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THE ETHICAL ROLE AND RESPONSIBILITIES OF A LAWYER-ETHICIST: THE CASE OF THE INDEPENDENT COUNSEL'S INDEPENDENT COUNSEL

Nancy J. Moore*

INTRODUCTION**

Lawyers and law professors are increasingly being asked to render opinions and advice as ethics experts or consultants. This recent and growing phenomenon has spawned considerable confusion regarding what one commentator calls the "ethics of ethics consultation:"

1. ethical issues that need to be recognized and addressed not only by "consulted lawyers," but also by "consulting lawyers." These issues include whether and when an attorney-client relationship has been formed by an ethics expert, what duties are owed by experts who do not form a traditional attorney-client relationship with anyone, and to whom an expert's duties are owed,


** Professor Samuel Dash, Georgetown University Law Center, has asked for, and will be given, the opportunity to respond to this Article in Volume 68, Issue 4 (March 2000) of the Fordham Law Review.—Eds.


2. See Chinars, supra note 1, at 43; Tellam, supra note 1, at 55.

3. See Kershen, Ethics of Ethics, supra note 1, at 1 (addressing "the ethical issues of an ethics consultation from the perspective of the lawyer who desires to make the inquiry").

4. See infra Part I.

5. See infra Part II.
both inside and outside a traditional attorney-client relationship. Of course, these issues are also faced by lawyer-experts who are consulted on a wide range of matters other than lawyer ethics.

All these questions are nicely raised by the episode involving the publication of Sam Dash's letter of resignation from his position as "outside consultant and adviser to [Ken Starr and Starr's Office] of Independent Counsel." On November 20, 1998, Sam Dash abruptly resigned his position. Starr had just concluded his testimony before the House Judiciary Committee, which was considering the impeachment of President Clinton based on allegations that were the subject of a report submitted to the Committee by Starr. Dash, who had been described as Starr's "ethics adviser," not only made the fact of his resignation public, but also released a copy of the two-page letter to Starr in which he explained the reasons for his resignation.

According to Dash, Starr had "violated [his] obligations under the independent counsel statute" and had "unlawfully intruded on the power of impeachment which the Constitution gives solely to the House."

Dash's views on the propriety of Starr's testimony were praised by some and excoriated by others. Among other attacks, some critics challenged Dash, the "ethics expert," for breaching his own ethical duties toward Starr, including duties of confidentiality and loyalty.

Thus, one commentator, pillorying the "legal community, and other Clinton supporters" for "applaud[ing] Dash," noted that "[i]f a lawyer in a civil or criminal case called a press conference to announce his resignation, saying his client is guilty, that lawyer would be in clear violation of legal ethics."

6. See infra Part III.
8. See id.
9. See id.
12. See id.; infra notes 14-24 and accompanying text. Not surprisingly, the individual views tended to reflect the speaker's general political alignment, including the characterization of Dash's conduct by a former Office of Independent Counsel ("OIC") staff lawyer as "an act of betrayal." Van Natta Jr., supra note 7.
13. See infra note 37.
the D.C. Rules of Professional Conduct, which provide that “[a] lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship,”16 and “[t]he lawyer’s obligation to preserve the client’s confidences and secrets continues after the termination of the lawyer’s employment.”17 He then scathingly concluded that “Dash felt confident that legal ethical standards have sunk so low that he could damage his client with impunity.”18 Another critic, a law school classmate of Dash, claimed that “[a]s ethics advisers, most giants of American jurisprudence would be appalled at the ethics of Professor Dash in making public statements concerning reasons for his resignation.”19

Dash responded briefly to an editorial challenging his motives for resigning,20 but did not immediately attempt to rebut the criticism of his decision to publish his letter of resignation. Nevertheless, his defenders suggested several possible justifications for Dash’s conduct, including an “arrangement with Starr [that] gave Dash the right to publicly state his disapproval if Starr strayed from his counsel,”21 Dash’s right to defend himself against a client who has “effectively misrepresented the lawyer’s advice,”22 and the erosion of the attorney-client privilege for government lawyers, as reflected in recent legal rulings that (ironically) Starr himself sought and won during his investigation of Clinton.23 Indeed, those legal rulings raise the further question whether Starr himself was ever a client of Dash, or whether Dash represented the Office of Independent Counsel (“OIC”) only, or perhaps even the “public itself.”24

Approximately three months later, Dash finally spoke out publicly,
in a speech given to the members of the Association of Professional Responsibility Lawyers at the February 1999 mid-year meeting of the American Bar Association. Here, Dash first stated that he was not acting as an "ethics lawyer" for Starr, but rather as an "independent consultant." He was then quoted as saying: "I did not want an attorney-client relationship with him," because that would involve a duty of loyalty, and "I wanted no operational role." He did note, however, that he "was required to maintain confidentiality" of investigative secrets and grand jury information, which he needed to know in order to render his advice, "so he took an oath and had this duty imposed by law."

Dash then sought to justify the publication of his resignation as a form of "noisy withdrawal," explaining that Starr stated "on specific occasions that he had consulted Dash and that Dash agreed with him." According to Dash, this prior publicity, initiated and relied upon by Starr, created a presumption that Dash approved all of Starr's decisions. Thus, he said, "it was my right to rebut a presumption that Starr created by making my role public."

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25. See Ellen J. Bennett, Dash Urges Renewal of Counsel Law, Explains Decision to Quit as Starr's Advisor, 15 ABA/BNA Lawyers' Manual on Professional Conduct 47 (1999). Dash also responded to a letter I wrote to him on July 21, 1999, offering him an opportunity to describe his relationship with Starr for purposes of this Article. That letter repeats and elaborates upon the statements he made in his February address at the mid-year meeting of the Association of Professional Responsibility Lawyers. See Letter from Samuel Dash to Professor Nancy J. Moore (July 28, 1999) (on file with the Fordham Law Review) [hereinafter Dash, Letter].

26. Bennett, supra note 25, at 48. In his subsequent letter to me, Dash stated that his "actual status was that of a contract consultant, under the same type of contract the government uses to purchase other kinds of services." Dash, Letter, supra note 25, at 1.

27. Bennett, supra note 25, at 48. In his letter to me, Dash elaborates as follows:

I insisted from the beginning that I would not serve as Starr's or OIC's lawyer or have any fiduciary relationship with them. In my view, I could not be effective as an outside independent consultant if I had a duty of loyalty to Starr or the office or the responsibilities of an advocate.


28. See Bennett, supra note 25, at 48.

29. Id.

30. Id. Dash elaborated on this defense at great length in his July 28 letter to me:

There was no doubt in my mind that Starr intended that my role would be a highly publicized one. He wanted to give the public assurance that, despite his Republican leanings, he would be professionally objective in the investigation of a Democratic president, and that he had me, with my reputation, as a kind of watchdog.

... The fact is that he advertised [sic] my involvement widely, and frequently defended against attacks on his conduct by referring to my favorable review of the specific issues. ...

Starr's highly public reliance on my views, was a matter of serious concern to me from the start. Clearly I expected that Starr would do this for the very reasons he turned to me in the first place. ...

While I took aggressive positions within my role, my understanding with
The Role of the Lawyer-Ethicist

Under this line of defense, Dash's role as an "independent consultant" was akin to that of an ethics "expert," a lawyer retained to provide an independent, objective opinion, rather than zealous advocacy of a client's position. Indeed, Dash's own prior statements provide indirect support that this was in fact his view at the time he resigned. Thus, in his November 1998 letter to Starr, Dash said that he had been hired as outside consultant and adviser to both Starr and the OIC. Admittedly, this statement is itself ambiguous, but it should be read in conjunction with earlier statements Dash had made in defense of his $400 an hour fee. Then he was quoted as saying, "I'm not part-time staff...I'm an outside independent consultant...and my usual hourly rate when I'm brought in as an expert is $400 an hour." If Dash was retained as an "expert" and not as an "attorney," then arguably his ethical duties were different from those owed by attorneys to their clients and former clients, although Dash himself muddies this argument by relying further on his right to make a "noisy withdrawal."

Dash, a professor of law at Georgetown University, frequently testifies as an ethics expert. In that capacity, ordinarily he would not form an attorney-client relationship with either the retaining lawyer or the retaining lawyer's client. Although Dash was clearly not retained by either Starr or the OIC to give testimony, either before a court or Congress, Dash may well have viewed his role as one of a neutral "expert" and not that of a partisan attorney. Nevertheless, even as a "neutral" expert, he probably owed duties of both

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Starr was that if the issue was not one of principle or one involving violation of legal ethics provisions or law, his judgment prevailed, as it should have. But I informed Starr from the beginning that if we disagreed on issues of principle, involving the integrity of the investigation, and he would not follow my advice, I would have to resign and make a public statement disavowing my support of his planned conduct, without revealing grand jury material or ongoing secret investigative strategy. I believed I was required and justified in taking this position for two reasons: (1) Starr's frequent public announcements of my support for certain actions, [sic] would permit the public, if I did nothing, to infer I supported what I considered unethical or unlawful conduct, and (2) I had a separate duty as a lawyer and a government contract holder to report unlawful or unethical conduct in the OIC.


31. See infra notes 44-48 and accompanying text.
32. See Van Natta Jr., supra note 7 and accompanying text.
34. Id. (emphasis added).
35. See infra notes 41-48.
36. See supra notes 29-30.
37. Thus, Dash sought to justify his $400 an hour fee by noting that this is what he receives for expert testimony. See supra notes 33-34 and accompanying text.
38. See infra note 56.
confidentiality and loyalty to someone, although those duties may not have been precisely the same as those owed by more traditional attorneys. Moreover, whether he was an attorney or not, a government official retained Dash, and thus the identity of the person (or entity) to whom his duties were owed is by no means clear.

The purpose of this Article is not to condemn or defend Sam Dash, but rather to use this highly publicized episode as a jumping-off point for a discussion of some of the issues involved in the consultation of lawyers who are experts in ethics and other subject areas. My starting point is an examination of the distinction between the role of a neutral expert and that of a partisan attorney. In Part I, I consider when a lawyer-expert enters into an attorney-client relationship, thus triggering all of the duties such a relationship ordinarily entails. In Part II, I consider the nature of the duties owed by an expert who is not in a traditional attorney-client relationship, specifically whether such duties differ in important respects from those owed by an attorney to a client. Finally, in Part III, I consider issues relating to the identity of the client or other person to whom an expert may owe duties.

