The Ethical Role and Responsibilities of a Lawyer-Ethicist Revisited: The Case of the Independent Counsel's Neutral Expert Consultant

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RESPONSE

THE ETHICAL ROLE AND RESPONSIBILITIES OF A LAWYER-ETHICIST REVISITED: THE CASE OF THE INDEPENDENT COUNSEL’S NEUTRAL EXPERT CONSULTANT

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In her recent *Fordham Law Review* article, Nancy Moore concluded that my role as contractual expert consultant to Independent Counsel Kenneth W. Starr was that of an attorney to his client. Or if my role were not that of an attorney to a client, then some other relationship existed between us that imposed similar fiduciary duties upon me. Moore focused on the ethical propriety of the public release of my resignation letter to Starr on November 20, 1998, in which I criticized Starr for improperly serving as an aggressive advocate for impeachment of the President before the House Judiciary Committee. She finds that my public release of this letter violated the duties of loyalty and confidentiality owed by an attorney to a client, or, alternatively, by an agent to a principal.

Neither the relevant facts of my relationship with Starr, nor the law governing the establishment of an attorney-client relationship, nor any other law, supports Moore’s analysis and conclusion. Certainly, the issue of defining the role I played in Starr’s investigation is an important one. Furthermore, the issue is especially timely when lawyers, as experts, are working with other lawyers and law firms in a variety of roles that may or not be governed by the rules regulating an attorney-client relationship. Nancy Moore deserves credit for giving this issue scholarly attention. My disagreement with her goes to the facts she assumes and to my belief that she stretched some of her

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2. See id. at 804-05.

3. See id. at 787-93.

4. A substantial portion of Moore’s footnotes, which support her factual
legal interpretations to permit conclusions that defy the policy and logic of the law.\(^5\)

Getting the facts right is crucial to the determination of whether the law professor's role as an advisor is that of an attorney to a client or some other role, such as an independent expert consultant or witness. That determination is not usually difficult, as it depends on a careful analysis of the facts in the specific situation and of the law governing lawyers. Moore agrees that the law of contracts, not the Model Rules of Professional Conduct, governs when an attorney-client relationship is established.\(^6\) The Proposed Final Draft of the Restatement of the Law Governing Lawyers by the American Law Institute, which Moore cites,\(^7\) restates the governing law for establishing an attorney-client relationship.\(^8\) The law requires a voluntary agreement\(^9\) between the would-be client and the attorney, in which the would-be client requests legal services of a kind ordinarily provided by a lawyer to a client and the lawyer consents to provide such services.\(^10\) It is this

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5. See infra notes 43-65 and accompanying text.
6. See Moore, supra note 1, at 783.
7. See, e.g., id. at 787 n.102 (citing Restatement (Third) of the Law Governing Lawyers § 201 (Proposed Final Draft No. 1, 1996)).
8. See Restatement (Third) of the Law Governing Lawyers § 26 (Proposed Final Draft No. 1, 1996). This section of the Restatement, entitled “Formation of Client-Lawyer Relationship,” provides:
   A relationship of client and lawyer arises when:
   (1) A person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.
9. Under some circumstances, a court can imply such an agreement. See id. § 26(1)(b). I discuss this issue later when I challenge Moore’s loose application of this law. See infra notes 43-51 and accompanying text.
10. See Restatement (Third) of the Law Governing Lawyers § 26; see also Innes v. Howell Corp., 76 F.3d 702, 712 (6th Cir. 1996) (holding that “[t]he relationship of [an] attorney-client is a contractual one, either expressed or implied by the conduct of the parties [and] [t]hus, the existence of the relationship hinges upon the fact of mutual assent, either explicit or tacit” (citation omitted)).
agreement and undertaking by the attorney that creates the attorney-client relationship with all the attendant fiduciary responsibilities of the attorney under the Model Rules of Professional Conduct.

Moore refused to credit the factual statement I sent her, at her request, except to acknowledge, generously, that I sincerely and honestly believed I had no attorney-client relationship with Starr. She relied instead on newspaper stories on which she based her speculations as to the facts of my agreement with Starr and as to the kind of services I performed under this agreement.

Perhaps, if we put aside this disagreement over the actual facts, and look, instead, at hypothetical facts, we can bring some objective clarity to the analysis of my role with Starr:

Hypothetical 1: Law Firm requests Law Professor to give expert testimony on a professional responsibility issue. Law Professor reviews the facts and law, concludes that he can give non-partisan, objective testimony on the issue that would be favorable to consulting Law Firm’s client, and testifies as an expert witness.

Under these facts, I believe that Moore would agree that Law Professor has no attorney-client relationship with Law Firm or its client. ABA Formal Opinion 97-407, which Moore cites, states that the duty of an expert witness to give non-partisan and objective testimony is inconsistent with an attorney-client relationship, for such a relationship requires partisan advocacy by an attorney to advance the client’s interests.

Hypothetical 2: Same facts as Hypothetical 1 above, only Law Professor’s review of the facts and law leads him to conclude that he is unable to give non-partisan, objective testimony supporting Law Firm’s client. Therefore, he refuses to testify as an expert witness.

