[e]ach individual member of an unincorporated association is a client of the association's lawyer."[316] With the possible exception of labor unions,[317] no authority has stated that the lawyer representing an unincorporated group does not also represent the members of the group.[318] However, a 1992 American Bar Association ethics opinion construes Model Rule 1.13, addressing a lawyer's responsibilities to

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[314] *See* RUUNAA §§ 3–5 (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2008). For examples of state statutes implementing the Model Act or its 1996 predecessor, see ALA. CODE § 10A-17-1.01 (2009); N.C. GEN. STAT. § 59B-2 (2006). The introductory comments to RUUNAA imply that it offers a codification of some common law principles and practices, which supports the conclusion that in some states without RUUNAA or its predecessor unincorporated associations have some legal status. *See* RUUNAA at Prefatory Note.

[315] As of this writing, eleven states currently use some version of UUNAA (Alabama, Colorado, Delaware, Hawaii, Idaho, Illinois, Louisiana, North Carolina, West Virginia, Wisconsin, and Wyoming), five states have adopted RUUNAA in some form (Arkansas, Iowa, Kentucky, Nevada, and the District of Columbia), and Texas's version of the UUNAA which had been in force expired as of the end of 2015. 29 West's Legal Forms, Specialized Forms § 25:10 (West 2016); 29 West's Legal Forms, Specialized Forms Section 25:11 (West 2016). *See* RUUNAA at Prefatory Note (2008); *Unincorporated Nonprofit Association Act* (2008), UNIF. LAW COMM'N, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Unincorporated%20Nonprofit%20Association%20Act%20(2008)%20(Last%20Amended%202011) [https://perma.cc/29LT-F4HC].

[316] Philadelphia Hous. Auth. v. Am. Radiator & Standard Sanitary Corp., 294 F. Supp. 1148, 1149 (E.D. Pa. 1969); *see also* Kalamazoo v. Mich. Disposal Serv. Corp., 125 F. Supp. 2d 219, 236 (W.D. Mich. 2000) ("Because unincorporated associations had no separate legal existence, courts regularly held that attorneys for unincorporated associations had a direct attorney-client relationship with each of the members of the association."); Connelly v. Dun & Bradstreet, Inc., 96 F.R.D. 339, 341 (D. Mass. 1982).

[317] *See* Russell G. Pearce, *The Union Lawyer's Obligations to Bargaining Unit Members: A Case Study of the Interdependence of Legal Ethics and Substantive Law*, 37 S. TEX. L. REV. 1095, 1098–1100 (1996).

[318] *See Kalamazoo*, 125 F. Supp. 2d at 236 (noting the emerging scholarly authority holding in certain contexts that "an attorney may represent such [unincorporated] associations without creating an attorney-client relationship with its individual members," while concluding that the joint-defense agreement among several criminal defendants did not qualify for that treatment).

organizational clients, as not requiring a group to possess "a separate jural entity" in order to qualify as an organization,[319] and other commentators support that conclusion.[320]

There is, however, a palpable challenge for a lawyer such as Hank working with a nascent charitable organization to proceed as though the unincorporated association is an entity that will serve as Hank's only client. That challenge arises from what we might term the "boundary" problem. Here is the worry. The entity designation assumes a discrete, finite group of constituents, who may be identified and advised about the implications of entity representation.[321] With a community-based charitable organization like NCN, the membership of the group is unlikely to be fixed or obvious. For organizational representation to proceed responsibly, the boundaries of the organization must be definable, if for no other reason than to have reasonable comfort that the lawyer understands who qualifies as a constituent and who does not, for purposes of attorney-client privilege[322] and Rule 1.6 duties.[323]

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[319] *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 365 (1992) (concluding that an unincorporated trade association may be treated as an entity for purposes of conflicts of interest).

[320] *See* HAZARD & HODES, *supra* note 62, § 18.06 (2016 Supp.); Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1115–16, 1118 (1992); Tremblay, *supra* note 15. An Arizona State Bar ethics opinion, addressing the lawyer's choices when forming a for-profit corporation, permitted the founders to elect to be treated as one entity client. *See* Ariz. St. Bar Formal Ethics Op. 02-06 (2002).