I. WHEN DOES A LAWYER-EXPERT FORM AN ATTORNEY-CLIENT RELATIONSHIP?

According to a recent opinion by the ABA Committee on Ethics and Professional Responsibility, Formal Opinion 97-407, a lawyer-expert may be retained to serve in either of two distinct roles: (1) as a "testifying expert," or (2) "as a non-testifying ‘expert consultant.’" The Committee further concluded that whereas the "testifying expert" does not form an attorney-client relationship and, therefore, is not necessarily subject to the Model Rules, the non-testifying "expert consultant" assumes "the role of co-counsel in the matter... and as such is subject to all of the Model Rules of Professional Conduct."

If these two roles are exclusive, then Sam Dash must have occupied the latter (co-counsel consultant) rather than the former (expert witness), since there was never any expectation that Dash himself would testify in a formal proceeding. It cannot be the case, however, that these two categories constitute all of the possible roles for a consulted lawyer with expertise in a particular subject. For example, some lawyers retain experts with a view toward determining whether or not they will testify in a proceeding. If the consulting lawyer

39. See infra notes 108-12 and accompanying text.
40. See infra Part III.A.
42. See id.
43. Id.
decides not to call the expert, either because the opinion is unsatisfactory or because the expert would make a poor witness, does that turn the lawyer-expert into a lawyer-co-counsel? Surely not. After all, the expert’s conduct in both cases is virtually identical—at least until the point where the consulting lawyer decides either to call or not to call the lawyer as a witness. It makes no sense to say that neither the consulting lawyer nor the expert can know whether the expert has formed an attorney-client relationship until after the decision whether to call the expert to testify has been made.44

Indeed, Opinion 97-407 does not purport to rest on labels, but rather on a functional analysis of the role performed by the lawyer-expert in each of these two categories. Thus, the expert witness is described as one who “provide[s] the court, on behalf of the other law firm and its client, truthful and accurate information.”45 Further, although the testifying expert may render assistance to the consulting lawyer,46 the “duty to advance a client’s objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, is inconsistent with the duty of a testifying expert,” whose views are “presented as objective.”47 By contrast, the lawyer-consultant is someone who is characterized by “protection of client confidences, in-depth strategic and tactical involvement in shaping the issues, assistance in developing facts that are favorable, and zealous partisan advocacy.”48 One who performs in that role, regardless of the label used, implicitly promises the client all the traditional protections

44. The Federal Rules of Civil Procedure identify a category of expert witnesses “who ha[ve] been retained or specially employed by another party in anticipation of litigation or preparation for trial and who [are] not expected to be called as a witness at trial.” Fed. R. Civ. P. 26(b)(4)(B). The significance of separating these so-called “consulting experts” from “testifying experts” concerns the ability of the opponent to discover their identities and opinions. See 8 Charles Alan Wright et al., Federal Practice and Procedure § 2032 (2d ed. 1994). The commentary on non-testifying experts does not generally distinguish between non-testifying experts who were initially retained with an expectation that they might testify and those who were never expected to testify. See id.

45. Opinion 97-407, supra note 41.

46. The Opinion states:
To be sure, the testifying expert may review selected discovery materials, suggest factual support for his expected testimony and exchange with the law firm legal authority applicable to his testimony. The testifying expert also may help the law firm to define potential areas for further inquiry, and he is expected to present his testimony in the most favorable way to support the law firms side of the case. He nevertheless is presented as objective and must provide opinions adverse to the party for whom he expects to testify if frankness so dictates.

Id.

47. Id.

48. Id. Expert witnesses are not in a position to protect confidences, since they are subject to being deposed by the opposing party. See id. (citing Fed. R. of Civ. P. 26(a)(2) and 26(b), “which permit broad discovery of testifying experts, but sharply limit discovery of consulting experts retained to advise in the litigation”).
under the Model Rules, because "[i]n short, a legal consultant acts like a lawyer representing the client, rather than as a witness."49

Now, Dash has said that, in his role as ethics consultant to Starr, he was not acting like a lawyer representing a client.50 Once again, however, neither labels nor other verbal characterizations will suffice. For example, although Dash has disclaimed any "operational role,"51 various press accounts described him as "play[ing] an active and influential role in Starr's inquiry into President Clinton's relationship with Monica Lewinsky, helping to broker an immunity deal with her in July and assisting in the writing and editing of the impeachment referral."52

Moreover, as Opinion 97-407 notes, even a testifying expert can become an expert consultant if the expert becomes involved in discussions of strategic or tactical issues.53 When this happens, the result may be the required disclosure of information previously thought to be confidential.54 Additionally, such a blurring of roles may trigger conflict of interest rules that typically are applicable to consultants but not to testifying experts.55

It is possible, however, that the press accounts are wrong and that Dash did not become actively involved in strategic or tactical discussions. Of course, if he actually interceded with Monica Lewinsky's lawyers, brokering an immunity deal on behalf of the OIC, then it would be difficult for him to maintain that he did not form an attorney-client relationship with Starr or the OIC. In such a role, Dash would clearly have been acting more like a lawyer for a client

49. Id. (emphasis added).
50. See supra note 27 and accompanying text.
51. Supra note 27 and accompanying text.
52. Van Natta Jr., supra note 7; see Dash, Letter, supra note 25, at 2. In his letter to me, Dash stated:
   I refused to undertake any operational duties in the investigations and prosecutions to avoid my obtaining a vested interest in Starr's mission, which could destroy my objectivity and independence. Except for the time I facilitated Monica Lewinsky's willingness to testify before the grand jury, I consistently turned down requests by Starr that I become active in the investigation or that I represent him in certain litigation relating to charges against him.

   Id.
53. See Opinion 97-407, supra note 41. The Opinion also mentions that the lines can become blurred when the expert becomes privy to "confidential information." Id. It is unclear what this means: testifying experts are often privy to information that is confidential in some sense, although there is an understanding that whatever is disclosed to the expert is subject to formal discovery. See supra note 48.
54. See supra note 48 (discussing how testifying experts are subject to being deposed by the opposing party).
55. See Opinion 97-407, supra note 41 (discussing differences in conflict of interest rules as applied to expert consultants and to expert witnesses). For a discussion of what duty of loyalty a lawyer-consultant who does not form an attorney-client relationship might owe to either the consulting lawyer or the consulting lawyer's client, see infra Part II.
than like a witness.\textsuperscript{56} The more interesting question, however, is how the relationship would have been characterized had Dash in fact limited himself to rendering "objective" opinions or advice on the ethical propriety of Starr's conduct. After all, this is a role that lawyers and law professors commonly assume, and it would not be surprising to learn that in this capacity, lawyer-experts do not always view themselves as forming an attorney-client relationship.\textsuperscript{57}

For example, a common experience for both law professors and practicing lawyers is a request for advice by a former student or by an inexperienced (or less experienced) lawyer. Typically, the request comes in the form of a brief telephone call, with no expectation that the lawyer-expert will be formally retained or even paid for the advice. Moreover, the factual information supplied is usually very general, perhaps even hypothetical. In some cases, however, the consultation may take the form of lengthier, more involved discussions, including the presentation of considerable confidential information.

These types of "lawyer-to-lawyer consultation" were the subject of Formal Opinion 98-411 by the ABA Committee on Ethics and Professional Responsibility.\textsuperscript{58} Here, the Committee assumed that the consulted lawyer is neither a member of the consulting lawyer's firm nor otherwise formally associated with the matter, and that "there is no intent to engage the consulted lawyer's services."\textsuperscript{59} The variety of forms that such a consultation can take were said to range from "superficial discussions, such as might occur between an audience member and a continuing legal education ("CLE") speaker, or an

\textsuperscript{56} Dash says merely that he "facilitated Monica Lewinsky's willingness to testify before the grand jury." Supra note 52 (quoting Dash's letter to me). It is difficult to imagine, however, that he did not discuss tactics and strategy with Starr in connection with his negotiations. For a discussion of the extent to which lawyers can avoid forming a lawyer-client relationship simply by agreeing with the putative client that the lawyer is not practicing law, see infra notes 82-83 accompanying text.

Even if we assume that in entering into negotiations with Monica Lewinsky's lawyers on the OIC's behalf, Dash acted as an attorney for either Starr or the OIC (or both), this would not necessarily mean that he was acting as an attorney either before or after the negotiations occurred. See, e.g., Heine v. Colton, Hartnick, Yamin & Sheresky, 786 F. Supp. 360, 367 (S.D.N.Y. 1992) (holding that a single legal question and answer would not create an attorney-client relationship over a long period of time in which the lawyer otherwise functioned as a business partner).

\textsuperscript{57} I have discussed this Article with numerous law professors, many of whom confided that they have performed "consulting work" that they did not believe constituted the practice of law. In all of these cases, the professors drew the line at working directly for a client. In their minds, it was the combination of limiting their work to the giving of expert advice and working only with the retaining lawyer that permitted them to maintain that they had not formed an attorney-client relationship. For a discussion of the significance of these factors in determining the existence of an attorney-client relationship, see infra notes 78-79 and accompanying text.


\textsuperscript{59} Id.
inquiry between colleagues to get a research lead or information about a particular judge," to "lengthy, detailed discussions to obtain substantial assistance with the analysis or tactics of a matter."60

After discussing the ethical issues faced by the consulting lawyer,61 the Committee turned its attention to issues involving the consulted lawyer. The Committee began by quickly concluding that the consulted lawyer does not form an attorney-client relationship "by virtue of the consultation alone."62 This conclusion is somewhat surprising.63 After all, the Committee expressly included substantial assistance with the analysis or tactics of a matter among the variety of forms of lawyer-to-lawyer consultations it described.64 Yet the Committee had previously concluded in Opinion 97-407 that lawyer-experts who become involved in discussions of strategy or tactics do enter into an attorney-client relationship.65 Unfortunately, the Committee did not explain its apparently contradictory conclusion in Opinion 98-411.