Here, I believe Moore would also agree that Law Professor has no attorney-client relationship with Law Firm or its client. She correctly states that the fact that a consulted lawyer expert does not testify does not change the relationship between the consulted lawyer and the consulting law firm. ABA Formal Opinion 97-407, however, seems to call for a different conclusion. Superficially read, this opinion appears to draw a distinction between a testifying expert witness who does not have an attorney-client relationship and a non-testifying expert consultant who does.

While Moore, at times, appears influenced by this unsupported distinction, she ultimately, and correctly, does not read this opinion as

11. See Moore, supra note 1, at 773-74 & nn.25-30.
13. See Moore, supra note 1, at 776-77.
14. See Opinion 97-407, supra note 12; see also Moore, supra note 1, at 776 (quoting from Opinion 97-407).
establishing two exclusive categories of experts—expert witness and expert consultant.\(^{15}\) Instead, she reads it as distinguishing between expert consultants on the question of whether an attorney-client relationship is formed.\(^{16}\) As Moore explains, Opinion 97-407 imposes an attorney-client relationship only where the role of the expert consultant involves the "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."\(^{17}\) Therefore, according to Moore's reading of Opinion 97-407, the role of a lawyer expert consultant is no different than that of an expert witness: the consulting lawyer does not retain the consultant to advocate for the client's cause, but instead only for the lawyer consultant's expert, neutral opinion.

Hypothetical 3: Law Firm consults Law Professor for an expert opinion on whether certain conduct of a Law Firm lawyer was in compliance with, or in violation of, the Model Rules of Professional Conduct. Law Professor provides his expert opinion. The consultation may or may not have been in anticipation of litigation.

Under these facts, I would read Moore's article to define the role of this expert consultant as no different from that of the expert witness: a role that requires no attorney-client relationship. Typically, law firms that consult expert consultants have not decided whether they will present expert testimony and only seek the objective, neutral expert opinion of the consultant to assist them in making that decision.

Here, again, the role of the expert consultant is a neutral and objective one. The consulting law firm does not expect him to provide partisan advocacy. This position is supported by ABA Formal Opinion 98-411, which treats this form of consultation as not involving an attorney-client relationship.\(^{18}\) Indeed, in this opinion, the ABA Standing Committee on Ethics and Professional Responsibility cautions consulting lawyers that, because no attorney-client relationship exists, they should be careful not to disclose confidential client information to the consultant.\(^{19}\) The Committee advises consulting lawyers that it is preferable to use hypothetical situations.\(^{20}\)

Alternatively, the Committee suggests that the consulting lawyer obtain a specific agreement from the consultant to honor the confidentiality of information received.\(^{21}\) Even under such an agreement, however, if Law Firm wants to present Law Professor's

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15. See Moore, supra note 1, at 776-78.
16. See id.
17. Id. at 777 (quoting from Opinion 97-407) (emphasis added).
19. See id.
20. See id.
21. See id.
expert testimony, the court will require Law Professor, in discovery, to disclose all information received by Law Firm on which Law Professor relied in forming the expert opinion.22 It follows, therefore, that if Law Professor chooses to honor his agreement of confidentiality, the court will not permit him to testify as an expert witness.

Hypothetical 4: Law Firm and Law Professor agree to a continuing relationship, whereby on the basis of an hourly fee, Law Professor will be available to Law Firm to provide neutral, objective, expert opinions on ethics issues that may arise in the Law Firm. Additionally, Law Professor will testify as an expert witness in cases where Law Professor determines he can give non-partisan, objective testimony in support of Law Firm's position.

Here is where Moore waives. Apparently, she is willing to find that there is no attorney-client relationship when the consultation by the law firm with the law professor is informal, brief, and, preferably, without payment of a fee to the law professor.23 However, she suggests that a different result may arise, one that may impose attorney-client obligations, when the relationship between the consulting law firm and the consulted law professor is continuous and the law professor provides to the law firm neutral, objective expert opinions on ethics issues for a substantial hourly fee.24

Such a distinction is meaningless and unsupported by existing law. Of what relevance is it to the establishment of an attorney-client relationship that the consulting law firm continually, over a period of time, requests its expert consultant to provide neutral, objective expert opinions? Also, how is the receipt by the expert consultant of a substantial hourly fee relevant? Moore does not answer these questions.

She may assume that if an expert consultant has a continuing relationship with a consulting law firm and receives a substantial fee, these factors jeopardize the neutrality and objectivity of the expert consultant and may induce him to behave as more of a partisan advocate than a neutral expert. Nothing in the law governing lawyers, however, even suggests such a distinction or concern. To the contrary, Rule 3.4(b) of the ABA Model Rules of Professional Conduct, a rule concerned with inducements for false testimony, permits the payment of a reasonable fee to the expert for his research and testimony.25 Furthermore, the rule does not restrict the number of times the same law firm may engage the expert witness or expert consultant.26 The

23. See Moore, supra note 1, at 781.
24. See id. at 782-83.
26. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-354 (1987) [hereinafter Opinion 87-354]. In this opinion, the ABA Standing Committee on Ethics and Professional Responsibility approved a lawyer's use of
rule does prohibit a contingent fee, payment of which depends on the outcome of the litigation, because such a fee gives the expert a stake in the outcome, and might induce him to testify falsely to earn a higher fee.27

