

2020

Forming Start-Up Companies: Who's My Client?

Nancy J. Moore

Boston University School of Law

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>

Part of the [Business Organizations Law Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)
[Commons](#)
Network

Logo

Recommended Citation

Nancy J. Moore, *Forming Start-Up Companies: Who's My Client?*, 88 Fordham L. Rev. 1699 (2020).
Available at: <https://ir.lawnet.fordham.edu/flr/vol88/iss5/7>

This Colloquium is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

FORMING START-UP COMPANIES: WHO'S MY CLIENT?

Nancy J. Moore*

INTRODUCTION

Consider the following scenario: three individuals—a magician, a baker, and a puppeteer—want to start a business that will run birthday parties for children. The magician will put up most of the money, the baker has extensive experience with children's birthday parties, and the puppeteer, who has an MBA, will manage the business. They meet with a lawyer to help them form a company, including advising them on such issues as choice of entity and allocation of ownership and control. Before the lawyer agrees to the representation, she must ask herself: “who will I represent?”¹

The author of this hypothetical, legal ethics expert Stephen Gillers, suggests that the issue is whether conflicts of interest prevent the lawyer from representing all three founders, in which case the lawyer would presumably represent only one of them.² Addressing a similar hypothetical, another legal ethics expert, Paul Tremblay, agrees that the only plausible alternatives are “represent[ing] the founders as joint clients, most often with an explicit understanding that the firm would later represent any resulting business entity” or “represent[ing] only one of the founders.”³ However, Tremblay also suggests that, in some circumstances, the founders will already have formed a partnership by operation of law, or a “default partnership.”⁴ In these cases, the lawyer will likely represent the existing partnership entity in choosing to form an entirely new entity.⁵ Tremblay also notes that under “the rather quirky *Jesse v. Danforth* doctrine,” recognized in a few jurisdictions, the founders, “while apparently individual joint clients during

* Professor of Law and Nancy E. Barton Scholar, Boston University School of Law. This Article was prepared for the *Colloquium on Corporate Lawyers*, hosted by the *Fordham Law Review* and the Stein Center for Law and Ethics on October 11, 2019, at Fordham University School of Law. The author would like to thank Jim Wheaton and the participants in the Colloquium for their helpful comments.

1. See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 214–15 (11th ed. 2018).

2. See *id.*

3. Paul R. Tremblay, *The Ethics of Representing Founders*, 8 WM. & MARY BUS. L. REV. 267, 279 (2017).

4. Tremblay does not use this term; however, he discusses a partnership by operation of law as governed by the default law of partnerships. See *infra* notes 159–63 and accompanying text.

5. Tremblay, *supra* note 3, at 275, 304.

the formation stage, retroactively convert to constituents of the entity—instead of former clients of the firm—after the entity has been established.”⁶ Whatever that means. And, to offer yet another option, mentioned by neither Gillers nor Tremblay, a State Bar of Arizona ethics opinion advises that a lawyer may form a business entity for multiple founders “and be counsel only for the yet-to-be-formed entity”—describing entity representation that is prospective rather than retrospective.⁷ What’s a lawyer to do?

Most jurisdictions have not yet addressed the question of whether some form of “entity” representation is available before a business entity has been created. As a result, one of this Article’s goals is to explore the advantages and disadvantages of doing so by considering both the “retroactive” and “prospective” options. In my view, courts should reject both of these options and insist on representation of one or more of the individual founders. But if some form of entity representation is deemed desirable, then I argue that it is the “prospective” rather than the “retroactive” option that should be recognized. As for “default partnerships,” I agree that representation of the existing entity appears to be at least a theoretical option, but I argue that such representation may raise more problems than it solves. As a result, I urge lawyers to choose to represent the partners jointly as individuals rather than the default partnership entity.

Part I of this Article examines early views of client identity in forming a start-up company. Although most courts and commentators assumed that entity representation was impossible because the entity had not yet been formed, one prominent commentator proposed reforming the ethics rules to permit lawyers to represent an incipient entity—but only when it was sufficiently “formed up” such that the group was the functional equivalent of a legally recognized entity. Part II addresses the formal adoption of a retroactive entity approach to preformation representation, including the lack of persuasive precedent for such an approach, as well as the weakness of the stated policy rationales. Part III discusses the concept of prospectively representing a yet-to-be-formed entity, concluding that while this is more attractive than a retroactive approach, it presents many of the same difficulties. Part IV directly addresses the policy concerns in answering the question of whether courts *should* permit lawyers to represent a yet-to-be-formed entity. It concludes that the disadvantages of doing so outweigh any benefits to the founders and that any such benefits can just as easily be accomplished through joint representation of some or all of the founders. Finally, Part V acknowledges that, under certain circumstances, founders who have begun the process of developing a business become default partners. When this happens, there is indeed an entity that qualifies for client status; nevertheless, here, too, there are difficulties in determining both the identification of the appropriate decision makers and the need to keep all the partners informed. As a result, this Article concludes that the partners are

6. *Id.* at 299 (citing *Jesse v. Danforth*, 485 N.W.2d 63, 67 (Wis. 1992)).

7. State Bar of Arizona, Ethics Op. 02-06 (2002).

better off when the lawyer represents them individually in a joint representation, where appropriate.

I. EARLY VIEWS ON CLIENT IDENTITY IN FORMING A START-UP COMPANY

The Wisconsin Supreme Court issued the “quirky” *Jesse v. Danforth*⁸ opinion in 1992. Before then, lawyers typically assumed that, when asked to form a business entity, they could not represent the entity itself because, prior to formation, the business “is only an incipient entity.”⁹ As a result, early cases and commentators debated whether a lawyer could or should represent more than one of the founders. For example, in a 1976 legal ethics forum sponsored by the *American Bar Association Journal*, two legal commentators debated the question of who the lawyer should represent in a hypothetical involving three cousins who wanted the lawyer to form a corporation for their proposed business venture.¹⁰ Richard Levin, the initial commentator, argued in favor of representing the three cousins, while Meyer Myer, his opponent, urged that, in all but the most exceptional case, the lawyer should advise the cousins that he can represent only one of them.¹¹ Similarly, in a 1985 Arizona Supreme Court decision, the question arose as to whether a lawyer who formed a corporation represented two incorporators who subsequently sued the lawyer for failing to disclose conflicts of interest involving a third incorporator.¹² To answer that question, the parties debated only whether the lawyer represented all of the incorporators during the incorporation or whether he represented the third alone and therefore owed no duty of loyalty to the remaining two.¹³

And yet, even prior to *Jesse*, there were at least two commentators who suggested that perhaps some form of entity rule could be applied to representation in the preformation period. Scott Thomas FitzGibbon first made this suggestion in a 1982 monograph published by the American Bar

8. 485 N.W.2d 63 (Wis. 1992).

9. See, e.g., BROOKE WUNNICKE, ETHICS COMPLIANCE FOR BUSINESS LAWYERS 171 (1987). John Burman reached the same conclusion in 2003, well after *Jesse* was decided. See John M. Burman, *Ethical Considerations When Representing Organizations*, 3 WYO. L. REV. 581, 584–91 (2003). In discussing a 1995 Wyoming case involving a lawyer who had helped two couples form a business together, Burman stated matter-of-factly: “[t]he lawyer cannot represent the entity to be formed; it does not exist.” *Id.* at 589. The 1995 Wyoming Supreme Court decision, which left it to the jury to decide whether the lawyer represented both couples or only one of them, did not mention *Jesse* or the possibility of either a retroactive or prospective representation of an entity-to-be. *Id.* at 589–90 (citing *Meyer v. Mulligan*, 889 P.2d 509 (Wyo. 1995)). Rather, the court noted: “[w]hen [the lawyer] was retained, [the corporation] did not exist; instead, he was hired by both [couples] to create [the corporation], as well as draft documents for the purchase of the motel.” *Meyer v. Mulligan*, 889 P.2d 509, 515 (Wyo. 1995).

10. See generally Stanley A. Kaplan, *Legal Ethics Forum: Representation of Multiple Clients*, A.B.A. J., May 1976, at 648.

11. *Id.* at 651–52.

12. *In re Ireland*, 706 P.2d 352, 359 (Ariz. 1985) (rejecting the lawyer’s claim that he represented only the third incorporator).

13. *Id.* at 356.

Association (ABA).¹⁴ A 1987 ethics treatise for business lawyers supported the general idea underlying FitzGibbon's proposal, without mentioning any of the specifics of that proposal.¹⁵ Before examining the proposal itself, we should ask what motivated FitzGibbon to make it. What problem was he attempting to solve?

The primary problem appears to have been the existence of conflicts of interest among the individuals involved in forming the entity and the difficulty of addressing these conflicts under the ABA Model Code of Professional Responsibility ("Model Code"), which preceded the ABA Model Rules of Professional Conduct ("Model Rules").¹⁶ Recognizing these conflicts, the two practitioner-commentators in the 1976 legal ethics forum disagreed about whether the lawyer should agree to joint representation of multiple founders or only one of them.¹⁷ Myer, who opposed joint representation, quoted extensively from disciplinary rule ("DR") 5-105, the Model Code's conflict of interest rule, which prohibited a lawyer from representing multiple clients with "differing interests" unless "it is obvious that he can adequately represent the interest of each."¹⁸ Myer then opined that what

the code seems to require [is] that it must be clear to the lawyer beyond reasonable doubt that he can represent the interests of each client with the same degree of competence and loyalty as each client would be entitled to if the lawyer represented him alone and that any reasonable doubt in the lawyer's mind should be resolved against multiple representation.¹⁹

Because such competence and loyalty appeared to require the lawyer to attempt to maximize the financial interest of each founder at the expense of

14. SCOTT THOMAS FITZGIBBON, PROFESSIONAL ETHICS, ORGANIZING CORPORATIONS, AND THE IDEOLOGY OF CORPORATE ARTICLES AND BY-LAWS 12 (1982).