Perhaps the Committee relied on its stated assumption that "there is no intent to engage the consulted lawyer's services."66 The problem, however, is that in Opinion 97-407, it was clear that the intent of the parties is not necessarily controlling. There, the Committee had cited its own previous statement that an attorney-client relationship can "come into being as a result of reasonable expectations [of the client] and a failure of the lawyer to dispel these expectations."67 Moreover,

60. Id.
61. Id. The primary issue discussed in Opinion 98-411 was the duty to avoid breaching the duty of confidentiality, including the question of whether the client must give informed consent prior to the consultation. See id. Elsewhere, commentators on "the ethics of ethics consultation" ask whether the client must be consulted for other reasons, including the right to control the manner in which the representation proceeds and the right to be consulted prior to the association of separate counsel. See, e.g., Pizzimenti, supra note 1, at 21 (discussing the applicability of Model Rule 1.2 on the allocation of decision-making between lawyer and client and the applicability of Model Rule 1.5(e) on the division of fees between lawyers not in the same firm).
63. See, e.g., Chinaris, supra note 1, at 47 (assuming, without explanation, that an attorney-client relationship is formed when one lawyer consults another lawyer for purposes of determining the ethical propriety of the lawyer's conduct and the primary purpose of the consultation is to benefit the lawyer himself, not the lawyer's client).
64. See supra note 60 and accompanying text.
65. See supra note 49 and accompanying text.
67. Opinion 97-407, supra note 41. But see Davis v. York Int'l Corp., No. CIV.A. HAR 92-3545, 1993 WL 180224, at *2 (D. Md. May 24, 1993) (rejecting a reasonable expectations test in favor of a requirement of a "mutual understanding giving rise to an attorney-client relationship" in a case where an audience member briefly consulted a CLE instructor after a lecture and the court held that no duty of confidentiality gave rise to a disqualification of the instructor or the firm).
the Committee concluded that even when there is a written agreement that a testifying expert will not perform as co-counsel, any blurring of the roles in actual practice may cause an attorney-client relationship to be formed, despite the contrary intentions of the parties. Further, the Committee had foreseen that the primary way in which the roles would become blurred was for a testifying expert to become involved in discussion of tactical or strategic issues of the case, or become privy to confidential information pertaining to the case.

Nor could the Committee that drafted Opinion 98-411 have relied on the assumption that the consultation did not involve any expected remuneration. After all, it is well-settled that the absence of a fee is not determinative of the presence of an attorney-client relationship, although it may be a factor to be considered along with the other relevant circumstances. Of course, testifying experts typically do expect to be paid for their services, yet the fact of remuneration alone obviously does not transform the testifying expert into co-counsel.

Then what is the key to determining when a non-testifying lawyer-expert-consultant enters into an attorney-client relationship? Although the fact of remuneration is not itself determinative, it may be helpful first to consider the status of casual consultations for which the expert will not be paid, and then turn to more formal retainer arrangements such as the arrangement between Sam Dash and Ken Starr.

With respect to the former, the more significant factor may be the informality of the consultation, rather than the absence of remuneration. After all, when the consultation is brief and does not involve the sharing of detailed, factual information, it is unlikely that the recipient will act in reliance on the expert's advice. Moreover, in the analogous context of physicians consulting physicians, courts have recognized a public policy in favor of furthering the development of mentoring relationships between professional colleagues. Thus, like

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68. See supra notes 53-55 and accompanying text.
69. See supra note 53 and accompanying text.
70. See, e.g., 1 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 8.3, at 569 (4th ed. 1996) ("The creation of the [attorney-client] relationship does not require the payment of a fee.").
71. See id. § 8.3, at 570.
72. Cf. Gilinsky v. Indelicato, 894 F. Supp. 86, 92-93 (E.D.N.Y. 1995). The issue before the Gillinsky court was whether a physician-patient relationship came into being when a treating physician consulted an expert-mentor. See id. The court held that because the consultation was not "fleeting and informal," but rather was "continuous, and substantial," it was foreseeable that the treating physician would rely on the expert-mentor's advice. Id. at 93.
the consulted physician, perhaps the consulted lawyer should be treated as source material such as a treatise or a textbook, or as one who simply contributes to the body of information available to the consulting lawyer who is representing a client.\textsuperscript{74} As the consulted lawyer becomes more heavily involved, however, it is increasingly foreseeable that the consulting lawyer will rely on the expert’s advice, for the benefit of the consulting lawyer’s client (or the lawyer herself).\textsuperscript{75} At the same time, the policy favoring the furtherance of informal, mentoring relationships among professional colleagues may give way to other policy considerations, including protecting the reasonable expectations of the client (or the lawyer-agent acting on the client’s behalf or the consulting lawyer herself)\textsuperscript{76} regarding such matters as loyalty, confidentiality, and competence.\textsuperscript{77} At some point, the involvement of the expert will become such that the consulted lawyer will be transformed from a treatise or a textbook into a lawyer providing legal services to a client.\textsuperscript{78} In these cases there will be no bright lines, but rather only various factors to be considered in determining when a particular consultation gives rise to an attorney-client relationship. Such factors may include the length of the consultation, the amount of detailed, factual information the expert is provided, and the foreseeability that the consulting lawyer will rely on the advice given by the expert.\textsuperscript{79} What then of more formal arrangements—such as the one between

\textsuperscript{74} See Gilinsky, 894 F. Supp. at 91 (referring to the \textit{Hill} decision).

\textsuperscript{75} See \textit{id.} at 91-93 (holding that given the nature of the consultation between physicians, which consisted of seven telephone calls lasting approximately 38 minutes, as well as a mentoring relationship between physicians, a jury could find that the consulted physician, under conditions of emergency, should have realized that the treating physician would rely on his advice “and perform the exact procedures that [the consulted physician] instructed”).

\textsuperscript{76} See infra Part III.

\textsuperscript{77} See \textit{supra} note 67 and accompanying text.

\textsuperscript{78} See \textit{Hill}, 186 Mich. App. at 305 (considering the question to be whether consulted physicians “were providing medical treatment when they talked with [the consulting physician]”).

\textsuperscript{79} See Gilinsky, 894 F. Supp. at 91 (describing factors that courts take into account in determining when a casual consultation between physicians gives rise to a physician-patient relationship).
Sam Dash and Ken Starr—which include the payment of a substantial fee? Under these circumstances, there can be no question that the lawyer-expert is providing services, for which the expert must be accountable in some respect. But is the accountability necessarily one of a lawyer to a client? Keep in mind that the formation of an attorney-client relationship has traditionally been viewed as a matter of contract law, and that the "reasonable expectations" test evolved in situations of ambiguity, where a lawyer failed to clarify her role in a matter. If Sam Dash wants to say that he is not being retained as a lawyer but as a mere "expert" or "consultant," and Ken Starr (himself a lawyer) agrees, is there any reason not to give effect to such an agreement?

Consider a law professor who receives a telephone call from a lawyer representing a client. The lawyer wants to retain the professor to give the lawyer legal advice, for the benefit of either the lawyer herself or the lawyer's client, and offers to pay the professor a substantial fee. The professor, however, explains that he is not admitted to practice law in that jurisdiction (or perhaps he is not admitted to practice in any jurisdiction). In addition, the professor has no legal malpractice insurance. As a result, the professor asks whether it is possible to structure the relationship so that the professor will not be forming an attorney-client relationship. The lawyer and the professor then agree, in writing, that the professor will not be acting as a lawyer, but rather is being retained solely as an "expert" or "consultant." Is such an agreement valid?

Surely the answer must depend, in whole or in part, on the nature of the services to be rendered. If the professor is (or may be) a testifying expert, then the agreement is clearly proper, because the act of testifying, even as to a legal opinion, is not itself a legal service, nor is the preliminary consultation typically performed by the testifying expert. If, however, the professor will write a brief, make an

80. See supra note 33 and accompanying text (discussing news accounts of Dash's contract rate of $400 per hour).
81. Indeed, Dash describes his relationship with Starr as contractual in nature. See Dash, Letter, supra note 25, at 1 ("My actual status was that of a contract consultant, under the same type of contract the government uses to purchase other kinds of services.").
82. See Moore, Expanding Duties of Attorneys, supra note 67, at 679-87.
83. See Dash, Letter, supra note 25, at 1 ("I insisted from the beginning that I would not serve as Starr's or OIC's lawyer or have any fiduciary relationship with them.").
84. Under state law, unauthorized practice of law doctrine applies both to non-lawyers (including law graduates not admitted to the bar in any jurisdiction) and to lawyers admitted in one jurisdiction who practice law in another jurisdiction in which the lawyer is not admitted. See Charles W. Wolfram, Modern Legal Ethics § 15.1, at 824 (1986); see also Model Rules of Professional Conduct Rule 5.5 (1998) ("A lawyer shall not... practice law in a jurisdiction where doing so violates regulation of the legal profession in that jurisdiction.").
85. See supra notes 42-49 and accompanying text.
appellate argument, or draft a legal instrument, then the purpose of such an agreement can only be to evade unauthorized practice laws and potential malpractice claims. These types of agreements contravene public policy and should be given no effect.

Thus, it would appear that the first question to ask in these cases is whether the services provided are legal services or whether they can be characterized properly as non-legal in nature. This is not always an easy question to answer, as anyone will attest who has tried to define what constitutes the "practice of law," particularly when the issue involves the conduct of lawyers themselves. Nevertheless, a contract to advise on the lawfulness of a proposed course of conduct would appear to fall squarely within the legal services category.

86. While there is considerable disagreement over any comprehensive definition of what constitutes the practice of law, it is generally agreed that such practice includes the representation of another person in litigation. See Restatement (Third) of the Law Governing Lawyers § 4 cmt. c (Proposed Final Draft No. 2, 1998); Wolfram, supra note 84, § 15.1.3, at 834. Such representation clearly includes a personal appearance before the court at trial or on appeal, and should also include drafting of a brief, which is an argument made to a court, only in written form. The drafting of legal instruments is also generally considered to constitute the practice of law, except perhaps where incidental to another specialized occupation, particularly when the preparation involves the filling in of blanks in a standard form. See id.; see also D.C. App. R. 49(b)(2)(A) (1999) (describing the practice of law as "[p]reparing... deeds, mortgages, assignments, discharges, leases, [and] trust instruments").

Performing legal services under the supervision of an admitted lawyer may not constitute the unauthorized practice of law, but this is rarely what lawyer-experts are asked or expected to do. See infra note 88.

87. See Model Rules of Professional Conduct Rule 1.8(h) (1998) (prohibiting a lawyer from making an agreement "prospectively limiting the lawyer's liability to a client for malpractice"). Aside from the potential harm to clients, the rationale for limiting the practice of law to lawyers licensed in the jurisdiction includes providing "a basis for imposing lawyer discipline and other regulation." Wolfram, supra note 84, § 15.1.2, at 833.

88. The consulted lawyer might argue that even performing legal services is not improper if done under the supervision of an admitted lawyer, such as the consulting lawyer. There are two flaws in this argument. First, experts are consulted precisely because the consulting lawyer does not have the requisite expertise; thus, the consulting lawyer is in no position to supervise the competence of the work performed. Secondly, non-lawyers acting under the supervision of a lawyer must be closely supervised. See Wolfram, supra note 84, § 15.1.4, at 847. Most professors and other lawyer-experts do not expect to work under such conditions.

89. See Restatement (Third) of the Law Governing Lawyers § 4 cmt. c (Proposed Final Draft No. 2, 1998); Wolfram, supra note 84, § 15.1.3, at 835-44.


