

ARTICLES

Triangular Lawyer Relationships: An Exploratory Analysis

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I. INTRODUCTION

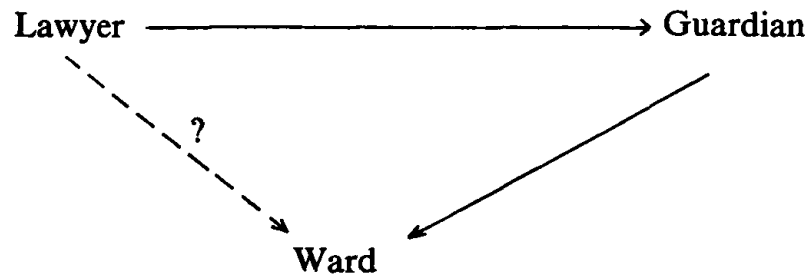
This article examines the nature of a lawyer's responsibilities where the lawyer's client has a special legal relationship with another party that modifies the lawyer's "normal" professional responsibilities. This legal relationship is termed "triangular," denoting the coexistence of a linkage of legal responsibility between the lawyer's client and a third person along with a linkage of professional responsibility between the lawyer and the client. The combination results in a special legal relationship between the lawyer and the third person.

The lawyer's special relationship being considered is "legal" rather than moral or ethical. This focus is not selected in derogation of a lawyer's moral or ethical responsibilities, or upon the assumption that moral and ethical responsibilities are clearly separable from legal duties. Not only do moral and ethical responsibilities coexist with legal duties, but special moral and ethical considerations also arise from special legal responsibilities. Legal responsibilities thus may constitute independently significant predicates for more careful consideration of moral and ethical issues.

This exploration focuses on two types of triangular relationships. The first involves a client in a fiduciary relationship to a third party. The classic example is that of a lawyer representing a guardian in matters relating to the guardian's responsibilities to a ward. In that relationship, the client-guardian has a set of strong and well defined legal obligations. Given these obligations, what are the legal obligations of the lawyer to the ward?

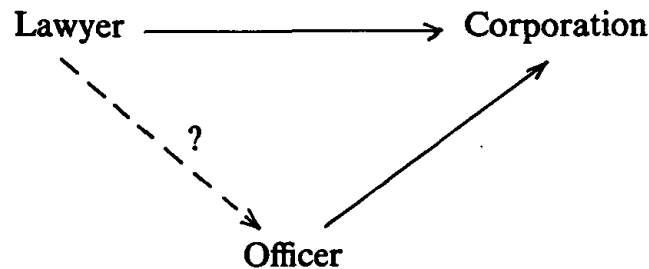
The lawyer→guardian→ward triangular relationship can be diagrammed:

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The second type of triangular relationship involves a third party who owes fiduciary duties to the lawyer's client, and the third party rather than the client is the one with whom the lawyer deals ordinarily. The classic situation is that of a lawyer who represents a corporation but who, in the ordinary course of professional service, deals with the corporation's officers, directors, and employees. To simplify terminology, we can treat the corporate officers, directors, and employees as a single category, even though important differences exist in their legal relationships to the corporation. Thus simplified, the corporate lawyer triangular relationship can be designated as lawyer→corporation←officer.

The lawyer-corporation-officer triangular relationship can be diagrammed:



The difference in the vectors of obligation in these two triangular relationships is important. In the lawyer→guardian→ward triangular relationship, the ward is the dependent person and the obligee of the guardian, but the guardian is the dependent person and the primary obligee of the lawyer. In the lawyer→corporation←officer triangular relationship, the corporation is the dependent entity and the obligee of both the lawyer and the corporate officer. This structural difference in obligations can help identify and define the lawyer's role in the two triangular relationships.

These two basic triangles can be used to analyze other triangular relationships that arise throughout law practice. It may be that some triangular relationships cannot be categorized according to these two basic types; certainly all the relationships categorized under one of these types are not identical to each other in all important respects. Hence, this article does not explore all the implications of analysis "triangularity." It is addressed to the classic examples of the two basic types, but further study may indicate that this can be applied to all triangular relationships.

Other triangular relationships can be classified into the two basic types:

I.	II.
<i>Classic</i>	<i>Classic</i>
Lawyer→Guardian→Ward	Lawyer→Corporation←Officer
<i>Others</i>	<i>Others</i>
Lawyer→General Partner→Partnership	Lawyer→Partnership←General Partner
Lawyer→Govt. Employee→Govt.	Lawyer→Govt.←Govt. Employee
Lawyer→Union Officer→Union	Lawyer→Union←Union Officer
Lawyer→Director→Corp.	Lawyer→Ward←Guardian

As the foregoing chart depicts, whether a triangular relationship falls into one or the other of the two basic categories depends on which party is the lawyer's client. If the lawyer represents the *guardian*, for example, the relationship is lawyer→guardian→ward and is of the first basic type. On the other hand, if the lawyer represents the *ward*, the relationship is lawyer→ward←guardian and is of the second basic type. Similarly, a lawyer retained to represent a corporate office or director rather than the corporation falls under the first basic type, whereas the normal corporate lawyer relationship is lawyer→corporation←director and falls under the second basic type.

II. TWO ILLUSTRATIVE CASES

A. LAWYER AND GUARDIAN AND WARD

Fickett v. Superior Court,¹ decided by the Arizona Court of Appeals in 1976, presented the following facts.² Mrs. Styer was an elderly lady of substantial wealth suffering failing eyesight and perhaps some general mental debilitation. She had a longtime friend, a businessman of sorts named Schwager. By court order, Schwager was appointed guardian of Mrs. Styer's person and property, an estate worth about one million dollars. Over the next two or three years Schwager misappropriated and mismanaged the estate in various ways—making investments in his own ventures and those of his wife, selling good stocks to buy bad real estate for the trust, commingling, paying for personal items for himself from estate funds, etc. The result was losses to the estate established at approximately twenty-five percent of its original value. Fickett served as Schwager's lawyer in the latter's capacity as trustee.

The successor guardian, apparently unable to collect fully from Schwager,

1. 27 Ariz. App. 793, 558 P.2d 988 (1976) (attorney would be liable for failing to use reasonable care to discover misappropriation, conversion, or improper investment by guardian).

2. The facts of the guardian's misconduct appear in *In re Guardianship of Styer*, 24 Ariz. App. 148, 536 P.2d 717 (1975).

brought suit against Fickett. The claim was not founded on fraud, because the successor guardian implicitly conceded that no intentional wrongdoing by the lawyer could be established. The claim against the lawyer was based instead on negligence. The charge thus was not that the lawyer aided or abetted the guardian's defalcations but that the lawyer had made it possible for the defalcations to proceed by being inattentive to his responsibilities in representing the guardian.