15. See WUNNICKE, *supra* note 9, at 174.

16. *About the Model Rules*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ [https://perma.cc/E9YB-TQB3] (last visited Mar. 17, 2020).

17. See generally Kaplan, *supra* note 10.

18. *Id.* at 651. DR 5-105(A) provides:

A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105(A) (AM. BAR ASS'N 1980). In turn, DR 5-105(C) provides:

In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

Id. DR 5-105(C).

19. Kaplan, *supra* note 10, at 651.

the others, Myer concluded that the founders' interests clearly "differ[ed]" and that the requirements of DR 5-105(C) could not be met.²⁰

Arguing in favor of joint representation, Levin did not mention DR 5-105, an omission obliquely noted by Myer.²¹ Rather, Levin quoted selectively from an aspirational ethical consideration ("EC"):

[T]here are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.²²

Despite the obvious obstacles posed by this portion of EC 5-15, as well as both the omitted portion²³ and the disciplinary rule itself, Levin invoked EC 5-15 to emphasize the benefits of joint representation, which include saving time and money and avoiding overemphasizing problems.²⁴ He concluded

20. *Id.* That article's three hypothetical founders differed in age, employment, family obligations, and financial contribution. *Id.* at 648, 651. This resulted in significant differences among them with respect to their need or preference for debt or preferred stock, the ease of buying out a deceased shareholder, and need for present income as opposed to accumulated earnings. *Id.* Myer dismissed the anticipated argument that these problems should be settled by the founders without the lawyer's help by concluding that this would make the lawyer "a mere scrivener or draftsman" and that it would deprive "the client of a large part of the service he rightfully expects." *Id.* at 651. He similarly dismissed the argument that the lawyer could "deal with these issues with fairness to all three clients," concluding that this would make the lawyer "an arbitrator or adjudicator, which not only is inconsistent with the traditional role of the lawyer in the United States but by definition is proof of the existence of differing interests." *Id.*

21. Levin referred not to DR 5-105 but to EC 5-15. *Id.* at 650. Myer began his own argument as follows:

While the ethical considerations of the Code . . . are aspirational in character and represent the objectives toward which every lawyer should strive, the disciplinary rules implementing them, as stated in the preamble to the code, are mandatory and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."

Id. at 651.

22. *Id.* at 650 (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 5-15).

23. The omitted language includes the following:

If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation.

MODEL CODE OF PROF'L RESPONSIBILITY EC 5-15.

24. According to Levin, the most important reason to reject the conclusion that separate lawyers are always required is "to avoid overemphasis on problems—that is, to reduce the probability that, as many people think, 'lawyers break deals.'" Kaplan, *supra* note 10, at 650. He goes on to elaborate that "[t]he separate lawyers would properly see their function to articulate and negotiate their clients' divergent interests, generating counter negotiation and giving force to the popular stereotype" of what it means to have multiple lawyers in an amicable situation, noting that "[t]his doesn't merely increase the fees, [but in fact] it has a tendency to explode them." *Id.*

that “we cannot face the business world with an obdurate demand that every situation must be handled by a multiplicity of lawyers.”²⁵

Eight years later, FitzGibbon similarly concluded that a conflict of interest is the major difficulty likely to be encountered by a lawyer who “sets to work at the behest of a few individuals who normally intend to be among the shareholders, directors, and officers”²⁶ and that a “strict interpretation” of conflict of interest provisions will often prohibit joint representation of multiple clients.²⁷ Like Levin, however, FitzGibbon argued that many entity organizers “may have no real need for separate lawyers” and that, “[w]here separate lawyers are not needed and not sought, it is better not to require them because of the extra expense.”²⁸ Further, “the introduction of opposing counsel would likely give the whole matter an adversarial cast, to the detriment of the planning and mediating side of the lawyer’s work.”²⁹

Having identified conflicts of interest as the major ethical problem facing lawyers forming an entity, FitzGibbon proposed not to relax the general conflicts rule but rather to modify the specific provision governing lawyers who represent entities like corporations.³⁰ EC 5-18, using language similar to current Rule 1.13(a) of the Model Rules, provided that “[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.”³¹ According to FitzGibbon, corporate personality may be a “fiction,” but it is a fiction taken seriously, and the lawyer must take instruction in accordance with “whatever its shareholders, directors, and officers have caused it to direct within their powers and in compliance with the stipulated formalities.”³² Moreover, a lawyer representing an entity “need not inform its constituents separately or seek their instructions or consent even when acting to their disadvantage.”³³ The rationale underlying this approach is that the constituents of a corporation “have chosen to bind their fates together”—that is, “[t]heir

25. *Id.*

26. FITZGIBBON, *supra* note 14, at 2.

27. *Id.* at 4 (discussing DR 5-105). According to FitzGibbon, the founders’ interests are likely to diverge according to the different roles they will assume: “[p]rovisions in the corporate documents that serve the interests of the majority shareholder, for example, may disserve those of the minority. Similarly, provisions that extend more leeway to management correspondingly constrict those who are not part of management.” *Id.* at 2. FitzGibbon also viewed the proposed Model Rule provisions as insufficient to support representation of multiple clients in this situation, *id.* at 3, failing to anticipate the extent to which the Model Rules have been liberally interpreted to allow the representation of conflicting interests in many situations, including forming an organization. *See infra* Part IV.

28. FITZGIBBON, *supra* note 14, at 12.

29. *Id.*

30. *Id.* at 12–15.

31. MODEL CODE OF PROF’L RESPONSIBILITY EC 5-18 (AM. BAR ASS’N 1980). Model Rule 1.13(a) provides: “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” MODEL RULES OF PROF’L CONDUCT r. 1.13(a) (AM. BAR ASS’N 2018).

32. FITZGIBBON, *supra* note 14, at 8.

33. *Id.* at 10.

interests may differ but they have freely chosen to join them, and their judgments that a mutual subordination of goals will benefit all is entitled to respect.”³⁴ Indeed, by “embrac[ing] documents such as articles of incorporation and by-laws which establish who speaks for whom and when, they have provided the lawyer with a means of knowing how to act for all of them.”³⁵

FitzGibbon readily conceded that neither the Model Code nor the proposed Model Rules afforded any clear basis for taking a similar approach to a corporation in the organizational stage.³⁶ Nevertheless, he concluded that many of the considerations that militate in favor of a “lawyer-for-the-entity” approach in the case of existing entities also applied to a lawyer forming an entity.³⁷ As a result, he proposed the following:

Entity representation principles should be extended to some cases where the “entity” is an informal one like that among promoters. Under appropriate circumstances, such arrangements should be understood to fall within the meaning of the phrase “a corporation or similar entity” in Ethical Consideration 5-18. The circumstances are appropriate when the individuals have “formed themselves up” with some degree of definiteness into a unit which functions along agreed-upon lines. The individuals should be eligible to be represented as an entity when they resemble partners under a full written partnership agreement: when they have agreed to act as a unit and to reach collective decisions.³⁸

He then recommended the following amendment to then proposed Rule 1.13:

The term “organization” in Rule 1.13 includes an association which is governed by articles of organization, by-laws, or a similar charter which specifies a division of authority and establishes procedures for its exercise, and which is entered into voluntarily by competent parties informed, or having fair opportunity to become informed, as to the nature of the association.³⁹

34. *Id.* at 11.

35. *Id.*

36. *Id.*

37. *Id.* at 12.

38. *Id.*

39. *Id.* This proposal preceded the explosion of limited liability company (LLC) statutes that began in 1992. *See, e.g.*, Bruce H. Kobayashi & Larry E. Ribstein, *Evolution and Spontaneous Uniformity: Evidence from the Evolution of the Limited Liability Company*, 34 *ECON. INQUIRY* 464, 470 n.24 (2001) (pointing out that from 1992 through 1994, forty states passed new LLC statutes). These statutes typically provide that founders may file the state-mandated formation document with none of the substantive terms FitzGibbon proposes because the statute supplies the default rules. *See, e.g.*, UNIF. LTD. LIAB. CO. ACT § 102(13) & cmt. 13 (UNIF. LAW COMM’N 2013) (explaining that an “operating agreement exists” when an LLC is formed and, to the extent the agreement does not provide the “rules of the game,” the statute “fills in the gaps”). If this is the case, then the filing manifests joint consent to do business as a particular type of entity, but the founders will have provided this consent without necessarily considering the nature of the entity they have agreed to form, including any default rules governing such matters as the division of ownership and authority. My thanks to my colleague Jim Wheaton, Director of the Boston University Startup Law Clinic and Research Director of the ABA/Uniform Law Commission Joint Editorial Board on Uniform Unincorporated Organization Acts, for this observation.