Moore even cites the law holding that the payment of a fee is irrelevant to the establishment of an attorney-client relationship.28 She also acknowledges that many law professors receive compensation by serving as independent expert consultants to law firms without creating an attorney-client relationship with the consulting law firm or its client.29 Further, I think Moore would agree that the establishment of an attorney-client relationship does not depend on how frequently a law firm requests services from an expert consultant. Indeed, she explains that the request for services, by itself, does not create an attorney-client relationship.30 Instead, she stresses that the kind of services the law firm requests and the expert consultant performs will determine whether the consultant has undertaken attorney-client obligations.31

She illustrates this point with an example of when an expert consultant may have entered into an attorney-client relationship. She explains that if the law firm requests that the law professor, as expert consultant, write an appellate brief or make an oral argument in court for the client, an attorney-client relationship is established.32 Moore is right that such a partisan advocate role necessitates the imposition of attorney-client fiduciary obligations. Alternatively, when the services that the law firm requests of the law professor, whether requested once or over an extended period of time, require the provision of neutral, objective expert opinions, then the expert consultant's role does not differ from that of an expert witness. Thus no attorney-client relationship will be assumed or established.

Therefore, the crucial question in determining the establishment of an attorney-client relationship between a consulting law firm and an expert witnesses supplied by a company with which the expert had a continuing relationship. See id. The Standing Committee cautioned, however, that the expert's compensation should be separate and apart from the company's charge of a contingent fee for its referral services. See id. 27. See id.; Model Rules of Professional Conduct Rule 3.4(b) cmt. 3.

28. See Moore, supra note 1, at 781 nn.70-71 and accompanying text. For this reason, it is difficult to understand why Moore appears so obsessed with my fee. She repeatedly refers to my hourly rate in contexts suggesting that she believes that such a "substantial" fee is incompatible with the required neutrality and objectivity of an expert witness. See id. at 775, 782-83. Not only is my fee irrelevant to whether Starr and I established an attorney-client relationship, the fee is well within the range of fees charged by law professors as expert witnesses or expert consultants. Indeed, in recent times, my fee has fallen behind a number of my contemporary law professor ethicists.

29. See id. at 783-86.
30. See id. at 783.
31. See id. at 783-84.
32. See id.
expert consultant is: What specific services does the law firm request and the expert consultant agree to perform? Opinion 97-407 deals with this question, and explains that where the services requested of the expert consultant are characteristic of partisan advocacy for the interests of the client, the law professor is performing a role that is typical of an attorney-client relationship.33

For example, a law firm may consult a law professor, who is an expert in a field of law, to help prepare pleadings in a lawsuit involving that field of law, or to assist in the cross-examination of an expert witness in an upcoming trial. In undertaking to perform such services, the law professor becomes co-counsel with the law firm in representing the client. But where the facts show that the law firm and the law professor have simply agreed to the provision of a neutral, objective expert opinion, whether for the purpose of giving expert testimony or otherwise, no attorney-client relationship has been established under the governing law.

Where does my relationship with Starr fit into this analysis? The answer depends on the facts concerning the specific services Starr requested of me, as an expert consultant, and that I agreed to, and did, perform. Moore’s conclusions on this question are unsound because they are based on factual speculations that are unrelated to and unsupported by my actual role with Starr. Because of this factual inaccuracy in Moore’s article, leading to a confusing application of the relevant law, I believe I must restate the facts of my relationship with Starr.

Shortly after Starr was appointed Independent Counsel, Democratic leaders attacked him as a partisan Republican who was incapable of being independent and of conducting an objective investigation of President Clinton. Starr accepted the appointment with the conviction that he would conduct a professional and objective investigation. His excellent reputation for integrity in his former positions as federal circuit court of appeals judge and Solicitor General of the United States supported his assessment. Starr was concerned, however, that the appearance of political bias created by these attacks against him could seriously erode public confidence in his conduct as Independent Counsel.

It was this concern that led Starr to invite me to serve him and his staff as an independent, neutral, and objective expert consultant on legal ethics and on issues arising from the prosecution function of his office. In defining my role at the outset, Starr and I agreed that I would remain strictly apart from the investigative and prosecutorial functions of the Independent Counsel, and that I would not undertake any operational duties or tasks in furtherance of his mandate. Thus, I would not conduct investigations, question witnesses, present

testimony or arguments in court, write briefs or memos advocating or supporting investigative and prosecutorial positions, or provide any other services that would, or would appear to, involve me as an advocate for Starr or his position as Independent Counsel.34

In effect, Starr installed me as an advisory, neutral "ombudsman" to review his staff's and his own ethical conduct in his investigations and prosecutions.35 Not only did I insist upon this independent, non-partisan role, but Starr also considered it necessary. He believed my oversight would support his goal of assuring the public of his fairness and non-political decision-making. Although Starr is a highly experienced and sophisticated lawyer and did not require a disclaimer, I expressly informed Starr that I did not represent him or his staff and did not have an attorney-client relationship with them.