The matter before the court was the lawyer's motion for dismissal by summary judgment. The motion was predicated on the familiar proposition that a lawyer, generally speaking, owes no duty of care, and has no corresponding liability for negligence, to one who is not his client.³ Acknowledging this general rule, the court nevertheless held:

We believe that the public policy of this state permits the imposition of a duty under the circumstances presented here. . . . [W]hen an attorney undertakes to represent the guardian of an incompetent, he assumes a relationship not only with the guardian but also with the ward. If [the lawyer] knew or should have known that the guardian was acting adversely to his ward's interests, the possibility of frustrating the whole purpose of the guardianship became foreseeable as did the possibility of injury to the ward. In fact, we conceive that the ward's interests overshadow those of the guardian.⁴

This analysis is simple enough and the result seems right, but little explanation is given. This want of explanation leaves unclear how far the principle involved may be pushed. If a lawyer for a court-appointed guardian assumes some kind of protective responsibility toward the ward, would that not also be true of a lawyer for anyone who has "fiduciary" responsibilities to some third party? Would it not be true, for example, of a lawyer representing a partner vis-à-vis a partnership? Of a lawyer representing a corporation vis-à-vis a corporate employee? Of a lawyer representing one spouse vis-à-vis the other?

The possibilities for the principle's extension do not stop with relationships that the law generally characterizes as ones of "confidence and trust." In many jurisdictions today there is a legal obligation of "fair dealing" between parties to contracts entailing long-term performance or conditions of dependency of one party on the other. Does a lawyer representing the party in the dominant position in one of these quasi-fiduciary relationships have some kind of legal responsibility to the party in the position of dependency? Would it follow that a lawyer has some such responsibility whenever his or

3. *Fickett*, 27 Ariz. App. at 794-95, 558 P.2d at 989-90. See generally C. WOLFRAM, MODERN LEGAL ETHICS, 223-226 (1986) (discussing lawyer liability to nonclients for negligence).

4. *Fickett*, 27 Ariz. App. at 795, 558 P.2d at 990.

her client is in anything less than an openly adverse relationship to a third party?

B. LAWYER AND CORPORATION AND OFFICER

*Yablonski v. United Mine Workers*⁵ presented a problem that the court approached as if it were a corporation case, though it was not. The facts of *Yablonski*, decided by the United States Court of Appeals for the District of Columbia Circuit in 1971, were as follows. Boyle had been for many years the president and dominant figure of the United Mineworkers of America, a major national labor organization. Yablonski was a dissident member who over a long period had disputed the prudence of various union policies under the Boyle regime. Yablonski assembled proof that Boyle had made unlawful use of union assets for his own personal benefit and to perpetuate himself in office. Yablonski brought a derivative suit on behalf of all the members of the union against Boyle, seeking an accounting for and restitution of the union funds allegedly misused.

The law firm representing the union as general counsel during Boyle's administration defended both the union and Boyle as an individual. The law firm had similarly represented Boyle individually "in many facets of his activities as a UMWA official."⁶ Plaintiff moved to disqualify the law firm from representing the union, on the ground that there was actual or potential conflict of interest in its representation of both the union and Boyle. The trial court denied the motion, but the Court of Appeals reversed, saying:

Counsel of the UMWA should be diligent in analyzing objectively the true interests of the UMWA as an institution without being hindered by allegiance to any individual concerned.⁷

We think the analogy of the position of a corporation and its individual officers when confronted by a stockholder derivative suit is illuminating here. We believe it is well established that when one group of stockholders brings a derivative suit, with the corporation as the nominal defendant and the individual officers accused of malfeasance of one sort or another, the role of both the corporate house counsel, and the regular outside counsel for the corporation becomes usually a passive one.

The corporation has certain definite institutional interests to be represented, and the counsel charged with this responsibility should have ties on a personal basis with neither the dissident stockholders nor the incumbent

5. 448 F.2d 1175 (D.C. Cir. 1971) (regular union outside counsel disqualified from representing union in action for restitution of funds misappropriated by union officers but should continue to represent officers).

6. *Id.* at 1179.

7. *Id.*

officeholders.⁸

This analysis seems to be a truism: The law firm, having represented the officer “in many facets of his activities as a UMWA official,” would have a conflict of interest in any representation of the organization where it was plausibly charged that some of these activities had defrauded the organization. This analysis becomes self-evident, however, only when reviewing the transactions in retrospect and assuming that at all relevant times there was reason to believe the transactions were tainted with malfeasance. There must have been a period far back in time when the relationship between Boyle and the union was “normal,” a time before Boyle started misappropriating funds and abusing his office. At that time, what was the legal relationship between the organization’s law firm and its officer?

We may juxtapose the language from *Fickett* alongside that from *Yablonski*. *Fickett* says: “When the lawyer undertakes to represent the guardian . . . he assumes a relationship not only with the guardian but also with the ward [T]he possibility of frustrating the whole purpose of the guardianship became foreseeable”⁹ *Yablonski* says: “[C]ounsel . . . should be diligent in analyzing objectively the true interests of the UMWA as an institution without being hindered by allegiance to any individual concerned.”¹⁰

Both *Fickett* and *Yablonski* define the lawyer’s role not in terms of persons but in terms of legal institutions—“the guardianship” and “the UMWA as an institution.” Neither defines the lawyer’s professional responsibilities in terms of a single specific individual. *Fickett* says the lawyer “assumes a relationship not only with the guardian but also with the ward”;¹¹ *Yablonski* says the lawyer “should [not] have ties on a personal basis with . . . the incumbent officeholders.”¹² Both refer to a larger structure and broader purpose the lawyer is supposed to serve. *Fickett* refers to the “whole purpose of the guardianship”;¹³ *Yablonski* refers to the fact that “the corporation has certain definite interests to be protected.”¹⁴

What do these statements mean? They do not seem wrong, quite the contrary. They are wrong, however, if Brougham’s classic dictum is unqualifiedly correct, that “an advocate, in the discharge of his duty, knows but one person in the world, and that person is his client.”¹⁵

8. *Id.* at 1181.

9. *Fickett*, 7 Ariz. App. at 795, 558 P.2d at 990.

10. *Yablonski*, 448 F.2d at 1179.

11. *Fickett*, 27 Ariz. App. at 795, 558 P.2d at 990.

12. *Yablonski*, 448 F.2d at 1181.

13. *Fickett*, 27 Ariz. App. at 795, 558 P.2d at 990.

14. *Yablonski*, 448 F.2d at 1181.

15. 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed. 1821).

II. TRADITIONAL CONCEPTS FOR DEFINING A LAWYER'S RESPONSIBILITIES

A. THREE POSSIBLE RELATIONSHIPS

Part of the difficulty posed by triangular lawyer relationships lies in the traditional limitations in the definition of a lawyer's responsibilities. Generally, those responsibilities recognize only three relationships that a lawyer may have. One is with a client; the second is with the court; and the third is with a third party. In substance and orientation, these relationships differ from each other radically. In moral and existential quality, they are strangely alike in their radical simplicity. They characterize the lawyer's "relevant other" respectively as something like friend, father, and foe.

1. Clients

In the relationship with a client, the lawyer is required above all to demonstrate loyalty. For the present discussion it is unnecessary to describe the dimensions of this duty of loyalty in detail. The duty includes maintaining diligent preference for the client's interests with the sole purpose of maximizing them—"zeal"—and doing so with sedulous protection of the client's secrets and confidences.¹⁶ Charles Fried analogized this relationship to that of "friend."¹⁷ Although the analogy to friendship is imperfect in many important details, it is generally satisfactory. A client is one to whom the lawyer is friend, indeed friend as distinguished from "foe."