FitzGibbon's 1982 proposed Rule 1.13 reform was narrow in scope, limited as it was to informal associations of founders that "resemble partners under a full written partnership agreement," and even then, it only applied after the founders were informed of and agreed to a specific division of authority and decision-making process.⁴⁰ As for founders who are "not sufficiently 'formed-up' to qualify for entity representation," FitzGibbon proposed that the ethical standards should be modified "to make it clear that even joint representation which does involve material impact on the lawyer's loyalties is permissible where well-informed, sophisticated, and independent parties consent."⁴¹ In such instances of joint representation, FitzGibbon urged lawyers to furnish a "representation letter" providing full disclosure of the existence and implications of the joint representation.⁴²

Model Rule 1.7(b) has been interpreted to adopt the second of FitzGibbon's reform proposals, permitting joint representation in many of the situations involving multiple founders that would have been prohibited under DR 5-105(C).⁴³ As for his proposed reform of Model Rule 1.13, to my knowledge, this specific proposal never received any serious consideration. Five years later, Brooke Wunnicke, author of a 1987 ethics treatise for business lawyers, appeared to endorse FitzGibbon's general approach to entity representation for a "group" of founders, but without FitzGibbon's explicit narrowing conditions.⁴⁴ Rather, after noting that the existing entity rules did not apply because "the corporation is only an incipient entity," Wunnicke concluded:

The appealing reality is that often the lawyer who is organizing a corporation is representing the group. Hence, absent an actual conflict of interest or patent unfairness to a member of the group, the same ethical rules that apply to representing the corporate entity should apply to the group who are the incorporators.⁴⁵

40. FITZGIBBON, *supra* note 14, at 12.

41. *Id.* at 14.

42. *Id.* at 18–20.

43. Rule 2.2 of the 1983 Model Rules provided for the special role of a lawyer as an "intermediary," which involved "seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs." MODEL RULES OF PROF'L CONDUCT r. 2.2 cmt. 3 (AM. BAR ASS'N 1983). That rule was deleted in 2002, at which time all discussion of common representation was moved to the Rule 1.7 comment. MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 32 (AM. BAR ASS'N 2018). The commission recommending these changes stated that the reason underlying the initial adoption of Rule 2.2 was to permit common representation in circumstances where it would have been previously prohibited, that is, "when the circumstances were such that the potential benefits for the clients outweighed the potential risks." *See Model Rule 2.2: Reporter's Explanation of Changes*, A.B.A. (Oct. 5, 2011), https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule22rem/ [<https://perma.cc/YZ5A-MLRU>]. Comment 28 to revised Rule 1.7 contains language almost identical to the initial Rule 2.2 comment. *Compare* MODEL RULES OF PROF'L CONDUCT r. 2.2 cmt. 3 (AM. BAR ASS'N 1983), *with* MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 28 (AM. BAR ASS'N 2018).

44. *See generally* WUNNICKE, *supra* note 9.

45. *Id.* at 171, 174. Wunnicke did not cite FitzGibbon (or any other source) for this suggestion; however, she had previously cited the FitzGibbon monograph as criticizing the

And eleven years after FitzGibbon first proposed treating a group of founders as an entity in some limited circumstances, a *Harvard Law Review* note cited both FitzGibbon and Wunnicke as support for the note's endorsement of *Jesse v. Danforth*,⁴⁶ which had adopted an entirely different—and far broader—type of entity representation in the organizational stage.

II. FORMAL ADOPTION OF A RETROACTIVE ENTITY APPROACH TO
PREFORMATION REPRESENTATION: *JESSE V. DANFORTH* AND *HOPPER V.*
FRANK

A. *Jesse v. Danforth*

In 1985, a group of twenty-three physicians retained a lawyer to assist them in creating a corporate entity to purchase and operate an MRI machine.⁴⁷ One year later, the lawyer incorporated MRI Associates of Greater Milwaukee (MRIGM) and continued to serve as its corporate counsel.⁴⁸ In 1987, MRIGM formed a service corporation and elected subchapter S treatment, permitting the shareholders to be taxed as a partnership but retain the benefits of a corporation.⁴⁹ In 1988, two former patients of two of the physicians sued them for malpractice arising from allegations involving the use of a CAT scanner owned by a different corporation of which the physicians were also shareholders.⁵⁰ A partner of the lawyer who formed and continued to represent MRIGM represented the plaintiffs.⁵¹ The defendant physicians moved to disqualify the plaintiffs' lawyer over a conflict of interest arising from the law firm's current and former representation of the individual physicians.⁵² The trial court denied that motion, the court of appeals reversed, and the plaintiffs then appealed to the Wisconsin Supreme Court, which reversed the court of appeals and ordered plaintiffs' counsel reinstated.⁵³

In its opinion, the Wisconsin Supreme Court relied on Rule 1.13 of the Wisconsin Rules of Professional Conduct, identical in relevant aspects to the Model Rule, for the well-settled positions that a lawyer who represents an organization represents the organization itself and that, although the lawyer *may also* represent one or more of its constituents, the lawyer does not

lawyer acting as an intermediary and urging lawyers to send detailed representation letters to each organizer. *Id.* at 174. Wunnicke likely was referring to the proposal she must have seen in the FitzGibbon monograph.

46. Note, *An Expectations Approach to Client Identity*, 106 HARV. L. REV. 687, 703 nn.108–11 (1993). Although the note's authors mistakenly cited both FitzGibbon and Wunnicke as supporting a “retroactive” entity approach, elsewhere the note fully described the “retroactive” approach first adopted in *Jesse*. See *id.* at 695–96.

47. *Jesse v. Danforth*, 485 N.W.2d 63, 65 (Wis. 1992).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

automatically do so (collectively, the “entity rule”).⁵⁴ Relying on a comment to Rule 1.13, also identical to the Model Rule comment,⁵⁵ the court further noted that “the clear purpose of the entity rule was to enhance the corporate lawyer’s ability to represent the best interests of the corporation without automatically having the additional and potentially conflicting burden of representing the corporation’s constituents.”⁵⁶ Under this reasoning, even if the organizing lawyer had previously represented the individual physicians during the period of incorporation, the court would have been justifiably skeptical of any claim that such representation continued once MRIGM became a legal entity. As a result, in the absence of evidence of postincorporation contact sufficient to establish the physicians as something more than mere constituents in their dealings with MRIGM’s lawyer, the court was clearly correct in holding that they were not current clients of the plaintiffs’ lawyer or his law firm.⁵⁷

So far, the court’s holding is straightforward and noncontroversial. But the court turned then to the physicians’ argument that, if not *current* clients, then at least they were *former* clients because they were individually represented when the lawyer formed MRIGM for the benefit of all twenty-eight physicians.⁵⁸ The court summarily rejected this argument, relying solely on its conclusion that the rationale underlying Rule 1.13 applied not only to existing organizations but to a lawyer retained to organize an entity:

If a person who retains a lawyer for the purpose of organizing an entity is considered the client . . . then any subsequent representation of the corporate entity by the very lawyer who incorporated the entity would automatically result in dual representation. This automatic dual representation, however, is the very situation the entity rule was designed to protect corporate lawyers against.⁵⁹

The court then adopted the following guideline:

[W]here (1) a person retains a lawyer for the purpose of organizing an entity and (2) the lawyer’s involvement with that person is directly related to that incorporation and (3) such entity is eventually incorporated, the entity rule applies *retroactively* such that the lawyer’s pre-incorporation involvement with the person is deemed to be representation of the entity, not the person.⁶⁰

In addition, the court stated that this standard would also apply to the application of Rule 1.6—the confidentiality rule.⁶¹ In other words, “it is the

54. *Id.* at 66–67.

55. *Id.* at 67.

56. *Id.*

57. This was not how the court reasoned with respect to the physicians’ claim that they were current clients. Rather, the court found that the defendants were never clients of the organizing lawyer because of the retroactive status of the entity. *Id.* at 66.

58. *Id.* at 67–68.

59. *Id.* at 67.

60. *Id.* (emphasis added).

61. *Id.*

corporate entity, not the retroactive constituent, that holds the privilege,” again citing a comment to Rule 1.13.⁶²

The defendant physicians attempted to produce evidence that the organizing lawyer represented them as individuals, including the lawyer’s affidavit stating that he was contacted “to assist a group of physicians in Milwaukee in organizing an entity to own and operate one or more magnetic resonance imaging (‘MRI’) facilities.”⁶³ The court held that “[t]his evidence overwhelmingly supports the proposition that the purpose of [the lawyer’s] pre-incorporation involvement was to provide advice with respect to organizing an entity and that [his] involvement was directly related to the incorporation.”⁶⁴ Because MRIGM was eventually incorporated, the retroactivity rule applied.⁶⁵

As for additional evidence that the physicians had filled out questionnaires provided to them by the organizing lawyer that inquired “as to the physicians’ personal finances and their involvement in pending litigation,” the court held that, because MRIGM was the client—not the physicians—and because the communications were directly related to the purpose of organizing MRIGM, the physicians could not claim the privilege of confidentiality.⁶⁶

There are many weaknesses in the *Jesse* opinion. For example, once the court rejected the physicians’ claim that they were current clients, there was apparently no need to adopt the “retroactivity” rule because, even if the physicians were former clients, they could only succeed in their disqualification motion if they could establish that the current lawsuit was substantially related to the subject matter of the former representation, and that did not appear to be the case.⁶⁷ Nevertheless, the court *did* announce its adoption of a “retroactivity” rule; that rule has since been cited by other courts⁶⁸ and other authorities,⁶⁹ and undoubtedly it will be considered by

62. *Id.* The court cited the comment to the Wisconsin version of Rule 1.13, which states that “[w]hen one of the constituents of an organizational client communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by Rule 1.6.” *Id.* (citing WIS. STAT. § 20:1.13 cmt. 2); see also MODEL RULES OF PROF’L CONDUCT r. 1.13 cmt. 2 (AM. BAR ASS’N 1983) (using the same language).

63. *Jesse*, 485 N.W.2d at 68.

64. *Id.*

65. See *id.* at 67–69.

66. *Id.* at 68–69.

67. See, e.g., William H. Simon, *Whom (or What) Does the Organization’s Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CALIF. L. REV. 57, 73–74 (2003).