I submit that the facts I have stated above concerning my relationship with Starr negate the establishment of an attorney-client relationship.36 Rather, these facts would require a court to hold me to the same obligations of an expert witness, and no more. Also, I assume from Moore's article that on these specific facts she might agree.37 However, Moore's article was not based on these specific facts. She assumed a different set of facts.38

34. I did not have an office in Starr's suite of offices. I visited Starr's office from time to time when Starr requested my expert opinion on an ethical or prosecutorial issue. In keeping with my limited role as an expert consultant, most of the ongoing work of the Independent Counsel and his staff proceeded outside of my presence or without my knowledge. Often, the first I would hear of Starr's investigative or prosecutorial conduct was upon reading newspaper reports indicating that someone had criticized or challenged such conduct.

35. I do not mean by this that I was a passive recipient of information upon which I expressed sterile opinions. Because of the on-going nature of my role as an expert, neutral consultant, I believed it to be important for my continued credible service that my opinions be followed by Starr and his staff. In most cases, I was informed about relevant facts and issues while I attended meetings held by Starr with his staff. Staff lawyers around the table will remember that I expressed my opinions aggressively. Although I was not a partisan advocate for Starr's investigations or prosecutions, I believed that my role as an "ombudsman" required that my opinions be presented and defended persuasively so as to effectively influence the decisions Starr and his staff would make on the proposed conduct or procedure at issue.

36. Moore seems to believe that even if I did not have an attorney-client relationship with Starr, the service I performed at a "substantial fee" had to make me accountable to someone in some respect. Moore, supra note 1, at 783. Of course, I was accountable to Starr under contract law for competence, care, and diligence in performing my service.

37. On the other hand, Moore indicates that even on these specific facts she might find an attorney-client relationship because, as she says, I gave Starr expert opinions on prospective actions. See id. at 784-85 & nn.91, 93. She explains that lawyers typically advise clients on the lawfulness of prospective conduct. See id. at 784-85. This is a false analogy. The expression by a lawyer of an opinion as to proposed future conduct is not a function unique to an attorney-client relationship. Consulting lawyers may often request lawyer-ethicists, as expert consultants, to opine on a proposed course of conduct and, later, to be ready to testify as an expert witness on the propriety of that conduct.

38. Moore was in touch with me during the writing of her article. As I stated
A clear example of her factual inaccuracy is her conclusion from news reports that I wrote part of Starr's impeachment referral report to the House Judiciary Committee and therefore played the role of a partisan advocate, rather than that of a neutral expert. The fact is that I wrote no part of this report. Consistent with my role as a neutral expert, I reviewed the report to give Starr my neutral, expert opinion on issues of ethical and legal propriety.

Also, Moore seized upon the statement in my letter to her that I "facilitated Monica Lewinsky's willingness to testify before the grand jury." Moore wonders what I meant by the word "facilitated," speculating that I actively negotiated with Lewinsky's lawyers for her testimony as a partisan advocate for Starr.

If Moore had asked me, I would have told her that I played no partisan role in this negotiation. Both Starr and Lewinsky's lawyers knew my role was that of a neutral, expert consultant and trusted me to serve as an objective observer. The only way I facilitated this negotiation was through my role as a neutral, expert consultant. Because both sides trusted me, I influenced their willingness to get together. Additionally, I offered the privacy of my home for the meeting, away from the surveillance of news reporters.

I played a similar role in the initial questioning of Monica Lewinsky in New York by Starr's staff. Her lawyers had insisted that I be present as an objective observer of the fairness of the interrogation. I neither asked questions nor suggested any to the independent counsel staff, at that time or at any other, including when Lewinsky was questioned later in Starr's office and when she testified before the grand jury.

Although my role as independent, expert consultant to Starr and his office was unique and unprecedented under the independent counsel legislation, it was equivalent to my usual role as expert consultant or witness on legal ethical issues for lawyers and law firms. In such cases, I do not represent the client or the lawyer, but serve as an expert resource on issues permitting expert testimony. As in the case with Starr, I have no duty to advocate a favorable position for the clients of the lawyers who consult me. My opinion must be as neutral and non-partisan as is required when I testify as an expert witness. In those above, she requested my explanation of my role with Starr, which I sent to her. If she had doubts concerning any of the details of that role, she could have asked me directly, instead of speculating on those details. She never asked me.

39. See Moore, supra note 1, at 778 n.51, 803 n.189.
40. Id. at 778 n.52.
41. See id. at 778-79.
42. There were other occasions when counsel for a witness, subject, or target requested my presence as an objective observer at a meeting with Starr or some of his staff. These lawyers knew of my role as a neutral, objective expert and trusted that my presence would lead to a more reasonable and fair resolution of the issues under discussion.
cases where my opinion does not support the consulting lawyer's desired position, the lawyer either abandons that position or does not call me as an expert witness.

A particularly troubling part of Moore's article is her loose and flawed application, to my role with Starr, of the law permitting a court to imply an attorney-client relationship in the absence of an express agreement. In some cases, where there has not been an express agreement, courts will imply such an agreement, sometimes under the principle of promissory estoppel. For example, courts will imply an agreement where the attorney should have been aware, under the circumstances, that the individual requesting representation believed an attorney-client relationship had been established and relied on such a belief. Alternatively, courts will not imply an agreement if the lawyer promptly explains to the individual that there is no attorney-client relationship between them, and that any information the individual discloses to the lawyer will not be protected as confidential or under the attorney-client privilege.