The relationship is otherwise largely unstructured, however. The lawyer's efforts may go as far as the law allows one person to act on behalf of another. The conventional statement of the duty of loyalty requires that, if the client so demands, the lawyer pursue the representation to the "bounds of the law."¹⁸ Except for this exterior boundary of legality and a few technical

16. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) [hereinafter MODEL RULES] provides in part: (a) "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation"

MODEL RULES Rule 1.7 provides in relevant part:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

17. Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060 (1976).

18. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981) [hereinafter MODEL CODE] ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law"); MODEL RULES Rule 1.2 provides in part:

particulars,¹⁹ the direction and purpose of the lawyer's activity in the lawyer-client relationship are legally undefined. The lack of any such structure allows maximum flexibility, which in turn facilitates the partisan purpose of the lawyer-client relationship.

What things the lawyer will do for the client is left to their joint exercise of discretion. Theoretically, the range of objectives is infinite, although the law provides a few protocols about the ways and means of achieving those directives. The lawyer may be commissioned as technical adviser to provide only tightly stated formal legal opinions responding to tightly limited formal requests. The lawyer may be commissioned as advocate in litigation to assert anything permitted by law on the client's behalf, even a presentation the client dictates almost entirely. On the other hand, the lawyer may be the client's lifelong business associate and personal confidant, virtually an alter ego, providing advice and assistance ranging far beyond legal considerations as such.

Not only is the lawyer-client relationship legally unstructured, aside from the requirement that it be "within the bounds of the law," but it is also enveloped in secrecy. The duty of confidentiality prohibits the lawyer from revealing anything about the client's affairs to anyone else—even the client's family—except as necessary to carry out endeavors on the client's behalf.²⁰ This legal duty is backed by strong professional tradition, the sanction of firm peer opinion, and the impulse of deep personal internalization by members of the profession. The companion evidentiary rule, the attorney-client privilege, precludes external inquiry into the lawyer-client relationship except where there is independent indication that the relationship has been employed in criminal or fraudulent purposes.²¹ The lawyer-client relationship in practice is an essential instrument in many undertakings at the margin of legality, with consequent implication of the lawyer in transactions that could

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation

....

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel to assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

19. See MODEL RULES Rule 1.8 (Conflict of Interest: Prohibited Transactions).

20. MODEL RULES Rule 1.6 provides in part:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm

21. C. WOLFRAM, *supra* note 3, § 6.3, at 250-57 (discussing attorney-client privilege).

beget disapproval, disgust, and ostracism if they were brought into open view by others. In serving a client, the lawyer is largely shielded from such informal social controls because his or her work is largely done in secret. The low visibility of the lawyer's work with clients permits the lawyer to operate largely free of legal and social restraint.

The structure of the lawyer's relationship with a client thus is legally both amorphous and secret. Subject to the client's approval and "within the limits of the law," the lawyer operates in something of a legal vacuum in working for a client, especially compared to the working environment, for example, of a securities underwriter, an accountant, or a policeman. Similar immunity from general social norms and scrutiny is enjoyed only by undercover agents, political go-betweens, and Cayman Island bankers.

2. Courts

The second of the lawyer's legal relationships, in the traditional conception, is with the court. The basic proposition posits that "A lawyer is an officer of the court."²² As an officer of the court the lawyer's duty is to play by the rules of the litigation game. The rules of the game are the laws of procedure and evidence—rules about pleading, discovery, objections, appeals, etc. In substance, these rules impose little constraint, short of fraud, on the advocate's role. As long as an advocate speaks through a complaint, brief, oral argument, or other forensic medium, he or she is permitted to assert anything not plainly frivolous or knowingly false.²³ Rule 11 of the *Federal Rules of Civil Procedure* qualifies this freedom in the federal courts by requiring some due diligence in investigating facts.²⁴ More generally, under the "duty of candor" the lawyer is obliged, notwithstanding his or her duty to the client, to tell the truth in statements made to the court and to refrain from offering submissions on a client's behalf that the lawyer knows are false or frivolous.²⁵

22. *Id.* § 1.6, at 17.

23. MODEL RULES Rule 3.1 provides in part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law"

24. FED. R. CIV. P. 11 provides in part:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law

25. MODEL RULES Rule 3.3 provides in relevant part:

- (a) A lawyer shall not knowingly:
- (1) make a false statement of material fact or law to a tribunal;
 - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

Once the advocate has met the minimal requirements of due diligence and candor when speaking on his or her own behalf, however, the substantive license is nearly wide open. The lawyer is accorded economic and moral immunity from the costs and consequences of the representation. Economically, neither the advocate nor the client is liable for the cost that litigation imposes on others or on the public. Morally, everything the advocate presents on the merits is someone else's assertion—evidence of witnesses as to matters of fact, sources of authority as to matters of law.²⁶

Although the lawyer's substantive responsibility to the court is minimal, the formal aspects of that relationship—the law of procedure and the rules of evidence—are highly detailed and exacting. The law of procedure and rules of evidence prescribe the parties' conduct in relationship to each other. Thus, rule 8 of the *Federal Rules of Civil Procedure* provides: "A pleading which sets forth a claim for relief. . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . ." ²⁷ While this rule is addressed formally to the parties, it is addressed implicitly to the advocate and reflexively to the advocate's legal relationship with the judge. Because of this rule, an advocate cannot convey the nature of his client's cause to the judge in just any simple and convenient way, such as sending the judge a letter. The advocate may present the cause only in a complaint formulated and filed according to rule 8.²⁸ Similarly, the advocate cannot informally suggest to the judge when the case might be set for trial; the advocate is required to make a motion, or to await a formal occasion such as the calendar call or the pretrial conference, to make such a suggestion.²⁹ The advocate cannot conduct pretrial interrogation of the opposing party simply by dropping by the witness for an interview; he or she is re-

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

26. MODEL RULES Rule 3.4 provides in part: "A lawyer shall not: . . . (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness . . ."

27. FED. R. CIV. P. 8(a).

28. FED. R. CIV. P. 8(a) provides:

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

29. *Id.*; see also FED. R. CIV. P. 40 (district courts shall provide rules for placing actions on

quired to give notice to the opposing party's lawyer and, in the absence of stipulation, to do all questioning on the record in the presence of opposing counsel and the reporter.³⁰

The advocate's relationship to the judge is not only controlled by an elaborate structure of legal rules but is also under the continuous surveillance of a suspicious monitor, opposing counsel. Much of what an advocate does as an officer of the court is in open view of his or her opponent—pleadings and motions, discovery through legal process, evidence and argument. The rest of what an advocate does—such as plotting strategy, conducting field investigation, and marshalling the case—is subject to the adversary's continuous counterintelligence, on alert to blow the whistle on endeavors that transgress the rules.

There is a further peculiarity about the lawyer's relationship to the court. The task in which the lawyer and the judge are engaged—along with the lawyer's client and the opposing lawyer and his client—is a game of make-believe. The game is litigation—the presentation of evidence and argument to establish facts and rules for resolving the dispute between the parties. The game is real in its “internal” manifestations, because it involves real energy, real emotion, real credibility, and real expenditures. It is also real in its “external” consequences, because there are winners and losers; real money passes according to the outcome. The immediate game itself, however, is one of make-believe. Concerning the facts, the law proceeds on the normative fiat of its own officials. The “facts found” by the court are taken as truth by force of law, no matter what Heaven or the litigants know the “true facts” to be. Similarly, the substantive rules governing the dispute are artifacts of a political process made authoritative by law. In the immediate sense, the law is what the judges say it is. Under the rules of the litigation game, these legal constructs pass for truth and justice.