68. See, e.g., *Manion v. Nagin*, 394 F.3d 1062, 1069–70 (8th Cir. 2005) (accepting the *Jesse* rule but finding that it did not apply to the facts of the case at bar); *McKinney v. McMeans*, 147 F. Supp. 2d 898, 901 (W.D. Tenn. 2001) (citing *Jesse* as support for finding that a lawyer did not represent a prospective shareholder).

69. See, e.g., Colorado Bar Ass’n, Ethics Comm. Op. 68 (2011); SUSAN R. MARTYN & LAWRENCE J. FOX, THE ETHICS OF REPRESENTING ORGANIZATIONS 24–25 (2009); J. S. Nelson, *The Corporate Conspiracy Vacuum*, 37 CARDOZO L. REV. 249, 296–98 (2015); Alec Rothrock, *Entity Formation: Defining the Client and the Duty of Confidentiality*, COLO. LAW., July 2005, at 77, 78 (2005); Thomas E. Rutledge & Phuc H. Lu, *No Good Deed Goes Unpunished: Pitfalls for Counsel to a Business Organization About to Be Governed by a New Law*, 45 BRANDEIS L.J. 755, 768 n.66 (2007); Tremblay, *supra* note 3, at 299–300; Note, *supra* note 46, at 695–96.

future courts determining client identity in situations involving entity formation, for either disqualification or liability purposes.⁷⁰

For our purposes, *Jesse*'s major weakness is the court's sole reliance on the underlying rationale of Rule 1.13's "entity rule," which is to avoid automatic dual representation (of entity and constituent) and its resulting possibility of disabling conflicts of interest. This rationale makes sense when a lawyer is retained by a fully formed entity to act on the entity's behalf; the lawyer is bound to act in the best interests of the entity, as determined by its duly authorized constituents, without having to worry about the individual and potentially conflicting interests of multiple constituents.⁷¹ But if the individuals who retain a lawyer for the purpose of organizing the entity are considered the clients of a lawyer, that does *not* mean, as the *Jesse* court says, that "any subsequent representation of the corporate entity by the very lawyer who incorporated the entity would *automatically* result in dual representation."⁷² To avoid dual representation of both the (existing) entity and one or more constituents, all that is required is for the organizing lawyer to clarify that, once the entity comes into being, the lawyer will become the entity's lawyer only and will cease representing the constituents as individuals. Indeed, if it is contemplated from the start that the organizing lawyer will become the entity's lawyer, then the limited nature of the lawyer's initial representation of the founders can and should be made clear at the time of the lawyer's retention.

In addition, there are problems inherent in the retroactive nature of the "entity" representation adopted in *Jesse*. The *Jesse* court conceded that, at the time the lawyer is forming the entity, the lawyer is representing the founding individuals; indeed, the opinion is clear that there will be no retroactive substitution of the entity as client unless and until the entity comes into being.⁷³ But what if it does not? For example, what if the lawyer's negligence results in the failure of the entity to attain legal status? Surely the individual founders should have a viable legal malpractice claim against the lawyer if they can establish the requisite damages. Alternately, what if the entity is never formed because of disputes between the founders, and one of them subsequently alleges that the breakdown was attributable to the lawyer having favored the interests of one them over the other? Surely the lawyer should be subject to either a legal malpractice or breach of fiduciary duty lawsuit by the complaining founder. In addition, the lawyer should also be subject to disqualification if he or she seeks to represent the favored founder in a lawsuit between the two former joint clients. Given that the lawyer

70. As *Jesse* itself illustrates, client identity is also relevant in determining who controls the lawyer's duty of confidentiality under both the attorney-client privilege and the professional rule of confidentiality. *Jesse*, 485 N.W.2d at 67, 69.

71. Some have argued that the entity rule does not make sense, even for existing entities, in internal disputes in closely held corporations and similar private entities. *See, e.g.*, Lawrence E. Mitchell, *Professional Responsibility and the Close Corporation: Toward a Realistic Ethic*, 74 CORNELL L. REV. 466, 469 (1989); Simon, *supra* note 67, at 74.

72. *Jesse*, 485 N.W.2d at 67 (emphasis added).

73. *Id.*

cannot know in advance whether the entity will be successfully formed, and the lawyer will initially represent multiple individuals with potentially conflicting interests, the lawyer should be bound to comply with the applicable conflict of interest rules for the representation of multiple individual clients.⁷⁴

The prospective approach taken in the Arizona ethics opinion avoids the problems inherent in *Jesse's* retroactive approach to entity representation. But before we examine the Arizona opinion, we should consider an opinion of the Fifth Circuit, which adopted a retroactivity approach similar to, but distinguishable from, *Jesse's*. The Fifth Circuit decided that case, *Hopper v. Frank*,⁷⁵ two years after *Jesse* but did not cite the Wisconsin Supreme Court opinion and relied on both different authority and a different rationale. As such, it may offer a more attractive option for future courts to consider.

B. Hopper v. Frank

Plaintiffs Lewis Hopper and Joe Sanderson were the majority shareholders of corporation Four-O, Inc.⁷⁶ They decided to raise capital to finance a television station through a limited partnership.⁷⁷ In 1986, Hopper and Four-O formed this limited partnership, Gulf Coast Television, Ltd., with the assistance of a lawyer and his law firm.⁷⁸ Hopper was an individual general partner in Gulf Coast, and Four-O was the managing general partner.⁷⁹ The law firm was also retained to prepare public offering documents for limited partnership interests; however, the attempted public offering was unsuccessful.⁸⁰ The plaintiffs sued the lawyer and the law firm for legal malpractice, alleging that their delay in providing the public offering documents was the reason the public offering was unsuccessful.⁸¹ The trial court granted summary judgment for the defendants, concluding that there was no attorney-client relationship between the plaintiffs and the law firm.⁸² The Fifth Circuit Court of Appeals affirmed.⁸³

Like the Wisconsin Supreme Court, the Fifth Circuit began its analysis with the state version of Model Rule 1.13 and its general provision that a lawyer retained to represent an organization represents the organization itself and not its constituents.⁸⁴ It then cited ABA Formal Opinion 91-361, which

74. If, however, a default partnership exists when the founders approach the lawyer, and the lawyer agrees to represent that partnership in its efforts to consider how to do business going forward, then the lawyer will not have to comply with the rules regulating multiple representation of individual clients. For a discussion of the problems associated with agreeing to represent a default partnership, see *infra* Part V.

75. 16 F.3d 92 (5th Cir. 1994).

76. *Id.* at 94.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 94–95.

83. *Id.* at 98.

84. *Id.* at 95 (noting that Mississippi had adopted Model Rule 1.13).

had applied Model Rule 1.13 in determining when a partnership lawyer has an attorney-client relationship with an individual partner.⁸⁵ That opinion analyzed a number of factors, including:

[W]hether the lawyer affirmatively assumed a duty of representation to the individual partner, whether the partner was separately represented by other counsel when the partnership was created or in connection with its affairs, whether the lawyer had represented an individual partner before undertaking to represent the partnership, and whether there was evidence of reliance by the individual partner on the lawyer as his or her separate counsel, or of the partner's expectation of personal representation.⁸⁶

More importantly, the *Hopper* court cited Formal Opinion 91-361 as adopting the proposition that “a lawyer’s representation of a partnership may preempt the prior representation of the partners as individuals.”⁸⁷ The court then noted that state corporation law “[s]imilarly” provides that “once a corporation adopts a preformation contract that was made by one of its incorporators with a view toward forming the entity, the corporation preempts the incorporator’s status as a party to the contract and, thus, assumes the incorporator’s liability.”⁸⁸ After analyzing evidence consisting primarily of correspondence between Hopper, Gulf Coast, and the law firm, the court concluded that, “[a]t best, the documents before the district court reflected that Hopper and Sanderson initially retained the Benesch Firm, and that the firm thus represented them individually until the formation of the partnership.”⁸⁹ The court elaborated that “[o]nce the partnership was in place . . . the summary judgment record reveals that the formation of Gulf Coast preempted any prior relationship with Hopper and Sanderson with respect to the delivery of the final public offering documents,” which, the court found, was “a project that facially appears to relate only to the issuer, Gulf Coast, who would receive and invest the funds raised in the public offering.”⁹⁰ Further, the court reasoned, even if an attorney-client relationship existed preformation,

Gulf Coast’s acceptance of the benefits of the attorney-client relationship—the final offering documents—and both parties’ agreement that Hopper and Sanderson would not pay or be personally liable for any legal fees, make clear that the attorney-client relationship with Gulf Coast preempted any prior arguable relationship with Hopper and Sanderson.⁹¹

Like *Jesse*, *Hopper* is subject to criticism on the ground that its retroactive “preemption” analysis may have been unnecessary to decide the case. Although there was some correspondence between Hopper and the law firm

85. *Id.* at 95–96 (citing ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 91-361 (1991)).

86. *Id.*

87. *Id.* at 96 (emphasis added).

88. *Id.*

89. *Id.* at 97–98.

90. *Id.* at 98.