As is obvious from this example, the policy behind implying attorney-client agreements is the protection of the layperson's legal rights, as well as the information a layperson may mistakenly disclose to a lawyer in the reasonable belief the lawyer is representing him. The Model Rules of Professional Conduct address this kind of ambiguous situation in Rules 4.3 and 1.13(d). Rule 1.13(d) governs the responsibilities of a lawyer who represents an organization such as a corporation. It requires the lawyer for an organization, when dealing with an employee or constituent of the organization, to explain that his client is the organization, not the employee or constituent, in situations where it is apparent that the organization's interests are adverse to the employee or constituent.

Similarly, Rule 4.3, which concerns a lawyer's dealings with an unrepresented person, imposes on the lawyer the duty not to state or imply that the lawyer is disinterested. Also, Rule 4.3 requires that where the lawyer "knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

As should be clear from this discussion, there are a number of reasons why the policies behind implying attorney-client agreements

43. See id. at 780-81.
45. See id.
47. See id. Rule 1.13(d).
48. See id.
49. See id. Rule 4.3.
50. Id.
are inapt concerning my role with Starr. First, my agreement with Starr involved two lawyers with extensive experience in legal relationships, and did not require the auxiliary protection provided to an uninformed layperson in dealing with a lawyer. Further, at the very beginning of our discussions of my role, I specifically informed Starr, consistent with Rules 1.13(d) and 4.3, and the principles of promissory estoppel, that I did not have an attorney-client relationship with him or his staff. I also indicated that I would not undertake any duties or responsibilities inherent in an attorney-client relationship. Under these circumstances, and the underlying facts, an attorney-client relationship could not be implied or presumed.\textsuperscript{51}

Moore summarily dismisses the specific disclaimers that Starr and I made about an attorney-client relationship as mere labeling.\textsuperscript{52} She argues that the fiduciary responsibilities of a lawyer cannot be avoided by simply denying an attorney-client relationship that, in fact and in law, exists.\textsuperscript{53} Of course, that is correct. But Moore misunderstands the point. This is not a case of denying a relationship that clearly exists. Instead, this is a case where the expert consultant and the consulting lawyer expressly refused to establish an attorney-client relationship at the outset, and subsequently conducted themselves consistently with this refusal. It is precisely because I refused to, and did not, perform attorney-client services for Starr or his staff that no attorney-client relationship was ever established, or could be implied.\textsuperscript{54}

Moore writes that it does not matter whether I had an attorney-client relationship with Starr.\textsuperscript{55} She argues that "other law" imposed on me the same fiduciary obligations required by that relationship.\textsuperscript{56}

\begin{itemize}
\item \textsuperscript{51} See First Nat'l Bank v. Trans Terra Corp., 142 F.3d 802, 807 (5th Cir. 1998) ("An attorney-client relationship can arise by express agreement or by implication from the parties' actions [and furthermore] courts will not readily find an implied relationship 'absent a sufficient showing of intent.'" (citations omitted)).
\item \textsuperscript{52} See Moore, supra note 1, at 778.
\item \textsuperscript{53} See id. at 778-81.
\item \textsuperscript{54} Moore refers to Hill ex rel. Burston v. Kokosky, 463 N.W.2d 265, 268 (Mich. Ct. App. 1990), to show analogous principles for establishing a physician-patient relationship. See Moore, supra note 1, at 781 n.73. By analogy, the holding in Hill negates the establishment of an attorney-client relationship between Starr and me. In finding no physician-patient relationship, the Court specifically stated: Defendant here was dealing with medical doctors who were not under his direction or control. He was entitled to assume that these doctors were cognizant of the circumstances under which the various cases were discussed, i.e., without defendant having personally examined the patient, and would themselves in dealing directly with their patients rely on their own ultimate opinions following proper medical procedures. \textit{Imposition of liability under these circumstances would not be prophylactic but instead counter-productive by stifling efforts at improving medical knowledge.} 
\textit{Hill}, 463 N.W.2d at 268 (emphasis added) (citation omitted).
\item \textsuperscript{55} See Moore, supra note 1, at 775-76.
\item \textsuperscript{56} See id. at 789-90 & nn.110-14.
\end{itemize}
She points to the principal-agent relationship under agency law as attaching fiduciary obligations of loyalty and confidentiality to my role as neutral, expert consultant to Starr. Her argument, however, is circuitous. It is this same law of agency that defines when an attorney-client relationship is established.

If there is no attorney-client relationship between the expert consultant and the consulting lawyer or his client under the facts and the law of agency, it also follows that under the law of agency the expert consultant is not an agent owing fiduciary obligations to a principal. This is precisely true here, because Starr did not control or supervise my work, as a principal does with an agent, and I had no obligation to pursue, as a partisan, the interests of Starr and his staff. Moore cannot change this result by manipulating agency law to lift herself up by her own boot straps, as the legal saying goes.

Furthermore, Moore argues that even when no attorney-client relationship exists, such a relationship may develop when the expert consultant receives confidential or strategy information from the consulting lawyer. What remarkable magic produces this transformation? Moore relies on the dictum in Opinion 97-407 for her argument. However, a later opinion of the ABA Standing Committee specifically refutes this untenable position and concludes that no attorney-client relationship is established when a lawyer consults an expert consultant for a neutral, expert opinion.