Morally and existentially, the relationship between advocate and judge is the converse of the lawyer's relationship to a client. The lawyer's role as an officer of the court is as legally structured and visible as the role of law office counselor is legally unstructured and secretive. The relationship with the court is governed by a tight formal matrix that closely regulates all of the lawyer's moves; the relationship with the client is governed only by a broad fiduciary formula that permits almost any arrangement within the limits of the law. The domain of advocate and judge is a theatrical stage in which every act and utterance is *ex officio* and the end product is an “official story.”

calendar on request of parties and notice to other parties); FED. R. CIV. P. 16(b) (judge or magistrate shall consult with attorneys to establish scheduling order).

30. FED. R. CIV. P. 30(c) provides in relevant part: “Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence.”

The domain of counselor and client is, or is supposed to be, an intimate, frank, trusting friendship, where the "client must feel free to discuss whatever he wishes" and the "lawyer should be fully informed of all the facts of the matter" ³¹

3. Third Party

The third kind of lawyer's relationship is that with a third party. In general, a third party is entitled to very little from the lawyer. If Brougham's dictum about the duty of the advocate is taken as the measure of the lawyer's legal duty to anyone but the client,³² a lawyer owes a third party nothing. The law concerning a lawyer's obligations to others is hard indeed, but not quite that hard. Against a lawyer, a third party is entitled to the protection of the criminal law. This protection is expressed in the rule that a lawyer may not assist a client in perpetrating a crime against third persons.³³ A third party is also entitled to the protection of the law of fraud. This protection is expressed in the rules that a lawyer may not assist a client in committing a fraud, may not directly make misrepresentations to a third party,³⁴ and is liable in tort and for disciplinary sanctions for a violation of those rules.³⁵ Rules against abusive litigation, such as rule 11 of the *Federal Rules of Civil Procedure* are essentially corollaries of the rule against fraud, for the concept of "frivolous litigation" is essentially the same as misrepresentation in contract law. That, however, is about all lawyers owe third parties.

B. INADEQUACY OF CONCEPTUAL PREMISES

The established conceptual system thus allows for only three parties with whom the lawyer may have a professional relationship: client, court, third party. As we shall see, the most difficult problems in triangular relationships are those in which the lawyer is performing a counseling function as distinct from the function of advocate. In counseling situations one thing is clear: none of the relevant others is a judge. Under the established scheme, that reduces the conceptual possibilities from three to two. The lawyer's relationship to the other person—the ward or the corporate officer—must be characterized as either that between lawyer and client or that between lawyer and third party.

This is a stark choice. If the relationship is characterized as that with a client, then the duties of loyalty, zealous partisanship, and confidentiality are

31. MODEL CODE EC 4-1.

32. See *supra* text accompanying note 15 (discussing Brougham dictum).

33. MODEL RULES Rule 1.2, set out *supra* note 18.

34. *Id.*

35. C. WOLFRAM, *supra* note 3, § 5.6.5, at 227-229; Hazard, *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 682-83 (1981).

fully engaged. To say that when the lawyer represents a guardian he or she thereby also represents the ward, or that when a lawyer represents a corporation he or she also represents its corporate officers, is to implicate very serious practical and conceptual difficulties, indeed contradictions.

This becomes clear when we consider that, if a lawyer is deemed to represent both guardian and ward, or both corporation and corporate officer, then the following problems would arise.

1. Conflict of Interest in Current Representation

The conflicts of interest rules governing concurrent representation would determine whether the lawyer could concurrently represent the guardian and the ward, and the corporation and its officer.³⁶ Guardian and ward, and corporation and corporate officer, necessarily have some potentially serious conflicts of interest. If a lawyer representing a guardian also represents the ward, and if a low threshold of sensitivity is used in applying the conflicts test, potential conflict between the two clients would always exist. As a result, a lawyer could *never* represent a guardian because that representation would necessarily entail the conflicting representation of the ward. The same would be true of corporate representation.

2. Conflict of Interest Regarding Former Client

The conflicts of interest rules regarding former clients would determine whether a lawyer could continue representation of the guardian after a dispute arose concerning the guardian's performance of his or her responsibility as such. A lawyer cannot represent one client against a former client in a matter that is the "same or substantially related."³⁷ Hence, if a lawyer were deemed to represent both guardian and ward and if at any point the ward disputed the guardian's accounts, the lawyer would not only have to cease "representing" the ward but would also have to cease representing the guardian as well. The same would be true in corporate representation.

3. Confidential Communications

Communications and confidential information concerning the guardianship would be governed by the rule as to "confidences and secrets" among multiple clients. In general, a lawyer engaged in multiple representation may not withhold from one of the clients confidences and secrets that have been

36. MODEL RULES Rule 1.7, set out *supra* note 16.

37. MODEL RULES Rule 1.9 provides in part: "A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation"

obtained from or on behalf of the other.³⁸ If this rule were applied on the premise that guardian and ward are both considered clients, everything the guardian confided to the lawyer would have to be made available to the ward. The same would be true in the corporate situation.

4. Attorney-Client Privilege

The corollaries of attorney-client privilege that apply in multiple representation would govern the situation of guardian and ward and that of corporation and officer. Both guardian and ward, or both corporation and corporate officer, would be joint holders of the privilege. Thus the privilege could be claimed by both, could be waived by either, and would be inoperative between them.³⁹ For example, a disgruntled former corporate employee could freely report corporate legal confidences to third parties. The same would be true in the situation of guardian and ward.

The courts have rightly hesitated to embrace the foregoing implications. They have been confused, however, in knowing where to stop or even where to start. They evidently recognize that the lawyer in these triangular relationships has special protective responsibilities to the person who is not the client, but they do not wish to say that these responsibilities include the whole package owed to a client. Under the conventional conceptual system, the alternative is to say that the lawyer's relationship to the other person is that of lawyer and third party. In the guardian-ward situation, this would mean that the ward is merely a stranger. The same would be true of the corporate lawyer's responsibility to a corporate director, officer, or employee.

To treat the ward or the corporate officer as a mere stranger is unappealing and incoherent. It is unappealing because it affords the ward or the corporate employee, insofar as the lawyer is concerned, only the cold comfort provided by the laws of crime and fraud. It is incoherent in the guardianship situation because it calls for the lawyer as agent of the guardian to have an arm's length relationship with one to whom the guardian has an intimate and exacting fiduciary duty. That makes no sense under basic principles of the law of agency. Under the law of agency, the duty of an agent of the principal (i.e., the lawyer representing the guardian) to a third person (i.e., the ward) is a function of the duty of the principal (i.e., the guardian) to that person.⁴⁰

38. C. WOLFRAM, *supra* note 3, § 6.4.8, at 274-276 (discussing co-client rule).

39. *Id.*

40. RESTATEMENT (SECOND) OF AGENCY § 344 provides:

An agent is subject to liability, as he would be for his own personal conduct, for the consequences of another's conduct which results from his directions if, with knowledge of the circumstances, he intends the conduct, or its consequences, except where the agent or the one acting has a privilege or immunity not available to the other.