91. *Id.* (emphasis added).

about the anticipated public offering before Gulf Coast came into existence,⁹² Hopper and Sanderson apparently did not cite this correspondence, relying solely on their affidavits that claimed, in a conclusory manner, that the firm “performed legal services for [Hopper, Sanderson, and Gulf Coast].”⁹³ As a result, the court cited correspondence that apparently took place *after* Gulf Coast was formed, which specifically indicated that the law firm would prepare the final public offering documents for the issuer.⁹⁴ And it was the delay in delivering those documents, not any conduct that occurred prior to the formation of Gulf Coast, that allegedly constituted legal malpractice.⁹⁵ Accordingly, the court only needed to determine that, regardless of whether Hopper and Sanderson were individual clients during the formation of the limited partnership, once Gulf Coast came into existence, there was insufficient evidence that the law firm continued to represent them individually, in addition to representing Gulf Coast as an entity.⁹⁶

But like *Jesse*, *Hopper* has also been cited as precedent for giving an entity retroactive status as the sole client during the period of its formation.⁹⁷ And while the *Jesse* court had no legal precedent for the retroactivity rule it adopted, the *Hopper* court cited not only an ABA ethics opinion but also a solid body of state corporate law providing that once a corporation adopts a preformation contract made by an incorporator, the corporation preempts the incorporator’s status as a party to the contract.⁹⁸

In my view, neither the ABA ethics opinion nor state business law provides adequate support for the adoption of the retroactive “preemption” rule applied in *Hopper*. First, the *Hopper* court almost certainly misinterpreted Formal Opinion 91-361 as applying its “preemption” rule retroactively. The primary purpose of the opinion was to clarify that Rule 1.13’s “entity rule” applies to (existing) partnerships, as well as corporations, an application that had been uncertain prior to the adoption of the Model Rules.⁹⁹ According to

92. *Id.* at 94 (stating that evidence of correspondence dated 1985, before Gulf Coast formed in 1986, was used primarily to claim the need for more discovery).

93. *Id.* at 97.

94. *Id.* It is not altogether clear that both letters were written after the formation of Gulf Coast sometime in 1986, as the first letter is dated July 29, 1986, and the opinion does not give the specific date when Gulf Coast became a limited partnership. *Id.* However, the court does state that the letter “was from Hopper, in his capacity as a president of Four-O, Inc., the managing general partner of Gulf Coast,” thereby implying that Gulf Coast had already been formed. *Id.*

95. *Id.*

96. See 1 GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING 18-32 to 18-35 (4th ed. Supp. 2017) (holding that the law firm in *Hopper* may have represented limited partners during formation of the partnership but had clearly transferred its client-lawyer relationship to the entity by the time of the alleged misconduct).

97. See, e.g., Rutledge & Lu, *supra* note 69, at 768; cf. HAZARD ET AL., *supra* note 96, at 18-33 n. 32. *Hopper* is cited less frequently than *Jesse*, perhaps because it is more easily interpreted as a narrow decision holding that the individuals had clearly transferred their client-lawyer relationship to the entity when the misconduct occurred. HAZARD ET AL., *supra* note 96, at 18-33 n. 32.

98. See *Hopper*, 16 F.3d at 95–96.

99. See ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 91-361 (1991) (stating that despite prior authorities treating a partnership as an “‘aggregate’ or group of

the opinion, the entity concept rests in part on the notion that organizations covered by this Rule are “separate jural entit[ies] having distinct rights and duties and capable, among other things, of entering into contracts and either bringing suit or being sued in [their] own name.”¹⁰⁰ And because “case authority and commentary support[ed] the treatment of partnerships as entities separate from their owners,” the opinion concluded that “a partnership is an organization within the meaning of Rule 1.13.”¹⁰¹

Having applied the “entity rule” to partnerships, the opinion then addressed the question of when a partnership’s lawyer has an attorney-client relationship with an individual partner.¹⁰² It concluded that, as with corporations, the partnership lawyer does not represent an individual partner “unless the specific circumstances show otherwise.”¹⁰³ It then stated that representing a partnership “does not necessarily preclude the representation of individual partners in matters not clearly adverse to the interests of the partnership, *nor preempt such an individual representation previously undertaken.*”¹⁰⁴ The most natural reading of that language is that, having represented the individuals in forming the partnership, the partnership lawyer may—but need not—*cease* representing the individuals after the partnership is formed. In other words, preemption occurs when the lawyer replaces prior individual representation with entity representation on a going-forward basis. There is no reason to interpret the opinion’s preemption language as imposing entity status retroactively on what was initially a representation of one or more individual founders.

As for the second legal authority the Fifth Circuit cited, it is true that well-settled corporate law provides that “once a corporation adopts a preformation contract that was made by one of its incorporators with a view toward forming the entity, the corporation preempts the incorporator’s status as a party to the contract and, thus, assumes the incorporator’s liability.”¹⁰⁵ And this rule has been applied not only to corporate ratification of ordinary business contracts but also to a corporation’s implied ratification of an incorporator’s agreement to pay the organizing lawyer’s legal fees.¹⁰⁶ But permitting the corporation to assume an incorporator’s prior obligation to pay a lawyer’s legal fees is not the same as making the corporation retroactively the lawyer’s client or stripping the individual incorporator of that status. A

individuals, rather than as an entity,” for purpose of determining the substantive rights and liabilities of the partners, the Model Rules drafters reject that concept in favor of the entity theory in adopting Model Rule 1.13).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* (emphasis added).

105. *Hopper v. Frank*, 16 F.3d 92, 96 (5th Cir. 1994). For authority on the law of corporate adoption or ratification of preformation contracts, see generally 1 JAMES D. COX & THOMAS LEE HAZEN, *TREATISE ON THE LAW OF CORPORATIONS* § 5:4 (3d ed. 2018).

106. *See, e.g., Arctic Slope Native Ass’n v. Paul*, 609 P.2d 32 (Alaska 1980) (accepting implied ratification when the municipal corporation accepted the benefits received, with full knowledge of all the material facts, and failed to repudiate the contracts in a timely manner).

person paying a lawyer's legal fees is not necessarily a client;¹⁰⁷ therefore, a corporation's agreement to pay legal fees for work already done does not make the corporation a client for purposes of that work. The corporate law cited in *Hopper* is sound, but it should be limited to the corporation's assumption of legal obligations, without thereby attaining a status as a retroactive client and certainly not one that displaces the incorporators as individual clients in the formation of the corporation.

Finally, regardless of the strength or weakness of its cited precedent, *Hopper*'s retroactivity rule suffers from the same practical problems raised in the preceding critique of *Jesse*. But before rejecting the entity theory entirely, we need to consider the possibility of an entity theory that is *prospective* rather than retroactive. This is the position taken in Arizona Ethics Opinion 02-06.¹⁰⁸

III. PROSPECTIVE REPRESENTATION OF A YET-TO-BE-FORMED ENTITY: ARIZONA ETHICS OPINION 02-06

In 2002, the State Bar of Arizona issued an ethics opinion advising that “[a] lawyer may form a business entity for various individuals and be counsel only for the yet-to-be-formed entity, if appropriate disclosures and consents occur.”¹⁰⁹ In the alternative, the lawyer may represent each of the incorporators, also with appropriate disclosures.¹¹⁰ The opinion further provided that the incorporators need to ratify the corporate action, nunc pro tunc, once the entity is formed.¹¹¹

In its initial determination that a lawyer can “represent an entity that does not yet exist,” the state bar relied on: (1) a comment to the Arizona version of Rule 1.13 that, like the Model Rule, states that the rule applies to “unincorporated associations”;¹¹² (2) state corporate law that, like the state law cited in *Hopper*, provides that a newly formed corporation may ratify preincorporation acts of the corporation and become retroactively liable;¹¹³ and (3) the decision in *Jesse*.¹¹⁴

As for the next question—whether a lawyer can represent “*only* the yet-to-be-formed entity and not the constituents”—the Arizona State Bar relied on

107. See MODEL RULES OF PROF'L CONDUCT r. 1.8(f) (AM. BAR ASS'N 2018) (regulating when a lawyer may accept compensation for representing a client from a third person).

108. See State Bar of Arizona, Ethics Op. 02-06 (2002).

109. *Id.*

110. *Id.*

111. *Id.* Because the Arizona opinion requires ratification once the entity is formed, one commentator views the opinion as failing to address the client identity question if the entity is never formed. Jett Hanna, *Entity Formation: Who Is the Client?*, TEX. LAW. INS. EXCHANGE, <https://www.tlie.org/article/entity-formation-who-is-the-client/> [https://perma.cc/SA6Y-CTLN] (last visited Mar. 17, 2020).

112. State Bar of Arizona, Ethics Op. 02-06; see also MODEL RULES OF PROF'L CONDUCT r. 1.13 cmt. 1.

113. State Bar of Arizona, Ethics Op. 02-06.

114. *Id.*

the reasonable expectations of the individuals,¹¹⁵ a test that has evolved as a common-law approach to deciding general questions concerning the existence of a lawyer-client relationship.¹¹⁶ Applying this test, if the lawyer is to avoid the inadvertent representation of the individual founders as a result of misunderstandings, the lawyer should clarify that the lawyer does not represent the constituents individually but only the yet-to-be-formed entity.¹¹⁷

Finally, the state bar enumerated the disclosures a lawyer should make to the incorporating constituents “to obtain their informed consent to the limited representation of the entity.”¹¹⁸ Required disclosures include specifying to the individuals that their communications will be conveyed to the other decision makers and are not confidential as to the entity.¹¹⁹

Surely a prospective approach is better than a retroactive approach, if only because it ensures that the founders are aware from the outset of their legal status as nonclients.¹²⁰ But even this more forthright option has its weaknesses.

Consider the most significant aspect of the opinion: its initial conclusion that a lawyer *can* represent an entity that has yet to be formed.¹²¹ This conclusion is reached without much analysis. Like *Hopper*, the opinion partly relies on state corporate law allowing a corporation to ratify preformation contracts made by the incorporators.¹²² Indeed, the opinion goes further than *Hopper* by explicitly stating that the incorporators will subsequently “need to ratify this corporate action, *nunc pro tunc*, once the entity is formed.”¹²³ But the opinion does not address who the client is if the corporation is not formed¹²⁴ or if the incorporators neglect to cause the corporation to ratify the preformation agreement.¹²⁵ In any event, as

115. *Id.* (“Who a lawyer represents depends on the reasonable perceptions of those who have consulted with the lawyer.”).