91. Such advice would appear to be clearly within each of the most frequently used tests for determining what constitutes the practice of law: "the professional
After all, lawyers are not merely partisan advocates, and the rendering of legal advice, even “objective” (or “candid”) advice, is precisely the role of the lawyer as counselor, a role now formally recognized in the ABA Rules of Professional Conduct.\[92\]

If, as in the case of Dash and Starr, the advice is given directly to the “client,”\[93\] then the conclusion seems clear that the professor’s advice is legal advice and the professor is practicing law. But what if the professor’s opinion is given to a consulting lawyer, who will exercise “independent judgment” in determining how to use that opinion in advising the ultimate client?\[94\] Does public policy still

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\[93\] According to Dash, Starr had an “official staff ethics officer” who consulted Dash, and while the ethics officer’s opinion was “official,” Dash’s was merely “advisory.” Dash, Letter, supra note 25, at 2. Nevertheless, it appears that Dash counseled Starr directly on numerous occasions. Moreover, Dash “informed Starr from the beginning that if [they] disagreed on issues of principle, involving the integrity of the investigation, and he would not follow [Dash’s] advice, [Dash] would have to resign and make a public statement disavowing [Dash’s] support of his planned conduct.” Id. Advice, coupled with a threat to resign and make public statements if the advice was not followed, hardly constitutes a merely “advisory” opinion. In any event, if the OIC, rather than Starr individually, was the putative “client,” see infra Part III, then Dash’s advice was given directly to the client.

Unquestionably, the fact that legal advice is given directly to a client is an important factor in determining whether particular conduct constitutes the practice of law. See D.C. App. R. 49(b)(2) (1999) (“‘Practice of Law’ means the provision of professional legal advice or services where there is a relationship of trust or reliance.”); see also supra note 72 and accompanying text (finding that in medical cases, the courts are less likely to find that physician-patient relationships have been formed in brief, informal consultations between physicians, where the consulted physician does not meet the patient). But see infra Part III (discussing how the consulting lawyer may be an agent of the client and how that agent may rely on the client’s behalf).

\[94\] In cases involving informal consultations between physicians, whether it is foreseeable that the treating physician will not render independent judgment and will rely on the consulted physician, is a significant factor in determining if a physician-patient relationship has been formed. See supra notes 75-79 and accompanying text. The question here is whether the fact that the consultation is not informal, but rather involves a formal retainer arrangement, should also have a bearing in determining whether a professional relationship has been formed with the ultimate client/patient for whose benefit the arrangement has been made. The question also arises of what constitutes “independent” judgment on the part of the treating professional. To the extent that the lawyer-expert’s opinions go beyond abstract statements of what the law is and apply a body of law to the facts of a particular case, it is obviously more likely that the expert will be deemed to be practicing law. Given that the lawyer-expert is consulted precisely because the consulting lawyer does not have the requisite expertise, it is difficult to understand how the consulting lawyer will exercise
demand that the professor be deemed to have entered into an attorney-client relationship? I believe that there are many law professors who do precisely this kind of consulting and who believe in good faith that they are not practicing law. Nevertheless, there is reason to question whether courts will ultimately validate these arrangements. At the very least, law professors and other consulted lawyers must understand and ensure that the consulting lawyer understands whether, and to what extent, absence of an attorney-client relationship has an adverse effect on the confidentiality interests of the consulting lawyer's client. If it is true that information relating to the representation of the client will not be protected as fully under the "expert-consultant" model, then this fact alone should give lawyers pause before attempting to negotiate their way out of an attorney-client relationship.

There is, perhaps, one final alternative to consider in evaluating whether Sam Dash performed as a lawyer or in some non-lawyer role. What if Dash's primary role was to publicize his candid opinion of the propriety of Starr's conduct? If, for example, his opinion was rendered only after Starr had acted, then wouldn't his role be very close to the testifying expert's? Why should it matter that his opinion was not given under oath in a formal proceeding? This is an important question, because a lawyer or law professor might well be retained in other circumstances to render an objective opinion to some third person. If an opinion is not designed to be acted upon by the client, but rather to be presented by a client to some third person, then arguably the rendering of the opinion, even a legal one, might not be characterized as performing legal services.

95. See Tellam, supra note 1, at 55-56 (discussing the duty of a consulted lawyer to ensure that the consulting lawyer is aware of the risk to the latter, due to failure to establish an attorney-client relationship, and consequent need to establish affirmatively another type of confidential relationship); see also infra Part II (discussing the obligation of confidentiality of a lawyer-expert who has not formed an attorney-client relationship, including a comparison with obligations of an attorney representing a client).

96. See infra Part II.

97. This was apparently not the case. Although Dash says he fully expected that Starr would publicize Dash's role when he had approved Starr's conduct, this was not the purpose for which his advice was given. Indeed, Dash's concern was that Starr follow his advice, particularly when the matter involved an important principle or violation of ethics rules or other law. See Dash, Letter, supra note 25, at 2 (discussing how Dash threatened to resign if Starr did not follow his advice on important issues).

98. Expert opinions are commonly rendered in the form of a written report, which is provided to the opposing party and may form the basis for a deposition. See Fed. R. Civ. P. 26(a)(2)(B). Cases are often settled on the basis of these reports, without testimony being given under oath either at trial or at a deposition.

99. Arguably, the mere rendering of such an opinion without more, is distinguishable from the type of evaluation for use by third persons that is viewed by lawyer disciplinary codes as yet another form of legal services provided by lawyers.
II. WHAT DUTIES ARE OWED BY A LAWYER-EXPERT-CONSULTANT WHO DOES NOT FORM AN ATTORNEY-CLIENT RELATIONSHIP?

If Sam Dash formed an attorney-client relationship with Ken Starr (or the OIC, or both\(^\text{100}\)), then clearly he owed his client(s) duties of competence,\(^\text{101}\) loyalty,\(^\text{102}\) and confidentiality.\(^\text{103}\) In this event, Dash would almost certainly continue to argue that the publication of his resignation letter was justified, perhaps by claiming that Starr consented to the disclosure of otherwise confidential information.\(^\text{104}\)

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\(^{100}\) See Model Rules of Professional Conduct Rule 2.3 (1998). Rule 2.3, entitled “Evaluation for Use by Third Persons,” provides:
(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:
(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client; and
(2) the client consents after consultation.
(b) Except as disclosure is required in connection with a report of an evaluation, information . . . is otherwise protected by Rule 1.6.

\(^{101}\) Id. Under Rule 2.3, it is apparently contemplated that the lawyer making the evaluation already represents the client, and is thus responsible for determining that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client, and that the client consents after consultation. Thus, if a consulting lawyer requested another lawyer to render the evaluation, the consulted lawyer would not necessarily be governed by that rule. In my hypothetical, Dash would not be responsible for determining if publicizing the opinion was in fact in Ken Starr’s best interest. If he was responsible for doing so, then he would be rendering legal services as contemplated by Rule 2.3.

\(^{102}\) See Model Rules of Professional Conduct Rule 1.1; Restatement (Third) of the Law Governing Lawyers § 28 (Proposed Final Draft No. 1, 1996). Aside from possible disciplinary action, this duty is enforceable through a legal malpractice lawsuit. See id. §§ 71, 72 (Tentative Draft No. 7, 1994).

\(^{103}\) See Model Rules of Professional Conduct Rules 1.7-1.10 (discussing current, successive, and imputed conflicts of interest); Restatement (Third) of the Law Governing Lawyers § 201 (Proposed Final Draft No. 1, 1996) (discussing conflicts of interest). Aside from possible disciplinary action, these duties are enforceable through such remedies as disqualification, legal malpractice, fee forfeiture, and sometimes even criminal sanctions. See id. cmt. f; see also id. § 207 cmt. a (discussing how business transactions between lawyers and clients create the risk that the transaction will be voidable by the client).

\(^{104}\) See supra note 21 and accompanying text. Even absent an express or implied agreement by Starr to permit Dash’s disclosure in this instance, the suggestion has been made that when a client “has effectively misrepresented the lawyer’s advice,” the lawyer “has the right . . . to make a public statement” correcting the record. Goldman, Of Sam Dash’s Exit, supra note 14 (quoting Professor Monroe Freedman).
Such a claim, however, would be problematic. For example, it does not appear that Starr expressly authorized Dash to make his resignation letter public. 106 Nor is it clear that Starr's prior publication of Dash's approving opinions constituted implied consent for Dash's publication of a contrary opinion, or even that such "implied" consent would have been sufficient to authorize such a harmful disclosure. 107 Moreover, even if Dash was expressly or impliedly authorized to make public both his resignation and his disapproval of Starr's voluntary appearance before Congress, it would still be hard to justify the harsh language of Dash's letter, including his characterization of Starr's conduct as "unlawful." 107

Although this proposition is intuitively appealing, there is no clear authority for it in lawyer disciplinary codes. See Model Rules of Professional Conduct Rule 1.6(b)(2) (describing the so-called self-defense provision, which is limited to establishing a claim or a defense in a controversy between a lawyer and a client, establishing a defense to a criminal charge or civil claim, or responding to allegations in a proceeding concerning a lawyer's representation of a client).

105. In his letter of resignation, Dash clearly implied that he had no express consent to publish either the fact of his resignation or the reasons therefore, stating only an implied right on his part to rebut an inference that he had approved Starr's conduct: "Frequently you have publicly stated that you have sought my advice in major decisions and had my approval. I cannot allow that inference to continue regarding your present abuse of your office and have no other choice but to resign." Van Natta Jr., supra note 7 (quoting resignation letter from Dash to Starr). When Dash spoke out several months later and specifically addressed the propriety of his publishing the resignation letter, once again he did not mention any express agreement, but rather described the letter as a form of "noisy" withdrawal, explaining that Starr chose to rely publicly on Dash's advice by stating on specific occasions that he had consulted Dash and that Dash agreed with him," thus creating "a presumption that Dash approved Starr's decisions unless Dash rebutted them." Bennett, supra note 25, at 48. It is only recently, in his letter to me, that Dash says that he "informed Starr from the beginning that if [they] disagreed on issues of principle, involving the integrity of the investigation, and he would not follow [Dash's] advice, [Dash] would have to resign and make a public statement disavowing [his] support of his planned conduct." Dash, Letter, supra note 25, at 2. Of course, even this statement does not clearly indicate that Starr expressly agreed to publication not only of Dash's disapproval, but also of the reasons for that disapproval.