[321] In accepting the proposition that a group forming a startup for-profit business may be treated by a lawyer as an entity consistent with Rule 1.13, the Arizona State Bar Ethics Committee described a group with limited, identifiable membership. *See* Ariz. St. Bar Formal Ethics Op. 02-06 (2002).

[322] A lawyer's communications with legitimate constituents of an organizational client will be protected against disclosure in forensic settings by the attorney-client privilege. *See* RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS § 73 (2000). Communications with individuals who are not proper constituents are not privileged. *See, e.g.*, *In re* Diasonics Securities Litig., 110 F.R.D. 570, 574 (D. Colo. 1986) (determining that communications between officer of acquired organization and lawyer for predecessor organization were not privileged).

[323] Rule 1.6's coverage is far broader than that of the attorney-client privilege and the attorney must maintain communications even with persons outside of the organizational circle as confidential. *See* HAZARD ET AL., *supra* note 138. But that does not mean that the boundary problem is not relevant for Hank and his Rule 1.6 obligations. If Hank discloses information related to the

If Hank is satisfied that NCN has an identifiable, finite membership and a decision-making structure on which he may rely to discern appropriate lines of authority, he may choose to treat NCN as his client, and not the individual founders/leaders. But at this stage of his work with the loosely structured group and its founders, he is not required to treat the entity as his client. He may choose to identify Gilad, Lynnel, and Toni as individual clients subject to the joint client conflicts caveats identified earlier in the for-profit context.[324] Prudence may suggest that he do so to eliminate the worries of working with an ill-structured community group.[325]

If Hank happens to practice in a jurisdiction that has adopted RUUNAA,[326] his assessment of his choices must account for that substantive law overlay. RUUNAA eliminates some of the ambiguity about the entity status of NCN as an unincorporated association, establishing that under appropriate, defined circumstances such a group may be treated as an organization with an identity and rights separate from its members or managers.[327] If nothing else, RUUNAA would permit Hank to make a more grounded and reliable determination of whether NCN is a lawful entity entitled to proceed in this representational space as a single client,[328] and, if so, how he accepts directions from the unincorporated association's constituents.[329]

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representation to a person who is not a member of the client organization without consent of a duly authorized constituent, he has breached his duties under Rule 1.6. *See* ANNOTATED MODEL RULES OF PROF'L CONDUCT 89 (6th ed. 2007).

[324] *See supra* notes 70–83 and accompanying text.

[325] *See* Susan D. Bennett, *Embracing the Ill-Structured Problem in a Community Economic Development Clinic*, 9 CLINICAL L. REV. 45, 48–49, 70 (2002).

[326] The discussion in the text would not change if instead of RUUNAA Hank's jurisdiction has adopted its predecessor, UUNAA.

[327] RUUNAA § 5(a) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2008); *see also* Elizabeth S. Miller, *Doctoring the Law of Nonprofit Associations with a Band-Aid or a Body Cast: A Look at the 1996 and 2008 Uniform Unincorporated Nonprofit Association Acts*, 38 WM. MITCHELL L. REV. 852, 866 (2012).

[328] For instance, under section 2(8) of RUUNAA, NCN would constitute an unincorporated association covered by the act if it "consist[ed] of [two] or more members joined by mutual consent pursuant to an agreement that is oral, in a record, or implied from conduct, for one or more common, nonprofit purposes ...." RUUNAA § 2(8) (2008). If it qualifies as an unincorporated association, then it is an entity distinct from its members with perpetual existence unless some factor serves to determine otherwise. *Id.* § 5(a)–(b).

[329] The unincorporated association would be managed by its managers. A "manager" is "a person that is responsible, alone or in concert with others, for the

2. Representational Responsibilities with a Charitable Enterprise Client

One complexity remains for a lawyer working with founders of a charitable enterprise. That complexity relates to the deference a lawyer must offer to the strategic visions of the founders. The worry to be unpacked here is whether the charitable nature of the client's mission, when compared to the typical economic success goals of a for-profit business, alters in any way the responsibilities of the nonprofit's counsel. I will argue that it does, albeit in subtle ways.