116. *See, e.g.*, Ingrid A. Minott, Note, *The Attorney-Client Relationship: Exploring the Unintended Consequences of Inadvertent Formation*, 86 U. DET. MERCY L. REV. 269, 283–84 (2009).

117. State Bar of Arizona, Ethics Op. 02-06.

118. *Id.*

119. *Id.*

120. *See, e.g.*, Note, *supra* note 46, at 688–89 (advocating for a “reasonable constituent’s expectation approach,” which “encourages attorneys to make pre-representation disclosures to constituents that help ensure that all parties—attorney, constituent, and entity—have common and consistent expectations concerning client identity”).

121. *See* State Bar of Arizona, Ethics Op. 02-06.

122. *See id.*

123. *Id.*

124. *See* Hanna, *supra* note 111. An Arizona corporate practice treatise claims that “dicta” in the Arizona ethics opinion wrongly interpreted professional responsibility law to require subsequent corporate ratification, unaware that the Restatement (Third) of the Law Governing Lawyers provided for entity status in that situation without relying on either the “fiction of ratification” or the “principles of corporate law.” 6 ARIZONA CORPORATE PRACTICE § 2:7 (Terence W. Thompson et al. eds., 2019). For a discussion of the applicable Restatement comment, see *infra* notes 132–35 and accompanying text.

125. State corporate law may not require express ratification; it may be sufficient if the corporation accepts the benefit of a preformation contract. *See, e.g.*, Arctic Slope Native Ass’n

previously discussed, state corporate law offers weak support for substituting the corporation for the incorporators as the lawyer's sole client when the corporation is being formed. Nor is *Jesse* strong support given that, as previously discussed, the decision is itself poorly reasoned. Additionally, the Arizona opinion failed to note or distinguish the purely retroactive aspect of *Jesse*, which did not require either preformation disclosures to the founders or subsequent ratification by the corporation.

The most persuasive authority cited in the opinion is the Rule 1.13 comment, which clearly says that “[t]he duties defined in this Comment apply equally to unincorporated associations.”¹²⁶ But that comment also begins by stating that “an organizational client is a *legal entity*, but it cannot act except through its . . . constituents.”¹²⁷ This is perhaps why ABA Formal Opinion 91-361 suggested limiting the Rule's application to organizations with a separate jural status, such as partnership.¹²⁸ A subsequent ABA ethics opinion took a broader approach, concluding that trade associations may be entity clients, regardless of whether the trade association is recognized as a “separate jural entity”;¹²⁹ however, it did so with no analysis or discussion of the circumstances under which other sorts of associations would qualify as an entity client under Rule 1.13.¹³⁰ Trade associations are typically “formal organizations with established chains of command,”¹³¹ so perhaps some level of formality is required.

To what extent can or should the term “unincorporated association” be extended to include more “loose-knit” groups?¹³² A comment to the Restatement (Third) of the Law Governing Lawyers is ambiguous. On the one hand, it refers to “unincorporated associations (such as trade associations and labor unions)” as but one example of “formally constituted organizations” entitled to entity status,¹³³ thereby suggesting a relatively narrow interpretation of the term “unincorporated association.” On the other

v. Paul, 609 P.2d 32, 34 (Alaska 1980) (noting the incorporated borough “ratified” a lawyer's contracts with constituent communities by accepting benefits performed, with full knowledge of material facts and without repudiating the contract in a timely manner).

126. MODEL RULES OF PROF'L CONDUCT r. 1.13 cmt. 2 (AM. BAR ASS'N 1983).

127. *Id.* r. 1.13 cmt. 1 (emphasis added).

128. See *supra* notes 100–01 and accompanying text. For a court decision agreeing with this narrow interpretation, see generally *Greate Bay Hotel & Casino, Inc. v. City of Atlantic City*, 624 A.2d 102 (N.J. Super. Ct. Law Div. 1993), which applies Rule 1.13 to business trusts because such trusts constitute separate legal entities under state law and cites numerous authorities recognizing other unincorporated associations with separate legal status as entity clients.

129. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 92-365 (1992).

130. *Id.*

131. See HAZARD ET AL., *supra* note 96, at 18-16.

132. See *id.* at 18-16 to 18-18 (arguing that Rule 1.13 should be extended to include loose-knit groups, including a group “formed primarily for the very purpose of retaining counsel,” but indicating no existing authority for that proposition); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 cmt. c (AM. LAW INST. 1998) (stating that organizations include informal entities such as a social club or informal group that has established an investment pool); *id.* § 96 reporter's note to cmt. c (citing no authority other than the Hazard and Hodes treatise).

133. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 cmt. c.

hand, the comment also says that “[a]n organization client may also be an informal entity such as a social club or an informal group that has established an investment pool,”¹³⁴ thereby supporting the more expansive interpretation endorsed by the Arizona ethics opinion. The importance of the Restatement’s reference to informal groups is weakened, however, by the fact that the reporter’s note cites no legal authority for treating such groups as organizational clients.¹³⁵ Given the lack of clear precedent,¹³⁶ whether informal groups such as a group of founders *should* have organizational client status remains an open question.

This brings us to the ultimate question of whether there are sufficient policy considerations to justify granting prospective entity status to informal groups of individuals seeking to form a business entity.

IV. SHOULD COURTS PERMIT LAWYERS TO CHOOSE TO REPRESENT A YET-TO-BE-FORMED ENTITY?

An initial stumbling block to granting client status to a yet-to-be-formed entity is the assumption that substantive law, such as the law of corporations or partnerships, must control. If a corporation comes into existence only when the articles of incorporation have been filed with the requisite agency,¹³⁷ then how is it possible for a lawyer to represent “the corporation” prior to that time? Even after *Jesse, Hopper*, and Arizona Ethics Opinion 02-06, some commentators continue to look to substantive law to provide the obvious answer to this question—it is *not* possible.¹³⁸

134. *Id.*

135. The only authority cited in the reporter’s note to Restatement section 96, comment c is a professional responsibility treatise coauthored by the then executive director of the American Law Institute, Geoffrey Hazard, which had stated its support for giving entity status to such informal groups. *Id.* § 96 reporter’s note to cmt. c. That treatise continues to take that position, although it does not itself cite any legal authority for doing so. Indeed, it cites both the Model Rules and the Restatement as applying organizational status not only to corporations but to “labor unions, unincorporated associations, governmental units, and other formal organizations with established chains of command.” HAZARD ET AL., *supra* note 96, at 18-16. It then argues that “any set of two or more persons engaged in more or less concerted activity *could be* regarded as an informal partnership or joint venture.” *Id.* (emphasis added). Paul Tremblay cites the Hazard and Hodes treatise as possibly authorizing the representation of informal community groups as entities, albeit only after a “forming up” process similar to that described by FitzGibbon. Paul J. Tremblay, *Counseling Community Groups*, 17 CLINICAL L. REV. 389, 421–37 (2010). Interestingly, Tremblay did not apply that theory to lawyers forming start-up companies, where he continued to view the representation as one of individual representation. *See id.* at 429–30 (describing a lawyer engaged in a limited representation of three individual organizers as “agents and fiduciaries” of the rest of the group).

136. *See* Tremblay, *supra* note 135, at 422 (“The authorities are not at all clear regarding the legal status, within the attorney-client relationship, of a loosely-structured group.”).

137. *See, e.g.*, State Bar of Arizona, Ethics Op. 02-06 (2002).

138. *See, e.g.*, John M. Cunningham, *The Professional Responsibilities of Lawyers Who Represent Multiple Clients in LLC Formations*, CUNNINGHAM-SEMINARS.COM, <https://web.archive.org/web/20030323224824/http://www.cunningham-seminars.com/articles/item10.htm> [https://perma.cc/769Y-P4V7] (last visited Mar. 17, 2020) (“Clearly, the LLC itself cannot be the client, since it does not yet exist.”). Tremblay, while acknowledging the result in cases like *Jesse*, nevertheless argues that substantive law limits the choices available

One commentator addresses this issue head on, persuasively arguing that professional responsibility law is its own distinct field and that what constitutes an “entity” or “organization” under corporate law or partnership law (or tax law or environmental law) can differ from what constitutes an “entity” or “organization” under professional responsibility law.¹³⁹ Surely this is correct; however, we still need to decide whether, and under what circumstances, professional responsibility law *should* grant entity status to informal groups such as founders seeking to form an entity.

To answer this question, we should begin by returning to the rationale underlying the entity rule adopted in Model Rule 1.13. According to FitzGibbon, who was discussing corporations, the lawyer is obligated to take instruction in accordance with “whatever [the corporation’s] shareholders, directors, and officers have caused it to direct within their powers and in compliance with the stipulated formalities.”¹⁴⁰ In doing so, the lawyer need not “inform its constituents separately or seek their instructions or consent even when acting to their disadvantage,”¹⁴¹ and the reason for that is that, although “their interests may differ . . . they have freely chosen to join them, and their judgments that a mutual subordination of goals will benefit all is entitled to respect.”¹⁴² Indeed, “by embrac[ing] documents such as articles of incorporation and by-laws which establish who speaks for whom and when, they have provided the lawyer with a means of knowing how to act for all of them.”¹⁴³

This reasoning led FitzGibbon to conclude that entity representation is appropriate, even when there is no formal entity, so long as “the individuals have ‘formed themselves up’ with some degree of definiteness into a unit which functions along agreed-upon lines.”¹⁴⁴ He then explained what he meant by proposing to amend Rule 1.13 to define an “organization” as including

an association which is governed by articles of organization, by-laws *or a similar charter* which specifies a division of authority and establishes procedures for its exercise, and which is entered into voluntarily by competent parties informed or having fair opportunity to become informed, as to the nature of the association.¹⁴⁵

How formal must this “similar charter” be, and what must the individuals know (or have an opportunity to know) as to the nature of the association?

to the organizing lawyer. *See* Tremblay, *supra* note 3, at 275 (“It is not an answer to assert that the lawyer should simply decide, along with his client, which designation they prefer. If the participants are not partners, and if the default substantive doctrine would not by operation of law deem their enterprise as a partnership, the lawyer may not have the authority to declare that he will treat the group as partners.”).