106. With respect to client consent, Model Rule 1.6(a) states that the client must consent "after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." Model Rules of Professional Conduct Rule 1.6 (a). Here, it is clear that the disclosure was not "impliedly authorized in order to carry out the representation," since the disclosure was in fact a resignation. Nor is there implied consent in the sense that one could assume that Starr would have consented if he had been asked. It is at least possible, although not likely, that Starr would have granted such consent, given his close relationship with Dash. For example, whereas Starr's aides reacted angrily to the publication of the resignation letter, see supra notes 13-19 and accompanying text, Starr himself apparently did not. See John C. Henry, Hous. Chronicle, Ex-Watergate Counsel Quits as Starr Aid—Testifying to Panel Chided, Nov. 21, 1998, at 1 (quoting Starr as characterizing Dash's resignation as merely "a gentle disagreement," without apparently even commenting on the publication of the resignation letter).

107. See supra note 11 and accompanying text. Professor Stephen Gillers, a legal ethics expert from New York University School of Law, characterized the language in the Dash resignation letter as "extraordinarily harsh." Goldman, Of Sam Dash's Exit,
Perhaps recognizing the difficulty of establishing a defense within the confines of an attorney-client relationship, Dash takes great pains to persuade us that he had no such relationship with either Starr or the OIC. Indeed, he flatly stated that his primary purpose in disclaiming an attorney-client relationship was to avoid assuming fiduciary duties, such as confidentiality and loyalty, so that he could be truly "independent." As discussed in Part I, whether a lawyer-expert-consultant forms an attorney-client relationship might depend on whether the consultant renders legal advice directly to a putative client, rather than through a consulting lawyer who will then exercise independent judgment on behalf of the consulting lawyer's client.

In my opinion, because Dash's relationship with Starr and the OIC appears to have been direct, in all likelihood it would be found that he did form an attorney-client relationship with one or both. Even if he had worked through a consulting lawyer, however, and it was determined that no attorney-client relationship was formed, it is unlikely that he would have succeeded in avoiding the assumption of any duties to the retaining lawyer's client. Indeed, except for purposes of unauthorized practice of law statutes, it may not even matter whether an attorney-client relationship was formed, because the duties owed even outside such a relationship may be substantially similar to those owed when such a relationship actually exists.

Let me quickly concede that I am not talking about informal, gratuitous consultations, pertaining to ethics or otherwise. I think it is fairly clear that so long as the consulting lawyer keeps the consultation brief and avoids disclosing specific, detailed information, no attorney-client relationship will result, and the consulted lawyer will have assumed no duties of competence, loyalty, or confidentiality. The more troublesome cases, however, are those in which the relationship is more formal, particularly when the consulted lawyer or law professor will be paid for her services. I argued in Part I that it may be impossible to structure the relationship to avoid a subsequent finding that an attorney-client relationship was formed. In this part, however, I argue that even if a court were to agree that the consulted

supra note 14. Professor Gillers was also quoted as saying that "[i]f Dash had to resign, he should have just said he had to resign." Id.

108. See supra notes 25-30 and accompanying text.

109. See supra note 26 and accompanying text.

110. See supra notes 93-94 and accompanying text. Even when the relationship is indirect and conducted solely through a consulting lawyer, there is reason to believe that a lawyer who provides legal services for the benefit of the consulting lawyer's client has formed an attorney-client relationship with that client, albeit inadvertently. See infra Part III.

111. See supra notes 93-96 and accompanying text (arguing that the provision of legal services, even through a retaining attorney, may constitute the establishment of an attorney-client relationship).

112. See supra notes 90-91 and accompanying text.

113. See supra note 72 and accompanying text.
lawyer had no attorney-client relationship, the duties owed by such a lawyer to the consulting lawyer's client would be substantially similar to those arising from an attorney-client relationship.114

Consider, for example, the status of an economist hired not to testify, but rather to render advice that will help the consulting lawyer better represent that lawyer's client.115 Such an economist may be an independent contractor,116 but she is also an agent, because she is retained to act on behalf of, and subject to, the control of the consulting lawyer.117 As an agent, she is a fiduciary118 and has duties to her principal of competence,119 loyalty,120 and confidentiality.121 Moreover, as a "subagent,"122 her duties are owed not only to the

114. My thanks to my colleague Professor Susan Koniak for pointing me in this direction.

115. It is clear, for example, that Rule 26 contemplates the use by a party of "an expert who has been retained or specially employed ... in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial." Fed. R. Civ. P. 26(b)(4)(B). See Wright et al., supra note 44, § 2032.

116. According to the Restatement of Agency, "[a]n independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." Restatement (Second) of Agency § 2(3) (1958). An independent contractor is distinguished from a "servant," who is an "agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." Id. § 2(2). Servants are by definition agents, whereas independent contractors may or may not be agents. See id. § 2(3).

117. The Restatement (Second) of Agency section 1 defines agency and principal as follows:

(1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act.

(2) The one for whom action is to be taken is the principal.

(3) The one who is to act is the agent.

Id. § 1.

"Control" does not mean "physical control," which is merely the means of distinguishing independent contractors from servants. See supra note 116. Independent contractors may or may not be agents. See supra note 116. Consultants are ordinarily subject to the control of the consulting lawyer, who typically specifies the form in which the consultant's advice will be rendered and has the ability to limit the total number of hours and the types of expenses that will be reimbursed.

118. See Restatement (Second) of Agency § 13 (1958) ("An agent is a fiduciary with respect to matters within the scope of his agency.").

119. See id. § 379 (describing the duty of care and skill).

120. See id. §§ 387-398.

121. See id. §§ 395-396 (describing the duties of confidentiality, which are characterized as an aspect of the agent's duty of loyalty).

122. A subagent is "a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible." Id. § 5(1). While the consulting attorney may have no actual authority to associate another lawyer to represent the client, i.e., in an attorney-client relationship, see infra note 184 and accompanying text, the consulting lawyer clearly has the authority to retain both testifying and non-testifying experts and consultants. See Restatement (Third) of the Law Governing Lawyers § 32(3) (Proposed Final Draft No. 1, 1996) (providing that
Of course, the duties of a non-lawyer agent are not co-extensive with the duties owed by a lawyer to a client. An agent is subject to a duty of loyalty not to act adversely to the principal in matters connected with the agency. Unlike a lawyer-agent, however, a non-lawyer agent has no duty to refuse engagements that pose the mere potential for conflict of interest. Similarly, an agent is subject to a duty of confidentiality, but unlike a lawyer-agent, the scope of the duty owed by a non-lawyer agent is limited to confidential information and only prohibits use that is actually harmful to the principal. Nevertheless, the duties of a non-lawyer agent are substantial and place severe constraints on the economist-expert-consultant, and therefore on the lawyer-expert-consultant, even when no attorney-client relationship has been formed.

Indeed, these fiduciary duties have been recognized and protected by courts in several situations. For example, although some ethics commentators have expressed concern regarding the difficulty of establishing a "confidential relationship" between consulting and consulted lawyers, courts routinely hold that the attorney-client relationship is established absent a prior agreement or client's instructions to the contrary, "a lawyer may take any lawful measure within the scope of representation that is reasonably calculated to advance a client's objectives as defined by the client").

123. See Restatement (Second) of Agency § 428 (1958).
124. Compare Restatement (Second) of Agency § 387 (providing that the agent has a duty to "act solely for the benefit of the principal in all matters connected with his agency"), with Model Rules of Professional Conduct Rule 1.7(b) (1998) (providing that a lawyer is prohibited from representing 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" the client consents after consultation and "the lawyer reasonably believes the representation will not be adversely affected" (emphasis added)).

125. See supra note 121 and accompanying text.
126. Compare Restatement (Second) of Agency § 395 (defining the duty "not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency"), with Model Rules of Professional Conduct Rule 1.6(a) (describing the duty not to disclose any and all "information relating to representation"); compare Restatement (Second) of Agency § 395 (describing a duty not to disclose or use information "in competition with or to the injury of the principal"), with Model Rules of Professional Conduct Rule 1.6(a), 1.8(b) (providing that no disclosure or use is permitted without the client's consent). For a discussion of whether communications to a lawyer-expert-consultant are protected by the attorney-client evidentiary privilege, see infra notes 127-29 and accompanying text.

127. See Chinaris, supra note 1, at 49-52 (proposing an amendment to Rule 1.6 that would permit a lawyer to consult with a non-affiliated lawyer about a "bona fide ethical dilemma," in response to concerns regarding the lack of confidentiality obligations of the consulted lawyer who does not form an attorney-client relationship with the consulting lawyer). Part of the difficulty of ethics consultations is that the consulting lawyer may be looking for advice that would be helpful to the lawyer herself and disadvantageous to the client. See id. Thus, it may be difficult to argue
that the disclosure of confidential client information to the consulted lawyer is impliedly authorized under Rule 1.6. See id.


129. With ethics experts, this argument may not work when the consultation is made not for the purpose of furthering the client's interests, but rather for the purpose of furthering the consulting lawyer's own interests in the representation. See supra note 127 and accompanying text.

130. For a discussion of the limitations on confidentiality for testifying experts, see supra note 47 and accompanying text.


132. See Great Lakes Dredge & Dock Co. v. Harnischfeger Corp., 734 F. Supp. 334, 339 (N.D. Ill. 1990). In Great Lakes, a case involving the disqualification of an expert, the court declined to adopt the presumption applied in cases involving former attorneys, i.e., "that once a confidential relationship is established, it is presumed that confidential communications were made and such communications will be used to the detriment of the communicating party."

133. Great Lakes, 734 F. Supp. 334, 339 (N.D. Ill. 1990). In Great Lakes, a case involving the disqualification of an expert, the court declined to adopt the presumption applied in cases involving former attorneys, i.e., "that once a confidential relationship is established, it is presumed that confidential communications were made and such communications will be used to the detriment of the communicating party." Id. at 338. Accordingly, the court held that disqualification of a former expert requires the moving party to establish that the expert in fact received confidential client information. See id. at 338-39; see also Cordy, 156 F.R.D. at 580 (distinguishing between experts and attorneys and requiring that there be proof that confidences were imparted to a former expert before the court will order disqualification). At least one court has distinguished an attorney-expert from non-attorney-experts, holding that the attorney-expert may be disqualified by use of a test similar to that applied to attorneys, in a case where the moving party alleged the existence of an attorney-client relationship. See W.R. Grace & Co. v. Gracecare, Inc., 152 F.R.D. 61, 64-65 (D. Md. 1993) (discussing how a consulting lawyer testified that he believed an attorney-client relationship was created between his client and a practicing trademark attorney he consulted to advise his client on several issues in the lawsuit, including the appropriateness of expert testimony). A second presumption that applies in disqualification cases involving former attorneys but not disqualification cases involving former experts is the...
explained in detail the basis for finding a confidential or fiduciary relationship with an expert, courts routinely find such a relationship exists, even absent an express confidentiality agreement.133

What about a lawyer-consultant's fear of a malpractice or breach of fiduciary duty lawsuit brought by the consulting lawyer's client? Although I have not found any cases directly on point, it would appear that such lawsuits would be relatively straightforward, given the expert's status as both agent of the consulting lawyer and subagent of the consulting lawyer's client. According to the Restatement (Second) of Agency, a "subagent who knows of the existence of the ultimate principal owes him the duties owed by an agent to a principal, except the duties dependent upon the existence of a contract."134 Thus, although it is true that the subagent is not liable to the principal for mere failure to perform under the contract with the agent, the subagent is liable to the principal for breaches of fiduciary duties (including disclosure of confidential information) and for losses suffered because of reliance upon performance by the principal or agent, including an action in tort for damages due to negligent performance.135 Such liability could also be based on a finding that the consulting lawyer's client is the third-party beneficiary of the contract between the consulting lawyer and the lawyer-expert-consultant.136

presumption that an attorney has shared confidential information with the attorney's partners. See Great Lakes, 734 F. Supp. at 336-38 (refusing to disqualify partner of plaintiff's former expert and distinguishing cases involving former attorneys).