A lawyer representing the founders of a for-profit business may encounter challenges generated by the founders' potentially varying personal interests. However, on questions about the underlying business model and the vision or goals of the business, the lawyer usually may comfortably follow the guidance of his clients.[330] The for-profit organizational lawyer may be a rich source of business advice, of course,[331] and most commentators agree that the lawyer possesses a commitment to advise companies about the moral implications of their business strategies.[332] Generally speaking, the

management of an unincorporated nonprofit association," *id.* § 2(3), and a "member" is "a person that, under the governing principles [of the entity], may participate in the selection of persons authorized to manage the affairs of the unincorporated nonprofit association or in the development of the policies and activities of the association," *id.* § 2(4). The entity need not expressly provide such titles for those individuals; their function and activity determine their role. *See* Miller, *supra* note 327, at 877.

[330] *See* Kristen A. Carpenter & Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 FORDHAM L. REV. 3085, 3141 (2013) ("[P]ractically speaking, stating that a corporate lawyer represents the corporation means that the corporate lawyer's clear and only role is to help the corporation pursue profit maximization, and the only remaining question is who is authorized to speak and act for the corporation in pursuit of this one goal.").

[331] *See* Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1062 (1997) ("This new generation of in-house lawyers ... frequently offers business as well as legal advice, and its members decidedly reject any notion that their role is limited to counseling clients on purely legal matters."); Lynnise E. Pantin, *Deals or No Deals: Integrating Transactional Skills in the First Year Curriculum*, 41 OHIO N.U. L. REV. 61, 81 (2014) ("lawyers ... participate in business planning"); Amy L. Weiss, Note, *In-House Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege*, 11 GEO. J. LEGAL ETHICS 393, 393, 393 n.4 (noting that in-house counsel serve "as business advisors").

[332] The literature on corporate lawyers' moral responsibilities is extensive and rich. For a sampling of the discussion, see generally Anthony V. Alfieri, *The*

for-profit representation model operates on a client-centered, autonomy-driven stance,[333] in large part because individual entrepreneurs and startup founders are entitled to take whatever risks they deem appropriate.[334]

That same deference does not automatically follow when the lawyer works with a charitable organization. It is particularly delicate when the lawyer works with the founders of such a startup. To illustrate the concerns, let us first consider the prospect of Hank's work with three individual founders of the NCN nonprofit: Gilad, Lynnel, and Toni. The founders have connections to and support from the neighborhood residents, but Hank has opted to treat the three founders as his individual, joint clients. The clients' goal is to establish an entity that can and will qualify for Section 501(c)(3) tax-exempt status. Until NCN, Inc.[335] is established, Hank's clients will be the three founders as persons. Unlike if they were founding a for-profit business, Hank must temper his guidance and counseling of the founders with attention to the public mission of the proposed venture and the interests of the larger neighborhood residents.[336] Hank is, and must be, counsel to a larger situation in this setting.[337] And he must be transparent

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Fall of Legal Ethics and the Rise of Risk Management, 94 GEO. L. J. 1909 (2006); Susan Carle, *Power as a Factor in Lawyers' Ethical Deliberation*, 35 HOFSTRA L. REV. 115 (2006); Stephen L. Pepper, *Three Dichotomies in Lawyers' Ethics (with Particular Attention to the Corporation as Client)*, 28 GEO. J. LEGAL ETHICS 1069 (2015); 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).

[333] ALVAREZ & TREMBLAY, *supra* note 101, at 111–12.

[334] *See* Robert R. Statchen, *Clinicians, Practitioners, and Scribes: Drafting Client Work Product in a Small Business Clinic*, 56 N.Y.L. SCH. L. REV. 233, 270 (2011–2012) (describing the risk-taking nature of entrepreneurs).

[335] The odds are enormous that Hank will advise the founders to establish a corporation to serve as the vehicle through which to operate NCN and to apply to the IRS for the tax exemption. Most tax-exempt entities are corporations. *See* David S. Walker, *A Consideration of an LLC for a 501(c)(3) Nonprofit Organization*, 38 WM. MITCHELL L. REV. 627, 633 (2012) ("[T]he 'predominant' form of charitable organization in the United States is the nonprofit corporation.") (citing JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS 48–53 (4th ed. 2010)).