Moreover, Opinion 98-411 states that the receipt by the expert consultant of otherwise confidential information does not prevent him from disclosing that information. The Opinion justified its stance by stating that the expert consultant does not act as lawyer for the client and therefore may have no duty of confidentiality regarding the communications he receives from the consulting lawyer or law firm.

57. See id. at 790-93.
58. See Restatement (Third) of the Law Governing Lawyers, § 26 cmt. b (Proposed Final Draft No. 1, 1996); see also Brinkley v. Farmers Elevator Mut. Ins. Co., 485 F.2d 1283, 1286 (10th Cir. 1973) ("Under Kansas law, the relation between an attorney and his client has been held to be one of agency to which the general rules of agency apply."); Murphy v. House & House, 955 P.2d 880, 883 (Wyo. 1998) ("The attorney-client relationship between Diane Walsh and the estate... invoked principles of agency law."); Peter Margulies et al., Report of Working Group on Client Capacity, 62 Fordham L. Rev. 1003, 1011 (1994) ("[T]he working group repeatedly examined the basis of a lawyer's authority to act [and] [agency law is clearly the primary foundation of the attorney-client relationship."); John P. Gillard, Jr., Comment, Pay-Per-Call Legal Advice, Professional Integrity, and Legal Licenses: Why 1-900-Lawyers is a Call to the Wrong Number, 79 Marq. L. Rev. 549, 566 (1996) ("Courts have historically used contract law and principles of agency to determine whether an attorney-client relationship has been established.").
59. See Moore, supra note 1, at 778 & nn.53-54.
60. See id.
61. See Opinion 98-411, supra note 18.
62. See id.
63. See id.
The courts confirm this position with regard to consultants who are expert witnesses by requiring the consultant to disclose, in discovery proceedings, all information he received from the consulting lawyer on which he relied in formulating his expert opinion. For this reason, Opinion 98-411 cautions consulting lawyers to use hypothetical situations or to obtain a specific agreement from the expert consultant not to disclose confidential information.

I had no such agreement with Starr. I was, however, subject to the criminal sanctions of Rule 6(e) of the Federal Rules of Criminal Procedure, which prohibits unauthorized disclosure of grand jury information. My role as expert consultant required me to have access to grand jury information and, for this reason, I took an oath not to disclose such information.

Moore’s reasoning that my role was that of an attorney to a client is undermined by her inability to identify who the client was, and her misapplication of legal principles in her speculations as to the client’s identity. At different times Moore speculates that my client was Starr, Starr’s staff, the “government agency”—Office of Independent Counsel—or all three. She rejects the possibility that the people of the United States were the client.

Her fallacy is due, in part, to her misunderstanding of the provisions and purposes of the independent counsel legislation. This legislation did not, as Moore seems to believe, create another government agency known as the Office of Independent Counsel (“OIC”).

64. See Opinion 97-407, supra note 12.
65. See Opinion 98-411, supra note 18.
67. See Moore, supra note 1, at 794-804.
68. See id.
69. See id. at 796.
71. The only time such an office was created, Congress did not do so; rather it was created by the attorney general. See In re Sealed Case, 829 F.2d 50, 55 (D.C. Cir. 1987). When the Iran-Contra independent counsel was challenged in court on the ground that the legislation was unconstitutional, the Attorney General, under his regulatory powers, created the “Office of Independent Counsel: Iran-Contra.” See id. He created this office inside the Department of Justice and gave a parallel appointment under this new regulation to the independent counsel appointed by the court. See id. at 56. It is also clear that Congress did not create a new federal agency called the Office of Independent Counsel. This term refers solely to the appointment of an appropriate independent counsel. See 28 U.S.C. § 593 (expired 1999). The legislation mentions the office of independent counsel only twice—once when dealing with restrictions on payment of travel expenses for commuting to the “primary office of the independent counsel,” and the second time when authorizing, in the same section, the appointment of additional personnel for the purpose of carrying out the duties of “an office of independent counsel.” Id. § 594. In these descriptive references, it is obvious that Congress was either identifying the place where the independent counsel and his staff worked or was authorizing additional personnel to help the independent counsel carry out his duties. It is also significant that the drafters of the legislation used lower-case letters for “independent counsel” and
Rather, on the application of the attorney general, it authorized a special division of the court to appoint an individual lawyer, called an independent counsel, to substitute for the attorney general as chief federal prosecutor in a limited matter, under certain specified circumstances.\footnote{2}

The creation of another government agency in the executive branch to investigate charges of criminal conduct by the President or other high federal officials would have been incompatible with Congress's intent. Congress wanted to sever the prosecutorial function from the chief executive and the attorney general and to transfer it to an independent, individual lawyer appointed by the special division of the court.\footnote{3} This transfer would resolve the obvious conflicts of interest that might arise if the Department of Justice, or some other executive agency, had the responsibility to investigate criminal charges against the President. This becomes clear when one recalls that the principal trigger for the legislation was the "Saturday Night Massacre," the event in which President Nixon ordered the firing of Special Watergate Prosecutor Archibald Cox, whom the attorney general had appointed. Congress passed the legislation to prevent such a travesty of justice from occurring again.