133. See Cordy, 156 F.R.D. at 581 (finding that the absence of a confidentiality agreement is not determinative and the question is "whether [the consulting lawyer] acted reasonably in assuming that a confidential or fiduciary relationship existed with [the expert]"). Apparently courts are willing to presume a relationship of confidence when the consulting lawyer provides confidential information to the expert. See id.


135. See id. § 401 ("An agent is subject to liability for loss caused to the principal by any breach of duty."); id. § 428 cmt. e (providing that the subagent is subject to the same liability as an agent for the violation of duties to the principal, except that the subagent is not liable for the mere breach of a contract). For a discussion of the specific duties owed by agents and subagents, see supra notes 118-23 and accompanying text.

136. Under section 302 of the Restatement (Second) of Contracts, the beneficiary of an agreement between a promisor and a promisee has a right of action against the promisor:

if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Restatement (Second) of Contracts § 302 (1979); see Jay M. Feinman, Economic Negligence § 4.2 (1995). Courts have been reluctant to use third-party beneficiary theory to confer a right of action in a third person when the attorney is representing a client, see Feinman, supra, § 9.3.5, but in this instance we have assumed that the lawyer-expert-consultant has not formed an attorney-client relationship. Thus, if the consulting lawyer is retaining the lawyer-expert in order to assist in the representation of the consulting lawyer's client, the contractual doctrine should apply. It does
III. To Whom Are the Lawyer-Expert's Duties Owed?

According to Sam Dash, he was an outside consultant and adviser to Ken Starr and to the OIC. In Part II of this Article, I argued that regardless of whether the relationship was one of attorney and client, Dash owed at least some duties of competence, loyalty, and confidentiality to some person or entity. In Part III, my purpose is to identify precisely the person or entity to whom these duties were owed. Of course, the answer to this question may depend not only on the specific relationship(s) formed (i.e., attorney-client or otherwise), but also on the particular context in which the question is raised (e.g., disqualification or civil liability). Nevertheless, for purposes of this part, I am going to assume both that the relationship was one of attorney-client and that identifying the client(s) will answer the question to whom Dash's duties were owed. Even with these admittedly simplifying assumptions, there are interesting complexities in the Dash-Starr/OIC relationship, each of which may have important ramifications beyond the particular case. These complexities involve: 1) the difficulty of client identification in representation involving governmental officials and agencies; 2) the ambiguity present whenever a lawyer undertakes representation involving both an organization and one or more of its individual constituents; and 3) the special problems that arise when a consulting lawyer requests advice on matters relating to that lawyer's ethical responsibilities in relation to the consulting lawyer's client.

appear, however, that under Restatement (Second) of Contracts section 302, the lawyer-expert-consultant could avoid liability by explicitly stating in the agreement with the consulting lawyer that no third party beneficiary rights are being created. See id. § 4.2 ("[T]he initial clause of § 302(1) clearly states that the parties have the power by their agreement to prevent the creation of third party beneficiary rights."). Nevertheless, it is unlikely that the consulting lawyer would agree to such a provision, because to do so might be in derogation of duties owed by the consulting lawyer to the client.

Of course, third party beneficiary theory will not apply when the purpose is to benefit the consulting lawyer and not the client. See infra Part III.C. (discussing client identification problems involving ethics consultations).

137. See supra note 26 and accompanying text.


Normally, the identification of a lawyer-client relationship is a predicate to determining the lawyer's duties. Once a person is determined to be a lawyer's client, then the fiduciary and other obligations of a lawyer to that person attach: competence, confidentiality, diligence, loyalty (avoidance of conflict of interest), zeal and the like. However, the simplicity of this approach, in which duties flow inexorably from the existence of the lawyer-client relationship, belies the complexity of actual practice.

Id.

139. See infra Part III.A.

140. See infra Part III.B.

141. See infra Part III.C.
A. Who Is a Government Lawyer’s Client?

At least one commentator has suggested that Dash’s publication of his resignation letter may have been justified precisely because Dash was an attorney with the OIC—a government agency. According to a media report, this commentator noted the irony that Dash’s conduct was “governed by court rulings—won by Starr’s office during the Whitewater/Lewinsky investigation—that chipped away at the notion of an attorney-client privilege for government lawyers.”142 Indeed, the commentator was quoted as saying, “[w]hatever duty of loyalty Dash has to the Office of Independent Counsel is trumped by the public’s right to know and Dash’s right to speak.”143

It is certainly true that Starr’s office won court rulings that raised questions regarding the existence and scope of the attorney-client privilege in the context of representing government agencies,144 but these rulings do not appear to justify Dash’s conduct in this case. First, even on the narrow question involving the evidentiary privilege, these cases held merely that White House lawyers could be compelled to reveal otherwise confidential communications to a duly appointed Independent Counsel.145 They did not abrogate the attorney-client privilege with respect to other individuals in other contexts. Second, even when information is not protected by an attorney-client evidentiary privilege, a lawyer has a duty of confidentiality under rules of professional conduct, except in narrowly defined circumstances that include express or implied consent by the client.146 Although government clients may consent to a broader spectrum of information than do non-government clients,147 it will be difficult for Dash to argue that either Starr or the OIC consented to the disclosure in this case.148

142. Goldman, Of Sam Dash’s Exit, supra note 14 (quoting Professor Bruce Green of Fordham University School of Law).
143. Id.
145. See supra note 144.
146. See Model Rules of Professional Conduct Rule 1.6 (1998); supra notes 105-06 and accompanying text.
147. See Cramton, supra note 138, at 294-95 (stating that a “government lawyer’s duty of confidentiality does not extend to information that the government has made available upon request to the public” because the “government in effect has consented to disclosure”). Professor Cramton also notes that the government lawyer’s duty of confidentiality is complicated by the doctrine of separation of powers. See id. at 295-96.
148. Dash’s communications with Starr and the OIC were not a matter of public record and thus disclosure was not warranted under the theory that the government
Nor is there any credible argument that Dash was justified in publicly disclosing his resignation letter because the "public" was his real or ultimate client. There are indeed those who have claimed that government lawyers represent the "public interest." Today, however, that argument is generally rejected in favor of the view that government lawyers represent either the agency itself or some other unit of government, and that disclosures of wrongdoing are justified only to those who have decision-making capability in regard to the matter in question. Under this view, if Starr's conduct was unlawful, then Dash may have been justified in making disclosures to individuals outside the OIC (since Starr is the head of the OIC), but only to those in a position either to reverse Starr's decisions or to dismiss him for misconduct.

Even those who advocate that a government lawyer's duty is to the "public interest" would probably concede that public disclosure by such a lawyer is appropriate only when the information would not

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149. See Cramton, supra note 138, at 298 (citing various proponents of the "public interest approach" to client identification in the context of government representation).

150. See id. at 300-01 (citing various proponents of the "agency approach," under which the agency is viewed as the client not under all circumstances, but in "the vast majority of situations").

151. See id. at 301-06 (arguing that in cases involving agency corruption, the Executive Branch should be viewed as the agency lawyer's client); see also Paulsen, supra note 144, at 486-92 (stating that in the context of an Independent Counsel investigation, the client of the White House lawyer is the Executive Branch, not the White House or the President).

152. Professor Paulsen analogizes the representation of government entities to that of private entities like corporations. See Paulsen supra note 144, at 513-19. Under the rules of professional conduct, corporate lawyers are not permitted to disclose corporate wrongdoing either to the public or to shareholders, when the lawyer's purpose is protecting the corporation itself. See Model Rules of Professional Conduct Rule 1.13(b), (c) (1998) (providing that if the board of directors refuses to act, the lawyer may resign and that disclosure outside the corporation is warranted only when permitted by Rule 1.6, which provides exceptions to confidentiality regardless of the client's consent). Rather, the corporate lawyer is permitted to refer the matter only to a "higher authority in the organization," including "referral to the highest authority that can act in behalf of the organization as determined by applicable law." Id. Rule 1.13(b)(3).

153. Under the Independent Counsel statute then in effect, there was no one who could actually reverse Starr's decisions, and the ability to remove him for misconduct was extremely limited. See James P. Fleissner, The Future of the Independent Counsel Statute: Confronting the Dilemma of Allocating the Power of Prosecutorial Discretion, 49 Mercer L. Rev. 427, 434-36 (1998) (describing the limited checks on the Independent Counsel, once he or she has been appointed). If Starr's alleged misconduct was criminal, Dash might also have been authorized, indeed required, by applicable federal statutes to disclose the misconduct to designated law enforcement officials. See Cramton, supra note 138, at 303 (describing the federal lawyer's statutory duty to report criminal misconduct to either the agency head or to the Attorney General).
otherwise be disclosed. Here, however, there is no question that Starr's appearance before Congress was going to be scrutinized by his opponents: if Starr's conduct was unlawful, then other lawyers clearly would be in a position to recognize and widely publicize that fact. Dash might respond that it was not so much the unlawful character of Starr's conduct that was important for the public to know, but rather the fact that Dash himself believed that Starr's conduct was unlawful. This argument, however, appears to be merely another way of claiming that the disclosure was justified by Starr's prior use of Dash's favorable opinions—that is, creating either an express or implied consent to future unfavorable opinions. I have previously concluded that either there was no such consent or, if there was, that the consent justified only publication of the resignation itself, and not the detailed contents of the resignation letter.154

In my view, then, although representing government agencies often entails difficult ethical questions of client identification, these questions are not seriously implicated in the Dash-Starr relationship. The same is not true, however, of the ethical issues raised both by the complexities of entity representation generally and by the unique aspects of ethical consultations by a consulting lawyer.