139. *See* ARIZONA CORPORATE PRACTICE, *supra* note 124, § 2.5.

140. FITZGIBBON, *supra* note 14, at 8.

141. *Id.* at 10.

142. *Id.* at 11.

143. *Id.*

144. *Id.* at 12.

145. *Id.* (emphasis added).

According to a current professional responsibility treatise that supports granting entity status to informal, “loosely-knit” groups, the group members must have agreed to act as a unit and to reach collective decisions, and there must be a formal organization with an “established chain of command.”¹⁴⁶

In some situations, sophisticated business persons may have already created such a “charter” before they approach a lawyer to assist them in formalizing the informal agreements they have reached on their own.¹⁴⁷ But what if the individuals are not sophisticated in business matters and are looking to the lawyer to assist them in addressing such issues as choice of entity, allocation of ownership voting, and exit strategies? Surely many—perhaps most—founders have little awareness of these matters and want their lawyer to play the role of “initiator, planner and advisor.”¹⁴⁸ Founders rarely come to the lawyer with a fully fleshed-out business plan, and even when they have already agreed on some aspects, they may reasonably expect that the lawyer will discuss that plan with them and reexamine their conclusions when it makes sense to do so.¹⁴⁹

Consider the initial party planners hypothetical advanced at the start of this Article. What would it take for them to “form themselves up” sufficiently to warrant entity status as the lawyer’s client? Must they have already come to a consensus as to how decisions will be made on the critical issues they will address, including allocating ownership share and voting rights? And if they have agreed that decisions will be made by majority vote and that each has an equal vote, does it matter that they may be unaware of the extent to which a majority can take unfair advantage of the minority? Or that it may be unfair to grant each founder an equal vote if the founders are making substantially different contributions to the entity? Or that, by agreeing to entity status under a “charter” instructing the lawyer to take direction from anything other than a consensus of all founders, they have agreed that the lawyer need not

146. HAZARD ET AL., *supra* note 96, at 18-16 to 18-17; *see also* Simon, *supra* note 67, at 86 (arguing that whether the client should be treated as an entity should depend less on matters of formality and more on whether the relations in question have sufficient structure to constitute a framework of dealing—parties who have not organized formally may have developed an authority structure and sense of common goals sufficient to permit a distinction between organizational and individual interests); Tremblay, *supra* note 135, at 426–28 (arguing that the three requisites for treating an informal group as an entity are that group members must see themselves as group; the members of the group must be identifiable; and a clear decision-making structure must exist). *But see* Tremblay, *supra* note 135, at 428 (discussing scholarship and practice around community lawyering, in which lawyers routinely represent community groups in the absence of any decision-making structure).

147. In *Buehler v. Sbardellati*, two real estate investors decided to form a limited partnership without the involvement of a lawyer. 41 Cal. Rptr. 2d 104, 106 (Ct. App. 1995). They agreed on a purchase price for the property and arranged for financing. *Id.* at 107. The investors sent a lawyer the paperwork on the transaction, including a contract of sale signed by both. *Id.* Although the lawyer had some concerns regarding the structure of the partnership, the investors told him that they did not want him to make decisions regarding the partnership agreement. *Id.* The court rejected a subsequent legal malpractice action by one of the partners on the ground that the investors had “already formed an enterprise” and that they understood that the lawyer was to represent the partnership and not the individual partners. *Id.* at 111.

148. Mitchell, *supra* note 71, at 481.

149. *Id.* at 482.

obtain the consent of, or even consult with, an individual founder, even when drafting provisions that will substantially prejudice the interests of that founder? And if the lawyer must fully disclose the ramifications of whatever “charter” the founders have adopted, or will adopt in order to obtain preformation entity status, then isn’t this similar to the type of disclosures the lawyer must make when representing them jointly as individual clients?¹⁵⁰ If so, then what is to be gained by granting them entity status?

Given the difficulty of determining whether and how professional responsibility law should grant entity status to a yet-to-be-formed entity, and the nature of the disclosures that a lawyer must make to each of the individual constituents-to-be, courts should be reluctant to take this approach unless the benefits of doing so outweigh the possible harms.

It is unclear what these benefits are. Once a “charter” exists, it may be easier *for the lawyer* to take instruction from the duly authorized decision makers without considering any potential conflict with individual constituents.¹⁵¹ And the lawyer may also benefit from the ability to continue representing the entity, once formed, in subsequent disputes with a founder.¹⁵² Even so, some risk remains that individual constituents will rely on the lawyer to protect their interests or at least inform them of the potential disadvantages of choosing one entity-formation plan over another. And if the lawyer advises one or more of them as to how a particular plan will affect their interests, then the danger persists that, under the “reasonable expectations” approach to client identity, a court will subsequently find that the lawyer inadvertently entered into a lawyer-client relationship with one or more of the individual founders.¹⁵³ If so, the lawyer is more likely to be found liable in a legal malpractice or breach fiduciary duty lawsuit or to be disqualified when attempting to represent the subsequently formed entity in a dispute with an initial founder.

150. And who is the lawyer’s client if and when the lawyer counsels them in “forming themselves up” to the point where the group is entitled to entity status? Are the individual founders prospective clients during that period of counseling?

151. See, e.g., Robert R. Keatinge, *The Implications of Fiduciary Relationships in Representing Limited Liability Companies and Other Unincorporated Associations and Their Partners or Members*, 25 STETSON L. REV. 389, 391 (1995) (noting that a lawyer representing more than one organizer is “subject to an especially delicate set of ethical and legal liability rules”).

152. See Simon, *supra* note 67, at 64 (contending that lawyers’ insistence that founders agree that the lawyer represents the corporation and not the individual founders “seems to serve little purpose other than to preserve their ability to align themselves against the founders should a dispute arise after the outside investment”).

153. See, e.g., Manion v. Nagin, 394 F.3d 1062 (8th Cir. 2005) (rejecting the application of Jesse’s retroactive entity representation approach when a lawyer advised a founder that, as the preferred stock owner, the founder could maintain control of the corporation and could not be fired from his role as the corporation’s executive director); see also Hanna, *supra* note 111 (raising the practical issue of how to avoid giving legal advice to constituents when forming an entity, including answering such questions as: “What is my potential liability under the entity alternatives?”; “What are the tax implications?”; and “What are my options if I want to withdraw from the entity?”).

It is even less clear how the *founders*, either collectively or individually, will benefit from the entity approach. Not much attention has been paid to this question.¹⁵⁴ The *Harvard Law Review* note endorses the entity approach on the ground that it accords with the “reasonable expectations” of the founders,¹⁵⁵ but it is doubtful that this is so,¹⁵⁶ particularly if the founders are not experienced in entity representation and have not yet been fully informed of the ramifications of this approach. Community groups like informal tenants’ associations or neighborhood groups may see a value in acting collectively toward a shared goal,¹⁵⁷ but it is hard to understand what these groups have in common with a group of founders coming to a lawyer to help them decide precisely how they, as individuals, will organize themselves into a formal entity.

FitzGibbon identified the founders’ desire to avoid the unnecessary expense and possible disharmony of having separate lawyers for each.¹⁵⁸ But that goal is now more easily met by having a single lawyer represent them jointly as individual clients. With informed consent, founders can limit the lawyer’s role to assisting them in reaching consensus on the various aspects of a business plan, giving them the information they need to negotiate among themselves, without the lawyer being obligated to consider and advise each individual founder where his or her best interests lie. The founders may also consent to share information among themselves as well as with the subsequently formed entity and to the lawyer’s representation of the entity, once formed, in a subsequent dispute with an individual founder who will cease being a client once the entity is formed. Such advance waivers are not always enforceable, but there may be even greater risk to the founders under the entity approach, including the risk that the lawyer may not be held accountable for negligence in forming the entity or for favoring one founder over another in resolving all of the issues raised in forming the details of the business plan.

In light of all these concerns—both theoretical and practical—courts should reject the possibility of entity representation of a yet-to-be-formed entity in favor of representation of one or more of the multiple founders.

154. The Hazard and Hodes treatise proposal was apparently motivated by a desire to avoid the implications of the aggregate settlement rule and to permit mass plaintiffs to agree to accept an aggregate settlement offer by a previously agreed-upon majority or supermajority vote. See Simon, *supra* note 67, at 111–14. It remains controversial even for that limited purpose. See Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 180 (1999).

155. Note, *supra* note 46, at 703 (contending that, absent evidence to the contrary, such as where the lawyer has a long-standing relationship with one of the founders, the “reasonable expectation” of three hypothetical restaurateurs, who have decided to run a pizza parlor together before retaining counsel, “must be one of ‘enterprise’ representation”).

156. See Simon, *supra* note 67, at 74 (assuming the *Jesse* court believed that “individuals seeking incorporation expect and desire to be dealt with on a more formal basis” and then criticizing this assumption, at least for smaller groups of founders, by finding that “the overwhelmingly salient reasons for small business incorporation concern dealings with outsiders” and not their internal relationships).