Thus, contrary to Moore's thesis, there is no "government agency" of which the independent counsel is the head.\footnote{4} Under the legislation, the independent counsel stands alone, as an individual, and acts as a substitute for the attorney general and the Department of Justice

\footnote{2} See id. §§ 591-593.

\footnote{3} In Morrison v. Olson, 487 U.S. 654 (1988), the Supreme Court upheld the constitutionality of Congress's transfer of the federal prosecution function to an independent counsel appointed by the court under the limited provisions of the legislation. \textit{See id. at} 696-97. The Court held that Congress could authorize the court to appoint the independent counsel because he was an inferior officer. \textit{See id. at} 695. Also, there was no violation of the separation of powers because the legislation gave neither Congress nor the court supervisory powers over the prosecution function of the independent counsel. \textit{See id. at} 693-96. Significantly, although the Court stated that the independent counsel was an executive officer, it consistently referred to the independent counsel as an individual lawyer and not as a federal executive agency. \textit{See id. passim}.

\footnote{4} In a case wholly unrelated to the issues discussed here, the Merit Systems Protection Board found that the Office of the Independent Counsel was an "agency" for purposes of review by the Board under the Whistleblower Protection Act of 1989. \textit{See O'Brien v. Office of Independent Counsel}, 74 M.S.P.B. 192, 199 (1997). The Merit Systems Protection Board's opinion, however, was clearly intended only to provide a remedy for a temporary employee of an independent counsel, who claimed he was discharged by the independent counsel for complaining about irregularities in the independent counsel's office. \textit{See id. at} 195. The opinion did not intend to interpret the independent counsel legislation as creating a new federal agency. It is significant, in this regard, that it was the Merit Systems Protection Board that put the quotation marks around the word agency. \textit{See id. at} 199.
combined. Therefore, there is no ground for her assumption that, under Rule 1.13 of the Model Rules of Professional Conduct, which deals with the representation of organizations, my client was an organization called the Office of Independent Counsel.

Indeed, in any given year, there were usually several independent counsels, each appointed by the court, operating simultaneously. Each was completely separate and independent from the other; each had a different mandate. Under Moore's theory, each appointment created a new government agency called the Office of Independent Counsel. This is an absurdity.

Additionally, Congress made no appropriations of funds to the independent counsel, as it would have if the independent counsel headed up a new government agency. Instead, it assigned the expenditures of an independent counsel to the budget of the Department of Justice, even though that department had no supervisory power or control over the independent counsel.

In examining Moore's argument that someone or some entity was my client, it would be helpful to determine whether Starr had a client, and if so, who that client was. Because the client of the independent counsel cannot have been a non-existent government agency, who, then, was the client? Both the purpose and history of the controlling legislation compel the conclusion that the people of the United States were the client of the appointed independent counsel. His specific statutory authority permitted no government agency to supervise or control him. Congress required the appointment of an independent counsel by the court to protect the people's interest and assure their confidence in the effective administration of federal criminal justice. Furthermore, in the context of the powers and mandate given by the legislation and the court, the independent counsel's role as the people's lawyer cannot truly be one of an attorney to his client.

75. *See* 28 U.S.C. § 594(a) (expired 1999) ("[T]he independent counsel . . . [has] full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [and] the Attorney General . . . ."); *United States v. Hemmingson*, 157 F.3d 347, 364 (5th Cir. 1998) ("An Independent Counsel prosecutes in the name of the United States and enjoys "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice."" (citations omitted)).

76. *See* Moore, *supra* note 1, at 798-800 & nn.159-69.

77. *See* id. §§ 591-599; *Morrison*, 487 U.S. at 685-93. In *Morrison*, the Supreme Court recognized that although the independent counsel was an executive official, he was not under the control of the President or the Attorney General. *Id.* The legislation did, however, give the Attorney General the power to remove the independent counsel for good cause. *See* 28 U.S.C. § 596(a)(1) (expired 1999). But even this power is circumscribed by the legislation, for it gives the independent counsel a right to judicial review of such a dismissal. *See id.* § 596(a)(3).

78. *See* id. §§ 591-599; *Morrison*, 487 U.S. at 685-93. *In Morrison*, the Supreme Court recognized that although the independent counsel was an executive official, he was not under the control of the President or the Attorney General. *Id.* The legislation did, however, give the Attorney General the power to remove the independent counsel for good cause. *See* 28 U.S.C. § 596(a)(1) (expired 1999). But even this power is circumscribed by the legislation, for it gives the independent counsel a right to judicial review of such a dismissal. *See id.* § 596(a)(3).

79. This holds true for both federal and state prosecutors, as well. *See* United States v. Singleton, 165 F.3d 1297, 1299-1300 (10th Cir. 1999) (en banc) ("The prosecutor . . . is not simply a lawyer advocating the government's perspective of the
None of the indicia of such a relationship exist. He receives no confidential information from “the people.” He has no duty to communicate regularly with “the people” about the details of his work. The people certainly cannot control the objectives of his investigations and prosecutions, as the Model Rules of Professional Conduct reserve for the client, and the people cannot, at will, discharge the independent counsel.

While the independent counsel has no duty of client confidentiality, the United States Attorneys' Manual, which the legislation requires the independent counsel to follow, constrains him from disclosing information about ongoing investigations. Also, Rule 6(e) of the Federal Rules of Criminal Procedure prohibits the independent counsel from disclosing grand jury information.