To treat the ward as a stranger vis-à-vis the lawyer disregards that interconnection.

In the corporate situation an even more complicated set of difficulties is presented if the corporate officer is treated as a mere stranger. For one thing, the corporate officer is effectively the personification of the corporate client for most ordinary legal purposes. Corporate counsel and the corporate officer must maintain an intimacy that substantially replicates that between counsel and a flesh and blood client. It is simply impossible to hold that a person who is, in fact, a confidential intimate shall nevertheless be regarded in law as a total stranger. Moreover, under the law of agency, some kind of protective responsibility is owed by the principal to the agent in matters within the scope of the agency.⁴¹ A corporation owes a responsibility to its employees, sometimes something like that of guardian to ward. Thus, whatever the relationship between an corporation and its director, officer, or employee, it is not that of one stranger to another.

The alternative relationships, lawyer-client and lawyer-third party, are starkly different in substance. They are oddly similar, however, in one qualitative respect: Both are relatively unmodulated, uncomplicated, polarized relationships. A client is a friend, for whom the lawyer legally may do anything within the limits of the law of crime and fraud. A third party is a foe, to whom the lawyer legally may do anything within those same limits. Neither relationship involves graduations, intermediacies, thresholds, degrees of scrutiny—none of the rebuttable presumptions, conditions precedent or subsequent, prima facie requirements, or other differentiations that the law uses ubiquitously in other domains. Tort law, for example, distinguishes between fraud, recklessness, ordinary care, highest care, and strict liability; contract law distinguishes between invitation, offer, conditions precedent and subsequent, executory contract, mutual promises, and injurious reliance. In every substantive field, indeed, the law has conceptual vocabularies to deal with relationships between parties whose interests are dependent, adjacent, or interconnected but nevertheless distinct. This vocabulary includes expectation, normal course of events, change of circumstances, reliance, notice and demand, mitigation of consequences, and “good faith.” The law at large thus readily conceives modulated relationships. Indeed, modulation of relationships between the polar types of friend and foe is mostly what substantive law is about.

This kind of modulation is absent in the legal definition of relationships between lawyer and client and between lawyer and third party. The very simplicity of these autonomies fits them for application in relationships of

41. *Id.* § 432 provides: “A principal is subject to a duty to an agent to perform the contract which he has made with the agent.”

contentious struggle, particularly in litigation and zero sum negotiation, where they are safe for being simple. A lawyer's relationship to his or her client carries only minimal obligations to others and is normally characterized by almost unambiguous fidelity. A lawyer's relationship to third parties is one of almost equally unambiguous antagonism—a mirror image. Neither relationship imposes more than minimal responsibility on the lawyer for defining the situation and structuring the relationships within it. Neither requires facility in accommodating conflicting interests, or much resiliency in interpersonal relationships, or even much self-control. Neither the advocate nor the negotiator is required to ask whether the client's present interests are more complex and more ambivalent than simply winning. Neither is required to ask whether the client's long-range interest may be defeated by immediate victory. The only judgment required is essentially tactical—how much to commit with what chance of winning. The attitude generally nurtured is that which Vince Lombardi cultivated in another professional calling, "Winning isn't everything, it's the only thing." Of course, Lombardi was addressing postadolescent males about playing football.

Such a simplistic normative premise is inadequate for defining the relationship between a lawyer and the guardian's ward or between a corporation's counsel and the corporation's directors, officers, and employees. The complex interdependencies in the lawyer-guardian-ward and lawyer-corporation-corporate officer situations do not lend themselves to analysis in terms of friend or foe.

The inadequacy of these premises no doubt explains why the responses of courts and scholars to lawyer triangular relationships have been so baffled and baffling. Lacking an adequate conceptual system to address the problem, the courts have done what courts always do in such circumstances: They adhere to bad concepts and get poor results, or, as in the *Fickett* and *Yablonski* cases, they reach what may be good results but improvise on concepts. A variation of this technique is to marshal miscellaneous "factors," factors found in all the problematic situations, and then to maintain that the correct solution depends on "all the factors." Thus, in trying to apply the attorney-client privilege to a situation where shareholders claimed that the corporation's counsel assisted its officers in corporate derelictions, the Fifth Circuit Court of Appeals said in *Garner v. Wolfenbarger*:⁴²

This case presents the important question of the availability to a corporation of the privilege against disclosure of communications between it and its attorney, when access to the communications is sought by stockholders in litigation brought by them against the corporation charging the corpora-

42. 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971) (availability of attorney-client privilege subject to shareholders's right to show of cause for its invocation).

tion and its officers with acts injurious to their interests as stockholders.⁴³ [T]he availability of the privilege should be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.⁴⁴

There are many indicia that may contribute to a decision of presence or absence of good cause, among them the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether their communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.⁴⁵

This circumscribes the problem rather nicely but does not progress much toward comprehending it.

IV. TOWARD BETTER CONCEPTUALIZATIONS

In an earlier writing I lamely used the term "quasi-client" to define the "other person" in a lawyer's triangular relationships.⁴⁶ Dean Patterson has tendered the term "derivative client" for the same person.⁴⁷ These terms have the virtue of making it clear that the ward or the corporate officer or stockholder is not simply a stranger in relation to the lawyer. They also have the virtue of recognizing that a connection exists between the lawyer's relationship to the client and the client's relationship to the third party. Such terms as "quasi client" and "derivative client" do not meet the difficulties involved, however, because they do not suggest what different responsibilities a lawyer may owe to such a person than to a full-fledged "client," or why. Further analysis is required.

Neither the concept of "client" nor that of "third party" appropriately engages the complexities of triangular relationships, even a simple one such as that of guardian and ward involved in *Fickett v. Superior Court*. The client in such a triangular situation is not a person alone—the *A* of classical legal hypotheticals, where "*A*, the owner of Blackacre" does something to or

43. *Id.* at 1095.

44. *Id.* at 1103-04.

45. *Id.*

46. G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 44 (1978).

47. L. PATTERSON, *LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY* 65 (1982).

is done something by *B*. One who has become another's guardian is no longer *A* but has become "*A* encumbered by duties to *B*." So long as the relationship between *A* and *B* exists, and for some purposes even after it ends, *A* is not a legal monad. Rather *A* is a member of an "institution," (as said in *Yablonski v. United Mine Workers*), that has a "whole purpose," (as said in *Fickett*). In legal terms, a guardian as such is an officeholder constituted by law, by court appointment as in the *Fickett* case or by private contractual designation. So also, and more obviously, the corporate director, officer, or employee is an officeholder constituted by legally sanctioned private ordering, and is a member of an "institution" that has a "whole purpose." As a matter of law, both guardian and corporate officer are not persons but personages, individuals who act in legal capacities.