B. Representation in the Context of Entities and Their Constituents

Sam Dash apparently did not intend to form an attorney-client relationship with either Ken Starr or the OIC. Nevertheless, as I argued in Part I, he may have formed such a relationship with someone; for example, if he performed legal services that can only be performed by an attorney representing a client.155 Does that mean that he represented both Starr, individually, and the OIC? This question raises client identification and conflict of interest problems commonly faced by lawyers in representations involving an entity and one or more of its individual constituents, regardless of whether the entity is public or private.

Assume, for example, that Attorney, a lawyer, has been retained by Pres, the president of Corp, a corporation, to advise Pres regarding her obligations as president of Corp. According to the retainer agreement, which is signed by “Pres, president of Corp,” Attorney will be compensated by Corp. Who does Attorney represent? The question may arise after Pres leaves Corp, perhaps when Corp sues Pres for breach of fiduciary duty, and Pres moves to disqualify Attorney from representing Corp on the ground that Attorney formerly represented Pres in the same or a substantially related matter.156

154. See supra notes 105-07 and accompanying text.
155. See supra notes 56-57 and accompanying text.
156. See Model Rules of Professional Conduct Rule 1.9(a) (prohibiting
Attorney may argue that she was initially retained by Pres, acting on Corp’s behalf, to represent Corp’s interest in having Pres comply with his official obligations. The fact that Corp was paying Attorney’s legal fee is not determinative of Corp’s status as a client, but it is certainly relevant on that question, particularly if Corp has no obvious interest in providing Pres with personal representation. Coupled with Corp’s own interest in the subject matter of the representation, it would be difficult not to conclude that Attorney has formed an attorney-client relationship with Corp itself.

Attorney may then argue that because she represented the entity itself, it follows that she was not representing any individual constituent of the entity. In support, she may cite Model Rule 1.13(a), which states that “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” All this provision does, however, is state that a lawyer representing an organization does not necessarily represent its individual constituents. Indeed, Rule 1.13(e) expressly states that “[a] lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents,” subject to the lawyer’s compliance with conflict of interest rules.

At this point, Attorney may argue that there was indeed a conflict of interests between Corp and Pres; therefore, she could not have

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157. See Model Rules of Professional Conduct Rule 1.8(f) (providing that it is permissible in some circumstances for a lawyer to accept compensation from a third person for representing a client).

158. Ordinarily, attorney-client relationships are viewed as a matter of contract, in which case the relevant question is what the parties intended. See Mallen & Smith, supra note 70, § 8.3, at 568 (providing that in a consensual relationship, the question is whether a lawyer and client have consented to its formation). There are indeed some situations in which an organization does have an interest in providing an organizational constituent with personal representation for example, when both the organization and the individual are sued by a third person and the organization has either indemnified the individual or has a contractual obligation to provide the individual with a defense. See Nancy J. Moore, Ethical Issues in Third-Party Payment: Beyond the Insurance Defense Paradigm, 16 Rev. Litig. 585, 602-05 (1997) [hereinafter Moore, Ethical Issues in Third-Party Payment]. Sometimes the use of the corporation’s attorney for the personal benefit of a corporate executive is offered simply as a benefit to the executive, as when the corporation’s attorney drafts a will for the executive or assists in a personal real estate transaction.

159. Model Rules of Professional Conduct Rule 1.13(a) (1998). The Model Code contains an even more explicit statement. See Model Code of Professional Responsibility EC 5-18 (1983) (“A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity.”).

160. See Moore, Expanding Duties of Attorneys, supra note 67, at 677.

represented both parties without their informed consent. Elsewhere I have argued that it is important to separate the question of the fact of a representation from the question of whether that representation was proper under applicable rules of professional conduct. Thus, if Attorney expressly or impliedly agreed to represent Pres while simultaneously representing Corp, then an attorney-client relationship was formed, regardless of whether Attorney complied with conflict of interest rules. Similarly, even in the absence of an express or implied agreement, if Pres reasonably believed that Attorney was representing his individual interests, and not just those of Corp, then an attorney-client relationship may have been formed, albeit inadvertently on the part of Attorney. Applying this analysis to Dash's relationship with Starr and the OIC, it seems clear that if Dash was representing anyone, it must have been the OIC itself. After all, the agency was paying Dash's fee, it had a substantial interest in the subject of the representation, and it had no particular interest in providing Starr with personal representation. Nevertheless, there are indications that Dash may also have been representing Starr individually. For example, Dash has referred to an agreement he made to advise both Starr and the OIC. Absent clarification from Dash that his advice to Starr was given only in fulfillment of his responsibilities to the OIC, Starr could reasonably have believed that Dash was his lawyer also, particularly if he viewed Dash as representing him in his official, as opposed to his personal, capacity.

162. See id. Rule 1.7(b).
164. As I have argued elsewhere, lawyers typically can avoid unwanted relationships in these situations, simply by clarifying their role whenever there is a significant potential for misunderstanding. See Moore, Expanding Duties of Attorneys, supra note 67, at 694, 704.
165. See supra note 33 and accompanying text.
166. The credibility of the OIC and its investigations was clearly a function of the credibility of Starr himself, who, in the public eye, was the OIC.
167. Government agencies are far less likely to use their lawyers for the personal benefit of government officials than are private organizations like corporations, except when the government is legally obligated to provide such representation, as when a government officer is sued in her individual capacity. See Moore, Ethical Issues in Third-Party Payment, supra note 158, at 607 n.97 (citing a state statute that provides that the government must provide for the defense of employees sued on account of acts or omissions within the scope of their employment); see also 28 U.S.C.A. § 2679 (1984) (providing the same defense for federal employees).
168. See supra note 30.
169. Professor Paulsen suggests a possible distinction between representation of a constituent, as an individual, and representation of the office held by the individual constituent, each of which is in turn distinguishable from representation of the entity itself. See Paulsen, supra note 144, at 487 (discussing the representation by an attorney working for the Clinton White House Counsel's office and distinguishing between representation of (1) Bill Clinton, personally, (2) the office of the President of the United States, and (3) an entity such as the White House or the executive
Nor should it matter that there may have been conflicts of interest between Starr and the OIC, at least on some matters. For example, these conflicts clearly surfaced when Dash advised Starr in connection with Starr's decision to continue representing private clients while serving as Independent Counsel. At that time, there was a significant risk that Dash's ability to represent each client was materially limited by his obligations to the other client. It is possible that the dual representation could have proceeded without material adverse effect; however, it was unclear who could have consented to the conflict on the OIC's behalf. Nevertheless, as I argued earlier, whether there is an impermissible conflict of interests is irrelevant to determining whether and with whom an attorney-client relationship has been formed.

C. Special Problems for Ethics Consultants

If there is ambiguity in a representation involving both an entity and its individual constituents, it is because the individual constituent has a personal interest in the subject of the representation, as when a lawyer advises a corporate president on compliance with her fiduciary

branch of the United States government). There is, however, yet another possibility. We could, for example, distinguish between representation of the individual constituent in personal matters and representation of the individual constituent in her role as officer or employee of the entity. Thus, Starr might readily concede that Dash was not representing Ken Starr, the citizen, but might argue that rather than representing the office of the Independent Counsel (an office that Ken Starr simply happened to occupy), Dash was representing Ken Starr in his official capacity as Independent Counsel. The difference might become apparent after Starr leaves his office and attempts either to disqualify Dash from subsequent representation adverse to Starr in a substantially related matter, or to sue Dash for malpractice for wrongful advice that caused Starr to incur certain damages. None of this seems likely to occur in this instance, but might happen to a different government, or corporate official in a different situation.

170. See Van Natta Jr., supra note 7.
171. See Model Rules of Professional Conduct Rule 1.7(b) (1998) (providing that conflict of interest exists "if the representation of [one] 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.")
172. See id. (providing that representation of conflicting interests is permissible if "the lawyer reasonably believes the representation will not be adversely affected" and "the client consents after consultation").
173. See Restatement (Third) of the Law Governing Lawyers § 202 cmt. c(ii). It states:
When the person who normally would make the decision whether or not to give consent—members of a corporate board of directors, for example—is another interested client of the lawyer, or is otherwise self-interested in the decision whether to consent, special requirements apply to consent. . . . Similarly, an officer of a government agency capable of consenting might be disabled from giving consent when that officer is a lawyer personally interested in consenting to the conflict.

Id.
duties to the corporation. There is a similar potential for ambiguity even outside the context of entity representation: whenever a lawyer representing a client seeks legal advice regarding that lawyer's ethical obligations in representing the client.

Outside the field of ethics, most lawyer-to-lawyer consultations are clearly "client-driven," meaning that the consultation is done for the primary purpose of benefiting the consulting lawyer's client. As a result, if the consulted lawyer forms an attorney-client relationship with anyone, it is with the consulting lawyer's client. In the ethics area, however, it is just as likely that the consultation is "lawyer-driven," meaning that it is done for the primary purpose of benefiting the consulting lawyer's own interests. If so, then it may be the consulting lawyer who reasonably relies on the consulted lawyer and becomes the inadvertent client.

In fact, the circumstances surrounding ethics consultations may be fairly ambiguous. For example, the lawyer may be concerned that the client is insisting on a course of action that the lawyer believes to be criminal or fraudulent. In such a case, it is probably in the interest of both the consulting lawyer and her client for the lawyer to obtain an expert's assistance in determining the lawyer's ethical obligations. How is one to determine whether the consultation was primarily client or lawyer-driven? Clearly, the consulted lawyer

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174. Given the president's interest in the subject of the representation, the president may reasonably rely on the lawyer to protect her interests, with the possible result that the lawyer inadvertently forms an unwanted attorney-client relationship. This is often in conflict with the interests of the lawyer's other client, the corporation itself. See supra notes 162-63 and accompanying text.

175. See Chinaris, supra note 1, at 44.

176. See id.

177. If "reasonable expectations" are what determine the existence of an inadvertent attorney-client relationship, see supra note 67 and accompanying text, then one might question whether an inadvertent relationship can be formed with a "client" who is unaware of the fact of the consultation. Certainly there is an argument that a consulting lawyer may not ethically associate with another lawyer in the case without the informed consent of that lawyer's client. See infra note 184 and accompanying text. If a consulting lawyer does so, then the client may not be bound by the retention. See, e.g., Restatement (Second) of Agency § 5 cmt. a (1958) (stating that a person may be a subagent although the appointing agent has no authority to appoint him, as when the agent has apparent, but not actual authority to make the appointment). Nevertheless, it might still be argued that if a consulting lawyer reasonably relies on the consulted lawyer to protect the client's interest, then it is, in effect, the client who so relies, through the medium of her legitimately authorized agent. If the client is thereby harmed, then the client should be permitted to reap the benefit of her agent's reliance on her behalf. See infra note 187

178. See Chinaris, supra note 1, at 44 ("[I]n the majority of situations these two motivations [to benefit the lawyer and the lawyer's client] overlap" and "[t]he ethics consultation may benefit or be needed by both lawyer and client.").