Contrary to what Moore suggests, Starr could not be my client. I could not represent him in his position as independent counsel because the court appointed him—and not me—and Starr could not have delegated to me any of his statutory authority. Also, pursuant to the independent counsel statute, the independent counsel controls both the goals and means of the investigations and prosecutions, which is incompatible with the relationship between an attorney and a client as defined by the Model Rules of Professional Conduct.

Of course, I could have represented Starr in his personal capacity,
as Moore suggests, when he was being investigated on various charges, such as the alleged leak of grand jury information. In fact, Starr asked me to represent him. I declined to do so, however, on the ground that I did not want to change my status as a neutral expert consultant. Starr retained another lawyer to represent him in these investigations.

The independent counsel cannot retain another independent counsel because this would be precluded by the very terms of the legislation. Also, as previously discussed, the independent counsel legislation created no government organization that could have been my client. Like Starr, I received no confidential client information from Starr's client, the people of the United States. Furthermore, I could not control the decisions the independent counsel made under his mandate, which is antithetical to what the Model Rules of Professional Conduct require a lawyer to do for his client. However, while I did not have an attorney-client relationship with Starr, I was, like Starr, still bound not to disclose grand jury information by Rule 6(e) of the Federal Rules of Criminal Procedure and not to disclose investigative secrets by the Justice Department guidelines.

I contend that the public release of my resignation letter, which contained no grand jury information or investigative secrets, was ethically proper. This is not to say that I believe expert consultants should, willy-nilly, disclose information they obtain from consulting lawyers. That would be unprofessional and, of course, bad business. Other circumstances compelled the public release of my letter.

By using my presence as an “ombudsman” to reassure the public that his investigations were fair and objective, Starr frequently and publicly relied on my expert opinions to rebut attacks on his conduct. He also referred to my opinions when explaining his conduct to judges and the Department of Justice. Starr urged and authorized me to explain my opinions to journalists, which I always did on the record.

I was concerned, however, that unless I made a public disclaimer, Starr's public reliance on my opinions that supported his conduct could create a perception in the media and in the public that I also had approved other conduct by Starr, which, in fact, my opinions did not support. The number of on-going investigations into some of the alleged conduct of Starr and his staff heightened this concern.87

87. See Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1194-95 (2d Cir. 1974), for an analogous exception to the duty of confidentiality even when an attorney-client relationship exists. In this case, the Second Circuit applied Canon 4 of the Model Code of Professional Responsibility, the self-defense exception. See id. Meyerhofer involved a lawyer who objected to the submission by his law firm of a fraudulent registration statement to the SEC. See id. at 1192. The court upheld the lawyer's right to disclose confidential information to the SEC and to the counsel for the opposing plaintiffs. See id. at 1195. The opposing plaintiffs had brought a lawsuit against the lawyer's law firm and the information he gave to them prevented his being named as a defendant in the lawsuit. See id. at 1193.
Fortunately, the need for such a public disclaimer did not become necessary until my resignation.

**CONCLUSION**

No doubt, Nancy Moore had a difficult assignment to analyze and define my role with Starr. The independent counsel legislation and the autonomous authority it gives the independent counsel were unique. Indeed, the principal criticism of the independent counsel, with which I disagree, has been that he is not accountable to any political or government organization. Similarly, the relationship of an expert consultant to such an autonomous public official has been unexplored. This is particularly so where the independent counsel and the expert consultant deliberately carve out a role of neutrality and independence for the consultant in an effort to negate an attorney-client relationship.

My disappointment over Moore’s article, apart from her factual inaccuracies, results from her narrow and wooden application of general principles of law to a new and special situation. This is unfortunate, because this approach treats the Model Rules of Professional Conduct and governing law as mechanical strictures to be mechanically applied. I believe that most legal ethicists disagree with this view. They believe that the goals of the Model Rules of Professional Conduct and their predecessor, the Model Code of Professional Responsibility, are to define duties and responsibilities which will assure that lawyers protect their clients’ interests and will preserve the integrity of the legal system.

I believe that the correct application of these rules requires ethicists to know not only the letter of a rule, but, also, to understand the underlying reason and purpose of a rule. This permits a determination of whether conduct that the specific wording of a rule seems to mechanically cover actually fits the reason and purpose of the rule. I believe it is safe to say that if it does not, the rule was never meant to restrain such conduct. After all, lawyers must live with and by these rules. The success of the rules in regulating the conduct of lawyers depends on the Bar’s acceptance of them and the good faith belief of lawyers that they will be applied equitably.

It is particularly important that lawyer-ethicists apply and interpret the law defining attorney-client relationships and the Model Rules of Professional Conduct in this goal-oriented context. Such application and interpretation will encourage lawyers to seek expert help in making ethical decisions and encourage law professors with such expertise to willingly provide such help. Moore’s effort to arbitrarily and mechanically impose the fiduciary obligations of an attorney-client relationship on such consultations can lead only to confusion. Additionally, it may serve to deter law professors from acting as expert consultants to lawyers who desire the expert opinions as a
means of ensuring that their professional conduct is consistent with ethical standards.
Notes & Observations