The relationship between the lawyer and the client in a triangular relationship is not one of complete confidentiality and intimacy. In consultations relating to the representation, the interests of a third party—the ward or the corporation—are always in contemplation. The consultations indeed are unintelligible except by reference to the needs, vulnerabilities, expectations, and history of the "relevant other." That being so, there is a special meaning in fact and in law to everything that both the fiduciary and the lawyer do and say. "Confidence," "trust," "accountability," "care," "prudent regard" as concerns the ward are the terms in which the law will interpret the guardian's words, acts, and documents. Those of the lawyer will also have to be interpreted in those terms.

Because the law imputes such meaning to the behavior of both the fiduciary and the lawyer, and because the lawyer knows or is deemed to know the law, the lawyer is in a position to interpret what he or she and the guardian are doing as a court might interpret them. Because the lawyer *can* interpret what is being done in the same way a court would, the law expects that the lawyer *will* in fact have done that, and accordingly assess whether the requisite care and bona fides have been manifested.⁴⁸ And if a day of reckoning comes concerning the guardian's performance in office, any conflict over whether that performance was full and fair cannot be simply a dispute between the guardian and the ward. The question also will arise, as in *Fickett* and *Yablonski*, as to what lawyer had been doing.

The vocabulary and metaphorical geometry used in analyzing the "normal" lawyer-client relationship contemplate an intimate dyad of lawyer and client, facing outward toward an alien and presumptively hostile world of third parties. That vocabulary and geometry misdescribes relationships between a lawyer, a client who is a legal personage, and a third person whose

48. See Hazard, *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271, 282-283 (1984).

very existence defines that personage. The problem is to develop concepts and vocabulary that intelligibly address relationships where the lawyer must care about two parties.

One method is to specify core or paradigm cases where the correct result is "intuitively" clear, and then to develop exceptions and qualifications. Another method is definition by exclusion—identifying the exceptions and qualifications first and then working at what remains in the middle. In this inquiry the latter procedure is used. First, it identifies, along one boundary, situations where the relationship between lawyer, client, and "relevant other" ought to be assimilated to that which "normally" obtains between lawyer, client, and "arms length" third party. Second, it considers, along another boundary, situations where the relationship can be assimilated to another "normal" case, that of a lawyer's joint representation of multiple clients. Finally, it considers the more complicated intermediate cases.

A. CLIENT OPENLY ADVERSE TO THE "OTHER"

There are cases where a lawyer in a triangular situation has the same "arm's length" position vis-à-vis the "relevant other" as a lawyer "normally" should have on behalf of a client. The clearest is where the lawyer, not having been involved previously, is retained to represent a guardian or a corporate officer in litigation concerning that person's performance of duties. The specification that the lawyer has *no* previous involvement with the guardian or corporate officer indicates that the lawyer has not incurred any responsibility in the transaction prior to the litigation.

In the case of a guardianship, litigation could involve a proceeding initiated by the ward against the guardian, either an independent suit or a motion in the guardianship proceeding to surcharge or remove the guardian. Litigation could involve an objection by the ward to a periodic accounting submitted by the guardian; such an accounting is essentially a request by the guardian for a declaratory judgment of exoneration and is therefore a surcharge proceeding with the parties reversed. The guardian risks legal condemnation, financial loss, civic disgrace, and moral obloquy. This being the guardian's legal exposure, the guardian is entitled to vigorous marshaling of evidence tending to show he did not violate his trust, and he is entitled to vigorous argument for a favorable definition of his legal obligations. By the same token, the lawyer is obliged to make zealous efforts on the guardian's behalf; hold in confidence information garnered for the representation; and abstain from conflicting representation in the matter.

There should be no equivocation or confusion about the nature of lawyer-client relationship and the lawyer's duties in this situation. An action for surcharge is a legal claim against the guardian in his or her individual capacity for alleged wrong committed in the course of an official capacity. The

potential financial loss, moral obloquy, and civic disgrace faced by the guardian are real individual interests. Persons with that kind of exposure are entitled to legal representation, which means full service advocacy.

The same analysis applies where a lawyer, not previously involved, is retained to represent a corporate director, officer, or employee. Ordinarily, that kind of representation is arranged only when there is a significant possibility that the interests of the director, officer, or employee may diverge from the corporation's interests. When this possibility exists, there is also a risk that there will be legal or informal recrimination on behalf of the corporation. Persons with that kind of exposure are likewise entitled to full service advocacy.

The same analysis again applies where a lawyer, not previously involved, is retained to represent the corporation against a corporate director, officer, or employee to redress malfeasance in office. That was the situation in *Yablonski*, where the derivative suit sought to redress the officer's mispending of organization funds. The holding in *Yablonski* that the organization is entitled to the zeal of an uncompromised advocate is correct.

A second almost equally clear case of a normal "arm's length" relationship involves the lawyer retained to represent someone nominated as guardian or corporate officer in negotiating the terms and conditions of the office. Again by hypothesis, the lawyer has not represented "the guardianship" or the corporation. If the nominee takes on the office, then he or she will have the fiduciary duties it entails—the duty to avoid self-interested transactions, the duty to use the care required in protecting the interests of the "relevant other," etc. While the general terms of these duties attach to the office, important details may be specified by contract and are therefore matters for potential negotiation. It is familiar hornbook learning that a fiduciary may contract for the duty of care to be recklessness rather than negligence; that broader rather than narrower discretion may be conferred; that certain otherwise applicable legal formalities may be waived, etc. A nominee for the office is entitled to legal advice about these obligations of the office, to unfettered assistance in negotiating the terms upon which it is undertaken, and to walk away from the deal if, upon due consultation with legal counsel, the terms appear unacceptable. The correlative responsibility of the lawyer for the nominee is also clear: to assist a client in dealing at arm's length with an "other." While the proposed contract will transform the arm's length relationship into a more legally intimate relationship, the contractual transformation has not yet been effected. The situation is the same where the lawyer represents one of the parties in other kinds of proposed special relationships: prenuptial agreements, partnership agreements, formation of corporate ventures, corporate employment contracts, etc.

A third clear case of "arm's length" representation is where a lawyer with

no prior involvement is brought into negotiations for termination or reformation of the special relationship. Again by the hypothesis the lawyer has not been involved in the conduct of the relationship, but only in negotiations concerning whether or not it should be continued.

Opening such negotiations signals that continuation of the fiduciary relationship has been transformed from an assumption—a presupposed characteristic of the relationship—into an unresolved contingency. That signal divides the relationship into two aspects. In past and pending transactions, the fiduciary remains subject to established obligations. Even in this respect, however, those duties are being performed “on notice” that the fiduciary for whatever reason is dissatisfied or fearful or tired or sees a better use of time, and in any event may not long continue to perform. For the other party, the ward or the corporation as the case may be, being “on notice” signifies that the fiduciary’s protective service may cease; that a final accounting may be imminent; and that there is a risk of “exit opportunism.” The fiduciary’s legal duties continue but their fulfillment is pervaded by legal uncertainty, emotional disengagement, and usually some distrust. Lots of human relationships are like that, however, and legally the fiduciary is still bound *ex officio*.

In the other aspect of the relationship, however, the lawyer has been retained concerning whether and on what terms the parties should continue their relationship in the future. This potential transformation is intelligible only if interpreted as a negotiation between the fiduciary in his or her original individual capacity and the ward or the corporation, wherein the subject of negotiation is the future existence of the fiduciary’s distinct legal capacity. In those negotiations the person occupying the fiduciary office stands at arm’s length with the ward, and the role of the lawyer is correspondingly “normal.”