[336] Tremblay, *supra* note 15, at 390.

[337] The commonly referenced "lawyer for the situation" concept, originating with Louis Brandeis, has been popularized in legal ethics circles by Geoffrey

with Gilad, Lynnel, and Toni about that gloss on his representational responsibilities.[338]

In that sense, Hank has what could be described as divided loyalties. In reality this does not represent a conflict of interest for him, in the same way that his choice to represent the multiple founders might. The "conflict," such as it is, is inherent in any lawyer's work on behalf of founders of an organization that commits to a mission that transcends the interests of its founders.[339] Hank's role is somewhat comparable to that of a lawyer for a fiduciary, in that the founders necessarily accept responsibilities for interests beyond their own personal ones.[340] The prevailing understanding is that a lawyer representing a fiduciary treats the fiduciary as his sole client. He does not represent the ward, but may only proceed with strategies that do not undermine the interests of the ward.[341] Similarly, Hank may robustly represent the three founder clients and honor their wishes, but only inasmuch as their strategies are consistent with the mission and governance constraints of a successfully functional nonprofit organization.[342]

Hazard. *See* GEOFFREY C. HAZARD, ETHICS IN THE PRACTICE OF LAW 65 (1978); Geoffrey C. Hazard, Jr., *Lawyer for the Situation*, 39 VAL. U. L. REV. 377 (2004). For a description of Brandeis's connection to the term "counsel for the situation," see Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1502–04, 1502 n.194 (1996).

[338] Tremblay, *supra* note 15, at 390.

[339] *See* Simon, *supra* note 5, at 59 (noting the difficulty lawyers face in representing organizations consisting of constituents with conflicting interests).

[340] *See* A.L.I., PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS § 300 (Tentative Draft No. 1, 2007).

[341] The American Bar Association articulates the duty in a more lawyer-friendly fashion, emphasizing that the fiduciary is the client and the ward or beneficiary a third party like any other third party. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 380 (1994). Commentators take a more nuanced stance of the special role in which the lawyer finds himself. *See generally* Kennedy Lee, *Representing the Fiduciary: To Whom Does the Attorney Owe Duties?*, 37 ACTEC L.J. 469 (2011); Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who Is the Client?*, 62 FORDHAM L. REV. 1319 (1994); Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889 (1994).

[342] Especially where the founders of the nonprofit organization aim to achieve tax-exempt status from the IRS (which is the most likely scenario), the founders' choices about organizational structures and visions will be limited by the IRS's rules and policies. For instance, the organization must be organized

Hank must also, notwithstanding his representational duties to the three joint clients, attend to the worries that commentators capture with the term "founder's syndrome."[343] Hank represents three individuals, but his commitment is to the organization that the individuals will establish.[344] Its founders may, and often do, desire to include in the corporate governance documents provisions that will assure that the founders maintain control over the organization.[345] Such provisions would be entirely appropriate in for-profit corporation or LLC papers.[346] They might not be appropriate in nonprofit organizational documents,[347] even if the IRS would not object to their inclusion, and even if the three founders were insistent that the provisions be included. Hank will need to exercise his discretionary judgment to determine whether the control provisions sufficiently benefit the soon-to-be created organization, rather than the personal preferences of the founders.[348] His

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and operated in such a way that none of the founders will receive private benefit or inurement except in certain limited circumstances. *See* 26 U.S.C. § 501(c)(3) (2012); 26 C.F.R. § 1.501(c)(3)-1 (2015). The organization must have in place protections against conflicts of interest. *See generally* Melanie B. Leslie, *Helping Nonprofits Police Themselves: What Trust Law Can Teach Us About Conflicts of Interest*, 85 CHI-KENT L. REV. 551 (2010).

[343] *See* STEPHEN R. BLOCK, WHY NONPROFITS FAIL: OVERCOMING FOUNDER'S SYNDROME, FUNDPHOBIA, AND OTHER OBSTACLES TO SUCCESS 135–54 (2004); *see also* LESLIE R. CRUTCHFIELD & HEATHER MCLEOD GRANT, FORCES FOR GOOD: THE SIX PRACTICES OF HIGH-IMPACT NONPROFITS 169, 171 (2008); James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 250, 250 n.235 (2003) (describing leadership unwilling to defer to the good of the organization).