157. See Tremblay, *supra* note 135, at 426.

158. See generally FITZGIBBON, *supra* note 14.

V. ENTITY REPRESENTATION OF DEFAULT PARTNERSHIPS

In some circumstances, individuals who have already begun the process of developing a business will become partners in what Tremblay calls a “partnership by operation of law”¹⁵⁹ or what I call a “default partnership.”¹⁶⁰ Indeed, such a partnership may exist in many of the situations described in Part IV, in which the founders have agreed to act as a unit and to reach collective decisions.¹⁶¹

Because default partnerships are legal entities, they qualify for entity client status under Model Rule 1.13.¹⁶² Tremblay assumes that when this occurs, the lawyer will inevitably be representing the partnership entity and not the individual partners, but he does not explain why this is so. Conceding that individual representation is always a choice, he nevertheless summarily concludes that this “leaves the enterprise itself (the partnership) without counsel, and any conflicts arising from partnership duties and benefits will not have been sorted out at this early stage of the representation.”¹⁶³ True, representing the partners individually leaves the partnership with representation, but it is unclear why this matters. And if the lawyer is going to represent the partners individually, then surely the lawyer must identify and address any conflicts among them, just as in joint representation in the absence of a default partnership. There may be slight differences because of fiduciary duties the partners owe to one another,¹⁶⁴ but there is no obvious

159. See Tremblay, *supra* note 3, at 271, 304–06.

160. Tremblay finds a partnership by operation of law through what he refers to as the “default substantive doctrine” that decides whether participants are partners in the absence of an express partnership agreements. See *id.* at 274–76. As long as “[f]our elements . . . [are] present,” specifically “(1) two or more persons; (2) associated; (3) to carry on a business for profit; . . . (4) as co-owners,” the default law of partnerships applies. *Id.* at 276–77.

161. See *supra* Part IV. According to Tremblay, it may be likely that “most startups seeking legal advice will either qualify as partnerships or as sole proprietorships that have employees.” *Id.* at 278–79. Nevertheless, groups whose business ideas are “manifestly ‘inchoate’” will not qualify as partnerships (i.e., when the product has yet to be developed, “[t]here have been virtually no capital investment, and there is nothing yet to own collectively.”) *Id.* My colleague Jim Wheaton has told me that he disagrees with Tremblay’s restrictive view of default partnerships and believes them to be far more common than Tremblay concedes. As a result, Jim informs me that the Boston University Startup Law Clinic typically enters into a formal retention agreement with “the partnership” as an entity, prior to the filing of an LLC or corporate formation document and completion of the formal organization of an entity.

162. As my colleague Jim Wheaton further informs me, however, the moment of “legal incorporation” is not always an auspicious time to recognize the entity as a functioning client: entities may be incorporated by a lawyer without any prior or even simultaneous creation of other formal documents, such as articles of incorporation or even appointment of permanent directors, and may continue to exist in that nonfunctional status for a considerable period of time. See Harold Marsh, Jr., *Relations with Management and Individual Financial Interests*, 33 BUS. LAW. 1227, 1235 (1978) (describing the technical formation of a corporation without a functioning board elected by owners, noting that the corporation here is “not intended to function as a real entity until the financing is completed and closed,” and questioning who the entity is (other than the promotor) to whom the lawyer’s allegiance is due).

163. See Tremblay, *supra* note 3, at 275.

164. See *id.* at 280.

reason why these issues cannot adequately be addressed under a joint representation model.

There are difficulties with a lawyer choosing to represent the default partnership as an entity client. Conceptually, the problem is that the entity itself does not appear to have any “interest” of its own in developing a more formal plan for the business organization. Rather, as with situations lacking a default partnership, the important interests are those of the individual partners deciding how to organize themselves going forward. When an entity has no interests separate from the interests of the individual constituents, courts have been quick to “pierce the corporate veil” and find individual representation, even when the organization is fully formed.¹⁶⁵ This situation most commonly arises with intra-entity disagreements, such as differences between majority and minority owners.

Practical problems exist as well. For example, whose consent is necessary to decide whether the lawyer will represent the entity or the individual partners? Default partners typically do not know that they have formed a partnership and have not agreed to any decision-making procedures. The lawyer would need to explain the common law of default partnerships, as well as the difference between individual and entity representation.¹⁶⁶ Tremblay argues that, although there is a responsibility to “inform” the partners, there is no need “to obtain any consent from them as a condition of proceeding.”¹⁶⁷ But this assumes that there are duly authorized constituents who can direct the lawyer. In the absence of a partnership agreement, any single partner can bind the partnership to a transaction in the “ordinary course of the partnership business,”¹⁶⁸ and disagreements among the partners with respect to such transactions are decided by majority vote.¹⁶⁹ But retaining an attorney to assist the partnership in deciding how to formally operationalize its business, including making changes to the entity’s structure, is likely outside the ordinary course of business¹⁷⁰ and would therefore need the consent of all of the partners.¹⁷¹ Moreover, once the lawyer is retained, a decision to change the structure of the entity in a manner that has a potential adverse effect on the rights of the individual partners is also outside the ordinary course of business and requires the consent of all of

165. See, e.g., Nelson, *supra* note 69, at 291–92 (explaining that “courts have been willing to pierce the single entity of corporate clients to recognize that an attorney’s true clients may be the constituent parts of a larger corporate client and that covering the constituents under the umbrella of a single entity misunderstands the true interests and incentives of the parties involved”); Simon, *supra* note 67, at 67–69.

166. See Tremblay, *supra* note 3, at 308.

167. *Id.*

168. See BROMBERG & RIBSTEIN ON PARTNERSHIP § 4.02[A] (Christine Hurt et al. eds., 2d ed. Supp. 2018).

169. UNIF. P’SHIP ACT § 401(j) (UNIF. LAW COMM’N 2013).

170. A decision to change the structure from a partnership to a corporation is outside the scope of ordinary business; incorporation makes liquidation more difficult and changes the partners’ financial rights. BROMBERG & RIBSTEIN ON PARTNERSHIP, *supra* note 168, § 4.03[C][6]. Entity representation for the purpose of considering a formal change in entity structure similarly has a potential adverse effect on the rights of the individual partners.

171. UNIF. P’SHIP ACT § 401(j).

the partners.¹⁷² Given this decision-making procedure, it is difficult to imagine what advantage there is, to either the partnership or the individual partners, of choosing to make the entity the client rather than the individual partners.¹⁷³

Perhaps at the initial meeting with the lawyer, all the partners could agree to a decision-making structure other than consensus—for example, authorizing a majority of the partners or a committee of partners to decide whether to retain the lawyer on behalf of the entity and how the business should be formally organized going forward. But what is the lawyer’s role in assisting the partners to agree on a decision-making structure? Wouldn’t the lawyer need to explain the advantages and disadvantages of the various alternatives? And who is the lawyer’s client for purposes of this counseling session? Is it the entity or is it the individuals? This type of counseling is virtually identical to counseling an informal group that is “forming up” to become an entity client, which Tremblay concedes involves representation of the individuals involved.

CONCLUSION

When a lawyer is approached by multiple individuals seeking to form an entity for the purpose of conducting a business, it is important for the lawyer to clarify who it is that the lawyer will be representing. Founders often do not want to retain more than one lawyer. As a result, lawyers usually understand that they must decide whether they can ethically represent all of the founders in a joint representation. If they consult court decisions and secondary authorities, they may learn that it is possible, although uncertain, that they may choose to prospectively represent an entity-to-be or that once the entity is formed, entity representation may be imposed retroactively, thereby stripping the individual founders of their status as clients, including the right to sue the lawyer for malfeasance or to control the confidentiality of their communications with the lawyer.

One purpose of this Article has been to explore both the validity and desirability of providing some form of entity client status to a group of individuals who have not yet formed a business organization. Neither the retroactive nor the prospective approach to such preformation entity status has any solid precedent to recommend it. Moreover, there appears to be no strong policy rationale for affording such entity status in most cases. Therefore, this Article concludes that courts that have yet to address the issue should insist that the lawyer represent one or more of the individual founders,

172. See BROMBERG & RIBSTEIN ON PARTNERSHIP, *supra* note 168, § 4.03[C][6].

173. As with informal groups that may not yet be entity clients, it is the lawyer, not the individuals, who appears to benefit most from granting the group entity status, through the prospect of limiting liability to the individuals and avoiding subsequent disqualification. One of the potential advantages of entity representation is the ability to continue to represent the entity in a subsequent dispute with an individual constituent. This is clearly a benefit to the entity, as well as to the lawyer, but this result is probably achievable in joint representation if the partners give their informed consent to the lawyer continuing to represent the entity in any such subsequent disputes.

except when they have already formed what substantive law recognizes as a default partnership. If, however, a court chooses to recognize some form of preformation entity status, the prospective approach is clearly superior to the retroactive approach taken in *Jesse* and *Hopper*.

When a default partnership has been formed, lawyers may choose to represent the legally recognized entity. However, there are both conceptual and practical difficulties in choosing to represent the default partnership itself, as opposed to the individual partners. Conceptually, the partnership appears to have no interest in determining how the individual partners will do business going forward, and, as a practical matter, it is unclear how the partnership will make all of the necessary decisions regarding choice of (future) entity and allocation of ownership and control. As a result, this Article urges lawyers to choose to represent one or more of the individual founders, even when some form of entity representation is at least theoretically permissible.

What is most important, of course, is that lawyers approached by founders seeking to form an entity address the client identity question explicitly, with full knowledge of both their legal options and the types of disclosures they will need to make to the individuals with whom they will be working. These disclosures should include the advantages and disadvantages of each type of representation, and it should be the individuals who ultimately decide whether they are satisfied with the type of representation the lawyer is offering.