The foregoing cases are quite clear as a matter of legal concept and analysis. There is, of course, an element of unreality in hypothesizing such unambiguous facts. The unreality is greatest in the third case, where it is hypothesized that the lawyer is brought in only for negotiations between the guardian and ward or corporation and officer about continuing their relationship. In reality it is unlikely that things would happen this way. Much more likely, the lawyer handling negotiations over continuation of a guardianship relationship would have been involved while the relationship was ongoing, quite possibly from its inception. The corporate situations hypothesized are also abstractions. A lawyer representing the corporation in negotiations with a corporate officer or employee is likely to have had some prior involvement in the relationship between the corporation and the officer.

Recognition of this element of unreality serves, however, to establish an important point: One problem in thinking through the lawyer’s responsibili-

ties in triangular relationships is that the relationship may not be continuously triangular. In various stages and circumstances the link of special responsibility between the client and the "relevant other" may become contingent, openly or otherwise. When this contingency becomes imminent the relationship threatens to become antipodal, with the client and lawyer on one side and the "relevant other" on the other. For example, an apparently routine guardianship accounting unexpectedly reveals serious questions of whether funds were misused, or a friendly negotiation of a corporate officer's scope of responsibility reveals unexpected conflict—if the situation reaches that stage, independent representation may be required. *If* the relationship becomes openly adverse, the lawyer "knows no other duty" than to the client. But when does a triangular relationship threaten to become contingent and antipodal? We will return to that question presently.

B. NORMAL PROTECTIVE RELATIONSHIP

While the positions of the fiduciary and the "relevant other" are openly adverse in some situations, normally the fiduciary's protective responsibility is unambiguous. In the normal legal relationship between guardian and ward, or between corporation and corporate director, officer, or employee, the legal purpose of the relationship is being fulfilled and the fiduciary is conforming his or her conduct to legal requirements.

The lawyer's task in this normal situation is to assist the fiduciary in meeting his or her legal obligations, and to help minimize legal risks to the relationship from outside forces, such as persons with competing claims on the assets or the tax collector. Toward these ends the lawyer supplies advice and employs legally recognized techniques that further the undertaking. Thus, the lawyer provides the forms and procedures for board action in the corporation, for the proprietries where a director has a conflict of interest that disqualifies him or her from voting on a corporate matter, etc. In the guardianship, the lawyer similarly safeguards the proprietries. The lawyer represents the guardian *in taking care* of the ward—the "whole purpose of the relationship," to use the phrase from *Fickett*. In the corporate situation, the corporate counsel works with the corporate director, officer, or employee *in taking care* of the corporation's "institutional interests," to use the phrase from *Yablonski*. Neither a "guardianship" nor a "corporation" has material existence or autonomous identity. They are legal events, artifacts of the lawyer's endeavors in the representation. The relationship itself is an evolving legal event that the lawyer's services continuously create.

The closest analogy for this kind of representation is joint representation in which a lawyer represents two or more closely connected parties, one of whom serves as spokesperson. In a typical example, the lawyer represents "the partnership" or "the partners" but on a day-to-day basis deals with the

managing partner. A variation involves a lawyer who jointly represents both members of a marital community in its financial affairs but on a day-to-day basis deals only with one of the spouses. In many guardianships and trusts, the guardian or trustee voluntarily or by direction consults with the ward or beneficiary, and to that extent makes their relationship into something of a partnership. In the corporate situation, while the law carefully specifies that the client is the corporation as an entity,⁴⁹ the lawyer nevertheless has responsibilities to various corporate "constituents" and deals on a day-to-day basis with several corporate officials.

The "joint" character of the representation in a triangular relationship is reflected, in reality if not legal form, in the lawyer's employment contract. In a guardianship, the lawyer's employment is determined by the guardian but his or her fee is chargeable to the guardianship estate. Managerially, the contract is with the guardian; economically, the burden of the fee rests on the ward. In the corporate situation, the lawyer's employment is determined by a corporate official but the cost of the legal fee or salary is borne by the corporation, the dependent party.⁵⁰ Thus, on the client side, the engagement of the lawyer is close to a joint enterprise legally and practically.

49. MODEL RULES Rule 1.13 provides in part: "(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

50. MODEL RULES Rule 1.13 provides in part:

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter sought for presentation to appropriate authority that can act in behalf of the organization as determined by applicable law; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with rule 1.16.

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

In view of these characteristics of the functioning triangular relationship, the lawyer's responsibilities may well be analogized to multiple representation. The key rules are those of confidentiality and loyalty. In multiple representation, the rule of confidentiality includes all within the group and excludes all outside it. In the corporate situation, the rule of confidentiality applies to information the corporate lawyer obtains from corporate "constituents" in the course of the representation, as does the corresponding rule of attorney-client privilege.⁵¹ The same principle would apply to information provided to a lawyer for a partnership and ought to apply to information received from a ward by a lawyer or a guardian.

Concerning the principle of loyalty, a lawyer may serve two or more clients in the same matter if they do not have adverse interests.⁵² In a triangular relationship in the normal state, the interests of the nonlawyer participants are not adverse; both, therefore, may be considered to be clients.

Conceptualizing both the "relevant others" as clients, and the lawyer as engaged in multiple representation, seems entirely natural when the triangular relationship is in its normal state. The question is whether there are reasons for refusing to conceptualize it in this way. Only one reason exists for such hesitancy: the implications that follow if the triangular relationship ceases to be normal and instead becomes antagonistic.

The principal implications of treating this situation as one of multiple representation have been suggested earlier.⁵³ Under standard doctrine, in multiple representation each client has the full rights of a client, including the power over confidentiality and the right to enforce the conflict of interest rules against the lawyer. Thus, if the corporate officer is treated in all respects as a client, then confidences he or she has imparted to the lawyer would not be usable against him or her *after* the normal triangular relationship has collapsed and the corporation and its officers become legal antagonists.⁵⁴ If the corporate officer is treated as a client in all respects, upon the collapse of his or her relationship with the corporation, the officer could then insist that the corporate lawyer not represent the corporation against him or her.⁵⁵ These are undesirable corollaries and their specter is a weighty

51. *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (attorney-client privilege covers employee responses to questionnaires and interview notes of counsel).

52. MODEL RULES Rule 1.7, set out *supra* note 16.

53. See *supra* text accompanying notes 36-39 (discussing attorney's inability to withhold confidences and secrets of one client from another).

54. The corporate officer does not have that right. *E.g.*, *Lane v. Chowning*, 610 F.2d 1385 (8th Cir. 1979) (defendant bank's attorney has no obligation to plaintiff-officer to refrain from using information acquired in representing bank).

55. The corporate officer does not have that right either. *E.g.*, *Meehan v. Hopps*, 144 Cal. App. 2d 284, 301 P.2d 10 (1956) (attorney not precluded from representing client-corporation against officer where no prior attorney-client relationship existed between counsel and officer).

objection.