[344] *See* MODEL RULES OF PROF'L CONDUCT r. 1.13(a) (2003) ("[A] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.").

[345] *See* Mary E. Costello, *The Non-Profit Founder's Dilemma: Tempering Issues of Control and Ownership* (2007), http://www.creativeedgeconsulting.org/TheNon-ProfitFoundersDilemma-TemperingIssuesofControlandOwnership.htm [https://perma.cc/R859-FUXS]; *see also* Noam Wasserman, *The Founder's Dilemma*, HARV. BUS. REV., Feb. 2008, at 104.

[346] Most corporate governance documents include mechanisms to address control by the founders, subject to whatever later negotiations might occur with future investors or shareholders. *See, e.g.*, GEORGE W. KUNEY & BRIAN K. KRUMM, THE ENTREPRENEURIAL LAW CLINIC HANDBOOK 51–52 (2013); REED & BARRON, *supra* note 18, at 61; Costello, *supra* note 345.

[347] *See* Costello, *supra* note 345.

[348] *See* Robin S. Golden, *Collaborative as Client: Lawyering for Effective Change*, 56 N.Y.L. SCH. L. REV. 393, 409 (2011–2012) (offering examples of a

opinion, as a lawyer, on that question is sufficient. He need not be bound by the instructions of his named clients.[349]

I do not intend to assume in these observations any hubris on Hank's part, or to succumb to the "generalization of expertise" cognitive illusion.[350] Instead, the underlying ethical mandate here rests on the understanding that charitable institutions commit to what we might deem a "thick theory of the good,"[351] while for-profit organizations, especially privately held businesses, can pursue the idiosyncrasies of their owners, and lawyers have little right to interfere with that pursuit.[352] Nonprofit founders may pursue idiosyncratic missions in a more cabined way, and their perception of the social justice strategies may be debated or challenged.[353]

CONCLUSION

Most lawyers hired to establish a new startup business will work with individual founders for some period of time before an entity emerges, and those lawyers will necessarily make choices about how to craft an appropriate engagement agreement with

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social justice "collaborative" as the lawyer's client, rather than any particular members of the group).

[349] No reported case or disciplinary report has addressed the argument made in the text, but its logic follows from Hank's recognition that Gilad, Lynnel, and Toni serve as surrogates for the charitable mission, and the unnamed community members who support the mission, which NCN, Inc. will pursue once it is established. Once an entity has been created, Hank will have more defined duties to honor the wishes of the duly authorized constituents, even if Hank disagrees with the values expressed by those instructions. *See In re* Wise, 740 N.E.2d 946, 955–56 (Mass. 2000) (concluding that attorney for nonprofit organization should be suspended for supporting ousted board members whose choices he favored, over the objections of current board members).

[350] In bioethics circles, the "generalization of expertise" concern represents the cognitive bias that assumes that an individual expert in medicine will have expertise in other areas, such as moral questions. *See* Robert M. Veatch, *Generalization of Expertise*, 1 HASTINGS CTR. STUDIES 29, 29 (1973); Bethany Spielman & George Agich, *The Future of Bioethics Testimony: Guidelines for Determining Qualifications, Reliability, and Helpfulness*, 36 SAN DIEGO L. REV. 1043, 1048–50 (1999).

[351] William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 225 (1991).

[352] *See* William L. F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1455–56 (1992) (lawyers too often do not respect the idiosyncrasies of clients).

[353] *See* Tremblay, *supra* note 15, at 463.

the founder-clients. This Article has demonstrated that lawyers in those settings must be especially attentive to the status the founders are entitled to based on the jurisdiction's common and statutory law. Some founders will have rights as individuals; others will be partners. The differences may matter to the work the lawyer accomplishes. Counsel for a startup must also anticipate that a group of founders might include participants who may not actually qualify as founders; therefore, perhaps may not warrant inclusion in the client collective. Among those founders who do qualify, some may drift away, replaced by others. This creative and dynamic dance presents ethical opportunities for the team's lawyer, as she pursues clarity about her relationship with those individuals. This Article may serve as at least a preliminary guide for lawyers who find themselves in this common setting.