179. See Kershen, supra note 1, at 6 (discussing the necessity of a consultation to learn lawyer's ethical obligations under Rule 1.2(d) of the Model Rules).

180. Professor Kershen suggests that the possibility that "the outside lawyer may suggest a course of action that the client will consider disadvantageous to the client's
should determine at the outset of the consultation who, if anyone, is the consulting lawyer's client. Absent such a determination, however, it is at least arguable that the consulted lawyer has obtained two inadvertent clients, particularly if the consulting lawyer's client was informed about, and consented to, the consultation.

"desired course of action" indicates that the consultation must be for the lawyer's benefit and not for the client's. Id. at 4 (discussing how one determines whether disclosures to an outside lawyer are "impliedly authorized in order to carry out the representation" and thus permitted under Rule 1.6(a) without the client's informed consent). But this is not necessarily so. One can easily imagine a corporate lawyer consulting a securities lawyer to determine whether a proposed press release would violate the client's obligations under securities law. The mere fact that the securities lawyer might render an opinion adverse to the client's proposed course of action does not mean that the consultation was lawyer-driven rather than client-driven.

The consultation could be considered primarily lawyer-driven if the lawyer already knows that she wants to withdraw, and the consultation is made with the specific purpose of determining if the lawyer could be disciplined for so doing. If, however, the lawyer is genuinely perplexed as to her ethical obligations and has not yet decided what she would like to do, then the consultation may be properly characterized as benefiting the lawyer and the client in roughly equal measure.

181. See supra notes 73-74. If the sole client is to be the consulting lawyer, then the consulting lawyer must be responsible for the consulted lawyer's fee, as there would be no justification for passing that cost along to the consulting lawyer's client. Whether the consulting lawyer is authorized to disclose information protected by Rule 1.6 for the sole purpose of obtaining legal advice for the lawyer herself has been the subject of continuing debate. Compare Kershen, supra note 1, at 8 (arguing that disclosure may be justified by the "self-defense" exception of Rule 1.6(b)), with Pizzimenti, supra note 1, at 21 (arguing that disclosures are not justified except with the informed consent of the client). Contrary to Professor Kershen's analysis, I believe that such disclosures are "impliedly authorized" in order to carry out the representation in most cases, because the lawyer may not be in a position to provide competent representation until she fully understands her own ethical obligations. See Model Rules of Professional Conduct Rule 1.6(a) (1998). But see Kershen, supra note 1, at 4 (stating that disclosures are not "impliedly authorized" when they are made for the purpose of benefiting the lawyer and not the client). I agree with Professor Kershen, however, that it would be better if the rules were amended to provide a clear exception for lawyers seeking legal advice for themselves. See id. at 10 (proposing amendment to Rule 1.6). The ABA Commission on the Evaluation of Professional Standards has tentatively proposed such an amendment. See ABA Comm'n on Evaluation of the Rules of Professional Conduct Rule 1.6(b)(4) (Proposed Rule 1.6 Public Discussion Draft Mar. 1999). I am the Chief Reporter for that Commission, although it should be noted that the views expressed in this Article are my own and do not necessarily reflect the views of the Commission.

182. If the consulting lawyer has obtained the informed consent of the client, then it is easier to argue that the client has reasonably relied on the advice of the consulted lawyer and thereby formed an attorney-client relationship with that lawyer. Obtaining such consent does not, however, eliminate the possibility that the consulted lawyer has also formed an attorney-client relationship with the consulting lawyer herself. For example, it has been argued that the consulting lawyer may not disclose information about the client without that client's informed consent, even if the consulting lawyer expressly retains the consulted lawyer to represent the consulting lawyer in the matter. See Kershen, supra note 1, at 6-8 (discussing the difficulties associated with finding such disclosures justified by recognized exceptions to client confidentiality rules). Thus, even if a consulting lawyer does inform the client and obtains the client's consent to the consultation, the consulting lawyer may still view the consultation having been done primarily for the lawyer's own benefit.
As in the entity representation cases, it might be argued that the lawyer could not be representing both lawyer and client because their interests are, or may be, in conflict. Similarly, it might be argued that there can be no attorney-client relationship without the informed consent of the consulting lawyer’s client. As I argued earlier, however, the fact of a representation is a question that should be considered separately from its ethical propriety. Thus, conflict of interest or not, if both the consulting lawyer and her client reasonably rely on the consulted lawyer to protect their respective interests, then the consulted lawyer may have formed two attorney-client relationships. Similarly, the consulting lawyer may have acted unethically in associating an ethics expert to assist in representing the client without first obtaining the client’s informed consent. Nevertheless, that impropriety does not necessarily prevent the client from reaping the benefit of an attorney-client relationship, including bringing a legal malpractice action if the expert’s advice is negligent and causes harm to the client.

Dash’s role was not limited to advice on legal ethics issues. When, however, Starr sought advice regarding the performance of his

183. See supra Part III.B.
184. See Kersh, supra note 1, at 5 (arguing that Model Rule 1.5(e) requires that the client consent to the employment of the second lawyer); supra note 181. Professor Kersh does not directly address the question whether the consultation may itself create duties on the part of the consulted lawyer toward the consulting lawyer’s client. Rather, Professor Kersh is concerned with the propriety of the consulting lawyer’s disclosure of confidential information.
185. See supra note 163 and accompanying text.
186. See supra note 61; see also Pizzimenti, supra note 61, at 26-27 (providing a detailed discussion of Rule 1.5(e) and more explicit provisions in the former ABA Model Code). Rule 1.5(e) is the only rule that addresses this issue directly. See id. Even that rule, however, encompasses only situations where the consulted lawyer will receive a fee. It is unclear what rule would prohibit a consulting lawyer from associating an unaffiliated lawyer who will work on the case for no legal fee. Professor Pizzimenti discusses the applicability of Rule 1.2(a), which allocates decision-making responsibility between lawyer and client, as well as commentary suggesting that a lawyer may not take action important to the client without at least informing the client of the proposed action. See id. at 31.
187. As a matter of agency law, the client may be in a position to choose between disavowing the attorney-client relationship when the consulting lawyer lacked even the apparent authority to engage the consulted lawyer as a subagent and ratifying the relationship. See Restatement (Second) of Agency § 82 (1958) (describing ratification).
188. Consider, for example, a lawyer who retains local counsel without first obtaining the client’s informed consent. Assume further that local counsel knows that the consulting lawyer is relying on local counsel to file an answer in the matter. If local counsel negligently fails to do so, and the case is dismissed, then it is difficult to imagine a court holding that the client does not have a cause of action in legal malpractice against local counsel.
189. See Van Natta Jr., supra note 7 ("Dash had played an active and influential role in Starr’s inquiry... helping to broker an immunity deal... and assisting in the writing and editing of the impeachment referral.")
role as a lawyer representing a client, \(^{190}\) identification of Dash's client or clients became even more complicated than in the typical entity-constituent scenario. Thus, it is difficult, if not impossible, to determine whether the consultation (or each consultation), \(^{191}\) was primarily client or lawyer-driven. Nevertheless, if Starr consulted Dash and then relied on his advice because it benefited his own interests in adhering to applicable ethical standards, then it is certainly more than likely that Dash will be found to have represented two clients and not one.

**CONCLUSION**

As I hope I have demonstrated in this Article, the ethics of ethics (and other) consultations is a subject of both great complexity and increasing importance. This fact was brought home to me when I learned that the very same issues I saw arising in law professor consultations were being raised in the discussion about lawyers in multidisciplinary practice firms, who justify their activities by insisting that they are performing "consulting services," not "legal services."

Of course Sam Dash was not part of any multidisciplinary practice group. Nor is there any indication that Dash attempted to tailor his relationship with either Starr or the OIC to avoid either unauthorized practice laws or malpractice liability. Rather, it would appear that Dash sincerely believed that he could best perform his role as "independent consultant" by viewing himself more like a neutral expert than a partisan attorney.

Nevertheless, the saga of Dash's highly public resignation suggests that lawyers and law professors should think carefully before entering into so-called "consulting" arrangements. Under the reasonable expectations test, these lawyers may inadvertently form attorney-client relationships with either the consulting lawyer or the consulting lawyer's client. Moreover, even when any potential ambiguity is avoided by a written agreement explicitly negating the existence of an attorney-client relationship, such an agreement may be found invalid as a matter of public policy if the lawyer is later determined to have provided legal rather than non-legal services. Even if a lawyer's status

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\(^{190}\) Prosecutors are unusual in that they are not only lawyer-advocates, but also government officials invested with the attributes of the client. See Model Rules of Professional Conduct Rule 3.8 cmt. (1) (1998). Some commentators prefer to view prosecutors as lawyers without clients. See Wolfram, *supra* note 84, § 13.10.1, at 759. The independent counsel, however, is best viewed as a lawyer representing the executive branch of government. See *supra* Part III.A. In any event, prosecutors are certainly lawyers who will from time to time need legal advice on complying with their obligations under rules of professional conduct and other law.

\(^{191}\) Rather than a single consultation, or even a series of consultations, on a single issue, Dash's continuing relationship with Starr apparently consisted of a series of consultations on numerous separate issues, some of which may have been primarily client-driven, while others may have been more lawyer-driven.
as non-lawyer consultant is upheld, the lawyer certainly owes fiduciary and other duties to someone, and these duties may not differ significantly from duties owed by a lawyer to the lawyer’s client. Finally, it is important to clarify at the outset the identity of the individual or entity to whom these duties are owed. Client identification is particularly troublesome in situations involving relationships between entities and their constituents and those involving consulting lawyers seeking advice on their ethical responsibilities toward their clients.

When I first began teaching legal ethics over twenty years ago, I often made up fanciful hypotheticals in order to raise issues I thought would be fun to explore. These days all I have to do is pick up a newspaper and I am immediately presented with real life problems of enormous complexity and importance. I apologize to Sam Dash for choosing to make an example of his relationship with Ken Starr and the OIC. If he made mistakes, and I believe that he did, these same mistakes are being made by numerous lawyers and law professors throughout the country. Particularly in view of the rise of multidisciplinary practice, it is important to identify these real life problems and give them the scholarly attention they deserve.
Notes & Observations