This weighty objection indicates that the multiple representation concept should not operate fully once the triangular relationship has collapsed; indeed, that is the recognized rule. Ordinarily upon collapse of the relationship, the lawyer may continue to represent the person or entity that was his client in the full and formal sense, even though representation entails a position adverse to the other member of the triangle.⁵⁶ If both were treated as clients in the strict sense, that option would not be available.⁵⁷ The law should continue to recognize the lawyer's authority to continue representation of a guardian or a corporation after the relationship with the other party becomes antagonistic.⁵⁸ On the other hand, the possibility that a triangular relationship might collapse into antagonism is an insufficient reason for rejecting the multiple representation analogy while the triangular relationship is still intact. It is also insufficient reason for denying the "relevant other" some of the rights of a full-fledged former client if the relationship does collapse, particularly where the lawyer had not made the ground rules clear earlier.⁵⁹

C. AMBIVALENT AND UNSTABLE SITUATIONS

A triangular relationship may, then, be analyzed in two ways regarding the lawyer. One of the parties can be regarded as the client and the other as the third party, or both can be regarded as clients. Each interpretation fits traditional concepts and terminology, and each implies a firm set of legal consequences. While both interpretations are plausible, they result in radically different definitions of the lawyer's responsibilities. Under one interpretation the "relevant other" is like a friend, under the second the "relevant other" is like a foe.

56. *E.g.*, *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. (1985) (trustee of corporation in bankruptcy has power to waive corporation's attorney-client privilege with respect to communications that took place before filing petition in bankruptcy); *Lane v. Chowning*, 610 F.2d 1385 (8th Cir. 1979); *Meehan v. Hopps*, 144 Cal. App. 2d 284, 301 P.2d 10 (1956).

57. *E.g.*, *Opdyke v. Kent Liquor Market, Inc.*, 40 Del. Ch. 316, 181 A.2d 579 (1962) (attorney who organized and was retained by three man corporation owed fiduciary duty to stockholders, breached fiduciary duty to minority stockholder by buying majority stock to which minority shareholder had claim, and held stock as constructive trustee for minority stockholder).

58. *See supra* text accompanying notes 25-28 (discussion of lawyer's duties to the court).

59. *Compare* MODEL RULE Rule 1.13 (Organization as Client), set out *supra* notes 49 and 50, with *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969) (in-house counsel who had represented corporate officer in his individual capacity in prior separate litigation disqualified from representing corporation in negligence action against officer); *see G. HAZARD & W. HODES, THE LAW OF LAWYERING* 243-244, 262-264 (1985) (discussing fairness to nonclients within an organization and the *Miranda*-type warning required by rule 1.13(d)); *but cf.* *W.T. Grant Co. v. Haines*, 531 F.2d 671 (2d Cir. 1976) (court has discretion to allow outside counsel to represent corporation in antitrust action against former employee even if counsel has had allegedly improper communication with employee unrepresented by counsel).

The obvious conclusion is that the problem cannot be analyzed usefully in terms of the structure of the relationship. That is, nothing very useful can be found in the proposition that in a guardianship relationship the guardian *is* the client and the ward *is not*, or in the proposition that in the corporate relationship the corporation *is* the client and the director or officer *is not*. Under normal circumstances, the most appropriate interpretation of the relationship between lawyer and guardian and ward is that the latter are both clients of the lawyer, subject to a rule of precedence among them when it comes to managing their own relationship and in dealing with the lawyer. So also in normal circumstances, the most appropriate interpretation of the relationship between lawyer and corporation and corporate constituents is that the latter are all clients of the lawyer, again subject to a rule of precedence among them when it comes to managing the enterprise and dealing with the lawyer. Nevertheless, when the relationship between the parties is about to collapse, the most appropriate legal interpretation is that they are antagonists as far as the lawyer is concerned. The vectors described earlier indicate the order of precedence.

The difference between a "normal" triangular relationship and one contaminated by antagonism does not lie in the *structure* of the relationship. Until finally resolved or dissolved, the structure is ambiguously triangular, with the nonlawyer parties being fellow clients, or antipodal, with the nonlawyer parties being antagonists. The proper interpretation depends not on structure but on process—what has happened within the relationship. The relevant set of happenings include, above all, what the lawyer has done in the relationship.

In *Fickett*, the lawyer had done nothing when he should have been doing something. The "something" he should have been doing was neither mysterious nor extraordinary. If he had adhered to normal lawyer practice followed in a normal guardian representation, he would have satisfied himself that the guardian had at least some idea of the responsibilities concerning investments and of the requirements for periodic accounting, and would have activated the procedure for submitting such accounts. If the guardian had approached him to confide that some of the investments were irregular, normal lawyer practice would suggest that the lawyer should have said something like, "That could involve very serious difficulties." The lawyer would thereby not commit himself to representing the guardian versus the ward, or vice versa; the lawyer would only be suggesting the urgent need for redefinition of the relationship between the guardian and the ward. He or she should do nothing to further or conceal the guardian's misfeasance, because the law provides that doing so would constitute fraudulent conduct on the lawyer's part. If the guardian persisted in misconduct, under accepted standards of practice the lawyer could withdraw and advise the ward of the fact of

withdrawal.⁶⁰

In *Yablonski*, the organization's lawyer did things when the situation was such that "the role of . . . counsel . . . becomes usually a passive one."⁶¹ The lawyer should not have assisted the president in defending colorable claims of malfeasance toward the organization. If the lawyer had adhered to proper practice in this abnormal situation, he or she would have advised the president to get independent legal representation and perhaps have advised the board to get other independent representation for the organization. Indeed, as the law has now evolved, any other course by the lawyer could be regarded as furthering or concealing the president's malfeasance.

V. CONCLUSION

The critical problem the lawyer faces in triangular relationships is that his or her professional responsibilities depend unavoidably on what the other two parties do for and to each other. The lawyer's duty cannot adequately be defined, as it normally is, by specifying *ex ante* the identity of "the client." Neither of the "relevant others" is a legally freestanding person in the standard conceptual sense of "client." The guardian is not an individual alone but a person whose legal identity is expressed in terms of legal responsibilities *ex officio*. The corporation is not an individual at all, but exists only in law and through personification by others who act *ex officio*. If the other parties to the relationship conduct themselves as the law contemplates they should, then all the "relevant others" collectively can be considered "the client." That principle is already well established for corporations,⁶² and there seems to be no reason not to think of guardianships and other triangular relationships in the same way. On the other hand, if the dominant party is guilty of misconduct toward the dependent one and if the lawyer behaves as though everything were still normal, the lawyer would then have at least an ethical problem and quite possibly legal liability.

Triangular relationships are legal artifacts, the creation of a legal process orchestrated by the lawyer. They collapse when lawyers fail to recognize, intercept, and mitigate legal derelictions by the dominant actors. Whether a triangular relationship is viable or headed for collapse is primarily a question of legal interpretation that the lawyer is uniquely situated to answer.

The lawyer can see and act. Depending on what he or she sees and does, the dominant actor may have to be treated as something less than a client simplicitor and the lawyer himself or herself as something different from one who "knows no other duty." That definition of role entails being an active,

60. See Hazard, *supra* note 48.

61. *Yablonski*, 448 F.2d at 1179.

62. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

visible participant in the transaction and exercising independent judgment. Such deportment does not fit the conventional mold.